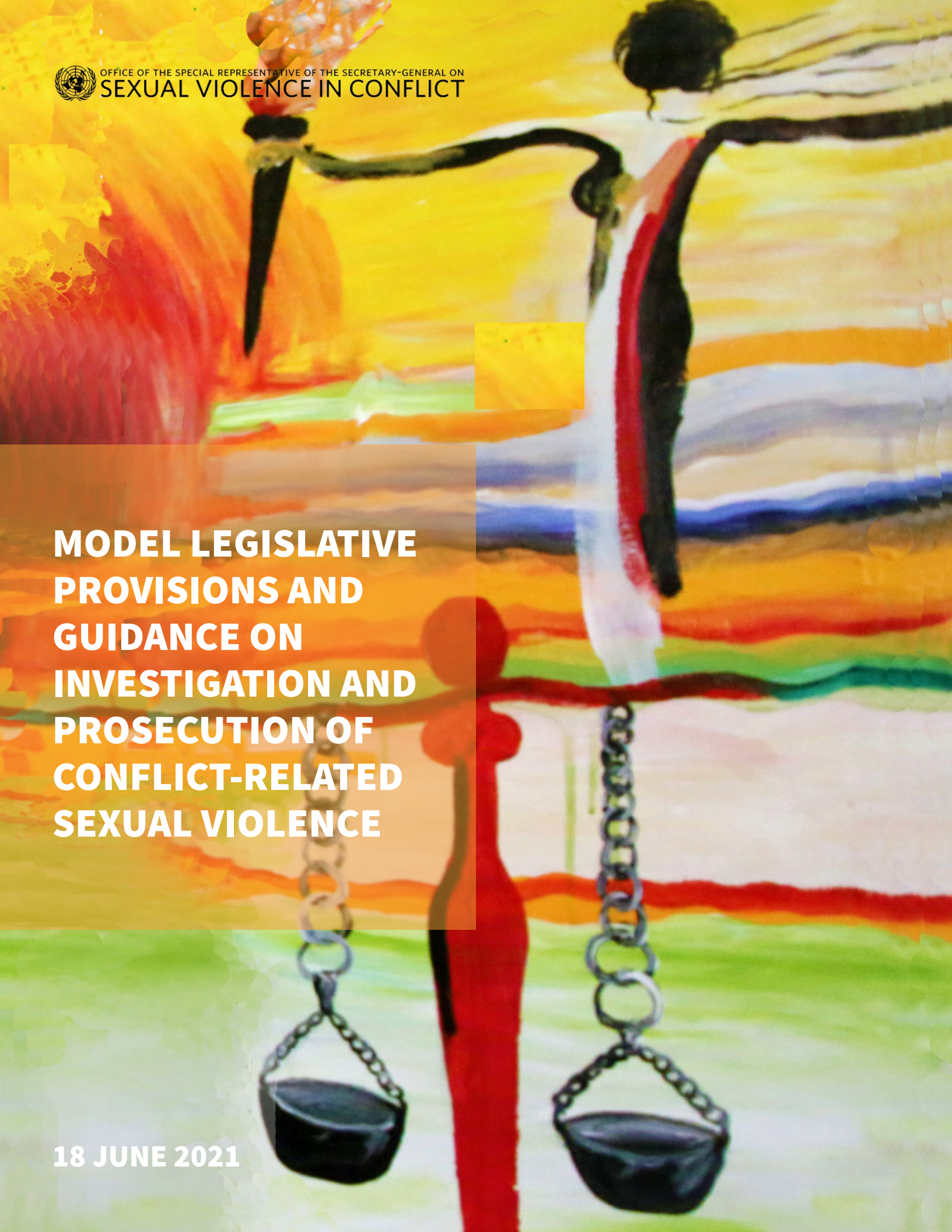




OFFICE OF THE SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL ON  
**SEXUAL VIOLENCE IN CONFLICT**

**MODEL LEGISLATIVE  
PROVISIONS AND  
GUIDANCE ON  
INVESTIGATION AND  
PROSECUTION OF  
CONFLICT-RELATED  
SEXUAL VIOLENCE**

**18 JUNE 2021**



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# Foreword

Conflict-related sexual violence is a serious crime that can have lasting, harmful effects on victims and their family, friends, and communities. It is perpetrated against women, men, girls and boys including by uniformed members of a State's police or army, members of non-State armed groups, transnational criminal and trafficking networks, and terrorist organizations. The primary responsibility to prevent sexual violence in conflict rests first and foremost with national governments.

Justice, security, and peace are inextricably linked. Robust justice systems are necessary not only to punish perpetrators of sexual violence but also to prevent and deter the commission of new crimes and to send a strong signal to would-be perpetrators that their acts are not "cost-free."

Yet, in many countries, national legislation fails to provide a comprehensive legal framework that recognizes all forms of sexual violence as crimes and protect all individuals who may fall victim. Weaknesses in the laws and procedures of many countries as well as in the administration of justice allow perpetrators to escape punishment and deny victims the right to remedy. Systematic impunity for sexual violence crimes constitutes an important element in contributing to the repetition of these violations.

United Nations Security Council Resolution 2467 (2019) called upon Member States "in the context of justice sector reform efforts, to strengthen legislation and enhance investigation and prosecution of sexual violence in conflict and post-conflict situations consistent with fair trial guarantees under international law," and to remove "procedural impediments to justice for victims such as restrictive limitation periods for filing claims, corroboration requirements that discriminate against victims as witnesses and complainants, exclusion or discrediting of victims' testimony by law enforcement officials and within judicial and other proceedings, and lack of facilities for closed hearings."<sup>1</sup>

This resolution further called upon Member States to draw upon the expertise of my office, specifically it "encourages national authorities in this context to strengthen legislation to foster accountability for sexual violence, stresses the critical role of the

domestic investigation and judicial systems of member states to prevent and eliminate sexual violence in conflict and to ensure accountability for those responsible, and requests relevant United Nations entities [.] to support national authorities in their efforts in this regard."<sup>2</sup>

It is in the spirit of supporting the work of Member States "in strengthening] the rule of law and the capacity of civilian and military justice systems to address sexual violence in armed conflict and post-conflict situations as part of broader efforts to strengthen institutional safeguards against impunity,"<sup>3</sup> that I present the **Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict's Model Legislative Provisions and Guidance on Investigation and Prosecution of Conflict-Related Sexual Violence** ("Model Legislative Provisions and Guidance").

The Model Legislative Provisions and Guidance have been informed by national practice from every UN Regional Group. They are intended to be a resource in assisting State legislators, international organizations providing legal assistance to requesting States, practitioners such as prosecutors, investigators, and lawyers, as well as public agencies and non-governmental, community-based, and civil society organizations, in implementing a robust legal and procedural framework in compliance with international norms and obligations.

The Model Legislative Provisions seek to remove barriers to access to justice for victims, survivors, and their families. These provisions significantly advance a victim and survivor-centric codification of both substantive and procedural criminal law on conflict-related sexual violence, while also allowing for future progressive developments in this area of law.

Indeed, in presenting these Model Legislative Provisions and Guidance, I intend to support national legislators seeking to enact or review and revise – within their national law – the legal provisions codifying conflict-related sexual violence crimes as international crimes at the national level. Though not exhaustive, the Model Legislative Provisions and Guidance contain criminal code

provisions and relevant procedural provisions, including measures for victim protection and victim participation. While the Model Legislative Provisions and Guidance was drafted with the Rome Statute of the International Criminal Court ("Rome Statute") in mind, and contains commentary in line with the Rome Statute's provisions for those States that are parties to it, it includes some provisions that go beyond the Rome Statute, and that adapt and expand protection for victims in a manner consistent with best practices in international law and are rooted in and derive from customary international law. The Model Legislative Provisions and Guidance can therefore be useful not only for States in the process of domesticating international criminal law provisions and enacting such laws for the first time but also for those considering amending legal provisions already in place in their national systems.

The costs of lawlessness are starkly evident across the world in terms of failures of justice and impunity for crimes of conflict-related sexual violence. The need for justice of victims and survivors of conflict-related sexual violence is profound. The reality is that victims and survivors of conflict-related sexual violence are nearly always also victims and witnesses of other serious international crimes, compounding their harm. It is my firm belief that bringing individuals justice in accordance with the principles contained in this Model Legislative Provisions and Guidance can impact greatly upon their recovery as well as that of their communities, from the atrocities of the past.

The rule of law and accountability for crimes of conflict-related sexual violence are critical for preventing such violence, reducing conflict, building and sustaining of peace, and achieving inclusive and sustainable development. In codifying and implementing such provisions, national justice systems will be transforming international law into national law. In so doing, States are providing their own population with justice at home in conformity with the principle of complementarity. Furthermore, States who adopt progressive laws on conflict-related sexual violence will be setting an example for those other States where impunity still reigns.

I urge all States to make use of these Model Legislative Provisions and Guidance as a concrete step in furtherance of their commitments to ensure justice and accountability, and by so doing, preventing conflict-related sexual violence in their own jurisdictions.

In the same spirit, the Model Indictment is intended to serve as a tool for national practitioners who are building and preparing cases involving conflict-related sexual violence as international crimes for prosecution in their own national courts. The Model Indictment represents the practical adaptation and articulation of the criminal and procedural provisions of the Model Legislative Provisions and Guidance.

My Office, including the Team of Experts on the Rule of Law and Sexual Violence in Conflict and the UN Action Against Sexual Violence inter-agency network, will continue to work with concerned Member States to strengthen the rule of law and accountability for crimes of conflict-related sexual violence. More importantly, we will support Member States' efforts in moving beyond traditional notions of judicial accountability to provide survivor-centered justice for crimes of conflict-related sexual violence. For too long, victims and survivors of conflict-related sexual violence have been disempowered by the perpetrators. Putting them in the driver's seat in the justice process puts the power back into their hands, where it belongs. The Model Legislative Provisions and Guidance was prepared with survivors, for survivors and victims of these crimes. They ensure that the justice system will not only "do no harm" but will actually "do it right."

The Model Legislative Provisions and Guidance therefore are fully in line with the spirit of resolution 2467 (2019) regarding "a survivor-centered approach in preventing and responding to sexual violence in conflict and post-conflict situations, ensuring that prevention and response are non-discriminatory and specific and respect the rights and prioritize the needs of survivors, including groups that are particularly vulnerable or may be specifically targeted."<sup>4</sup>

It is my firm conviction that victims and survivors deserve justice close to home; justice that involves and includes them; justice that empowers rather than sacrifices them; justice that honors their courage and respects their needs as a core consideration; justice that uplifts them rather than further victimizes them; justice that paves the path for other victims to come forward; and justice that is accessible, tangible, visible, and transformative. The Model Legislative Provisions and Guidance is a tool in your hand that can help to make that difference.



**Pramila Patten**  
Under-Secretary-General  
Special Representative of the Secretary-General on  
Sexual Violence in Conflict

18 June 2021

<sup>1</sup> S.C. Res. 2467, op. para. 14 (2019).  
<sup>2</sup> Id. at op. para. 3.  
<sup>3</sup> Id. at op. para. 14.

<sup>4</sup> Id. at op. para. 16.

**Model Legislative Provisions and Guidance on Investigation and Prosecution of Conflict-Related Sexual Violence**

# Guiding Principles and Methodology



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## Guiding Principles

Development of the Model Legislative Provisions on Investigation and Prosecution of Conflict-Related Sexual Violence ('Model Legislative Provisions') was guided by the following principles:

- a. The Model Legislative Provisions adopt a victim and survivor-centred approach, meaning they prioritise the rights, needs, participation, and wishes of the victim or survivor of sexual violence with full respect for their autonomy;
- b. The Model Legislative Provisions integrate international human rights law norms and standards, including the rights of victims or survivors of gross violations of international human rights law and serious violations of international humanitarian law and the rights of the accused to due process and a fair trial;
- c. The Model Legislative Provisions draw on comparative and international law to identify widely recognised standards, normative principles, and good practices;
- d. The Model Legislative Provisions reflect the need to accommodate the specificities of national legislation and judicial procedures, the legal, social, economic, cultural and geographical conditions of each State and the various main legal traditions (common law, civil law, and hybrid legal systems, etc.);
- e. The Model Legislative Provisions pay special attention to those provisions whose implementation requires legislation and to key issues related to victims, survivors and witnesses of conflict-related sexual violence crimes; and
- f. The Model Legislative Provisions are transparent where they depart significantly from existing codes and developed jurisprudence, proposing new models for assisting and protecting victims or survivors of conflict-related sexual violence in the justice process.

## Methodology

The Model Legislative Provisions and Guidance on the Investigation and Prosecution of Conflict-Related Sexual Violence commenced with research and analysis of domestic criminal and procedural codes from a range of national and international courts and tribunals. It was informed by survivors of sexual violence, and other serious international crimes (including those who have participated in litigation against their perpetrators), as well as the expertise of academics and established practitioners in the areas of conflict-related sexual violence, international criminal law, and victim or survivor centred litigation.

The drafting team studied the relevant national criminal and procedural provisions from 28 States representing a non-exhaustive but nonetheless wide range of legal traditions and geographic locations.<sup>1</sup> Many of the States whose laws were reviewed and analysed have adopted legislation aimed at addressing international crimes, and several of these States' courts have held trials on that basis. The States whose laws were selected for review and analysis were: Argentina, Australia, Belgium, Bosnia-Herzegovina, Burkina-Faso, Canada, Colombia, Denmark, France, Finland, Germany, Guatemala, India, Iraq, Japan, Kenya, Luxembourg, Mali, Namibia, Netherlands, New Zealand, Norway, the Democratic Republic of Congo, South Africa, Sweden, Switzerland, the United States, and the United Kingdom. The team also reviewed relevant provisions from the International Criminal Court, the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, the Extraordinary Chambers of the Courts of Cambodia, and the Extraordinary African Chambers in Senegal.

Analysis aimed at identifying different trends in criminalising sexual violence and international crimes in national jurisdictions, and more specifically at identifying the legal provisions allowing for prosecution of the fullest range of sexual violence crimes while serving and empowering survivors or victims of conflict-related sexual violence most effectively. The most protective and innovative provisions, found scattered across multiple states and jurisdictions, provided a foundation for many of the Model Legislative Provisions.

The Model Legislative Provisions draw deeply from this research, as well as from other relevant national and international sources, in particular those reflecting recent jurisprudential and doctrinal developments and those that inform and identify widely recognized standards, normative principles, and good practices with respect to the empowerment and protection of survivors, victims and witnesses in justice processes.<sup>2</sup>

The Model Legislative Provisions are meant to be modified and adapted to reflect civil, common law, hybrid, or other legal systems. Some of the tailoring necessary to make the document useful in domestic legal settings is reflected in the drafting, for example by providing different options for different legal systems. Language in brackets, e.g., [language in brackets] indicates language which may be appropriate only in certain legal systems.

<sup>1</sup> Many of the states whose national codes were studied also have a federal structure in which states or provinces have their own criminal and procedural codes which may diverge from the national code. The analysis only included a limited review of such sub-national laws (U.S. and Australia).  
<sup>2</sup> Of worthy note in this regard are two sources: *Victim Participation in Criminal Law Proceedings: Survey of Domestic Practice for Application to International Crimes Prosecutors, Redress and Institute for Security Studies* (September 2015) and *Justice in Matters Involving Child Victims and Witnesses of Crime: Model Law and Related Commentary*, United Nations Office on Drugs and Crime (2009).

Further adaptation may be required. As one example, in many legal systems, more than one crime may be charged in connection with the same conduct, and the States are encouraged to permit and facilitate cumulative charging in the context of widespread conflict-related sexual violence where multiple crimes are committed within the same pattern of conduct. Recognising that some national systems do not permit cumulative charging, however, it is suggested that practitioners in such systems could use the elements of additional crimes as gravity or aggravating factors for the crimes which are charged. See Article 36; see *also* Legislative Guidance and Commentary (“Legislative Guidance”) to Article 36 for further discussion of this example.

The Model Legislative Provisions incorporate legal provisions that allow for prosecution of the fullest range of conflict-related sexual violence crimes while at the same time serving survivors or victims of conflict-related sexual violence in the most empowering and respectful way possible. When meeting both goals is not possible, a survivor-centric practice demands that the latter value take precedence. For example, not all survivors or victims of sexual violence wish to be identified as such or even for the crimes they have suffered from to be prosecuted as sexual violence crimes. Prosecutors and other justice practitioners are encouraged to respect the wishes of such survivors or victims wherever possible. For this reason, some crimes not explicitly containing a sexual violence component but which often apply to sexual violence, such as torture and enslavement, have been included among the model criminal provisions.

Every survivor or victim of conflict-related sexual violence has the right to have their best interests given primary consideration, while safeguarding the rights of the accused. The best interests of a survivor or victim includes the ability to make their own informed choices wherever possible throughout the justice process. Thus, the Model Legislative Provisions incorporate procedural provisions that provide robust opportunities for participation by survivors or victims in prosecution. This is no simple matter since legal cultures vary widely in this regard. Indeed, in some countries, survivors or victims do not have any formal role in prosecution of the crimes by which they were victimised. With these legal systems in mind, the Model Legislative Provisions provide minimum provisions for survivor or victim participation even without formal status. It is hoped that these provisions will provide a floor below which state practice should not fall. Additional participatory rights are suggested for those States that provide survivor or victims with a more active role, but these are not in any way meant to provide a limit. Should a legal system provide survivors or victims with more rights or more robust opportunities for participation than those found in the Model Legislative Provisions, those rights and opportunities should not be reduced.

While these Model Legislative Provisions are meant to augment existing law, they will certainly overlap with areas beyond the scope of this project. One such limitation is inherent in the mandate of the Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict – that is, it focuses on sexual violence as gross violations of international human rights law, serious violations of international humanitarian law, or international criminal law (including crimes against humanity and genocide). However, laws involving crimes of sexual and gender-based violence outside of conflict or mass atrocities often require revision as well. Legislators and other users of these Model Legislative Provisions should understand whilst engaging in law reform on conflict-related sexual violence, they should examine other laws and practices relating to sexual and gender-based violence within their country.

Another example involves accused persons who should be afforded all the protections required under human rights law, including due process and fair trial rights. The Model Legislative Provisions reflect this norm; however, they do not provide an exhaustive set of protections that should be afforded to persons accused of criminal offenses. Similarly, survivors or victims of conflict-related sexual violence may include children. The Model Legislative Provisions reflect this reality in certain respects; however, the provisions are not comprehensive as to the rights and needs of child victims and witnesses of crimes in the justice process. For further information about children’s rights in the justice process, please see the United Nations Office on Drugs and Crime’s excellent model law and commentary: *Justice in Matters Involving Child Victims and Witnesses of Crime* (2009) and *United Nations Model Strategies and Practical Measures on the Elimination of Violence Against Children in the Field of Crime Prevention and Criminal Justice* (2014) (and particularly Chapter V regarding protection).

Likewise, although mutual legal assistance and extradition are beyond the scope of these Model Legislative Provisions, efficient and effective mutual legal assistance and extradition regimes are necessary to address the often cross-border nature of conflict-related sexual violence and to apprehend individuals who have committed such crimes. Once again, the United Nations Office on Drugs and Crime’s *Model Law on Extradition* (2004) and *Model Law on Mutual Legal Assistance in Criminal Matters* (2007) are invaluable tools for States to create a far more streamlined process than traditional letters rogatory. At the time of this writing, States are also developing a multilateral treaty on mutual legal assistance for serious international crimes (i.e., war crimes, crimes against humanity and genocide). Although the latter is treaty-based, provisions on mutual legal assistance and extradition can be adopted within domestic law without

treaty. Aware that many of the Model Legislative Provisions can also satisfy the obligations of State parties to the Rome Statute, references to the requirements of that treaty are provided throughout the Legislative Guidance. And, while many of the provisions included in this document reflect international law and practice, several provisions have been formulated with the aim of capturing the complete scope of the harm that can be perpetrated and subsequently prosecuted as conflict-related sexual violence. Thus, the Model Legislative Provisions incorporate provisions allowing the prosecution of crimes that may not yet be explicitly codified in international criminal law or in most national jurisdictions.

The Legislative Guidance provides explanations as to the basis of each of the model provisions and note where they significantly diverge from existing codes and developed jurisprudence, and, more importantly, why.

Again, the Model Legislative Provisions herein are meant to provide a standard as of the date of this writing and those using this guidance should be aware that jurisprudential and legislative developments relating to conflict-related sexual violence are often changing. Thus, this Model Legislative Provisions and the Legislative Guidance are meant to be a starting point for legislators and societies undergoing legislative reforms. States are encouraged to develop and enact even more progressive and inclusive provisions than those proposed herein.

Finally, no legislative reform process would be complete without consultation with civil society, including women and girls and especially including survivors or victims of conflict-related sexual violence. Civil society and survivors or victims can assist legislators in adapting these Model Legislative Provisions to their specific context and experiences. Any legislative reform process on conflict-related sexual violence should allow the opportunity for a country’s citizenry to participate meaningfully in laws that impact them and indeed that consultation process can increase trust between the government and its citizens in areas impacted by conflict.

### Note on Terminology

Individuals who have suffered grave international crimes or human rights abuses have the right to determine what they wish to be called. For many, the use of the term “survivor” is considered more empowering. In other communities, the term “victim” conveys a legal status in their justice system which is the basis for them to access often long-awaited justice; and many such victims choose to use that term. For the Model Legislative Provisions themselves, we have chosen, however, for both breadth and clarity to use the criminological term “victim” in keeping with other statutes (such as the Rome Statute of the International Criminal Court). For further details and more nuanced discussion on this issue, please see the definition of “Victim” in the Legislative Guidance.

# Part I

# Model Legislative Provisions

## Model Legislative Provisions and Guidance on Investigation and Prosecution of Conflict-Related Sexual Violence



UN Photo | Albert Gonzalez Farran

### Preamble

#### *[Option 1: Civil Law Countries]*

Considering the Resolution on Women Peace and Security adopted by the United Nations (UN) Security Council in its resolution 1325 (2000) of 31 October 2000 and its subsequent implementing resolutions 1820 (2008), 1888 (2009), 1889 (2009), 1960 (2010), 2106 (2013), 2122 (2013), 2242 (2015), 2467 (2019), and 2493 (2019), related Security Council resolutions such as 2331 (2016) and 2388 (2017) on sexual violence and trafficking in persons (including by violent extremist groups), and other related international instruments,

Considering in particular the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* adopted by the UN General Assembly in its resolution 60/147 of 16 December 2005 (the "Guidelines"),

Taking into account that conflict-related sexual violence is a crime that is perpetrated against persons of all ages and genders, Considering also that every victim and survivor of conflict-related sexual violence has the right to have their best interests given primary consideration, while safeguarding due process rights,

Bearing in mind the following rights of survivors and victims, in particular those contained in the Guidelines:

- a) The right to benefit from the implementation of the State's relevant human rights and other international commitments;
- b) The right to be treated with respect and dignity, and for all appropriate measures to be taken to ensure safety and security as well as psychological well-being;
- c) The right to adequate, effective, and prompt reparation for the harms suffered;
- d) The right to equal and effective access to justice; and
- e) The right to prompt and relevant information concerning violations, including on procedures to engage with the justice process and its status, as well as reparations mechanisms.

Considering that improved responses, assistance, protection, and support of the rights, needs, and experiences of victims of conflict-related sexual violence can help victims, survivors and their families to be more willing to disclose instances of victimisation and more supportive of the justice process,

The Law to amend the legal code of [State] has been adopted [on day, month and year] It shall come into force upon publication in the Official Gazette.]

#### *[Option 2: Common Law Countries]*

An Act amending the laws of [State] to provide for improved responses, assistance, protection, and support of the rights, needs, and experiences of survivors and victims of conflict-related sexual violence, particularly within the justice process, in accordance with existing international instruments, especially the Resolution on Women Peace and Security adopted by the United Nations (UN) Security Council in its resolution 1325 (2000) of 31 October 2000 and its subsequent implementing resolutions 1820 (2008), 1888 (2009), 1889 (2009), 1960 (2010), 2106 (2013), 2122 (2013), 2242 (2015), 2467 (2019), and 2493 (2019), related Security Council resolutions such as 2331 (2016) and 2388 (2017) on sexual violence and trafficking in persons (including by violent extremist groups), and other related international instruments, including the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* adopted by the UN General Assembly in its resolution 60/147 of 16 December 2005 (the "Guidelines");

This Act may be cited as the "Justice in Matters Involving Sexual Violence as an International Crime". It shall come into force [on day, month and year] [upon publication in the Official Gazette].]

### Chapter I Definitions

For the purposes of the present [Act] [Law], the following definitions shall apply:

1. "Child" or "Children" refers(s) to every human being below the age of eighteen years.
2. "Conduct" refers to acts or omissions.
3. "Conduct of a sexual nature" is not limited to physical violence and may not involve any physical contact — for example, forced nudity. "Conduct of a sexual nature," therefore, covers both physical and non-physical conduct with a sexual element.

