

# THE HAGUE PRINCIPLES ON SEXUAL VIOLENCE

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The Civil Society Declaration  
on Sexual Violence

International Criminal Law  
Guidelines on Sexual Violence

Key Principles for Policy  
Makers on Sexual Violence



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Meaningfully addressing sexual violence starts with understanding all forms of sexual violence. Over the course of 2019, over 60 civil society organisations came together to bring the voices of survivors to the forefront

**MEANINGFULLY  
ADDRESSING SEXUAL  
VIOLENCE STARTS  
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ALL FORMS OF SEXUAL  
VIOLENCE.**

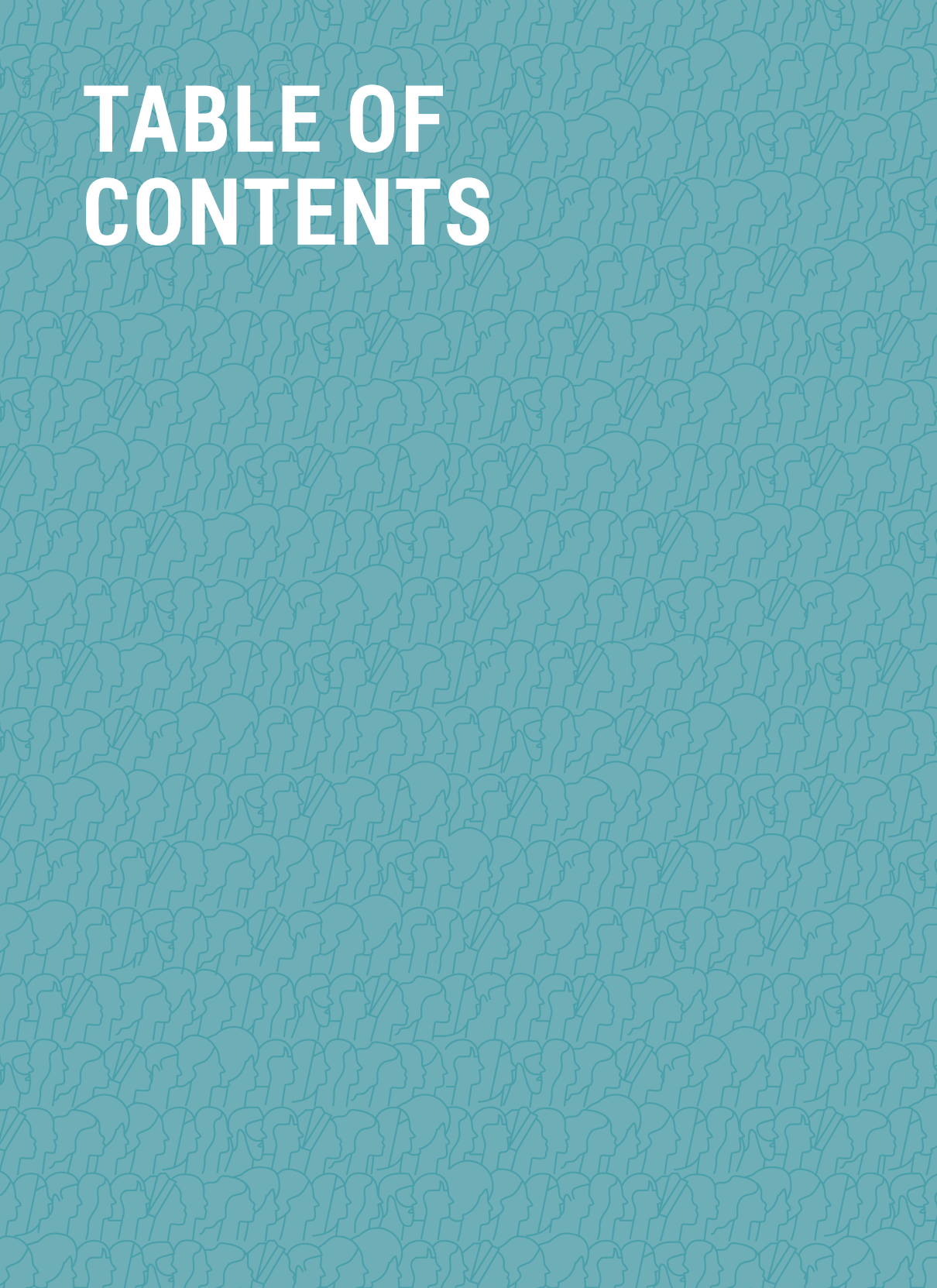
of discussions about addressing sexual violence. More than 500 survivors were consulted on what they think makes violence “sexual”. Information from consultations was complemented by input from civil society, legal practitioners, academics, and policy makers to create The Hague Principles on Sexual Violence.

The Hague Principles on Sexual Violence consist of:

**The Civil Society Declaration on Sexual Violence** – providing general guidance on what makes violence “sexual”, especially to survivors;

**International Criminal Law Guidelines on Sexual Violence** – a tool for international criminal law practitioners that explains when acts of sexual violence in the Civil Society Declaration amount to international crimes, as well as practical elements to inform the international criminal law prosecution of these acts;

**Key Principles for Policy Makers on Sexual Violence** – ten key principles derived from the Civil Society Declaration to incorporate in policy development and implementation, legislative strategies and legal and judicial procedures.



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# THE CIVIL SOCIETY DECLARATION ON SEXUAL VIOLENCE

# INTRODUCTION

Over the course of 2019, more than 60 civil society organisations came together to bring the voices of survivors to the forefront of discussions about accountability for sexual violence. Sexual violence is a difficult topic to navigate and is often not well understood. Laws and policies addressing sexual violence often do not reflect the reality of what survivors experience and accountability efforts often fall short as a result. The Civil Society Declaration on Sexual Violence seeks to enhance the understanding of what constitutes an act of sexual violence from the perspective of survivors of sexual violence.

Better understanding the lived experience of survivors is essential for those engaged in addressing crimes of sexual violence. It ensures that violence is not overlooked or trivialized by practitioners who may not always recognise these acts, and it provides survivors with recognition and validation of their experiences. Additionally, as sexual violence is better understood, laws, policies, and practices can be developed to address sexual violence more effectively.

**BETTER UNDERSTANDING  
THE LIVED EXPERIENCE OF  
SURVIVORS IS ESSENTIAL FOR  
THOSE ENGAGED IN ADDRESSING  
CRIMES OF SEXUAL VIOLENCE.**

To that end, the Civil Society Declaration on Sexual Violence presents a broad view on how to interpret the concept of sexual violence, based primarily on consultations with self-identified survivors of sexual violence. Information from consultations was complemented by input from civil society, legal practitioners, academics, and policy makers. The process was a unique opportunity to empower survivors as experts on the topic, generating a document that is firmly grounded in real experience and informed by a wide range of actors who are engaged first hand in the field of sexual violence.

The Declaration blends this multitude of experiences to provide guidance on what makes an act “sexual” and to indicate when an act of sexual nature may become an “act of sexual violence”. As such, the Declaration serves as a critical reference point on sexual violence in a way that is survivor-centric, inclusive, modern, forward-looking, and contextually relevant. It provides real examples based on the expertise of survivors, and the experience of actors who have engaged in the prosecution and documentation of sexual violence.

The Commentary to the Civil Society Declaration on Sexual Violence can be found in Annex 1 and serves as a key document to understand the Declaration's various principles, indicia, and examples. Importantly, the Commentary sets out the rationale behind the inclusion of various elements based on the input from survivors and provides examples given by survivors to illustrate their feedback.

As noted, the Civil Society Declaration on Sexual Violence is largely based on the views of survivors of sexual violence. To explain how the input of survivors and other actors was sought and used, as well as the contributions from a variety of other actors, Annex 2 of the Declaration sets out the methodology by which the Declaration was developed.

The Civil Society Declaration on Sexual Violence and its Annexes are part of The Hague Principles on Sexual Violence. In addition to the Declaration, The Hague Principles include the International Criminal Law (ICL) Guidelines, a resource on the implementation of the Civil Society Declaration for ICL practitioners. The ICL Guidelines set out the sexual violence acts in the Civil Society Declaration that may amount to international crimes. This is to inform the international criminal investigation and prosecution of these acts.

The Hague Principles on Sexual Violence also include the Key Principles for Policy Makers on Sexual Violence, a guideline for the implementation of the Civil Society Declaration for policy makers working to address sexual violence through legislation and policy development.

# PREAMBLE

Violations of a sexual nature have long been a feature in times of conflict and peace. These violations are deeply rooted in every society, a result of patriarchal domination and lasting discrimination, and exacerbated by structural instabilities such as conflict.

Understood broadly, the concept of “sexual violence” encompasses all violations of sexual autonomy and sexual integrity. It is often characterized by humiliation, domination, and destruction.

Despite its egregious nature in all circumstances and the recognition that sexual violence is a threat to peace and security<sup>1</sup> when used as a tactic of war, there is no universal view of what makes an experience of harm or violence “sexual”. This is due to the widely varying modes of sexual expression, identities, norms, and perceptions among various nations, regions, cultures, communities, and individuals.

**UNDERSTOOD BROADLY,  
THE CONCEPT OF “SEXUAL  
VIOLENCE” ENCOMPASSES  
ALL VIOLATIONS OF SEXUAL  
AUTONOMY AND SEXUAL  
INTEGRITY.**

Understanding the breadth of views on what constitutes an act of sexual violence is essential for those engaged in documenting, preventing, investigating, prosecuting, or responding in any other way to crimes of sexual violence. This is imperative to ensure violence is not overlooked or trivialized, and it is essential in providing survivors with recognition of their experiences.

To that end, the Civil Society Declaration presents diverse views on how to interpret the concept of sexual violence, based primarily on input from self-

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1. See United Nations Security Council (UNSC), Resolution 1820 (2008), UN Doc. S/RES/1820 (2008), 19 June 2008, para 1.

identified survivors of sexual violence, with additions from civil society, practitioners, academics, and policy makers.

By bringing together these diverse views and experiences, the Civil Society Declaration intends to inform and expand upon understanding of the concept and consequences of sexual violence.

The Civil Society Declaration acknowledges that the impact of sexual violence is felt by individuals, but also by families and communities, and can persist for generations.

The Civil Society Declaration recognizes that sexual violence can be committed at any time, in any space, and by and against any individual adult or child, whether male, female, or otherwise. The Declaration also recognizes that sexual violence can be committed by many means, including through controlling a person's sexual or reproductive capacity, coercing them into committing acts of sexual violence against another, or intrusion into their physical, mental, or emotional space.

The Declaration exemplifies the process of implementing lived experience and thoughtful engagement in shaping law. The examples given in this Declaration are illustrative, rather than exhaustive.

As a living document, the Declaration will be open to future revisions.



# PART 1.

## GENERAL PRINCIPLES

1. Sexual violence involves singular, multiple, continuous, or intermittent acts<sup>2</sup> which, in context, are perceived by the victim, the perpetrator, and/or their respective communities as sexual in nature. Such acts are to be characterised as sexually violent if they violate a person's sexual autonomy or sexual integrity.
2. This includes acts which are:
  - a. committed "forcibly",<sup>3</sup> meaning through physical force, threat of force, or coercion, such as that caused by fear of violence, duress, detention, psychological oppression, or abuse of power against any person or persons, or by taking advantage of a coercive environment; or
  - b. committed against a person who is unable or unwilling to give genuine, voluntary, specific and ongoing consent.<sup>4</sup> A person may be incapable of giving relevant consent if affected by natural, induced, or age-related incapacity. Other factors that may affect a person's capacity to give genuine consent include literacy, access to information, and linguistic, educational, and economic positions.

Physiological reactions should not be considered as a reflection of consent or a suggestion that the circumstances were not coercive.

3. Acts of sexual violence can be committed by and against any person, regardless of age, sex, or gender;
4. Acts of sexual violence can be committed at any time and in any environment, including marital, familial, or intimate;

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2. For the purpose of this Declaration, the term "act" refers to an active or passive action as well as a deliberate omission.

3. This definition of "forcibly" is consistent with the International Criminal Court (ICC) Elements of Crimes (EoC), (EoC, fn 5, International Criminal Court (ICC), Elements of Crimes, 2011).

4. See EoC, fn 16. Consent to the relevant sexual activity must also be specific and ongoing. Thus, it will not suffice if the person has consented to similar conduct, if they consented to the relevant activity(ies) on a previous occasion, if they initially consented but later withdrew that consent, or if the nature of the sexual activity changes without their consent. The consent should not be considered as freely given when it has occurred in a situation of vulnerability. See Part 5 for the factors that may be regarded as affecting whether an act of a sexual nature is committed without genuine, voluntary, specific, and ongoing consent.

5. An act can be sexual in nature even in the absence of physical contact;
6. An act can be sexual in nature even if it is neither intended to produce sexual gratification, nor does it produce that result;
7. The sexual nature and the gravity of an act are determined in part by identity, ability, age, race, sex, culture, religion, historical precedents, indigeneity, and other intersecting factors. Therefore, if decision makers take steps to understand the context in which an act occurred, they will be better equipped to determine whether an act is sexual, and to assess the gravity of such acts.

## PART 2.

### INDICIA THAT AN ACT IS SEXUAL IN NATURE

Each of the following indicia suggests that an act is sexual in nature, but such indicia are not necessary to such a finding, nor is this list exhaustive:

1. The act involved exposing a “sexual body part”<sup>5</sup> or physical contact with such a body part, including over clothing;
2. The act was intended to be sexual by the perpetrator or was perceived as such by the affected person or their community as being sexual in nature;
3. The perpetrator or a third party<sup>6</sup> derived sexual gratification from the act, or intended to do so;
4. The act, while not necessarily sexual in itself, was intended to impact:
  - a. the affected person's sexual autonomy or sexual integrity, including their capacity to engage in sexual activity, feel sexual desire, or have intimate relationships;
  - b. the affected person's sexual orientation or gender identity; or
  - c. the affected person's reproductive capacity or reproductive autonomy;
5. The act involved sexual innuendos or language with implicit or explicit sexual connotations for the affected person, the community, or the perpetrator;

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5. See Part 3.

6. For the purposes of this Declaration, a “third party” can include an animal or person, living or dead.

6. The act involved use, interference, control, or degradation of fluids or tissue associated with sexual and reproductive capacity, including semen, vaginal fluids, menstrual blood, breast milk, or placenta.

These indicia are illustrative and non-exhaustive.

## PART 3.

### EXAMPLES OF SEXUAL BODY PARTS

In most, if not all cultures, sexual body parts are understood to include the anus, breasts, penis, testicles, vagina, and vulva, including the clitoris.

In certain cultures, other body parts that are regarded as sexual include the back, especially the lower back, buttocks, ears, hair, hips, lips, mouth, neck, thighs, waist, and wrists.

These examples of sexual body parts are illustrative and non-exhaustive.

## PART 4.

### EXAMPLES OF ACTS OF SEXUAL VIOLENCE

1. Acts of sexual violence can include:
  - a. acts committed by one person against another;
  - b. acts that one person causes another person to commit against themselves, against a third party (including another person or an animal), or on a dead body; or
  - c. acts orchestrated or facilitated by a group, political or state entity or other organisation.
2. Acts of sexual violence can fall into two categories:
  - a. acts of a sexual nature deemed inherently violent; and
  - b. acts of a sexual nature that may amount to sexual violence if they occur forcibly<sup>7</sup> or against a person who is unable or unwilling to give genuine, voluntary and specific consent.<sup>8</sup>

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7. See Part 1.2.a.

8. See Part 1.2.b.

3. Acts of a sexual nature that may be regarded as inherently violent include:
- a. causing someone to form reasonable apprehension, or fear, of acts of sexual violence;<sup>9</sup>
  - b. depriving someone of access to hygiene, treatment, or medicine related to menstruation, pregnancy, childbirth, fistula care, rectal hematoma, HIV or other sexually transmitted infections, sexual maiming, disfigurement, gynaecological, urological or urinary treatment, or any other aspect of sexual health or reproductive health;
  - c. depriving someone of reproductive autonomy, such as by subjecting them to forced pregnancy,<sup>10</sup> forced sterilization,<sup>11</sup> reproductive sabotage,<sup>12</sup> forced parenthood; or preventing them from making choices as to whether or not to use contraception, undergo sterilization, impregnate another person, or carry a pregnancy in their own body to term;
  - d. grooming for sexual activity, including through online communication or social media;
  - e. humiliating or mocking a person based on their perceived sexual orientation, gender identity, sexual performance, sexual reputation, sexual choices, sexual activity (or lack thereof), or sexual body parts;<sup>13</sup>
  - f. prohibiting someone from engaging in consensual sexual activity, including due to a person's sex, sexual orientation, gender identity, disability, or any other grounds on which discrimination is prohibited under international law;

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9. As listed in Part 4 of this Declaration.

