



Trainers' Guide

ADDRESSING CONFLICT-
RELATED SEXUAL VIOLENCE
AND OTHER INTERNATIONAL
CRIMES IN UKRAINE

This Trainers' Guide is specifically aimed at the Ukrainian practitioners who participated in the 2023 and 2024 ULAG/WIGJ Training of Trainers sessions and complements the online and in-person trainings.

The Trainers' Guide is available in Ukrainian and English and can be downloaded for free at <https://4genderjustice.org/training-of-trainers-programme-2023-resources/>.

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Introduction

This Trainers' Guide is a tool that provides training and curricular guidance in support of training and coaching Ukrainian legal and civil society practitioners in understanding and utilizing international standards to address conflict related sexual violence (CRSV) and other grave crimes in Ukraine. It provides knowledge, skills, resources, guidelines, and reference materials tailored to the Ukrainian context.

This learning resource serves a dual purpose:

1. **Guidance for Trainers:** It is a practical tool for current and future trainers to develop training programs, share best practices, and ensure that the content delivered is both relevant and effective.
2. **Capacity Building:** The handbook focuses on strengthening the skills and knowledge of professionals, enabling them to respond more effectively to CRSV. It is designed to be flexible, catering to various training needs and contexts without being confined to specific categories of participants.

The handbook is organized into clusters that simplify navigation and use:

- **Section Clusters:** Each cluster groups together related topics, making it easier for trainers to deliver coherent and focused training sessions.
- **Key Messages:** Each section contains key messages that trainers should emphasize. These are essential points that help participants grasp the core concepts and apply them in their professional practice.
- **Suggested Activities:** To reinforce learning, each section also includes suggested activities. These are designed to engage participants actively, encouraging them to internalize the material through practical application.

As a living document, it will be updated and complemented over time. Resources to further complement the Trainers' Guide are offered in our [Online Directory of Resources](#).

As a trainer, we invite you to stay abreast of changes in laws, understandings, policies, and processes – and to update your training accordingly.

This first edition of the Trainers' Guide contains the following 10 modules:

1. Module 1: Modalities of trainings and applying interactive teaching methods
2. Module 2: Understanding Sexual Violence
3. Module 3: Legal Framework and Contextual Elements
4. Module 4: Understanding Consent and Coercion
5. Module 5: CRSV as War Crimes – Overview
6. Module 6: Do No Harm
7. Module 7: Interviewing Victims and Witnesses
8. Module 8: Investigative Planning
9. Module 9: Case Building and Modes of Liability
10. Module 10: Corroboration
11. Module 11: Principles of Admissibility

Abbreviations

CAT	United Nations Convention Against Torture and other Cruel, Inhumane, and Degrading Treatment or Punishment
CCU	Criminal Code of Ukraine
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CIL	Customary International Law
CPCU	Criminal Procedure Code of Ukraine
CRSV	Conflict-Related Sexual Violence
ECHR	European Convention on Human Rights
ECTHR	European Court of Human Rights
GBV	Gender-Based Violence
HRMMU	United Nations Human Rights Monitoring Missing in Ukraine
ICC	International Criminal Court
ICL	International Criminal Law
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
OHCHR	The Office of the United Nations High Commissioner for Human Rights
OTP	Office of the Prosecutor
PoWs	Prisoners of War

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Module 1

Modalities of trainings and applying interactive teaching methods

Learning Objectives:

- This module will help equip participants with the knowledge, skills and confidence to effectively deliver training sessions using a variety of training methods that will help achieve learning objectives.
- Participants will gain knowledge of the most common training methods, the goals of each method, and recommendations for their application.
- Based on the results of this module, participants will be able to select the most suitable training methods: one which best fits the purpose, available time and group dynamics.
- Participants will realize the importance of constant switching of training methods, learn how to integrate methods into a seamless and coherent training process, will be able to adapt methods in the course of training, and develop the ability to provide constructive feedback to their own training participants.

For this module, trainers can refer to:

- [Guidelines for trainers on developing and conducting trainings \(Ukrainian\)](#)
- [Trainer's Guide: Preparing and delivering an impactful training \(Ukrainian\)](#)
- [10 Adult Learning Principles](#)
- [The Training, Development and Learning Open Access Library](#)
- [Educational space for beginner Learning and Development practitioners](#)
- [A brief guide to training methods and approaches](#)
- [What is Visual Facilitation?](#)
- [Facilitation techniques](#)
- [Games, Icebreakers, Energizers & Exercises](#)
- [100 ways to energize groups](#)
- [What is the case method?](#)
- [How to Lead Roleplays](#)
- [Guide to the World Café Method](#)

I. Common training methods

Tell me and I will forget. Show me and I might remember. Involve me and I will understand. This is the principle that every trainer should follow when preparing and conducting training sessions. To achieve this and other objectives, and to increase the effectiveness of training, different training methods could be used.

A training method is a way for a trainer to interact with participants or for participants to interact with each other to learn new knowledge and skills. That is why there are trainer-centered and trainee-centered methods. The former imply the trainer's active role and relatively passive involvement of the participants, while the latter imply active interaction of the participants, where they independently come to conclusions, develop new ideas, etc.

There are many different training methods, each with its own advantages. We will note the features of the most common methods, dividing them by the focus of attention.

A. Trainer-Centered Methods (classroom teaching)

1. Mini-lectures

A lecture is, without exaggeration, the most common and well-known teaching method. However, what distinguishes a mini-lecture as a training format from the usual concept of a lecture?

First, as we can see from the name, it is a **mini**-lecture. Its duration usually should not exceed 20 minutes.

This method is great if you need:

- To deliver new information to the participants
- The same information to be delivered to a large number of people at the same time

Recommendations for applying this method:

- Preparing for a mini-lecture, do not write out the text of your speech, only the main talking points
- Manage your time and set aside some for questions from the participants
- Make your lecture more engaging using visualization and interesting tidbits (facts, statistics, humor, examples from your own life)
- Maintain eye contact with all participants during the lecture

Tip: A lecture does not mean that only the trainer speaks, and the participants are silent. Think of questions to interact with the participants.

2. Discussion

This method is intuitively used by all trainers, as it is one of the most natural methods of teaching adults. Discussion involves high concentration and active involvement of participants and is aimed at a structured but somewhat informal exchange of knowledge, ideas and opinions.

There are three types of facilitated discussions: moderated discussion, ORID, and buzzgroup.

This method is great for the following situations:

- If you need to have an in-depth discussion on a topic with all participants, use the ORID discussion type or a moderated discussion (for more information see: <https://participedia.net/method/4652>)
- If the goal is to have a quick and short discussion in small groups, i.e. to summarize or update some information, use the buzzgroup method (for more information see <https://blogs.city.ac.uk/smallgroupsteaching/opening-activities/buzz-groups/>)

Recommendations for applying this method:

- Write down questions for the discussion in advance.
- Highlight key points with a colored marker to quickly find them in the text.
- Follow the plan you have prepared in advance.

Tip: *It is very easy to get off topic in this method, so you need to keep track of time.*

3. Brainstorming

The purpose of brainstorming is to generate as many ideas as possible on a given topic through active work at a fairly fast pace. The time spent on brainstorming is usually quite short, but it depends on your goal: brainstorming can also take place in several stages, followed by discussion.

This method is great for the following situations:

- generating a wide range of solutions to solve a problem
- letting participants unload their experience

Recommendations for applying the method:

- The brainstorming question should be open-ended, so that an unlimited number of ideas can be thrown in
- Capture all ideas, for example on a flipchart
- Just write down any ideas, do not evaluate them
- Encourage all group members to discuss, support equality

Tip: *If ideas are repeated, don't write them down again, but rather mark the idea you already wrote down with a check mark or a plus sign.*

4. Polls and voting

Although these two methods are quite similar, they actually have different goals:

- Polls are most often aimed at testing the knowledge of the material or at identifying the attitude of participants to a particular topic (in the latter case, there are no right and wrong answers)
- Voting is aimed at making a decision, obtaining statistics

This method is great for the following situations:

- quickly and efficiently test knowledge
- consolidate information through repetition

- Identify topics that require additional attention
- update the topic

Recommendations for applying the method:

- Prepare questions and answers in advance
- Voting/polls can be conducted by a show of hands, using cards of different colors, special voting applications
- Summarize the results with a joint discussion

Tip: Use an interactive format, for example, with online tools, surveys/voting can be conducted from mobile phones with questions and answers displayed on the screen at the same time

B. Trainee-Centered Methods (collaborative or interactive training)

1. Group work

Group work is an easy-to-use and effective training method where absolutely all participants are involved.

This method is great for the following situations:

- developing a strategy for representing the client, developing an interview plan, creating a strategy for debate in court
- situation resolution

Recommendations for applying the method:

- Prepare the instructions in advance and read them to the participants (see below for recommendations on how to develop instructions)
- The task can be the same for all groups or different
- Monitor the implementation process, help the group if necessary
- Give participants 2-3 minutes' notice of the end of the session

Tip: During group work, the trainer is not silent. He/she constantly observes the group and helps if there's any difficulty.

2. The World Cafe method

The World Cafe method is a type of brainstorming. The main feature of this method is that participants work on topics in groups and change according to set timing in a clearly defined scheme. On the table host remains in place and moderates the process at their table. Unlike brainstorming, all participants are actively involved because they work in small groups. Also, the participants themselves (table hosts) lead the discussions. This method is also popular because of its lively and interactive (constant changes of topics, organized movement, etc.).

This method is great for the following situations:

- a large number of ideas from all participants of the training, for example, to find a common vision
- the results need to be evaluated immediately or prioritized for further analysis

Recommendations for applying the method:

- Propose at least 3 open-ended questions
- Prepare clear instructions in advance
- The method requires a sufficient number of participants
- The method requires a sufficient amount of time
- The method requires sufficient space

3. Roleplay

This is a method in which participants play the role of a certain person in a situation. This is a deliberate attempt to demonstrate the characteristics of different roles by putting the participants in a situation as close to real life as possible.

This method is great for the following situations:

- gain confidence by trying out a certain role in a safe format
- emphasize understanding and appreciating the others' point of view
- analyze alternative ways of doing things
- improve problem-solving and decision-making skills

Recommendations for applying the method:

- Prepare carefully, thinking not only about the situation and the course of the role-play, but also who will play the respective roles
- Think where in your training it's best to plan a role-play so that participants are as open and relaxed as possible
- Allow enough time
- Conduct a debriefing after each stage of the role-play or at the end

A good example of using a role-play is teaching interviewing techniques. Another example is role-playing based on ECtHR judgments.

4. Case studies

This method is suitable for developing critical thinking and improving analytical skills. You can use it both for individual and group work. The case is a description of a specific real-life situation that participants research and analyze to propose their own solutions. Here is a good list of the benefits of this method:
<https://www.iese.edu/standout/case-method-what-is/>

This method is great for the following situations:

- applying theoretical knowledge to real-life situations
- finding solutions together by sharing experiences

Recommendations for applying the method:

- Prepare a situation as close as possible to real events or take a real court case

- Shorten the text as much as possible, leaving only the most important facts that will help participants analyze the case without distracting from the essence
- Write down clearly formulated questions for the case study

A good example of how this method is used is a scenario describing a court case where multiple subjects have committed multiple crimes.

Tip: *If you are using a real court case as a case study, make sure that all the details described and the legislation you refer to are up-to-date. If necessary, change the data, as the main goal is to practice the skills, not to come up to the only correct solution.*

II. How to choose a training method

Choosing the right training method is the key to successful training. Each method has its advantages, but there are methods which suit some objectives more than the others.

A. Why, for what purpose? What do I want to achieve?

Think about what you want to achieve (this is not about the end goal of the training, but about your training objectives at this stage of the training). Make sure that the method you choose will help you achieve this objective as best as possible.

B. Is this method suitable for my audience?

- It is important to use a learning and speaking style that matches the audience (lawyers, colleagues) and their field of activity.
- Take into account the participants' existing experience. For example, if they already have a good amount of theoretical knowledge in this area, focus on those methods that allow your participants to unload their experiences, change attitudes, or practice skills.
- Be aware of different group sizes, as some methods work better for small teams, while others work well for larger groups.

C. How much time can I spend on this topic?

When choosing a training method, keep in mind that some training methods require more time than others. In this context, you should also keep in mind the space available, as some methods require a large enough space for participants to move around, change groups, locations, etc.

In addition, it is equally important to remember that the key to success in implementing a training method is the trainer, or rather his or her experience and qualifications. If the method is new to you, you are not sure that you understand its essence or methodology correctly, think about what can help you prepare better, set aside extra time for this in the preparation process, think through every detail and try not to experiment. However, remain confident in yourself and your abilities.

On the average participants hold their attention for 20 minutes, then their concentration drops significantly. So, it is best to use a combination of methods and

change the pace of the training. Alternating trainer-centered and trainee-centered methods will help. Regularly changing the methods and pace of training will keep participants interested and ready to learn. It will also be more interesting and less tiring for you as a trainer.

It is also important to ensure smooth transitions between methods. This should happen naturally and seamlessly for the participants. To do this, do not announce the names of the methods to the participants, build bridges between topics, if necessary, make breaks or warm-ups.

III. Recommendations for effective implementation of training methods

A. Providing instructions

- Before starting any activity/task/method, explain what needs to be done. At the same time, try to give the participants some understanding of why it is necessary (remember the importance of rationale when teaching adults).
- Explain the rules, for example, what is and is not allowed. Demonstrate if necessary.
- Put the main instructions (time, role assignment, movement pattern, etc.) in writing in a visible place, and don't forget to present the results at the end, if applicable.
- Give the necessary handouts to the participants only when you are sure that they understand everything and are ready to complete the task.

B. Groups

- Grouping should be as quick and easy as possible. Remember that this is not a separate element of your training, but only an auxiliary tool in the effective implementation of the training method.
- Grouping should be appropriate, fitting the audience, the room, etc.
- First announce the instructions and make sure that they have no questions about the task, then form the groups.
- The optimal number of participants in a group is 3 to 5 people.
- If you haven't thought about ways to group your participants in advance, don't be lost. Such methods of grouping as calculating by 1, 2, 3, etc. are very affordable, and most importantly, they absolutely fulfill their function.

C. Communication with participants

Training by its very nature involves active communication between the trainer and the participants. That is why it is important for the trainer not only to focus on the content and the course of the training, but also to maintain a friendly atmosphere that promotes effective adult learning. One of the ways for that is reacting to the participants' answers:

- Any comment or question from a participant cannot be ignored by the trainer. Praise your participants for correct answers, acknowledge partially correct answers and supplement them with the necessary information. If a participant's answer is incorrect, ask a clarifying question, guide the participant to a correct answer, or involve the group.
- Encourage less active participants to discuss and contain more active ones.
- Do not evaluate participants' answers.
- To prevent or eliminate disruptive behavior of difficult participants, refer to the rules established at the beginning of the training.
- Use, but do not abuse, non-verbal communication.

It is important to understand that any reaction by the participant (a comment, question, etc.) has some basis underneath. As a trainer, you need to understand what the participant wants to achieve with his or her behavior (to get attention, etc.) and try to satisfy this need. There are different types of participant behavior and methods to deal with difficult participants. You can learn more about them here: <https://www.targettraining.eu/de/train-the-trainer-dealing-with-difficult-participants-part-2/>

However, it is best to avoid complicated situations preemptively. Turn difficult participants into your allies, if any. Remember that your positive reaction to the information coming from participants will help you avoid difficult situations during the training.

Module 2

Understanding Sexual Violence

Learning Objectives:

- At the end of this module, trainees will have an understanding of some of the key terminology and concepts surrounding sexual violence, and CRSV. This will help them teach others to recognise different forms of CRSV and investigate those violations using an individualised approach, taking into account the immediately surrounding circumstances, as well as the broader context in which the crimes were perpetrated.
- Trainees will also have a basic understanding of the gendered elements of CRSV and of international crimes more broadly, and how gender will impact on a victim's experience of all aspects of the criminal justice process. They will begin to understand how some of the gendered myths and stereotypes around sexual violence can negatively impact on reporting, and victim access to justice. They will be introduced to and learn to recognise 'Red Flags' or indicators of CRSV in their research and analysis, documentation, investigations planning, and investigations.

Module Time:

- This module can be given in two parts over the course of 3 hours.

For this module, trainers can refer to:

- This chapter
- [The Hague Principles on Sexual Violence](#)
- [Presentation of Online Training Session 2 on 'What is sexual violence and the importance of situating sexual violence in conflict'](#)
- [Recording of Online Training Session 2 on 'What is sexual violence and the importance of situating sexual violence in conflict'](#) (Only in Ukrainian)
- [The Murad Code](#) (in particular, Principles 1 and 6)
- [Second Edition of the International Protocol on the Documentation and Investigation of Sexual Violence in Conflict \(PSVI Protocol\)](#), Part II, Chapter 2; Part VII, Chapters 16 and 17
- [Global Investigative Journalism Network, Reporter's Guide to Investigating War Crimes: Conflict-Related Sexual Violence](#)
- [Convention on Preventing and Combating Violence against Women and Domestic Violence \(Istanbul Convention\) and its Explanatory Report](#)

- Sánchez, Marković, and Strand (2023), Gender Competent Criminal Law, In: Vujadinović, D., Fröhlich, M., Giegerich, T. (eds) Gender-Competent Legal Education. Springer Textbooks in Law. Springer, Cham.
- Presentation of Offline Training Session 6 on Day 2 on '[Combating Stigma in Justice](#)'
- Presentation of Online Training Session 10 on 'SGBV & SGBV Red Flags in Open Source Investigation'
- Recording of Online Training Session 10 on 'SGBV & SGBV Red Flags in Open Source Investigations'

I. Introduction to Key Terminology & Concepts Related to CRSV

A. Gender

All sexual violence crimes are gender-based crimes. This means that in all sexual violence crimes you will encounter or there will be elements related to gender. Gender can influence the reason for the violence, how the violence was committed, against whom or by whom the violence was committed and so on. Understanding gender is essential to start with, as it will allow you to understand the basis of conflict-related sexual violence.

Language evolves, and language around gender and sexual violence evolves at a high pace. Discussion around gender and sexual violence can be uncomfortable and even controversial. Legal instruments, including laws, are often outdated or unclear on these terms.

As such, starting your training with grounding terms, that are based on a survivor's perspective and are not harmful, is key.

Gender is defined as: “[S]ex characteristics and social constructs and criteria used to define maleness and femaleness, including roles, behaviours, activities and attributes. As a social construct, gender varies within societies and from society to society and can change over time”. This definition is taken from the International Criminal Court's Office of the Prosecutor's Policy on the Crime of Gender Persecution (2022).

When people do not conform to the appropriate gender role for their culture, they can be demeaned, criticised, stigmatised, subjected to direct and indirect discrimination, and marginalised by their peers and communities. These negative impacts can permeate all aspects of day-to-day life and are at the basis of conflict-related sexual violence.

1. Gender mainstreaming

Gender should be mainstreamed throughout all CSO activities including in communication plans, advocacy strategies and documentation/investigations. Gender mainstreaming has been explained by the Office of the High Commissioner for Human Rights, who defines it as “[t]he process of assessing the implications for women, men and other gender identities of any planned action, including legislation, policies or programmes, in all areas and at all levels”.¹ Gender mainstreaming requires organisations and individuals to conduct their activities in a gender-sensitive manner taking into account gendered-stereotypes that exist within society, the cultural context, the specific individual needs of victims which may be affected by gender and/or other intersectional identities, and the perception (and biases) of authorities (including law enforcement agencies, the judiciary, etc.) who interact with victims of CRSV/GBV.

¹ OHCHR, Integrating a Gender Perspective into Human Rights Investigations, p.8.

2. The need for a gender perspective in addressing international crimes

Having a gender perspective in addressing CRSV and other crimes allows you to understand how gender shapes violence. It will allow you to understand differences in status, power, roles, and needs between persons, because of their gender. A gender perspective will allow you to also consider social and political hierarchies, domination, and inequalities as they relate to a person's gender. Taking a gender perspective also allows you to break free from misconceptions and bias that influences our work in addressing CRSV.

When investigating and documenting international crimes, a gender perspective requires individuals to assess the gendered nature of the crimes committed and understand the gendered experiences of people affected by crimes. For example, a crime which at first appears gender-neutral – such as the shelling of civilian areas – might on a closer analysis have specific gendered dimensions and impacts. One such example might be the March 2022 targeting of the maternity hospital in Mariupol.

With this, we can begin to understand how gender impacts the work of all practitioners dealing with different forms of conflict-related violence, including CRSV. For example:

- A gender perspective will help criminal justice actors understand and prove intent - why someone might be targeted for acts of violence and discrimination, including in conflict.
- Gender can influence the way in which a crime (whether specific crimes of sexual violence or other crimes) is committed - acts of sexual humiliation, for example, are gender-specific.
- Gender impacts the way in which a victim experiences crime – for example, while globally, men are overwhelmingly the primary victims of enforced disappearance, the gender inequalities in many cultures will often exacerbate the hardships suffered by their surviving female relatives. Ukraine is no exception.
- Gender also impacts the way in which victims experience all parts of the criminal justice system, from barriers to accessing justice presented by the implicit biases held by criminal justice actors they might engage with, to the specific protection or support measures they might need.

Ultimately, having a gender perspective means that those engaging with victims of CRSV and other international crimes should be taking an individualised approach to every victim you might be dealing with. An individualised approach recognises that every victim has different strengths, capacities, resources and needs.

Notes for trainers:

Ask trainees whether anyone can give examples of gender role expectations. Some examples to start discussion include:

- Pink is a girl's colour; blue is for boys.
- Women can't be firefighters.

- Women should prioritise taking care of children and running their household over their career.

You may think of other examples of gendered expectations which apply to a person's physical appearance or how they are expected to behave.