4. "Conflict-related sexual violence" means incidents, or patterns of gender-based violence encompassing any conduct of a sexual nature, including but not limited to rape, committed against women, men, girls, boys, as well as adults or children with diverse expressions of gender identity. Such incidents, or patterns constitute gross violations of international human rights law, serious violations of international humanitarian law, crimes against humanity, or genocide, and can occur in conflict or post-conflict settings that have direct or indirect links with the conflict or that occur in other situations of concern such as in the context of political repression.
5. "Gender" means the social attributes and opportunities associated with being male and female and the relationships between women and men and girls and boys, as well as the relations between women and those between men. These attributes, opportunities and relationships are socially constructed and are learned through socialization processes. They are context, time-specific, and changeable. Gender determines what is expected, allowed and valued in a woman or a man in a given context. In most societies there are differences and inequalities between women and men in responsibilities assigned, activities undertaken, access to and control over resources, as well as decision-making opportunities. Gender is part of the broader socio-cultural context, intersecting with other aspects of identity such as race, social class, ethnicity, sexual orientation, religion, and age as well as other forms of identity.
6. "Gender expression" means the way a person expresses gender through actions and appearance, including dress, speech, and mannerisms. A person's gender expression is not always linked to the person's biological sex, gender identity, or sexual orientation.
7. "Gender identity" means the deeply-felt experience of a person's gender. A person's gender identity may or may not be aligned with the sex assigned to them at birth in accordance with predominant gender norms.
8. "Person" means a natural person or a legal person, such as a corporation or organisation existing under or authorized by the laws of [State] or the laws of any foreign country.
9. "Sexual orientation" refers to a person's physical, romantic, affectionate, and/or emotional attraction to, and/or intimate relations with, individuals of a different gender, the same gender, no gender, or more than one gender.
10. "Victim" means a person or group of persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights. The term "victim" also includes the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimisation. A foster parent, child, stepparent, stepchild, legal guardian, or other immediate caregiver may be considered "immediate family" in appropriate circumstances. A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, convicted, or otherwise the subject of legal proceedings, and regardless of any familial or other relationship between the perpetrator and the victim.
11. "Secondary victimisation" means victimisation that occurs not as a direct result of a criminal act but through the response of institutions and individuals to the victim.
12. "Revictimisation" means a situation in which a person suffers more than one criminal incident consecutively.
13. "Justice process" encompasses detection, identification or ascertainment of the crime, investigation of the crime, reporting, the making of the complaint, prosecution, trial and post-trial procedures, regardless of whether the case is handled in a national, international or regional criminal justice system for adults or juveniles or in customary or informal justice systems.
14. A person may be incapable of giving "genuine consent" if affected by natural, induced, or age-related incapacity, or as set out in the crimes below.

## Chapter II Criminal Law Provisions

### War Crimes

#### Article 1 *Sexual Violence as a War Crime*

A person is guilty of sexual violence as a war crime if:

- 1) The person engaged in conduct, or caused another person to engage in conduct, against another person by force, or threat of force, or by coercion or by taking advantage of a coercive environment or the conduct was committed against a person incapable of giving genuine consent. Coercion includes but is not limited to fear of physical, sexual or psychological violence, duress, detention, oppression, abuse of authority or power;

- 2) The conduct was of a sexual nature;
- 3) The conduct took place in the context of and was associated with an armed conflict; and
- 4) The person who engaged in the conduct was aware of factual circumstances that established the existence of an armed conflict.

#### Article 2 *Rape as Sexual Violence as a War Crime*

A person is guilty of rape as sexual violence as a war crime if:

- 1) The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body;
- 2) The invasion was committed by force, or threat of force, or by coercion or by taking advantage of a coercive environment or the conduct was committed against a person incapable of giving genuine consent. Coercion includes but is not limited to fear of physical, sexual or psychological violence, duress, detention, oppression, abuse of authority or power;
- 3) The conduct took place in the context of and was associated with an armed conflict; and
- 4) The person who engaged in such conduct was aware of factual circumstances that established the existence of an armed conflict.

#### Article 3 *Aggravated Sexual Violence as a War Crime*

A person is guilty of aggravated sexual violence as a war crime if:

- 1) The person engaged in conduct, or caused another person to engage in conduct, against another person by force, or threat of force, or by coercion or by taking advantage of a coercive environment or the conduct was carried out against a person incapable of giving genuine consent. Coercion includes but is not limited to fear of physical, sexual or psychological violence, duress, detention, oppression, abuse of authority or power;
- 2) The conduct was of a sexual nature;
- 3) The conduct:
  - a. Resulted in a permanent, chronic, serious physical or mental injury, illness or disability on the victim or another person, including infection with a sexually transmitted disease (including HIV);
  - b. Resulted in the pregnancy of the victim;
  - c. Was carried out by more than one person;
  - d. Was committed against a child;
  - e. Resulted in or included mutilation;
  - f. Included the use of or threat of use of weapons or firearms;
  - g. Was committed with particular brutality or cruelty;
  - h. Resulted in the death of the victim; and/or
  - i. Resulted in a consequence of comparable gravity to any of the above;
- 4) The conduct took place in the context of and was associated with an armed conflict; and
- 5) The person who engaged in the conduct was aware of factual circumstances that established the existence of an armed conflict.

#### Article 4 *Enforced Pregnancy as a War Crime*

A person is guilty of enforced pregnancy as a war crime if:

- 1) The person confined one or more persons forcibly made pregnant with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law;
- 2) The conduct took place in the context of and was associated with an armed conflict; and
- 3) The person who committed the act was aware of factual circumstances that established the existence of an armed conflict.

#### Article 5 *Enforced Impregnation as a War Crime*

A person is guilty of enforced impregnation as a war crime if:

- 1) The person engaged in conduct against another person by force, or threat of force, or by coercion or by taking advantage of a coercive environment or the conduct was against a person incapable of giving genuine consent. Coercion includes but is not

- limited to fear of physical, sexual or psychological violence, duress, detention, oppression, abuse of authority or power;
- 2) The conduct was of a sexual nature and included a physical invasion;
- 3) The conduct was committed with the intent to impregnate one or more persons;
- 4) The conduct resulted in the pregnancy of one or more persons;
- 5) The conduct took place in the context of and was associated with an armed conflict; and
- 6) The person who engaged in the conduct was aware of factual circumstances that established the existence of an armed conflict.

#### Article 6 *Enforced Sterilisation as a War Crime*

A person is guilty of enforced sterilisation as a war crime if:

- 1) The person permanently deprived another person or persons of, or significantly altered their, biological reproductive capacity, in a manner not justified by medical necessity, without the explicit and genuine consent of the person;
- 2) The conduct took place in the context of and was associated with an armed conflict; and
- 3) The person was aware of factual circumstances that established the existence of an armed conflict.

#### Article 7 *Enforced Contraception as a War Crime*

A person is guilty of enforced contraception as a war crime if:

- 1) The person temporarily deprived another person or persons of biological reproductive capacity, in a manner not justified by medical necessity, without the explicit and genuine consent of the person;
- 2) The conduct took place in the context of and was associated with an armed conflict; and
- 3) The person was aware of factual circumstances that established the existence of an armed conflict.

#### Article 8 *Enforced Abortion as a War Crime*

A person is guilty of enforced abortion as a war crime if:

- 1) The person induced or carried out an abortion on a pregnant person, in a manner not justified by medical necessity, without the explicit and genuine consent of the pregnant person;
- 2) The conduct took place in the context of and was associated with an armed conflict; and
- 3) The person who engaged in such conduct was aware of factual circumstances that established the existence of an armed conflict.

#### Article 9 *Torture as a War Crime*

A person is guilty of torture as a war crime if:

- 1) The person inflicted severe physical or mental pain or suffering upon one or more persons;
- 2) The person 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;
- 3) Such person or persons were protected persons or hors de combat, or civilians, or otherwise protected under any of the four Geneva Conventions, Additional Protocol I or II, or under customary international law or conventional international law applicable to armed conflict;
- 4) The person engaging in this conduct was aware of the factual circumstances that established this status;
- 5) The conduct took place in the context of and was associated with an armed conflict; and
- 6) The person was aware of factual circumstances that established the existence of an armed conflict.

Where the conduct satisfying element 1) is conduct of a sexual nature, evidence satisfying elements 2), 3), and 4) shall not be required.

#### Article 10 *Mutilation as a War Crime*

A person is guilty of mutilation as a war crime if:

- 1) The person subjected one or more persons to mutilation, such as by permanently disfiguring any part of the person or persons, or by permanently disabling or removing an organ, appendage, or other part of the body;

- 2) The conduct was neither justified by the medical, dental or hospital treatment of the person or persons concerned nor carried out in such person's or persons' interest;
- 3) Such person or persons were protected persons or hors de combat, or civilians, or otherwise protected under any of the four Geneva Conventions, Additional Protocol I or II, or under customary international law or conventional international law applicable to armed conflict;
- 4) The person engaging in this conduct was aware of the factual circumstances that established this status;
- 5) The conduct took place in the context of and was associated with an armed conflict; and
- 6) The person was aware of factual circumstances that established the existence of an armed conflict.

Where the conduct satisfying element 1) is conduct of a sexual nature or targets sexual organs, evidence satisfying elements 4) and 5) shall not be required.

#### Article 11 *Terror as a War Crime*

A person is guilty of terror as a war crime if:

- 1) The person engaged in conduct described in, of similar gravity to, the offences enumerated in Articles 1 through 10 and 12 through 16;
- 2) The purpose of the conduct, by its nature or context, was to intimidate a population;
- 3) Such person or persons were protected persons or hors de combat, or civilians, or otherwise protected under any of the four Geneva Conventions, Additional Protocol I or II, or under customary international law or conventional international law applicable to armed conflict;
- 4) The person engaging in this conduct was aware of the factual circumstances that established this status;
- 5) The conduct took place in the context of and was associated with an armed conflict; and
- 6) The person who committed the conduct was aware of factual circumstances that established the existence of an armed conflict.

Where the conduct satisfying element 1) is conduct of a sexual nature, evidence satisfying elements 3) and 4) shall not be required.

#### Article 12 *Enslavement as a War Crime*

A person is guilty of enslavement as a war crime if:

- 1) The person exercised any or all powers attaching to the right of ownership over another person or persons;
- 2) The conduct took place in the context of and was associated with an armed conflict; and
- 3) The person who committed the conduct was aware of the factual circumstances that established the existence of an armed conflict.

#### Article 13 *Slave Trade as a War Crime*

A person is guilty of slave trade as a war crime if:

- 1) The person was involved in the capture, acquisition or disposal of a person or persons with intent to reduce them to slavery; was involved in the acquisition of a slave with a view to selling or exchanging them; was involved in disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, or, through other similar conduct, engaged in trade or transport in slaves;
- 2) The conduct took place in the context of and was associated with an armed conflict; and
- 3) The person who committed the conduct was aware of factual circumstances that established the existence of an armed conflict.

#### Article 14 *Trafficking in Persons for the Purpose of Sexual Violence and/or Exploitation as a form of Enslavement as a War Crime*

A person is guilty of trafficking in person for the purpose of sexual violence and/or exploitation as a form of enslavement as a war crime if:

- 1) The person was involved in the recruitment, transportation, transfer, harbouring or receipt of one or more persons;

- 2) The conduct was committed by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control;
- 3) The conduct was committed for purpose of violence and/or exploitation, including by exchange of money or other consideration for sexual acts or other forms of sexual exploitation;
- 4) The conduct took place in the context of and was associated with an armed conflict; and
- 5) The person who committed the conduct was aware of factual circumstances that established the existence of an armed conflict.

#### Article 15 *Sexual Slavery as a form of Enslavement as a War Crime*

A person is guilty of sexual slavery as a form of enslavement as a war crime if:

- 1) The person exercised any or all of the powers attaching to the right of ownership over another person;
- 2) The person committed conduct of a sexual nature against such person or persons or caused such person or persons to be subjected to conduct of a sexual nature within the exercise of their powers of ownership over the person or persons;
- 3) The conduct took place in the context of and was associated with an armed conflict; and
- 4) The person who engaged in the conduct was aware of factual circumstances that established the existence of an armed conflict.

#### Article 16 *Enforced Marriage/Enforced Imposition of Conjugal Status as a form of Enslavement as a War Crime*

A person is guilty of enforced marriage/enforced imposition of conjugal status as a form of enslavement as a war crime if:

- 1) The person forcibly conferred a status of marriage or similar conjugal status upon another person or persons;
- 2) The conduct took place in the context of and was associated with an armed conflict; and
- 3) The person who engaged in the conduct was aware of factual circumstances that established the existence of an armed conflict.

### Crimes Against Humanity

#### Article 17 *Sexual Violence as a Crime Against Humanity*

A person is guilty of sexual violence as a crime against humanity if:

- 1) The person engaged in conduct against a person by force, or threat of force, or by coercion or by taking advantage of a coercive environment or the conduct was against a person incapable of giving genuine consent. Coercion includes but is not limited to fear of physical, sexual or psychological violence, duress, detention, oppression, abuse of authority or power;
- 2) The conduct was of a sexual nature;
- 3) The conduct was part of a widespread or systematic attack directed against a civilian population; and
- 4) The person who engaged in such conduct was aware of the attack.

#### Article 18 *Rape as Sexual Violence as a Crime Against Humanity*

A person is guilty of rape as sexual violence as a crime against humanity if:

- 1) The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body;
- 2) The invasion was committed by force, or threat of force, or by coercion or by taking advantage of a coercive environment or the conduct was against a person incapable of giving genuine consent. Coercion includes but is not limited to fear of physical, sexual or psychological violence, duress, detention, oppression, abuse of authority or power;
- 3) The conduct was part of a widespread or systematic attack directed against a civilian population; and
- 4) The person who engaged in such conduct was aware of the attack.

#### Article 19 *Aggravated Sexual Violence as a Crime Against Humanity*

A person is guilty of aggravated sexual violence as a crime against humanity if:

- 1) The person engaged in conduct against another person by force, or threat of force, or by coercion or by taking advantage of a coercive environment or the conduct was committed against a person incapable of giving genuine consent. Coercion includes but is not limited to fear of physical, sexual or psychological violence, duress, detention, oppression, abuse of authority or power;
- 2) The conduct was of a sexual nature;
- 3) The conduct:
  - a. Resulted in a permanent, chronic, serious physical or mental illness or disability on the victim or another person, including infection with a sexually transmitted disease (including HIV);
  - b. Resulted in the pregnancy of the victim;
  - c. Was carried out by more than one person;
  - d. Was committed against a child;
  - e. Resulted in or included mutilation;
  - f. Included the use or threat of use of weapons or firearms;
  - g. Was committed with particular brutality or cruelty;
  - h. Resulted in the death of the victim; and/or
  - i. Resulted in a consequence of comparable gravity to any of the above.
- 4) The conduct was part of a widespread or systematic attack directed against a civilian population; and
- 5) The person who engaged in such conduct was aware of the attack.

#### Article 20 *Enforced Pregnancy as a Crime Against Humanity*

A person is guilty of enforced pregnancy as a crime against humanity if:

- 1) The person confined one or more persons forcibly made pregnant with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law;
- 2) The conduct was part of a widespread or systematic attack directed against a civilian population; and
- 3) The person who engaged in such conduct was aware of the attack.

#### Article 21 *Enforced Impregnation as a Crime Against Humanity*

A person is guilty of enforced impregnation as a crime against humanity if:

- 1) The person engaged in conduct against another person by force, or threat of force, or by coercion or by taking advantage of a coercive environment or the conduct was against a person incapable of giving genuine consent. Coercion includes but is not limited to fear of physical, sexual or psychological violence, duress, detention, oppression, abuse of authority or power;
- 2) The conduct was of a sexual nature and included a physical invasion;
- 3) The conduct was committed with the intent to impregnate one or more persons;
- 4) The conduct resulted in the pregnancy of one or more persons;
- 5) The conduct was part of a widespread or systematic attack directed against a civilian population; and
- 6) The person who engaged in such conduct was aware of the attack.

#### Article 22 *Enforced Sterilisation as a Crime Against Humanity*

A person is guilty of enforced sterilisation as a crime against humanity if:

- 1) The person permanently deprived another person or persons of, or significantly altered their, biological reproductive capacity, in a manner not justified by medical necessity, without the explicit and genuine consent of the person;
- 2) The conduct was part of a widespread or systematic attack directed against a civilian population; and
- 3) The person who engaged in such conduct was aware of the attack.

**Article 23 *Enforced Contraception as a Crime Against Humanity***

A person is guilty of enforced contraception as a crime against humanity if:

- 1) The person temporarily deprived one or more persons of biological reproductive capacity, in a manner not justified by medical necessity, without the explicit and genuine consent of the person;
- 2) The conduct was part of a widespread or systematic attack directed against a civilian population; and
- 3) The person who engaged in such conduct was aware of the attack.

**Article 24 *Enforced Abortion as a Crime Against Humanity***

A person is guilty of enforced abortion as a crime against humanity if:

- 1) The person engaged in conduct against another person;
- 2) The conduct involved inducing or carrying out an abortion on a pregnant person, in a manner not justified by medical necessity, without the explicit and genuine consent of the person;
- 3) The conduct was part of a widespread or systematic attack directed against a civilian population; and
- 4) The person who engaged in such conduct was aware of the attack.

**Article 25 *Mutilation as a Crime Against Humanity***

A person is guilty of mutilation as a crime against humanity if:

- 1) The person subjected one or more persons to mutilation, such as by permanently disfiguring any part of the person or persons, or by permanently disabling or removing an organ, appendage, or any other part of the body;
- 2) The conduct was neither justified by the medical, dental or hospital treatment of the person or persons concerned nor carried out in such person's or persons' interest;
- 3) The conduct was part of a widespread or systematic attack directed against a civilian population; and
- 4) The person who engaged in such conduct was aware of the attack.

**Article 26 *Torture as a Crime Against Humanity***

A person is guilty of torture as a crime against humanity if:

- 1) The person inflicted severe physical or mental pain or suffering upon one or more persons;
- 2) The conduct was part of a widespread or systematic attack directed against a civilian population; and
- 3) The person who engaged in such conduct was aware of the attack.

**Article 27 *Persecution as a Crime Against Humanity***

A person is guilty of persecution as a crime against humanity if:

- 1) The person severely deprived, contrary to international law, one or more persons of fundamental rights;
- 2) The person 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, or other grounds that are universally recognized as impermissible under international law; and
- 4) The conduct was committed in connection with any act conduct criminalised as a crimes against humanity in this [Act] [Law], or conduct of comparable gravity.
- 5) The conduct was part of a widespread or systematic attack directed against a civilian population; and
- 6) The person who engaged in such conduct was aware of the attack.

**Article 28 *Other Inhumane Acts as a Crime Against Humanity***

A person is guilty of other inhumane acts as a crime against humanity if:

- 1) The person committed, through acts or omissions, other inhumane acts of similar to the offences enumerated in Articles 17 through 27 and 29 through 34, intentionally causing great suffering, or serious injury to body or to mental or physical harm, against a person or persons;

- 2) The conduct was part of a widespread or systematic attack directed against a civilian population; and
- 3) The person who engaged in such conduct was aware of the attack.

**Article 29 *Terror as a Crime Against Humanity***

A person is guilty of terror as a crime against humanity if:

- 1) The person engaged in conduct described in, or of similar gravity to, the offences enumerated in Articles 17 through 27 and 30 through 34;
- 2) The purpose of the conduct, by its nature or context, was to intimidate a population;
- 3) The conduct was part of a widespread or systematic attack directed against a civilian population; and
- 4) The person who engaged in such conduct was aware of the attack.

**Article 30 *Enslavement as a Crime Against Humanity***

A person is guilty of enslavement as a crime against humanity if:

- 1) The person exercised any or all of the powers attaching to the right of ownership over another person or persons;
- 2) The conduct was part of a widespread or systematic attack directed against a civilian population; and
- 3) The person who engaged in such conduct was aware of the attack.

**Article 31 *Slave Trade as a Crime Against Humanity***

A person is guilty of slave trade as a crime against humanity if:

- 1) The person was involved in the capture, acquisition or disposal of a person or persons with intent to reduce them to slavery; was involved in the acquisition of a slave with a view to selling or exchanging them; was involved in disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, or, through other similar conduct, engaged in trade or transport in slaves;
- 2) The conduct was part of a widespread or systematic attack directed against a civilian population; and
- 3) The person who engaged in such conduct was aware of the attack.

**Article 32 *Trafficking in Persons for the Purpose of Sexual Violence and/or Exploitation as a form of Enslavement as a Crime Against Humanity***

A person is guilty of trafficking in persons for the purpose of sexual violence and/or exploitation as a form of enslavement as a crime against humanity if:

- 1) The person was involved in the recruitment, transportation, transfer, harbouring or receipt of a person or more persons;
- 2) The conduct was committed by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control;
- 3) The conduct was committed for purpose of sexual violence, exploitation through prostitution, or other forms of sexual exploitation;
- 4) The conduct was part of a widespread or systematic attack directed against a civilian population; and
- 5) The person who engaged in such conduct was aware of the attack.

**Article 33 *Sexual Slavery as a form of Enslavement as a Crime Against Humanity***

A person is guilty of sexual slavery as a form of enslavement as a crime against humanity if:

- 1) The person exercised any or all of the powers attaching to the right of ownership over another person or persons;
- 2) The person committed conduct of a sexual nature against a person or persons or caused such person or persons to be subjected to conduct of a sexual nature within the exercise of their powers of ownership over the person or persons;
- 3) The conduct was part of a widespread or systematic attack directed against a civilian population; and
- 4) The person who engaged in such conduct was aware of the attack.

**Article 34 *Enforced Marriage/Enforced Imposition of Conjugal Status as a form of Enslavement as a Crime Against Humanity***

A person is guilty of enforced marriage/enforced imposition of conjugal status as a form of enslavement as a crime against humanity if:

- 1) The person forcibly conferred a status of marriage or similar conjugal status upon another person or persons;
- 2) The conduct was part of a widespread or systematic attack directed against a civilian population; and
- 3) The person who engaged in such conduct was aware of the attack.

**Genocide****Article 35 *Genocide***

A person is guilty of genocide if:

The person committed any of the following acts with the intent to destroy, in whole or in part, a national, ethnical, racial, religious or any identifiable group of persons, that at the time and place of its commission constitutes a protected group according to customary international law, as such:

- 1) Killed one or more members of the group;
- 2) Caused serious bodily or mental harm to one or more members of the group;
- 3) Deliberately inflicted on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- 4) Imposed measures intended to prevent births within the group; or
- 5) Forcibly transferred one or more children of the group to another group.

**Penalties****Article 36 *Penal Sanctions (Civil Law) or Aggravating Circumstances (Common Law) (Gravity Factors)***

The following factors are non-exhaustive; factors of similar importance or consequence can be considered in determining the penalty for persons convicted under Articles 1 through 35:

- 1) Resulted in a physical invasion of the body with a sexual organ or any other object;
- 2) Resulted in a permanent, chronic, serious physical or mental injury, illness or disability on the victim or another person, including infection with a sexually transmitted disease (including HIV);
- 3) Resulted in the pregnancy of the victim;
- 4) Resulted in the termination of pregnancy of the victim without that victim's genuine and informed consent;
- 5) Was committed against a child;
- 6) Resulted in or included mutilation;
- 7) Included the use or threat of use of weapons or firearms;
- 8) Was committed with particular brutality or cruelty;
- 9) Resulted in the death of the victim;
- 10) The conduct resulted in communal or familial exile or exclusion;
- 11) The conduct was carried out against a person of particular vulnerability, due for example to an illness or other condition, age, physical or mental injury, disability, or pregnancy, as a result of their economic or social circumstances, or other similar condition;
- 12) The conduct was carried out by a superior or superiors or person(s) with de facto or *de jure* position of trust, authority, influence or power over the victim;
- 13) The conduct was carried out by more than one person;
- 14) The conduct was carried out by the victim's ascendant, descendant, spouse, former spouse, or the person with whom the victim has maintained a familial or conjugal relationship, whether or not these persons lived together, and whether or not the familial or conjugal relation was the result of another criminal act, except in cases of forced perpetration;
- 15) The conduct was carried out in the presence of family members of the victim. The gravity is further increased if it is committed in the presence of family members who are children;
- 16) The conduct was preceded by or included the administration of a substance on the victim which materially alters their mental capacity or ability to exercise decision making;
- 17) The conduct occurred in public or in view of others, or in a place of particular significance to the victim or the community, such as a place of worship or sanctity;

- 18) The conduct is being, or threatens to be, shared via technological means so it persists in cyberspace over time;
- 19) The perpetrator has committed repeated violent acts including, but not limited to, acts of sexual violence; and/or
- 20) The victim was made to engage in acts of a sexual nature with someone known to them.

**Article 37 *Other Penalties for Conflict-Related Sexual Violence Crimes***

- 1) In accordance with Article 42, penalties for conflict-related sexual violence will not be diminished on the basis of any adverse distinction founded on grounds such as gender, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, customary or societal roles, wealth, birth or other status of the victim.
- 2) In cases where domestic law provides no specified penalty for conflict-related sexual violence, the penalty provided for torture shall be applied. In such cases where there is no penalty specified by law for torture, the penalty provided for a crime of similar gravity shall be applied, and should be no less than twenty (20) years imprisonment.