10. Pursuant to Art. 7.2.f of the Rome Statute, "forced pregnancy" means "[t]he unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy."

11. The ICC Elements of Crimes specify that forced sterilization occurs where "[t]he perpetrator deprived one or more persons of biological reproductive capacity" and "[t]he conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent". In addition, "[t]he deprivation is not intended to include [birth control] measures which have a non-permanent effect in practice" and "[i]t is understood that 'genuine consent' does not include consent obtained through deception". ICC Elements of Crimes, Art. 7.1.g-5, 8.2.b.xxii-5 and 8.2.e.vi-5.

12. This includes tampering with or damaging condoms and other contraceptives.

13. See Part 3.

- g. punishing or degrading someone's perceived non-compliance with gender norms; their perceived status as neither male nor female; or their perceived sexual behaviour, sexual orientation, or gender identity;
  - h. punishing someone for refusing to engage in sexual activity;
  - i. sexually harassing someone by engaging in unwelcome sexual conduct which can be interpreted as offensive, humiliating, or intimidating under the circumstances. Unwelcome sexual conduct may include:
    - i. making noises, statements, or gestures with a sexual overtone;
    - ii. sending sexually explicit messages;
    - iii. using phones or other devices to invade privacy; or
    - iv. staring in a way that could be reasonably interpreted as indicating sexual objectification or sexual desire.
  - j. subjecting a person to child marriage or a sexually exploitative relationship; and
  - k. threatening to violate a person's sexual autonomy or sexual integrity, through any means.
4. Acts that may be regarded as examples of sexual violence where they occur forcibly<sup>14</sup> or against a person who is unable or unwilling to give genuine, voluntary and specific consent,<sup>15</sup> include:
- a. beating, biting, burning, constricting, circumcising, mutilating, or otherwise injuring a sexual body part,<sup>16</sup> or any other body part with a sexual intention, including after a person's death;
  - b. being confined with another person;
  - c. disseminating or producing images, footage, or audio recordings of a person in a state of nudity or partial undress or engaged in acts of a sexual nature, including through online communication or social media;

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14. See Part 1.2.a.

15. See Part 1.2.b.

16. See Part 3.

- d. exposing a person to nudity, especially to naked sexual body parts,<sup>17</sup> or exposing them to acts of a sexual nature,<sup>18</sup> including seeing or hearing through images, descriptions, footage, art, or audio recordings thereof;
- e. having someone enter into or remain in a marriage or other intimate partnership, including an arranged marriage, temporary marriage, false marriage, transfer of spouse/partner;
- f. having someone feign sexual desire or sexual enjoyment;
- g. having someone perform movements, including dance movements, with a sexual association;
- h. having someone perform, in view of others, bodily functions that are normally conducted in private, including measures related to menstrual hygiene;
- i. having someone undress completely or partially, including the removal of headwear in cultures where this has a sexual implication, or requiring them to wear clothing with a sexual association;
- j. having someone undergo procedures or rituals to determine or alter their sexual orientation or gender identity;
- k. impregnating a person, through any means;
- l. inspecting someone's genitals, anus, breasts, or hymen without medical or similar necessity;
- m. kissing or licking a person, especially a sexual body part;<sup>19</sup>
- n. making physical contact with a person, including by touching any sexual body part<sup>20</sup> of that person's, touching a person with a sexual body part,<sup>21</sup> or by sitting or lying on a person;
- o. marking a person as sexually deviant, sexually impure, or as survivor of sexual violence, by using culturally significant methods, such as by removing their hair, requiring them to wear sexually suggestive symbols, or branding their body;

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17. See Part 3.

18. As listed in Part 4 of this Declaration.

19. See Part 3.

20. See Part 3.

21. See Part 3.

- p. penetrating someone's body, however slightly, with a human or animal sexual organ;<sup>22</sup>
  - q. penetrating someone's anal or genital opening, however slightly, with an object or body part;<sup>23</sup>
  - r. preparing a person to engage in sexual activity with a third person;
  - s. transmitting HIV or other sexually transmitted infection(s);
  - t. watching someone in a state of nudity or participating in acts of a sexual nature;<sup>24</sup> including seeing or hearing through images, descriptions, footage, art, or audio recordings thereof.
5. Acts committed as part of a structural or institutional violence, including acts and omissions by States and other entities, may also be perceived as sexual violence, as input from survivors, practitioners, and global civil society indicates. This includes:
- a. the perpetration of acts of sexual violence (as previously listed) by State representatives or agents;
  - b. the failure of national authorities to:
    - i. protect people from sexual violence;
    - ii. hold perpetrators of sexual violence to account under national law or refer the matter to a competent court; and/or
    - iii. guarantee remedies and assistance to survivors.
  - c. the adoption of discriminatory laws fostering or allowing impunity for the perpetrator, including through low sentences or allowing a perpetrator to escape justice through marriage to their victim.

These examples are illustrative and non-exhaustive. The acts are organized alphabetically to avoid a perception of hierarchy among them. In particular, this aims to avoid the perspective that acts involving penetration are necessarily more serious than other acts.<sup>25</sup>

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22. In many systems, including the ICC, this conduct constitutes rape if committed forcibly or without genuine, voluntary, specific, and ongoing consent.

23. *Ibid.*

24. As listed in Part 4 of this Declaration.

25. It is acknowledged that the alphabetical order will not be apparent in translations of the Declaration.

## PART 5.

# FACTORS AFFECTING WHETHER AN ACT OF A SEXUAL NATURE IS COMMITTED WITHOUT GENUINE, VOLUNTARY, SPECIFIC AND ONGOING CONSENT<sup>26</sup>

As noted in Part 2, acts of a sexual nature may violate sexual autonomy or sexual integrity if they are committed forcibly<sup>27</sup> or against a person who is unable or unwilling to give genuine, specific, and ongoing consent.<sup>28</sup> Factors which may be relevant to the determination of whether an act was committed without such consent include:

1. An unequal power relationship between the perpetrator and the affected person due to a variety of possible factors, including:
  - a. the vulnerability of the affected person due to factors considered by the perpetrator to be strategic advantages, such as the affected person's sex, sexual orientation, gender identity, age, disability, poverty, class, social status, caste, ethnicity, indigeneity, race, religion, illiteracy, or other grounds;
  - b. a context of detention, confinement, or institutionalization;
  - c. a context of migration or displacement;
  - d. a context of genocide, widespread or systematic attack, armed conflict, or national disturbances;
  - e. the perpetrator being in possession of a weapon, and the affected person being unarmed;
  - f. the perpetrator being a person in a position of authority;
  - g. the affected person having any type of dependency (including financial, legal,<sup>29</sup> professional, familial, and/or personal) on the perpetrator, or any other type of contextual relationship that gives rise to a risk of exploitation;

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26. See Part 1.2.b.

27. See Part 1.2.a.

28. See Part 1.2.b.

29. This includes when a person is a caregiver or tutor.



- h. an inability or incapacity of the affected person to consent or control their conduct due to age, mental illness, or temporary intoxication;
- i. an awareness that the perpetrator has previously used violence against the affected person, or a third party, as punishment for non-compliance with the perpetrator's demands; or
- j. a situation where there is a reasonable fear of suffering sexual violence based on the surrounding context of terror created by the perpetrator(s).

These examples are illustrative and non-exhaustive.

# ANNEX 1.

## COMMENTARY

### PART 1.

#### GENERAL PRINCIPLES

Part 1 of the Civil Society Declaration on Sexual Violence lists general statements identified as core principles regarding sexual violence. These are based on the experiences of survivors of sexual violence from 25 countries, as well as input from NGOs, practitioners, academics, and other experts. The input shared during these consultations inform the Declaration extensively and are used as examples throughout this Commentary.<sup>1</sup> For more information on the process by which the Declaration was developed, see Annex 2: Methodology.

**1. Sexual violence involves singular, multiple, continuous, or intermittent acts<sup>2</sup> which, in context, are perceived by the victim, the perpetrator, and/or their respective communities as sexual in nature. Such acts are to be characterised as sexually violent if they violate a person's sexual autonomy or sexual integrity.**

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1. Due to the confidential nature of consultations, the reports comprising the findings of the consultations will not be made publicly available. They will however be cited throughout the Declaration.

2. For the purpose of this Declaration, the term "act" refers to an active or passive action as well as a deliberate omission.

2. This includes acts which are:

- a. committed "forcibly",<sup>3</sup> meaning through physical force, threat of force, or coercion, such as that caused by fear of violence, duress, detention, psychological oppression, or abuse of power against any person or persons, or by taking advantage of a coercive environment; or
- b. committed against a person who is unable or unwilling to give genuine, voluntary, specific and ongoing consent.<sup>4</sup> A person may be incapable of giving relevant consent if affected by natural, induced, or age-related incapacity. Other factors that may affect

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3. This definition of "forcibly" is consistent with the International Criminal Court (ICC) Elements of Crimes (EoC), (EoC, fn 5, International Criminal Court (ICC), Elements of Crimes, 2011).

4. See EoC, fn 16. Consent to the relevant sexual activity must also be specific and ongoing. Thus, it will not suffice if the person has consented to similar conduct, if they consented to the relevant activity(ies) on a previous occasion, if they initially consented but later withdrew that consent, or if the nature of the sexual activity changes without their consent. The consent should not be considered as freely given when it has occurred in a situation of vulnerability. See Part 5 for the factors that may be regarded as affecting whether an act of a sexual nature is committed without genuine, voluntary, specific, and ongoing consent.

**a person's capacity to give genuine consent include literacy, access to information, and linguistic, educational, and economic positions.**

**Physiological reactions should not be considered as a reflection of consent or a suggestion that the circumstances were not coercive.**

Freely given consent excludes consent given under coercion or in any situation in which the victim is in a vulnerable position where they are unwilling or unable to consent to a sexual act. Situations of vulnerability that could invalidate consent can be the result of, e.g. captivity,<sup>5</sup> detention,<sup>6</sup> or any

oppressive circumstances, including abuse of power or conflict.<sup>7</sup> Part 5 of the Declaration establishes a list of factors affecting whether an act of a sexual nature is committed forcibly or without genuine consent. While it is widely accepted that consent should not be an element to take into consideration in the case of international crimes (including genocide, crimes against humanity, and war crimes) or mass violations of human rights, it is still relevant outside of these contexts, mainly in domestic settings and in so called "peace time".

**3. Acts of sexual violence can be committed by and against any person, regardless of age, sex, or gender;**

As is well documented and demonstrated in cases from numerous international tribunals, sexual violence can be committed *by* and *against* persons of any gender or sex.<sup>8</sup>

Consistent with Principle 3, gender-neutral language is used throughout the Declaration. To include all people, including those who are

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5. In the case against Anto Furundžija, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) found that "any form of captivity vitiates consent". ICTY, *Prosecutor v. Anto Furundžija*, Trial Judgement, IT-95-17/1-T, 10 December 1998, para 271.

6. ICTY, *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Appeals Judgement, IT-96-23&IT-96-23/1-A, 12 June 2002, para 132: "For the most part, the Appellants in this case were convicted of raping women held in de facto military headquarters, detention centres and apartments maintained as soldiers' residences. As the most egregious aspect of the conditions, the victims were considered the legitimate sexual prey of their captors. Typically, the women were raped by more than one perpetrator and with a regularity that is nearly inconceivable. (Those who initially sought help or resisted were treated to an extra level of brutality.) Such detentions amount to circumstances that were so coercive as to negate any possibility of consent."; See also ICTY, *Prosecutor v. Kvočka et al*, Appeal Judgement, IT-98-30/1-A, 28 February 2005, para 396; ICTY, *Prosecutor v. Milan Milutinović et al*, Trial Judgement, IT-05-87-T, 26 February 2009, para 200; ICTY, *Prosecutor v. Mičo Stanišić and Stojan Župljanin*, Trial Judgement vol 1 of 3, IT-08-91-T, 27 March 2013, paras 430, 432, 489, 587, 603, 629-30; ICTY, *Prosecutor v. Momčilo Krajišnik*, Trial Judgement, IT-00-39-T, 27 September 2006, para 333.

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7. Priya Gopalan, Daniela Kravetz and Aditya Menon, "Proving Crimes of Sexual Violence" in Serge Brammertz and Michelle Jarvis (eds), *Prosecuting Conflict-Related Sexual Violence at the ICTY* (Oxford University Press, 2016), p 135. See also ICTY, *Prosecutor v. Vlastimir Đorđević*, Appeals Judgement, IT-05-87/1-A, 27 January 2014, para 852 citing to *Milutinović et al*, *Ibid.*, para 200.

8. See, e.g. Chris Dolan, "Victims Who Are Men" in F. Ní Aoláin et al (eds), *The Oxford Handbook of Gender and Conflict* (Oxford University Press, 2018) p 86. See also ICTY, *Prosecutor v. Radoslav Brđanin*, Trial Judgement, IT-99-36-T, 1 September 2004, para 824: "Two (...) male detainees, at least one of whom was a Bosnian Muslim, were forced to perform fellatio on each other (...) whilst being subjected to ethnic slurs."; ICTY, *Prosecutor v. Duško Tadić*, Trial Judgement, IT-94-1-T, 7 May 1997, paras 206, 237, 670, 692, 726, 730.

intersex, the Declaration uses neutral terms (e.g. “themselves” rather than “himself” and “herself”). It is recommended that gender-neutral language be used in translations of the Declaration. If this is not possible linguistically, it is suggested that translations include a footnote specifying that the Declaration is intended to apply to all people regardless of gender or sex.

#### **4. Acts of sexual violence can be committed at any time and in any environment, including marital, familial, or intimate;**

In recent years, there has been unprecedented international attention on sexual violence in conflict, as demonstrated, among others, by a series of United Nations Security Council resolutions on the issue and by the Global Summit to End Sexual Violence in Conflict in London in 2014. This Declaration has been written to encompass all sexual violence, including that which is committed in so called “peace time”. Principle 4 is written to exclude limitations on the context for the commission of the acts mentioned in the Declaration.

This principle reflects the findings of the consultations with survivors where, in addition to discussing conflict-related sexual violence, participants described experiences of sexual violence within a family environment, most often at the hands of a husband or intimate partner. These responses are consistent with feminist scholarship, which emphasizes that people – especially women and children – are at risk of violence, including sexual violence, within the intimate sphere of the home and family.

The importance of acknowledging that sexual violence can be committed in the

intimate sphere has already been illustrated, in particular during the negotiations on the ICC Elements of Crimes from 1999-2000. Certain States sought to exclude sexual violence in the so-called “private sphere”,<sup>9</sup> especially where such acts could be justified by religious or cultural beliefs. For example, it has been argued that the Elements of Crimes should specify that the crime of rape does not affect “natural and legal marital sexual relations in accordance with religious principles or cultural norms in different national laws”, that the crime of sexual slavery does not include the “rights, duties, and obligations incident to marriage between a man and a woman”, and that the crime of forced pregnancy excludes “acts related to natural marital sexual relations or the bearing of children in different national laws in accordance with religious principles or cultural norms”.<sup>10</sup> These proposals were rejected, but underscore the value of clear guidance for courts and the international community at large, elucidating the fact that sexual violence within a marital, familial, or intimate context is an issue of serious concern.

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9. The issue of “private” versus “public” spheres was central in the last decades of the twentieth century. It is now widely recognised that the difference is not relevant anymore. Any crime, including those of sexual violence, committed in any space, should be prosecuted.

10. Proposal Submitted by Bahrain, Iraq, Kuwait, Lebanon, the Libyan Arab Jamahiriya, Oman, Qatar, Saudi Arabia, the Sudan, the Syrian Arab Republic, and United Arab Emirates: Concerning the Elements of Crimes against Humanity, PCNICC/1999/WGEC/DP.39', 3 December 1999, discussed in Rosemary Grey, *Prosecuting Sexual and Gender-Based Crimes at the International Criminal Court* (Cambridge University Press, 2019), p 120-121.

**5. An act can be sexual in nature even in the absence of physical contact;**

Principle 5 affirms that acts of a sexual nature, and by extension acts of sexual violence, do not require physical contact, nor do they need to lead to physical injury. Input from survivors and global civil society reveals broad support for this principle.

Principle 5 is also consistent with jurisprudence of international courts and tribunals. The term sexual violence is also used to describe acts that do not involve physical contact or lead to physical injury, such as forced nudity.<sup>11</sup>

**6. An act can be sexual in nature even if it is neither intended to produce sexual gratification, nor does produce that result;**

Principle 6 affirms that acts of a sexual nature (and by extension, acts of “sexual violence”), need not be aimed at obtaining sexual gratification, nor produce that result. In other words, some acts of a sexual nature relate to sexual gratification, but others do not. Alternative aims may be to dominate, punish, humiliate, or intimidate, among others.