Ask trainees to consider what they can do to challenge these stereotypes when they see them. This is because when it comes to accessing justice, particularly for sexual violence crimes, these stereotypes can be a real barrier as they can give rise to negative inferences as regards the evidence.

B. Gender-Based Violence

Gender-based violence (GBV) is an “umbrella” term that refers to harmful acts directed at an individual based on their gender. It can be targeted at women or men, as well as LGBTQI+ individuals (i.e., lesbian, gay, bisexual, transgender, queer, intersex, and other people who do not fit the heterosexual norm or traditional gender binary categories). GBV can take the form of sexual violence, but it can also include physical, mental, and economic harm. Non-sexual examples of GBV include psychological violence, stalking, hate speech, and domestic violence.

C. Acts of a Sexual Nature

Acts of a sexual nature refer to acts that target a person's sexuality or sexual autonomy. Sexual autonomy is part of bodily autonomy, a human right which refers to the power and agency people have to make choices about their own bodies. Everyone has the right to claim their bodily autonomy: men, women, boys, girls, and people of diverse sexual orientations and different gender expressions.

What constitutes an ‘act of a sexual nature’ is a difficult topic to navigate and is often not well understood. To better understand the ‘sexual’ nature of an act, it is important to be knowledgeable about the societal norms and the perceptions of the community where the act took place. To enhance understanding about what constitutes an ‘act of a sexual nature’, the Hague-based organisation Women's Initiatives for Gender Justice developed [The Hague Principles on Sexual Violence](#). Consultations with survivors of sexual violence, practitioners and experts revealed that assessing whether an act is sexual in nature requires taking steps to understand the context in which it took place.

Slide 2 of [Online Training Session 2 Presentation](#) offers some very practical suggestions as to how trainees can use The Hague Principles in their day-to-day work.

Trainers can build a quiz around Slides 4-9 of [Online Training Session 2 Presentation](#). Without first showing the slides to trainees, trainers can put the scenarios in each of those slides to the participants and ask trainees whether that scenario constitutes an act of sexual violence, and if so, why. The answers can be revealed by after discussion, showing trainees the slides.

Whether the act was intended to be sexual by the perpetrator or perceived as being sexual in nature by the victim or their community will be important indicia for this determination. Sometimes the determination is easy. For example, acts of a sexual nature include acts of rape. However, they are not limited to rape and can involve both physical and non-physical acts.

Acts of a sexual nature might not result in visible, physical injury, involve the use of physical force, or even involve any physical contact.



[The Hague Principles on Sexual Violence](#) provide useful guidance on what, in context, makes violence 'sexual' in nature, especially from the viewpoint of survivors.

Note for trainers:

Ask trainees to provide examples of acts of a sexual nature which they have come across in their case files or wider experience in Ukraine, including acts which do not involve physical contact. Discuss.

D. Sexual Violence

Sexual violence refers to intentional and non-consensual acts of a sexual nature. It occurs when a perpetrator commits an act of a sexual nature against one or more persons or causes that person or those persons to engage in an act of a sexual nature by force, by threat of force or coercion, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.

E. Conflict-Related Sexual Violence

Conflict-related sexual violence refers to acts of sexual and gender-based violence which occur within the context of armed conflict (war crimes) or mass atrocities such as crimes against humanity or genocide. Incidents of conflict-related sexual violence will amount to international crimes if what is referred to as the common or contextual elements for each of these categories of crimes are met. These elements are explained in **Section I of Module 3**.

Like any crime of sexual or gender-based violence, CRSV can be committed against any person, regardless of age, sex, or gender.

As of the date of the first release of this Trainers' Guide (October 2023), numerous documents reporting on CRSV in Ukraine have been prepared and published by international agencies and organisations. A number of these have been collected by ULAG and are available at the following [link](#).

Additional OHCHR reports relating to human rights violations in Ukraine, including CRSV, can be found [here](#).

The material collected at this location is not exhaustive and should be regularly updated with contributions by those using this Trainers' Guide.

Where the information contained in these documents is considered relevant and probative to the facts at issue and elements required to be proven in criminal

proceedings related to events in Ukraine, and where such reports are shown to have sufficient guarantees of impartiality as to be considered reliable, they may be admitted as evidence in criminal proceedings.² Among other things, they may provide courts with useful context to the cases brought before them, and corroborate other evidence in case files. These documents should not however be overly relied upon and should not be used to replace testimonial, physical or forensic evidence.

Notes for trainers:

Consider asking trainees whether they have ever encountered acts of conflict-related violence within the scope of their work that they thought might be sexual in nature but were unsure how to classify those incidents. Discuss.

Consider asking trainees to provide examples of CRSV which did not result in visible, physical injury and did not involve use of physical force or physical contact. Two illustrative examples follow:

1. Someone was taken at gunpoint from his home in occupied Mariupol by two men in camouflage uniform. Their pronunciation was not Ukrainian. He was taken with men dressed in civilian clothes to a run-down banquet hall where he was marched into a room in front of 12 soldiers sitting at tables and ordered to undress. Naked, he was examined from head to toe for tattoos, or scars or other signs which might mean they had recently seen combat, such as chafing from a flak jacket or bruising from the recoil of a firearm.
2. Women detainees at a filtration camp were sometimes allowed to shower but were always watched while they were showering by male armed guards.

II. The Importance of Situating CRSV in Context

The investigation of sexual violence, whether as domestic offences or as international crimes, is built on a comprehensive understanding and analysis of the context within which the acts of violence were committed.

CRSV almost never happens in isolation of other crimes. An example of this can be found in the International Criminal Tribunal for the former Yugoslavia (ICTY) *Stakić* case, where sexual violence was found to be part of the violent campaign of persecution which Bosnian Serb forces used to terrify the targeted Muslim population into fleeing the sought-after territory in Prijedor Municipality.³

² See, for example, Situation in the Central African Republic in the Case of Prosecutor v Jean-Pierre Bemba Gombo, Decision on the admission into evidence of items deferred in the Chamber's "Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute," ICC-01/05-01/08-2299, 27 June, 2013.

³ Contextualizing Sexual Violence and Linking it to Senior Officials, Barbara Goy, Michelle Jarvis and Giulia Pinzauti in *Prosecuting Conflict-Related Sexual Violence at the ICTY*, edited by Serge Brammertz and Michelle Jarvis, Oxford University Press, 2016, pp.225-226; ICTY, *Stakić Appeal Judgment*.

Contextualising evidence of sexual violence will therefore ensure we see the connections between the CRSV and the broader pattern of violence in the war in Ukraine.

Seeing sexual violence in context is often essential to be able to link those crimes to more remote, mid-level and higher-level perpetrators (see **Modules 5 and 8**).

Contextualising CRSV does not mean that sexual violence needs to have happened on a large scale in order to be classified and prosecuted as an international crime.

For example, a single rape, or limited number of acts of sexual violence could be part of a pattern of deliberate, violent crimes intended to force the population of an area to flee. While the number of acts of CRSV might be small, and even with no evidence that they were officially ordered, **in context**, evidence of these crimes is just as integral to the campaign to expel the population as other violent and persecutory acts.

It is therefore important that incidents of CRSV are always situated within the case-related narrative (described in **Module 8**), as part of investigative planning. This approach reflects the realities of CRSV in

the ongoing war. Women who may be victims of rape, for example, often report that alongside this they have witnessed killings (including of their own family members), and/or have been victim to other crimes such as looting, inhumane treatment or humiliation, among others. These harms are all connected and may also be connected to the same perpetrator or perpetrator group.

An approach to CRSV cases focussing on the specifics of the sexual violence and its immediate situation is therefore too narrow, and risks having CRSV crimes misclassified as isolated incidents. A narrow approach also obscures the fact that the evidence of CRSV victims will almost invariably be relevant to other international crimes (cross-reference to **Section III of this Module**).

A. Overarching context – contextual elements

Presenting sexual violence in context - at a relatively general level - is necessary to satisfy the contextual elements required for war crimes and crimes against humanity or the common elements of genocide (see **Module 5**). Practice at the ICTY included doing this through witness testimony on the background leading up to the specific crimes charged.



Avoid Misconceptions

It is a common misconception that CRSV is a crime of passion or an opportunistic crime.

In fact, CRSV is intentional. It almost never happens in isolation from other violations, and usually occurs as part of a broader pattern of violence.

B. Contextualisation helps ensure charges accurately reflect the nature of the crime

In some cases, while rape may be charged as a war crime, that approach may not fully or accurately reflect the nature or purpose of the crime under investigation. For example, a rape might have been committed during interrogation, thereby satisfying the threshold to be classified as torture. In another example, in circumstances where rape is committed in the context of someone exercising powers attaching to ownership over the victim (e.g., in a situation of human trafficking or forced labour), the sexual violence may be charged as sexual slavery. Contextualisation at this more specific level will therefore ultimately help practitioners identify charges that more accurately reflect the nature of the criminal conduct.

C. Contextualisation as required under the Istanbul Convention

Ukraine is bound by its July 2022 ratification of the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, otherwise referred to as the Istanbul Convention. Article 2(3) stipulates that the Convention will apply in times of peace and situations of armed conflict. It is therefore clear that the provisions of the Convention apply to CRSV as well as domestic crimes of rape and other forms of sexual violence.

Article 36(2) of the Convention (which refers to sexual violence, including rape) provides that consent to sexual contact must be given voluntarily as the result of a person's free will assessed in the context of the surrounding circumstances. Moreover, paragraph 192 of the Explanatory Report to the Istanbul Convention, which is its key interpretative document, says the following (with regard to crimes of sexual violence, including rape):

192. 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.

In line with the Istanbul Convention, Articles 152, 153 and 154 of the CCU also refer to sexual acts committed against a person without their “voluntary consent.” The Criminal Code specifies that consent to sexual contact shall be deemed voluntary if it is the result of a person's free act and deed, with due account of attending circumstances.

Therefore, not only domestic legislation but also Ukraine's obligations under the Istanbul Convention require contextualisation of rape and all other forms of sexual

violence to establish those factors which negate free, voluntary and genuine consent to sexual contact. Article 2(3) of the Convention makes clear that this also applies with respect to CRSV.

Practically speaking, this means that any CRSV documentation efforts must be comprehensive. Among other things, a comprehensive, context-based approach calls for documentation of:

- **What happened:** consider legal elements of potential offences (see **Module 3**);
- **The harms suffered by the victim, including the impact of the crime;**
- **Who else was harmed and what other crimes were committed:** this helps interviewers identify evidence of patterns (see **Modules 8 and 9**) as well as investigative leads; and
- **How the perpetrators committed the violations:** this may also help identify patterns and will focus on the acts and behaviour of the perpetrator in order to demonstrate the coercive situations in which the sexual violence was carried out.

D. Advantages of a context-based approach

In addition to the advantages outlined above, a context-based approach may also:

- help avoid discriminatory, adverse inferences against victims of CRSV;
- help guard against missing evidence;
- uncover indicators that CRSV is likely to have occurred (see **Section III** of this Module);
- help those investigating and building case files see connections to other international crimes (see **Section II of Module 3**);
- provide linkage evidence (see **Section II of Module 9**);
- help practitioners make better-informed charging decisions; and
- identify more ways for the evidence in a single case to be used in a broader number of cases (including against remote and higher-level perpetrators).

In understanding sexual violence in context, it is important to remember that **there is no requirement that the sexual violence be ordered or otherwise officially sanctioned or approved to amount to a war crime**. Even a single act of sexual violence can amount to a war crime, as well as a crime against humanity if the common (contextual) elements are met.

III. 'Red Flags'

As noted in **Section II**, CRSV never occurs in isolation but rather it is perpetrated in parallel with other crimes. Because of this, **every** plan or strategy for an international crimes investigation should have a CRSV component.

There are a number of indicators that can serve as early-warning signs that the commission of CRSV is likely to occur or have occurred in situations under examination. Examples of these are set out on Slide 10 of [Online Training Session 2 Presentation](#), and reproduced below:

- Detention – and related to that: security searches, reports of disciplinary punishment, and with the cases of women (and children) the presence of male guards/supervisors;
- Forced displacements, and displaced or fleeing women (and children) being forced to pass through checkpoints;
- Separation of men and women;
- House raids and searches, particularly when women are home alone;
- Proliferation of weapons/small arms;
- Movement of troops after victory/defeat;
- Proximity of armed groups to civilian centres;
- Frequent incursions into villages by individuals/groups of soldiers/armed men; and
- Signs of rampage, looting/pillaging.

Discuss: In applying a gender perspective to a report of looting (for example), consider whether incidents such as the destruction of a home and looting of all its contents might have a disproportionate effect on women.

Module 3

Legal Framework and Contextual Elements

Learning Objectives:

- By the conclusion of this Module, trainees will be able to list and be familiar with the norms of international law which govern the investigation and prosecution of war crimes committed in Ukraine, and how these impact on women's human rights as well as state obligations;
- Trainees will be introduced to customary international law as a valuable tool for the interpretation and application of Article 438 CCU (in particular, the jurisprudence of the ICTY and ICTR), and be able to recognise gaps in domestic legislation and practice related to the investigation and prosecution of sexual violence cases, including CRSV;
- They will have an understanding of the contextual or common elements which distinguish international crimes from domestic criminal offences, as well as a basic understanding of the general intent requirements under Article 30 of the Rome Statute.

Module Time:

- The time within which this Module may be delivered is subject to the trainer's planning.
- While it may be delivered on one 90-minute session, it may be useful to split this Module into two 90-minute sessions, allowing time for interactive, moderated discussions with trainees on the evidence which might go to satisfy the contextual elements for different international crimes.
- Given the importance of CIL in interpreting and applying Article 438 CCU, trainers may wish to add a further practical session on online legal research to this Module, introducing trainees to the different available legal databases. In such case, the Module session may be completed in two or three 90-minute sessions.

For this module, trainers can refer to:

- [Presentation of Online Training Session 3 on 'What makes international crimes different from domestic crimes?'](#)

- [Recording of Online Training Session 3 on 'What makes international crimes different from domestic crimes?'](#) (Only in Ukrainian)
- [Second Edition of the International Protocol on the Documentation and Investigation of Sexual Violence in Conflict \(PSVI Protocol\)](#), Part III, Chapters 3 and 4; Annex 1
- [M.C. v. Bulgaria](#), Application No. 39272/98, [Judgment of 4 December 2003](#)
- [Prosecutor v. Kunarac et al.](#), IT-96-23-T & IT-96-23/1-T, [Trial Judgment](#), 22 February 2001
- [Recording of Online Training Session 6 on 'Legal Research'](#) (in Ukrainian)
- Useful databases:
 - [European Court of Human Rights, HUDOC Database](#)
 - [ICRC Customary International Humanitarian Law Database](#)
 - [Rule 93. Rape and Other forms of Sexual Violence](#)
 - [ICRC International Humanitarian Law Databases](#)
 - Lexis, [Elements Digest](#)
 - Lexis, [Means of Proof Digest](#)
 - Peter Robinson, [International Tribunal Digests](#)
 - [Nuremberg Academy Sexual Crimes in Conflict Database](#)
 - [ICTY Manual on Developed Practices](#)
 - [ICC Case Law Database](#)
 - [ICC Court Records and Transcripts](#)
 - [Unified Court Records Database – ICTY, ICTR and MICT](#)
 - [ICTY, ICTR and MICT Case Law Database](#)
 - [International Crimes Database](#)
- [Rome Statute](#), Article 30
- [CCU](#) Articles 438, 152-155 (in particular); and
- [CPCU](#)
- JurFem, [Review of International Criminal Court Judgments](#)
- JurFem, [Wartime Violence](#) – commentary on the prevention, punishment and redress for conflict-related sexual violence

I. Legal Regime

The reference in CCU Article 438 to “international law” and “international agreements” refers to the international humanitarian law (IHL) treaties to which Ukraine is a party – in other words, the four Geneva Conventions of 1949 and Additional Protocol I, and the war crimes stipulated within each treaty (see Slide 6 of Online Training Session 3 Presentation).

Importantly, we can use customary international law (CIL) - which is binding on Ukraine – in interpreting Article 438. CIL is represented by (among others) the statutes and jurisprudence of the *ad hoc* tribunals (including the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)).

While CIL has a role in ICC jurisprudence, under Article 21 of the Rome Statute it is considered a secondary authority. Furthermore, the question among scholars as to whether the Rome Statute and the jurisprudence of the ICC are sources of CIL remains open. Nevertheless, as an instrument and body of law which interprets IHL treaties, the Rome Statute and the jurisprudence of the ICC can also be relied on when assessing the scope of Article 438.

At the same time, Ukraine is also bound by its ratification of international human rights treaties, including the European Convention on Human Rights (ECHR), the Istanbul Convention, the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), and the Optional Protocol for the Elimination of all Forms of Discrimination against Women (among others) and is obliged to apply their provisions in its interpretation and application of the law (cross reference to **Section II of Module 2**).

With this in mind, we should refer to paragraph 166 of the decision of the European Court of Human Rights (ECtHR) in the landmark case of M.C. v. Bulgaria (Judgment of 4 December 2003) (M.C. v. Bulgaria) which states 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.” (see Slide 11 of Online Training Session 2 Presentation).

Other relevant findings from the ECtHR on CRSV include:

Aydin v. Turkey (1997):

- rape of a detainee by a state official constitutes torture under Art 3 ECHR (first time rape by public officials explicitly recognized as torture);
- the Court also emphasized the serious and long-lasting psychological effects of rape, particularly when committed by state officials in detention;
- the failure by national authorities to conduct a thorough and effective investigation was found a separate violation under Art 13 ECHR;
- the Court also criticized the use of 'virginity testing' in the investigation, recognizing it is a discriminatory practice with no scientific value and potentially constituting cruel, inhuman or degrading treatment in itself.

M.C. v. Bulgaria (2003):

- the Court established that member states have a positive obligation to enact criminal law provisions that effectively punish rape and to apply them in practice through effective investigation and prosecution;
- the Court rejected the notion that victims must show evidence of physical resistance in rape cases, emphasizing that lack of consent should be the central element in rape prosecutions.

Maslova and Nalbandov v. Russia (2008):

- the Court found that acts of sexual violence committed by state agents (police officers in this case) constituted torture under Art 3 ECHR;
- it emphasized the gravity of sexual violence when perpetrated by those in positions of authority and underscored the state's obligation to prevent and investigate such acts, even in conflict-related contexts.

N.Ç. v. Turkey (2013):

- this case dealt with the sexual abuse of a minor; the Court found that the length of criminal proceedings and the manner in which they were conducted failed to meet the requirements inherent in the state's positive obligations to effectively investigate and punish all forms of rape and sexual abuse;
- the Court stressed the importance of protecting minors and vulnerable individuals in sexual violence cases.

Y. v. Slovenia (2015):

- the Court addressed the issue of secondary victimization during criminal proceedings for sexual abuse;
- it found that the manner in which criminal proceedings are conducted should not unjustifiably compound the victim's suffering, particularly during cross-examination.

J.L. v. Italy (2021):

- this recent case focused on the re-victimization of a rape survivor through stereotyping and victim-blaming in the judicial process;

- the Court emphasized that judicial reasoning should avoid perpetuating gender stereotypes, making judgments on the victim's personal characteristics, or using victim-blaming language.

II. Elements of International Crimes

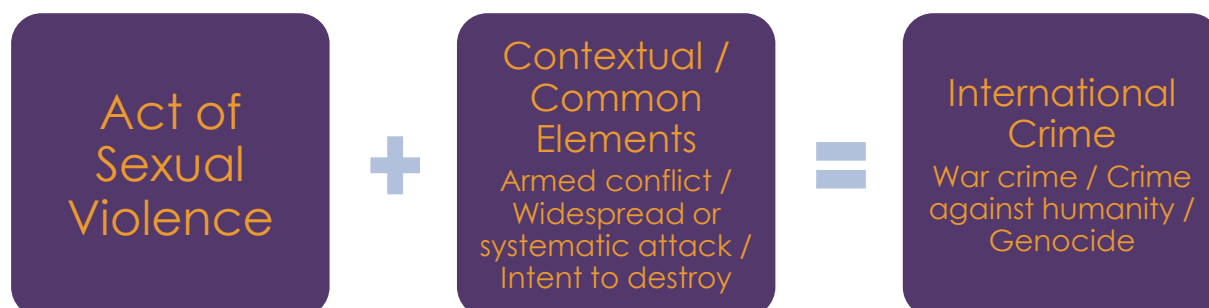
Whether they are investigated and prosecuted domestically or internationally, international crimes require proof of certain specific elements:

- **the contextual (or common) elements:** elements that relate to the circumstances in which the crime must be committed, or be part of;
- **the physical elements (*actus reus*) of the crime:** elements that relate to the conduct of the perpetrator, the consequences of such conduct and the circumstances in which they occurred; and
- **the mental elements (*mens rea*) of the crime:** elements that relate to the intent of the perpetrator in committing the crime.

This Module will provide an overview of the contextual elements and general mental elements applicable to all crimes. **Section II.A of Module 4** will review the physical elements of war crimes relevant to CRSV in more detail.

A. Contextual (Common) Elements

The main distinguishing factor between international and domestic crimes is the context in which they are committed. War crimes, crimes against humanity and/or genocide must occur within specific contexts. These are referred to as the contextual or common elements.⁴



We will examine these contextual/common elements in this section.

B. War Crimes

Criminal Code of Ukraine, Article 438 – Violation of the rules of the warfare

Cruel treatment of prisoners of war or civilians, deportation of civilian population to engage them in forced labour, pillage of national treasures on occupied territories, use of methods of the warfare prohibited by international instruments, or any other

⁴ This infographic is also available as Slide 5 of [Online Training Session 3 Presentation](#).

violations of rules of the warfare stipulated by international treaties, ratified by the Verkhovna Rada of Ukraine, and also issuing an order to commit any such actions [...].