**Selected Modes of Liability****Article 38 *Incitement***

A person shall be criminally liable who directly urges one or more persons to commit an offence enumerated in Articles 1 through 35 where:

- 1) The person intended for the other person or persons to commit the offence;
- 2) The person satisfied the *mens rea* requirement of the offence; and
- 3) The offence was subsequently committed.

**Article 39 *Joint Criminal Enterprise***

A person shall be criminally liable for an offence enumerated in Articles 1 through 35 which resulted from a joint criminal enterprise where:

***Joint Criminal Enterprise I* – Basic Joint Criminal Enterprise**

- 1) There existed a common plan, purpose or design to commit the crime between a plurality of persons;
- 2) The person participated in the common plan, purpose or design involving the perpetration of the crime; and
- 3) The person intended to participate in the common plan, purpose or design and that the crime be committed.

***Joint Criminal Enterprise II* – Systemic Joint Criminal Enterprise**

- 1) There existed a common plan, purpose or design to commit a crime between a plurality of persons;
- 2) The crime involved a system of ill-treatment;
- 3) The person participated in the common plan, purpose or design involving the perpetration of the crime; and
- 4) The person had personal knowledge of the system of ill-treatment and the intent to further this system of ill-treatment.

***Joint Criminal Enterprise III* – Extended Joint Criminal Enterprise**

- 1) There existed a common plan, purpose or design to commit a crime between a plurality of persons;
- 2) The person participated in the common plan, purpose or design involving the perpetration of the crime;
- 3) The person intended to participate in the common plan, purpose or design and to further it; and
- 4) The person was aware that the crime was the foreseeable consequence of the common plan, purpose or design, and even with that awareness, continued to participate.

**Article 40 *Superior or Command Responsibility***

A person shall be criminally liable for an offence enumerated in Articles 1 through 35 committed by that person's subordinates where:

- 1) The person had effective control over the subordinates;

- 2) The person had reason to know, should have known, or consciously disregarded information which clearly indicated that the subordinates were about to commit such acts or had done so; and
- 3) The person failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators.

### Chapter III - Criminal Procedure Provisions

#### General Principles Of Criminal Law

##### Article 41 *Jurisdiction*

- 1) Courts of [State] shall have jurisdiction over offences and modes of liability enumerated in Articles 1 through 40 of this [Act] [Law], regardless of whether such a crime is alleged to have been committed in the territory of the State or abroad and irrespective of the nationality of the victim or accused, provided that such accused shall be within the territory of the State at the time of the commencement of the trial.
- 2) In exercising jurisdiction under this [Act] [Law], the courts shall accord priority to the court of the State in whose territory the crime is alleged to have been committed, provided that the State is genuinely willing and able to prosecute.

##### Article 42 *Principle of Non-Discrimination*

The application and interpretation of this [Act] [Law] must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender, sex, age, race, colour, language, disability, religion or belief, political or other opinion, national, ethnic or social origin, customary or societal communal roles, wealth, birth or other status.

##### Article 43 *Exclusion of Jurisdiction Over Children*

Courts of [State] shall have no jurisdiction over any person who was a child at the time of the alleged commission of an offense enumerated in Articles 1 through 35 of this [Act] [Law].

##### Article 44 *Principle of Legality*

- 1) Criminal offences and criminal sanctions shall be prescribed only by law.
- 2) No punishment or other criminal sanction may be imposed on any person for an act which, prior to being perpetrated, has not been defined as a criminal offence by national law or international law.
- 3) Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to customary international law.

##### Article 45 *No Prescription / Non-Applicability of Statutes of Limitations*

- 1) No [prescription] [statutes of limitations] shall be applied to the criminal offences enumerated in Articles 1 through 35 of this [Act] [Law] nor to any conduct which constitute acts of genocide, crimes against humanity, war crimes, or other criminal offences that, pursuant to international law, are not subject to the statute of limitations.
- 2) No time limits as to investigation or other procedural rules shall impede or prevent investigation, civil or criminal complaint, indictment, or prosecution of criminal offences identified in paragraph (1) of this article, except as strictly necessary to protect the rights of the accused.

##### Article 46 *No Defence by Necessity, Law, Order or Official Status*

- 1) No interest, no necessity of a political, military or national nature, can justify, even as a reprisal, the offences enumerated in Articles 1 through 35 of this [Act] [Law].
- 2) The fact that the accused has acted in accordance with domestic law does not absolve the accused of responsibility if, in the existing circumstances, the law could clearly lead to the commission of one of the offenses enumerated by this [Act] [Law].
- 3) The fact that an accused has acted in accordance with an order of a government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

- a. The person was under a legal obligation to obey orders of the government or the superior in question;
  - b. The person did not know that the order was unlawful; and
  - c. The order was not manifestly unlawful.
  - d. For the purposes of this paragraph, orders to commit genocide, crimes against humanity, or sexual violence as a war crime, are manifestly unlawful.
- 4) This [Act] [Law] applies to all equally, without any distinction based on official status. In particular, the official status of head of State or government, member of a government or parliament, elected representative or agent of a State, does not in any way exempt from criminal liability under this [Act] [Law], nor does it constitute, as such, a ground for reducing the sentence.

##### Article 47 *No Amnesty*

- 1) There shall be no amnesty or pardon offered for offences committed under this [Act] [Law].
- 2) [For jurisdictions in which an amnesty was previously granted] [Amnesty law] [Peace agreement], to the extent that it provides amnesty for offences codified in Articles 1 through 35, and in conformity with customary international law, is hereby revoked.

##### Article 48 *Foreign Official Immunity*

- 1) Immunity shall not apply in relation to the criminal offences enumerated in Articles 1 through 35 of this [Act] [Law].
- 2) Paragraph 1 shall not apply to persons who enjoy immunity *ratione personae* (official status) during their term of office, consistent with international law.
- 3) Paragraphs 1 and 2 are without prejudice to:
  - a. Any provision of a treaty that is binding on [State] and the State of the official, under which immunity would not be applicable;
  - b. The obligation to cooperate with an international tribunal which, in each case, requires compliance by [State].

#### Protection and Other Provisions Relating to Victims

##### Article 49 *Respect*

- 1) Victims shall be treated with respect and dignity, in accordance with the principles of Article 42.
- 2) Victims shall be treated in a respectful and sensitive manner throughout the legal proceedings, considering their personal situations and immediate special needs.

##### Article 50 *Information*

From the initiation of an investigation, [the prosecutor] [the police] [the pre-trial judge or investigative magistrate] [the responsible ministry] are responsible for ensuring that victims are informed of their rights:

- 1) To the protective measures available to them, in particular, the protection measures provided for in Article 55, and how to access them. Victims shall also be informed of any penalties incurred by the perpetrators of the violence and the conditions of execution of any possible convictions;
- 2) To be heard by investigators and other officials who are the same gender as the victim if the victim so requests;
- 3) To participate in the criminal proceedings in accordance with international or domestic law (as applicable);
- 4) To be assisted by a legal representative of their choice or who, at their request, is [appointed] [referred to them] by the State [free of charge] [the costs being at the expense of the victims unless they fulfil the conditions of access to legal aid, explicitly detailing those conditions, or if they benefit from legal protection insurance];
- 5) To be assisted by a service under one or more relevant public authorities or by an association that is a victim support organisation, which might be a non-governmental organisation;
- 6) To be provided with any information that may affect their personal security, such as the accused or offender's release from detention or imprisonment;
- 7) To be informed of the progress and results of the investigation of their case as well as the scheduling, progress and ultimate disposition of any proceedings;
- 8) To benefit from an interpreter and translation essential to their understanding of the proceedings in their entirety;
- 9) To have diplomatic and consular assistance, necessary visas and travel documents, and contact tracing to a victim's family upon request;

- 10) To be accompanied at their request, at all stages of the proceedings, by their legal representative and by a support person of their choice, unless otherwise decided by the competent judicial authority;
- 11) To declare as domicile the address of a third party, subject to the express agreement of that third party or otherwise to have the location of their domicile concealed;
- 12) To be provided with sexual and reproductive health services free of charge;
- 13) To obtain reparation, by compensation and/or by any other appropriate means, considering their personal circumstances and any special needs.

#### Article 51 *Language, professional support, and other special assistance measures*

- 1) The court shall ensure that all proceedings which are attended or observed by victims are conducted in language that is comprehensible to the victims.
- 2) If the victim needs the assistance of interpretation into a language that the victim understands, an interpreter shall be provided free of charge.
- 3) A victim shall have access to diplomatic and consular assistance, temporary entry or residence visas if necessary, and relevant travel documents. A victim may also request contact tracing to their family upon request.
- 4) A victim shall have access to the assistance of a professional psychologist throughout all the proceedings in which the victim participates, in particular throughout the time period during which the victim is providing testimony. Such assistance shall be provided free of charge. Rather than a professional psychologist, the victim may elect to be supported by another person specially trained to assist the victim throughout the justice process. Such support shall be provided free of charge.
- 5) If, in view of the victim's special individual needs, which may include but are not limited to age, disability, ethnicity, poverty, or risk of revictimisation and/or secondary victimisation, the victim requires special assistance measures in order to testify or participate in the justice process, such measures shall be provided free of charge.

#### Article 52 *Support Person*

- 1) In any proceedings against an accused in respect of an offence under this [Act/Law], the judge or competent magistrate may, on application of the prosecutor or victim representative, or on application of victim or witness, order that a support person of the victim or witness's choice be permitted to be present during any procedural phase of the justice process including in the courtroom while the victim or witness testifies, if it is not contrary to the interests of justice.
- 2) In determining whether to make an order under subsection 1), the judge or competent magistrate shall consider:
  - a. the age of the victim or witness;
  - b. the victim's or witness's mental or physical disabilities, if any;
  - c. the nature of the offence, including whether the victim or witness may face re-victimisation or secondary victimisation;
  - d. whether the victim or witness needs the order for their mental and physical security or to protect them from intimidation or retaliation or threat thereof;
  - e. the nature of any relationship or socially-imposed hierarchy – including customary or societal communal roles – between the victim or witness and the accused;
  - f. society's interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice process; and
  - g. any other factor that the judge or competent magistrate considers relevant.
- 3) In the case that the victim or witness contemplated under subsection 1) is a child or is incapable of giving genuine consent, the judge or competent magistrate shall order that a support person be permitted to be present and to be close to the victim or witness while the victim or witness testifies and be provided free of charge. Such support person will be selected by the victim or witness, subject to the court's reasonable management of the proceedings.
- 4) The judge or competent magistrate shall not permit a witness to be a support person unless the judge or competent magistrate is of the opinion that doing so is not contrary to the interests of justice.
- 5) The judge or competent magistrate may order that the support person and the witness not communicate with each other in any manner during the witness's testimony in court, and that they not communicate about the content of the witness's testimony throughout the duration of the presentation of the witness's evidence.
- 6) No adverse inference may be drawn from the fact that an order is, or is not, made under this section.

#### Article 53 *Legal Assistance*

- 1) Victims shall have the right to legal representation in the justice process, including the right to be accompanied by their legal representative at all stages of the proceedings.
- 2) Victims shall have the right to legal counsel of their choice.
- 3) Upon their request, victims shall be [referred to pro bono legal counsel] [assigned a legal representative] by the State to assist them throughout the justice process [free of charge] [once financial need has been demonstrated].

#### Article 54 *Training for Individuals Working with Victims and Witnesses of Conflict-Related Sexual Violence*

- 1) Individuals working with victims and witnesses of conflict-related sexual violence shall undergo appropriate professional training on issues related to conflict-related sexual violence. The training should cover the following:
  - a. Relevant human rights norms, standards and principles, including the rights of victims of gross violations of international human rights law and serious violations of international humanitarian law, and the rights contained in this [Act] [Law];
  - b. Principles and ethical duties related to the performance of their functions, including on the confidentiality of information;
  - c. Threat, risk and crisis assessment skills and techniques, with a particular emphasis on security of persons and information;
  - d. Particular skills relating to making referrals, with an emphasis placed on the need for confidentiality;
  - e. Gender issues and the impacts of structural gender inequalities as well as patterns of discrimination against victims and their communities;
  - f. The dynamics and nature of conflict-related sexual violence, its impact and consequences, including negative physical and psychological effects;
  - g. Special measures and techniques to assist victims and witnesses of conflict-related sexual violence in the justice process;
  - h. Information on cross-cultural linguistic, ethnic, religious, social and gender issues, with particular attention to persons from disadvantaged groups, and ensuring inclusion of victims who are men and boys;
  - i. Interview and assessment techniques that minimize distress or trauma to victims and witnesses while maximizing the quality of information received from them, including skills to deal with victims and witnesses in a sensitive, understanding, constructive and reassuring manner;
  - j. The proper and appropriate use of medico-legal and forensic evidence; and
  - k. Roles of, and methods used by, professionals working with victims and witnesses of conflict-related sexual violence
- 2) Individuals working with child victims and witnesses shall, in addition to training on issues related to victims and witnesses of conflict-related sexual violence, undergo appropriate professional training on issues related to child victims and witnesses.

#### Article 55 *Protective Measures*

- 1) All reasonably necessary measures must be used to avoid secondary victimisation.
- 2) All reasonably necessary measures shall be adopted for the well-being of victims to guarantee their personal and family security, both mental and physical, including protection against any action or exposure that could result in an undue attack on their privacy or security. Such measures must not be to the detriment of the rights of the accused or of a fair and impartial trial, nor will they be incompatible with them.
- 3) To guarantee the physical safety and mental well-being of victim and witness and/or their families, and in respect of their privacy, protective measures may be imposed by the [court] [pre-trial judge or competent magistrate] on application of the prosecutor or victim representative, or on application of victim or witness, or on the [court's] [pre-trial judge's or competent magistrate's] own motion, and at any time during the justice process. Such measures may include:
  - a. Measures to prevent interaction between a victim or witness and the accused or associates of the accused, including in-person meetings, phone calls, email, mail, text, social media, or any other form of communication;
  - b. Restraining orders from a competent court, supported by a restraining and protective order registry system;
  - c. Orders to place the accused in pretrial detention, with conditions that take into account the safety risks and situation of vulnerability of victims, including "no contact" bail conditions;
  - d. An order of house arrest only if the house is not shared by a victim, a victim's relative (including their children), or a witness;

- e. Protection for a victim or witness by the police or other relevant agencies and safeguarding the whereabouts of the victim or witness from disclosure;
- f. Other protective measures from competent authorities that may be deemed appropriate.

- 4) Protective measures may be imposed by the [court] [pre-trial judge or competent magistrate] *lex officio* or on *ex parte* application of the prosecutor, victim, or victim representative for the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture as restitution or reparations, without prejudice to the rights of bona fide third parties.

A breach of any protective measure ordered by the court shall be punishable by a term of imprisonment or other sanction consistent with the nature of the crime committed in breach thereof, and with the scale and gravity of the harm caused to victims, witnesses or other persons.

#### Article 56 Principles of Evidence in Cases of Sexual Violence

In cases of conflict-related sexual violence, the court shall be guided by and, where appropriate, apply the following principles:

- a. No corroboration of the victim's testimony shall be required;
- b. Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent;
- c. Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent;
- d. Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence;
- e. Credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred from the prior or subsequent conduct of a victim or witness;
- f. No adverse inference may be drawn solely from a delay of any length between the alleged commission of an offence under this [Act] [Law] and the reporting thereof.

#### Article 57 In Camera Consideration of Relevance or Admissibility of Evidence

- 1) Where there is nonetheless a motion to introduce or elicit, including by means of the questioning of a victim or witness, evidence that the victim consented to an alleged crime of sexual violence, notification shall be provided to the court in closed session which shall describe the substance of the evidence intended to be introduced or elicited and the relevance of the evidence to the issues in the case.
- 2) In deciding whether the evidence referred to in subsection 1) is admissible, a court shall hear in camera the views of the prosecutor, the defence, and the victim representative, if any, as well as the witness or victim if he or she so requests or if the court requires, and shall take into account whether that evidence has a sufficient degree of probative value to an issue in the case and the prejudice that such evidence may cause. For this purpose, the court shall be guided by principles within Articles 42, 49, and 56 especially with respect to the proposed questioning of a victim.
- 3) Where the court determines that the evidence referred to in subsection 2) is admissible in the proceedings, the court shall state on the record the specific purpose for which the evidence is admissible. In evaluating the evidence during the proceedings, the court shall apply Articles 42, 49, and 56.

#### Article 58 Modes of Victim Participation

- 1) **Victim.** Whether they choose to exercise them or not, in addition to the rights recited in this [Act] [Law], victims retain the following rights:
  - a. **Notice of a Proceeding.** The [the prosecutor] [the police] [the judicial authorities] [or other appropriate government ministry or mechanism] must use best efforts to give the victim reasonable, accurate, and timely notice of any public court proceeding involving the crime.
  - b. **Attending the Proceeding.** Victims and their legal representatives should be allowed to attend all public court proceedings in person, or, where this would not be practicable given a large number of victims, security, or other

considerations, the court shall take all reasonable efforts to ensure that victims are capable of attending public hearings remotely. In the event that the court must exclude a victim who is also a witness from a public court proceeding involving the crime, the court must first determine by clear and convincing evidence that the victim or witness's testimony would be materially altered if the victim heard other testimony at that proceeding. In determining whether to exclude a victim, the court must make every effort to permit the fullest attendance possible by the victim and must consider reasonable alternatives to exclusion. The reasons for any exclusion must be clearly stated on the record.

- c. **Time for Deciding a Motion.** The court must promptly decide any motion asserting a victim's rights described in these rules.
- d. **Right to Be Heard on Release, Plea, or Sentencing.** The court must permit a victim to be reasonably heard at any public proceeding concerning release, plea, pardon, sentencing, commutation of sentence involving the crime.

#### *[Option for systems adopting or revising additional forms of victim participation]*

- 2) **Victim participant.** Victims may elect to participate formally in the proceedings by applying for victim participant status according to [State] law. A victim participant shall be accorded all the rights of victims recited in this Article as well as those rights enumerated in [State] law. In addition, victim participants retain the following rights [consistent with [State] law]:

- a. **Initiation of Proceedings.** The [State] retains the obligation to investigate and prosecute the offences and modes of liability enumerated by Articles 1 through 40 of this [Act] [Law]; however, a victim participant may initiate proceedings by filing a [civil] [criminal] complaint in accordance with [State] law.

#### *[Option for systems where prosecutors are responsible for responding to complaints]*

If the State prosecutor refuses to pursue a victim-initiated proceeding, the victim participant may file an appeal with the [court] [pre-trial judge] [competent magistrate].

- b. **Status.** A victim whose applications for status to participate are denied by the [court] [pre-trial judge] [investigative magistrate] may request reconsideration and, if denied, may appeal to a higher court. Should the basis of such status conferred cease to be operative while the judicial process continues, a victim participant will retain such status if the [court] [pre-trial judge] [competent magistrate] finds that retaining such status is not contrary to the interest of justice.
- c. **Access to the Investigative and Judicial File.** Victim participants and their legal representatives shall be entitled to inspect, copy or photograph records and physical evidence available to the court or to the prosecutor, unless there is a sound probability that the inspection, copying or photocopying may endanger the purpose of the investigation or the lives or health of people or would considerably delay the proceedings, or the victim participant has already been examined as a witness. If the State prosecutor refuses the inspection of the files, the victim participant may file an appeal with the [court] [pre-trial judge] [competent magistrate]. The decision of the [court] [pre-trial judge] [competent magistrate] is final.
- d. **Suggestion of Investigative Steps.** Victim participants or their lawyers may suggest investigative steps, formally or informally, [to the prosecution] [to the court] [to the competent magistrate].
- e. **Proposal of Witnesses.** Victim participants or their lawyers may propose witnesses, formally or informally, [to the prosecution] [to the court] [to the competent magistrate].
- f. **Examination of Witnesses.** Victim participants or their lawyers may call witnesses and examine [and cross examine] witnesses at trial, subject to the court's reasonable management of the proceedings.
- g. **Introduction of Documentary or Physical Evidence.** Victim participants or their lawyers may introduce documents or physical evidence at trial, subject to the court's reasonable management of the proceedings.
- h. **Opening Statements.** Victim participants or their lawyers may submit opening statements [orally or in writing] at the beginning of trial, subject to the court's reasonable management of the proceedings.
- i. **Closing [Statement] [Argument].** Victim participants or their lawyers may submit closing [statements] [arguments] [orally or in writing] at the close of trial, subject to the court's reasonable management of the proceedings.

#### *[Option for systems where criminal courts have jurisdiction in civil claims]*

- j. **Claim Reparation.** Victim participants who have personally suffered injury or damage caused by the crime at issue may bring a claim for reparations.

- 3) **Multiple Victims.** If the court finds that the number of victims and victim participants makes it impracticable to accord all of them their rights described in these rules, the court must design a reasonable, gender-sensitive procedure that gives effect to these rights without unduly complicating or prolonging the proceedings and in accordance with Article 42. To safeguard the rights of the victim participants to choose their own legal representation and to avoid any conflict of interest in legal representation, the court may:
- Request that victims or particular groups of victims choose a common legal representative or representatives to provide common representation to multiple victims;
  - Request that victim representatives limit the number of submissions and interventions where possible through joint positions; or
  - Issue other case management orders and directives consistent with the rights of the accused and the victim participants.

#### Article 59 *Investigation*

Investigations of any crime articulated in Articles 1 through 35 of this [Act] [Law] shall be conducted in accordance with the following principles:

- All investigations are conducted by professionals trained in accordance with Article 54, or with the assistance of investigators who have received this training.
- Investigations shall be conducted in a prompt and professional manner consistent with Articles 42 and 49.
- Professionals engaged in the investigation process will ensure that the victim has given informed consent to investigative steps that could affect them, such as being interviewed, photographed, or examined, before proceeding with such investigative steps.
- The victim's security and private information will be protected, including in accordance with Article 55.

#### Article 60 *Protective Measures for Investigative Interviews*

In view of the victim's special individual needs, the authority conducting an investigative interview of the victim shall apply the following specific protective measures:

- Each interview of the victim takes place in premises designed or adapted to their situation;
- For each interview, the victim may choose to be accompanied by the victim's legal representative and/or guardian or a support person;
- If the victim so requests, the victim is heard by investigators of the same gender as the victim.
- Unless it is impossible or the victim requests an alternative, the victim is heard at each interview by the same investigators;
- The victim is heard by investigators specially trained in offences under this [Act] [Law] or with the assistance of investigators who have received this training;

#### Article 61 *Closed Sessions*

In court proceedings which would normally be public, the court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the court, having regard to all the circumstances, particularly the views of the victim or witness.

#### Article 62 *Protective Measures at Trial*

- Taking into consideration that violations of the privacy of witnesses or victims may create risk to their mental and physical security, the court shall be vigilant in controlling the manner of questioning a witness or victim so as to avoid any harassment or intimidation, paying particular attention to attacks on victims of crimes of sexual violence.
- At the request of a victim or witness or their legal representative, or the prosecutor, or on its own motion, the court may order one or more of the following measures to protect the privacy and physical and mental well-being of the victim or witness and

to prevent undue distress and secondary victimisation:

- Excluding or expunging from the public record any names, addresses, workplaces, professions or other evidence or information that could be used to identify the victim or witness;
- Forbidding the parties from revealing the identity of the victim or witness or disclosing material or information that would tend to identify the victim or witness;
- Ordering the delayed disclosure to the accused of any records that identify the victim or witness, until such time as the court may find appropriate in consideration of the rights of the accused;
- Assigning a pseudonym or a number to a victim or witness, in which case the full name and date of birth of the victim shall be revealed to the accused within a reasonable period for the preparation of their defence;
- Efforts to conceal from the public the features or physical description of the victim or witness giving testimony or to prevent distress or harm to the victim or witness, including testifying:
  - Behind an opaque shield;
  - Using image- or voice-altering devices;
  - Through examination in another place, transmitted simultaneously to the courtroom by means of a closed-circuit television; and/or
  - By way of videotaped examination of the victim or witness prior to the hearing, in which case the counsel for the accused shall attend the examination and be given the opportunity to examine the victim or witness;
- Holding closed sessions consistent with Article 61;
- Appointing a support person consistent with Article 52;
- Designating a victim observation room, from which victims can observe the proceedings in a setting which ensures their privacy and protection and where they can be provided with support services and follow the proceedings. A victim observation room should have a separate entrance and access to separate sanitary facilities so that there is no interaction possible between the victims and the accused or associates of the accused; or
- Taking any other measure that the court may deem necessary, taking into account the best interests of the victim and the rights of the accused.

#### *Option for Common Law and Hybrid System countries*

- [Preventing a situation in which an accused cross-examines the witness, consistent with Article 63.]