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11. See e.g. International Criminal Tribunal for Rwanda (ICTR), *Prosecutor v. Jean-Paul Akayesu*, Trial Judgment, ICTR-96-4-T, 2 September 2008, para 10A. Before the International Criminal Court, the judges in the *Bemba* case did not dispute that forced nudity constitutes sexual violence; rather, the decision indicates that the alleged acts of forced nudity were not of sufficient gravity to prosecute. See ICC, Pre-Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Prosecutor’s Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, ICC-01/05-01/08, 10 June 2008, paras 39,40.

Principle 6 draws broad support from survivors, respondents to an online survey disseminated by WIGJ,<sup>12</sup> and global civil society actors. It is also consistent with the statutes and jurisprudence of international courts and tribunals,<sup>13</sup> none of which require proof of sexual gratification in order to satisfy the elements of rape or any other crime.

**7. The sexual nature and the gravity of an act are determined in part by identity, ability, age, race, sex, culture, religion, historical precedents, indigeneity, and other intersecting factors. Therefore, if decision makers take steps to understand the context in which an act occurred, they will be better equipped to determine whether an act is sexual, and to assess the gravity of such acts.**

Reinforcing the preamble of the Declaration, Principle 7 emphasizes that experiences of sexuality, and therefore of sexual acts and sexual violence, vary among cultures.

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12. In order to gather input from a broad range of stakeholders, including NGOs, practitioners, experts, and members of the general public, as well as to gather examples of specific acts of a sexual nature from various cultural backgrounds, Women’s Initiatives for Gender Justice disseminated an online survey as widely as possible. The survey was made available online between October 2018-August 2019 and was completed by 525 respondents from 84 countries (see Annex 2: Methodology).

13. For example, in the ICTY case *The Prosecutor v. Ranko Češić*, Presiding Judge Alphons Orié expressly rejected the Defence’s argument that proof of the perpetrator’s intent to “satisfy any sexual feelings” is an element of the crime of rape. There is no reason why his position would not apply *mutatis mutandis* to any sexual violence crime. ICTY, *The Prosecutor v. Ranko Češić*, Oral Decision, IT-95-10/1, 8 October 2003, p 83 (line 18), p 84 (line 19), discussed in Grey, 2019, op. cit., p 119.

This principle reinforces the idea that practitioners stand to benefit from taking positive or proactive steps to understand the cultural significance of the relevant acts. For example, judges may invite submissions from counsel, experts, and/or other *amici curiae* on the matter.

## PART 2.

### INDICIA THAT AN ACT IS SEXUAL IN NATURE

**Each of the following indicia suggests that an act is sexual in nature, but such indicia are not necessary to such a finding, nor is this list exhaustive:**

**1. The act involved exposing a “sexual body part”<sup>14</sup> or physical contact with such a body part, including over clothing;**

The consultations with survivors revealed broad support for the idea that acts involving the exposure of or physical contact with certain body parts (see Part 3 of the Declaration) constitute sexual acts. Support for this idea is underscored by the responses to the online survey.

In some consultations, participants indicated that exposing or touching relevant body parts was not necessarily a sexual act; this could instead qualify as part of a legitimate medical procedure, for example. For these participants, the classification of an act as sexual depended on the perpetrator’s intent.

These *indicia* have been articulated to capture cases in which the author touches the affected person or exposes their body part to the affected person, and those in which the author causes the affected person to touch their own body, the body of the author, the body of a third party, or to show another person their body part.

**2. The act was intended to be sexual by the perpetrator or was perceived as such by the affected person or their community as sexual in nature;**

In several consultations, participants indicated that an act could be regarded as sexual depending on the intent of the perpetrator. Responses of this kind referred to intent to obtain sexual gratification as well as any intent aimed at associating an act with sexuality – including intent to mark the affected person as sexually deviant or to diminish their sexual desirability in the eyes of others. This can, for example, include acid attacks intended to affect a person’s attractiveness to others.

Even if the act was not intended to be sexual by the author, it may still be perceived as such by the affected person or their community. This point was made in a number of consultations, for example in Ecuador, where the point was raised that “what is sexual depends on what I try to protect; if what I want to protect is sexual to me, then the act that violates my will is also of a sexual nature”.

Because survivors are the most affected by an act of violence and because they are the principal beneficiaries of any justice-seeking process, accountability, and/or

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14. See Part 3.

reparations for the violations, an act should be considered sexual whenever they identify it as such. This interpretation should also include the perception of family and the community of the affected persons.

**3. The perpetrator or a third party<sup>15</sup> derived sexual gratification from the act, or intended to do so;**

An act can be considered sexual even if it was not aimed at obtaining sexual gratification, nor did it produce that result (see Principle 6). However, consultations indicated that where an act *does* cause sexual gratification for the author or a third party, or where it is intended to produce that result, this is a reason to classify an act as sexual in nature.

**4. The act, while not necessarily sexual in itself, was intended to impact:**

In some consultations, participants indicated that sexual violence could affect sexual capacity, desire, or relationships; gender identity; sexual orientation; or reproductive capacity and autonomy. However, they did not provide a view on whether or not an act becomes sexual *due to* having those effects, when these effects are the intended result.

In other consultations, participants considered that the occurrence of such results should qualify an act as sexual violence.

Based on these findings, the Declaration recognises that an act is sexual when a person intends to impact the affected person's capacity, desire, relationships,

gender identity, sexual orientation, or reproductive capacity and autonomy. In other words, if a person commits an act of physical violence (e.g. beating) that accidentally results in a loss of reproductive capacity, the violence does not necessarily become sexual violence. However, it does transition to sexual violence if the perpetrator *intends* to impact the reproductive capacity of the affected person *by using* physical violence.

**a. the affected person's sexual autonomy or sexual integrity, including their capacity to engage in sexual activity, feel sexual desire, or have intimate relationships;**

Across the consultations, there was a broad view that acts can be sexual if they cause the affected person to lose interest in sexual activity or make it difficult for that person to maintain intimate relationships. For example, many women who experienced sexual violence reported being afraid of men, unable to trust (their partner in particular, but also as a general feeling), and/or disinterested in sex as a result of the violence. Other participants described being unable to share a bed or being physically incapable of sex as a result of sexual violence.

The view that acts are sexual if they impact a person's sexual capacity, desire, or relationships finds support in the arguments of the Legal Representative for Victims (LRV) in the ICC case *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, concerning Kenya's 2007-

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<sup>15</sup>. For the purposes of this Declaration, a "third party" can include an animal or person, living or dead.

2008 post-election violence. In this case, the victims argued (through their lawyer) that the act of forcibly circumcising men should be classified as sexual violence because it “had a detrimental effect on them physically and psychologically, including on their ability to have sexual intercourse”. For example, one victim was “unable to sustain an erection and suffers from premature ejaculation,” and another had difficulties with sex because he had “a pipe fitted in his urethra in order to urinate”.<sup>16</sup>

**b. the affected person’s sexual orientation or gender identity; or**

Some consultations indicated that an act could be considered sexual if its intent was to affect a person’s sexual orientation or gender identity. For example, in discussions held in Mexico, participants referred to “the intention to ‘convert’ lesbian victims (corrective acts)” as a factor that could make an act sexual in nature. Participants also raised this point in the online survey,<sup>17</sup> indicating that an act might be sexual when resulting “in a survivor feeling disconnected from their gendered personhood.” Participants from Syria raised such impact, especially affecting men repeatedly raped in detention settings.

In such cases, both the initial act and its consequences can be considered sexual. An example is the so called “corrective rape” of women as a means of changing their perceived sexual orientation. Such acts are sexual in and of themselves – the forcible sexual act of rape – and because their intent has sexual implications (when the intention is to affect a person’s sexual orientation). The intent here plays an important role. This implies that the initial act does not always have to be of a sexual nature, as long as it is committed with an intent to affect a person’s sexual orientation or gender identity.

The view that acts are sexual if the intent or effect is to impact a person’s sexual orientation or gender identity finds support in the aforementioned arguments by the LRV in the Muthaura & Kenyatta case. In this case, the victims argued that the act of forcibly circumcising men should be classified as sexual violence because it affected their sense of gender identity. As explained by the victims’ lawyer, “the attacks have had a severe effect on the victims’ masculinity and sense of manhood.”<sup>18</sup> This sense of manhood was also addressed in the Kenya consultation report, where a survivor explained that referring to a man as being “more of a woman than a man” or “less of a man” can result in questioning one’s sexual and gender identity.

It is important to note that the Declaration does not imply that sexual orientation

<sup>16</sup> ICC, Trial Chamber V, *The Prosecutor v. Muthaura & Kenyatta*, Victims’ Observations on the “Prosecution’s application for notice to be given under Regulation 55(2) with respect to certain crimes charged”, ICC-01/09-02/11-458, 24 July 2012, para 14.

<sup>17</sup> See Annex 2: Methodology.

<sup>18</sup> ICC, Muthaura & Kenyatta, 24 July 2012, op. cit., para 14.



and gender identity are elements that can be changed. The Declaration only reflects that when this is the intention of the perpetrator, and the purpose they seek to achieve through any other act, then it is qualified as a form of sexual violence.

**c. the affected person's reproductive capacity or reproductive autonomy;**

It is noted that in the consultations, there was no broad support for the proposition that an act could be considered sexual if it impacts a person's reproductive capacity or reproductive autonomy, or if it was intended to do so. However, this proposition is included in the Declaration for two reasons.

First, participants did not generally disagree with the proposition. Rather, when asked for their views on this proposition, participants tended to explain how acts of sexual violence (chiefly, rape) impacted their ability to conceive and to give birth. These responses indicate that the proposition was miscommunicated or misunderstood, not that it was rejected. Participants raised the violation of reproductive autonomy, characterised by a deprivation of a person's agency over their own reproductive capacity, as a form of sexual violence, mainly related to the use, or lack thereof, of contraceptive methods. This relates, for example, to tampering with or damaging condoms and other contraceptives.<sup>19</sup>

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19. For more details, see comments of Part 4.3.c on "[d]epriving someone of reproductive autonomy, such as by subjecting them to forced pregnancy, forced sterilization, reproductive sabotage, forced

Second, classifying such acts as sexual provides a pathway for prosecuting these acts at the ICC and other courts. Thus, it is an opportunity for global civil society to support accountability for violations that States have been slow – and sometimes reluctant – to expressly criminalize.<sup>20</sup>

**5. The act involved sexual innuendos or language with implicit or explicit sexual connotations for the affected person, the community, or the perpetrator.**

In many consultations, participants indicated that using a phrase with an implicit or explicit sexual connotation was an act of sexual violence. On the issue of sexual connotation, a consultation in Palestine included the example of asking about one's marital status as a means of investigating the sexual availability of the person and/or insinuating how "lucky" the wife/husband is. Implicit messages are often accompanied by other physical expressions with sexual overtones, but they do not have to be.

Participants generally referred to spoken language, but there is no reason to exclude other acts of speech, such as sending emails, text messages, and images, or posting messages on social media.

Both implicit and explicit use of sexual language or language with sexual

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parenthood; or preventing them from making choices as to whether or not to use contraception, undergo sterilization, impregnate another person, or carry a pregnancy in their own body to term."

20. See Rosemary Grey, "The ICC's First 'Forced Pregnancy' Case in Historical Perspective" (2017), *Journal of International Criminal Justice*, Vol 15(5), p 905-930.

connotations could amount to sexual harassment, which could amount to an act of sexual violence.

**6. The act involved use, interference, control, or degradation of fluids or tissue associated with sexual and reproductive capacity, including semen, vaginal fluids, menstrual blood, breast milk, or placenta.**

The use of fluids or tissue related to sexual and reproductive capacity has been recognised as being sexual in nature. This can include various acts aimed at or resulting in the damage of one's personal fluids. It can also include the use of these fluids and tissue in order to physically or emotionally hurt, humiliate, or punish another person, or for any other reason which violates a person's integrity.

Research conducted in Australia on breast milk sharing has shown that breastfeeding is "closely tied to a woman's identity as a mother." Taking this into account, the "[sexualisation] of breast milk is unwanted sexual attention to [the woman], her body, her children, [and] or her role as a mother".<sup>21</sup> Keeping control over one's breast milk is therefore a matter of integrity and identity. Violating this control can be considered, according to the women interviewed, a form of sexual violence.

**These indicia are illustrative and non-exhaustive.**

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21. Research realised by Libby Salmon as part of her PhD on the social and legal regulation of breast milk sharing in Australia, at the Australian National University.

## **PART 3.**

### **SEXUAL BODY PARTS: ILLUSTRATIVE EXAMPLES**

In most, if not all cultures, sexual body parts are understood to include the anus, breasts, penis, testicles, vagina, and vulva, including the clitoris.

In certain cultures, other body parts that are regarded as sexual include the back, especially the lower back, buttocks, ears, hair, hips, lips, mouth, neck, thighs, waist, and wrists.

**These examples of sexual body parts are illustrative and non-exhaustive.**

Sexual body parts vary across societies, cultures, religions, and other factors. It should therefore not be understood as a universal list, but rather illustrates the results of the in-person consultations, the online survey, and input from global civil society and experts.

## **PART 4.**

### **EXAMPLES OF ACTS OF SEXUAL VIOLENCE**

This section intends to provide a non-exhaustive list of acts of a sexual nature, which are or amount to sexual violence.

In some of the consultations, participants did not delineate between sexual acts and sexual violence. For example, when asked for examples of sexual acts, some participants listed acts that are inherently violent (such as rape). Conversely, when asked for examples of sexual violence, some

participants listed acts that are only violent if achieved forcibly or without genuine consent (such as touching a sexual body part). The Declaration does not adopt this approach of treating “sexual acts” and “sexual violence” as interchangeable concepts.

In order to reflect the differences between the two concepts, the acts listed in this Declaration are divided into two categories: the acts that are inherently violent and therefore constitute sexual violence on their own, and acts of a sexual nature that only become sexual violence if committed forcibly or against a person who is unwilling or unable to give genuine, voluntary, specific and ongoing consent.

**1. Acts of sexual violence can include:**

- a. acts committed by one person against another;**
- b. acts that one person causes another person to commit against themselves, against a third party (including another person or an animal), or on a dead body; or**
- c. acts orchestrated or facilitated by a group, political or state entity or other organisation.**

This interpretation seeks to broaden international concepts of sexual violence by explicitly prompting readers to consider all kinds of acts, rather than focusing solely on the acts of the perpetrator.

**2. Acts of sexual violence can fall into two categories:**

- a. acts of a sexual nature deemed inherently violent; and**

- b. acts of a sexual nature that may amount to sexual violence if they occur forcibly<sup>22</sup> or against a person who is unable or unwilling to give genuine, voluntary and specific consent.<sup>23</sup>**

**3. Acts of a sexual nature that may be regarded as inherently violent include:**

- a. causing someone to form reasonable apprehension, or fear, of acts of sexual violence;<sup>24</sup>**

In several consultations, respondents described an atmosphere in which forcible sexual acts seemed likely or inevitable as a form of sexual violence. This includes a feeling of constant fear created by a widespread campaign of sexual violence.

An example can be seen in the Ukraine consultation, in which women who experienced sexual violence in detention stated that “even being in a place of captivity created a sense of danger and uncertainty for them. The forced stay in a closed space with men caused fear and an expectation of sexual abuse by the combatants.” As one participant explained, in some places of captivity, “one can sense sexual violence in the air.”

A good example of such apprehension was articulated by Yazidi survivors from Iraq. Survivors explained that the Yazidis are specifically targeted by fighters, with women being abducted, forced into unwanted marriages, and mistreated if

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22. See Part 1.2.a.

23. See Part 1.2.b.

24. As listed in Part 4 of this Declaration.

they resist, creating a widespread fear or apprehension of this happening to Yazidi women at any time.

This issue was also discussed in *Ladner v. United States*, where it was decided that “merely putting another in apprehension of harm whether or not the actor actually intends to inflict or is capable of inflicting that harm” amounts to assault.

This phrasing used in the Declaration seeks to translate these experiences into an act. The term “reasonable apprehension” is used to exclude fears which, while honestly felt, would not have been foreseeable to a perpetrator. It is imperative that judges or other decision makers think about how other people experience the world when applying this “reasonable” standard. Here, the reasonable standard is not the one of a reasonable human being but of a reasonable person with the characteristics of the victim, e.g. age, gender, and vulnerability.

In the judgment of *Akayesu*, the ICTR recognised that, “the female displaced civilians lived in constant fear and their physical and psychological health deteriorated as a result of the sexual violence and beatings and killings.”<sup>25</sup> This Declaration adopts the view that this constant fear, when consciously induced by the perpetrators, can amount to an act of sexual violence in itself, through the creation of an atmosphere that leads

to a reasonable apprehension of sexual violence.