A war crime can only be committed in the context of an international or non-international armed conflict (see Slide 7 of [Online Training Session 3 Presentation](#)). International armed conflicts include situations of occupation. The perpetrator must also be aware of the factual circumstances that established the existence of an armed conflict.⁵

It is worth noting that in international armed conflicts, war crimes can still be charged against perpetrators of violations against PoWs who are not repatriated even after the conflict ends (see Article 5, [Geneva Convention III](#)).

Proving a war crimes case **always** requires evidence of the existence of an armed conflict **and** that the violation was associated with the conflict, even though these are not specifically listed among the factors set out in **Article 91 CPCU**. This connection to the conflict is referred to as the 'nexus'.

1. Nexus

Proving the nexus means that the evidence must show that the conflict played a major part in either the perpetrator's decision to commit the crime, their ability to commit the crime or the manner in which the crime was committed.⁶

Proving nexus is not complicated. The nexus may be established by evidence that shows, for example:

- the crime was perpetrated within the period of the conflict;
 - the crime took place in a conflict-affected area;
 - the manner in which the crime was committed (i.e., how the crime was carried out);
 - the purpose for which the crime was committed;
 - whether the perpetrator was a combatant;
 - whether the victim was a non-combatant;
- or



The evidence does not need to show the conflict was the sole reason for the crime, or that the crime took place on the battlefield.

CRSV will often take place away from the scene of active combat, in places such as formal or ad hoc detention facilities, or the homes of the victims.

⁵ See e.g., ICC Elements of Crimes, Article 8; *Prljic et al Appeal Judgement*, para. 2392.

⁶ *Bemba Trial Judgment*, para. 142; *Katanga Trial Judgment*, para. 1176; *Kunarac et al. Appeal Judgment*, para. 58.

- whether the crime could be said to serve the ultimate goal of the military campaign.

This is not an exhaustive list. In addition, these examples and others are set out in Slide 8 of [Online Training Session 3 Presentation](#).

CRSV will often take place away from the battlefield in locations on, for example, Russian occupied territory or in Russia itself. These locations can include filtration facilities, detention centres, or even private homes. As noted above, even a single isolated act can constitute a war crime.⁷

ICTY, Kunarac et al., [Appeal Judgment](#), 2002, para. 58

What ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon the environment – the armed conflict – in which it is committed. It need not have been planned or supported by some form of policy. 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. Hence, if it can be established, as in the present case, that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict. The Trial Chamber's finding on that point is unimpeachable.

Reproduced at Slide 7 of [Online Training Session 3 Presentation](#).

Note for trainers:

Consider asking trainees to provide examples of what types of evidence they might use to prove the nexus in cases of CRSV as a war crime. Discuss.

2. Protected person status

In addition to proving the nexus, proving a war crime of sexual violence under Article 438 will **always** require evidence which shows that the victims were protected persons under one or more of the Geneva Conventions.

This **will require** evidence that the victim falls in one of the following categories:

- i *civilians (including those displaced by conflict);*

⁷ [Rome Statute](#), 2002, Article 8(2)(c).

- ii wounded, sick and shipwrecked members of the armed forces not taking part in hostilities;
- iii PoWs and other detained persons.⁸

Like nexus, the protected person status is not one of the factors specifically listed in Article 91 CPCU as being required to be proven. See Slide 9 of [Online Training Session 3 Presentation](#) for a more detailed explanation of protected persons.

C. Crimes Against Humanity

It is important that trainees understand the contextual elements of crimes against humanity, as the evidence in the cases they build may be used in proceedings bringing criminal cases in other jurisdictions (e.g., in a universal jurisdiction case) where crimes against humanity would be applicable.

A crime against humanity can only be committed as part of a widespread **or** systematic attack against any civilian population, and the perpetrator must have known their actions were part of the attack.⁹ Proof of a crime against humanity does not require a situation of armed conflict, or even a military attack.

The ICC additionally requires that the attack was committed pursuant to or in furtherance of a State or organisational policy to commit such an attack. This additional element is unique to the Rome Statute and is not required by CIL.

ICTY, Tadić Appeal Judgment, para. 555

The Appeals Chamber agrees that the weight of authority supports the proposition that crimes against humanity can be committed for purely personal reasons, provided it is understood that the two aforementioned conditions – that the crimes must be committed in the context of widespread or systematic crimes directed against a civilian population and that the accused must have known that his acts, in the words of the Trial Chamber, “fitted into such a pattern” – are met.

The sexual violence itself does not need to be widespread or systematic, but the attack during which the sexual violence took place must be widespread or systematic.¹⁰ This means that even one act of sexual violence could constitute a crime against humanity if it took place as part of the attack.

A **widespread** attack can refer to an attack carried out over a large geographical area, or an attack in a small geographical area directed against a large number of civilians, such as the siege of Azovstal.

⁸ ICRC, [Persons Protected Under IHL](#).

⁹ [Rome Statute](#), 2002, Article 7; ICTY, [Kunarac et al. Appeal Judgment](#), para. 102;

¹⁰ See e.g., [Brdanin Appeal Judgment](#), para. 257; [Kordić and Čerkez Appeal Judgment](#), para. 94.

The term '**systematic**' refers to the organised nature of the acts which make up the attack, and the 'improbability of their random occurrence.'¹¹ Patterns of crimes are frequently evidence of systematic attacks.¹² Patterns may be obvious from such things as:

- temporally and geographically repeated and coordinated crimes;
- the nature of the targets, such as directed attacks on infrastructure;
- whether the crimes followed a similar pattern to events elsewhere in the theatre of war;
- the nature of the crimes;
- evidence of a plan or policy targeting the civilian population;
- whether military or other authorities were involved in the attack (e.g., any missile which by the nature of the weapon will require authorisation from several levels of command responsibility before firing); or
- the way the perpetrators carried out the attack: for example, in an area under military occupation, this could include mass arrests of civilians, house-searches and enforced disappearances, all carried out by different arms of the occupation authorities (army, police or FSB). This can help show that the attacking forces were organised and coordinated in carrying out their mission. The random shelling of the entire city of Kharkiv since 24 February 2022 is also an obvious pattern of crime.

Proof of this contextual element requires evidence of the civilian character of the population. The presence of some combatants among the population does not necessarily mean that it loses its civilian status. The targeted population must be **predominantly** civilian.

The attack does not need to be directed against the civilian population of an entire area. It is sufficient to show that 'enough' people were targeted during the course of the attack or that they were targeted in such a way as to show the attack was directed against a civilian **population** rather than a limited and/or randomly selected number of individuals.¹³

Proving CRSV was Part of a Widespread or Systematic Attack

Establishing that an incident of sexual violence is part of a widespread or systematic attack against the civilian population can be proven by (for example):

- Showing that the victim suffered other harms that were part of the attack;
- Showing that the perpetrator committed other crimes that were part of the attack;

¹¹ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Trial Judgment, 29 May 2013, paras. 41-42.

¹² *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Appeal Judgment, 17 December 2004, para. 94.

¹³ *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-T, Trial Judgement, 30 May 2013, paras. 964-965.

- Showing that the sexual violence was committed at the same time or in the same location as other crimes that formed part of the attack.

A context-based approach will show that an act of sexual violence occurring before or after the main attack, or in a different location, is not necessarily an isolated act.

The perpetrator's motive, whether it was personal, sexual or otherwise, is irrelevant to the classification of a crime of sexual violence as a war crime or crime against humanity.

See Slides 10-12 of [Online Training Session 3 Presentation](#).

Note for trainers:

Consider discussing with trainees the types of evidence they might use to prove that the CRSV under investigation occurred in the context of a widespread or systematic attack against a civilian population in Ukraine.

D. Genocide

The crime of genocide which is set out under Article 442 CCU covers the same conduct as ICL definitions. Genocide is commonly associated with mass/large/scale killing, but the legal definition includes a broad array of harms that might include sexual violence crimes.

Proving genocide requires that the perpetrator committed any of the following acts with the specific intent to destroy, in whole or in part, **a national, ethnical, racial or religious group**:

- Killing;
- Causing serious bodily or mental harm to members of the group;
- Deliberately inflicting conditions of life calculated to bring about their physical destruction in whole or in part;
- Imposing measures intended to prevent births; or
- Forcibly transferring children from the group to another.

For genocide, the perpetrator does not have to intend to destroy the group as a whole. It is enough to intend to destroy the group in part. This does not require a certain numerical threshold, provided that part is substantial. Courts have accepted the intention to target part of a group in a particular geographical area as genocide.

III. Mental Elements

A finding of individual criminal responsibility under international criminal law requires certain mental elements to be established:

1. **Those relevant to the contextual elements** (see **Section II** of this Module): for example, as discussed above in relation to war crimes, the perpetrator must be

aware of the factual circumstances that established the existence of an armed conflict.¹⁴ The fact that the perpetrators are serving in Ukraine might, for example, be sufficient.

2. **Those relevant to the specific acts** (see **Module 5**): for example, the war crime of rape requires that the perpetrator intended the penetration and knew that it was committed in circumstances in which free, voluntary and genuine consent was impossible.¹⁵ Certain war crimes contain an additional specific intent: for example, the war crime of torture requires the conduct be committed with a prohibited *purpose* (see **Section IV.A of Module 5**) and the war crime of forced pregnancy requires the specific intent to affect the ethnic composition of any population or to carry out other grave violations of international law (see **Section III.C of Module 5**).

Article 30 of the Rome Statute sets out the general mental elements applicable to all crimes contained in the Rome Statute. Accordingly, the evidence must show that the mental elements of intent and knowledge are established in relation to each material element of the specific crime (see Slide 4 of [Online Training Session 5 Presentation](#)). In particular:

- Intent: means that a person meant to engage in the conduct or meant to cause a consequence or was aware that it would occur in the ordinary course of events.
- Knowledge: means awareness that a circumstance exists or a consequence will occur in the ordinary course of events.

The intent requirements under Article 24 of the CCU follow a similar logic as those recognised under international law, providing for two categories of intent:

1. **direct**: “where a person was conscious of the socially injurious nature of his/her act (action or omission), anticipated its socially injurious consequences, and wished them”;¹⁶ and
2. **indirect**: “where a person was conscious of the socially injurious nature of his/her act (action or omission), foresaw its socially injurious consequences, and anticipated, though did not wish them”.¹⁷

In many cases, intent and knowledge/awareness will be shown through the factual circumstances surrounding the commission of the crimes, for example the fact that the perpetrator intended to penetrate someone will be obvious from their actions.

Intent or knowledge/awareness can also be shown by such things as evidence of statements made by the suspect (direct, mid-level or high-level perpetrator) and/or

¹⁴ See e.g., *Prljic et al Appeal Judgement*, para. 2392; ICC Elements of Crimes, Article 8.

¹⁵ See e.g., *Kunarac et al Trial Judgement*, para. 460; *Katanga Trial Judgement*, paras 970.

¹⁶ [CCU](#), Article 24(2).

¹⁷ [CCU](#), Article 24(3).

evidence of other people informing the suspect about the commission of violent crimes, for example: minutes of meetings, intercepted communications, interviews with the suspect, diaries, reports on the security situation provided to the suspect, or evidence from insider witnesses.¹⁸

¹⁸ See e.g., Brammertz & Jarvis *Prosecuting conflict-related sexual violence at the ICTY* (2016), p. 247; Gotovina et al. Trial Judgment, paras 2374, 2586; Tolimir Trial Judgment, para. 1140; Šainović et al. Appeal Judgment, para. 1581.

Module 4

Understanding Consent and Coercion

Learning Objectives:

- This Module builds on the learning in Module 2, and reinforces the importance of a context-based investigation in dealing with crimes of rape and other forms of sexual violence.
- On completion of this module, trainees will understand how the definitions of rape and other sexual violence crimes applicable in Ukraine are based on free, voluntary and genuine consent and recognise a broad range of coercive circumstances which negate consent.
- They will understand the factors recognised in both international human rights law and international criminal law which negate consent to sexual contact, and how those factors should be broadly interpreted and applied in their own cases.

Module Time:

- This module can be presented in one session of either 90 minutes, or 120 minutes, or broken into two or more sessions to allow sufficient time to use different training tools, exercises (including a discussion of the film *As If I'm Not There*, and/or case studies).

For this module, trainers can refer to:

- This chapter
- Second Edition of the International Protocol on the Documentation and Investigation of Sexual Violence in Conflict (PSVI Protocol), Part II, Chapter IV
- Slide 5-8 of Online Training Session 4 Presentation on 'Understanding Consent and Coercion'
- Handout "Exploring Coercion and Consent in Interviews with Witnesses/Victims of Conflict-Related Sexual Violence"
- The film: *As If I'm Not There*
- M.C. v. Bulgaria, Application No. 39272/98, Judgment of 4 December 2003

- Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) and its Explanatory Report
- CEDAW, General Recommendation No. 35 on gender-based violence against women, CEDAW/C/GC/35, para 33
- *Prosecutor v. Bemba*, ICC-01/05-01/08, Trial Judgment, 21 March 2016, para. 105-106
- Directive 2012/29/EU of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime
- *Prosecutor v. Kunarac et al.*, IT-96-23& IT-96-23/1-A, Appeal Judgment, 12 June 2002
- *Prosecutor v. Kunarac et al.*, IT-96-23-T & IT-96-23/1-T, Trial Judgment, 22 February 2001
- *Prosecutor v. Kvočka et al.*, IT-98-30/1-T, Trial Judgement, 2 November 2001
- Effectively Investigating, Prosecuting and Adjudicating Sexual Violence Cases: A Manual for Practitioners in Georgia (Equality Now, 2021)
- Rape and Sexual Violence: Human Rights Law and the Standards in the International Criminal Court' (Amnesty, 2011)
- Articles 153-154 CCU

International criminal law and human rights law holds that the possibility to give free, voluntary and genuine consent to sexual contact is negated when the act is committed through:¹⁹

- Use of actual or threatened physical, psychological or economic violence;
- Threats of force or coercion (such as that caused by fear of violence, duress, detention, intimidation, blackmail, psychological oppression or abuse of power, among others);
- By taking advantage of a coercive environment; or
- By taking advantage of a person incapable of giving genuine consent.

When just one of the above factors has been proven, this should be sufficient to establish the non-consensual nature of the sexual act at issue. Any context-based investigation will be comprehensive and should investigate and document evidence of these circumstances. This shifts focus away from the acts and conduct of the victim to instead examine the behaviour of the perpetrator and the surrounding context.

This approach is particularly important when dealing with cases in Ukraine. Here, the overarching coercive circumstances of conflict and occupation mean that perpetrators will often not need to use or threaten physical force to carry out the sexual violence crime. Linked to this, victims of CRSV face increased credibility challenges from law enforcement, state security and criminal justice actors (including defence counsel), insinuating consent and accusing them of attempting to conceal their involvement with the opposing side. This underscores the particular importance of a context-based analysis in all CRSV cases and will improve access to justice for victims of CRSV.

As discussed below, this approach is specifically called for in applying Articles 152, 153 and 154 of the CCU, and should therefore be applied in dealing with war crimes of rape and other forms of sexual violence under Article 438.

In addition, a number of the CRSV war crimes have similar coercion elements. In particular,

- The **war crimes of rape** (see **Section I of Module 5**), **other forms of sexual violence** (see **Section II of Module 5**) and **enforced prostitution** (see **Section III.B of Module 5**) must be committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by

¹⁹ For additional guidance in defining and recognising these factors which negate consent, see: [ICC Rules of Procedure and Evidence](#), Rule 70; Articles 1(4), 1(17) of the [Law on Domestic Violence](#). See also [Criminal Code of Ukraine](#) Article 126-1 (domestic violence); [Istanbul Convention](#) Article 3; [Explanatory Report to the Istanbul Convention](#); Articles 179-181, 187-181.

taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.²⁰

- The **war crime of forced pregnancy (see Section III.C of Module 5)** is understood as encompassing the same coercive circumstances described in the other sexual violence crimes (i.e., rape, other forms of sexual violence and enforced prostitution).²¹
- The **war crime of enforced sterilisation (see Section III.D of Module 5)** requires that the conduct was neither justified by medical or hospital treatment or carried out with the victim(s) *genuine consent*, which does not include consent obtained through deception.²²
- The **war crime of sexual slavery (see Section III.A of Module 5)** does **not** involve factors which would negate the consent of the victim. In fact, consent is not an element of this crime which is instead exclusively concerned with exercise of rights of ownership of another person.²³

I. Consent Under Articles 152-154 of the CCU

Under Articles 152, 153 and 154 CCU, the domestic crimes of rape, sexual violence and compulsion to sexual intercourse occur when a 'sexual act' or 'sexual violence' is committed without the **voluntary consent** of the victim. Consent will be 'voluntary' if it is the result of a person's free act and deed, "with due account of attending circumstances" (see Slide 8 of [Online Training Session 4 Presentation](#)).

The CCU therefore requires a determination of whether a victim of the above-noted crimes was able to give free, voluntary and genuine consent to be based on analysis of the surrounding circumstances or context (see **Section II of Module 2**).

This is fully in line with Ukraine's obligations under the Istanbul Convention,²⁴ and in line with international criminal law and other international human rights law standards. An analysis of the "attending circumstances" can be made with reference to the norms set in more detail in the following section.

II. Factors Negating Consent Under International Law

As discussed above, customary international law and the ICC Elements of Crimes specifically incorporate factors negating free, voluntary and genuine consent (see

²⁰ See ICC Elements of Crimes, Articles 8(2)(b)(xxii)-1, 8(2)(b)(xxii)-3, and 8(2)(b)(xxii)-6.

²¹ Ongwen [Trial Judgment](#), para. 2725; Ongwen [Decision on the Confirmation of the Charges](#), para. 99.

²² ICC Elements of Crimes, fn 55.

²³ *Kunarac et al. Appeal Judgment*, paras 120-121; ECOSOC, [Contemporary Forms Of Slavery: Systematic rape, sexual slavery and slavery-like practices during armed conflict \(Update\)](#), para. 51. Indeed, "slaves may be well fed, well clothed, and comfortably housed, but they are still slaves if without lawful process they are deprived of their freedom by forceful restraint [...] involuntary servitude, even if tempered by humane treatment, is still slavery": *US v. Oswald Pohl & Others*, Case No. 4, [Opinion and Judgment](#), US Military Tribunals sitting in the Palace Of Justice in Nuremberg, 3 November 1947, reprinted in *Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council No. 10* (Vol. 5 1997), pp. 958, 970, as quoted in *Kunarac et al. Appeal Judgment*, para. 123.

²⁴ [Istanbul Convention](#) Article 36(2).

Slides 5-7 of [Online Training Session 4 Presentation](#)) in the war crimes of rape, other forms of sexual violence and enforced prostitution. In addition, these factors will be relevant to interpreting what amounts to “forced” in relation to the war crime of forced pregnancy and whether the victim gave “genuine consent” in relation to the war crime of enforced sterilisation.

War Crime of Rape under Article 8(2)(b)(xxii)-1 – ICC Elements of Crimes

[...]

2. The invasion was **committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.**

[...]

The determination of whether factors exist which negate free, voluntary and genuine consent also requires an analysis of the context in which the act of a sexual nature under investigation is perpetrated (cross reference to **Section II of Module 2**).

These factors are examined in turn below and should be applied consistently by all criminal justice actors in Ukraine when dealing with sexual violence charges contrary to Article 438 CCU.

A. Physical Violence

Physical force provides clear evidence of non-consent, but the European Court of Human Rights has confirmed that force is not an element of rape, and that *consent must be given voluntarily, as a result of the person's free will, assessed in the context of the surrounding circumstances* (see Slide 6 of [Online Training Session 4 Presentation](#) (Extract from *M.C. v. Bulgaria* – para. 163)).

Furthermore, even if committed with physical force, sexual violence does not necessarily result in physical injury and may not leave any visible traces on the body of a victim. In addition, evidence of physical injuries may no longer exist where reporting of the crime is delayed. With this in mind, forensic examinations, including gynaecological examinations, should only be ordered where necessary²⁵ and with the victim's informed consent. If as a result of a gynaecological examination, an expert does not find evidence of physical injuries or their examination is inconclusive, no adverse inferences should be drawn from this.

The absence of physical injuries does not mean that the sexual violence did not happen and should not be a reason to doubt the credibility of the victim.

²⁵ [Directive 2012/29/EU](#), 25 October 2012, Article 20(d).

Furthermore, in those cases where physical force is used, the level of force does not need to reach a certain threshold, such as 'excessive physical force' or 'life-threatening physical force' before the sexual violence is considered criminal.

B. Threats and Coercion

Threats and coercion are forms of psychological violence. They are aimed at gaining and maintaining power and control over the will of a person. They give rise to situations through which sexual violence can be committed. It is important to assess these situations in context, because what may initially be seen as the victim's consent or submission to sexual contact may actually be their way of coping with or adapting to their threatening, coercive environment and avoiding other harmful consequences.

1. Threats

Threats may refer to physical violence but may also refer to other non-physical forms of harm, such as economic harm, threats of disclosing defamatory information, or information representing private life. They may be directed against the victim personally but may also be aimed at other persons or things, such as the victim's property. Threats do not need to refer to immediate harm or harm that reaches a certain threshold, such as an act or situation dangerous to life or health. Indeed, a threat that may emerge in the future will still negate consent if it creates a coercive environment for the victim.

Threats do not need to be explicit and may be delivered in words or actions, or a combination of both. In addition, the perpetrator does not need to actually fulfil the threat, or even have the ability to do so, so long as the victim believed at the time that they could.

2. Coercion

In any circumstances, perpetrators of sexual violence will often employ more subtle behaviours, such as inducements or bullying (e.g., verbal or psychological abuse or controlling behaviour) to create or exploit vulnerabilities in victims and make them dependant on, or obedient to, their abuser.