#### Article 63 *No Cross Examination by the Accused*

- In any proceedings in respect of an offence involving conflict-related sexual violence, with due regard for the rights of the accused, the judge or competent magistrate shall, on application of the prosecutor or victim representative, or on application of victim or witness, order that the accused not personally cross-examine the victim or witness. If the order is made, the judge or competent magistrate shall appoint counsel, if necessary, and instruct counsel to conduct the cross examination. Such cross examination may be undertaken by the defence lawyer under the supervision of the judge or competent magistrate, who will have the duty to prevent the asking of any question that may expose the victim to intimidation, hardship, or undue distress.
- In the case that the victim or witness contemplated under subsection 1) is a child or is incapable of giving genuine consent, the judge or competent magistrate shall not allow the accused to personally cross examine the victim or witness. If such an order is made, the judge or competent magistrate shall appoint counsel to conduct the cross examination. Such cross examination may be undertaken by the defence lawyer under the supervision of the judge or competent magistrate, who will have the duty to prevent the asking of any question that may expose the victim to intimidation, hardship, or undue distress.

Article 64 *Victim Impact Statement*

- 1) The court shall give the victim the opportunity to make a verbal statement at the court session. [After the victim has made such statement, the court may pose further questions about the statement to the victim. Further questions from the prosecutor and the defendant shall be posed through the presiding judge in the court's discretion.]
- 2) If more than one of the surviving relatives of a deceased victim wish to make a verbal statement at the court session and they fail to agree among themselves which of them will address the court, the court shall decide which of them it will hear.

*[Option if a state victim fund exists:]*Article 65 *Victim Fund*

- 1) The court shall inform a victim and their legal representative of the procedures for claiming compensation along with any eligibility requirements.
- 2) No victim shall be denied compensation solely on the basis of nationality or any discriminatory ground identified in Article 42.

Article 66 *Reparations*

- 1) In accordance with [State] and international law, and taking account of individual circumstances, victims of any crime articulated in Articles 1 through 40 should, as appropriate and proportional to the gravity of the violation and in the circumstances of each case, be provided with full and effective reparation in the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Where reparations are provided, their payments shall be taken in priority to any fines that may be levied.

*[Option 1. Common law countries]*

- 2) Upon conviction of the accused and in addition to any other measure imposed on such accused, the court may, at the request of the prosecutor, the victim, the victim's legal representative, or on its own motion, order reparations of the victim in accordance with this Article./

*[Option 2. Countries where criminal courts have no jurisdiction in civil claims]*

- 2) After delivering the verdict, the court shall order reparations of the victim in accordance with paragraphs 4), 6), 7), and 8) of this Article, where appropriate, and shall inform the victim and the victim's legal representative of the right to additional reparations in accordance with paragraph 5) of this Article./

*[Option 3. Countries where criminal courts have jurisdiction in civil claims]*

- 2) The court shall order full reparations to the victim, where appropriate, and inform the victim of the possibility of seeking assistance for enforcement of the reparation order./
- 3) *Costs.* The convicted offender should bear the costs of reparations to the victim for the harm suffered and may be ordered to reimburse [State or State designated fund] for costs already incurred in providing reparations to the victim. Where appropriate, the court may provide for additional reparations to be funded by [State or State designated fund].
- 4) *Restitution* should, whenever possible, restore the victim to the original situation before the crime occurred. Restitution includes, as appropriate: enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.
- 5) *Compensation* should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from the crime or crimes, such as:
  - a. Physical or mental harm;
  - b. Lost opportunities, including employment, education and social benefits;
  - c. Material damages and loss of earnings, including loss of earning potential;
  - d. Any other inchoate damage; and/or
  - e. Costs required for legal or expert assistance, medicine and medical services, psychological and social services, and physical protection and security.

- 6) *Rehabilitation* should include medical and psychological care as well as legal and social services, including social and education reintegration. Rehabilitation also includes access to sexual and reproductive health services.

- 7) *Satisfaction* should include, where applicable, any or all of the following:
  - a. Effective measures aimed at the cessation of continuing violations or providing the victim with ongoing security;
  - b. Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations;
  - c. Search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or cultural practices of the affected families and communities;
  - d. An official declaration or a judicial decision affirming the victim as a fully autonomous and equal member of the community, restoring the reputation and the rights of the victim and of persons closely connected with the victim;
  - e. Public apology, including acknowledgement of the facts and acceptance of responsibility;
  - f. Commemorations and tributes to the victims; and/or
  - g. Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.

- 8) *Assurance of non-repetition* should include, where applicable, any or all of the following measures, insofar as it is within the purview of the court to order such measures which will also contribute to prevention including:
  - a. Effective measures supporting the advancement of security sector reform;
  - b. Effective measures aimed at assuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality;
  - c. Effective measures aimed at protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders;
  - d. Effective measures aimed at providing relevant education or training to responsible sectors of society, which may include law enforcement officials and military and security forces;
  - e. Effective measures aimed at promoting the observance of codes of conduct and ethical norms, in particular international standards, by economic enterprises or public servants such as law enforcement, correctional, media, medical, psychological, social service and military personnel;
  - f. Effective measures aimed at preventing and monitoring social conflicts;
  - g. Effective measures to institute a State policy to combat conflict-related sexual violence, including the capacity and resources to prevent, investigate and prosecute such acts;
  - h. Effective measures to further victim's participation, and particularly those of women and girls, and persons with diverse sexual orientations, gender identities or gender expressions, in all areas of post-conflict building and post-conflict governance processes, including through the introduction of temporary special measures;
  - i. Effective measures aimed at reforming institutions and practices contributing to or allowing for the commission of the crime or crimes; and/or
  - j. Any other measure the court deems appropriate to ensure the non-repetition of conflict-related sexual violence.

Article 67 *Information on the outcome of the trial*

- 1) The court shall ensure that the victim is informed of the outcome of the trial.
- 2) The court shall inform the victim and the victim's legal representative of existing procedures for the granting of early release to the offender and of the victim's right to express their views in that regard.

**Model Legislative  
Provisions and Guidance  
on Investigation and  
Prosecution of  
Conflict-Related Sexual  
Violence**

# Part II

## Legislative Guidance and Commentary on the Model Legislative Provisions on Conflict-Related Sexual Violence



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### Introduction to the Legislative Guidance And Commentary On The Model Legislative Provisions On Conflict-Related Sexual Violence

In its Resolution 1325 (2000) on Women Peace and Security adopted 31 October 2000, the United Nations Security Council first addressed the disproportionate and unique impact of armed conflict on women. It also stressed the importance of women's equal and full participation as active agents in peace and security. The Security Council's subsequent implementing resolutions 1820 (2008), 1888 (2009), 1889 (2009), 1960 (2010), 2106 (2013), 2122 (2013), 2242 (2015), 2331 (2016), 2388 (2017), 2467 (2019), and 2493 (2019), recognised sexual violence as a weapon and tactic of war or terror; noted that sexual violence can constitute a war crime, crime against humanity, or a constitutive act with respect to genocide; reiterated that sexual violence exacerbates armed conflict and impedes international peace and security; included language on women's participation in combating sexual violence; supported recourse to avenues of justice; recognised the need to address root causes of armed conflict and security risks faced by women; called for the provision of multisectoral services for women affected by conflict; highlighted the importance of collaboration with civil society; recognized that sexual violence in conflict occurs on a continuum of violence against women and girls; recognized the need for a survivor-centred approach; encouraged member states to respect the rights and prioritise the needs of survivors, including vulnerable or targeted groups; affirmed that services should include provisions for women with children born as a result of sexual violence in conflict as well as men and boys; and urged member states to strengthen access to justice for victims including via reparations and strengthened criminal law, including removing procedural impediments to justice and implementing robust mechanisms for the identification of victims so as to provide them with protection and assistance.

The *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* adopted by the UN General Assembly in its resolution 60/147 of 16 December 2005 (the 'Guidelines') also form part of the body of the United Nations standards and norms in criminal justice, which are internationally recognized normative principles in that area as developed by the international community since the end of World War II. The Guidelines provide for several obligations of States with respect to such victims. These include, broadly, an obligation to implement the State's relevant human rights and other international commitments; an obligation to treat victims with respect and dignity, with care for security and psychological wellbeing; an obligation to provide victims with adequate, effective, prompt reparation for the harms suffered; an obligation to provide victims with equal and effective access to justice; and an obligation to inform victims concerning the truth about violations and the availability of reparations mechanisms.

The present Legislative Guidance has been designed to provide a better understanding of certain Model Legislative Provisions and to assist in their incorporation into domestic law. The Legislative Guidance contains references to laws, jurisprudence and international norms as well as explanations and examples related to the various articles of the Model Legislative Provisions.

As an initial matter, the Model Legislative Provisions centre on the principle that every survivor of conflict-related sexual violence has the right to have their best interests given primary consideration, while safeguarding the rights of accused persons and convicted offenders. The best interest of the survivors and victims includes the ability to make their own informed choices wherever possible throughout the justice process.

Because there are different legal systems with different drafting traditions, the Model Legislative Provisions include some optional articles and provisions in order to accommodate such differences. In addition, because many States have ratified or acceded to relevant human

rights treaties or the Rome Statute and may have already introduced domestic legislation dealing with gross violations of international human rights law or serious violations of international humanitarian law, crimes against humanity or genocide, or in any case require that domestic legislation be consistent with the state's international commitments, the present Legislative Guidance indicates where relevant provisions incorporate the requirements of relevant international instruments and where the suggested provisions build on them to better serve the victims. Domestic legislators may wish to refer to these instruments explicitly in their legislation to assure that the state's obligation has been satisfied.

### On the Preamble

Although, as noted in the Introduction, the Model Legislative Provisions are based on the UN Security Council's Resolutions on Women Peace and Security (1325 et seq) and the General Assembly's Guidelines, there are many additional relevant sources in international law to which national legislators could refer. These include, in addition to those treaties and international instruments referred to in the commentaries below, *inter alia*:

*Convention on the Elimination of all Forms of Discrimination Against Women* (adopted on 18 December 1979, entered into force on 3 December 1981).

*Council of Europe Convention on preventing and combating violence against women and domestic violence ("Istanbul Convention")* (adopted on 11 May 2011, entered into force on 1 August 2014).

*Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women ("Convention of Belem do Para")* (adopted on 9 June 1994, entered into force on 5 March 1995).

*Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ("Maputo Protocol")* (adopted on 11 July 2003, entered into force on 25 November 2005).

*Beijing Platform for Action* (adopted 4-15 September 1995 at the Fourth World Conference on Women).

*Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (adopted on 29 November 1985 by General Assembly resolution 40/34).

*Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation* (adopted 19-21 March 2007 at the International Meeting on Women's and Girls' Right to a Remedy and Reparation held in Nairobi).

*Vienna Declaration and Programme of Action* (adopted on 25 June 1993 by the World Conference on Human Rights in Vienna).

CEDAW General Recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations, CEDAW/C/GC/30, 18 October 2013.

CEDAW General recommendation No. 33 on Women's access to justice, CEDAW/C/GC/33, 23 July 2015.

CEDAW General Recommendation No. 35 on gender-based violence against women, updating General Recommendation No. 19, CEDAW/C/GC/35, 14 July 2017.

The primary responsibility of the Security Council under the UN Charter is the maintenance of promotion and protection of all human rights, and its Resolutions on Women Peace and Security reflect but one aspect of that mandate. Similarly, the Model Legislative Provisions should be incorporated or integrated as appropriate into existing or pending legislation on international crimes as one among many tools to promote human rights within a legal system.

Justice practitioners litigating and adjudicating conflict-related sexual violence crimes – just as justice for other serious international crimes – are encouraged to consider each individual case to have the potential to be emblematic and representative of other cases that cannot be brought due to myriad obstacles. National justice practitioners are therefore encouraged to do what is within their power to spread the transformative impact well beyond the confines of the direct parties in one particular case.

### On Chapter I Definitions

#### *Child or Children*

This article is in accordance with article 1 of the Convention of the Rights of the Child (adopted on 20 November 1989, entered into force on 2 September 1990).

#### *Conduct*

The concept of conduct includes both acts and omissions. All the model criminal provisions target illegal conduct, whether it is by active participation or by omission to fulfill a duty. Thus the range of responsibility is covered by this concept.

#### *Conduct of a sexual nature*

This definition is drawn from the ICC's Policy Paper on Sexual and Gender-Based Crimes, which was issued in June 2014.

#### *Conflict-related sexual violence*

The present definition of 'conflict-related sexual violence' is included in the Report of the Secretary-General on Conflict-Related Sexual Violence (S/2020/487, 3 June 2020). The term refers to:

rape, sexual slavery, forced prostitution, forced pregnancy, forced abortion, enforced sterilization, forced marriage, and any other form of sexual violence of comparable gravity perpetrated against women, men, girls or boys that is directly or indirectly linked to a conflict. This link may be evident in the profile of the perpetrator, who is often affiliated with a State or non-State armed group, which includes terrorist entities or networks; the profile of the victim, who is frequently an actual or perceived member of a persecuted political, ethnic or religious minority, or targeted on the basis of actual or perceived sexual orientation or gender identity; the climate of impunity, which is generally associated with State collapse; cross-border consequences, such as displacement or trafficking; and/or violations of the provisions of a ceasefire agreement. The term also encompasses trafficking in persons for the purpose of sexual violence and/or exploitation, when committed in situations of conflict.

The definition of "conflict-related sexual violence" is also drawn in part from the 2014 OHCHR Publication on *Sexual and Gender-based Violence in the context of Transitional Justice* and in part from UN Special Rapporteur McDougall, *Contemporary Forms of Slavery: Systematic rape, sexual slavery and slavery-like practices during armed conflict*, final report (New York: United Nations, 22 June 1998), E/CN.4/Sub.2/1998/13, 7-8. See also World Health Organisation definition of sexual violence, "any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed, against a person's sexuality using coercion, by any person regardless of their relationship to the victim, in any setting, including but not limited to home and work." [https://www.who.int/violence\\_injury\\_prevention/violence/global\\_campaign/en/chap6.pdf](https://www.who.int/violence_injury_prevention/violence/global_campaign/en/chap6.pdf)

See also *The Civil Society Declaration on Sexual Violence*, prepared through extensive global consultation with survivors, and published by the Women's Initiatives for Gender Justice, in an effort to convey the views of survivors as to what constitutes 'sexual' violence. <https://4genderjustice.org/wp-content/uploads/2019/11/The-Hague-Principles-on-Sexual-Violence.pdf>

The definition is also taken from the *UN Analytical and Conceptual Framing of Conflict-related Sexual Violence, June 2011* and from the *Guidance Note of the Secretary General on Reparations for Conflict Related Sexual Violence of June 2014*.

The term is not strictly speaking a legal term, and is a term of art that has developed to mean more than only sexual violence which is committed in the context of or associated with armed conflict (i.e., war crimes, or international humanitarian law violations.) The term is expansive and includes sexual violence committed outside of armed conflict including in the context of political repression and crimes against humanity. It is important to emphasize that all forms of conflict-related sexual violence also constitute violations of the bodily integrity and sexual autonomy of victims of such acts.

According to the International Protocol on Documentation and Investigation of Sexual Violence in Conflict, Second Edition, "Sexual violence has been referred to as 'the most immediate and dangerous type of gender-based violence occurring in acute emergencies. Gender-based violence (GBV) is described as 'any harmful act that is perpetrated against a person's will and that is based on socially ascribed (i.e., gender) differences between males and females. It includes acts that inflict physical, sexual or mental harm or suffering, threats of such acts, coercion, and other deprivations of liberty.' While all forms of sexual violence can generally be considered to be acts of GBV, not all forms of GBV are sexual in nature." [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/598335/International\\_Protocol\\_2017\\_2nd\\_Edition.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/598335/International_Protocol_2017_2nd_Edition.pdf)

### Gender

The definition of "gender" is drawn from *Gender Mainstreaming: Strategy for Promoting Gender Equality*, UN Office of the Special Advisor on Gender Issues and the Advancement of Women ("SAGIAW"), rev. August 2001. The last line of the SAGIAW's definition is "Other important criteria for socio-cultural analysis include class, race, poverty level, ethnic group and age," which was altered slightly.

### Gender Expression

The definition derives from the OHCHR publication *Born Equal and Free: Sexual Orientation, Gender Identity, and Sex Characteristics in International Human Rights Law* (2d Edition 2019).

### Gender Identity

The definition derives from the OHCHR publication *Born Equal and Free: Sexual Orientation, Gender Identity, and Sex Characteristics in International Human Rights Law* (2d Edition 2019). This definition provides that a person's gender identity may or may not align with the sex they were assigned at birth. Such assignment is usually based on a "person's physical characteristics relating to sex, including genitalia and other reproductive anatomy, chromosomes and hormones, and secondary physical characteristics emerging from puberty." *Id.* Not all people are born with sex characteristics that neatly align with the two predominant categories. "Intersex people are born with physical sex characteristics that do not fit the normative definitions for male or female bodies. For some intersex people, these are apparent at birth, while for others they emerge later in life, often at puberty. Intersex persons may have any sexual orientation and gender identity." *Id.* While there are no crimes enumerated in the Model Legislative Provisions with explicit reference to a victim's physical sex characteristics, all people with all sex characteristics, gender identities, gender expressions, and sexual orientations are protected by these provisions, including intersex people.

### Person

The Rome Statute does not recognize corporate criminal liability. By including "legal person" in the definition of person, the Model Legislative Provisions definition anticipates possible prosecution of international crimes committed by legal persons such as corporations and organisations. See Corporate Criminal Liability, *infra*.

### Sexual Orientation

The definition derives from the Yogyakarta Principles; the law of the Government of Canada; and the OHCHR publication *Born Equal and Free: Sexual Orientation, Gender Identity, and Sex Characteristics in International Human Rights Law* (2d Edition 2019).

### Victim

Although these Model Legislative Provisions are meant primarily to serve victims of conflict-related sexual violence, many such victims may prefer not to be identified as such, preferring to identify for example as survivors or survivors of other crimes other than sexual violence (such as "torture survivors"). The provisions of this law are meant to protect such victims regardless of whether they publicly acknowledge the sexual elements of their abuse and acknowledging their right to choose the terminology which describes their experiences. This definition, it should be noted, is consistent with a victim being deceased. Depending on the legal system, an immediate family member or an estate representative may represent a deceased victim in litigation.

The term "victim" also includes immediate family or others who have intervened to assist victims. Thus, in some terminology, "victim" includes both "direct" and "indirect" victims.

Immediate family members are defined to include foster parents, children, stepparents, legal guardians, or other immediate caregivers in appropriate circumstances. Every effort should be made to include and recognize members of the victim's immediate family as the victim understands it. This may, for example, include same-sex parents who are not granted legal status as parents under local law or it may include grandparents who act effectively as the victim's parents. It should not be interpreted to include anyone with a relationship to a victim, however.

The definition of "victim" is based on the Guidelines, paras. 8 and 9, and the *UN Guidance Note of the Secretary-General: Reparations for Conflict-Related Sexual Violence*, June 2014, p. 8.

### Secondary victimisation

The definition of "secondary victimisation" has been drawn from the *Handbook on Justice for Victims: on the Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* developed by UNODC in 1999. The UN General

Assembly used the same definition in the updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice, adopted by resolution 65/228 of 20 December 2010.

### Revictimisation

The definition of "revictimisation" draws on the definition contained in Council of Europe *Recommendation Rec (2006) 8 of the Committee of Ministers to member States on assistance to crime victims*, 14 June 2006, 4. Point 1.2. of the appendix to recommendation 8.

### Justice Process

It should be noted that the obligation of law enforcement to prevent and protect against, and to investigate, any alleged acts of sexual violence crimes (or indeed any other crime) does not rely upon a victim making a formal complaint or reporting. Just as law enforcement continuously ensures the maintenance of law and order and protects the community from acts of terrorism or violent extremism even without a complaint, not waiting for an incident to occur before their law enforcement obligations are triggered by a complaint filed by a victim, so with any criminal acts including those involving sexual violence.

### Note on Compliance With the Rome Statute

The Rome Statute of the International Criminal Court (ICC) established the first permanent international criminal court with jurisdiction over the core international crimes. This permanent court is governed by the principle of complementarity, meaning it will only accept jurisdiction over an investigation or prosecution of core international crimes where the national court with primary jurisdiction is "unwilling or unable genuinely to carry out the investigation or prosecution." Rome Statute of the ICC, Article 17. See also *id.* at Preamble para. 10; Articles 18, 19. A State's willingness and ability to investigate and prosecute core international crimes may be demonstrated at least in part by adoption of legislation allowing for the same.

The Rome Statute of the ICC does not obligate States Parties to incorporate *stricto sensu* the core crimes of the Rome Statute and its Elements of Crimes. States Parties may implement the core crimes in their legislation as they see fit. At least three approaches to legislative implementation have been noted: First, States may prosecute international crimes in accordance with existing domestic legislation. This approach has shortcomings but may be feasible depending on the content of domestic law and on domestic legal culture. Second, States may incorporate crimes identical to the ICC Elements of Crimes. This approach has the advantage of certainty that the State's obligations are being fulfilled, at least in respect of legislation, but the disadvantage that imprecisions or compromises resulting from negotiations in which the State has no clear investment may be imported into the national code. Such provisions may also lack clarity as to their connection to domestic legislation and become out of date as customary international law advances. Third, States may adopt a more dynamic approach, providing a stronger connection to existing criminal offences in domestic law, clarifying Rome Statute concepts, and adopting developments in customary international law. See generally Joseph Rikhof, "Fewer Places to Hide? The Impact of Domestic War Crimes Prosecutions on International Impunity", in Morten Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes*, Torkel Opsahl Academic EPublisher (Oslo 2010). The Model Provisions tend to favor the third of these approaches, while bearing in mind the advantages of the second.

While these Model Legislative Provisions are offered only with respect to conflict-related sexual violence crimes or crimes which could be predicated on facts involving conflict-related sexual violence, all the model provisions are believed to comply with State obligations under the Rome Statute, whose corresponding provisions are noted within Legislative Guidance and Commentary below.

## On Chapter II Criminal Code Provisions

### War Crimes

#### Note on Armed Conflict

"Armed conflict" may refer to both international and non-international armed conflict. The distinction between international and non-international armed conflict is usually not relevant in regard to the prosecution of conflict-related sexual violence, which is absolutely prohibited in both contexts.

The International Committee of the Red Cross ("ICRC") defines international and non-international armed conflict as follows:

1. International armed conflicts exist whenever there is resort to armed force between two or more States.

2. Non-international armed conflicts are protracted armed confrontations occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State (party to the Geneva Conventions). The armed confrontation must reach a minimum level of intensity and the parties involved in the conflict must show a minimum of organisation.

*Opinion Paper: How is the Term "Armed Conflict" Defined in International Humanitarian Law?*, (ICRC, March 2008), available at <https://www.icrc.org/en/doc/assets/files/other/opinion-paper-armed-conflict.pdf>.

The model provisions follow the trend towards affording war crimes the same coverage regardless of whether committed in non-international or international conflicts. A helpful analysis including examples of States which have already adopted legislation consistent with this trend is incorporated into the Case Matrix Network, Implementing the Rome Statute of the International Criminal Court, CMN ICJ Toolkits (Centre for International Law Research and Policy, September 2017), at 43-44, available at <https://www.legal-tools.org/doc/e05157/pdf/>. Of note in this analysis in particular are the codes of Bosnia and Herzegovina, Serbia, Montenegro, Croatia, and the Former Yugoslav Republic of Macedonia, which all essentially make reference to "rules of international law in times of war, armed conflict or occupation," which are applied in the contexts of international or non-international armed conflicts. See *id.* at 44 (quoting the Criminal Code of Bosnia Herzegovina).

#### Article 1 Sexual Violence as a War Crime

The codification of "sexual violence" with gravity factors was a deliberate decision intended to bring justice in a manner which acknowledges the vast range of sexual violence harms experienced by victims. In codifying this provision, it is intended to "promote" the Rome Statute's residual provision "any other form of sexual violence" (Article 8(2)(b)(xxii) and 8(2)(e)(vi) for war crimes and Article 7(1)(g) for crimes against humanity) as a criminal act that could be charged as such, and/or charged as one of the particularised crimes set out below in the provisions. The Model Legislative Provisions also sought to ensure justice for sexual violence crimes in a manner which does not oblige a victim of sexual violence to prove penetration. While the crime of rape as sexual violence is also codified, well established as an international crime of sexual violence, the Model Legislative Provisions sought also to tailor the law to the reality of the experiences of the victims. For example, victims who have sought justice for sexual violence crimes have often had to endure secondary victimisation (such as vaginal examinations or even so-called "virginity" tests or degrading questioning in court) to prove penetration, thus removing the focus on the perpetrator of the physical violence, and shifting the focus onto the victim and the manner in which penetration is being proved. It is clear that victims often face insurmountable obstacles to obtaining justice, in particular a justice which empowers rather than sacrifices them. Sexual violence is a form of violent physical harm, and the gravity factor which has previously depended upon the victim's evidence of a physical invasion or penetration has not been consistent with the gravity of the harm faced by survivors of sexual violence. In other words, the harm caused by sexual violence is not necessarily more or less severe with or without penetration. Charging sexual violence with a list of potential gravity or aggravating factors – separate from rape as sexual violence – provides a broader range of options for adjudication of harms in accordance with the experiences of the victims.