- b. depriving someone of access to hygiene, treatment, or medicine related to menstruation, pregnancy, childbirth, fistula care, rectal hematoma, HIV or other sexually transmitted infections, sexual maiming, disfigurement, gynaecological, urological or urinary treatment, or any other aspect of sexual health or reproductive health;**

Across consultations it was stated that denying access to procedures, measures, or products related to menstruation, reproduction, or sexual health can constitute an act of sexual violence. This includes, for example, delay in providing sanitary protection or care, as well as the banishment of women and girls during menstruation.

In the Ecuador consultation, it was stated that preventing a person from sexual and reproductive health education, including the topics of contraception and menstruation in the framework of the family, could also be regarded as a form of sexual violence in some situations.

An example from Syria was forcing people to provide their used menstrual hygiene products for inspection.

Another example came from the Nepal report, which mentioned the traditional system of Chhaupadi, common in western Nepal, where women are prohibited from entering their homes and are forced to live elsewhere when they are menstruating.

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25. ICTR, *Jean Paul Akayesu*, 2 September 1998, op. cit., para 12A.

In the consultations with male survivors from Uganda, South Sudan, DRC, and Burundi, the example of “being forced not to bathe until a spouse returns” was shared.

- c. depriving someone of reproductive autonomy, such as by subjecting them to forced pregnancy,<sup>26</sup> forced sterilization,<sup>27</sup> reproductive sabotage,<sup>28</sup> forced parenthood; or preventing them from making choices as to whether or not to use contraception, undergo sterilization, impregnate another person, or carry a pregnancy in their own body to term;**

Classifying these disparate acts as deprivations of reproductive autonomy serves an important purpose: it indicates that the harm lies in depriving a person of agency over their own reproductive capacity. From this perspective,

performing an abortion is not necessarily harmful, nor is providing contraception or impregnating a person. Rather, the harm lies in taking away a person’s choice.

Preventing from making choices as to whether or not to use contraception, undergo sterilization, impregnate another person, or carry a pregnancy in their own body to term could take many forms. This phrase is deliberately broad. It includes:

- Restricting choice as to contraception (which covers both forcing someone to use contraception and denying access to contraception).

The practice of requiring a person to use contraception has been employed by several actors during armed conflict, such as ISIS<sup>29</sup> and the FARC in Colombia. In Colombia, the policy of forced contraception was often coupled with the policy of forced abortion when contraception failed<sup>30</sup>.

- Restricting choice as to sterilization (which covers both forced sterilization and denying access to sterilization);
- Restricting choice as to impregnating another person (e.g. forcing a man to impregnate another person).

26. Pursuant to Art. 7.2.f of the Rome Statute, “forced pregnancy” means “the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy.”

27. The ICC Elements of Crimes specify that forced sterilization occurs where “[t]he perpetrator deprived one or more persons of biological reproductive capacity” and “[t]he conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent”. In addition, “[t]he deprivation is not intended to include [birth control] measures which have a non-permanent effect in practice” and “[i]t is understood that ‘genuine consent’ does not include consent obtained through deception”. ICC Elements of Crimes, Art. 7.1.g-5, 8.2.b.xxii-5 and 8.2.e.vi-5.

28. This includes tampering with or damaging condoms and other contraceptives.

29. See Dienneke De Vos, [“Can the ICC prosecute forced contraception?”](#), European University Institute, 14 March 2016.

30. See ABColombia, [Colombia: Women, Conflict-Related Sexual violence and the Peace Process](#), November 2013; See also Francisco Gutiérrez Sanín and Francy Carranza Franco, [“Organizing women for combat: The experience of the FARC in the Colombian war”](#) (2017), *Journal of Agrarian change*, Vol 17(4), p 733-738.

Impregnation can include natural and artificial insemination;

- Restricting choice as to carrying a pregnancy. This includes:
  - Preventing a person from accessing abortion services, such as occurred in Nazi Germany, where women who were expected to give birth to Aryan children were denied access to abortions.<sup>31</sup> This is different from forced pregnancy, because it does not require proof that the pregnancy was initiated forcibly;
  - Requiring a person to undergo an abortion; and
  - Causing a person to experience a miscarriage. An example was given in the Mexico consultation, in which participants referred to forced abortions caused by beating and torture as a form of sexual violence. Further evidence of forced miscarriage due to physical or mental violence can be found in cases before the Nuremberg Tribunal, the International Criminal Tribunal for Rwanda, and the Women's International War Crimes Tribunal on Japan's Military Sexual Slavery.<sup>32</sup>

Regarding forced pregnancy, in the Decision on the confirmation of charges against Dominic Ongwen, the Trial Chamber noted that "the essence of the crime (...) is in unlawfully placing the victim in a position in which she

cannot choose whether to continue the pregnancy."<sup>33</sup> This is in accordance with the view adopted in this Declaration that depriving a person of their reproductive autonomy constitutes a form of sexual violence.

The phenomenon of reproductive coercion also includes interfering with a person's planned contraception means, dubbed "birth control sabotage", and/or interfering with someone's reproductive plans, called "pregnancy coercion".<sup>34</sup>

Consultations with male survivors from South Sudan, Burundi, DRC, and Uganda revealed the phenomenon of being forced to "accept a rape-related pregnancy that he was not responsible for", otherwise known as forced parenthood.

**d. grooming for sexual activity, including through online communication or social media;**

The act of grooming implies that a person builds a personal relationship with an underage person or a person in a position of vulnerability in order to create or enable sexual interest. This can be achieved through different means, including online communication or social media.

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31. See Grey, 2017, op. cit., p 912.

32. *Ibid.*, p 911, 914, and 917.

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33. ICC, Pre-Trial Chamber II, *The Prosecutor v. Dominic Ongwen*, Decision on the confirmation of charges against Dominic Ongwen, ICC-02/04-01/15, 23 March 2016, paras 99-100.

34. Elizabeth Miller, Beth Jordan, Rebecca Levenson, and Jay G. Silverman, "Reproductive coercion: connecting the dots between partner violence and unintended pregnancy" (2010), *Contraception*, Vol 81(6), p 457-459.

One example of grooming is the process by which an adult convinces a child or teenager that they are in a consensual romantic relationship in order to engage in sexual activity that the child may feel is consensual, despite the inability of minors to give consent or to understand the vulnerability of their position.

**e. humiliating or mocking a person based on their perceived sexual orientation, gender identity, sexual performance, sexual reputation, sexual choices, sexual activity (or lack thereof), or sexual body parts;<sup>35</sup>**

This element was widely mentioned during the consultations with survivors. For example, in the Lebanon consultation, participants referred to “insulting [a woman] because she is not good in making sexual act[s] with her husband [sic]” as an example of sexual violence. In the Mexico consultation, participants noted that “using obscene and degrading words [and/or] language referring to the victim’s body or sexual orientation is also considered a sexual act”. In the consultations in Chile, survivors mentioned repeated insults in detention settings based on physical appearances and ethnicity. It was specified that most insults were targeting women, in order to “disqualify them as women”.

In Syria, the Independent International Commission of Inquiry identified similar acts. One woman was called a “dirty Sunni woman” by a male officer as he

went to wash his hands after conducting a genital search.<sup>36</sup>

In the consultations with survivors from Ukraine, examples from captivity were highlighted. “In the example of intentional depreciation of the physiological traits of the survivor and other actions aimed at violating the gender identity of women, there were cases where the prisoners were undressed and ridiculed for the features of their body structure (“imperfection” of the figure), survivors were told they were not feminine [and] that the offenders would not have sexual contact with them because they are disgusted with the survivors because of their age.” One of the women described a case of humiliation that she suffered during captivity: “as a result of taking hormones, hair was growing on my lower back... and when they had stripped me and saw my hair, they all began to take pictures and look.” This example also shows the practice of forced nudity (see Part 4.3.p).

The report from consultations with survivors from Cambodia mentions how female factory workers are teasingly called “factory girls”, a term implying that they are easy-going, not virgins, have had several sexual partners, and so on.

It is also well known that a common practice during the Rwandan genocide

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35. See Part 3.

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36. Human Rights Council, *‘I Lost My Dignity’: Sexual and Gender-based violence in the Syrian Arab Republic*, Conference room paper of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN Doc. A/HRC/37/CRP.3, 8 March 2018, para 32.

was to stereotype Tutsi women as temptresses who were more desirable than Hutu women, which resulted in Tutsi women being targeted for acts of sexual violence.<sup>37</sup> For instance, witnesses testified about Interahamwe soldiers objectifying Tutsi women's sexual organs and body parts. A group of women in a camp were forced to undress and perform exercises in order to "display the thighs of Tutsi women", after which these women were raped following an Interahamwe soldier saying: "Now, let's see what the vagina of a Tutsi woman feels like."<sup>38</sup>

- f. **prohibiting someone from engaging in consensual sexual activity, including due to a person's sex, sexual orientation, gender identity, disability, or any other grounds on which discrimination is prohibited under international law;**

In the Ecuador report, participants underlined the view that sexual violence is not limited to acts committed against one's sexual integrity; it can also include

the prohibition of access to consensual sexual activity and the limitation of one's sexual desire. This relates to the notion of "sexual normality" (versus "sexual deviancy") which was considered as affecting mainly – but not only – members of the LGBTQ community and persons with disabilities.

This personal, familial, and/or social prohibition of exercising sexuality can be seen as structural sexual violence and could lead, as has been the case within the conflict in Colombia, to extermination or social cleansing of "sexually deviant" persons.<sup>39</sup>

- g. **punishing or degrading someone's perceived non-compliance with gender norms; their perceived status as neither male nor female; or their perceived sexual behaviour, sexual orientation, or gender identity;**

In many countries this violence takes the form of corrective rape, but it can also be perpetrated through general physical or emotional violence. The sexual component of this violence therefore relies more on the reason behind the violence rather than on the act of violence itself.

In the Mexico consultation, participants gave the example of a perpetrator using [unspecified] violence against a lesbian woman in order to "take revenge on her for 'taking away' their women". They also

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37. ICTR, *The Prosecutor v. Pauline Nyiramasuhuko et al*, Appeals Judgement, ICTR, IT-98-42, 14 December 2015, para 540: "The Trial Chamber found that, at the beginning of June 1994, Nyiramasuhuko came to the Cyarwa-Sumo Sector, Ngoma Commune, and distributed condoms for the Interahamwe to be used in the raping and killing of Tutsi women in that sector. The Trial Chamber further found that Nyiramasuhuko gave the following order to the woman to whom she distributed the condoms: "[g]o and distribute these condoms to your young men, so that they use them to rape Tutsi women and to protect themselves from AIDS, and after having raped them they should kill all of them. Let no Tutsi woman survive because they take away our husbands."

38. *Ibid.*, para 437.

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39. Amnesty International, *Colombia: "Scarred Bodies, Hidden Crimes": Sexual Violence Against Women in the Armed Conflict*, AMR 23/040/2004, 12 October 2004.



referred to “[d]iscriminatory language based on sexual orientation, and [t]hreatening language because of the victim’s sexual orientation”.

**h. punishing someone for refusing to engage in sexual activity;**

Participants in consultations from Ukraine revealed that in cases where female soldiers refused to engage in sexual activity, they were harassed or threatened by their male superiors, and that sexual harassment was not punished within the ranks of the Ukrainian military service.

Consultations with Yazidi survivors revealed that ISIS punished women for refusing to engage in sex by burning their faces or bodies.

**i. sexually harassing someone by engaging in unwelcome sexual conduct which can be interpreted as offensive, humiliating, or intimidating under the circumstances. Unwelcome sexual conduct may include:**

- i. making noises, statements, or gestures with a sexual overtone;**
- ii. sending sexually explicit messages;**
- iii. using phones or other devices to invade privacy; or**
- iv. staring in a way that could be reasonably interpreted as indicating sexual objectification or sexual desire.**

Across consultations, examples of sexual harassment were prominent. It was raised unanimously in a variety of different

forms. Cases of sexual harassment were often broadly recognised as a form of sexual violence which does not include physical contact.

In the Uganda consultations, one of the participants gave the specific example of taking a woman’s underpants, when they have been left out after being washed, as a form of sexual violence that did not involve physical contact. Respondents also claimed that being looked at in a manner indicating sexual desire was a form of non-physical sexual aggression.

In Mexico, several forms of harassment were mentioned, mainly: “[I]nsults, humiliating and obscene language (for example, when the guards drank milk, then asked the victims ‘Don’t you want *lechita*?’ (Diminutive for milk)”. The milk here refers to the men’s semen.

The report from Palestine dedicated an important section to sexual harassment in all its forms. Survivors confirmed that an act is a form of sexual violence when *the conduct implies verbal, physical, and sexual advances offensive to survivors of violence*. Survivors reported that this is a common practice in Palestine and that a majority of them, if not all, “have been verbally harassed while moving from one place to another, in the markets, the streets, public parks, especially during the holidays, and national and cultural occasions”. This involves a sexual act that aims at harassing, undermining, and taking advantage of women and girls. Verbal harassment includes commenting on a woman’s body by explicitly describing her body, intimate body parts,

breasts, and genital organs (e.g. making comments such as, “you are pretty”, “you have big breasts”, comments on a girl or woman’s height or bottom, or comments such as “whoever marries you is a lucky man”).

Participants from the consultations in the Central African Republic mentioned that repeatedly sending love letters to non-responsive persons could amount to sexual harassment.

Survivors from Bosnia gave the example of tongue movement toward another person with a sexual connotation.

Sexual harassment relies on the feelings and perception of the affected person(s), regardless of whether the conduct was intended to create such feelings or perceptions. It can be the result of different acts, by different perpetrators, in different places. This is in line with the UN understanding and interpretation of sexual harassment according to which, “sexual harassment has much in common with other sexual abuse, whether it happens in conflict, the home, the street[,] or elsewhere”.<sup>40</sup>

**j. subjecting a person to child marriage or a sexually exploitative relationship;**

During the consultations, child marriage was widely raised by participants as an act of sexual violence. Participants agreed that any type of child marriage should be prohibited and that it can be

considered an act of sexual violence because it involves inappropriate sexual activity with children.

Sexually exploitative relationships can involve different types of situations. They can, for example, include forcing a person to offer sexual services regardless of remuneration, such as forced prostitution or sexual slavery. They can also include situations of domestic violence.

Consultations with Yazidi survivors revealed that girls are sometimes offered to another family as part of a reconciliation ritual.

**k. threatening to violate a person’s sexual autonomy or sexual integrity, through any means.**

During the consultations, threats were listed by survivors as one of the main forms of sexual violence which does not involve physical contact. Threats can be directed against the affected person as well as against third parties (especially if known to the affected person).

This act also includes explicit threats of sexual violence against another person. The threats can be directed against the affected person as well as against third parties (especially if known to the affected person).

This act also includes conditional threats of sexual violence, such as threats of sexual violence that will occur if the person fails to comply with certain conditions. For example, in the Lebanon consultation, participants gave the example of Person A filming a sexual act with Person B and then threatening

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40. UN Women, *Towards an end to Sexual Harassment: The Urgency and Nature of Change in the Era of #METOO*, 2018, p 3.

to post the film on YouTube if Person B refused to engage in further sexual acts. As disseminating sexual images is itself an act of sexual violence, this threat constitutes sexual violence in its own right.

In the Ukraine consultation, victims talked about incidents of being threatened with a special type of punishment: "One of the female survivors described how her body reacted with stress to the images of violence in her mind arising from the threats. Occasionally, threats did not refer to sexual violence, but the victims were threatened in such a way that they imagined all possible scenarios. Thus, the combatant's phrase 'We can do whatever we want to you' was interpreted by the female survivor as a threat, including sexual violence. Victims talked about incidents when they were threatened with a special type of punishment - a transfer to the places of captivity known for the high level of sexual violence."

**4. Acts that may be regarded as examples of sexual violence where they occur forcibly<sup>41</sup> or against a person who is unable or unwilling to give genuine, voluntary, and specific consent,<sup>42</sup> include:**

- a. beating, biting, burning, constricting, circumcising, mutilating, or otherwise injuring a sexual body part,<sup>43</sup> including after a person's death;**

During the consultations and in the answers to the online survey, biting was raised alongside with kissing and licking another person. The different acts were separated in this Declaration because biting, unlike kissing and licking, was not agreed upon unanimously when committed in all circumstances over any part of the body. In order for an act to be considered sexual, a person must bite a sexual body part or another part of the body with a sexual connotation (see Part 2).

Participants from Colombia mentioned during the consultations that the act of biting, especially regarding nipples, could be regarded as a more general form of sexual violence: the "[d]estruction of body parts".

An example of this act can also be found in the ICTY case *The Prosecutor v. Duško Tadić*, in which the Trial Chamber recognised that the fact that a prisoner "was compelled to sexually mutilate [another prisoner] by biting off one of his testicles",<sup>44</sup> was part of a sexual assault.

Biting may also be used to brand a person as a victim of sexual violence. See Part 4.3.o for more information.