While coercion is not articulated as a stand-alone offence in Ukrainian law or specifically defined under the CCU, reference to Article 40, which refers to physical or mental coercion, can be useful in understanding how coercion should be interpreted. It is reproduced, in part, below:

- A person's act or omission that caused harm to legally protected interests shall not be deemed a criminal offence, where that person acted under direct physical coercion that rendered him/her unable to be in control of his/her actions.
- The decision on a person's criminal liability for causing harm to legally protected interests shall be made pursuant to provisions of [Article 39](#) of the CCU, where that person was subject to physical coercion, under which he/she was able to control his/her actions, and also subject to mental coercion.

Article 40 refers to people being **unable to control their actions as a result of coercion**. A victim of coercion is unable to exercise genuine choice. This is in line with international standards – which stipulate that coercion can negate capacity to give free, voluntary, genuine consent. This is always, however, a context-based determination.

Coercion and coercive environments are commonly found in the context of an unequal power relationship between the victim and perpetrator. Coercion includes the idea of someone in a position of power offering or giving material or a benefit to a victim in order to achieve control.

For example, it can arise in situations where the victim is dependent on the perpetrator (for such things as access to food, or protection from attacks), or in a relationship with the perpetrator that gives rise to exploitation (such as human trafficking). There are numerous reports of women in liberated territories having been isolated in their homes during the occupation, with their phones stolen by occupation forces, access to electricity and internet cut off, and all escape routes blocked by Russian occupiers. They may, in their unique coercive circumstances, have submitted to sexual violence to avoid something worse happening to themselves or their families. They may have feared resisting would provoke acts of physical violence.

Coercion can also include such things as surveillance, rules, isolation, manipulation, put-downs, degradation, and humiliation (among others) to create or exploit vulnerabilities in victims. It can include threats to punish the victims for acts they allegedly committed or might think of doing – such as to flee, or escape from detention, or reporting the harms they suffered to the authorities.

Methods of coercion may also include different forms of psychological torture, examples of which are provided in the [Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment](#) (Istanbul Protocol) at para. 372.

Acts and evidence of coercion do not need to be contemporaneous to the sexual act under investigation to be relevant to criminal proceedings.

Illustrative examples of acts coercion relevant to the Ukrainian context can be found at Slide 9 of [Online Training Session 4 Presentation](#).

Note for trainers:

Ask the trainees to share some examples of coercion from their own cases and discuss. In order to start discussion, it is recommended that trainers should research and identify have their own examples from open source.

3. Taking advantage of an inherently coercive environment

In addition, CRSV can also be committed by taking advantage of an inherently coercive environment where the perpetrator is not directly responsible for creating the coercive situation but takes advantage of a coercive environment that exists independently.²⁶

Inherently coercive environments include:

- the presence of the military in the area
- armed conflict or occupation
- situations where other war crimes or crimes against humanity are being committed

Genuine consent under circumstances of massive military occupation by foreign troops, the presence and use of weapons, house searches, disappearances, deprivations of liberty, random acts of violence, and intimidation (including killing) is viewed as being essentially impossible.

It should be noted that taking advantage will most often occur alongside other forms of coercion.

4. Incapacity

A person may also be considered incapable of giving free, voluntary and genuine consent to sexual conduct if, at the time of the commission of the crime, they were incapacitated (by drugs or alcohol, unconscious, asleep, suffering from an illness or injury, or debilitated by age-related incapacity).²⁷

Note for trainers:

Discuss with trainees the types of questions or approach they might take to understand factors negating consent and factors showing coercion when interviewing victims of CRSV. "[Exploring Coercion and Consent in Interviews with Witnesses/Victims of Conflict-Related Sexual Violence](#)" may be used as a handout for trainees.

²⁶ 'Rape and Sexual Violence,' Amnesty International, 1 March 2011, pp. 26-27; 'Sexual Violence in Detention,' ICRC, February 2017, p. 2; *Ongwen Trial Judgment*, para. 2710; *Ntaganda Trial Judgment*, para. 935.

²⁷ *Kunarac et al. Trial Judgment*, paras 451-452, 591, 762; *Sesay et al. Trial Judgment*, para. 148; *M.C. v. Bulgaria Judgment*, paras 79, 150.

Module 5

CRSV as War Crimes

Learning Objectives:

- At the end of this Module, trainees will have a broad understanding of the different forms of CRSV and their elements, as well as the elements of other crimes which can be committed by sexual conduct, and should be able to recognise evidence that can be used to prove those violations. Trainees will also be familiar with the different charging options available for acts of CRSV and some of the factors involved in choosing the most appropriate charging option in all the circumstances.

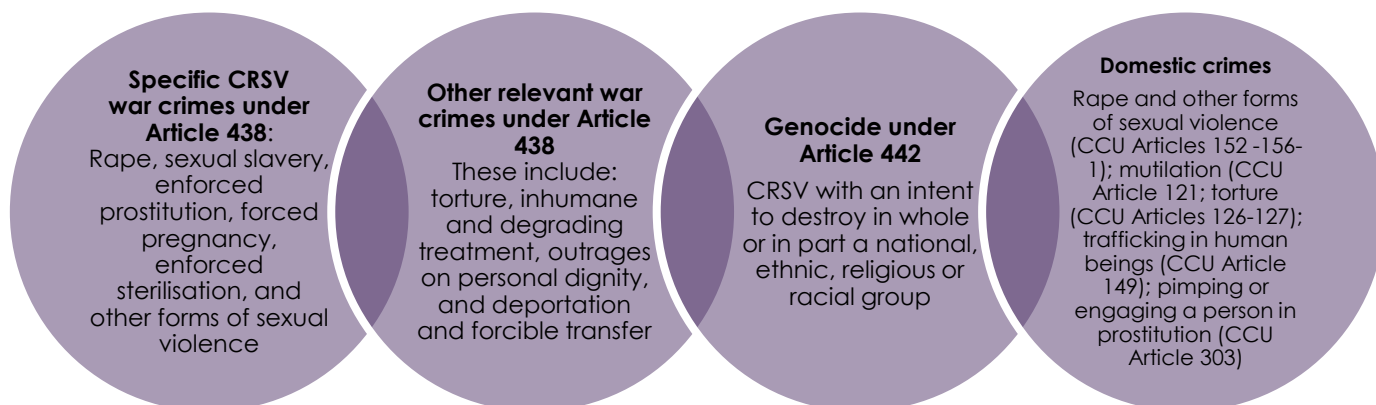
Module Time:

- This Module can be delivered in two sessions of 90 minutes.

For this module, trainers can refer to:

- This Chapter
- [Handout “Legal Framework of CRSV War Crimes”](#)
- [Handout “Legal Framework of Other International Crimes”](#)
- Slide 6 of [Online Training Session 5 Presentation on ‘International crimes involving sexual violence’](#)
- [Recording of Online Training Session 5 on ‘International crimes involving sexual violence’](#)
- [Second Edition of the International Protocol on the Documentation and Investigation of Sexual Violence in Conflict \(PSVI Protocol\)](#), Part II, Chapter II; Part III, Chapter IV; Part VII, Chapter 17; Annex 1
- Synergy for Justice, [Technical Guidance](#), including
 - [Women in Detention](#)
 - [LGBTQI Patterns of Injuries](#)
 - [Sexual Dysfunction Following Torture](#)

The graphic below is a visual overview of the crimes discussed in this section. It is also available in Slide 6 of [Online Training Session 5 Presentation](#).



When committed during an armed conflict, the following may amount to war crimes pursuant to Article 438 CCU:

<p>Rape</p> <p>Sexual slavery</p> <p>Enforced prostitution</p>	<p>Forced pregnancy</p> <p>Enforced sterilisation</p> <p>Other forms of sexual violence</p>
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You can refer to the [Legal Framework for CRSV War Crimes Handout](#).

Note: these acts can also amount to crimes against humanity when committed as part of a widespread or systematic attack against a civilian population.

I. Rape

The war crime of rape can be prosecuted as a violation of Article 438 CCU by virtue of Article 27 of the Fourth Geneva Convention and Articles 75(2)(b), 76(1), and 77(1) of Additional Protocol I. As noted above in **Section II of Module 2** and **Section II of Module 4**, rape is also criminalised as a domestic crime under Article 152 CCU.

The war crime of rape occurs when:

1. there is an invasion of the body of a person (i.e., penetration, **however slight**, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body), and
2. this invasion is committed by force, by threat of force or coercion, by taking advantage of a coercive environment, or against a person incapable of giving genuine consent. See Slide 1 of [Online Training Session 5 Presentation](#), Article 8(2)(b)(xxii)-1 of the International Criminal Court [Elements of Crimes](#).

These material elements of the war crime of rape are very similar to those contained in Article 152 CCU (the domestic crime of rape).

- Article 152 CCU defines rape as: “Committing sexual acts involving vaginal, anal or oral penetration into the body of another person using the genitals or any other item, without the voluntary consent of the victim (rape) [...]”
- As also pointed out earlier, consent must be given voluntarily **as the result of the person's free will assessed in the context of the surrounding circumstances.** (See Slide 2 of [Online Training Session 5 Presentation](#))

Under both Ukrainian and international criminal law, rape is gender-neutral, and therefore can include same-sex penetration and both male and/or female perpetrators and victims.

ICC, [Ntaganda Trial Judgment](#), para. 933.

The concept of 'invasion' is intended to be broad enough to be gender neutral. Accordingly, 'invasion', in the Court's legal framework, includes same-sex penetration, and encompasses both male and/or female perpetrators and victims.

Notes for trainers:

Discuss with the trainees examples they have come across in their work of penetration which might amount to the war crime of rape.

You might consider asking them questions including how they might classify:

- 1) a situation where the victim, a detainee, was forced to perform oral sex on her interrogator;
- 2) an incident where a woman is searched at a checkpoint and the soldiers inserted fingers inside her vagina as part of the search; and
- 3) an incident where two prisoners are forced to sodomise one another.

II. Other Forms of Sexual Violence

A war crime of sexual violence can be prosecuted under Article 438 CCU by virtue of Article 27 of the Fourth Geneva Convention and Articles 75(2)(b), 76(1), and 77(1) of Additional Protocol I which prohibit “any form of indecent assault”.²⁸ See the [Legal Framework of CRSV War Crimes Handout](#).

The war crime of sexual violence occurs when:

1. An act of a sexual nature is committed; and

²⁸ See also, Article 4 of the [ICTR Statute](#), which provides that the ICTR has the power to prosecute persons committing or ordering committed serious violations of common Article 3 of the Geneva Conventions, including “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault” (among others).

2. By force, threat of force coercion, or taking advantage of a coercive environment, or a victim's incapacity to give consent.

In addition, the Rome Statute requires that the conduct to be of a gravity comparable to that of a grave breach of the Geneva Conventions (wilful killing; torture or inhuman treatment, including biological experiments; wilfully causing great suffering; or serious injury to body or health).



The above **gravity requirement is unique to the Rome Statute and is not contained** the Geneva Conventions, customary international law, the statutes of the *ad hoc* tribunals, or the legislation of some European States, including Ukraine. As such, this element would not need to be established to prove the war crime of sexual violence under Article 438 of the CCU.

The jurisprudence of the *ad hoc* tribunals provides useful guidance in interpreting the material elements of the war crime of sexual violence:

ICTY, Furundžija Trial Judgment, para. 186

[...] international criminal rules punish not only rape but also any serious sexual assault falling short of actual penetration. It would seem that the prohibition embraces all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim's dignity.

ICTR, Akayesu Trial Judgment, para. 688

The Tribunal considers sexual violence, which includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.

ICTY, Karadžić Trial Judgment, paras 512-513

512. Other acts of sexual violence encompass acts which may fall short of rape, including crimes such as sexual slavery or molestation, but are of equal gravity to other crimes under Article 5 of the [ICTY] Statute. These acts are often characterised as "sexual assault". Serious abuses of a sexual nature inflicted upon the integrity of a person by means of coercion, threat of force, or intimidation in a way that is humiliating and degrading to the victim's dignity may constitute other acts of sexual violence. These acts are not limited to the physical invasion of the human body and may include acts which do not involve penetration or even physical contact.

513. Sexual violence is found when (i) the perpetrator commits an act of a sexual nature on another or requires the victim to perform such an act, (ii) that act infringes on the victim's physical integrity or amounts to an outrage to the victim's personal dignity, and (iii) the victim does not consent to the act. The perpetrator must

intentionally commit the act, and be aware that the victim did not consent to the act.

As a domestic crime, sexual violence is criminalised by Article 153 of the CCU, which states: "...any sexual violence, not related to the penetration into another person's body, without the voluntary consent of the victim."

A. Forced nudity as a form of sexual violence

Common in detention and filtration centres, as well as at checkpoints, forced nudity affects everyone from PoWs to those trying to flee. It is extremely common in torture cases.

As the [Istanbul Protocol](#) (paragraph 455) explains:

Sexual torture begins with forced nudity, which in many countries is a constant factor in torture situations. An individual is never as vulnerable as when naked and helpless. Nudity enhances the psychological terror of every aspect of torture, as there is always the threat of potential sexual torture or ill-treatment, including rape. Furthermore, verbal sexual threats, verbal abuse and mocking are also part of sexual torture, as they enhance the humiliation and its degrading aspects.

Jurisprudence from the *ad hoc* tribunals confirms that forced nudity **is considered an act of sexual violence**.²⁹

ICTR, [Akayesu Trial Judgment](#), para. 688

[...] The incident described by Witness KK in which the Accused ordered the Interahamwe to undress a student and force her to do gymnastics naked in the public courtyard of the bureau communal, in front of a crowd, constitutes sexual violence.

Before the ICC however, the jurisprudence is undeveloped. While the *Bemba* [Arrest Warrant](#) decision did not dispute the fact that forced nudity constitutes sexual violence, it indicated that the alleged acts of forced nudity were not of *sufficient gravity* to prosecute.

In appropriate contexts, forced nudity may be charged as a number of other war crimes which might accurately reflect the nature of the crime and the harms done. In particular, forced nudity may be charged as:

²⁹ *Prosecutor v. Akayesu*, 2 September 1998, [Trial Judgment](#), para. 688.

- The war crime of causing great suffering, which is a grave breach of the Geneva Convention,³⁰ where the perpetrator caused great physical or mental pain or suffering to, or serious injury to body or health of, one or more persons who were protected under the Geneva Conventions (see **Section IV.C of this Module**).
- The war crime of inhuman treatment, which is a grave breach of the Geneva Conventions,³¹ where the perpetrator inflicted severe physical or mental pain or suffering upon one or more persons who were protected under the Geneva Conventions (see **Section IV.B of this Module**).
- The war crime of torture, which is a grave breach of the Geneva Conventions,³² where the perpetrator inflicted severe physical or mental pain or suffering upon one or more persons who were protected under the Geneva Conventions for such purposes as: obtaining information or a confession, punishment, intimidation, or coercion or for any reason based on discrimination of any kind (see **Section IV.A of this Module**).

ICTY, Krstić Trial Judgment, para. 513

The Trial Chamber finds that serious bodily or mental harm [...] is an intentional act or omission causing serious bodily or mental suffering. The gravity of the suffering must be assessed on a case by case basis and with due regard for the particular circumstances. In line with the *Akayesu* Judgement, the Trial Chamber states that serious harm need not cause permanent and irremediable harm, but it must involve harm that goes beyond temporary unhappiness, embarrassment or humiliation. It must be harm that results in a grave and long-term disadvantage to a person's ability to lead a normal and constructive life. In subscribing to the above case-law, the Chamber holds that inhuman treatment, torture, rape, **sexual abuse** and deportation are among the acts which may cause serious bodily or mental injury.

In jurisdictions which have ratified the Rome Statute or have incorporated crimes against humanity, forced nudity (as well as other acts of sexual violence) may also potentially be classified as an act of persecution (see **Section IV.F of this Module**)

B. Threats of sexual violence as a form sexual violence

As they are directed at a person's sexuality, threats of sexual violence may be considered acts of sexual violence.³³ They **may** therefore **potentially** be charged in

³⁰ First Geneva Convention, Article 50; Second Geneva Convention, Article 50; Third Geneva Convention, Article 130; and Fourth Geneva Convention, Article 147.

³¹ First Geneva Convention, Article 50; Second Geneva Convention, Article 50; Third Geneva Convention, Article 130; and Fourth Geneva Convention, Article 147.

³² First Geneva Convention, Article 50; Second Geneva Convention, Article 50; Third Geneva Convention, Article 130; and Fourth Geneva Convention, Article 147.

³³ See e.g., The Hague Principles, pp. 38-39, 71; Kvočka et al Trial Judgement, paras 98; Brđanin Trial Judgement, paras 516-517.

Ukraine as other acts of sexual violence; however, they are not likely to pass the ICC's gravity test.

Interpreting what may amount to threatening sexual violence is made more complex by the fact that there is no stand-alone offence of threatening (as such) under the CCU. Other than the specific offence of threat to kill (Article 129), threats are only constituent elements of other offences, such as:

- Article 195 (Threats to destroy property): **where reasonable grounds existed to believe that the threats may be fulfilled.**
- Article 303 (Pimping or engaging in prostitution): engaging a person in prostitution or compulsion to engage in prostitution, **involving deceit, blackmail or vulnerable state of a person, with imposition of violence or threat of violence, or pimping).**
- Article 386 (Preclusion of appearance of a witness): threats of murder, violence, destruction of property of these persons or their close relatives, or disclosure of defamatory information about them, or tampering with a witness, victim or expert for the same purposes, and also any threats to commit any such actions as a revenge for any previously presented testimony or opinion.

These norms may nevertheless help in defining the elements of the criminal threat in relation to a charge of sexual violence under Article 438.

Provided the investigation has been comprehensive and the conduct in question has been fully contextualised, a range of conduct may be incorporated under this charging option. For example, threats of any kind, including threats of sexual violence against the direct victim, or threats of sexual or other forms of violence made against their family members which occur during interrogations.

In addition, as noted in **Section I.D of Module 2** and **Section II.B of Module 4**, evidence of threats, including threats of sexual violence, whether those threats are implicit or explicit may amount to coercion, negating an individual's ability to freely and voluntarily consent to sexual contact.

C. Forced witnessing of sexual violence

Forcing others to witness acts of sexual violence against another person can be considered as an act of sexual violence against those witnesses.³⁴ For example, forcing someone to watch the rape of a family member is not only an act of sexual violence against the person who was raped, but an act of sexual violence against the person forced to watch.

³⁴ See e.g., Furundžija Trial Judgement, paras 267, 87, 127, 268 and p. 112 (Anto Furundžija convicted of the war crime of torture for acts including: "forc[ing] [a victim] to watch [another soldier's] sexual attacks on [another victim]").

Forcing someone to watch or witness nudity (especially naked sexual body parts) or watch acts of sexual violence will often be perpetrated in situations of detention.³⁵ Victims can include all genders and ages, civilians as well as military (*hors de combat*). Forcing someone to watch acts of sexual violence has been found to constitute torture (see **Section IV.A of this Module**), the war crime of outrages upon personal dignity (see **Section IV.B of this Module**),³⁶ and may constitute cruel and inhuman treatment.

III. Other Specific CRSV War Crimes

In addition to rape and sexual violence, there are four other acts of CRSV which are criminalised as international crimes, namely sexual slavery, enforced prostitution, forced pregnancy and enforced sterilisation. These crimes have been recognised in CIL and codified within the Rome Statute. The following sections examine the elements of these crimes as contained in the ICC Elements of Crimes as the most widely accepted codification of their elements.

A. Sexual Slavery

Under the Rome Statute, this is a specific form of the crime of enslavement which penalises “the perpetrator’s restriction or control of the victim’s sexual autonomy while held in the state of enslavement”. The elements are:³⁷

- the perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty;
- the perpetrator caused such person or persons to engage in one or more acts of a sexual nature.

ICC, Ongwen Trial Judgment, para. 2715

The crime of sexual slavery is a specific form of the crime of ‘enslavement’, penalising the perpetrator’s restriction or control of the victim’s sexual autonomy while held in a state of enslavement. The crime of sexual slavery, whether a crime against humanity or war crime, is committed when the material element of enslavement is fulfilled, and the perpetrator also caused such person or person to engage in one or more acts of a sexual nature.

³⁵ Report on Preliminary Examination Activities, Office of the Prosecutor, International Criminal Court, 2016, para 94.

³⁶ See, for example: Sesay et al Trial Judgement, paras 1194, 1299, 1347, 1352 and pp. 677-678, 680-682, 684-685 (each accused convicted of the war crimes of terrorism and outrages upon personal dignity for acts including: “ordering [the victim] to watch and to count the men raping his wife [while] [h]is children [...] were also watching”).

³⁷ See ICC Elements of Crimes, 8(2)(b)(xxii)-2.

B. Enforced Prostitution

Under the Rome Statute, the elements of the war crime of enforced prostitution are:³⁸

- The perpetrator caused one or more persons to engage in an act of a sexual nature, and did so by:
 - force;
 - threat of force or coercion;
 - taking advantage of a coercive environment, or such person(s)'s incapacity to give genuine consent;
- The perpetrator or another obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.

Use of physical force is not an element of this offence (cross reference to **Section II.A of Module 4**). The victim could instead be forced into prostitution by threats, intimidation, extortion and other forms of duress which prey on fear or desperation and may constitute coercion.³⁹ The crime of enforced prostitution might also cover situations in which a person is compelled to perform sexual acts in order to obtain something necessary for survival or to avoid further harm. The elements of this crime do not require the perpetrator to have engaged in the sexual act, it is sufficient that they caused the victim to engage in a sexual act either on themselves or with another.

In situations where the evidence does not on its face satisfy the contextual elements of a war crime (see **Section II.A of Module 3**), these cases should still be documented and investigated, as they may involve criminal networks linked to the occupation forces and engaged in human trafficking and other forms of exploitation. An alternative charge may be "trafficking in human beings" contrary to Article 149 of the Criminal Code or engaging a person in prostitution under Article 303.