With respect to the element of coercion for sexual violence and aggravated sexual violence, the Model Legislative Provisions have placed the coercion element first, and the sexual violence element second. The aim of this was to place primary emphasis on the violent attack, rather than its sexual nature. The evolution of gender justice has faced obstacles such as the setting aside of sexual violence as not-foreseeable or collateral to what is viewed by many as the "main" crimes of violence. Sexual violence is a form of serious physical violence, and placing the coercion element first emphasises this aspect of the crime. Legislators are encouraged to codify a presumption of non-consent where sexual violence takes place in circumstances which satisfy the contextual elements of international crimes. Such a presumption would result in evidence of consent being admissible only in exceptional circumstances.

The violence described by this element can be aggravated by the factors listed as aggravating factors for the stand-alone crime of sexual violence. This can increase the penalty for civil law jurisdictions and can aggravate the sentence in common law jurisdictions. It can also be considered as a factor for determinations on reparations and damages for victims.

There is no requirement of proving that the victims had a protected status under the Geneva Conventions, or were hors de combat, or were civilians, medical personnel, or religious personnel, taking no active part in the hostilities. As explained by the Trial Chamber in *Ntaganda*:

While international humanitarian law allows combatants to participate directly in hostilities, and as part of this participation, to target combatant members of the opposing forces as well as civilians directly participating in hostilities, and further provides for certain justifications for conduct that results in damage to property or the death of persons that may not be legitimately targeted, there is never a justification to engage in sexual violence against any person; irrespective of whether or not this person may be liable to be targeted and killed under international humanitarian law.

Trial Chamber IV, *The Prosecutor v. Bosco Ntaganda*, Second decision on the defense's challenge to jurisdiction of the Court in respect of Counts 6 and 9.

The language of this provisions is drawn largely the Fourth Geneva Convention, Article 27; Additional Protocol I, article 76-77; Additional Protocol II, article 4; Rome Statute: War crime of rape: Article 8 (2) (b) (xxii)-1, Article 8 (2) (e) (vi)-1, War crime of sexual violence: Article 8 (2) (b) (xxii)-6, Article 8 (2) (e) (vi)-6 and Rule 93 of Customary International Law. See also *The Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Judgement, 2 September 1998, para. 598. CIL: Rule 93 and Handbook for Legislation on Violence Against Women, The Division for the Advancement of Women in the Department of Economic and Social Affairs, United Nations, 2010 and the laws of Canada and Norway.

#### Article 2 Rape as Sexual Violence as a War Crime

It is firmly established in customary and statutory international criminal law as well as in the jurisprudence that rape committed in armed conflict constitutes a war crime. This provision is placed here to ensure it is clear that rape is but one form of sexual violence, and to discourage practitioners from inadvertently reinforcing a "hierarchy" of sexual violence harms. For those victims who choose to have their harms adjudicated as rape, this provision is included consistent with international law.

See *The Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Judgement, 2 September 1998, paras. 687 and 688:

The Tribunal considers that rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts. The Tribunal also notes the cultural sensitivities involved in public discussion of intimate matters and recalls the painful reluctance and inability of witnesses to disclose graphic anatomical details of sexual violence they endured. The United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment does not catalogue specific acts in its definition of torture, focusing rather on the conceptual framework of state-sanctioned violence. The Tribunal finds this approach more useful in the context of international law. Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person...

The Tribunal defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. 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. 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. The Tribunal notes in this context that coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence of Interahamwe among refugee Tutsi women at the bureau communal...

#### Article 3 Aggravated Sexual Violence as a War Crime

The language of this provisions is largely drawn from the Fourth Geneva Convention, Article 27; Additional Protocol I, article 76-77; Additional Protocol II, Article 4; Rome Statute: War crime of rape: Article 8 (2) (b) (xxii)-1, Article 8 (2) (e) (vi)-1, War crime of sexual violence: Article 8 (2) (b) (xxii)-6, Article 8 (2) (e) (vi)-6. See also *The Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Judgement, 2 September 1998, para. 598; ICRC Customary International Humanitarian Law Rule 93; the *Handbook for Legislation on Violence Against Women, The Division for the Advancement of Women* (UN DESA 2010); and the national legislation of Canada and Norway.

Article 3(3)(d) children born as a result of aggravated sexual violence require protection from discrimination, especially in accessing

resources, identification documents and social services such as education and health care, and have a right to receive reparations as a category of war victims, as per State practice in Colombia, for example. See Security Council resolution 2467 (2019) operative para. 18. (Article 3)(3) Aggravated Sexual Violence as a War Crime: the and/or indicates that one of these factors is sufficient, but more than one may be present. Penalties can be increased accordingly depending upon how many gravity factors are present. Article 3(3)(h) Killing and sexual violence resulting in death can be prosecuted as separate offences, if the jurisdiction so permits.

A charge of (aggravated) sexual violence does not preclude a charge of torture stemming from the same act, if the jurisdiction so permits. For the crime of torture, the element of severe mental or physical pain or suffering must also be proven.

#### Note on Sexual Violence as a Method of Warfare as a War Crime

During the drafting of the Model Legislative Provisions, consideration was given to adding a provision entitled "Sexual Assault as a Method of Warfare as a War crime".

Sexual violence committed during armed conflict is often characterised as a "weapon of war" or as a "tactic of war" or "method of war" as sexual violence may be used to weaken the enemy or terrorize the enemy's civilian population. The last decades have witnessed numerous situations in which sexual violence has been used in a systematic manner against a civilian population as part of a military strategy. Under the international humanitarian law weapons framework, there is no specific definition unanimously accepted for the terms "weapon or method" and the phrase is interchangeably used with the expression "means and methods of warfare". P.J. Cameron, *The Limitations on Methods and Means of Warfare (1980) 9 Aust. YBIL 252*.

An analysis of different definitions adopted at the national and international levels reveals the existence of two common elements in the understanding of the notion: "weapon" refers to (i) an object, material, instrument, mechanism, device or substance that is used to (ii) kill, injure, damage, threaten or destroy. Gloria Gaggioli, *Sexual violence in armed conflicts: A violation of international humanitarian law and human rights law, International Review of the Red Cross (2014), 96 (894), 503–538*.

The term "method of warfare" typically refers to the manner in which weapons are used in the course of hostilities or as any particular strategic or tactical way to conduct hostilities. The lawfulness of a method of warfare depends on its indiscriminate nature and on whether it causes superfluous injury or unnecessary suffering. Because sexual violence always causes superfluous injury and unnecessary suffering, under international humanitarian law, it is also always prohibited.

Because all sexual violence is already forbidden in armed conflict, the provision "Sexual Violence as a Method of Warfare as a War crime" was ultimately not included in the Model Legislative Provisions. However, it is widely recognized that sexual violence is used as tactic or method of warfare, and governments and practitioners are encouraged to explore this legal framework as a possible applicable legal framework for accountability for conflict-related sexual violence. The Security Council, through its Resolution 2106 (2013) recognizes that "sexual violence can be used or commissioned as a method or tactic of war". Resolution 1820 also recognizes that "sexual violence, when used or commissioned as a tactic of war in order to deliberately target civilians or as a part of a widespread or systematic attack against civilian populations, can significantly exacerbate situations of armed conflict and may impede the restoration of international peace and security." Moreover, the Beijing Declaration and Platform for Action also recognizes that "parties to conflict often rape women with impunity, sometimes using systematic rape as a tactic of war and terrorism. [...] (para. 135).

#### Article 4 Enforced Pregnancy as a War Crime

The Model Legislative Provisions use the term "enforced" for several criminal provisions. In the context of crimes of conflict-related sexual violence, definition of consent has long moved away from obliging the victim to demonstrate that individual did not agree or demonstrate that act was committed by force – moving instead toward demonstrating the circumstances of coercion, detention, duress, etc., obviate consent. The Model Legislative Provisions simply recognize this trend and are drafted to ensure robust protection for victims.

The language of this provision is drawn largely from the ICC Elements of Crimes: War crime of forced pregnancy: Article 8 (2) (b) (xxii)-4 and Article 8 (2) (e) (vi)-4; and from *Prosecutor v. Dominic Ongwen*, Decision on the confirmation of charges against Dominic Ongwen, Pre-trial Chamber, Pre-trial Chamber, ICC-02/04-01/15-422-Red, 23 March 2016, para. 99 and ss.

#### Article 5 Enforced Impregnation as a War Crime

This provision stems from the Elements of the War Crime of Forced Pregnancy in the ICC Elements of Crimes (Article 8 (2) (b) (xxii)-4 and Article 8 (2) (e) (vi)-4). However, it was considered that the act of sexual violence with the intent of impregnation was not reflected in the provision of forced pregnancy in the Rome Statute, hence the importance of adding it the Model Legislative Provisions. Victims have often expressed their surprise at there being no provision which explicitly criminalises sexual violence which is aimed at resulting in pregnancy, in particular when it does in fact so result. As the crime of forced pregnancy in the ICC Elements of Crimes focuses on the actus reus of "confining", the Model Legislative Provisions incorporate this additional criminal provision to bring a remedy to victims and survivors who have suffered this harm even in the absence of – or indeed in addition to – confinement.

#### Article 6 Enforced Sterilisation as a War Crime

This provision expands beyond the equivalent provision of the ICC Elements of Crimes to criminalise "significantly altering" the victim's biological reproductive capacity.

The language of this provisions is drawn from the ICC Elements of Crimes: War crime of enforced sterilisation: Article 8 (2) (b) (xxii)-5, Article 8 (2) (e) (vi)-5.

#### Article 7 Enforced Contraception as a War Crime

This provision is intended to address situations where, for example, a civilian population is administered contraceptives while in detention, against their will and wishes, to impact upon their ability to reproduce, or, as another example, to avoid pregnancy resulting from patterns of sexual violence with a view toward concealing evidence of a pattern of sexual violence.

#### Article 8 Enforced Abortion as a War Crime

This act could also constitute mutilation of a pregnant person by removal of the placenta in a manner not justified by medical necessity, without the explicit and genuine consent of the person.

#### Article 9 Torture as a War Crime

The elements of torture as a war crime set out in Article 8 of the Rome Statute include a provision requiring a showing that the victim was a protected person; however, such a showing is not required for torture where it is charged in relation to an act of sexual violence. This is why the article excludes elements relating to protected persons when the conduct involves sexual violence.

The prohibited purpose requirement also need not apply to sexual violence amounting to torture, since no legitimate purpose could exist to justify conduct of a sexual nature causing severe physical or mental injury in the context of war.

The language of this provision is drawn from the Geneva Conventions, common Article 3, First Geneva Convention, Article 12, Second Geneva Convention, Article 12, Third Geneva Convention, Article 17, Article 87, and Article 89, Fourth Geneva Convention, Article 32, Additional Protocol I, Article 75(2) and Additional Protocol II article 4(2), Customary International Law, Rule 90, ICC Elements of Crimes: War crime of torture: Article 8 (2) (a) (ii)-1 and Article 8 (2) (c) (i)-4.

See also *The Prosecutor v. Ntaganda*, Judgment on the appeal of Mr. Ntaganda against the "Second decision on the defence's challenge to jurisdiction of the Court in respect of Counts 6 and 9", ICC-01/04-02/06-1962 at para. 65 (5 June 2017) (finding that "there is never a justification to engage in sexual violence against any person; irrespective of whether or not this person may be liable to be targeted and killed under international humanitarian law.") (quoting the Trial Chamber's Impugned Decision at para. 49).

See also comment to Article 26 below.

#### Article 10 Mutilation as a War Crime

The language of this provision is taken in part from the ICC's Elements of Crimes, referencing the ICC Elements of Crimes Article 8 (2) (b) (x)-1. Note that the ICC's Elements of Crimes set out that a person is guilty of mutilation if "The person 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.” This language was incorporated to ensure that no victim of mutilation is denied justice pursuant to this provision even where they have been mutilated in a manner which does not – under the court’s understanding – “disfigure” the victim, nor does it remove an organ or appendage. For example, severely violent acts of sexual violence could lead to internal mutilation of the victim, which does not disfigure the victim externally, and which also does not cause the victim to lose an organ. It would, however, constitute mutilation. The language of the mutilation provision in this legislative guidance ensures that such an act would satisfy the elements of mutilation.

The ICC’s Elements of Crimes also notes with respect to the crime of mutilation that:

Consent is not a defence to this crime. The crime prohibits any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the party conducting the procedure and who are in no way deprived of liberty.

The ICC’s Elements of Crimes requires that the victim be “in the power of the adverse party” for crimes of mutilation committed in the course of international armed conflicts. Such action would also be prohibited when applied to civilians or others “hors de combat” in the course of non-international armed conflicts. In the case of sexual violence, no such proof is required.

Mutilation can be committed through sexual conduct or non-sexual conduct.

Mutilation could also constitute torture.

The Model Legislative Provisions have separated out the crime of mutilation from the crime of committing criminal medical experiments; however, it is understood that IHL prohibits criminal medical experiments.

ICRC Customary International Humanitarian Law Rule 92 provides that “Rule 92. Mutilation, medical or scientific experiments or any other medical procedure not indicated by the state of health of the person concerned and not consistent with generally accepted medical standards are prohibited.” It sets out the following in relation to mutilation as a war crime:

“The prohibition of mutilation was already recognized in the Lieber Code. [Lieber Code, Article 56 (cited in Vol. II, Ch. 32, 1423)] Common Article 3 of the Geneva Conventions prohibits “mutilation” of civilians and persons hors de combat. [Geneva Conventions, common Article 3 (*ibid.*, § 1407)]. Mutilation is also prohibited by specific provisions of the Third and Fourth Geneva Conventions. [Third Geneva Convention, Article 13 (*ibid.*, § 1410); Fourth Geneva Convention, Article 32 (*ibid.*, § 1412)]. In addition, the prohibition of mutilation is recognized as a fundamental guarantee for civilians and persons hors de combat by Additional Protocols I and II. [Additional Protocol I, Article 75(2) (adopted by consensus) (*ibid.*, § 1418)]. Mutilation constitutes a war crime in both international and non-international armed conflicts under the Statute of the International Criminal Court. [ICC Statute, Article 8(2)(b)(x) and (e)(xi) (*ibid.*, § 1421)]. It is also recognized as a war crime in non-international armed conflicts under the Statutes of the International Criminal Tribunal for Rwanda and of the Special Court for Sierra Leone. [ICTR Statute, Article 4(a) (*ibid.*, §1427); Statute of the Special Court for Sierra Leone, Article 3 (*ibid.*, § 1422)].”

#### Article 11 Terror as a War Crime

The criminalisation of the war crime of terror can be found in the Statutes of the ICTR and the SCSL, although it is undefined there. The ICTY Statute and the Rome Statute do not include the crime of terror as a war crime.

The language for this provision is drawn from Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War. Fourth Geneva Convention, Article 33; Additional Protocol I, article 51(2); Additional Protocol II, articles 4(2)d) and 13(2); Security Council Resolution 1566 (S/RES/1566 (2004)). *See also* International Convention on the Suppression of the Financing of Terrorism (New York: 1999) Article 2(b); Article 421-1 of the French Penal code. *But see The Prosecutor v. Stanislav Galić*, Case No. 98-29/A, Appeals Chamber, Judgement, 30 November 2006, para. 104; *The Prosecutor v. Dragomir Milošević*, Case No. 98-29/A, Appeals Chamber, Judgement, 12 November 2009, para. 37.

Although terror as such is not defined in its statute, the ICTY has produced jurisprudence regarding this crime, such as in *The Prosecutor v. Brdanin*. Rapes of Bosnian Muslim and Bosnian Croat women occurred in various BiH municipalities. In each incident, armed Bosnian Serb soldiers or policemen were the perpetrators. Paramilitaries created an “atmosphere of fear and terror amongst the non-Serb inhabitants of the Bosnian Krajina by committing crimes against Bosnian Muslims and Bosnian Croats and their property including rape, murder, plunder and the destruction of property.” (IT-99-36-T, Judgement, 1 Sept 2004 (Brdanin trial judgment), paras. 14-15, 17, 97, 104, 115, 318, 490, 512-513, 515-518, 523, 737, 755, 761, 820, 824, 832, 835, 847, 852, 856, 1010, 1010-1013, 1018, 1050, 1058, 1061, and Disposition; and *The Prosecutor v. Brdanin*, IT-99-36-A, Judgement, 3 Apr 2007 (Brdanin appeal judgment), para. 256.) *See also The Prosecutor v. Krajišnik*, Paramilitary groups and members of the local MUP (ministry of internal affairs) forces “engaged in criminal activities on a massive scale. Muslim residents as well as some Serbs were terrorized by these groups through [...] rapes [...]” (IT-00-39-T, Judgement, 27 Sept 2006 (Krajišnik trial judgment), paras. 291, 304, 306, 309, 327, 333, 372, 461, 463, 487, 490, 493, 499, 545, 547, 550, 576, 600, 606, 637-641, 652, 656, 665, 667, 679, 685, 696, 701, 745, 789, 800, 804, 859, 965, 966, 972, 1105, 1146-1146, 1150, 1181-1182.) The court held that “based on the totality of the evidence, it is clear that murder, torture, rape, beatings and other forms of physical and mental violence were strategically and systematically committed against non-Serbs in Omarska. Most of these atrocities appear to have been committed with a premeditated intent to create an atmosphere of violence and terror and to persecute those imprisoned.” (*The Prosecutor v. Kvočka* and 3 others, IT-98-30/1-T, Judgement, 2 Nov 2001 (Kvočka trial judgment), paras. 98-109, 114, 119-122, 182-183, 197, 229, 232-234, 327, 415, 547-549, 551-561, 572-573, 727, 579, Disposition; and *The Prosecutor vs Kvočka* and 3 others, IT-98-30/1-A, Judgement, 28 Feb 2005 (Kvočka appeal judgment), paras. 6, 329-334, 402, 407, and Disposition).

*See also* RUF Appeal Judgment, Special Court for Sierra Leone, paras. 1103-4, affirming the Trial Chamber Judgement finding that sexual slavery and forced marriage “were committed with the specific intent to spread terror and therefore constituted acts of terrorism.” RUF Trial Judgment, para. 1493

This crime is included here to remind practitioners that acts of sexual violence which are committed with the intent to cause terror could also be prosecuted as terror as a war crime or crime against humanity. For systems which permit cumulative charging, both crimes can be charged based upon the same conduct. For systems which do not, either can be charged with the other conduct increasing the gravity of the crime, resulting in higher penalties.

Particular attention is called to para. 135 of the 1995 Beijing Declaration and Platform for Action, which states the following: “While entire communities suffer the consequences of armed conflict and terrorism, women and girls are particularly affected because of their status in society and their sex. Parties to conflict often rape women with impunity, sometimes using systematic rape as a tactic of war and terrorism. The impact of violence against women and violation of the human rights of women in such situations is experienced by women of all ages, who suffer displacement, loss of home and property, loss or involuntary disappearance of close relatives, poverty and family separation and disintegration, and who are victims of acts of murder, terrorism, torture, involuntary disappearance, sexual slavery, rape, sexual abuse and forced pregnancy in situations of armed conflict, especially as a result of policies of ethnic cleansing and other new and emerging forms of violence. This is compounded by the life-long social, economic and psychologically traumatic consequences of armed conflict and foreign occupation and alien domination.”

*Note also* Security Council Resolution 2331 (2016) which stresses in operative para. 8:

that acts of trafficking in persons in armed conflict and sexual and gender-based violence in conflict, including when it is associated to trafficking in persons in armed conflict, can be part of the strategic objectives and ideology of, and used as a tactic by certain terrorist groups, by, inter alia, incentivizing recruitment; supporting financing through the sale, trade and trafficking of women, girls and boys; destroying, punishing, subjugating, or controlling communities; displacing populations from strategically important zones; extracting information for intelligence purposes from male and female detainees; advancing ideology which includes the suppression of women’s rights and the use of religious justification to codify and institutionalize sexual slavery and exert control over women’s reproduction; and therefore encourages all relevant actors at the national, regional and international level to ensure that such considerations are taken into account, in accordance with their obligations under international law and national laws [.]

*See also* the definition of conflict-related sexual violence above.

States considering legislative amendments or codification may want to consider in this regard the following *Legislative Guide on Incorporation of Anti-Terrorism Instruments*, available at [http://www.unodc.org/documents/terrorism/Publications/Guide\\_Legislative\\_Incorporation\\_Implementation/English.pdf](http://www.unodc.org/documents/terrorism/Publications/Guide_Legislative_Incorporation_Implementation/English.pdf). *See also* <https://www.securitycouncilreport.org/un-documents/terrorism/>.

### Note on Slavery as a War Crime

The crimes of enslavement, sexual slavery, trafficking in persons, and enforced marriage are included as forms of slavery. Note that the Extraordinary African Chambers (EAC) in the Habré case observed that sexual slavery constitutes part of the *actus reus* of enslavement as crime against humanity and of slavery as a war crime. This analysis considers sexual slavery as a form of slavery rather than a separate crime reflecting a form of “modern” slavery. Considering that “sexual slavery” comprises an *actus reus* or indicator of slavery, scholars suggest that sexual violence and sexual integrity harms ought to be re-folded into the conceptualisation of all forms of slavery as an international crime. See Patricia Viseur Sellers & Jocelyn Getgen Kestenbaum, “Sexual Slavery and Customary International Law” in *Prosecuting the President: the Trial of Hissène Habré* (Sharon Weill et al. eds., 2020 Forthcoming), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3516905](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3516905).

Trafficking, sexual slavery, and enforced marriage/imposition of conjugal status – as with forced labour and other non-sexual conduct – all constitute *indicia* or *actus reus* of enslavement. Such is reflected in the articles that follow, all of which set out forms of of enslavement which involve sexual violence.

#### Article 12 Enslavement as a War Crime

See Note on Slavery as a War Crime just before this Article.

Enslavement is the overarching crime of slavery.

The language of this provisions is drawn from the Geneva Conventions Additional Protocol II, article 4(2)(f), the Convention to Suppress the Slave Trade and Slavery of 1926; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956 and ICRC Rule 94 of Customary International Humanitarian Law.

This provision is consistent with the national codes of several States, who have broadly defined the category of persons to be protected by IHL. See Case Matrix Network, Implementing the Rome Statute of the International Criminal Court, CMN ICJ Toolkits (Centre for International Law Research and Policy, September 2017), at 43-44, available at <https://www.legal-tools.org/doc/e05157/pdf/>

See also *The Prosecutor v. Bosco Ntaganda*, Trial Chamber IV, Judgment, 8 July 2019, stating:

There is no exhaustive list of situations or circumstances which reflect the exercise of a power of ownership. In determining whether the perpetrator exercised such a power, the Chamber must take into account various factors, such as control of the victim's movement, the nature of the physical environment, psychological control, measures taken to prevent or deter escape, use of force or threats of use of force or other forms of physical or mental coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality, forced labour, and the victim's vulnerability. The exercise of the right of ownership over someone need not entail a commercial transaction. Imposition of ‘similar deprivation of liberty’ may take various forms; it may cover situations in which the victims may not have been physically confined, but were otherwise unable to leave as they would have nowhere else to go and fear for their lives.

#### Article 13 Slave Trade as a War Crime

The language of this provision is drawn from the Convention to Suppress the Slave Trade and Slavery of 1926. See also ILO Convention Concerning Forced or Compulsory Labour, 1930 (No.29); ILO Convention concerning the Abolition of Forced Labour of 1957 (No. 105); and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956.

The slave trade prohibition has been recognized as a peremptory norm, a crime under customary international law and humanitarian law. See e.g., Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Article 4(2)(f); Rule 94 of the ICRC Database on Rules of Customary International Humanitarian Law, available at [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule94](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule94). However, the crime of slave trade has never been prosecuted by any international tribunal, nor has it been included in the Rome Statute. This model legislative provision seeks to fill this legislative and accountability gap.

The crime of slave trade has fallen into disuse as an international crime ever since its inclusion in the widely adopted 1926 Slavery Convention. See Patricia Viseur Sellers and Jocelyn Getgen Kestenbaum, “Missing in Action: The International Crime of Slave Trade,” *Journal of International Criminal Justice* (2020). The crime of slave trade as an international crime entails the facts preceding enslavement, such as abductions, captures, kidnappings, or exchanges, i.e. conduct that is precursory to the enslavement itself. Penalization of the slave trade condemns perpetrators who acquire and intend to reduce persons into slavery, or who further exchange or transport a person already enslaved to other slavery situations. The slave trade, unlike sexual slavery, does not require the exercise of any or all of the powers attached to the rights of ownership over persons. See *id*. Moreover, the crime of the slave trade does not require proof of coercive circumstances, nor does consent provide a defense. Charging the crime of slave trade as a war crime (or a crime against humanity) entails an *actus reus* of committing various acts that would reduce a person into slavery or further enslave a person already enslaved (see *id*. at 17), as per the types of conduct enumerated in this article.

See Note on Slavery as a War Crime just before Article 12.