Different examples were given during the consultations, including the use of "electric shocks in a woman's private parts" in Mexico, or similar use of electric shocks to the genitals of detained political dissidents by Gaddafi's forces in

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41. See Part 1.2.a.

42. See Part 1.2.b.

43. See Part 3.

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44. ICTY, *Duško Tadić*, Trial Judgement, op. cit., para 198.

Libya.<sup>45</sup> In the Kenya consultation report, participants also raised examples of the mutilation of sexual organs, including sexual organs being severed, as well as female genital mutilation.

These acts were raised on several occasions before the SCSL. During the RUF (Revolutionary United Front) case of *The Prosecutor v. Issa Hassan Sesay et al*, several examples of the slitting of male and female genitals were referenced.<sup>46</sup> During *The Prosecutor v. Moinina Fofana, and Allieu Kondewa* (also known as the Civil Defence Forces case), the Prosecution mentioned the practice of putting pepper on or around men's genitalia in order to burn them.<sup>47</sup> A similar example raised in consultations with male survivors was "tying a person to the ground and dripping hot candle wax on their testicles and penis".

Genital mutilation is a very common form of sexual torture against all genders. Many examples of such acts against men, such as squeezing the penis or the testicles (e.g. with the hand, or by closing a drawer on it/them) can be found in the report published by Heleen Touquet in

2018 regarding sexual violence against men.<sup>48</sup> Female genital mutilation is widely perpetrated against women and girls during both conflict and peace times. Up until 2018, the World Health Organization noted that "[m]ore than 200 million girls and women alive today have been cut in 30 countries in Africa, the Middle East[,] and Asia where FGM is concentrated".<sup>49</sup>

In some cases, genital mutilation is followed by other acts. Male survivors from Uganda, South Sudan, Burundi, and DRC shared the example of "forceful circumcision followed by forcing the circumcised person to eat his own foreskin or giving it to another person (often a close relative) who is forced to eat it".

**b. being confined with another person;**

During consultations with male survivors, participants raised the example of being locked in the same space with someone of the opposite sex, especially in detention settings. This Declaration adopts the view that this act can be broadened to include all sexual orientations and gender identities depending on the context. As such, being confined with another person of the same sex but with a different sexual orientation, in a state of nudity or any other relevant specific context can have the same effect as being confined with a person with the opposite sexual

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45. ICC, Pre-Trial Chamber I, *The Prosecutor v. Gaddafi et al* Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, ICC-01/11-4-Red, 16 May 2011, para 27; *Report of the International Commission of Inquiry on Libya* (2 March 2012) UN Doc. A/HRC/19/68, p 45.

46. SCSL, *Issa Hassan Sesay et al*, Trial Judgment, op. cit., paras 1307 and 1208.

47. SCSL, *The Prosecutor v. Moinina Fofana and Allieu Kondewa*, Trial Judgment, SCSL-04-14-T, 2 August 2007, paras 496 and 520.

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48. Heleen Touquet, *Unsilenced. International Truth and Justice Project*, 2018. Other examples of mutilation, electrocution, burning, beating and tying the penis can be found in the LDHR report of 2019, op. cit., p 24-32.

49. WHO, *Female Genital Mutilation. Key Facts*, 2018.

identity. The fact of being forced to stay in confinement with other persons in state of nudity was also raised by participants in Syria. Although the condition of nudity exacerbates the sexual tension, the close proximity can be sufficient, in the view of survivors, to be considered sexual or create apprehension of sexual violence.

**c. disseminating or producing images, footage, or audio recordings of a person in a state of nudity or partial undress or engaged in acts of a sexual nature, including through online communication or social media;**

This example of an act of a sexual nature becomes particularly relevant in societies where online communication and social media have been developed and are used by a wide range of people, including teenagers and adults. It was widely mentioned during the consultations.

There is now a broad range of examples of such acts, including sending obscene or unwanted nude images or so called “revenge porn” (i.e. posting footage or images of a person during sexual activity on the internet as a form of revenge).

In the Palestine consultations, sexual violence via social media was specifically referred to as a new form of harassment and as a primary means for extortion. In such countries where “honour” is considered sacred, these acts can even lead to the killing of those affected, usually women.

**d. exposing a person to nudity, especially to naked sexual body parts,<sup>50</sup> or exposing them to acts of a sexual nature,<sup>51</sup> including seeing or hearing through images, descriptions, footage, art, or audio recordings thereof;**

This act captures circumstances in which the perpetrator exposes their own body parts, exposes certain body parts of the affected person, or causes the affected person to expose their own body, the body of the perpetrator, or the body of a third party. It also includes the forced exposure of a person to sexual acts, whether these acts are consensual or forced.

A common example of this act occurs in conflict settings, such as in Myanmar<sup>52</sup> where people have been forced to watch the rape of a family member. In addition to constituting an act of sexual violence against the person who was raped, the act of forcing others to witness that act can be regarded as a form of sexual violence against those witnesses. This was a common practice recognised by the Special Court for Sierra Leone

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50. See Part 3.

51. As listed in Part 4 of this Declaration.

52. Institute for International Criminal Investigations & REDRESS, *Supplement to the International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: Myanmar*, March 2018, p 6-7.

(SCSL)<sup>53</sup> and by the ICTY,<sup>54</sup> and was raised as an example in consultations by a survivor from South Sudan.

In addition, information gleaned from consultations indicated that exposing a person to sexualized images can sometimes be a pre-cursor to forcing a person to conduct “live” sexual acts. For example, in the Lebanon consultation, participants referred to “obliging the wife/ woman to watch pornographic movies, and later to imitate what she watched” as an example of sexual violence.

Being forced to watch pornography was raised by the majority of consultation participants across all countries as an act of sexual violence.

In the Ecuador consultation, it was found that even when the intention was not necessarily sexual, exposure to nudity (or sexually negligent behaviour) could be

considered a sexual act if it affects the perception of one’s sexuality.

Being forced to watch/witness nudity or sexual acts, was overall considered a violation of one’s freedom and personal integrity.<sup>55</sup>

**e. having someone enter into or remain in a marriage or other intimate partnership, including an arranged marriage, temporary marriage, false marriage, transfer of spouse/partner;**

In many consultations, participants referred to forced marriage or other variations (e.g. early marriage, wife inheritance) as an example of sexual violence. In light of these perspectives, the Declaration regards the act of entering into or remaining in a marriage may be an act of a sexual nature, which *if forced or not consensual*, becomes sexual violence. Hence, arranged marriage (the process by which the spouses are introduced by third party) is not necessarily viewed as sexual violence, but it is capable of becoming sexual violence if achieved forcibly, through fraud, or deception.

In the Ongwen case,<sup>56</sup> the charge of forced marriage as an “other inhumane

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53. Special Court for Sierra Leone (SCSL), *The Prosecutor v. Issa Hassan Sesay et al*, Trial Judgment, SCSL-04-15-T, 2 March 2009, paras 1194 (forcing a man to watch his wife being raped) and 1347 (man forced to watch multiple rapes and killing of his wife, man forced to count each person raping his wife). See also Chris Coulter, *Bush wives and girl soldiers: Women's Lives through War and Peace in Sierra Leone* (Ithaca; London: Cornell University Press, 2009).

54. ICTY, *The Prosecutor v. Miroslav Kvočka et al*, Trial Judgment, IT-98-30/1-T, 2 November 2001, para 98. See also ICTY, *Radoslav Brđanin*, Trial Judgment, op. cit., paras 517 and 1013. Some acts of sexual violence were committed in front of other prisoners at Omarska. In one instance, “an armed man entered the Omarska camp restaurant area where prisoners were eating. He uncovered the breast of a female detainee, took out a knife, and ranit along her breast for several minutes. The other detainees held their breath thinking he might cut off the breast any second” (para 517).

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55. See Lawyers & Doctors for Human Rights (LDHR), *“The Soul Has Died”: Typology, Patterns, Prevalence and the Devastating Impact of Sexual Violence Against Men and Boys in Syrian Detention*, March 2019, p 35-37.

56. ICC, *Dominic Ongwen*, Confirmation of charges, op. cit., paras 87, 89, 90, 91: “The Chamber agrees that forcing another person to serve as a conjugal partner may, per se, amount to an act of a similar character to those explicitly enumerated by article 7(1) of the Statute and may intentionally cause great suffering, and that forced marriage may, in the abstract, qualify

act” included as a crime against humanity was established based on previous jurisprudence from the Special Court of Sierra Leone (SCSL)<sup>57</sup> and the Extraordinary Chambers of Cambodia, where it was stated that victims “are forced to enter into conjugal relationships in coercive circumstances” and endure “serious physical or mental suffering or injury or a serious attack on human dignity of a degree of gravity comparable to that of other crimes against humanity.”<sup>58</sup>

Furthermore, it has been established by the UN Special Rapporteur on the situation of systematic rape, sexual slavery, and slavery-like practices during armed conflict that, “Sexual slavery also encompasses situations where women and girls are forced into ‘marriage’. For instance, in addition to the cases documented in Rwanda and the former Yugoslavia, there are reports

from Myanmar of women and girls who have been raped and otherwise sexually abused after being forced into ‘marriages’ or forced to work as porters or minefield sweepers for the military.”<sup>59</sup>

The Declaration refers to “a marriage or other intimate partnership” (emphasis added). These terms capture forced civil unions as well as forced domestic and sexual partnerships, none of which are considered legal marriages in the relevant State(s).

Also relayed by consultation participants was the example of temporary marriage, when a marriage is entered into but ended soon after intercourse. Such marriages are clearly fraudulent and entered into so that the perpetrator has not committed rape in their own eyes or the eyes of their community or culture.

Another example of intimate partnership which can amount to sexual violence was raised during consultations with survivors from Mali. Participants mentioned the custom of “levirate”, according to which men are obliged to marry their brothers’ widows. This constitutes an act of violence against both the widow and the man forced to enter into a relationship that he did not choose. Both parties will then have to consummate their union, which involves forced or non-consensual sexual intercourse.

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as ‘other inhumane acts’ under article 7 of the Statute rather than being subsumed by the crime of sexual slavery.”

57. SCSL, *The Prosecutor v. Issa Hassan Sesay et al*, Appeals Judgement, SCSL-04-15-A, 26 October 2009, para 736: “[The] accused, by force, threat of force, or coercion, or by taking advantage of coercive circumstances, causes one or more persons to serve as a conjugal partner, and the perpetrator’s acts are knowingly part of a widespread or systematic attack against a civilian population and amount to the infliction of great suffering, or serious injury to body or to mental or physical health sufficiently similar in gravity to the enumerated crimes against humanity.”; SCSL, *Prosecutor v. Alex Tamba Brima et al*, Appeals Judgment, SCSL-2004-16-A, 22 February 2008, para 196.

58. Extraordinary Chambers in the Courts of Cambodia (ECCC), *Case 002 Chea Nuon et al*, Closing Order, 002/19-09-2007-ECCC-OCIJ, 15 September 2010, para 1443.

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59. UN Sub-Commission on the Promotion and Protection of Human Rights, *Final Report of the UN Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-like Practices During Armed Conflict*, UN Doc. E/CN.4/Sub.2/1998/13, 1998, para 30.

**f. having someone feign sexual desire or sexual enjoyment;**

The act of feigning sexual desire or enjoyment as well as its implications were raised during the consultations in several locations. For example, in the Lebanon consultation, one participant stated that “she has to pretend that she is happy during the sexual act, because if not, she will be beaten, and her partner will exercise different acts of violence.” Another survivor from Zimbabwe experienced a similar situation and mentioned the humiliation of being forced to smile at the perpetrator and call him by his name during the rape.

The Palestine consultations reveal men requiring their spouses to feign sexual desire and arguing that “the most important thing is the man’s enjoyment”. There is a social norm that a man can “enjoy his wife’s body any time and under all circumstances, with or without her consent”, thus “forcing the wife to have sex during her menstrual period or while pregnant” is something common.

Consultations with male survivors revealed the example of “being forced to cheer while acts of sexual violence are committed on oneself and another person”.

**g. having someone perform movements, including dance movements, with a sexual association;**

Several consultation reports mention being coerced into performing any kind of movement, especially - but not necessarily - while naked, in front of or for

another person. This could take different forms, including dance, gymnastics, or other physical exercise (e.g. squats and other similar movements).

Survivors from Burundi mentioned being forced to perform sexual dances to satisfy another person as an example of sexual violence.

A further example was found by the United Nations Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea (DPRK), which reported that DPRK guards forced prisoners to perform squats while naked.<sup>60</sup>

In the survey, as well as in international jurisprudence, forcing a person to parade naked is recognised as being a form of sexual violence. Forcing victims to parade naked was charged as sexual violence in *The Prosecutor v. Jean-Paul Akayesu* case before the ICTR.<sup>61</sup>

**h. having someone perform, in view of others, bodily functions that are normally conducted in private, including measures related to menstrual hygiene;**

This act could include requiring a person to urinate, defecate, or use menstrual products while being watched. For example, in the Mexico consultation, participants referred to being forced to perform all of the above mentioned in

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60. Office of the United Nations High Commissioner for Human Rights (OHCHR), *Report of the Detailed Findings of the Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea*, UN Doc. A/HRC/25/CRP.1, 7 February 2014, p 416-422.

61. ICTR, *Jean-Paul Akayesu*, Trial Judgment, op. cit., para 429 and 437.



front of guards as examples of sexual violence.

Similarly, Palestinian survivors described how the toilets are in “Arabic style, which means that the prisoner has to squat to use it, exposing her body before the soldiers sitting in a transparent glass room opposite the toilets”.

**i. having someone undress completely or partially, including the removal of headwear in cultures where this has a sexual implication, or requiring them to wear clothing with a sexual association;**

This act includes two sub-acts, one being the requirement of a person to undress completely or partially, and the other being the requirement to wear clothing with a sexual association. Both were raised by a vast majority of the participants in all consultations.

Support for the first act can be found in the ICTR’s Akayesu case, in which the Trial Chamber held that, “acts of sexual violence include [...]sexual abuse, such as forced nudity”.<sup>62</sup> In the Kenya consultation, participants referred to the “stripping of women, children[,] or men in public or in the presence of their family members”.

The reference to the removal of headwear takes into account views from the consultations. For example, participants in the Tunisia consultation identified being forced to remove the hijab as a form of sexual violence. In Kosovo, participants referred to “[forcibly] taking

off the head scarf or other clothes and disclosing their body or parts of it” as sexual violence.

Several examples raised in the Ukraine consultations referred to “forcing male prisoners of war to dress in women’s clothing” as an act of sexual violence. Related examples of sexual humiliation included “the case of a captured civilian man whom the members of pro-Russian armed groups in Luhansk dressed in leather clothes and took around on a dog’s leash. Representatives of the Luhansk People’s Republic filmed this act of humiliation and published this video on the Internet.”

Survivors from the Democratic Republic of Congo indicated that “being forced to wear attractive or sexy clothing” would be considered an act of sexual violence.

**j. having someone undergo procedures or rituals to determine or alter their sexual orientation or gender identity;**

This act was raised in several consultations. For example, in the Lebanon consultation, participants referred to “the un-human testing [sic]” of lesbian, gay, bisexual, transgender, and intersex (LGBTI) persons in Syria. Such conduct has also been documented elsewhere. There is evidence that in Nazi Germany, homosexual people were forced to participate in biological experiments aimed at changing their sexual orientation.<sup>63</sup> To give a more recent example, the Islamic State of Iraq

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62. *Ibid.*, para 10A.

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63. Grey, 2019, *op. cit.*, p 96.

and the Levant has reportedly searched and seized peoples' cell phones in order to find evidence of homosexual activity.<sup>64</sup>

**k. impregnating a person, through any means;**

Impregnation in these cases can include both natural and artificial insemination. This act relates to the act of "preventing [a person] from making choices as to whether or not to (...) impregnate another person". The two acts were divided for two reasons.

Firstly, the affected person varies between the two acts; in the case of preventing somebody from making a choice regarding whether or not to impregnate somebody else, the affected person is the person who impregnates. In the act of impregnating somebody, the affected person would be the person who is being impregnated.

Secondly, while preventing a person from making a choice regarding their reproductive rights is an act of sexual violence in itself, impregnating a person only qualifies as such if committed forcibly or without genuine, voluntary, specific, and ongoing consent.

**l. inspecting someone's genitals, anus, breasts, or hymen without medical or similar necessity;**

This example includes so called "virginity testing". This testing is still common practice in more than 20 countries and affects many survivors of rape who wish to seek justice, as well as those seeking to be married. In both cases, women undergo an invasive testing procedure, which can be conducted through a variety of methods (mainly to verify the state of the hymen), in order to assess whether they are still a virgin. Another common version of this test is the "two-finger test," which consists of the insertion of two fingers into the vagina of the person in question to assess its size and elasticity<sup>65</sup>. This can be considered a forcible or non-consensual form of penetration.