Forced prostitution can be one of the indicia of ownership that would indicate sexual slavery (see above). It is recognised that in situations of armed conflict "most factual scenarios that could be described as forced prostitution would also amount to sexual slavery".⁴⁰ In making a charging decision, using a context-based approach one should consider which crime most adequately reflects the full scope of the harm done to the victim: i.e., for forced prostitution the focus is on the advantage gained by the perpetrators, and for sexual slavery the focus is on the powers attaching to ownership.

One example where a situation of enforced prostitution which may not amount to sexual slavery may be where women are forced to submit to sexual acts in exchange for safety or other means of survival. In such instances, the woman may be free to go home or to escape but the context of armed conflict nonetheless means that she is

³⁸ See ICC Elements of Crimes, 8(2)(b)(xxii)-3.

³⁹ Ongwen Trial Judgement, para. 2710; Ntaganda Trial Judgement, paras 934-935; Katanga Trial Judgement, para. 965; Bemba Trial Judgement, paras 105-106.

⁴⁰ ECOSOC, Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery And Slavery-Like Practices During Armed Conflict, para. 33.

coerced into prostitution. In such a situation, a thorough context-based analysis would be needed on the facts to determine the appropriate charge.

C. Forced Pregnancy

Under the Rome Statute, the crime of forced pregnancy is narrowly defined and requires physical and mental elements that go **beyond** the act of forcible impregnation. The elements of this offence are:

- That the perpetrator confined one or more woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.

This crime therefore requires two material elements – **confinement** and **forcible impregnation**.

- “Confinement” should not be narrowly interpreted. It does not mean under lock and key, but instead it can include restrictions which in practice mean a person cannot leave.

ICC, Ongwen Trial Judgment, para. 2723

The crime of forced pregnancy, whether as a crime against humanity or a war crime, is committed when the perpetrator 'confined one or more women forcibly made pregnant'. The forcible conception of the woman could occur prior to or during the unlawful confinement. The perpetrator need not have personally made the victim forcibly pregnant – confining a woman made forcibly pregnant by another is necessary and sufficient for the crime of forced pregnancy.

The crime of forced pregnancy also requires that the perpetrator should have committed the crime with the **specific intent** of either affecting the ethnic composition of any population **or** carrying out other grave violations of international law. Accordingly, the perpetrator must have the intention to confine the victim (see **Section III of Module 3**) and must do so with one of the two specific intents.

Forced pregnancy can be one of the indicia of ownership that would indicate sexual slavery.

In situations where the evidence does not satisfy the contextual elements of the war crime of forced pregnancy, an alternative charge may be “trafficking in human beings” contrary to Article 149 of the Criminal Code, which contains a note that exploitation of a human being includes forced pregnancy.

D. Enforced Sterilisation

Under the Rome Statute, the elements of the war crime of enforced sterilisation are:

- The perpetrator deprived one or more persons of biological capacity, and

- The conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent.

As opposed to other war crimes of sexual violence at the ICC, lack of genuine consent **is** an element of enforced sterilisation. Charging options for forced sterilisation include genocide (where it was committed with an intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such), however it may also be charged as the war crimes of mutilation, torture, or cruel and human treatment (see **Sections IV.E, IV.A, and IV.B of this Module**).

IV. Other International Crimes Relevant to Sexual Violence

Trainees should be aware of the different charging strategies available for acts of CRSV. In some instances, a charge under the specific CRSV provisions (discussed above) might most appropriately reflect the sexual nature of the harm done. On the other hand, charging CRSV as another might more accurately reflect the different forms of CRSV and purposes behind them, as well as ensuring they are considered in context and connected to the broader pattern of violations.

Evidence of CRSV may also be relevant to proving the elements of a range of other international crimes, including (in certain contexts):

- War crime of torture;
- War crime of inhuman treatment;
- War crime of wilfully causing great suffering;
- War crime of mutilation;
- War crime of deportation and forcible transfer;
- War crime of outrages on personal dignity;
- Crime against humanity of enslavement;
- Crime against humanity of persecution;
- Crime against humanity of other inhumane acts; and
- Genocide by causing serious bodily or mental harm.

The legal framework underpinning these crimes is set out at the [Legal Framework of Other International Crimes](#) Handout.

This section will discuss **some** of these specific charging options, including as potential charging alternatives to specific sexual violence crimes.

A. War Crime of Torture

Torture amounts to a war crime which can be prosecuted under Article 438 CCU. Article 438 of the Criminal Code of Ukraine ('CCU') explicitly refers to "cruel treatment of prisoners of war or civilians", which the war crime of torture would fall under. It is a grave breach of the Geneva Conventions (see e.g., Article 130 of the Third Geneva Convention and Article 147 of the Fourth Geneva Convention) and is criminalised under customary international law, as well as by Article 8(2)(a)(ii)-1 of the [Rome Statute](#). Torture is also prohibited by the [United Nations Convention Against Torture](#)

and other Cruel, Inhuman and Degrading Treatment or Punishment (CAT), to which Ukraine is a party. Torture is also prohibited as an ordinary crime by Article 127 CCU.

The ICC elements of torture as a war crime differ from the definition found in the CAT. In particular, Article 1 of the CAT requires, among other things, that a public official or person acting in an official capacity must have instigated, consented or acquiesced to the act. Under CIL, ICL, and the Rome Statute, the war crime of torture does not require this element. This is also in line with the elements of Article 127 CCU.

Accordingly, the elements outlined below are those found under CIL/ICL/Rome Statute, which may ultimately be easier to establish than by applying the definitions in the CAT.

The elements of the war crime of torture are:

- The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons;
- The perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind; and
- Such person or persons were protected under one or more of the Geneva Conventions of 1949 and the perpetrator was aware of the protected status.

Former ICTY practitioners have made a number of observations regarding the prosecution of sexual violence as torture:

- sexual violence, committed in an inherently coercive environment, such as a prison, will almost invariably involve the prohibited purposes: intimidation, coercion, punishment, discrimination, or obtaining information;
- CRSV is often inherently discriminatory on the basis of gender. Evidence of a discriminatory purpose may, in context, support the classification of sexual violence as the crime of torture;
- any sexual motives behind the act do not displace the prohibited purpose – i.e., intimidation, coercion, punishment, discrimination, or obtaining information;⁴¹ and
- a single act of sexual violence may be used strategically for one of the prohibited purposes.⁴²

ICC, Ongwen Trial Judgment, para. 2701

The severity implies an important degree of pain and suffering and may be met by a single act or by a combination of acts when viewed as a whole. This can be assessed only on a case-by-case basis in the light of all the circumstances of the case. It is not necessary to prove that the pain or suffering involved specific physical injury (such as organ failure), impairment of a bodily function or death. The pain and

⁴¹ See e.g., Delalić Trial Judgment, pp. 191-192.

⁴² Brammertz and Jarvis, op. 187-188

suffering may be either physical or mental. The consequences of torture do not have to be visible, nor must the injury be permanent.

ICTY, Delalić et al. Trial Judgment, para. 471.

A fundamental distinction regarding the purpose for which torture is inflicted is between a 'prohibited' purpose and one which is purely private. The rationale behind this distinction is that the prohibition on torture is not concerned with private conduct, which is ordinarily sanctioned under national law. In particular, rape and other sexual assaults have often been labelled as 'private', thus precluding them from being punished under national or international law. However, such conduct could meet the purposive requirements of torture as, during armed conflicts, the purposive elements of intimidation, coercion, punishment or discrimination can often be integral components of behaviour, thus bringing the relevant conduct within the definition.

While the physical or mental pain or suffering must be severe, there is no bright line test that sets a threshold level of pain or suffering required for an act to amount to torture.⁴³ The determination is context-based.

A study on male victims of CRSV and torture in Syrian detention centers highlights for instance that survivors experience both acute and long-term physical and psychological impacts, facing a wide range of immediate symptoms such as acute pain, bleeding, infections, sleep disturbances, fear, sadness and anxiety during detention.⁴⁴ Over time, while some acute symptoms fade, it is reported that issues including scars, chronic pain, intrusive memories, avoidance, lack of trust, self-isolation, anger, low self-esteem, and sexual dysfunction persist, significantly affecting the survivors' long-term well-being and social relationships.⁴⁵

The following is a non-exhaustive, illustrative list of examples of the breadth of the sexually violent acts which the ICTY Trial Chambers have, in context, found to amount to torture:

- kicking the victim in their genitals;⁴⁶
- subjecting the victim to sexual intimidation or violence, including threatening to cut off a female's breast;⁴⁷
- sexually abusing detainees;⁴⁸
- forcing a victim to watch a soldier's sexual attacks on another victim;⁴⁹

⁴³ Naletelić Appeal Judgement, para. 299.

⁴⁴ Kivlahan, C. et al, Long-term physical and psychological symptoms in Syrian men subjected to detention, conflict-related sexual violence and torture: cohort study of self-reported symptom evolution, January 2024, *eClinicalMedicine* Vol 67, p. 7.

⁴⁵ *Ibid*, p. 8.

⁴⁶ Kvočka et al. Trial Judgment, paras 98, 108, 229, 234, 319-321, 408, 415, 419-420, 470, 504.

⁴⁷ *Prosecutor v. Martić*, IT-95-11-T, Trial Judgment, 12 June 2007 ('*Martić Trial Judgment*'), paras 288, 454-455, 477, 480, 518.

⁴⁸ *Furundžija* Trial Judgment, paras 267, 87, 127, 268.

⁴⁹ *Furundžija* Trial Judgment, paras 267-268.

- forcing the victim to undress;⁵⁰
- threatening sexual violence;⁵¹ and
- forcing a victim to prove they are menstruating.⁵²

Note for trainers

Discuss with the trainees examples from their work which might constitute CRSV and whether they would suggest the charging as the crime of torture.

B. War Crime of Inhuman Treatment

Inhuman treatment is a war crime which can be prosecuted under Article 438 CCU. Article 438(1) of the Criminal Code of Ukraine ('CCU') explicitly refers to "cruel treatment of prisoners of war or civilians", which the war crime of inhuman treatment would fall under. It is a grave breach of the Geneva Conventions (see e.g., Article 130 of the third Geneva Convention and Article 147 of the Fourth Geneva Convention) and is criminalised under customary international law (CIL), as well as by Article 8(2)(a)(ii)-2 of the Rome Statute.

The Rome Statute elements of the war crime of inhuman treatment are:

- The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons; and
- Such person or persons were protected under one or more of the Geneva Conventions of 1949.

Inhuman treatment has been defined as an act or omission which causes serious mental or physical suffering or injury, or which constitutes a serious attack on human dignity.⁵³ The inhuman treatment does not need to be imposed for a prohibited purpose (e.g., to obtain information or a confession or to punish the victim), nor does it require the involvement of a public official or person acting in an official capacity.⁵⁴ A legal finding of either torture or inhuman treatment reflects a comprehensive analysis of the situation and depends on the individual circumstances of each case and the characteristics of the victim.

⁵⁰ *Brđanin Trial Judgment*, paras 1013, 524, 538, 998, 1050, 1061.

⁵¹ *Kvočka et al. Trial Judgment*, paras 560-561.

⁵² *Kvočka et al. Trial Judgment*, paras 105, 415, 419-420, 470, 504, 578-579, 691, 752-753.

⁵³ See e.g., *Prosecutor v. Delalić et al. Trial Judgment*, paras 442 and 543; *Prosecutor v. Kordić and Čerkez, Appeals Judgment*, para. 39; *Prosecutor v. Naletilić & Martinović, Trial Judgment*, para. 342; *Prosecutor v. Krstić, Trial Judgment*, para. 513.

⁵⁴ See e.g., ICC Elements of Crimes, Article 8(2)(a)(ii)-2. Compare to the second element of the war crime of torture: ICC Elements of Crimes, Article 8(2)(a)(ii)-1, Element Two.

C. War Crime of Wilfully Causing Great Suffering

Wilfully causing great suffering is a war crime which can be prosecuted under Article 438 CCU. Article 438(1) of the Criminal Code of Ukraine ('CCU') explicitly refers to "cruel treatment of prisoners of war or civilians", which the war crime of wilfully causing great suffering could fall under. It is a grave breach of the Geneva Conventions (see e.g., Article 130 of the Third Geneva Convention and Article 147 of the Fourth Geneva Convention), and is criminalised under customary international law (CIL), as well as by Article 8(2)(a)(iii) of the Rome Statute.

The Rome Statute elements of the war crime of wilfully causing great suffering are:

- The perpetrator caused great physical or mental pain or suffering to, or serious injury to body or health of, one or more persons; and
- Such person or persons were protected under one or more of the Geneva Conventions of 1949.

ICTY, Kordić & Čerkez Trial Judgment, para. 244

[...] the Chamber agrees with the findings of the Trial Chamber in Čelebići, which held, inter alia, that the scope of this crime encompasses mental, in addition to physical suffering. Moreover, the Čelebići Trial Chamber held that the terms "great" and "serious", which qualify the terms "suffering" and "injury", respectively, merely require a finding that a particular act of mistreatment, in order to fall within the ambit of this crime, must occasion suffering or injury of the requisite level of seriousness

D. War Crime of Outrages upon Personal Dignity

Outrages on person dignity is a war crime which can be prosecuted under Article 438 CCU. Article 75(2)(b) of Additional Protocol 1 prohibits "outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault", and such outrages are determined by the overriding principle of humane treatment as articulated in Article 27 of the Fourth Geneva Convention.⁵⁵ It is criminalised under customary international law (CIL), as well as by Article 8(2)(b)(xxi) of the Rome Statute.

The Rome Statute elements of the war crime of outrages upon personal dignity are:

- The perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons; and

⁵⁵ Additional Protocol I, Article 75(2)(b); Fourth Geneva Convention, Article 27. See also, ICRC, Customary IHL Database, Rule 90. Torture and Cruel, Inhuman or Degrading Treatment; J. Pictet (ed), The Geneva Conventions of 12 August 1949: Commentary: IV Geneva Convention (ICRC 1958), p. 201.

- The severity of the humiliation, degradation or other violation was of such a degree to be generally recognised as an outrage on personal dignity.

Outrages upon personal dignity “are constituted by any act or omission which would be *generally* considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity.”⁵⁶ The following acts are examples of acts constituting outrages on personal dignity:

- Forced incest;⁵⁷
- Forcing a woman to walk in public wearing only her blouse and underwear, and then cutting off her underwear with a knife;⁵⁸
- Removing a foetus from the womb;⁵⁹
- Imposing conditions of constant fear of being subjected to physical, mental, or sexual violence on detainees;⁶⁰ and
- Forcing detainees to relieve bodily functions in their clothing.⁶¹

E. Mutilation

Genital mutilation is a form of sexual violence directed against **all genders**, which specifically targets their sexual organs or sexual function. Genital mutilation is criminalised in Ukraine under Article 121 CCU ('intended grievous bodily injury'), which refers to wilful bodily injury dangerous to life at the time of infliction or resulting in any loss of an organ or its function.

There are numerous charging options for crimes of genital mutilation:

1. Genital mutilation as the war crime of mutilation

Mutilation is a serious violation of the Geneva Conventions (e.g., Article 13 of Geneva Convention III and Article 32 of Geneva Convention IV) and also prohibited by Articles 11 and 75(2)(a)(iv) of Additional Protocol I. Such conduct would also amount to the grave breaches of torture and inhuman treatment, and wilfully causing great suffering (see e.g., Article 130 of the Third Geneva Convention and Article 147 of the Fourth Geneva Convention). Genital mutilation may therefore be considered a violation of Article 438 CCU and can be charged as such.

The physical mutilation of persons who are in the power of an adverse party, which causes death or seriously endangers the health of such persons during an international

⁵⁶ Kunarac *Appeal Judgment*, paras. 161-163.

⁵⁷ ICTR, *Bagosora Decision on Motions for Judgement of Acquittal*, para. 40.

⁵⁸ ICC, *Katanga and Ngudjolo Chui Decision on the Confirmation of Charges*, paras 375, 377

⁵⁹ ICTR, *Bagosora Decision on Motions for Judgement of Acquittal*, para. 40.

⁶⁰ ICTY, *Kvočka et al. Trial Judgement*, para. 173

⁶¹ ICTY, *Kvočka et al. Trial Judgement*, para. 173.

armed conflict is also recognised as a war crime contrary to Article 8(2)(b)(x) of the Rome Statute.

The Rome Statute elements of the war crime of mutilation are:

- The perpetrator subjected one or more persons to mutilation, in particular by permanently disfiguring the person or persons, or by permanently disabling or removing an organ or appendage.
- The conduct caused death or seriously endangered the physical or mental health of such person or persons.
- The conduct was neither justified by the medical, dental or hospital treatment of the person or persons concerned nor carried out with in such person's or persons' interest.
- Such person or persons were in the power of an adverse party.

Genital mutilation can also be captured by the ordinary crime of mutilation under Article 121 of the CCU ('intended grievous bodily injury'), which refers to wilful bodily injury dangerous to life at time of infliction or resulted in any loss of organ or its function. This domestic norm can also be used to interpret the elements of this crime.

2. Genital mutilation as the war crime of torture

Genital mutilation is commonly regarded as a crime of torture, which is a grave breach of the Geneva Conventions, and which can be charged under Article 438 of the CCU. See further **Section IV.A** above for the definition of the war crime of torture.

3. Genital mutilation as the war crime of sexual violence

Incidents of genital mutilation may be charged under Article 438 of the CCU as the war crime of 'any other form of sexual violence,' contrary to Article 27 of the Fourth Geneva Convention and Article 75 of Additional Protocol 1. See further **Section II.** above for the definition of the war crime of sexual violence.

International courts have repeatedly found that mutilating or otherwise causing injury to a sexual body part is an act of sexual violence.⁶²

ICTY, Kvočka Trial Judgment, para. 180

⁶² *Prosecutor v. Kvočka et al*, Judgement, para 180 and fn 343; *Prosecutor v. Sesay et al.*, Trial Judgement, paras 1208, 1307- 1309, 1347, 1352, 2063 and pp 677-678, 680-682, 684-685 (each accused convicted of the war crimes of terrorism and outrages on personal dignity for acts including: "slitting the [genitalia] of several male and female civilians with a knife"); *Prosecutor v Kajelijeli*, Trial Judgment, paras. 936, 678, 683, 934-40, 942 (finding that the Interahamwe committed rapes and sexual assaults, constituting inhumane acts, including "[c]utting a women's breast off and licking it, and piercing a woman's sexual organs with a spear"); *Prosecutor v. Krajišnik*, Appeal Judgement, paras 372, 800, 803-806, 1126 (Momcilo Krajišnik was convicted of the crime against humanity of persecution for acts including: "sexually mutilat[ing] [male detainees]").

[S]exual violence is broader than rape and includes such crimes as sexual slavery or molestation.

Fn. 383: Sexual violence would also include such crimes as sexual mutilation, forced marriage, and forced abortion as well as the gender-related crimes explicitly listed in the ICC Statute as war crimes and crimes against humanity, namely "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization" and other similar forms of violence

4. Genital mutilation as the war crime of inhuman treatment

Genital mutilation may also be charged under Article 438 as the war crime of inhuman treatment, a grave breach of the Geneva Conventions. See further **Section IV.B** above for the definition of the war crime of inhuman treatment.

5. Genital mutilation as the war crime of enforced sterilisation

Genital mutilation for both women and men often results in the permanent loss of reproductive capacity. Accordingly, in appropriate cases, prosecutors may wish to consider separately charging genital mutilation under Article 438 CCU as enforced sterilisation. See further **Section III.D** above for the definition of the war crime of enforced sterilisation.

6. Genital mutilation as an act of genocide

Finally, in appropriate cases, genital mutilation may be classified as an act of genocide under Article 442 CCU, which covers genocide by "inflicting grievous bodily injuries on them" or by the "decrease or prevention of childbearing" of the targeted group. This requires evidence showing that the acts under investigation are committed with the perpetrator's specific intent to destroy, in whole or in part, any national, ethnic, racial, or religious group, as such.

F. Crimes against Humanity of Persecution

CRSV can also be charged as the crime against humanity of persecution where it is committed against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognised as impermissible under international law.

Persecution as a crime against humanity is not currently prohibited under Ukrainian law. However, this crime may be relevant in cases before the ICC, regional courts, or other national jurisdictions which have incorporated the Rome Statute into their domestic provisions.

Persecution as a crime against humanity is criminalised under Article 7(1)(h) of the Rome Statute and its elements are:

1. The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights.
2. The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.
3. Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law.
4. The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court.

To qualify as persecution, the **totality** of fundamental rights violations— considered together in light of their cumulative effect — must rise to the level of the other enumerated crimes against humanity. This means that persecution may encompass a range of different forms of sexual violence other than rape including, for example, sexual touching, genital mutilation, genital beatings, threats, forced nudity, and other degrading sexual acts.

Module 6

Do No Harm

Learning Objectives:

- Develop a deeper understanding of the human rights of victims of CRSV and other serious violations.
- Develop and implement policies and procedures for dealing with these victims, in line with the standards embraced by the principle of Do No Harm, in particular, Informed Consent.