#### Article 14 Trafficking in Persons for the Purpose of Sexual Violence and/or Exploitation as a Form of Enslavement as a War Crime

See Note on Slavery as a War Crime just before Article 12.

Trafficking is included in the Rome Statute as a footnote to Article 7(1)(c) as part of enslavement.

This provision – and indeed other provisions in the code – could also apply to circumstances of “sexual abuse and exploitation” where the contextual elements are satisfied.

The language of this provisions comes from the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

See also Security Council Resolution 2331 (S/RES/2331 (2016)), which:

1. Condemns in the strongest terms all instances of trafficking in persons in areas affected by armed conflicts, and stresses that trafficking in persons undermines the rule of law and contributes to other forms of transnational organized crime, which can exacerbate conflict and foster insecurity and instability and undermine development; [.]

8. Stresses that acts of trafficking in persons in armed conflict and sexual and gender-based violence in conflict, including when it is associated to trafficking in persons in armed conflict, can be part of the strategic objectives and ideology of, and used as a tactic by certain terrorist groups, by, inter alia, incentivizing recruitment; supporting financing through the sale, trade and trafficking of women, girls and boys; destroying, punishing, subjugating, or controlling communities; displacing populations from strategically important zones; extracting information for intelligence purposes from male and female detainees; advancing ideology which includes the suppression of women's rights and the use of religious justification to codify and institutionalize sexual slavery and exert control over women's reproduction; and therefore encourages all relevant actors at the national, regional and international level to ensure that such considerations are taken into account, in accordance with their obligations under international law and national laws; [and] [.]

12. Expresses its intention to consider targeted sanctions for individuals and entities involved in trafficking in persons in areas affected by armed conflict and in sexual violence in conflict, and encourages information exchange and other appropriate forms of cooperation between relevant United Nations entities, including the Special Representative on Sexual Violence in Conflict and the Special Representative on Children in Armed Conflict, within their respective mandates, regarding initiatives and strategies to curb trafficking in persons in the context of armed conflict.

#### Article 15 Sexual Slavery as a Form of Enslavement as a War Crime

See Note on Slavery as a War Crime just before Article 12.

The language of this provisions is drawn from the ICC Elements of Crimes: Article 8 (2) (b) (xxii)-2, Article 8 (2) (e) (vi)-2 and the following jurisprudence:

*Ministère Public c. Hissène Habré*, Extraordinary African Chambers, Judgement, 30 May 2016, paras. 1482 and 1483.

*The Prosecutor v. Kunarac, Kovac, Vukovic*, n° IT-96-23-T/1-T TPIR, Trial Chamber, Judgement, 22 February 2001, para. 530 and ss.

*The Prosecutor v. Alex Tamba Brima*, Brima Bazzy Kamara et Santigie Borbor Kanu, Trial Chamber II, SCSL-04-16-T, Judgement, 20 June 2007, para. 708.

#### Article 16 *Enforced Marriage/Enforced Imposition of conjugal status as a form of Enslavement as a War Crime*

See note to article 4 regarding the use of the word 'enforced.'

The underlying principles of this provisions are also drawn from the national legislation of Switzerland, Luxembourg, Australia and the following jurisprudence:

*The Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-A, Appeal Judgement, 26 October 2009, para. 736.

*The Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara et Santigie Borbor Kanu*, Appeal Chamber, SCSL-04-16-T, 22 February 2008, para 196.

*The Prosecutor v. Dominic Ongwen*, Decision on the confirmation of charges against Dominic Ongwen, Pre-trial Chamber, Pre-trial Chamber, ICC-02/04-01/15-422-Red, 23 March 2016.

Case 002, Judgement, Trial Chamber, No. 002/19-09-2007/ECCC/TC, 16 November 2018, p. 1863 and ss.

See Note on Slavery as a War Crime just before Article 12.

### Crimes Against Humanity

These Model Legislative Provisions include selected acts which involve or may involve conflict-related sexual violence crimes, including acts not specifically criminalised in the Rome Statute. Many States have not limited the acts that would constitute crimes against humanity to those in the Rome Statute, instead including crimes against humanity taken from customary international law. See Case Matrix Network, *Implementing the Rome Statute of the International Criminal Court*, CMN ICJ Toolkits (Centre for International Law Research and Policy, September 2017), at 43-44, available at <https://www.legal-tools.org/doc/e05157/pdf/> (last accessed 20 November 2019). For example, Kenyan law defines crimes against humanity to include 'an act defined as crimes against humanity in conventional international law or customary international law that is not otherwise dealt with in the ICC Statute or in the Act.' Kenyan International Crimes Act 2008, 24 December 2008, Section 6(4). See also the Samoan International Criminal Court Act 2007, 9 November 2007, Article 6. ('For the purposes of this section, "crime against humanity" is an act specified in Article 7 of the Statute and includes any other act which, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law or conventional international law or by virtue of it being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.')

#### Article 17 *Sexual Violence as a Crime Against Humanity*

See comments to Article 1.

#### Article 18 *Rape as Sexual Violence as a Crime Against Humanity*

See comments to Article 2.

#### Article 19 *Aggravated Sexual Violence as a Crime Against Humanity*

See comments to Article 3.

#### Article 20 *Enforced Pregnancy as a Crime Against Humanity*

See comments to Article 4.

The language of this provisions is based on the ICC Elements of Crimes: Crime against humanity of forced pregnancy, Article 7 (1) (g)-4.

#### Article 21 *Enforced Impregnation as a Crime Against Humanity*

See comments to Article 5.

#### Article 22 *Enforced Sterilisation as a Crime Against Humanity*

See comments to Article 6.

The language of this provisions is based on the ICC Elements of Crimes: Crime against humanity of enforced sterilization, Article 7 (1) (g)-5.

#### Article 23 *Enforced Contraception as a Crime Against Humanity*

See comments to Article 7.

#### Article 24 *Enforced Abortion as a Crime Against Humanity*

See comments to Article 8.

#### Article 25 *Mutilation as a Crime Against Humanity*

The language of this provision is taken in part from the ICC's Elements of Crimes, referencing the ICC Elements of Crimes Article 8 (2) (b) (x)-1 referencing the war crime of mutilation. That document goes on to note:

Consent is not a defence to this crime. The crime prohibits any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the party conducting the procedure and who are in no way deprived of liberty. Note that the Rome Statute does not include the crime of mutilation as a crime against humanity.

See comments to Article 10.

#### Article 26 *Torture as a Crime Against Humanity*

Torture as a war crime requires proof, inter alia, of a prohibited purpose such as 'obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind', as set out in the elements of Torture as a War Crime (Article 9). Torture as a crime against humanity, however, has no separate 'prohibited purpose' requirement. Because all crimes against humanity involve a knowing attack against a civilian population, all crimes against humanity are already committed with a prohibited purpose. Thus, a prohibited purpose need not be separately demonstrated.

Some States have codified a stand-alone crime of torture, for example, in accordance with obligations under the Convention Against Torture or customary international law on human rights, apart from the framework of international crimes. The language of this provision is based on the ICC Elements of Crimes: Crime against humanity of torture, Article 7 (1) (f).

#### Article 27 *Persecution as a Crime Against Humanity*

Persecution can be charged where any crime against humanity is committed with a discriminatory intent based on identity, such as those set out in the elements of this crime.

**Article 28 Other Inhumane Acts as a Crime Against Humanity**

Other Inhumane acts is a residual clause included here as in the Rome Statute to ensure that acts of similar gravity which meet the contextual elements can be prosecuted as crimes against humanity even in the absence of a sufficiently specific enumerated crime. States who decide not to codify all the enumerated crimes herein have the option of prosecuting that conduct under this category of other inhumane acts.

**Article 29 Terror as a Crime Against Humanity**

Where any of the conduct enumerated in these Model Legislative Provisions, or conduct of a similar nature and gravity, is committed with the purpose to intimidate a population, and where the conduct with this intent is committed as part of a widespread or systematic attack on a civilian population, such would constitute terror as a crime against humanity.

See comment to Article 11.

**Article 30 Enslavement as a Crime Against Humanity**

See comment to Article 12.

**Article 31 Slave Trade as a crime against humanity**

See comment to Article 13.

**Article 32 Trafficking in Persons for the Purpose of Sexual Violence and/or Exploitation as a form of Enslavement as a Crime Against Humanity**

See comment to Article 14.

**Article 33 Sexual Slavery as a form of Enslavement as a Crime Against Humanity**

See comment to Article 15.

**Article 34 Enforced Marriage/Enforced Imposition of conjugal status as a form of Enslavement as a Crime Against Humanity**

See comment to Article 16.

**Genocide****Article 35 Genocide**

Sexual violence, including rape, can be a constituent act of genocide. It should be noted that the Malabo Protocol incorporates rape or other forms of sexual violence as a separately enumerated act of genocide. See also *The Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, 2 September 1998 (holding that rape and other acts of sexual violence satisfy the factual elements of genocide).

Most of the language of this provision comes from the Convention on the Prevention and Punishment of the Crime of Genocide ('Genocide Convention'), and the Criminal Codes of France and Burkina Faso.

The first draft of the Genocide Convention defined protected groups as racial, national, linguistic, religious and political groups. (Article I, Draft Convention on the Crime of Genocide, Economic and Social Council, 26 June 1947). By including 'racial, national, linguistic, religious or political groups of human beings', the draft Convention was designed to provide the widest possible protection for all such groups. After the negotiation leading to the adoption of the Convention on the Prevention and Punishment of the Crime in Genocide, the definition of protected groups was reduced to national, ethnical, racial or religious groups.

There is precedent for considering the addition of 'tribal' groups to the list of protected groups to conform with customary international law as found, for example, by the International Tribunal for Rwanda. See *The Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, 2 September 1998; *The Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, Judgment, 21 May 2000. See also Report of the International Commission of Inquiry on Darfur to the Secretary-General (S/2005/60), paras. 508-12.

Some jurisdictions have also added 'political' groups to the list of protected groups. Although not protected explicitly under the Genocide Convention, 'political groups' have been explicitly protected in national legislation in at least twelve countries in their domestic genocide statutes: Bangladesh, Cambodia, Colombia, Costa Rica, Côte d'Ivoire, Ecuador, Ethiopia, Lithuania, Panama, Poland, Switzerland and Slovenia. David L. Nersessian, *Genocide and Political Groups* 112 (2010); William A. Schabas, *Genocide in International Law* (2nd ed. 2009). See also Beth Van Schaack, *The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot* (May 1997). In this regard:

Most international law supports the current definition of genocide and excludes political groups. Legal actions involving Spain, Argentina, and Guatemala, however, interpreted the definition of genocide differently [..]. The courts in these cases [..] illustrate a frustration with current accepted standards [..]. Rather than allow courts to struggle with the current restrictive definition of genocide, the international community should expand the definition to include political groups.

Howard Shneider, *Political Genocide in Latin America: The Need for Reconsidering the Current Internationally Accepted Definition of Genocide in Light of Spanish and Latin American Jurisprudence*, 25 *American University International Law Review* 312 (2010), available at <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1071&context=auilr>.

See *id.* at 328, describing the *Scilingo Case* before the Spanish National Appellate Court, SAN [Spanish National Appellate Court], Sala de lo Penal [Criminal Chamber], Nov. 4, 1998 (No. 84/98) 'Caso Scilingo' [Scilingo Case] (No. 84/98) at 'Fundamentos de Derecho: Quinto' (finding that atrocities committed in Argentina's Dirty War amounted to genocide because the category 'national group' should be extended to include groups targeted by the State because they were perceived to be opposed to the government's goals). An additional ten countries' penal codes recognize a 'broad form' idea of groups based on 'any arbitrary criterion': Belarus, Burkina Faso, Canada, DR Congo, Estonia, Finland, France, Latvia, Peru, and Romania. David L. Nersessian, *Genocide and Political Groups* 112 (2010). This is in keeping with the decision of the Trial Chamber in *Akayesu*, which opined that 'it is particularly important to respect the intention of the drafters of the Genocide Convention, which according to the travaux préparatoires, was patently to ensure the protection of any stable and permanent group.' *The Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, 2 September 1998, para. 515.

**Penalties****Article 36 Penal Sanctions (Civil Law) or Aggravating Circumstances (Common Law) (Gravity Factors)**

Among the penal sanctions or aggravating circumstances or gravity factors, legislators will find: A person of particular vulnerability. Where the vulnerability is due to age, this could refer to an elderly victim or an infant victim. Where the vulnerability is due to economic or social circumstances which are apparent or known to the person who commits the act, this aggravating factor could apply also to victims of sexual abuse and exploitation as well as to victims of trafficking.

The aggravating factors listed at the end of the criminal provisions in the Model Legislative Provisions are intended to apply to any of the above criminal acts as appropriate. For civil law systems, these gravity factors can guide the codification of appropriate penalties. For common law systems, these gravity factors can be considered at the sentencing stage as aggravating factors. Both systems may decide to separate out the crimes combining some of the gravity factors into separately itemised distinct crimes.

These aggravating factors apply irrespective of the relationship between the perpetrator and the victim. No marriage or other relationship shall constitute a defence to a charge of sexual violence.

More than one crime may be charged in connection with the same conduct, and States are encouraged to permit and even encourage cumulative charging, in particular in the context of mass atrocities where multiple crimes are committed within the same pattern of conduct.

See in particular the EU Genocide Network and Eurojust report on cumulative charging, "Cumulative Prosecution Of Foreign Terrorist Fighters For Core International Crimes And Terrorism-Related Offences," concluding that "[e]xisting national jurisprudence of EU Member States and developing national practice demonstrate that it is possible to cumulatively prosecute and hold FTFs (foreign terrorist fighters) accountable for war crimes, crimes against humanity and the crime of genocide, in addition to terrorism-related offences." Available at ([http://www.eurojust.europa.eu/doclibrary/genocide-network/KnowledgeSharing/Cumulative%20prosecution%20of%20foreign%20terrorist%20fighters%20%28May%202020%29/2020-05\\_Report-on-cumulative-prosecution-of-FTFs\\_EN.pdf](http://www.eurojust.europa.eu/doclibrary/genocide-network/KnowledgeSharing/Cumulative%20prosecution%20of%20foreign%20terrorist%20fighters%20%28May%202020%29/2020-05_Report-on-cumulative-prosecution-of-FTFs_EN.pdf))

Recognising that some national systems do not permit, or discourage, cumulative charging, it is recommended that such systems consider utilising the elements of other crimes as gravity factors for the crime they decide to charge. As an example, if the prosecutor is charging aggravated sexual violence, and in the context of the conduct forced impregnation was also committed, but where there will be no cumulative charging, the prosecutor may consider seeking a higher penalty due to the forced impregnation, thus considering forced impregnation and aggravating or gravity-increasing factor to the underlying crime of aggravated sexual violence. As such, it is also recommended to national practitioners to consider additional crimes as possibly aggravating or increasing the gravity of certain crimes, where they are not in a position to charge both arising from the same conduct.

Torture can also be charged for the harm caused to family members of the victim who were forced to hear or see an act of sexual violence committed against their family members.

#### Article 37 Other Penalties for Conflict-Related Sexual Violence Crimes

This clause represents an innovation that should not be necessary but unfortunately so often is. The gravity of a sexual violence crime should not be diminished based on discriminatory assessments or harmful traditional or customary values. Sexual violence is to be treated with the same degree of seriousness and penalties as applied to other criminal acts of similar gravity.

### Selected Modes Of Liability

#### Note on Common Modes Of Liability

Some modes of liability are more common in international crimes cases than in domestic cases, and models for these have been provided in the Model Legislative Provisions. Several common modes of liability are not included in the Model Legislative Provisions since most countries already have such liability provisions in their national laws. These modes of liability, which often (but not always) find their counterparts in domestic legislation are provided below.

#### Co-perpetrating

A person shall be criminally liable as an offender of a criminal offense who jointly with one or more person committed the crime, pursuant to a common plan.

#### Ordering

A person shall be criminally liable as an offender of a criminal offence who ordered the commission of the offence, where:

1. A superior-subordinate relationship existed between the person and those who committed the crime;
2. The person gave an order or direction, which had a substantial effect on the commission of the offence; and
3. The person knew, or, in light of the circumstances at the time, should have known of the substantial likelihood that the offence would be committed in the execution of that order or direction.

Note that this formulation of "ordering" liability would include liability where the order was not carried out.

#### Instigation

A person shall be criminally liable as an offender of a criminal offense who urges one or more persons to commit an offence where:

1. The person intended for the other person or persons to commit the offence;
2. The person satisfied the mens rea requirement of the offence; and
3. The urging made a substantial contribution to the commission of the offence.

#### Aiding and Abetting

A person shall be criminally liable as an offender of a criminal offense who:

1. Provided practical assistance, encouragement or moral support;
2. Which had a substantial effect on the commission of the crime; and
3. The person knew that the assistance or support would facilitate the commission of the crime.

#### Corporate Criminal Liability

This section is drawn from Canadian law. Legal persons such as corporations may participate in, or otherwise be responsible for, the commission of grave crimes. A legal person is a person existing under or authorized by the laws of any country, and could include a public body, a body corporate, a society, a firm, a partnership or an association of persons created for a common purpose that has an operational structure and holds itself out to the public as an association of persons.

Twenty-three executives of chemical company I.G. Farbenindustrie (I.G. Farben) were prosecuted for their role in violating customary international law by the United States Military Tribunals, established under Control Council Law No. 10. See generally Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, in 1 Enactments and Approved Papers of the Control Council and Coordinating Committee, Allied Control Authority Germany 306 (1945). I.G. Farben is perhaps best known for having manufactured the insecticide by means of which millions of people were exterminated in gas chambers at Auschwitz. See Joseph Borkin, *The Crime and Punishment of I.G. Farben* (The Free Press, London 1978) at 122-23; and *The Farben Case*, 8 Trials of War Criminals 1168. Several I.G. Farben executives were convicted, *inter alia*, of slavery and murder, and, although the company itself was not haled before the bar, the Tribunal implied that I.G. Farben's actions constituted a violation of international law.

"[W]e find that the proof establishes beyond a reasonable doubt that offenses against property as defined by Control Council Law No. 10 were committed by [I.G.] Farben . . . . The action of [I.G.] Farben and its representatives . . . cannot be differentiated from acts of plunder or pillage committed by officers, soldiers or public officials of the German Reich.

The Farben Case, 8 Trials of War Criminals 1140.

"The Allied Control Council had dismantled I.G. Farben and seized all of its assets by the time its executives went on trial." Brief for Petitioners to the Supreme Court of the United States, *Kiobel v. Royal Dutch Petroleum*, No. 10-1491, at 50-51, 14 December 2011 (citing Control Council Law No. 2, Providing for the Termination and Liquidation of the Nazi Organisations (Oct. 10, 1945); Control Council Law No. 9, Providing for the Seizure of Property Owned by I.G. Farbenindustrie and the Council Thereof (Nov. 30, 1945). (The dissolution of I.G. Farben was not clearly related to its complicity in crimes against humanity, slave labor, or poison gas, crimes of which the Allies were "as yet only dimly conscious." Brief Amici Curiae of Nuremberg Historians and International Lawyers in Support of Neither Party before the Supreme Court of the United States, *Kiobel v. Royal Dutch Petroleum*, No. 10-1491, at 34, 37, 21 December 2011.)

Despite the implicit acknowledgement of corporate responsibility at Nuremberg, the Rome Statute of the ICC contains no provision for imposing criminal penalties on legal persons. The reason for this is related to the diversity of approaches to criminal liability for corporations worldwide. "Whereas it is universally accepted that corporations are subject to civil liability under domestic law, practice varies considerably in national systems around the globe on the criminal liability of corporations and the penalties associated therewith." Brief of Ambassador David J. Scheffer, Northwestern University School of Law, as Amicus Curiae in Support of the Petitioners, *Kiobel v. Royal Dutch Petroleum*, No. 10-1491, at 5, 21 December 2011. "There was no consensus among delegations in Rome about how to impose criminal penalty, upon a corporate defendant, and that indecision severely undermined talks about how to extend the Court's criminal jurisdiction to [legal] persons." *Id.* at 6. However, since the conclusion of the negotiations on the Rome Statute, the trend "has been toward more corporate criminal liability, not less, both at the national level and in multilateral treaties." *Id.* at 16.

While the model provisions are intended to apply to legal as well as natural persons, due to the variety of corporate accountability laws around the world, the Model Legislative Provisions do not include a model provision for corporate criminal liability. States wishing to incorporate corporate criminal liability for the first time may wish to consider Article 46 C of the *Annex of the Malabo Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, which defines Corporate Criminal Liability in these terms:

1. For the purpose of this Statute, the Court shall have jurisdiction over legal persons, with the exception of States.
2. Corporate intention to commit an offence may be established by proof that it was the policy of the corporation to do the act which constituted the offence.
3. A policy may be attributed to a corporation where it provides the most reasonable explanation of the conduct of that corporation.
4. Corporate knowledge of the commission of an offence may be established by proof that the actual or constructive knowledge of the relevant information was possessed within the corporation.
5. Knowledge may be possessed within a corporation even though the relevant information is divided between corporate personnel.
6. The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes.

A State wishing to impose criminal liability on legal persons for the first time might wish also to provide for penalties, including fines, sanctions, or dissolution for legal persons convicted of an international criminal offence. Civil liability for legal persons provides an additional (or alternative) option.

#### *Attempt*

A person shall be criminally liable who attempts to commit a crime:

1. By taking action that commences the execution of the crime by means of a substantial step, and
2. The offense was not subsequently committed.

#### Article 38 *Incitement*

Julius Streicher, publisher of the antisemitic German weekly *Der Stürmer*, was convicted of crimes against humanity by the International Military Tribunal (the IMT or Nuremberg Tribunal) on October 1, 1946, and he was executed for his crimes. "At the time of the IMT, incitement to murder and extermination was considered a form of persecution on political and racial grounds, punishable as a crime against humanity." Incitement to Genocide in International Law, *Holocaust Encyclopaedia*, the United States Holocaust Memorial Museum (19 October 2019), available at <https://encyclopedia.ushmm.org/content/en/article/incitement-to-genocide-in-international-law>

Although he was convicted on a theory of complicity rather than incitement, Streicher's conviction was based on his writings, which advocated for participation in the Holocaust. Thus, "Streicher could easily have been found guilty of inciting genocide, had the offense existed at the time." Robert Cryer, Incitement (October 2019), available at <https://www.encyclopedia.com/international/encyclopedias-almanacs-transcripts-and-maps/incitement>.

Article III(c) of the Genocide Convention and Rome Statute's Article 25(3) (e) retain the concept of individual criminal responsibility for incitement, but only in respect of genocide and only for "direct and public" incitement. The model provision here retains the "direct" element but eliminates the "public" element, the definition of which has been "wildly inconsistent" in jurisprudence. See Gregory Gordon's chapters "Problems Regarding the Crime of Direct and Public Incitement to Genocide" and "Fixing Incitement to Commit Genocide" in his book, *Atrocity Speech Law: Foundation, Fragmentation, Fruition* (Oxford 2017), especially pages 293-295 regarding elimination of the "public" element and finding that there is "no compelling articulable reason" for its inclusion.

The model provision provides for the possibility of incitement for crimes against humanity and war crimes. In addition to the Nuremberg precedent on crimes against humanity, at least one domestic jurisdiction recognises incitement to commit war crimes as international law. See Gordon at 357 (citing the U.S. Army Field Manual).

#### Article 39 *Joint Criminal Enterprise*

The definitions of the elements of the three forms of JCE are drawn from the pathbreaking *Tadic case*. *The Prosecutor v. Dusko Tadic*, IT-94-1-A, ICTY, Appeal Chambers, 15 July 1999, paras. 227 and 228s.

#### Article 40 *Superior or Command Responsibility*

The definition comes from ICRC Customary International Humanitarian Law Rule 153 on Command Responsibility for Failure to Prevent, Repress or Report War Crimes

#### **On Chapter III Criminal Procedure Provisions**

The procedural provisions included among these Model Legislative Provisions represent only a few of those which may be important for the enforcement of the substantive provisions.

#### **General Principles Of Criminal Law**

The procedural provisions in this section may already find their counterpart in domestic law; however, the requirements of international law in the wake of mass atrocities may vary from typical criminal procedure in certain ways. Models of these variations are provided in the Model Legislative Provisions. Additional guarantees that may be needed to augment legislation are provided below.

#### *Right To A Fair Trial*

The Model provisions list only some of the relevant protections that should be made available to persons accused of offenses articulated herein. However, accused persons should be afforded all of the protections required under human rights law. These include:

- 1) The accused has the right to a fair and public hearing within a reasonable time by a competent, independent and impartial tribunal established by law.
- 2) During the proceedings, the accused has the following minimum guarantees:
  - a. To be informed promptly and in detail of the nature and cause of the charge against them;
  - b. To have adequate time and facilities for the preparation of the defence and to communicate with counsel of their own choosing;
  - c. To be tried without undue delay;
  - d. To be tried in their presence, and to defend themselves in person or through legal assistance of their own choosing; to be informed, if they do not have legal assistance, of this right; and to have legal assistance assigned to them, in any case where the interests of justice so require, and without payment by them in any such case if they do not have sufficient means to pay for it;
  - e. To examine the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them;
  - f. To have the free assistance of an interpreter if they cannot understand or speak the language used in court;
  - g. Not to be compelled to testify against themselves or to confess guilt.
- 3) Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.
- 4) The accused shall not be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure.