Another widely reported example is cavity searches, including vaginal searches, ostensibly for the purpose of finding valuables or documentation. During her 2017 visit to Cox's Bazar to meet with Rohingya people who had fled Myanmar, the UN Secretary General's Special Representative on Sexual Violence in Conflict heard many first-hand accounts of such searches.<sup>66</sup>

This act also includes gynaecological examinations. For example, in the Mexico consultation, participants referred to "improper touching by the

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64. CUNY School of Law, MADRE, and OWFI, *Communication to the ICC Prosecutor Pursuant to Article 15 of the Rome Statute Requesting a Preliminary Examination into the Situation of Gender-Based Persecution and Torture as Crimes Against Humanity and War Crimes Committed by the Islamic State of Iraq*, 8 November 2017, para 63.

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65. Dorine Llanta, "*Can two fingers tell the truth?*", International Law Girls, 18 February 2019; WHO, OHCHR, UN Women, *Eliminating Virginity Testing: An Interagency Statement*, 2018.

66. UNSC, *Report of the Secretary-General on Conflict-Related Sexual Violence*, UN Doc. S/2018/250, 16 April 2018, p 55.

[gynaecologist]" as an example of sexual violence. They also mentioned "unnecessary searches (for example, when walking from one area to another in the same space, [where] there was no possibility of hiding something) that included touching and nudity" in the context of security-related searches.

Overall, this act includes unjustified and inappropriate strip-searches and body searches, which violate internationally recognised human rights.

**m. kissing or licking a person, especially a sexual body part;<sup>67</sup>**

According to one survivor's example in the Georgia consultation, "[t]hink of the forced kiss. It may not end with gratification, but it is of [a] sexual nature, because it can make a person feel embarrassed, frightened, and be humiliating and unpleasant when it is against one's will."

This act, as well as the others, can include a third party. This was illustrated in the ICTY's Tadić case, which included an incident in which a prisoner was forced to lick another prisoner's buttocks.<sup>68</sup> This was also present in the ICTY case *Prosecutor v. Miroslav Bralo*, where the perpetrator forced a prisoner to lick his penis clean after he had raped her anally.<sup>69</sup>

**n. making physical contact with a person, including by touching a sexual body part<sup>70</sup> of that person's, touching them with a sexual body part<sup>71</sup>, or by sitting or lying on them;**

In the context of this Declaration, this includes the act of one person sitting on any part of another person, with both persons in any state of dress or undress, as long as the act is either perceived as sexual by the affected person or intended as sexual by the perpetrator. Such a scenario was mentioned in the Mexico consultation.

This act is also in line with international case law. In the ICTR case *The Prosecutor v. Emmanuel Rukundo*, the ICTR mentioned that forcing "sexual contact with [the victim] by opening the zipper of his trousers, trying to remove her skirt, forcefully lying on top of her and caressing and rubbing himself against her until he ejaculated and lost his erection"<sup>72</sup> was "clearly of a sexual nature." The judges reached the same conclusion regarding "Rukundo's actions and words, such as telling her that if she made love with him, he would never forget her, [which] supports the Chamber's finding that his actions were of a sexual nature".<sup>73</sup>

Consultations with male survivors from Uganda, DRC, Burundi, and South Sudan

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67. See Part 3.

68. ICTY, *Duško Tadić*, Trial Judgment, op. cit., para 206.

69. ICTY, *Prosecutor v. Miroslav Bralo*, Initial indictment, IT-95-17, 2 November 1995, para 25.

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70. See Part 3.

71. See Part 3.

72. ICTR, *The Prosecutor v. Emmanuel Rukundo*, Trial Judgement, ICTR-2001-70-T, 1 December 2010, para 381.

73. *Idem*.

revealed the example of “being used as a mattress on which another is raped”.

In the consultation with survivors from Kenya, “[i]t was unanimously agreed [upon] that there are instances when sexual body parts can be in contact without necessarily the act being considered a sexual act”. Examples can be accidental contact such as on public transport, queuing in supermarkets, and walking in crowded public places. The general consensus was that the “intention of either of the parties involved determines whether or not such contacts are sexual in nature or not”.

The intention of the acts was also mentioned in the Georgia consultation: “[a]ccording to the survivor, the breast, female genitals[,] and thighs are the main sexual body parts, though any part of the body can be considered sexual if it is touched with an intimate, sexual intention.” For the survivor, an act is of a sexual nature if contact with sexual body parts, as well as with non-sexual body parts, carries the subtle meaning of sexuality and if the actor has sexual desire and intention while making contact. According to survivors, the determining factor is not only the contacted or exposed body parts, but also the actor’s intention which gives an act a sexual nature.

This act relates to the first indicium of Part 2 of the Declaration, regarding what makes an act sexual in nature.

**o. marking a person as sexually deviant, sexually impure, or as survivor of sexual**

**violence, by using culturally significant methods, such as by removing their hair, requiring them to wear sexually suggestive symbols, or branding their body;**

Although this act was not mentioned during the consultations, nor was it raised in the online survey, it is important to include it in this Declaration.

Historic examples of this act include forcing homosexual men in Nazi concentration camps to wear a pink triangle patch,<sup>74</sup> and shaving off the hair of women who were accused of having sex with “the enemy”, as happened in France after World War II.<sup>75</sup>

A recent example of this act is the sexual violence perpetrated against the Rohingyas, highlighted by the *Report on Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts*, published in August 2019 by the U.N. Independent International Fact-Finding Mission on Myanmar. According to this report, “[p]erpetrators commonly scarred survivors [of sexual violence] through biting on their cheeks, thighs[,] and other body parts in what appeared to be attempts of ‘branding’.”<sup>76</sup>

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74. Heinz Heger, *The Men with the Pink Triangle* (Merlin-Verlag, 1972).

75. Antony Beevor, “*An ugly carnival*”, *The Guardian*, 5 June 2009.

76. Human Rights Council, *Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts*, UN Doc. A/HRC/42/CRP.4, 22 August 2019, paras 75, 96. The biting to mark sexual violence survivors was also raised in Manisha Nandan, Mahipal Singh Sankhla, Mayuri Kumari, Kirti Sharma, and

Other examples of marking include tattoos, especially in abusive domestic or exploitative relationships.<sup>77</sup>

**p. penetrating someone's body, however slightly, with a human or animal sexual organ;<sup>78</sup>**

This act was raised unanimously among participants across consultations. It covers any act of penetration with a sexual organ, including oral sex. As noted in the footnote, the terminology comes from the definition of rape in the ICC Elements of Crimes, which covers cases in which:

"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." (emphasis added).

The un-italicized parts of this definition of rape are included elsewhere in Part 3 of the Declaration. The reference to a sexual organ is interpreted here to include

penetration with biological or *synthetic* genital organ.

The example of penetration of the ears was raised during the DRC consultations. Similar examples of penetration of the nose were given by Anne-Marie de Brouwer in an analysis of sexual violence perpetrated during the Rwandan genocide.<sup>79</sup>

The involvement of animals was also raised several times. In the Kenya consultation, for example, bestiality, in which someone is forced to have intercourse with an animal, was referred as one of the examples of an act of sexual violence.

**q. penetrating someone's anal or genital opening, however slightly, with an object or body part;<sup>80</sup>**

Unlike the previous example, this example refers specifically to anal or genital (vaginal) penetration. The penetration need not be done with a sexual organ; it can be done with any object or body part. Once again, this terminology comes from the ICC Elements of Crimes.

In many consultations, when asked about any other acts of sexual violence that they were aware of, the participants provided examples of the insertion of objects into the sexual organs.

Dr Heleen Touquet's report, "Unsilenced International Truth and Justice Project",

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Rajeev Kumar, "Investigation of Sexual Assault Cases through Bite Marks Identification – A Review Study" (2016, International Journal of Social Relevance & Concern, Vol 4(9)).

77. See e.g. Annie Kelly, "[I carried his name on my body for nine years': the tattooed trafficking survivors reclaiming their past](#)", The Guardian, 16 November 2014. See also the work of [Survivors' Ink](#) to cover tattoos, scars, and other markings of survivors of sexual violence.

78. In many systems, including the ICC, this conduct constitutes rape if committed forcibly or without genuine, voluntary, specific, and ongoing consent.

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79. Anne-Marie de Brouwer et al, *And I live on* (Wolf Legal Publishers, 2019).

80. *Ibid.*

refers to relevant cases and original statements from witnesses: “In four cases, the perpetrators put a sharp object up the urinary tract. The objects ranged from pieces of wire, a piece of pen, a thin metal rod to the stem of a coconut leaf. In order to insert the object for the perpetrators, the victim is strapped to a table. This type of torture leads to serious injuries.”<sup>81</sup>

The “object” here can be understood as inanimate elements or surfaces used as an object. As such, male survivors from Uganda, Burundi, South Sudan, and DRC provided the example of being forced to “have sex with a hole created in the ground”.

**r. preparing a person to engage in sexual activity with a third person;**

During the consultations with male survivors, participants described cases where people were made to prepare a person to have sex with another person (mainly a commander), including by stimulating the person sexually. This involves physical contact but the act of “preparing a person” could be in itself an act of a sexual nature, even without such physical contact. Another example of this act can be found in the case of Dragoljub Kunarac before the ICTY,<sup>82</sup> where the witness D.B. was forced to take a shower and put in condition (through threats) to “satisfy the commander’s desire”. She

then initiated the sexual activity based on the fear of reprisals.<sup>83</sup> The preparation of the person to engage in sexual activity could be regarded, according to this Declaration and based on survivors’ views, as an act of sexual violence if committed forcibly or without consent.

**s. transmitting HIV or other sexually transmitted infection(s);**

This element was initially identified by participants who mentioned that HIV and other Sexually Transmitted Infections (STIs) were a common consequence of rape. In the Uganda consultation, a woman gave the examples of HIV/AIDS and other sexually transmitted infections being passed along as a result of rape, making it difficult to have children.

When asked if the transmission could be in itself an act of sexual violence, answers were almost unanimously positive for cases where transmission was intended by the perpetrator, either through the act of rape or any other means. This includes cases where the affected person consented to have sexual intercourse without knowledge of the intention of the perpetrator (e.g. if the STI was kept secret from the affected person or if the perpetrator lied about their condition).

**t. watching someone in a state of nudity or participating in acts of sexual nature,<sup>84</sup> including seeing or hearing through images, descriptions, footage, art, or audio recordings thereof.**

81. See Touquet, 2018, op. cit., p 20.

82. ICTY, *Prosecutor vs. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Trial Judgement, IT-96-23-T&IT-96-23/1-T, 22 February 2001.

83. Ibid., para 219.

84. As listed in Part 4 of this Declaration.

This includes whether the person is aware of the fact that they are being watched or not.

Survivors from Zimbabwe revealed how women were forced to “stand naked while men were watching and making comments”.

This includes watching a person through surveillance cameras. In the Mexico consultation, participants referred to guards “gathering in an office to observe the female inmates through security cameras” and masturbating to such footage as an example of sexual violence.

Similarly, in the consultations with survivors from Palestine, participants mentioned being watched by soldiers and guards while using the toilets, saying, “[c]ameras are everywhere and are always on. Prisoners said that they have cameras in the toilets while passing to the courtroom.”

**5. Acts committed as part of a structural or institutional violence, including acts and omissions by States and other entities, may also be perceived as sexual violence, as input from survivors, practitioners, and global civil society indicates. This includes:**

- a. the perpetration of acts of sexual violence (as previously listed) by State representatives or agents;**
- b. the failure of national authorities to:**
  - i. protect people from sexual violence;**
  - ii. hold perpetrators of sexual violence to account under national law or**

**refer the matter to a competent court; and/or**

- iii. guarantee remedies and assistance to survivors.**

- c. the adoption of discriminatory laws fostering or allowing impunity for the perpetrator, including through law sentences or allowing a perpetrator to escape justice through marriage to their victim.**

Input from survivors and global civil society indicates that acts and omissions by States may also be perceived as sexual violence. Examples related include the lack of protection offered by the State, or the general context of domestic violence justified by the State. A further example given is when the state system protects or is perceived to protect the perpetrator instead of the victim, which is considered in and of itself as an act of sexual violence.

**These examples are illustrative and non-exhaustive. The acts are organised alphabetically to avoid a perception of hierarchy among them. In particular, this aims to avoid the perspective that acts involving penetration are necessarily more serious than other acts.<sup>85</sup>**

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85. It is acknowledged that the alphabetical order will not be apparent in translations of the Declaration.

## PART 5.

### FACTORS AFFECTING WHETHER AN ACT OF A SEXUAL NATURE IS COMMITTED WITHOUT GENUINE, VOLUNTARY, SPECIFIC AND ONGOING CONSENT<sup>86</sup>

As noted in Principle 2, acts of a sexual nature may violate sexual autonomy or sexual integrity if they are committed forcibly<sup>87</sup> or against a person who is unable or unwilling to give genuine, specific and ongoing consent.<sup>88</sup> Factors which may be relevant to the determination of whether an act was committed without such consent include:

1. An unequal power relationship between the perpetrator and the affected person, due to a variety of possible factors, including:
  - a. the vulnerability of an affected person due to factors considered by the perpetrator to be strategic advantages, such as the affected person's sex, sexual orientation, gender identity, age, disability, poverty, class, social status, caste, ethnicity, indigeneity, race, religion, illiteracy, or other grounds;
  - b. a context of detention, confinement, or institutionalization;

- c. a context of migration or displacement;
- d. a context of genocide, widespread or systematic attack, armed conflict, or national disturbances;
- e. the perpetrator being in possession of a weapon, and the affected person being unarmed;
- f. the perpetrator being a person in a position of authority;
- g. the affected person having any type of dependency (including financial, legal, professional, familial, and/or personal) on the perpetrator, or any other type of contextual relationship that gives rise to a risk of exploitation;
- h. an inability or incapacity of the affected person to consent or control their conduct due to age, mental illness, or temporary intoxication;
- i. an awareness that the perpetrator has previously used violence against the affected person, or a third party, as punishment for non-compliance with the perpetrator's demands; or
- j. a situation where there is a reasonable fear of suffering sexual violence based on the surrounding context of terror created by the perpetrator(s).

These examples are illustrative and non-exhaustive.

As stated in Part 1.2, an act of sexual violence can be committed:

- a. "forcibly", meaning through physical force, threat of force, or coercion, such as that caused by fear of violence, duress, detention, psychological oppression,

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86. See Part 1.2.b.

87. See Part 1.2.a.

88. See Part 1.2.b.



or abuse of power against any person or persons, or by taking advantage of a coercive environment; or

- b. against a person who is unable or unwilling to give genuine, voluntary, specific and ongoing consent. A person may be incapable of giving relevant consent if affected by natural, induced, or age-related incapacity. Other factors that may affect a person's capacity to give genuine consent include literacy, access to information, and linguistic, educational, and economic status.

Part 5 seeks to complement this general principle by providing, based on input from survivors of sexual violence, civil

society, academics, and legal practitioners, a non-exhaustive list of factors that can affect whether an act of a sexual nature is committed without genuine, voluntary, specific, and ongoing consent. Many examples were raised during the consultations, some more general regarding contexts (e.g. confinement, migration, or detention), and others more specific, such as when a participant from Guinea relayed an example of sexual violence being perpetrated by "blue helmets and red berets", referring to UN Peacekeepers and members of the military. Some factors mentioned in this list can be found in national legislations and/or international instruments and are already widely accepted.

# ANNEX 2.

## METHODOLOGY

This annex to the Civil Society Declaration on Sexual Violence (the Declaration) outlines the process by which the Declaration was developed.

### 1. Background on the *Call it what it is* campaign

Women's Initiatives for Gender Justice (WIGJ) is an international human rights organisation advocating for gender justice through the International Criminal Court (ICC) and national mechanisms. WIGJ launched the *Call it what it is* campaign in December 2018 with a goal of enhancing the understanding of what may constitute an act of sexual violence, and subsequently increasing accountability for conflict and atrocity-related sexual violence (CARSV).

Sexual violence is a difficult topic to navigate and is not widely understood. There are many existing efforts to address sexual violence in the broadest sense, including those working on developing policies to address root causes; strengthening international and national criminal codes on sexual violence; codifying protocols to ensure proper processes to investigate, prosecute, and adjudicate sexual violence; addressing stigma; ensuring proper reparation mechanisms; and more. However, there is no universal view of what makes an act sexual, nor is there a universal view of what transforms an act of violence into an act of sexual violence. No national or international laws, protocols, or policies on sexual violence explain or give guidance as to what survivors may consider a sexual act or an act of sexual violence.

To close the existing gap and advance universal understanding of what makes an act sexual, as well as when an act of a sexual nature may amount to sexual violence, the *Call it what it is* campaign gathered civil society organisations, expert practitioners, and academics from around the world to translate the views and expertise of survivors into a practical guide and crucial reference point for practitioners on what makes violence sexual: the Civil Society Declaration on Sexual Violence.