Module Time:

- 90 to 120 minutes

For this module, trainers can refer to:

- [Presentation of Online Training Session 14 on 'The principle of Do No Harm'](#)
- [Recording of Online Training Session 14 on 'The principle of Do No Harm'](#)
- The [Murad Code \(all Principles\)](#)
- [Second Edition of the International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, Part IV, Chapters 7 and 8.](#)
- Institute for International Criminal Investigations (IICI), [Tool for SGBV-investigation/documentation trainers: training materials accompanying the International Protocol on the Documentation and Investigation of Sexual Violence in Conflict \(March 2017 edition\).](#)
- [Documenting international crimes and human rights violations for accountability purposes: Guidelines for civil society organisations, Annex 3.](#)
- [Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment \(UN Human Rights Office of the High Commissioner, 2022\), pp. 36, 41, 85, 144.](#)
- [Threat and Risk Assessments Template](#)
- [Gender-based Violence Disclosure Toolkit \(Center for Human Rights, Gender and Migration, 2022\)](#)

- [Briefing Note: An Overview of Avenues for Redress for Victims of Conflict-Related Sexual Violence in Ukraine](#) (European Human Rights Advocacy, 19 April 2023)
- [Working With Victims of Sexual Violence During Armed Conflict: A manual for Ukrainian mental health and emergency response professionals](#) (Council of Europe Project “Combatting Violence against Women in Ukraine”, 2021-2022)

Background

Based on considerations of safety and dignity of survivors, 'Do No Harm' is an ethical principle requiring those who engage with victims of sexual violence and other serious crimes to be aware of the possible negative impacts their intervention investigation/documentation of serious crimes can have on those victims, witnesses, the wider community and their own colleagues and co-workers. It requires investigators and documenters to be aware of the harm those impacts might cause, and to put in place measures that prevent or minimise that harm impact.⁶³

At its core, Do No Harm is built on respect for the autonomy of victims and their rights and abilities to make the best possible decisions for themselves in respect of all aspects of their engagement with criminal justice actors from any sector. This means that implementing Do No Harm does not necessarily mean one should not document a victim's account of a crime they suffered; it means that the question of whether and how you document or not is the victim's personal decision.⁶⁴ In order to take such decisions, victims should be fully informed and understand all aspects of what their participation might involve.

Sharing information, informed consent and mitigation are therefore central to the effective implementation of the principle of Do No Harm.



This infographic is reproduced from IICI's Module 7 Presentation, part of their Tool for SGBV-investigation/documentation trainers: training materials accompanying the International Protocol on the Documentation and Investigation of Sexual Violence in Conflict (March 2017 edition).

I. Informed Consent

Informed consent refers to consent that is explicit, voluntarily given, and based on a clear appreciation and understanding of the facts and consequences of a specific

⁶³ PSVI Protocol, p. 85.

⁶⁴ Module 7, Presentation, Tool for SGBV-investigation/documentation trainers: training materials accompanying the International Protocol on the Documentation and Investigation of Sexual Violence in Conflict (March 2017 edition). See also, Murad Code, in particular: Principle 2; Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime (Victim's Rights Directive).

action.⁶⁵ Informed consent has five elements. It should be: informed; explicit; voluntary; specific, and continuous. These elements are explained below.

A. Informed

This element requires that victims of CRSV who wish to report the crime are provided with full, clear and honest information about the following (among others):

- 1) **their legal rights and obligations** (including, where applicable, their right to file a claim for compensation, as set out in the CPCU);
- 2) **how** reporting a crime will involve sharing private and sensitive information;
- 3) **why** sharing this information will be necessary;
- 4) **how** their private and sensitive information will be used, stored and kept confidential and any **limitations** to that confidentiality;
- 5) **risks** that the use, sharing or public disclosure of that information might present to their safety and security;
- 6) **when and why** sharing this information might be necessary and **who** this information may be shared with;
- 7) **what protection options are potentially available** to mitigate against harm in the event of disclosure;
- 8) **what** support services are available to them;
- 9) **their right** to choose **insofar as possible** not to participate in any or all parts of the criminal proceedings; to choose not to answer questions, provide information, stop, withdraw consent, or add conditions or terms to their consent.⁶⁶

The principles underlying these recommendations are found in the [Murad Code](#).

While the information above may be given orally or in writing (preferably both), it **must** be delivered in a manner that is simple and easy for the victim to understand, taking into account their personal characteristics, vulnerabilities, and any factors which might affect their ability to understand or be understood.⁶⁷ Informed consent is a process.⁶⁸ This means that while a written pro-forma may be useful for documenters to ensure consistency in the information shared, without active dialogue between the documenter and their interlocutor where all their questions are answered, it is rarely sufficient.

⁶⁵ [Canadian Framework for Collaborative Police Response on Sexual Violence](#), 2019, p.18.

⁶⁶ [PSVI Protocol](#), p. 91; [Effectively Investigating, Prosecuting and Adjudicating Sexual Violence Cases: A Manual for Practitioners in Georgia](#), p.33.

⁶⁷ [Ibid](#), [PSVI Protocol](#), pp. 90-91.

⁶⁸ [Ibid](#), p. 91.

Informing CRSV survivors in Ukraine of avenues for redress

Survivors of CRSV have the right to individual petition concerning the responsibility of the State for rights violations before the European Court of Human Rights and certain UN bodies, namely the UN Committee on the Elimination of Discrimination Against Women (CEDAW), the UN Human Rights Committee (CCPR), the UN Committee Against Torture (CAT) and the UN Committee on the Elimination of Racial Discrimination (CERD).⁶⁹

In the case of criminal proceedings, there is no right to individual petition as these proceedings concern the criminal responsibility of individual perpetrators rather than states for committing CRSV. Such criminal proceedings can be pursued at the International Criminal Court, domestically by the Office of Ukraine's Prosecutor General, and domestically under the principle of universal jurisdiction by other states.⁷⁰

Please refer to the full [EHRAC briefing note](#) for more information on the particularities of each avenue for redress and practical aspects to consider when advising clients.

B. Voluntary

Informed Consent must not be coerced. Documenters will not compel victims to share private or sensitive information. They will not, either directly or implicitly, offer access to any benefit, such as aid or protection, to the victim in exchange for information.⁷¹ For trainees who act as victim representatives, this means that they should ensure that victims understand that they have a choice as to whether to engage; that this choice can be exercised or withdrawn anytime, and that their choice will be respected. It should be made clear to interviewees, however, that **there is no unconditional right under the CPC for a victim to opt out of certain aspects of criminal proceedings.**

This element requires documenters to always be mindful of the unequal power dynamics between them and those they may seek to interview. Make clear that any support you might be referring them to does **not** depend on them giving you a statement.

C. Explicit

Explicit informed consent is fully and clearly expressed. It should leave nothing implied.⁷² Ideally, informed consent will be recorded (e.g., in a written document) by the documenter taking the statement.

⁶⁹ European Human Rights Advocacy Centre (EHRAC), [Briefing Note: An Overview of Avenues for Redress for Victims of Conflict-Related Sexual Violence in Ukraine](#), 19 April 2023.

⁷⁰ *Ibid*, p 10.

⁷¹ *Ibid*, pp. 90-91.

⁷² [PSVI Protocol](#).

D. Specific

Informed consent must be obtained for each specific activity, process or sharing of information. This might include:

- 1) Recording any personal information (including at the time the crime is initially reported);
- 2) Conducting interviews (remotely or in person);
- 3) Taking handwritten notes of an interview;
- 4) Recording an interview in a formal, written protocol;
- 5) Video and/or audio-recording the interview;
- 6) Taking photographs (including of members of one's family, their home and property or belongings);
- 7) Conducting any physical, medical and forensic examinations; or
- 8) The transfer of information to third parties, including international investigators or organisations, among others.⁷³

E. Continuous

The obligation to secure a victim's informed consent continues through all phases of their participation in criminal justice proceedings or other activities. In terms of best practice, this would mean that every time documenters make contact with a victim, you should update them on the progress of their file and reaffirm that they have not changed their mind about continuing to engage with you.⁷⁴

⁷³ *ibid.*, pp.90-91.

⁷⁴ *ibid.*, pp. 90-91.



F. Factors which negate informed consent

One of the biggest risks to informed consent is that the individual did not fully understand the information shared.⁷⁵ This reinforces the need for documenters to deliver this information in the simplest, most practical terms possible.

II. Mitigating Harm

Mitigation always begins with a threat and risk assessment, which should be undertaken before any investigative activity. Based on the threat and risk assessments, documenters can assess the necessary mitigation measures. While mitigation measures will as much as possible and practical be individualised to the interviewee, they will generally fall under one of the categories below.

A. Threat and risk assessment

Do No Harm is activated before any interview or other activity actually takes place. A risk assessment is the first, and most critically important step documenters can take in mitigating and responding to harm.

There are three components to a risk assessment. These are illustrated and explained in more detail in the [Threat and Risk Assessments](#) template and discussed in more detail in the [PSVI Protocol](#) at pp. 92-93.

⁷⁵ [PSVI Protocol](#), p. 90.

B. Coordination

Over-documentation, or repeated, unnecessary interviewing can impact negatively on the interviewees and their families, as well as on justice and accountability efforts. The PSVI Protocol provides useful examples of some of these different impacts and the measures civil society can take, either as individuals or organisations to improve coordination to mitigate harm.⁷⁶ When trainees approach new situations for investigation or analysis (either individually or as organisations), they are encouraged to consider these and other ways they could work to improve coordination to mitigate harm.

One example might be establishing a central point of contact within the appropriate offices of the OPG and the NPU to update multiple organisations on the process of certain thematic, strategic or other investigations, and provide feedback about their contributions to those investigations.

C. Confidentiality

The following is in addition to the factors discussed under the "informed" element of informed consent.

When discussing confidentiality with a victim/witness:

ask
the victim/witness if they have any specific concerns or suggestions

explain
the conditions and limitations of confidentiality

obtain
their informed consent as to how their information may be used

provide information
about procedures in place in the event of a potential security breach

ask and agree with the victim/witness
how they would like confidentiality to be approached

Confidentiality is addressed in the PSVI Protocol, at pages 95-97.

From the perspective of civil society organisations in Ukraine, addressing confidentiality as a mitigation measure will involve a number of considerations, among them:

⁷⁶ PSVI Protocol, pp. 93-94.

- **you will need to understand how the existing legislative and procedural framework deals with confidentiality for victims (and witnesses) in criminal cases.** This will allow you to identify gaps in law and practice and develop advocacy strategies to respond to those gaps. It will also ensure you can explain those existing systems to your interlocutors. This will require you to be constantly up to date as to any changes in those laws and practices, and assess how it will impact those you engage with; and
- **you will need to develop an internal system to protect information so that you can explain how it works to those you engage with and use it effectively.** This is important for building trust. And with this, in your interviews you will need to proactively identify the specific protection needs of victims and assess the extent to which you can address those needs with the systems you have in place.

It is important to recall that you can only guard the personal and sensitive information of your interlocutors so long as it is in your possession and under your control. It is important that they know this.

Consider, for example, notices of suspicion. Should you, as civil society, inform victims that in the event a notice of suspicion is published in relation to the crimes under investigation, there is a risk that their personal information could be made public?

D. Referrals

As with Coordination above, when trainees or their organisations are called on by individual victims, or to deal with new situations for investigation, best practice would be to find out what referral services or networks might be available to work with them in providing medical, legal, psychosocial, or other support and be prepared to refer their interlocutors. Considerations around how to build the pathways to those services or networks is addressed in the [PSVI Protocol](#) at pp. 98-102.⁷⁷

⁷⁷ See also, [Murad Code](#), in particular Principles 2 and 7.

Module 7

Interviewing Victims and Witnesses

Learning Objectives:

- Using the PEACE methodology, trainees will feel confident in implementing practices and procedures in interviewing which will ensure meaningful access to justice for survivors in an environment that is safe, secure, and adapted to their individual needs.
- Improving capacities of trainees to prepare and conduct comprehensive, content-based interviews of victims of (or witnesses to) CRSV and other international crimes, in line with accepted international standards and practices.

Module Time:

- A minimum of 90 minutes
- Training time for this Module will vary in line with different factors, such as the inclusion of practical exercises aimed at building trainee capacity to implementing some of the practices set out in this Module.

For this module, trainers can refer to:

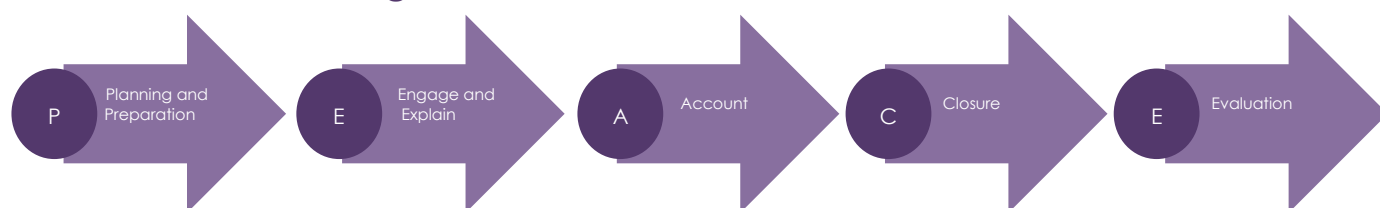
- [Presentation of Online Training Session 14 on 'The principle of Do No Harm'](#)
- [Recording of Online Training Session 14 on 'The principle of Do No Harm'](#)
- The [Murad Code](#), all principles
- [Second Edition of the International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), Part V, Chapters 10, 11 and 12; Annexes 7 and 8
- IICI [Tool for SGBV-investigation/documentation trainers: training materials accompanying the International Protocol on the Documentation and Investigation of Sexual Violence in Conflict \(March 2017 edition\)](#)
- Handout "[Interview Guide](#)"
- [Achieving Best Evidence in Criminal Proceedings](#) (National Police Chiefs' Council, January 2022)
- [Documenting international crimes and human rights violations for accountability purposes: Guidelines for civil society organisations](#), Chapter 5; Annex 3

- [Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment](#) (UN Human Rights Office of the High Commissioner, 2022)
- [Handbook on Civil Society Documentation of Serious Human Rights Violations: Principles & Best Practice](#) (Public International Law & Policy Group (PILPG), 2016)
- [Guidelines for Investigating Conflict-Related Sexual and Gender-Based Violence against Men and Boys](#) (Institute for International Criminal Investigations, 2016)
- [Effectively Investigating, Prosecuting and Adjudicating Sexual Violence Cases: A Manual for Practitioners in Georgia](#) (Equality Now, 2021)
- [Interviewing Survivors of Sexual and Gender-Based Violence](#) (WITNESS, 2013)
- [Gender-based Violence Disclosure Toolkit](#) (Center for Human Rights, Gender and Migration, 2022)
- [Police Response to Violence Against Women Library](#) (International Association of Chiefs of Police)
- [Witness Statements in International Human Rights Litigation: Preparation Guide](#) (European Human Rights Advocacy Centre, September 2023)
- [IICI guidelines on remote interviewing](#) (August 2021)

Background

Trainees should take into account the following international best practice when interviewing victims and witnesses in order to ensure that any statements they collect can be used in relevant criminal cases in Ukraine or other European or international jurisdictions.

I. Use the internationally accepted PEACE model when conducting interviews



As set out in **Module 6** above, it is important for trainees to understand that Do No Harm is activated before any interview. This means that threat and risk assessments will be integral parts of any interview and investigations planning.

Approaches to interviewees should therefore be determined on the basis of a risk assessment and should anticipate any confidentiality concerns. For example, consider that in their individual contexts, an indiscrete or unexpected approach might cause them fear, or make them feel pressure to speak with you. They may, for example, not know how they have been exposed or how you became aware of their name.

A. Planning and Preparation

- **Gather background information** on the allegations, other incidents, violations and/or events in the area, and the interviewee (including any previous statements they have made). Assess the gaps in your evidence and determine what value the evidence of the person you intend interviewing will add to your investigation. Based on this, consider whether you really need to do this interview; if so, why?
- **Based on your collected information, prepare an interview outline** setting out the objectives of the interview and the range of topics to be covered. This outline should NOT be a pro forma checklist.
- **Wherever possible, identify an interview location** that is an accessible, private space where the victim/witness is and will feel safe. Interviewing victims of CRSV in their homes is not encouraged, as this may reveal the identity of the victim. You may in certain circumstances wish to give victims/witnesses the option to choose the time and location of the interview. That may even mean such things as doing an interview over Zoom, or in an exchange of emails. If you agree to interview in person, try to create an environment where your interviewee feels as comfortable

as possible. If the interview is not in their home, make sure the layout of the room and the way you propose to work is not intimidating.

- **Consider who will comprise the interview team.** Be as flexible as possible as to the gender of the interview team. Interviewing in pairs is preferable. If the interview team is comprised of more than one individual, decide who will ask the questions and who will take notes/record the interview.
- **Determine in advance how to propose to record the interview** (i.e., handwritten, typed onto a laptop, or video/audio recorded). Ask your interview whether they agree with your proposal and have a back-up available if they do not.

Be aware that even at this early stage in the interview process, your interviewee may not wish to give a statement at all or may not be prepared to give you a complete, comprehensive statement on the first visit. It may take several meetings to fully document their account. You may need to have a contingency plan in place for these situations.

B. Engage and Explain

During the interview, practitioners should make every possible effort to ensure interviewees feel comfortable and secure. Explain to the interviewee that they have control over the situation, and that they can pause or terminate the interview at any time.

Accordingly, practitioners should:

- 1) **Create a positive atmosphere.** Introduce yourselves and explain who you are and why you are there. It may be appropriate to show some proof of the organisation you are affiliated with. This will help to develop trust and rapport.
- 2) **Explain** the purpose of the interview clearly. Give your interlocutors an overview of the topics to be discussed. Explain that some of them may be difficult, that is okay if they don't know the answers or don't wish to answer. Tell them it will be important for them to tell the truth. Ask them how much time they have, so that you can plan your interview and adjust your schedule accordingly. Respect their choices.
- 3) **Explain** how their information will be used.
- 4) **Ask** them whether they have any safety or security concerns and what those are.
- 5) **Inform** your interviewees about protection measures they can give them – and their limitations. As noted above, interviewees need to understand that you can only control the personal and sensitive information they give you so long as YOU have it. **Tell them** how you will do that. And then make sure you implement those measures. If you cannot do everything they want, say so and explain why not; **make sure** they understand that you will not use or share their information without their free, prior, express informed consent.

- 6) **Then** secure informed consent.
- 7) **Ask** the interviewee if they have given any previous interviews. If so, secure details so that you can try to locate and collect any records of this previous information. You may at this point wish to postpone your interview until you have collected this information.

Do not hurry; be patient; be honest and be realistic. Do not create false expectations about how soon their case might go to court – if at all. Be trustworthy. Do not make promises you cannot keep. And if you do make promises, keep them.

C. Account

Be a good listener.

At the beginning of this phase, a conversational approach might be used rather than a rapid series of questions to obtain preliminary information, rather than an interrogative approach.⁷⁸ This will help put the witness at ease.

When interviewing victims/witnesses, practitioners should use short, simple, open-ended and probing questions. These will allow interviewees to give unrestricted answers. For example, practitioners should use the 'who, what, where, when, and how do you know' questions. If the answer to this last question is not already abundantly obvious from the interview, asking 'how do you know' is particularly important, as it will elicit of the interviewee's basis for knowledge for every fact.

Among other things, this will help to distinguish between direct evidence and hearsay. For example, if a witness makes an assertion about a violation, consider asking: Did you see it? Do you remember what the lighting at that time? Hear it? How far away were you? Or did someone tell it to you? If talking about the Russian soldiers, consider: What makes you think they were from a certain country/region?

Some example questions might be: you want to really open up the account about the violation, some example questions might be: **“What are you able to tell me about your experience?”**; **“Where would you like to begin?”**

The format of the 'TEDS' questions below will **encourage your interlocutor to describe the incident under investigation in their own words.**⁷⁹

TEDS Questions	
Tell	Could you tell me exactly what happened?
Explain	Could you explain to me what happened afterwards?

⁷⁸ [Trauma-Informed Victim Interviewing.](#)

⁷⁹ [The Impact of Trauma on Adult Sexual Assault Victims.](#)

Describe	Could you describe to me what that person looked like?
Show	Could you show me on the map where this happened?

Avoid asking the following types of questions:

- **leading** (e.g., He hit you, didn't he?) These can suggest the answer.
- **forced-choice** (e.g., Were the uniforms green or blue?) Questions which tend to result in only a yes/no answer should be avoided. These limit the response choices of the interviewee and can be considered leading.
- **compound** (e.g., What did they look like and what did they say?).

Inconsistencies in testimony are not something that must be eradicated. They can be indications of reliability and credibility and can arise for many reasons, including:

- The victim's lack of understanding;
- Trauma-induced inability to recollect events; or
- Fear of retaliation, shame, or embarrassment.

When faced with inconsistencies, practitioners should seek to clarify rather than confront by taking them back through their story step-by-step, or by posing questions differently.

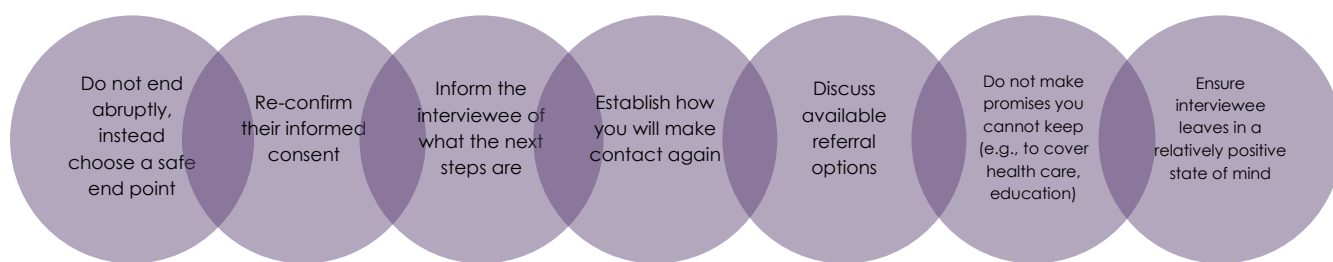
Practitioners should also keep in mind the fact that **CRSV often occurs as part of a series of violations**, so they should ensure that they seek to understand the entire picture surrounding the incident in question.