The language of this provision is drawn from the Universal Declaration of Human Rights (article 10), the International Covenant on Civil and Political Rights (article 14), the American Convention on Human Rights (article 8) and the European Convention on Human Rights (article 6).

Additional provisions for defences might need to be made, depending on the existing domestic law. See, e.g., ICC Elements of Crimes Article 31 "Grounds for Excluding Criminal Responsibility" and Article 32 "Mistake of Fact or Law".

#### Article 41 *Jurisdiction*

This provision tracks the African Union's draft model law on Universal Jurisdiction, with an addition of active personality jurisdiction. See Draft African Union Model National Law on Universal Jurisdiction over International Crimes EXP/MIN/Legal/VI, May 2012, Article 4.

The final version of the AU's Model Law adopted in July 2012 provides simply that the person "shall be within the territory of the State." African Union Model National Law on Universal Jurisdiction over International Crimes, adopted 9–13 July 2012 at the 21st Ordinary Session of the Executive Council of the African Union vide decision EX.CL/Dec.708(XXI), Addis Ababa, Ethiopia. Either provision is somewhat more restricted than pure universal jurisdiction, conforming instead with emerging state practice as described by Langer and Eason's research, which finds that while the use of extraterritorial jurisdiction for core international crimes is expanding, those countries that prosecute international crimes without any territorial, nationality or national-interest link with the crime are increasingly only inclined to do so when they find the perpetrator on their territory. See Langer & Eason, *The Quiet Expansion of Universal Jurisdiction*, *European Journal of International Law* (2019); Langer, *Universal Jurisdiction Is Not Disappearing: The Shift from 'Global Enforcer' to 'No Safe Haven' Universal Jurisdiction*, *Journal of International Criminal Justice* (2015). Many States will be obliged to provide jurisdiction in this context based on treaty commitments in any event. This provision is not meant to reduce any existing basis of jurisdiction over an organisation or corporate defendant. See Spain's Organic Act No. 6/1985 and Belgium's "Law Relative to the Repression of Serious Violations of the International Conventions of Geneva of August 12, 1949, and the Protocols I and II of June 8, 1977," both of which provided for a more "pure" form of universal jurisdiction. See also Guidelines para 5.

Paragraph 2 articulates a priority for the home jurisdiction of the victims when jurisdictional conflicts arise. Jurisdictional conflicts or conflicting extradition requests tend to be resolved on a case-by-case basis and differ between civil and common law jurisdictions. Since conflicts may arise where the country of the accused, for example, may prefer to try their own soldiers rather than render them to the country on whose territory the crime took place, such conflicts would be resolved in favour of the victims' home jurisdiction, at least insofar as the victim's State is genuinely willing and able to prosecute.

#### Article 42 *Principle of Non-Discrimination*

In the investigation and prosecution of cases involving conflict-related sexual violence, extra efforts may be necessary to assure that members of previously marginalized groups, including women and girls, will have access to justice. Harmful stereotypes based on gender or other social categories must be strictly avoided. See Guidelines para. 25, and The ICC Elements of Crimes, Article 21 ("The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status"). Of particular note, the inclusion of the term "birth" here should be understood to include protection against discrimination against children born as a result of sexual violence crimes.

#### Article 43 *Exclusion of Jurisdiction Over Persons Under Eighteen*

The language of this provision is taken from Article 26 of the Rome Statute and is consistent with the widely recognized principle that children who are accused of crimes under international law allegedly committed while they were associated with armed forces or armed groups, including terrorist or violent extremist groups, should be considered as victims of offences against international law, rather than as perpetrators.

#### Article 44 *Principle of Legality*

The language of this provision is inspired by the language in the procedural code for Bosnia Herzegovina, the Rules of Procedure and Evidence of the International Criminal Court, and many other sources. The principle of legality embodies a core concept of human rights law. The innovation in this provision is that it identifies international law as a basis for satisfying the principle of legality. In other words, this provision means that the criminal offenses enumerated in the Model Legislative Provisions may be prosecuted even if they were not articulated in national law at the time of their commission, so long as they were prohibited by international law. This innovation is consistent with Article 22 of the ICC Elements of Crimes. It is also supported by Article 15 of the International Covenant on Civil and Political Rights, which states:

- (1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.
- (2) Nothing in this Article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

The provision is also consistent with the EU Charter of Fundamental Rights, Article 49 of which provides: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed." Legislators are encouraged to include this provision with caution. International criminal courts and tribunals have adopted a more flexible approach to the principle of legality than most domestic legal systems, in part due to the nature of international crimes, which often occur where a State is held captive to one or more criminal organisations, and customary international law, which is not always written down in the same manner as a national penal code; thus, this approach is appropriate for prosecution of those crimes enumerated in the Model Legislative Provisions, especially by those states bound by ICCPR Article 15(2) or EU CFR Article 49.

In connection with this article, when appropriate, legislators may wish also to include a provision on application of the most favourable (also posterior) law.

#### Article 45 *No Prescription / Non-Applicability of Statutes of Limitations*

The language of the first paragraph of this provision is drawn from international law and from the codes in Canada, Bosnia Herzegovina, and others. It is consistent with the ICC Elements of Crimes Article 29. See also Guidelines paras 6, 7.

The language of the second provision was developed based on the drafter's experience working in systems that place time limits on investigations that, under certain circumstances, can act as de facto statutes of limitation, in contravention of the principle of international law prohibiting the application of statutes of limitations to core international crimes. To avoid such a result, states may wish to amend their criminal procedure codes to abolish or permit the extension of time limits on judicial investigations. Any such amendment, however, must be made while cognizant of States' duty to ensure prompt investigations of core international crimes.

The second paragraph also clarifies that civil complaints should also not be subject to statutes of limitations for the same crimes. Some systems may require amendment of the civil procedure code to give full effect to this provision.

#### Article 46 *No Defence by Necessity, Law, Order or Official Status*

The language of these provisions is drawn largely from the laws of Belgium and Burkina Faso, and it is also informed by the International Law Commission's draft articles on Crimes Against Humanity (available at <https://undocs.org/en/A/72/10#page-186>). See also Articles 27 and 33 of the Rome Statute.

#### Article 47 *No Amnesty*

Amnesties are never legitimate where States have an obligation to prosecute, whether by treaty or by customary international law, and this includes war crimes, crimes against humanity, genocide, and torture (and all the crimes enumerated in the Model Legislative Provisions). See Lisa J. Laplante, *Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes*, 49 Va. J. Int'l L. 915, 941-43 (2009); See also Security Council Resolutions 2106 (12) (2013); 2467(30) (2019) (sexual violence crimes should be excluded from amnesty and immunity provisions. By the same token, use of an amnesty to avoid extradition is also illegitimate. See *Belgium v. Senegal*, 2009 I.C.J. at para. 12. See also Application of Convention on Prevention and Punishment of Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*), 1996 I.C.J. 595. Further, the *jus cogens* nature of a crime, such as torture, "serves to internationally de-legitimise any legislative, administrative or judicial act authorizing" the crime. *The Prosecutor v. Furundzija*, IT-95-17/1-T, Judgment, 1998, para 153. States which have *de jure* amnesties for the offenses enumerated in these Model Legislative Provisions are urged to revoke them. States which observe amnesties de facto for these crimes are urged to proceed without delay to investigate, prosecute, or extradite, as appropriate.

#### Article 48 *Foreign Official Immunity*

Paragraph (1) of this provision tracks closely the language of Draft Article 7 as proposed by the Special Rapporteur in her fifth report (A/CN.4/701) (Draft Article), considered by the International Law Commission (ILC) in its sixty-ninth session. See UN Report of the International Law Commission, Sixty-ninth session (1 May – 2 June and 3 July – 4 August 2017), General Assembly Official Records, Seventy-second Session, Supplement No. 10 (A/72/10), available at <https://undocs.org/en/A/72/10#page-186> ("ILC Report"). Although this language was ultimately altered by the Commission and continues to be revised, the provisions offered in this paragraph are consistent with the views of the Commission as expressed in the ILC Report. Similar provisions can be found in a variety of State procedural codes.

Under customary international law, State officials (*inter alia* government officials, intelligence officers, and military personnel) generally enjoy immunity from criminal prosecution by foreign States with respect to acts performed in their official capacity. Whether this conduct-based immunity—or *immunity ratione materiae*—extends to international crimes, such as genocide, crimes against humanity, and war crimes has been described as one of the most important questions facing international criminal law today. See Adil Ahmad Haque, *Immunity for International Crimes: Where Do States Really Stand?* Just Security, 17 April 2018, available at <https://www.justsecurity.org/54998/immunity-international-crimes-states-stand/>.

There is no treaty which expressly and comprehensively addresses the question of exceptions to immunity from foreign criminal jurisdiction over State officials; however, several may be seen to do so implicitly. These include the Convention on the Prevention and Punishment of the Crime of Genocide (Paris: 9 December 1948) United Nations Treaty Series, vol. 78, No. 1021, p. 278; the International Convention on the Suppression and Punishment of the Crime of Apartheid (New York: 30 November 1973), United Nations Treaty Series, vol. 1015, No. 14861, p. 244; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York: 10 December 1984), United Nations Treaty Series, vol. 1465, No. 24841, p. 113; the International Convention for the Protection of All Persons from Enforced Disappearance (New York: 20 December 2006), A/RES/61/177; Inter-American Convention to Prevent and Punish Torture (Cartagena: 9 December 1985), OAS Treaty Series, No. 67; Inter-American Convention on Forced Disappearance of Persons (Belém do Pará, 9 June 1994), available at [www.oas.org/juridico/english/treaties/a-60.html](http://www.oas.org/juridico/english/treaties/a-60.html); compare for conventions addressing special regimes of immunity: Vienna Convention on Diplomatic Relations (Vienna: 18 April 1961), United Nations Treaty Series, vol. 500, No. 7310, p. 96; Vienna Convention on Special Missions (New York: 8 December 1969), id., vol. 1400, No. 23431, p. 232; Vienna Convention on the Representation of States in their Relations with International Organisations of a Universal Character (Vienna: 14 March 1975), United Nations Juridical Yearbook 1975 (Sales No. E.77V.3), p. 87; Vienna Convention on Consular Relations (Vienna: 24 April 1963), United Nations Treaty Series, vol. 596, No. 8638, p. 262; for conventions addressing exceptions to State immunity: United Nations Convention on Jurisdictional Immunities of States and Their Property (New York: 2 December 2004), Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 49 (A/59/49), vol. I, resolution 59/38, annex; European Convention on State Immunity (Basle: 16 May 1972), United Nations Treaty Series, vol. 1495, No. 25699, p. 182. See Janina Barkholdt and Julian Kulaga, *Analytical Presentation of the Comments and Observations by States on Draft Article 7, paragraph 1, of the ILC Draft Articles on Immunity of State officials from foreign criminal jurisdiction, United Nations General Assembly, Sixth Committee, 2017*, Berlin Potsdam Research Group, April 2018, available at <https://ssrn.com/abstract=3172104>.

Paragraph (2) also tracks the Draft Article, with one notable deviation: Paragraph 2 qualifies status-based immunity – or immunity *ratione personae* – with international law. Whereas it is generally recognized that certain high-ranking state officials (heads of State, heads of Government, and Ministers of Foreign Affairs) are immune to foreign criminal jurisdiction under customary international law, limited by their term of office, it is less clear whether status-based immunity may be subject to the same exception for international crimes. By way of example, in the celebrated Pinochet case in the United Kingdom, a head of State was not granted immunity with respect to charges of torture, with a variety of reasons offered as the basis for this decision. See *Regina v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No. 1) [2000] 1 AC 61; [2002] 119 ILR 50; *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No. 3) [2000] 1 AC 147; [2002] 119 ILR 135. It is not impossible to imagine a similar case where a high-ranking official maintains such a status on a permanent basis precisely to retain immunity for international crimes. The addition of “consistent with international law” to this provision thus provides flexibility for developments in international law which may clarify the existence of exceptions for such cases in the future.

Paragraph (3) also tracks the Draft Article, allowing for the international crimes exception wherever a State’s treaty obligations require it. For example, State parties to the Rome Statute would apply paragraph (3) of this article. See Article 27 of the Rome Statute.

### Protection and Other Provisions Relating to Victims

The provisions in this section will require harmonisation with any existing legislation on victim rights and witness protection. Legislators should avoid that the enactment of legislative provisions that result in discrimination against victims of sexual violence in cases not covered by the offences set out above. As a general rule, there should be protective provisions applicable to all victims of sexual violence, including conflict-related sexual violence. Many of the provisions set out in this document do have broad applicability.

#### Article 49 *Respect*

The language of this provision is drawn from the Guatemalan code and could have found its roots in any number of sources. See also Guidelines para 10. Human dignity is the cornerstone of human rights law and encompasses the concepts of equality and respect for the autonomy of every human person within a community. However, because the concept of dignity has been abused with respect to victims of conflict-related sexual violence, this provision relies more heavily on dignity’s underlying values.

The concept of the inherent human dignity of all human persons can be found in numerous human rights instruments (including the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights) and various national constitutions. The Federal Constitutional Court of Germany has described the concept of dignity as being based on a conception of the human being, “as a spiritual-moral being endowed with the freedom to determine and develop himself,” and goes on to describe this freedom as being “not that of an isolated and self-regarding individual, but rather [that] of a person relating to and bound by the community [.] This means that [the state] must regard every individual within society with equal worth. It is contrary to human dignity to make persons the mere tools of the State.” *Life Imprisonment Case* 45 BVerfGE 187 (1977), cited in Evadné Grant, “Dignity and Equality”, *Human Rights Law Review*, Volume 7, Issue 2, 2007, Pages 299–329, at 309 (citing translation in Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2nd edn (London: Duke University Press, 1997) at 307–08.

Compliance with this provision means treating victims as fully autonomous and equal members of the community. However, because victims have suffered egregious and serious crimes, often compounding existing inequality in their communities, fully autonomous and equal participation in a justice process cannot be simply assumed. This provision creates an affirmative obligation to take the victim’s views and circumstances into consideration throughout all phases of the justice process. Treating victims in a sensitive manner refers not only to how victims are treated directly, but also to how they are referred to, spoken about, and consulted throughout the justice process.

Victims and survivors of international crimes, irrespective of whether they are victims of conflict-related sexual violence crimes, do not all survive in the same ways (or, indeed, not all survive). Some victims may have thoughts of helplessness and not being able to continue with life. Some victims may have or express anger or aggression or a range of other emotions. Some victims may express no emotions at all and present with a blank affect. Some victims fear or may suffer revictimisation, stigmatisation, secondary victimisation or all three. Some victims suffer social isolation. Some suffer from flashbacks, nightmares, and sleep disturbances. Some victims struggle with concentration, and some struggle with memory. Some feel disoriented. Some victims feel shame or have shame imposed on them. Victims and survivors of conflict-related sexual violence are nearly always also victims and witnesses of other serious international crimes, compounding their harm. Many victims have lost trust in other people, especially of those in authority. And some victims are so resilient that they share none of these struggles.

Investigators, prosecutors, victim representatives, and other justice practitioners are encouraged to take all this into consideration and to make every effort to ensure that victims are empowered to exercise their rights throughout the justice process and to resist the temptation to make decisions that impact on victims’ rights without consulting them, or to make assumptions about their experiences or opinions. All efforts should be made to ensure the victims have agency throughout all phases of any justice process. In many communities, elders are treated with the highest level of respect and deference. In such communities, compliance with this provision could mean treating victims as elders. Other examples could include: offering to interview a victim at home or some other private location rather than at a police station, ensuring that a victim is given breaks whenever requested and with some frequency if not requested, soliciting a victim’s input where multiple crimes could be charged on the same operative set of facts, referring to a victim by their most respectful title rather than by a first name or nickname (or referring to that victim by a pseudonym in appropriate circumstances).

#### Article 50 *Information*

The language of the provisions of this section is drawn largely from the law of France, and it accords with the victim’s right to truth. See also Guidelines paras. 11 and 24.

Most of the rights referred to in the first paragraph find their counterpart in the Model Legislative Provisions.

Subparagraphs (1) and (6) refer to the right to be provided with any information that may affect a victim’s personal security along with protective measures that may be available. Article 55 enumerates some of the protective measures that should be available at any stage of the process, but whether and when to invoke such measures is impossible to ascertain without information.

Subparagraph (3) refers to the right to participate in criminal proceedings in accordance with international domestic law as applicable. This right would include but is not limited to the rights enumerated in Article 58 of the Model Legislative Provisions.

Subparagraph (4) refers to the right to be assisted by a legal representative of the victim’s choice. Because systems vary widely as to the availability and form of legal aid, the various brackets within this provision (and corresponding Article 53) reflect this reality, and are meant to assist the legislators in drafting the appropriate language for their unique legal system.

Subparagraph (e) refers to the right to assistance by a service, whether under a public authority or a victim support organisation. Examples of such services might include social services or victim support services. Many of the professional support services called for in Articles 50, 51, 52, and 53 could be facilitated by a government unit or victim support organisations as well. Not every country will have such services or even victim support organisations available, particularly in the aftermath of mass atrocity. However, the victims would still have a right to be informed about them, when they emerge. And governments should prioritise the creation of such services where there are none.

Subparagraph (7) refers to the right to be informed of the progress and results of the investigation of the victim's case. While not all systems currently provide such information to victims, legislators are urged to adopt this as a minimum requirement stemming both from the right to truth and from the principle of victim-centric practice. For more on the right to be informed of the progress and results of the investigation, see paragraphs 38-39 of the OHCHR Study on the right to truth E/CN.4/2006/91 8 February 2006, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G06/106/56/PDF/G0610656.pdf>.

Subparagraph (8) refers to the right to interpretation and translation of proceedings, addressed in Article 51.

Subparagraph (9) refers to the right to diplomatic and consular assistance and necessary travel documents, which are especially important where cross-border crimes or crimes of trafficking in persons occur. In such cases, family tracing may also be desired by the victim.

Subparagraph (10) refers to the right to be accompanied by a legal representative and a support person at all stages of the proceedings. This right is particularly important for victims of conflict-related sexual violence. See also Articles 52 and 53.

Subparagraph (11) refers to the right to declare a third party address as the victim's domicile, subject to the express agreement of that third party, or otherwise to have the location of their domicile concealed. This right is not recorded separately in the Model Legislative Provisions.

Subparagraph (12) refers to the right to have sexual and reproductive health services in the wake of an incident of conflict-related sexual violence including in Security Council resolution 2106 (2013) para. 19.

Subparagraph (13) refers to the right to reparations, which rights are reflected in Articles of the Model Legislative Provisions.

#### Article 51 *Language, professional support, and other assistance measures*

The first two paragraphs of this provision are necessary for the victim to access the truth of the proceedings and to meaningfully participate. It is not uncommon to provide translation only for those portions of the proceedings that impact on the victim's rights, but to the extent that a victim wishes to follow the proceedings in their case, this impacts on the victim's rights. Thus, this provision is more inclusive.

The third paragraph relates to diplomatic and consular assistance, immigration and family tracing often required in the aftermath of cross-border conflicts and especially in cases of trafficking in persons.

The language of the fourth paragraph of this provision is drawn from Guatemala. A country which cannot afford to provide professional psychologists might provide a 'professional trained to support victims of conflict-related sexual violence' as an alternative, and should prioritise funding for this important role.

The psychologist/psychosocial expert should also be able to make recommendations about protective measures or additional support required by the victim. Best practice for the victim's representative or prosecutor would be to seek such advice.

#### Article 52 *Support Person*

The language of this article is drawn from the law of Canada, but it could have been drawn from several sources. In many countries, the purpose of a support person is to provide emotional support to victims and witnesses, to reduce the harmful impact of a court appearance. In order to be of real support, there needs to be a relationship of trust between the victim or witness and the support person. Trust is improved by ensuring that the same person accompanies the victim or witness throughout the process and by allowing the victim or witness to choose their support person (where not contrary to the interests of justice, e.g., where there is a risk of influencing testimony). The third paragraph of this article provides certain rights for victims and witnesses under the age of 18. Where age determinations are a challenge, the court should decide in favour of greater protection for the victim or witness.

#### Article 53 *Legal Assistance*

The language of this provision is based on the law of France and will be most familiar to litigators in civil law systems. However, witnesses in common law systems are also entitled to a lawyer, even if they are not parties to the case. It is more protective of victims to advise them of this right.

The second paragraph of this provisions emphasises that victims have the right to the attorney of their choice.

The third paragraph acknowledges that legal services should be provided free of charge. However, different legal cultures provide legal aid in a variety of ways if at all. The bracketed language in this provision is meant to reflect that reality. For example, in some States, the government would provide legal aid directly to whomever the victim chooses as their lawyer. This is the most protective model. In some States, legal aid attorneys are a limited group on salary with the government. In some States, pro bono services are provided by law firms and legal nonprofit organisations. It must be stressed that in any such circumstances, the victim's choice of counsel must be respected and accommodated to the extent feasible. That is, an attorney may not be assigned without the victim's consent, although a victim's choices may be naturally constrained by the limited availability of counsel. A country which does not have a legal culture of pro bono assistance and cannot afford to provide legal services free of charge should prioritise funding for this important role.

#### Article 54 *Training for Individuals Working with Victims of Conflict-Related Sexual Violence*

The language of this article is drawn largely from *Justice in Matters involving Child Victims and Witnesses of Crime Model Law and Related Commentary*, UNODC (2009). See also Guidelines paras 12(c).

Individuals who work with victims of conflict-related sexual violence should receive appropriate professional training. These include *inter alia* police, prosecutors, judges, medico-legal forensic experts, legal aid providers, support personnel and interpreters/translators. Ideally, the training should contain a common, multidisciplinary component intended for all professionals, combined with more specific modules addressing the specific needs of each profession. For example, while training for judges and prosecutors may focus more on legislation and specific procedures, law enforcement officials and victim lawyers may require training on broader issues, including psychological and behavioural issues. The training of social workers, meanwhile, may focus more on assistance, while training for medical personnel should focus on forensic examination techniques to assemble a solid evidentiary basis. The Model Legislative Provisions includes a non-exhaustive list of topics for training, which legislators should adapt to the specific needs of their country. It does not assign responsibility for coordinating such training, but legislators may wish to designate or create a national authority for that purpose or assign the responsibility to a department or ministry of justice.

#### Article 55 *Protective Measures*

The language of this article is drawn largely from the law of the Netherlands and from *Justice in Matters involving Child Victims and Witnesses of Crime Model Law and Related Commentary*, UNODC (2009). See also Guidelines paras 10, 12.

Paragraph 1 of this Article requires that all possible measures must be used to avoid secondary victimisation. Legislators are especially encouraged to establish or expand the role of victim support services, which can often play a central role in preventing secondary victimisation. Additional good practices for avoiding secondary victimisation include training of medical teams, police officers, and other justice practitioners, use of interview protocols by police, and use of special hearing rooms for children.

Paragraph 2 of this Article requires all reasonably necessary measures be adopted for the well-being of victims to guarantee their personal and family security, both physical and mental, including protection against any action or exposure that could result in an undue attack on their privacy or security. Such measures might include use of pseudonyms to refer to victims, protocols for protecting victim information, assuring that any meetings with victims are sheltered from public view, and holding victim contact information confidential.

Paragraph 3 of this Article provides for protective measures for the physical safety and mental well-being of victims and witnesses, and in respect of their privacy. A selection of illustrative examples is provided; however, sub-section (f) clarifies that the court may issue other protective measures deemed appropriate.

Paragraph (3)(b) refers to a registry system for restraining and protective orders. It can be critical for a judge who presides over conflict-related sexual violence cases, or for investigators working on such cases, to have the ability to get immediate access to court protective or restraining orders, both to enhance victim safety and to help ensure that judges don't make duplicate or conflicting court orders.

Paragraph (4) of this Article provides for protective measures pertaining to the identification, tracing, and freezing of assets and property that may be forfeited as restitution or reparations. The language of this paragraph stems from Rome Statute Article 93(1) (k). *See also The Prosecutor v. Katanga*, Urgent Request to the Democratic Republic of the Congo for the purpose of obtaining the identification, tracing, freezing, and seizure of property and assets of Germain Katanga, Pretrial Chambre I, 6 July 2007, ICC-01/04-01/07; *Prosecutor v. Lubanga*, Request to States Parties to the Rome Statute for the identification, tracing and freezing or seizure of the property and assets of Mr. Thomas Lubanga Dyilo, Registrar, 31 March 2006, ICC-01/04-01/06. *See also* the United Kingdom case *Mareva Compania Naviera SA v International Bulkcarriers SA* 2 Lloyd's Rep 509 [1975] (providing for an order on ex parte application for freezing certain assets prior to judgment).

Paragraph (5) applies penalties for those who may breach protective measures.