In addition to the Declaration, the campaign resulted in two additional documents. Firstly, the International Criminal Law Guidelines has been created

as a tool for the implementation of the Declaration for ICL practitioners. The guidelines articulate when acts of sexual violence as set out in the Declaration amount to international crimes. This is to inform the international criminal prosecution of these acts. Secondly, the Key Principles for Policy Makers on Sexual Violence has been designed as a tool for the implementation of the Declaration for policy makers working on sexual violence in conflict. Together, the three documents form The Hague Principles of Sexual Violence.

## **2. Development of the Civil Society Declaration and its Annexes**

The Declaration and its Annexes were developed through an inclusive process, as described below.

### **2.1 Desk research**

The first step of the campaign was to conduct extensive desk research on the use of the term “sexual” in various codifications of sexual violence in national and international criminal laws. This desk research led to the realization that no national or international laws, protocols, or policies on sexual violence explain or give clear guidance as to what survivors may consider a “sexual act” or an “act of sexual violence”. This is also true for the legal documents underpinning the jurisdiction of the ICC.

### **2.2 Online survey**

In order to gather input from a broad range of stakeholders, including NGOs, practitioners, experts, and members of the general public, as well as to collect examples of specific acts of sexual violence from various cultural backgrounds, WIGJ disseminated an online survey as widely as possible. The survey was made available online between October 2018 and August 2019 and was completed by 525 respondents from 84 countries.<sup>1</sup> The survey was available in 14 languages.<sup>2</sup>

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1. Afghanistan, Argentina, Armenia, Australia, Austria, Bangladesh, Belarus, Belgium, Bosnia and Herzegovina, Brazil, Bulgaria, Burma, Cambodia, Canada, Central African Republic (CAR), Chile, China, Colombia, Cote d'Ivoire, Croatia, Democratic Republic of the Congo (DRC), Dominican Republic, Ecuador, El Salvador, France, Georgia, Germany, Guatemala, Guinea-Bissau, Guyana, Hungary, India, Indonesia, Iran, Iraq, Ireland, Italy, Japan, Kenya, Kosovo, Lebanon, Libya, Lithuania, Malaysia, Mali, Malta, Mexico, Micronesia, Moldova, Mozambique, Nepal, Netherlands, New Zealand, Niger, Nigeria, Norway, Pakistan, Palestinian Territories, Paraguay, Peru, Philippines, Poland, Saint Lucia, Serbia, Slovenia, South Africa, South Korea, South Sudan, Spain, Sri Lanka, Sudan, Sweden, Switzerland, Syria, Tanzania, Tunisia, Turkey, Uganda, Ukraine, United Kingdom, United States, Venezuela, Zambia, and Zimbabwe.

2. Arabic, Bengali, Chinese, English, French, German, Indonesian, Hausa, Korean, Persian, Portuguese, Russian, Romanian, and Spanish.

Respondents were presented with eight questions on the nature of what makes violence “sexual”. Two of these were open-ended, which enabled respondents to include more information and personal views on specific themes related to the questions. Respondents were invited to provide their name, country of origin, and contact information, but anonymous responses were also welcomed.

### **2.3 Consultations with survivors of sexual violence**

From March through September 2019, WIGJ partnered with various national and local civil society organisations to conduct consultations with self-identified survivors of sexual violence from 25 countries.<sup>3</sup>

The choice of countries to conduct consultations in was based on several criteria. First, WIGJ identified countries that had a known history of CARSV, either recent or ongoing. The second criteria assessed the feasibility of organising such consultations, including the safety of survivors and the safety and availability of local NGO partners with the capacity to conduct the consultations. An overarching aim was to ensure a measure of geographic and cultural diversity. While the survivors consulted offer a sample of views with significant diversity, it is acknowledged that not all regions and cultures are equally represented.

Approximately 500 survivors of sexual violence took part in consultations. The vast majority were women. The overrepresentation of female survivors was noted after the first round of consultations as an unintended outcome. In order to ensure that the voices of male survivors were also heard, WIGJ worked with local NGO partners to conduct consultations specifically intended to gather the views of male survivors.

To encourage a broad and diverse set of answers, participants were asked to give illustrative examples of “any form of sexual violence” through dialogue prompted by open-ended questions. This allowed for participants to engage with the issue without any preconceived definitions that would limit the discussion.

Participants remained anonymous to WIGJ. This anonymity combined with the style of open-ended dialogues encouraged open and honest discussions. In some countries, local organisations involved in the

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3. Bosnia, Burundi, Cambodia, CAR, Colombia, DRC, Ecuador, Georgia, Guinea, Iraq, Kenya, Kosovo, Lebanon, Mali, Mexico, Nepal, Nigeria, Palestinian Territories, South Sudan, Syria, Tunisia, Turkey, Uganda, Ukraine, and Zimbabwe.

consultations reported that through these discussions, they had identified practices of sexual violence thus far unknown to them, even after years of working in the field of addressing sexual violence. They credited the open and anonymous nature of the consultations as a critical factor in allowing survivors to disclose the wide range of sexual violence they had endured, witnessed or heard about.

Survivors were not asked to share their personal stories or experiences explicitly, but rather invited to share whatever information they wished, whether personal or general. In several consultations, participants did decide to share their own experiences, or the experiences of other persons known to them, but in other discussions, talks remained at a more general level.

Throughout the consultations and discussions, survivors were provided access to psychological support.

Following the consultations, participants were provided with a statement of appreciation and gratitude for their time and shared views. They were informed of what would happen with their input and the process by which the Declaration would be drafted. A monthly update on developments in the Call it what it is campaign is sent to the NGO partners who held the consultations with survivors, so that updates can be shared with survivors themselves as well. The final Declaration will be sent to all NGO partners with the request to update the participating survivors.

## **2.4 Drafting process and expert review**

From April through May 2019, based on ongoing input from survivors, a first working draft of the Declaration was prepared by Dr Rosemary Grey (University of Sydney) and the WIGJ team.

Two annexes were also prepared:

- The Commentary, explaining in detail each provision of the Declaration; and
- The Methodology, explaining the process by which the Declaration and its Annexes were developed.

In May 2019, the working draft of the Declaration and the draft Commentary were reviewed by a panel of experts, namely:

- Prof Christine Chinkin, Emerita Professor of International Law, Professorial Research Fellow, and Founding Director of the Centre of Women, Peace, and

Security at the London School of Economics and Political Science (LSE), London, United Kingdom;

- Prof Valerie Oosterveld, Associate Professor and Associate Dean at the Faculty of Law of Western University, Ontario, Canada;
- Ms Patricia V. Sellers, Special Adviser on Gender for the Office of the Prosecutor of the International Criminal Court, The Hague, The Netherlands;
- Ms Priya Gopalan, Human Rights, International Criminal Law, and Gender practitioner with extensive expertise on sexual and gender-based violence, Switzerland.

Based on the valuable comments received from these experts through conference calls, e-mail exchanges, and written feedback, WIGJ drafted a consolidated version of the Declaration and its Annexes.

The Draft Declaration was then sent for review and input to over 50 NGO partners and 30 experts including academics, international and national practitioners, legal advisors of State delegations, and survivor networks.

## **2.5 Finalisation**

Comments and feedback from NGO partners and experts were incorporated into the final draft of the Declaration. The final version of the Draft Declaration and its Annexes was adopted by the Call it what it is campaign in September 2019.

## **3. Analysis and use of input**

The Declaration was developed based on input from survivors of sexual violence and a wide variety of civil society actors, experts, and practitioners. This involved a process of analysis and organisation of the input into the resulting principles, indicia, and examples listed in the Declaration. Specifically, the process involved:

- developing phrases that captured the multitude of experiences described by participants;
- shaping the responses into a standard format, such as by structuring the illustrative examples given as responses into distinct “acts”;
- adding references to jurisprudence or academic research to illustrate or clarify certain points;

- ensuring that the Declaration was as inclusive and all encompassing; and
- where possible, describing all acts in gender-neutral terms and avoiding discrimination against members of the lesbian, gay, bisexual, transgender, intersex, or queer (LGBTIQ) community.

#### **4. Future review**

It is envisaged that The Hague Principles of Sexual Violence will be a living set of documents. It is anticipated that these documents will be periodically reviewed and updated, and feedback will be sought on an ongoing basis.

# **INTERNATIONAL CRIMINAL LAW GUIDELINES ON SEXUAL VIOLENCE**



# INTRODUCTION

The International Criminal Law Guidelines on Sexual Violence (ICL Guidelines) are one component of the three-part Hague Principles on Sexual Violence, which also comprise the Civil Society Declaration on Sexual Violence (Civil Society Declaration) and the Key Principles for Policy Makers on Sexual Violence.

## CONTEXT

Significant progress has been made since the early 1990s in addressing impunity for conflict and atrocity-related sexual violence (CARSV) crimes and enhancing access to justice for survivors, commencing with the express statutory criminalization of certain CARSV crimes and ground-breaking jurisprudential developments by the international *ad hoc* criminal tribunals (the International Criminal Tribunal for

the Former Yugoslavia and the International Criminal Tribunal for Rwanda, referred to hereafter as ICTY and ICTR or *ad hoc* tribunals). Building upon these advancements, the Rome Statute of the International Criminal Court (ICC) expanded the list of sexual violence crimes codified under international law to include rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation and “any other form of sexual violence” as war crimes and crimes against humanity. CARSV crimes, including “any other form of sexual violence”, were also codified in the statutes of the hybrid criminal tribunals (the Special Court for Sierra Leone and the Extraordinary Chambers of the Courts of Cambodia, referred to hereafter as SCSL and ECCC or hybrid tribunals). Each of these Courts further evolved the jurisprudence.

**OVERALL, THE GUIDELINES  
AIM TO FACILITATE THE  
DELIVERY OF MEANINGFUL  
JUSTICE TO VICTIMS OF ALL  
FORMS OF CARSV CRIMES.**

The crime “any other form of sexual violence” ostensibly serves as a “catch-all” category, covering acts of sexual violence that may not fit neatly within the other enumerated CARSV crimes. Recognition and codification of this crime has thus increased the potential to hold perpetrators of CARSV accountable and deliver inclusive justice to victims.

However, the scope of conduct that may fall within the category “any other form of sexual violence” is not widely understood. While the ICC Elements of Crimes clarifies that to establish “any other form of sexual violence” it must be demonstrated, *inter alia*, that the perpetrator committed or caused another to engage in “an act of a sexual nature”, no guidance is provided as to the parameters of what constitutes an act of a sexual nature. Further, the direction that can be gleaned from the jurisprudence of the ICC, as well as the ad hoc and hybrid tribunals, is limited.

This lack of understanding and authoritative guidance threatens to diminish efforts to fully address the sexual violence components of mass international crimes, resulting in:

- A disparity between how CARSV crimes are addressed by criminal justice practitioners and how the violence is perceived and experienced by victims;
- Failure to recognize or identify acts of a sexual nature, victims, witnesses and perpetrators of CARSV crimes and the scale of the crimes committed;
- Lack of charges for CARSV crimes despite compelling evidence;
- Failure to prosecute all forms of CARSV crimes and to ensure that CARSV crime charges are comprehensive;
- Acquittals for CARSV crimes; and
- The re-characterization of CARSV crimes in a manner that does not reflect the harm suffered from the perspective of victims, leading to insufficient, inappropriate or a lack of remedies.

The challenges identified above similarly pertain to the CARSV crimes of sexual slavery and enforced prostitution, which also contain “acts of a sexual nature” as a material element.<sup>1</sup>

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1. See, respectively, *ICC Elements of Crimes*, Articles 7(1)(g)-2 (Crime against humanity of sexual slavery), 8(2)(b)(xxii)-2 (War crime of sexual slavery) and 8(2)(e)(vi)-2 (War crime of sexual slavery), Element Two: “The perpetrator caused such person or persons to engage in one or more acts of a sexual nature,” and Articles 7(1)(g)-3 (Crime against humanity of enforced prostitution), 8(2)(b)(xxii)-3 (War crime of enforced prostitution) and 8(2)(e)(vi)-3 (War crime of enforced prostitution), Element One: “The perpetrator caused one or more

Furthermore, an understanding of the type of conduct which may constitute “an act of a sexual nature”, and when such conduct may rise to the level of sexual violence, is not only important for addressing war crimes and crimes against humanity which always include acts of sexual violence. The commission of sexual violence may also satisfy the material elements of other war crimes and crimes against humanity, such as apartheid, deportation or forcible transfer of population, enslavement, extermination, genocide, outrages upon personal dignity, persecution, torture, and wilfully causing great suffering, or serious injury to body or health.<sup>2</sup> Sexual violence may also constitute an act of genocide. Thus, clarity regarding the scope of conduct that may be classified as sexual violence will serve to increase accountability for these crimes.

## PURPOSE

To address these lacunae, the Women’s Initiatives for Gender Justice devised the ICL Guidelines, drawing upon the Civil Society Declaration on Sexual Violence. The Civil Society Declaration provides insight into the interpretation of “any other form of sexual violence” by explaining what makes an act sexual and when an act of a sexual nature constitutes sexual violence from the perspective of survivors, complemented by input from civil society, practitioners, academics, and policy makers.

The ICL Guidelines translate the Civil Society Declaration into practical guidance for criminal justice practitioners working toward accountability for CARSV crimes, explaining the circumstances under which acts of sexual violence, including those identified by survivors, can rise to the level of international crimes, generating individual criminal responsibility. While the ICL Guidelines are grounded in the jurisprudence and statutory frameworks of the ICC, *ad hoc* and hybrid tribunals, they are designed to be of use to practitioners working in both international and domestic jurisdictions.

The ICL Guidelines are designed to assist criminal justice practitioners in addressing CARSV crimes by means such as:

- Inspiring and encouraging creative, robust and progressive strategies to enhance accountability for CARSV crimes;

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persons to engage in one or more acts of a sexual nature [...]”.

2. As explained in these Guidelines, the *ad hoc* and hybrid tribunals have already established that the material elements of many of these crimes may be met through demonstrating the commission of acts of sexual violence.

- Guiding practitioners in interpreting the elements of CARSV crimes, including “an act of a sexual nature”, in a forward-looking, culturally sensitive, inclusive and contextually relevant manner;
- Aiding practitioners in gathering comprehensive and sufficient evidence of CARSV crimes, including in identifying when a CARSV crime may have been committed and the overall context in which it occurred;
- Informing the inquiries of practitioners and their ability to identify survivors, witnesses and perpetrators;
- Assisting practitioners in devising persuasive arguments to support CARSV crime charges in a manner that ensures all dimensions of sexual violence are addressed; and
- Increasing understanding and recognition by practitioners of all forms of CARSV crimes.

It is envisioned that the Guidelines will also serve as a valuable tool for other stakeholders faced with the challenge of addressing CARSV crimes.

Overall, the Guidelines aim to facilitate the delivery of meaningful justice to victims of all forms of CARSV crimes.

# ELEMENTS OF SEXUAL VIOLENCE AS A CRIME AGAINST HUMANITY OR WAR CRIME

1. To establish that an act of a sexual nature constitutes a crime against humanity or war crime, engendering individual criminal responsibility, several elements must be established, which can be categorized as follows:
  - a. objective elements (*actus reus*), demonstrating the commission of the prohibited conduct;
  - b. subjective elements (*mens rea*), demonstrating that the prohibited conduct was committed with a culpable mental state; and
  - c. contextual elements, establishing that the prohibited conduct had a nexus to a particular set of circumstances.

It is also necessary to establish the mode of liability by which criminal responsibility is attributed to the accused.<sup>3</sup>

2. Although the crime “any other form of sexual violence” is not included in the governing statutes of the *ad hoc* tribunals, sexual violence was nonetheless prosecuted under the rubric of other war crimes and crimes against humanity.<sup>4</sup> In these cases, the tribunals defined the elements of

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3. For details on the manner in which modes of liability have been applied to sexual violence crimes in the jurisprudence of the *ad hoc* tribunals and the ICC, see “International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, Best Practice on the Documentation of Sexual Violence as a Crime or Violation of International Law”, Second Edition, Foreign & Commonwealth Office, United Kingdom, March 2017; “Prosecuting Conflict-Related Sexual Violence at the ICTY”, edited by Serge Brammertz and Michelle Jarvis, Oxford University Press, 2016; “International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, Basic Standards of Best Practice on the Documentation of Sexual Violence as a Crime under International Law”, First Edition, Foreign & Commonwealth Office, United Kingdom, June 2014; “Modes of Liability, A review of the International Criminal Court’s current jurisprudence and practice”, Expert Paper, Women’s Initiatives for Gender Justice, November 2013.