D. Closure

When concluding an interview, ask your interlocutor whether there is anything they want to add, clarify, or whether they have any questions. Try to leave your interviewee in the same place or better than when the interview began. You should never end the interview abruptly,⁸⁰ but choose a safe ending point. Remind them that they can provide more information to you as they recall it.

In summary:

⁸⁰ Investigative interviewing, College of Policing.



E. Evaluation

Evaluate the information obtained during the interview:

- Consider whether the interview has revealed any **new or changed risks** to the interviewee or another person.
- Assess the information received including its effect on your current investigation and whether it is consistent.
- Based on the interview, pursue possible further lines of inquiry, and amend documentation strategies accordingly.
- Evaluate whether you got all the information you could (be self-critical) and whether further documentation is required.

II. Remote interviewing

Remote interviewing should only be considered when absolutely necessary due to factors such as insurmountable travel restrictions or severe security concerns.⁸¹

Please note that due to risks and challenges, remote interviewing is strongly discouraged particularly for victims/witnesses:

- in unsafe locations
- with privacy concerns
- who have experienced trauma
- with cognitive or other disabilities
- suspect or insider witnesses
- otherwise critically important to the investigation

In such situations, remote interviewing should only take place if absolutely necessary for pressing investigations, follow strict policies and procedures, and involve continuous threat and risk assessments with realistic mitigation measures. They must include high-quality video calls,⁸² be conducted by competent interviewers, and

⁸¹ [IJC guidelines on remote interviewing](#), August 2021.

⁸² Video interviews as opposed to audio or text only interviews are recommended due to health, security and/or evidential risks. Also important to note is that it is nearly if not entirely impossible to conduct trauma-sensitive interviews via an audio or text only interview. Ibid, p 2.

have reliable, vetted on-the-ground support for facilitation and psychological care throughout the process.

Remote interviews with children are strongly discouraged due to the high risks of harm and compromising evidence, and the scarcity of expertise for conducting such interviews ethically and effectively.⁸³

III. Witness statements

Witness statements are crucial in human rights litigation as they provide detailed, personal accounts that help humanize cases and present compelling evidence to courts which more often rely on written submissions rather than oral hearings, making these statements the primary way to present comprehensive evidence.⁸⁴

Domestic proceedings' statements often fall short at the international level due to their limited scope. Therefore, recent and detailed statements are essential to support legal arguments and ensure that claims of human rights violations are substantiated. Without adequate detail, claims may be dismissed, and reparations denied.⁸⁵

Providing a witness statement can strengthen and humanize a case, offering survivors a chance to share their story, but it can also be re-traumatizing. It is crucial to consider the witness's emotional well-being and existing evidence before obtaining new statements, and to use trauma-informed practices if needed.⁸⁶

Points to remember when drafting a witness statement:⁸⁷

- should contain clear specific details
- exclude hearsay if it can be avoided
- should be in the witness's own words as far as possible
- should not include legal submissions or argument
- ensure covering all relevant matters, including evidence to establish 'clear causal connection' between alleged violation and harm suffered by victim
- attach corroborating or supporting evidence

⁸³ To learn more about safely interviewing children, watch [Reparative Justice IV: Challenges of Engaging, Interviewing and Supporting Child victims/survivors/witnesses of War and Terror](#) (Project Sunflowers Webinar, 3 April 2024).

⁸⁴ European Human Rights Advocacy Centre (EHRAC), [Witness Statements in International Human Rights Litigation: Preparation Guide](#), September 2023.

⁸⁵ Ibid, p 3.

⁸⁶ See also, EHRAC, [Guidelines for trauma informed legal practice for lawyers working with adult survivors of human rights violations](#), March 2022.

⁸⁷ Please refer to the full [EHRAC Witness Statements Preparation Guide](#) for more comprehensive guidance and relevant templates.

Module 8

Investigative Planning

Learning Objectives:

- Recognise the strategic advantages of careful and dynamic Investigative Planning
- Understand the basics of developing an Investigations Plan

Module Time:

- A minimum of 90 to 120 minutes

Resources available for a comprehensive training on this module:

- [Presentation of Online Training Session 14 on 'The principle of Do No Harm'](#)
- [Recording of Online Training Session 14 on 'The principle of Do No Harm'](#)
- [Presentation of Online Training Session 15 on 'Digital Evidence Training'](#)
- [Recording of Online Training Session 15 on 'Digital Evidence Training'](#)
- [Second Edition of the International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, Part IV, Chapter 9; Part V, Chapter 13; Part VII, Chapters 16 and 17](#)
- [IICI Tool for SGBV-investigation/documentation trainers: training materials accompanying the International Protocol on the Documentation and Investigation of Sexual Violence in Conflict \(March 2017 edition\)](#)
- [Documenting international crimes and human rights violations for accountability purposes: Guidelines for civil society organisations, Chapter 13; Annex 3](#)
- [Berkley Protocol on Digital Open Source Investigations, Chapter V, paras. 115-126](#)

Background

The investigation or documentation of international crimes usually proceeds in a phased approach and should be informed by a planning process. An investigations plan is a reference point for your investigation.

The realities of the situation in Ukraine may mean that your trainees will have to respond urgently quickly to dynamic situations, and not have time to develop a comprehensive or even a written investigation plan. Accordingly, this Module is developed to offer some basic practical and strategic elements of investigations planning, which your trainees may adapt to office-based work as well as field missions.

A full description of necessary steps in developing an effective Investigative Plan is set out in the [PSVI Protocol](#) (see Chapter Nine, pp. 119-140).

An investigation plan will inform the collection and assessment of evidence and accordingly will require continuous review and re-adjustment during the investigation and as you build your case. Evidence that might not appear immediately relevant may become relevant over time, especially in complex cases.

Among other things, an investigations plan can help ensure:

- CRSV is recognised as a core component of the investigation, and CRSV 'red flags' (indicators of actual or potential CRSV) (See **Section III of Module 2**) are taken into account;
- A comprehensive, context-based, structured investigation;
- Unnecessary risks, particularly to the safety and wellbeing of victims and witnesses are avoided (or measures put in place to mitigate potential harms should those risks materialise);
- Know what to do with the evidence gathered;
- Referral options are identified and referral pathways are, wherever possible, established;
- That wherever possible, your own investigations are coordinated with other investigations or documentation efforts.⁸⁸

Note for trainers:

The trainer should encourage as much discussion as possible and encourage participants to share their experiences of planning obstacles, planning successes and the consequences of not having a proper plan in place.

⁸⁸ List drawn in part from the [PSVI Protocol](#), page 121.

I. Important Aspects of an Investigation Plan

Trainees should be familiar with the critical aspects of an investigation plan and can adapt the level of detail of each component depending on their operational realities.

A. Preliminary research and analysis⁸⁹

An investigation plan is built on the analysis of background information and evidence already available to you (in-house).

Your preliminary research and analysis could cover such things as:

- the specific crimes alleged;
- context;
- individual/groups of alleged perpetrators;
- available and accessible support services;
- the local situation (e.g., in cases when the area under investigation has been recently de-occupied, evidence as to how the occupation was effected and what has its affect and impact on civilian life been will be useful);
- evidence of coordinated operations, and
- command/control structures in the occupied area.

By collating this information and evidence, you can develop a chronological narrative – a comprehensive, contextual overview of events in the area under investigation. Based on this evidence, you will eventually be able to develop a hypothesis or case theory.

Investigating CRSV will not and should not happen on its own. As noted above, any plan involving the investigation of international crimes should have a CRSV component; and any CRSV investigation should also seek to document and understand the full range of international crimes committed within the specific context. In planning the investigation of international crimes, trainees should ask themselves the following:

- whether their preliminary research has uncovered any red flag indicators of CRSV;
- whether (and how) those indicators have they been investigated; and
- what the results are of those investigations.

This information should be included in the preliminary assessment of the evidence. As part of this research, it might be revealed that the information you are seeking has already been investigated and documented. If this is the case, you should consider whether additional investigation is required to avoid over documentation.

Additional initial information can include:

- Where victims and witnesses are located;
- Whether you have access to crime scenes;

⁸⁹ See, PSVI Protocol , pp.123-124.

- Security risks for victims, investigators/prosecutors, information and evidence, including the personal safety and security of victims and witnesses and their private information;
- Potential referral pathways for victims (medical/psycho-social, legal or other);
- Security assessment for your team, the information obtained and stored, and the people you will contact during the course of your investigation; and
- Protective measures – consider what arrangements need to be made to ensure safety and security of witnesses and information.⁹⁰

Note for trainers:

Discuss with trainees possible sources of information for their preliminary research. Have them develop a list.

B. Developing a Working Hypothesis or Case Theory

As you analyse your preliminary research, you should be able to develop a working hypothesis or case theory. This is how an international crimes case is built. A case theory is the framework to guide the evidence collection.

A case theory is your logical story of what might have happened. It is always driven by the evidence. At the preliminary research stage, the evidence may not be sufficient to develop a concrete hypothesis, but this will develop based on additional evidence collected throughout the investigation.

Like your investigations plan, the case theory must be constantly reviewed and adjusted on the basis of the analysis of incoming evidence. Evidence that might disprove or contradict the case theory should not be dismissed but should be explored and may require a rethinking of the original case theory.

C. Developing your team and your tools

At the outset, carefully consider:

- Who is your team?
- How will their work be divided among you?
- What are their tasks and responsibilities?
- Who is in charge?

A strong, efficient team will be one where everyone within the team understands what is expected of them, and how their work fits into the overall objective of the investigation.

⁹⁰ See, [PSVI Protocol](#), pp.126-128.

As you do your research, your team can start to build the tools you will need to support the investigation.

In addition to the chronological narrative, consider preparing:

- an overview of the legal framework - considering what the alleged violations are in the area under investigation and examine the elements of the crimes potentially committed;
- a command and control organigram;
- a map-based overview of all relevant locations, including the scene of crime. This can be supplemented with information such as:
 - the locations where individual victims lived, worked, were arrested at, detained or killed (among others);
 - in some cases, an indication of the routes travelled between those locations may be relevant as evidence or organisation or control;
 - military positions, including for example:
 - local command headquarters;
 - troop accommodation locations; and/or
 - military vehicle/weapon locations.

The above is not an exhaustive list.

Your organisation should have procedures in place - such as codes of conduct, standard operating procedures, reporting arrangements, etc – which should be shared with and followed by all team members.

II. Assessment and analysis - where are the gaps?⁹¹

For each incident to be investigated, looking at the evidence and information you have, consider how you know this information. Ask yourselves:

- Whether the sources of information have been identified?
- If so, where did it come from?
- Can it be used in court? If not, what are your alternative sources of information?
- Are there indicators of CRSV? If so, have they been investigated?

Consider the case theory and elements of the offences, then identify your information gaps and potential sources of information to fill them.

⁹¹ See, [PSVI Protocol](#), p.129.

A. Information Collection Strategy⁹²

1. Allegations or events to be investigated

Remember that at any time, the list of crimes committed in the area/allegations under investigation will reflect your current understanding of events and will be updated as more information and evidence is uncovered.

2. Persons, entities or organisations to be investigated

Consider whether you have or are able to obtain background/biographical data of alleged perpetrators and their current whereabouts.

The legal and evidential issues attached to direct perpetrator cases, which represent the greatest number of CRSV cases which Ukraine is presently dealing with, are closely linked to those which arise in domestic cases of rape or other forms of sexual violence. As pointed out in *Prosecuting Conflict-related Sexual Violence at the ICTY*, building CRSV cases against more remote perpetrators requires a different investigative strategy and approach to the case theory.⁹³ **For example, it is important to recall that one does not need to conclusively, personally identify the direct perpetrator to prove an international crimes case against a remote perpetrator, including mid-level or high-level targets.**

More generally, trainees should ask themselves what evidence they have to link the crime to the military (or civilian) occupation forces, and what information/evidence they have about the identity of the perpetrator group, its leadership, its origin and effective control of the area under investigation?

3. What do you need to prove and how will you gather evidence?

Keeping in mind the elements of the potential crimes in mind, consider what you need to prove and the gaps in your evidence.

III. Anticipating potential defences

Your investigations planning should take into account the potential defences you anticipate in the event of a prosecution, so that you are in a position to recognise and collect evidence which will effectively counter those arguments. For example, consent is often an issue in rape cases. Trainees should therefore ask themselves what specific evidence should be collected to show that the victim was unable to give free, voluntary and genuine consent to sexual contact at issue.

IV. Exculpatory information

Exculpatory information is anything which tends to undermine the case theory or might go to exculpate the direct or remote perpetrator(s). This information must be collected and clearly identified as being exculpatory and disclosed to the accused

⁹² See, *PSVI Protocol*, pp.129-131.

⁹³ Brammertz and Jarvis, op. 339.

(or their counsel). In criminal proceedings, prosecutors must be prepared to adapt their case theory in light of exculpatory evidence, whenever it might be uncovered.



Module 9

Case Building and Modes of Liability

Learning Objectives:

- This Module builds on the learning in the previous sections (cross reference to **Module 2**). Understanding that CRSV must always be contextualised, trainees will be introduced to what is commonly referred to as linkage evidence. Establishing linkage relates to proving who is allegedly responsible for the crime and how (through what “mode” or principle of liability).
- Trainees will learn how to identify patterns and how to use pattern evidence to establish linkage to mid-level and high-level perpetrators. They will understand how and why their research, analysis and planning for different activities should refer to pattern and linkage evidence.

Module Time:

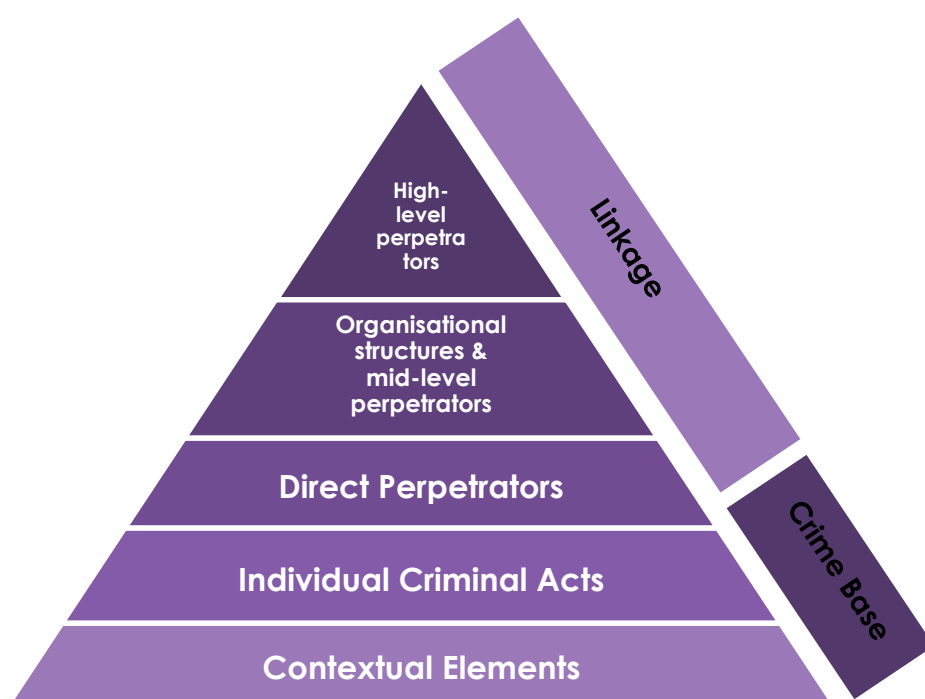
- This module can be delivered in two 90 minute sessions

For this module, trainers can refer to:

- Second Edition of the International Protocol on the Documentation and Investigation of Sexual Violence in Conflict (PSVI Protocol), Part III, Chapter 4; Part IV, Chapter 10; Part V, Chapter 14; Annex 1
- Recording of Online Session 13 on ‘Modes of Liability’
- Presentation of Online Session 13 on ‘Modes of Liability’
- Handout “Comparing Modes of Liability under CCU and ICL”

Case building refers to how international crimes cases, including CRSV, are built from the crime base. Comprehensive, context-based investigations may link responsibility for these crimes to direct perpetrators, or remote mid-level or high-level actors under whose direction, authority or control the direct perpetrators operated. This will require proof of:

- the specific elements of the alleged crimes (cross reference to **Section II of Module 3**);
- the contextual (or common) elements (cross reference to **Section II.A of Module 3**), and
- the linkage elements. Linkage refers to evidence which shows that way in which a perpetrator (or perpetrator group) can be held criminally responsible for the alleged international crime. It refers to the way in which these different levels of perpetrators carried out or contributed to the crime.



I. Case building starts from 'crime base' evidence

'Crime base' evidence refers to the statements of victims and witnesses about their direct experiences and the harms they suffered. These are the violations at the core of any international crime prosecution. The crime base information must be gathered with a mind to first proving the crimes themselves.

Thereafter, further questioning of victims, witnesses and even alleged collaborators, alongside information from other sources, will supplement the crime base and allow linkage up the chain of command. These other sources will include such things as items or documents recovered from military-occupied locations; intercepted communications, information published on open sources, as well as information from captured prisoners of war. While linkage information is almost irrelevant without proof

of the crime-base, in cases against mid-level or high-level perpetrators, this does not necessarily require conclusive identification of the direct perpetrator.

The crime base evidence can generally be divided into three categories: locations, persons, and context. These are discussed below.

A. Relevant locations

Relevant locations should be identified, fully recorded and eventually, whenever possible, forensically examined to put any victim accounts into context. In CRSV cases, however, investigative experiments (re-enactments) are not recommended.

B. Persons

Documenters should try to identify and, where possible locate, and interview all those persons who were involved in, affected by, or present during the events under investigation. Access by victim representatives to a case-file related to their own case may be a useful resource in this regard, as these may include reports or interrogation records from potential witnesses that provide details. The same may be said of records/documentation from civil society, and media reports/journalist interviews.

As noted above, even though victims of CRSV and other crimes may not be able to conclusively identify the alleged direct perpetrators, in ICL it is often the case that the victim evidence will be critically important as linkage of those crimes to more remote perpetrators (see below, **Section II**).

C. Context

It is in gathering information about the context within which a violation was perpetrated that investigators, documenters and analysts will generally see the first evidence of patterns, structures, planning, control and organisation which could help them link responsibility for a crime to a mid-level or higher-level perpetrator. This evidence can also be important to show that the violations under investigation were connected to the conflict, and part of a widespread and systematic attack.

Contextual evidence can be found from a broad range of sources.

Notes for trainers:

Discussion: Have trainees list potential sources of information for gathering evidence of context. These can include: government authorities (judicial, local prosecutor, police, military, human rights councils); local activists/human rights defenders; NGOs/INGOs-including human rights, refugee, medical, humanitarian, documentation; civil society organizations; UN agencies (OHCHR, UNICEF, UNHCR, UNFPA, UN Women, WHO); journalists, photographers, filmmakers; medical and health care professionals; hospitals; religious leaders, among others.

Contextual evidence can not only show patterns, but also linkage. Below is a small, non-exhaustive list of illustrative examples:

- The occupation and adaptation of certain premises as military offices/headquarters/troops accommodations/detention facilities;
- The roles and responsibilities of certain military (or other) personnel;
- The relationship between (members of) the civilian occupation administration, Russian military and state security units/structures;
- The role in the community of Ukrainian civilians targeted for abuse;
- The means and methods of interrogation and/or different crimes, including killings, torture, acts of sexual violence (among others);
- Transfers between filtration/detention facilities and/or across national borders; and
- Hiding/disposing of human remains (among others).

Moreover, as we will see below in **Section IV**, the general context in which the suspect operated, that made the occurrence of sexual violence more likely, as well as evidence of patterns of prior or subsequent sexual violence is relevant for assessing awareness and foreseeability of CRSV sexual violence.

II. Practical Tips – recognising and collecting linkage evidence

It will be important for trainees to understand how to draw these linkages between direct perpetrators of CRSV and those mid-level or high-level perpetrators who might be considered 'most responsible', particularly when confronted with complex command structures (whether those are military or security or political/administrative). Linking mid-level or high-level perpetrators to the commission of CRSV crimes will usually require evidence that demonstrates the existence of either formal or informal hierarchies of power and control over the direct perpetrator, through which those remote perpetrators acted. This is shown in the examples listed immediately above. Understanding how to draw such links is helpful when confronted with complex command structures (military or security or political/administrative).

Establishing a link between those 'most responsible' and the crimes committed will usually involve, at a minimum, the following levels:



The number of levels linking a suspect to the crime will depend on how far the suspect is removed from the direct perpetration of the crime and the complexity of the organisations or structures, planning and operations employed by a perpetrator to carry out the crimes.

Providing trainees with practical tips, relevant to the context in Ukraine, to investigate these three linkage levels will assist them in guiding others in their case-building. The following table offers some suggestions which may be used in victim or witness interviews:

Practical Tip	Potential Questions / Evidence
<p>Even if witnesses and victims cannot positively identify the perpetrators, the information gathered may provide significant leads that can assist the documentation process.</p>	<p>You may ask a witness about:</p> <ul style="list-style-type: none"> • The perpetrators nickname, or how they were referred to by others. • The perpetrators nationality or region of origin. • The language or dialect spoken by the perpetrator. • Clothing, insignia, vehicles or weaponry worn or used by the perpetrator. • Any information identifying the unit or group to which the perpetrator belonged, including its structure or activities. • Whether the perpetrator was with, spoke to or referred to anyone else. • Who appeared to be in charge of a particular area.
<p>Gather information to gain an understanding of the organisation and hierarchical structure of the group identified as being involved in the perpetration of the crime.</p>	<p>You might seek information on:</p> <ul style="list-style-type: none"> • The people with authority in the area or at the location under investigation and the scope of their authority. • How the occupation authorities were organised in their town/villages. • How relevant persons communicated with each other (especially how orders and directions were passed and complied with, and reports issued). • De facto channels of authority.