#### Article 56 *Principles of Evidence in Cases of Sexual Violence*

The language of these provisions are drawn from Rules of Procedure and Evidence of the International Criminal Court and the International Criminal Tribunal for the Former Yugoslavia. See ICC Rules of Procedure and Evidence ("RPE") Rule 70; ICTY RPE Rule 96.

The first paragraph indicates that a victim's credible but uncorroborated testimony is sufficient to establish the facts to which the victim testifies.

Although victims and witnesses of conflict related sexual violence may suffer from some degree of trauma as a result, there is no automatic or necessary correlation between trauma and lack of credibility. Traumatized individuals can be both credible and reliable.

Practitioners should avoid assumptions about how a victim or survivor will react in any particular situation. Victim responses are as varied as humans. The manner of response is no indication of credibility.

#### Article 57 *In Camera Consideration of Relevance or Admissibility of Evidence*

The language of these provisions draws largely from the International Criminal Court's Rules of Procedure and Evidence. ICC RPE Rule 72.

#### Article 58 *Modes of Victim Participation*

Much of the language of this section is drawn from U.S. law, French law, the Extraordinary Chambers of the Courts of Cambodia, and the International Criminal Court, and its provisions find their counterparts in many systems. *Victim Participation in Criminal Law Proceedings: Survey of Domestic Practice for Application to International Crimes Prosecutions*, Redress (September 2015) (the Redress ISS Study) was an especially useful source in drafting this section.

Although there is a great deal of variation in modes of participation available to victims, even in the most restrictive States, a victim-centric approach would require that victims be afforded the rights listed in paragraph (1) of this section at a minimum, irrespective of the legal system.

It must be borne in mind that to the extent that new forms of victim participation are adopted within the criminal procedure code, and to the extent that legal aid may be provided for the same, corresponding changes may also be required in the civil code and/or in the professional requirements and restrictions placed on attorneys. Legislators are urged to consult with local Bar Associations before implementing such changes.

Subparagraph (a) provides for a right of reasonable, accurate, and timely notice of any public court proceeding involving the crime. This reflects the victim's right to be informed and to follow all the proceedings.

Subparagraph (b) provides for the victim's right to attend the proceedings, including by remote attendance, which might be accomplished through video-links, listening centres, use of a victim observation room, or similar means.

Subparagraph (c) provides for prompt decisions on a victim's motions asserting a victim's rights. This is one way the court system can exhibit the respect required in Article 49.

Subparagraph (d) provides several opportunities where a victim should be heard. Note that the right to be heard on sentencing is detailed in Article 64 of the Model Legislative Provisions.

Paragraph (2) of this section provides a list of several possible rights of victim participation which States may consider incorporating into their national law. States which do not already provide formal status to victim participants may wish to consider allowing participation in accordance with these provisions, which may be tailored to fit their system.

Many States allow for these or similar forms of victim participation already. In such States, the term "victim participant" may be replaced by those State-recognized statuses already present in the legal code or created along with this legislation. Such statuses may include but are not limited to intervenor, complainant, civil party, injured party, subsidiary prosecutor, or private prosecutor. For such States, this article may provide a benchmark against which to measure existing practice. In systems where victims are provided with more robust protection and power, nothing in these model provisions should lead to their curtailment or restriction.

Subparagraph (a), allowing victims to initiate criminal proceedings, is particularly important when it comes to conflict-related sexual violence crimes. Because such crimes are often overlooked by those in authority, even those who mean very well, empowering victims to charge such crimes can be crucial. In some countries, all initial complaints would be handled at the police level and would not reach the prosecutor. In some countries, initial complaints would involve not only the prosecution but also an investigative magistrate. The model provision provides for a right of appeal where the victim's complaint is not accepted by the prosecutor. Where national procedural provisions do not provide for prosecutorial review of initial complaints, a similar mechanism should be provided to allow victims to initiate proceedings and to appeal to a higher authority should their complaint be rejected. It should be noted that in some legal systems, civil and criminal complaints are traditionally heard together, where in other systems they are always separated. *See also* subparagraph (j).

Subparagraph (b) provides for victims who have applied for status as victim participants to appeal a denial of status. Where national procedural provisions do not provide for such, a similar mechanism for reconsideration of status denial decisions should be put in place to ensure exercise of a victim's right to be a formal participant in proceedings. Subparagraph (b) also provides for victims to retain such status when the basis of such status ceases to be operative. This occurred, for example, in Case 002/2 at the Extraordinary Chambers of the Courts of Cambodia, when the charges were narrowed. Victims whose specific crimes were no longer still to be pursued at trial were allowed to continue as victims, having already satisfied the initial requirements. The interests of justice limit the right to retain status.

Subparagraph (c) provides a right of access to the investigative dossier and case file. In countries where victims retain this right, it is not uncommon for the court to designate a "reserve" file that cannot be shared or that can only be shared under limited circumstances. Where national procedural provisions do not provide for such, a similar mechanism should be established for giving the victim meaningful access to the evidence, including the investigation process, while safeguarding the integrity of the investigation and all due process rights.

Subparagraphs (d) and (e) provide that victim participants play an active role in the investigation by suggesting investigative steps and witnesses. Best practice for an investigator would include victims for their ideas, and this provides a formal avenue for victims to engage in any event.

Subparagraphs (f), (g), (h), and (i) provide formal rights for victim participation at trial. On this point, State practice varies widely. Subparagraph (j) provides for the right to claim reparation. This is a point on which State practice varies widely. *See also* Article 66 regarding reparations.

Paragraph (3) of this section draws on research in the Redress/ISS Study on Victim Participation in Legal Proceedings (2015), which surveys domestic practice in this area, and in particular on the law and practice of the United States, Colombia, and the Extraordinary Chambers of the Courts of Cambodia. One practice that is not expressly listed here but which would generally comply with this paragraph is the established practice in Colombia, where during the hearing on the indictment, the judge can limit the number of victim representatives intervening in the trial to the number of defendants. Of course, such a practice cannot be applied rigidly, for example, in a case with multiple defendants and multiple conflicts of interest. It should be noted that management of large numbers of victims through means suggested by this paragraph will not absolve the court of responsibility to provide reparations that are individually tailored as required by Article 66.

#### Article 59 *Investigation of Conflict-Related Sexual Violence*

Investigation into conflict-related sexual violence, whether carried out by law enforcement, prosecutors, victim representatives, or others charged with the investigation of sexual violence crimes for the purpose of criminal action will ensure the principles enumerated in this

provision are respected. These principles pertain both to legal rights of victims and to professional ethical obligations of practitioners. "Investigator" as used in this section refers to anyone carrying out such an investigation.

Training Paragraph (a) refers to the training outlined in Article 54. It is the obligation of any individual investigating conflict-related sexual violence crimes to secure professional training for themselves if it is not provided.

Prompt Professional Investigation (Do No Harm) Paragraph (b) refers to the articles on non-discrimination and respect for victims. It requires prompt investigation aligned with the primary ethical duty to do no harm.

1. The key ethical principle of Do No Harm should guide any investigation into conflict-related sexual violence: it is a minimum requirement. Do No Harm means:
  - a. Giving deliberate and careful thought to all possible negative impacts of investigation on victims/witnesses, the wider community and the investigation team;
  - b. Being prepared for the harm those impacts may cause; and
  - c. Making every possible effort to prevent, minimise or respond to potential harm, or changing or ceasing investigative activities if harm cannot be prevented or appropriately minimised.
2. A professional approach also requires that investigators:
  - a. Avoid Bias
    - Investigators should not make assumptions about who might be a victim based on age, gender or social status.
    - Rather, they should be cautious of stereotypes and bias about how victims 'should' react or behave.
  - b. Communicate Professionally
    - Investigators should be aware of how their choice of words, body language and facial expressions could be interpreted.
    - Investigators should make sure that they are comfortable with sexual issues and terminology.
  - c. Consider Security and Privacy at each stage of an investigation
    - By way of example, investigators should try to meet victims and witnesses in a discreet location and make sure the surroundings are comfortable and safe.
    - If they cannot guarantee visual privacy, investigators should try to ensure that they cannot be overheard.
  - d. Come Prepared
    - Investigators should research and engage with referral/ support services in the area before contacting victims.
    - Investigators should be prepared to assess and respond to the victims' needs, fears or concerns.
  - e. Remove obstacles to justice for male survivors of conflict-related sexual violence:
    - Investigators should intentionally include investigation into sexual violence against men and boys as part of any investigation into such violations.
    - Investigators should ensure presence of support services and safe spaces for male victims.
    - Investigators should work intentionally to overcome myths associated with male victims of sexual violence.

Informed Consent Paragraph (c) refers to two key principles of victim-centred litigation:

Informed Consent requires:

1. Victims are informed: investigators should provide full and complete disclosure of all information relevant to the victim's participation in the justice process. This includes being provided with complete information regarding, at a minimum:
  - a. The purpose of the investigation;
  - b. The intended use of the information;
  - c. The meaning and limits of confidentiality;
  - d. The risks and benefits of participation, and
  - e. What to expect at each stage of the process.

2. Victims consent to investigative steps: Victims must freely and voluntarily agree to participate in that phase prior to the investigative activity being initiated. No investigative steps are to be undertaken without genuine (i.e., full, free and voluntary) and informed consent by the victim or witness. This includes informed consent to:
  - a. be interviewed and have their information recorded
  - b. be photographed and/or examined
  - c. be referred to support services/have information shared with third parties

Security and Confidentiality Paragraph (d) refers to the investigator's obligation to foreground the victim's security and confidentiality through the justice process:

1. To Safeguard Victim Confidentiality means investigators should:
  - a. Develop confidentiality procedures and policies and ensure that team members know what information to collect, where and how to store it and who can access it;
  - b. Ensure that team members do not discuss case details with anyone outside of the documentation team;
  - c. Put in place information protection measures (e.g., use of pseudonyms, coding system, etc.) for all identifying information on the victim/witness, referrals made and protective measures taken;
  - d. Fully and clearly explain to victims/witnesses the conditions and limits of confidentiality and ensure that they give their informed consent as to how their information is used; and
  - e. Agree with victims/witnesses how they would like to be approached and contacted.
2. To safeguard the victim's security requires, inter alia, that investigators conduct threat and risk assessments. Such a threat and risk assessment must include at least the following:
  - a. STEP 1: Evaluation of the threat(s):
    - What are the threats?
    - Who/what is threatened?
    - Who/what has made the threat?
  - b. STEP 2: Assessment of the risk(s)
    - How likely is it that the threat will become a reality?
    - How severe would the impact be?
  - c. STEP 3: Mitigate or manage the risk
    - Put in place measures to reduce or counter those risks on individuals, infrastructure or information, or, pause or cease investigation until such measures may be put into place.

#### Article 60 *Protective Measures for Investigative Interviews*

The language of this provision is drawn from the French code. The French code is actually more protective, but given the length of time necessary to investigate a conflict-related sexual violence case, we had to allow for the possibility that the same investigators may no longer be able to hear the victim. The Maya Achi case in Guatemala was also borne in mind, during which testimony was thrown out, inter alia, because the investigative interview took place at the victims' lawyer's offices rather than at the attorney general's offices (at the victims' request). See Burt & Estrada, *In Major Setback, Judge Dismisses Charges in the Maya Achi Sexual Violence Case*, International Justice Monitor (21 June 2019), available at [https://www.ijmonitor.org/2019/06/in-major-setback-judge-dismisses-charges-in-the-maya-achi-sexual-violence-case/?fbclid=IwAR1r58SL\\_NX-U3i4SmLemQZD1RggUuWwlsnhBN7NGJe3pEYSOvlnqOs7Y70](https://www.ijmonitor.org/2019/06/in-major-setback-judge-dismisses-charges-in-the-maya-achi-sexual-violence-case/?fbclid=IwAR1r58SL_NX-U3i4SmLemQZD1RggUuWwlsnhBN7NGJe3pEYSOvlnqOs7Y70). This type of accommodation should be encouraged rather than discouraged.

Trained investigators should be aware of the risks of retraumatising witnesses through requiring them to tell their stories repeatedly and how to avoid secondary victimisation.

If the victim or witness has the assistance of a professional psychologist or psycho-social expert, investigators should consult them.

The United Nations Office of Drugs & Crimes at the time of this writing is developing a Protocol on Effective Interviewing, which will be of use in this field.

#### Article 61 *Closed Sessions*

The language of the provisions of this section is drawn from the French code but find their counterpart in many others.

#### Article 62 *Protective Measures at Trial*

The language of the provisions of this section are drawn from criminal procedural codes in Guatemala, France, Colombia, the Netherlands, and from the experience and suggestions of experts and practitioners. See also Guidelines para. 12. The solutions suggested in this article will not necessarily be high-tech. An “opaque shield” could be achieved through hanging of a curtain, for example.

#### Article 63 *No Cross Examination by Accused*

This section is drawn from Canadian law. See also Guidelines para. 10.

#### Article 64 *Victim Impact Statement*

The language of this article is drawn from The Netherlands, which is in the process of extending this right. See also Guidelines para 11, 12. Several common law countries also allow victim impact statements. Not all allow for cross examination. Best practice would be to consider the presentation of background witnesses and experts who can give context to the victim’s testimony. Courts in systems that provide a more robust array of victim participation opportunities but which do not separate liability and sentencing phases of trial may wish to combine the victim impact statement with the victims’ closing statement.

#### Article 65 *Victim Fund*

The language of this article is drawn largely from *Justice in Matters involving Child Victims and Witnesses of Crime Model Law and Related Commentary*, UNODC (2009). See also Guidelines paras. 16, 25.

#### Article 66 *Reparations*

This provision is designed to give the litigants and judges flexibility to design a remedy tailored to the needs of the victims. Providing a full remedy with all its many dimensions is all the more important in cases involving large numbers of victims. The language of this provision is drawn mainly from the Guidelines, paragraphs 15-23 as well as the UN Secretary-General’s Guidance Note on Reparations for Conflict-Related Sexual Violence (2014).

Paragraph (1) indicates the goal of providing victims with full and effective reparation in all its forms, such goal being in priority before any fines that may be levied.

Paragraph (2) is provided in three variations to reflect different legal cultures. Legislators may adjust these provisions to suit their individual legal cultures but are urged to leave room for litigants and courts to be creative in fashioning appropriate remedies for extraordinary harms. Paragraphs (3) assigns costs in the first instance to the convicted offender but allow for situations when the offender is indigent, when there are a large number of victims, when the State was implicated in the violations, when the accused was a high-level perpetrator acting under color of law of the State such that the State or a State fund may be an appropriate source for funding reparations.

Paragraphs (4), (5), and (6) are largely parallel with the ICC Elements of Crimes and are available in some degree in most domestic jurisdictions.

Paragraphs (7) and (8) include provisions which may be used less often and may even seem to be beyond the court’s general competence, but recalling that at least some cases will deal with mass crimes convicting high ranking government officials, military leaders, or corporate businesses, judicial orders effecting these kinds of reparations may indeed be appropriate and transformative of the root causes that caused these crimes to occur.

#### Article 67 *Information on the Outcome of the Trial*

This provision, while arguably covered in other provisions within the Model Legislative Provisions calls out the importance of the right of the victims to know the outcome of the trial, as this may directly impact on their security, their right to reparations, their empowerment in the process, and in unexpected additional ways.



# Part III

## Model Indictment

### Model Legislative Provisions and Guidance on Investigation and Prosecution of Conflict-Related Sexual Violence



The first Trial for Sexual Violence in Conflict was likely 1474

#### INDICTMENT TEMPLATE FOR INTERNATIONAL CRIMES

*[name of court]*  
CASE NUMBER [ ]

THE PROSECUTOR

Against

*[full name of first accused]* also known as  
*[nickname if any]*, hereinafter "the [first] Accused"  
and  
*[full name of second accused, if any]* also known as  
*[nickname if any]*, hereinafter "the second Accused"<sup>1</sup>

#### INDICTMENT

The Prosecutor, *[name of court]*, under Article *[article in code which authorises the issuance of the indictment]* of the *[relevant code charges]*:

*[full name of first accused]* also known as  
*[nickname if any]*

with war crimes and crimes against humanity in violation of *[relevant articles of the penal code or statute]* as set forth below:

#### INTRODUCTION

*[Brief Factual Contextual Narrative]*

#### THE ACCUSED

The ACCUSED was born on or about *[DOB]* in *[birth place]* *[Additional facts describing the background of the accused, sufficient to identify him specifically, and his role or position within the relevant armed group or structure]*

#### GENERAL ALLEGATIONS

- A. At all times relevant to this Indictment, a state of [internal and/or international] armed conflict existed within the territory [of geographic scope]. For the purposes of this Indictment, organised armed factions involved in this conflict included [list the armed groups/factions who were engaging in hostilities].
- B. A nexus existed between the armed conflict and all acts or omissions charged herein as Violations of the Laws and Customs of War and/or Violations of International Humanitarian Law.
- C. Victims of crimes charged in this Indictment were at the time of the commission of the crimes protected under the provisions of International Humanitarian Law, were civilians, and/or were hors de combat – who took no active part or who were no longer taking an active part in hostilities.<sup>2</sup>
- D. All acts and omissions charged herein as Crimes Against Humanity were committed as part of a widespread or systematic attack directed against a civilian population.
- E. All offences alleged herein were committed within the territory of [relevant geographic scope] between [relevant temporal scope -- dates].
- F. [Any additional material facts which are applicable to the entirety of the relevant context, such as the date on which a conflict began; date on which a peace agreement was signed ending the conflict; a description of the relevant organised armed factions; key relevant events such as a coup d'etat or key leadership changes, etc.]

<sup>1</sup> Accused persons may be prosecuted individually or jointly where appropriate

<sup>2</sup> This can be omitted for indictments which only contain charges of sexual violence crimes, as it is not an element requiring proof

**INDIVIDUAL CRIMINAL RESPONSIBILITY<sup>3</sup>**

*[Narrative description of the material facts which underpin the JCE I mode of liability]*

Where the ACCUSED is charged with a crime alleged in this Indictment under the theory of **joint criminal enterprise**:

**JCE I**

- At all times relevant to this Indictment, the ACCUSED, through his association with [other members of the JCE], acted in concert with [other members of the JCE].
- [JCE members], including the ACCUSED, and [other JCE members] shared a common plan, purpose or design (joint criminal enterprise) to commit the crimes alleged in this Indictment.
- The ACCUSED furthered the joint criminal enterprise through [conduct in furtherance of the JCE] which involved the crimes alleged in this Indictment.
- The ACCUSED intended to participate in the joint criminal enterprise and intended that the crimes be committed in furtherance of the joint criminal enterprise.

*[Narrative description of the material facts which underpin the JCE III mode of liability]*

**JCE III**

- At all times relevant to this Indictment, the ACCUSED, through his association with [other members of the JCE], acted in concert with [other members of the JCE].
- [JCE members], including the ACCUSED, and [other JCE members] shared a common plan, purpose or design (joint criminal enterprise) to commit the crimes alleged in this Indictment.
- The ACCUSED furthered the joint criminal enterprise through [conduct in furtherance of the JCE] which involved the crimes alleged in this Indictment.
- The ACCUSED intended to participate in the joint criminal enterprise, was aware that that the crimes alleged in this Indictment were a reasonably foreseeable consequence of the common plan, purpose or design, and continued to participate in the joint criminal enterprise, assuming the risk that his actions in furtherance of the JCE would involve the commission of the crimes alleged in this Indictment.

**Superior Responsibility**

*[Narrative description of the material facts which underpin the Superior Responsibility mode of liability]*

Where the Accused is charged with a crime alleged in this Indictment under the theory of **superior responsibility**:

- The ACCUSED had effective control over those who directly committed the crimes alleged in this Indictment;
- The ACCUSED knew, had reason to know, should have known, or consciously disregarded information which clearly indicated that his subordinates were about to commit such crimes or had already done so; and
- The ACCUSED failed to take the necessary and reasonable measures to prevent such acts or to punish the direct perpetrators.

**COUNTS 1-2: Sexual violence<sup>4</sup>**

*Narrative Description of Facts on which the charge of Sexual Violence is based, specific but in summary form, ensuring inclusion of material facts for each element of the crime. Who, what when where why how with material facts sufficient to inform the accused specifically of what acts he is accused which form the basis for this charge.*

By his/their acts or omissions as set out above, the ACCUSED is individually criminally responsible **under the theory of superior responsibility, and/or as part of a joint criminal enterprise**, pursuant to [provisions of the penal code containing the mode of liability of

**superior responsibility, and JCE]** for the crime of:

**Count 1: Sexual Violence as a WAR CRIME**, punishable under [relevant provision of Penal Code or International Crimes Act or other domestic legislation domesticating the Geneva Conventions and their Protocols, and/or the Rome Statute, or otherwise criminalising sexual violence as a war crime] and customary international law.

And

**Count 2: Sexual Violence as a CRIME AGAINST HUMANITY**, punishable under [relevant provision of Penal Code or International Crimes Act or other domestic legislation domesticating the Rome Statute or otherwise criminalising sexual violence as a crime against humanity] and customary international law

**COUNTS 3-4: Aggravated Sexual Violence**

*Narrative Description of Facts on which the charge of Aggravated Sexual Violence is based, specific but in summary form, ensuring inclusion of material facts for each element of the crime. Who, what when where why how with material facts sufficient to inform the accused specifically of what acts he is accused which form the basis for this charge.*

By his/their acts or omissions as set out above, the ACCUSED is individually criminally responsible **under the theory of superior responsibility**, pursuant to [provision of the penal code containing the mode of liability of superior responsibility] for the crime of:

**Count 3: Aggravated Sexual Violence as a WAR CRIME**, punishable under [relevant provision of Penal Code or International Crimes Act or other domestic legislation domesticating the Geneva Conventions and their Protocols, and/or the Rome Statute, or otherwise criminalising aggravated sexual violence as a war crime] and customary international law,

and

**Count 4: Aggravated Sexual Violence as a CRIME AGAINST HUMANITY**, punishable under [relevant provision of Penal Code or International Crimes Act or other domestic legislation domesticating the Rome Statute or otherwise criminalising aggravated sexual violence as a crime against humanity] and customary international law.

**COUNTS 5-6: Torture**

*Narrative Description of Facts on which the charge of torture is based, specific but in summary form, ensuring inclusion of material facts for each element of the crime. Who, what, when, where, why, and how, with material facts sufficient to inform the accused specifically of what acts he is accused which form the basis for this charge.*

By his/their acts or omissions as set out above, the ACCUSED is individually **criminally responsible under the theory of superior responsibility, and/or as part of a joint criminal enterprise, pursuant to** [provisions of the penal code containing the mode of liability of superior responsibility, and JCE] for the crime of:

**Count 5: Torture as a WAR CRIME**, punishable under [relevant provision of Penal Code or International Crimes Act or other domestic legislation domesticating the Geneva Conventions and their Protocols, and/or the Rome Statute, or otherwise criminalising torture as a war crime] and customary international law,

And

**Count 6: Torture as a CRIME AGAINST HUMANITY**, punishable under [relevant provision of Penal Code or International Crimes Act or other domestic legislation domesticating the Rome Statute or otherwise criminalising torture as a crime against humanity] and customary international law.

<sup>3</sup> Three examples of such provisions are included here, to provide a template for inclusion of any relevant modes of liability. Other modes of liability such as ordering, aiding and abetting, instigating, and any others may be incorporated as per the relevant penal code provisions.

<sup>4</sup> Examples of crimes set out in the Model Legislative Provisions are incorporated here. An Indictment for international crimes can include as many counts as permitted by national law, in particular in jurisdictions where cumulative charging is permitted where it arises from the same pattern of conduct.

#### Count 7: Persecution

*Narrative Description of Facts on which the charge of persecution is based, specific but in summary form, ensuring inclusion of material facts for each element of the crime. Who, what, when, where, why, and how, with material facts sufficient to inform the accused specifically of what acts he is accused which form the basis for this charge. For the charge of persecution, the Accused can be charged with (for example) gender persecution where the evidence shows that the victims (of the above charged crimes) were targeted specifically due to their gender.*

As such, the above enumerated charges, sexual violence as a war crime and crime against humanity, aggravated sexual violence as a war crime and a crime against humanity, torture as a war crime and a crime against humanity, were committed in a manner which severely deprived, contrary to international law, one or more persons of fundamental rights. The Accused targeted the victims of these crimes by reason of the identity of a group or collectivity or targeted the group or collectivity as such. Such targeting was based on the gender of the victims.

By his/their acts or omissions as set out above, the ACCUSED is individually criminally responsible **under the theory of superior responsibility, and/or as part of a joint criminal enterprise**, pursuant to *[provisions of the penal code containing the mode of liability of superior responsibility, and JCE]* for the crime of:

**Count 7: Persecutions as a CRIME AGAINST HUMANITY**, punishable under *[relevant provision of Penal Code or International Crimes Act or other domestic legislation domesticating the Rome Statute or otherwise criminalising persecution as a crime against humanity]* and customary international law.

Dated this *[month][day][year]*

At *[location]*

*[signature and full name of Prosecutor]*



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**OSRSG-SVC**  
OFFICE OF THE SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL ON  
SEXUAL VIOLENCE IN CONFLICT