The foregoing reinforces that contextualizing sexual violence is important to be able to link CRSV to more remote perpetrators, as it may lead to evidence which can be used to connect the action (or inaction) of the mid-level or high-level perpetrator to the sexual violence. Based on that evidence, prosecutors can then choose the appropriate mode of liability.

III. Modes of Liability under Customary International Law

As noted above, modes of liability is the term used in ICL to describe the specific ways in which a person may have committed or contributed to an international crime.

While the greatest number of cases currently dealt with by Ukrainian prosecutors refer to the persons who physically committed the crimes (direct perpetrators), perpetrators of international crimes can also include remote perpetrators. These are the persons who may have committed the crime(s) through others, without even having seen the victim(s) or visited the scene of the crime. These are typically described as mid-level or high-level perpetrators, and may include military commanders, state security service officials or political leaders.

The modes of liability contained in the CCU cover much of the conduct captured by the modes of liability under ICL. [The Modes of Liability Handout](#) compares the modes of liability under the CCU with those in ICL, along with some short studies from cases where CRSV has been prosecuted under the relevant mode.

This Section considers some of the modes of liability recognised by customary international law outlined in the [Modes of Liability Handout](#), namely planning, ordering, instigating, aiding and abetting and command responsibility. These modes may be relevant for linking CRSV to more remote perpetrators in Ukraine.

[The Modes of Liability Handout](#) shows there are some comparisons analogies to these modes under the CCU:

- Planning (under the ICTY and ICTR statutes) has similarities to the Ukrainian mode of organising;
- Ordering is a mode available in Ukrainian law, customary international law (under the ICTY and ICTR statutes) as well as the Rome Statute;
- Instigation (under the ICTY and ICTR statutes) covers functionally the same conduct as 'soliciting or inducing' under the Rome Statute and finds comparison with the mode of abetting under Article 27(4) of the CCU;
- Aiding and abetting (under the ICTY and ICTR statutes and the Rome Statute) finds comparison with the modes of abetting and acting as an accessory under the CCU; and
- Command responsibility can be incorporated into Article 438 of the CCU by virtue of Articles 86 and 87 of Additional Protocol I.

Understanding how international criminal law has interpreted these modes may help trainees with some of the diverse factual situations they are called to address and recognise how the CCU modes can be interpreted to reflect the ways in which individuals commit or contribute to war crimes and mass atrocities.

It should be noted that different international courts and tribunals have interpreted the elements of the modes of liability in different ways. For the purposes of this Module, the definitions recognised as customary international law (as interpreted by the ICTY and ICTR) are relied upon.

A. Planning

Planning means that one or several persons design the conduct constituting one or more crimes which are later perpetrated. The accused does not need to have been present at the crime scene; but the planning must have substantially contributed to the crime.⁹⁴

The individual planning the crimes must have had, at a minimum, the **awareness of the substantial likelihood** that a crime would be committed.⁹⁵

For example, consider a situation where the accused might plan what he characterises as the legal evacuation of the population of an area, but is aware of a substantial likelihood that the persons carrying out the transfer will rape women in the course of the evacuation because they have done this before on similar occasions. In a scenario like this, the elements of planning sexual violence would be satisfied.

B. Ordering

Liability for ordering sexual violence requires that a person in a position of authority **either** orders another person to commit sexual violence or to carry out an act *in the execution of which* sexual violence is perpetrated.⁹⁶ There is no requirement to prove a formal superior-subordinate relationship or that the order be directly transmitted to the physical perpetrator. The order may be express or implied. The order must have a substantial effect on the commission of the crime.⁹⁷

As with planning, it is not necessary to show that sexual violence *as such* is ordered. The one who orders can be held criminally responsible provided they are aware of the **substantial likelihood** that sexual violence will occur in execution of that order.⁹⁸

For example, this mode of liability could refer to the actions of a commander/head of a filtration facility who ordered the use of violent interrogations against detainees and was aware of a substantial likelihood that during the course of these interrogations sexual violence, such as forced nudity and beating of genitals, would occur.

C. Instigating

Liability for instigating sexual violence requires that the accused prompts, urges or encourages another person to commit sexual violence or prompts an act or omission in the execution of which sexual violence is committed.⁹⁹ The instigation could be an act or an omission; it may be explicit or implicit, non-verbal or even written prompting.

⁹⁴ See e.g., *Kordić and Čerkez Appeal Judgment*, para. 26; *Milošević Appeal Judgment*, para. 268.

⁹⁵ See e.g., *Kordić and Čerkez Appeal Judgment*, para. 31; *Milošević Appeal Judgment*, para. 273; *Nahimana et al. Appeal Judgment*, para. 479.

⁹⁶ See e.g., *Kordić and Čerkez Appeal Judgment*, para. 28.

⁹⁷ See e.g., *Karadžić Trial Judgment*, para. 573.

⁹⁸ See e.g., *Prosecutor v. Blaškić, IT-95-14-A, Appeal Judgment*, 29 July 2004, para. 42; *Kordić and Čerkez Appeal Judgment*, para. 30.

⁹⁹ See e.g., *Kordić and Čerkez Appeal Judgment*, para. 27.

As with planning and ordering, it is sufficient to show that the instigation was a factor **substantially contributing** to the commission of sexual violence.¹⁰⁰

The accused must have at least been aware of the **substantial likelihood** that the crime would be committed in the execution of the instigation.¹⁰¹

For example, this mode of liability may be satisfied in a case where a commander prompted a soldier to “go and have some fun” during the house searches, aware that the soldiers would understand this as encouragement to rape women in the town.

D. Aiding and abetting

Aiding and abetting covers situations where the accused renders practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.¹⁰² There is no need for the conduct or actus reus of the crime of aiding and abetting to be in the immediate physical vicinity of the underlying crime.

The accused must have acted with the knowledge that their acts assisted in the commission of the crime by the actual perpetrator(s).¹⁰³ A hypothetical illustrative example might be an individual in charge of training (a military unit before its deployment to Ukraine on such methods and tactics as illegal interrogation methods and clearance operations, with the knowledge that this would assist in the commission of crimes, including sexual violence.

E. Command Responsibility

Command responsibility refers to the responsibility of commanders for crimes committed by forces or subordinates acting under their effective command and control, which occurred because of their failure prevent or punish the crimes.¹⁰⁴

The mental element of command responsibility requires that the accused either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes.¹⁰⁵

For example, a *de facto* commander of a filtration camp may be held responsible for the crimes (including rapes, forced nudity and genital mutilation) committed by the guards under his command, where he was aware of the commission of the crimes

¹⁰⁰ See e.g., *Kordić and Čerkez Appeal Judgment*, para. 27.

¹⁰¹ See e.g., *Kordić & Čerkez Appeal Judgment*, paras 29, 32; *Brdanin Trial Judgment*, para. 269; *Naletilić & Martinović Trial Judgment*, para. 60.

¹⁰² See e.g., *Delalić Trial Judgment*, para. 327; *Popović Appeal Judgment*, para. 1732.

¹⁰³ See e.g., *Stanišić and Simatović Trial Judgment: Vol. II*, para. 1264; *Orić Trial Judgment*, para. 288. Note, at the ICC, aiding and abetting should be performed for the specific purpose of facilitating the commission of such a crime, which is not the case under customary international law

¹⁰⁴ See e.g., ICTY, *Blagojević & Jokić Trial Judgment*, para. 790; ICTY, *Kordić & Čerkez Appeal Judgment*, para. 827; ICTY, *Halilović Trial Judgment*, para. 56; ICTY, *Limaj et al. Trial Judgment*, para. 520; ICTY, *Orić Trial Judgment*, para. 294.

¹⁰⁵ See e.g., ICTY, *Delalić et al. Trial Judgment*, para. 346; ICTR, *Ndindiliyimana et al. Judgment and Sentence*, para. 126.

which were frequent and notorious and did not take reasonable or appropriate action to prevent or punish the crimes.

Note for trainers:

Topics for discussion might include:

- The different people who might be held responsible for CRSV and under which provision of the CCU they might be held responsible.
- Different factual situations and which modes of liability might make up their case theory.

IV. Foreseeability of CRSV Crimes

Regardless of the perpetrator-level or the mode of liability applicable in a particular jurisdiction, prosecutors eventually will need to consider evidence about the alleged perpetrators' intent or knowledge/awareness for the crime in question. In this regard, while the modes of liability have different mental elements (see [The Modes of Liability Handout](#)), some degree of foreseeability will always need to be established. For example, as seen above, under customary international law the modes of liability of planning, ordering, and instigating require that, at a minimum, the perpetrator was aware of the **substantial likelihood** that the crimes would be committed in the execution of his actions.

There will often be no direct evidence that a mid-level or high-level perpetrator actually **intended** to plan, order, instigate or aid and abet sexual violence. Such cases will therefore have to be proved based on circumstantial evidence and by showing that the probability of sexual violence was **foreseeable** to the accused in particular. This depends on the information available to them at the time.

Evidence of the general context in which the suspect operated, that made the occurrence of sexual violence more likely, as well as evidence of patterns of prior or subsequent sexual violence is therefore relevant for assessing awareness and foreseeability of sexual violence.

Practitioners should consider the following 'pattern evidence' to demonstrate policies, planning, and coordination:

Evidence that the crimes occurred on a large scale.

Evidence that similar crimes were repeated across different periods of time and locations.

Evidence that the crimes occurred according to similar patterns, e.g., the capture of civilians after takeovers of territory; sexual violence occurring during house

searches to find people supporting the Ukrainian armed forces; sexual violence occurring in detention or as part of interrogations; etc.

Evidence that the CRSV crimes occurred in the context of other crimes being committed.

Evidence of involvement of certain units or groups of perpetrators in the crimes.

Evidence of policies or propaganda revealing a policy to commit crimes.

In the ICTY Appeals Chamber Judgment in the case of *Prosecutor v. Đorđević*, the judges noted the following, included here as an illustration of the importance of contextual evidence:

ICTY, *Đorđević Appeal Judgement*, paras. 925-926

925. Furthermore, the Trial Chamber found that he was aware of the massive displacement of Kosovo Albanian civilians on the basis that he witnessed thousands of displaced persons in 1998 and that he received regular MUP reports throughout March to June 1999 that reported on the increasing numbers of Kosovo Albanians crossing the borders from Kosovo into Albania or FYROM. He also knew about the humanitarian situation as well as killings and other violent crimes against Kosovo Albanians through other sources, including the media.

926. Under these circumstances, the Appeals Chamber finds that it was foreseeable to Đorđević that crimes of a sexual nature might be committed. The Appeals Chamber recalls that thousands of Kosovo Albanian civilians were being forcibly displaced and mistreated on a massive scale by Serbian forces who could act with near impunity, and that women were frequently separated from the men and thereby rendered especially vulnerable. The Appeals Chamber, Judge Tuzmukhamedov dissenting, finds that in such environment, the possibility that sexual assaults might be committed was sufficiently substantial as to be foreseeable to Đorđević and that he willingly took the risk when he participated in the JCE. The Appeals Chamber, Judge Tuzmukhamedov dissenting, is further satisfied that, in light of his knowledge of the persecutory nature of the campaign, it was also foreseeable to Đorđević that such sexual assaults might be carried out with discriminatory intent.

Trainees engaged in investigations, documentation, research and analysis of CRSV cases against mid-level or high-level perpetrators should consider facts which may be used to show the perpetrator intended or was aware that CRSV would occur. These might include:

- The general context in which the suspect operated, that made the occurrence of sexual violence more likely.

- The violent nature of the campaign (particularly if it was widespread and systematic against civilians).
- Evidence that the practice of CRSV occurred on a large-scale or followed a particular pattern.
- Evidence such as patterns of prior or subsequent sexual violence.
- Ethnic/national animosity/prevailing atmosphere of aggression and violence.
- The violent or unstable character of soldiers under the command of the accused.
- Prejudicial attitudes towards women.
- The role of the alleged perpetrator in the operation and their awareness of the violent nature and vulnerability of victims.
- Separation of men and women.
- Detention, in particular if men and women are held separately.
- The accused being informed of the CRSV and taking inadequate measures to reduce risk.
- The accused playing a role in the creation of an environment of impunity.¹⁰⁶

Note for trainers:

Discuss with participants what evidence, including contextual evidence, might show foreseeability of CRSV crimes.

¹⁰⁶S. Brammertz and M.J. Jarvis, *Prosecuting Conflict-Related Sexual Violence at the ICTY* (Oxford University Press 2016), pp. 251-253.

Module 10

Corroboration

Learning Objectives:

- This Module is aimed at helping to prepare victim representatives to successfully address credibility challenges faced by their clients, which may be rooted in discriminatory legal frameworks or gendered stereotypes on the part of criminal justice actors.

Module Time:

- 45-60 minutes

For this module, trainers can refer to:

- Second Edition of the International Protocol on the Documentation and Investigation of Sexual Violence in Conflict (PSVI Protocol), Part III, Chapter 4; Part IV, Chapters 9, 10 and 12; Part VI, Chapter 14.
- Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) (Article 55 on *Ex parte* and *ex officio* proceedings) and Explanatory Report to the Istanbul Convention, para. 280.
- Effectively Investigating, Prosecuting and Adjudicating Sexual Violence Cases: a Manual for Practitioners in Georgia, Section 5.
- Murad Code, Principles 1 and 8.
- Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, Dubravka Šimonović, 2021, para. 100(a).

Background

Corroborating evidence is defined as evidence that strengthens, adds to, or confirms already existing evidence.

I. Corroboration does not automatically establish credibility

“Corroboration of testimonies, even by many witnesses, does not automatically establish the credibility, reliability or weight of those testimonies.”¹⁰⁷ The fact that a witness gives an account that varies from other witnesses – even from a number of other witnesses – does not therefore necessarily affect their credibility. Furthermore, the ICTY Appeals Chamber in the Dragomir Milošević case held that trial chambers have “...the discretion to decide in the circumstances of each case whether corroboration is necessary or whether to rely on uncorroborated, but otherwise credible, witness testimony.”¹⁰⁸

II. Any practice of strictly requiring corroboration in sexual violence cases is discriminatory

International human rights suggest that laws or practices which strictly require corroborative evidence in SGBV cases discriminates against women and their right to equal access to justice.

CEDAW, Recommendation 33 on women’s access to justice, para. 25

The Committee recommends that States parties:

Ensure that the principle of equality before the law is given effect by taking steps to abolish any existing laws, procedures, regulations, jurisprudence, customs and practices that directly or indirectly discriminate against women, especially with regard to their access to justice, and to abolish discriminatory barriers to access to justice, including:

[...]

(iii) Corroboration rules that discriminate against women as witnesses, complainants and defendants by requiring them to discharge a higher burden of proof than men in order to establish an offence or seek a remedy;

¹⁰⁷ *Prosecutor v. Limaj*, IT-03-66-A, Appeal Judgment, 27 September, 2007, para. 203; *Prosecutor v. Dragomir Milošević*, IT-98-29/1-A, Appeal Judgment, 12 November, 2009, para. 248. See also, *Prosecutor v. Zlatko Alexovski*, IT-94-14/1-A, Appeal Judgment, 24 March 2000, para. 62: “Neither the Statute nor the Rules oblige a Trial Chamber to require medical reports or other scientific evidence as proof of a material fact. Similarly, the testimony of a single witness on a material fact does not require, as a matter of law, any corroboration. The only Rule directly relevant to the issue at hand is Rule 89. In particular, sub-Rule 89(C) states that a Chamber “may admit any relevant evidence which it deems to have probative value”, and sub-Rule 89(D) states that a Chamber “may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial”.

¹⁰⁸ *Prosecutor v. Dragomir Milošević*, IT-98-29/1-A, Appeal Judgment, 12 November, 2009, para. 215.

Neither Articles 85 or 91 CPCU strictly require corroboration, recent complaint or evidence of physical injuries in dealing with cases of sexual violence. Any practice otherwise should be abolished.

III. No strict requirement for corroboration in international criminal law

It is a long-settled principle of ICL that judges may rely on the evidence of a single credible witness to enter a conviction without the need for corroboration.¹⁰⁹

Rule 96(i) of the ICTY Rules of Procedure and Evidence provided that no corroboration of a victim's testimony shall be required in cases of sexual assault. In this regard, the Trial Chamber in the case of *Prosecutor v. Delalić* held at para. 505 that this was:

"[...] not to create a 'presumption of reliability' with respect to the testimony of such victims. Rather, the purpose is simply to affirm that contrary to the position taken in some domestic jurisdictions, the testimony of victims of sexual assault is not, as a general rule, less reliable than the testimony of any other witness."¹¹⁰

This principle has also been codified in the ICC Rules of Procedure and Evidence, where Rule 63(4) states that: "[...] a Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, **in particular, crimes of sexual violence.**" Therefore, the victim's own evidence can be the basis to find an allegation of sexual assault proven, if found to be sufficiently credible and reliable to meet the reasonable doubt standard of proof.

IV. No strict requirement for corroboration in other domestic jurisdictions

Because of their discriminatory effects, laws and practices strictly requiring corroboration in cases of sexual violence against women have been abandoned in many parts of the world. For example, in Canada, victim corroboration is not a "pre-requisite" to a conviction for sexual violence. The Canadian Criminal Code provides that in sexual assault (and other) cases: no corroboration is required for a conviction and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration.¹¹¹ Strict corroboration rules for victims of sexual violence offences have also been abolished in England and Wales.¹¹²

¹⁰⁹ See e.g., *Ntaganda Trial Judgment*, paras 75-76; *Prosecutor v. Haradinaj*, IT-04-84-A, Appeal Judgment, 19 July 2010, paras 145, 219; *Prosecutor v. Tadić*, IT-94-1-A, Appeal Judgment, 15 July 1999, para. 65; *Prosecutor v. Bagilishema*, ICTR-95-1A-A, Appeal Judgment, 3 July 2002, para. 79; *Prosecutor v. Milošević*, IT-98-29/1-A, Appeal Judgment, 12 November 2009, para. 215; *Prosecutor v. Kupreškić et al.*, IT-95-16-A, Appeal Judgment, 23 October 2001, para. 220.

¹¹⁰ *Prosecutor v. Delalić*, IT-96-21-A, Appeal Judgment, 20 February 2001.

¹¹¹ Criminal Code of Canada, Section 274.

¹¹² Criminal Justice and Public Order Act of the United Kingdom 1994, Section 32.

Module 11

Principles of Admissibility

Learning Objectives:

- For trainees to better understand the principles of admissibility that apply in international criminal law, in order to be able to effectively apply those standards in their own evidence collection, legal submissions and oral arguments.

Module Time:

- 90 to 120 minutes

For this module, trainers can refer to:

- This chapter
- Second Edition of the International Protocol on the Documentation and Investigation of Sexual Violence in Conflict (PSVI Protocol), Part III, Chapter 4; Part V, Chapter 12; Chapter 10.
- [Syria Supplement to the Second Edition of the International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: A Syria Specific Country Guide](#) (Synergy for Justice, November 2023).
- Documenting international crimes and human rights violations for accountability purposes: Guidelines for civil society organisations.

I. Basic Principles of Admissibility

Unlike the situation in Ukraine, admissibility of evidence before the ICC is not determined on the basis of strict compliance with the laws of criminal procedure.¹¹³ For information to be admissible before the ICC, it must be relevant, reliable and its probative value must outweigh any prejudicial effect on the trial's fairness.¹¹⁴

Relevance: examines whether a piece of information pertains to the matters being documented and makes the existence of the fact more or less probable.¹¹⁵

Probative value: addresses how a piece of information proves or demonstrates something at issue.¹¹⁶ The assessment of probative value is centred around the following:

- **Reliability:** information is reliable if it is “voluntary, truthful and trustworthy”,¹¹⁷ which involves an assessment of the information’s accuracy (i.e., plausibility and clarity);¹¹⁸ credibility (i.e., the extent it can be trusted);¹¹⁹ and authenticity (i.e., whether it is genuine).
- **Significance:** helps the Court in reaching a conclusion about the (non)existence of a material fact or in assessing the reliability of other evidence in the case.¹²⁰ Information can be deemed significant in two ways:
 - by significantly helping the Court reach “a conclusion about the existence or non-existence of a material fact”; or
 - by helping the Court assess “the reliability of other evidence in the case”.¹²¹

Prejudicial effect: even if a piece of information is relevant and of probative value, it can nevertheless be excluded if it can prejudice the trial's fairness, including the suspect's rights or the fair evaluation of testimony or other evidence.¹²² According to the Rome Statute, information will not be admitted if obtained “by means of violation of [the Statute] or internationally recognised human rights” if the violation “casts substantial doubt” on its reliability (e.g., if it was obtained through torture).¹²³ This is in line with Article 87(2) of the CPCU.

¹¹³ CPC, Article 86(1).

¹¹⁴ Rome Statute, Article 69(4); ICC Rules of Procedure and Evidence, Rule 64; Katanga Decision on the Prosecutor's Bar Table Motions, para. 16 *et seq.*

¹¹⁵ Kilolo et al. Judgment Pursuant to Article 74, para. 195; Katanga Decision on the Prosecutor's Bar Table Motions, para. 16.

¹¹⁶ Rome Statute, Article 69(4).

¹¹⁷ Lubanga Decision on the Admissibility of Four Documents, para. 28, fn. 81.

¹¹⁸ Nahimana et al. Appeal Judgment, para. 194.

¹¹⁹ Naletilić & Martinović Appeal Judgment, para. 402.

¹²⁰ Katanga Decision on the Prosecutor's Bar Table Motions, para. 34.

¹²¹ Katanga Decision on the Prosecutor's Bar Table Motions, paras 34-35.

¹²² Bemba et al. Response to "Prosecution's First Request for the Admission of Evidence from the Bar Table", para. 6. See also, Rome Statute, Article 69(4).

¹²³ Rome Statute, Article 69(7)(a).