4. See the section entitled “Acts of a sexual nature as established before the *ad hoc* and hybrid tribunals”.

5. See, e.g., UNGA, "Report of the Secretary-General pursuant to paragraph 2 of SC Resolution 808 (1993), 3 May 1993, UN Doc S/25704, para 34 (stating "the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise"); *Prosecutor v. Barayagwiza*, ICTR-97-19-AR72, [Decision on Prosecutor's Request for Review or Reconsideration](#), 31 March 2000, para 69 (stating "[t]he International Tribunal is a unique institution, governed by its own Statute and by the provisions of customary international law, where these can be discerned"); *Prosecutor v. Brima et al*, SCSL-04-16-T, [Judgement](#), 20 June 2007 ("*Brima et al* Trial Judgement"), paras 638-639 (stating "[r]egarding [the crimes over which the Special Court has jurisdiction], the Secretary-General of the United Nations [...] in his 'Report on the Establishment of a Special Court for Sierra Leone' noted that [i]n recognition of the principle of legality, in particular *nullum crimen sine lege*, and the prohibition on retroactive criminal legislation, the international crimes enumerated, are crimes considered to have had the character of customary international law at the time of the alleged commission of the crime. [...] The Trial Chamber is entirely in agreement with that statement and recognizes that the elements of the crimes charged in the Indictment are to be interpreted in accordance with customary international law. Since the ICTY and ICTR also apply customary international law, the Special Court will, where appropriate, be guided by decisions of those tribunals for their persuasive value [...]"); *Prosecutor v. Kajelijeli*, ICTR-98-44A-A, [Judgement](#), 23 May 2005 ("*Kajelijeli* Appeal Judgement"), para 209 (stating "[i]n the following review of the Trial Chamber's findings, the Appeals Chamber will rely upon the relevant provisions found in the sources of law for this Tribunal, i.e., its Statute, the Rules and customary international law"); *Prosecutor v. Furundžija*, IT-95-17/1-T, [Judgement](#), 10 December 1998 ("*Furundžija* Trial Judgement"), para 168 (explaining "[t]he prohibition of rape and serious sexual assault in armed conflict has also evolved in customary international law [...] These norms are applicable in any armed conflict"); *Prosecutor v. Tadić*, IT-94-1-T, [Opinion and Judgmt](#), 7 May 1997 ("*Tadić* Trial Judgment"), paras 622-623 (noting the customary international law status of the prohibition of crimes against humanity and finding that this conclusion is implicit in the Appeal's Chamber's decision on jurisdiction in the case); *Prosecutor v. Sesay et al*, SCSL-04-15-T, [Judgement](#), 2 March 2009 ("*Sesay et al* Trial Judgement"), para 58 (recalling the ICTY Trial Chamber's finding in the *Tadić* Trial Judgment that the prohibition of crimes against humanity is part of customary international law); *Prosecutor v. Milutinović et al*, IT-05-87-T, [Judgement](#), 26 February 2009 ("*Milutinović et al* Trial Judgement"), Vol. 2 of 4, para 196 (noting that "no international treaty sets out the elements of sexual assault as an offence recognised by international law" and that "[s]imilarly, the elements of sexual assault in customary international law have never been elaborated"); *Prosecutor v. Stakić*, IT-97-24-T, [Judgement](#), 31 July 2003 ("*Stakić* Trial Judgement"), paras 409, 411 (observing that "[i]n interpreting and applying the relevant law, the Trial Chamber has taken the following principles, inter alia, as its basis: [...] the norms laid down in Articles 2 to 5 of the [ICTY] Statute [governing war crimes, genocide, and crimes against humanity] reflect customary international law"); *Prosecutor v. Galić*, IT-98-29-A, [Judgement](#), 30 November 2006, para 83 (noting "Judges have consistently endeavoured to satisfy themselves that the crimes charged in the indictments before them were crimes under customary international law at the time of their commission and were sufficiently defined under that body of law [...] because in most cases [...] the treaty provision itself will not sufficiently define the elements of the prohibition they criminalise and customary international law must be looked at for the definition of those elements"); *Prosecutor v. Blaškić*, IT-95-14-A, [Judgement](#), 29 July 2004, para 141 (noting "[t]he Tribunal may enter convictions only where it is satisfied that the offence is proscribed under customary international law

International and domestic practitioners applying a customary international law framework may thus look to this jurisprudence as authoritative guidance.<sup>6</sup>

3. The Rome Statute was the first to codify “any other form of sexual violence” as a war crime or crime against humanity. Although the offence has yet to be successfully prosecuted before the ICC, the ICC Elements of Crimes explain how the elements are to be defined under the Rome Statute, which may also serve as guidance in other jurisdictions in which the Rome Statute applies.
4. The manner in which each category of elements has been addressed by the *ad hoc* tribunals, reflecting customary international law, and defined under the ICC Elements of Crimes, is described in more detail below.

## PART A.

### MATERIAL ELEMENTS (ACTUS REUS)

#### ***Ad hoc* tribunals**

5. The ICTR first elaborated the material elements of sexual violence, qualified as the crime against humanity of other inhumane acts, in the *Akayesu* case as (a) “any act of a sexual nature” that is (b) “committed on a person under circumstances which are coercive”.<sup>7</sup> Thereafter, various ICTY Trial Chambers addressed the material elements of the offence, employing

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at the time of its commission”); *Prosecutor v. Hadžihasanović et al*, IT-01-47-AR72, [\*Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility\*](#), 16 July 2003, para 35 (*finding* “[t]he obligation of the Tribunal to rely on customary international law excludes any necessity to cite conventional law where customary international law is relied on”).

6. “Any other form of sexual violence” as a war crime and crime against humanity was also codified in the governing statutes of the hybrid tribunals. Although to date, it has not been successfully prosecuted before these tribunals, their jurisprudence is also grounded in customary international law and thus may be relied upon as authoritative guidance by international and domestic practitioners applying a customary international law framework.

7. *The Prosecutor v. Akayesu*, ICTR-96-4-T, [\*Judgement\*](#), 2 September 1998 (“*Akayesu* Trial Judgement”), paras 598, 688 (*finding*: “[s]exual violence which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive”). This definition was not challenged on appeal.

varied but arguably consistent approaches, in particular, with regard to whether a lack of consent must be established.

6. For instance, in the *Furundžija* case, the Trial Chamber held that: "international criminal rules punish not only rape but also any serious sexual assault falling short of actual penetration [...] the prohibition embraces all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person [...] by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim's dignity".<sup>8</sup> By contrast, in the *Milutinović* case, the Trial Chamber described the material elements of "sexual assault" as: (a) the commission of "an act of a sexual nature on another, including requiring that person to perform such an act. (b) That act infringes the victims' physical integrity or amounts to an outrage to the victim's personal dignity. (c) The victim does not consent to the act".<sup>9</sup>
7. The Trial Chamber in *Kvočka et al* adopted the definition of sexual violence set out in the *Akayesu* Trial Judgment.<sup>10</sup> The Trial Chamber further explained that "sexual violence is broader than rape and includes such crimes as sexual slavery or molestation", as well as "sexual mutilation, forced marriage, and forced abortion, as well as the gender related crimes explicitly listed in the ICC Statute as war crimes and crimes against humanity".<sup>11</sup>
8. In the *Đorđević* case, the Appeals Chamber affirmed the definition of sexual violence espoused by the Trial Chamber, as initially established in the *Milutinović* Trial Judgment.<sup>12</sup>
9. It is important to bear in mind that when an act of sexual violence is qualified as an underlying act of a specific war crime or crimes against

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8. *Furundžija Trial Judgement*, para 186. See also *Stakić Trial Judgement*, para 757 and *Prosecutor v Brđanin*, IT-99-36-T, *Judgement*, 1 September 2004 ("*Brđanin* Trial Judgement"), para 1012 (adopting the same definition). In these cases, the definition of sexual assault was not challenged on appeal.

9. *Milutinović et al Trial Judgement*, Vol. 1 of 4, para 201. See also *Prosecutor v. Đorđević*, IT-05-87/1-T, *Public Judgement with Confidential Annex*, 23 February 2011 ("*Đorđević* Trial Judgement"), para 1768 (adopting the definition of sexual assault established in the *Milutinović et al* Trial Judgement).

10. *Prosecutor v. Kvočka et al*, IT-98-30/1-T, *Judgement*, 2 November 2001 ("*Kvočka et al* Trial Judgement"), para 180. This definition was not challenged on appeal.

11. *Kvočka et al Trial Judgement*, para 180 and fn 343.

12. See *Prosecutor v. Đorđević*, IT-05-87/1-A, *Judgement*, 27 January 2014 ("*Đorđević* Appeal Judgement"), para 851.



humanity, it is also necessary to satisfy the specific material elements of those offences.<sup>13</sup>

## The Rome Statute

10. The ICC Elements of Crimes specifies the following material elements of the crime against humanity and war crime(s) of “any other form of sexual violence” as follows:

- a. “The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person’s or persons’ incapacity to give genuine consent.”<sup>14</sup>
- b. Such conduct was of a gravity comparable to:
  - i. For the crime against humanity of sexual violence (Article 7(1)(g)-6) - other crimes against humanity in Article 7(1)(g) of the Statute, namely rape, sexual slavery, enforced prostitution, forced pregnancy, and enforced sterilization;<sup>15</sup>
  - ii. For the war crime of sexual violence (Article 8(2)(b)(xxii)-6) associated with an international armed conflict - that of a grave breach of the Geneva Conventions;<sup>16</sup>
  - iii. For the war crime of sexual violence (Article 8(2)(e)(vi)-6) associated with an armed conflict not of an international character - that of a serious violation of Article 3 common to the four Geneva Conventions.<sup>17</sup>

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13. See, e.g. *Milutinović et al Trial Judgement*, Vol. 1 of 4, para 201 (finding that to establish the underlying offence of sexual assault as a form of persecution as a crime against humanity, the Prosecution must prove the specific requirements of persecution in addition to the elements of sexual assault).

14. *ICC Elements of Crimes*, Articles 7(1)(g)-6, 8(2)(b)(xxii)-6, and 8(2)(e)(vi)-6, Element One.

15. *ICC Elements of Crimes*, Article 7(1)(g)-6, Element Two.

16. *ICC Elements of Crimes*, Article 8(2)(b)(xxii)-6, Element Two.

17. *ICC Elements of Crimes*, Article 8(2)(e)(vi)-6, Element Two.

## An act of a sexual nature

### *Acts of a sexual nature as established before the ad hoc and hybrid tribunals*

11. The following is a representative list of acts, which were established to be “sexual” in nature and successfully prosecuted before the *ad hoc* and hybrid tribunals:<sup>18</sup>

- a. Beating, biting, mutilating or otherwise causing injury to a sexual body part;<sup>19</sup>

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18. This representative list includes examples of instances in which an accused was not ultimately found responsible for acts of a sexual nature, which a Trial Chamber established had taken place. It also includes non-binding support for the characterization of an act as sexual in nature taken from sources such as United Nations human rights and ICC reports and policy documents.

19. *Prosecutor v. Todorović*, IT-95-9/1-S, [Sentencing Judgement](#), 31 July 2001 (“*Todorović* Sentencing Judgement”), paras 38, 34, 37 (Stevan Todorović pled guilty to sexual assault as the underlying criminal conduct of the crime against humanity of persecution for acts including: “beat[ing] [the victim] and kick[ing] him in the genital area” and ordering the victim to bite another man’s penis); *Prosecutor v. Simić*, IT-95-9/2-S, [Sentencing Judgement](#), 17 October 2002 (“*Simić* Sentencing Judgement”), para 63 (Milan Simić pled guilty to torture as a crime against humanity for acts including: “order[ing] [victims] to stand with their legs apart in order to receive forceful kicks to their genitals”); *Tadić Trial Judgement*, paras 206, 194-198, 720, 722-730 and p.285 (Dusko Tadić convicted of the war crime of cruel treatment and the crime against humanity of inhumane acts for acts including: ordering a prisoner to “hit and bite [another prisoner’s] genitals” and “bit[e] off one of [his] testicles”); *Prosecutor v. Tadić*, IT-94-1-A, [Judgement](#), 15 July 1999 (“*Tadić* Appeal Judgement”), paras 68, 170-171 and p. 144 (overturning Tadić’s acquittal and entering convictions for the war crimes of torture and wilfully causing great suffering or serious injury to body and health based, inter alia, on these acts); *Kvočka et al Trial Judgement*, para 180, fn 343 (finding that “Sexual violence would also include such crimes as sexual mutilation”); *Sesay et al Trial Judgement*, paras 1208, 1307-1309, 1347, 1352, 2063 and pp 677-678, 680-682, 684-685 (each accused convicted of the war crimes of terrorism and outrages on personal dignity for acts including: “slitting the [genitalia] of several male and female civilians with a knife”); *Prosecutor v. Sesay et al*, SCSL-04-15-A, [Judgement](#), 26 October 2009 (“*Sesay et al* Appeal Judgment”), pp. 477-479 (affirming the convictions). See also, United Nations Economic and Social Council, Commission on Human Rights, Sub Commission on Prevention of Discrimination and Protection of Minorities, [Contemporary forms of slavery: Systematic rape, sexual slavery and slavery like practices during armed conflict, Final Report submitted by Ms. Gay J. McDougall, Special Rapporteur](#), 22 June 1998, E/CN.4/Sub.2/1998/13 (“ECOSOC, Contemporary forms of slavery, systematic rape, sexual slavery and slavery like practices during armed conflict: Final Report”), para 21 (stating “sexual violence covers both physical and psychological attacks directed at a person’s sexual characteristics, such as [...] mutilating a person’s genitals, or slicing off a women’s breasts”). But see *Brdanin Trial Judgement*, paras 498, 524, 538, 998, 1050, 1061, 1088 (Radoslav Brdanin convicted of the crime against humanity of persecutions, incorporating torture, and the war crime of torture for acts including: “kick[ing] [the victim] in [his] genitals”); *Prosecutor v. Brdanin*, IT-99-36-A, [Judgement](#), 3 April 2007 (“*Brdanin* Appeal Judgement”), paras 276, 288-289, and p. 162 (reversing Brdanin’s convictions for these crimes, holding that the Trial Chamber erred in finding Brdanin responsible for aiding and abetting torture in the camps

- b. Causing someone to form a reasonable apprehension or fear of acts of sexual violence, including through sexual threats;<sup>20</sup>

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and detention facilities); *Prosecutor v. Kajelijeli*, ICTR-98-44A-T, [\*Judgment and Sentence\*](#), 1 December 2003, paras 936, 678, 683, 934-40, 942 (finding that the Interahamwe committed rapes and sexual assaults, constituting inhumane acts, including “[c]utting a women’s breast off and licking it, and piercing a woman’s sexual organs with a spear”, but acquitting Juvénal Kajelijeli of the crime against humanity of other inhumane acts for these acts as the Prosecution did not prove that he was physically present during, gave an order for or knew or had reason to know about their commission); *Kajelijeli Appeal Judgement*, paras 4, 325 (affirming Kajelijeli’s acquittal of this crime); *Prosecutor v. Krajišnik*, IT-00-39-T, [\*Judgement\*](#), 27 September 2006, paras 372, 800, 803-806, 1126 (Momcilo Krajišnik convicted of the crime against humanity of persecution for acts including: “sexually mutilat[ing] [male detainees]”); *Prosecutor v. Krajišnik*, IT-00-39-A, [\*Judgement\*](#), 17 March 2009, paras 283-4, 820 (reversing Krajišnik’s conviction for the crime against humanity of persecution for all underlying acts other than forcible transfer and deportation); *The Prosecutor v. Kenyatta et al*, ICC-01/09-02/11, [\*Decision on the Confirmation of Charges Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute\*](#), 23 January 2012, paras 265-266, 264 (finding “every act of violence which targets parts of the body commonly associated with sexuality should [not] be considered an act of sexual violence”, that such determinations are “inherently a question of fact”, that “the evidence placed before it [did] not establish the sexual nature of the acts of forcible circumcision and penile amputation”, and therefore “the acts under consideration do not qualify as other forms of sexual violence” under the Rome Statute). Nevertheless, following this determination, the ICC Office of the Prosecutor (OTP) undertook to: “continue to present acts of genital mutilation or deliberate injuries to the genitalia as sexual crimes”. See ICC OTP, [\*Policy Paper on Sexual and Gender-Based Crimes\*](#), June 2014, fn 14. See further ICC OTP, [\*Report on Preliminary Examination Activities 2016\*](#) (14 November 2016) (“*Report on Preliminary Examination Activities 2016*”), para 94 (noting, in relation to the preliminary examination in the situation in Iraq/UK, allegations from an Article 15 communication from Public Interest Lawyers of “other forms of sexual violence”, including “inflicting physical injuries to the genitalia of detainees”).

**20.** *Kvočka et al Trial Judgement*, paras 98, 108, 229, 234, 319-321, 408, 415, 419-420, 470, 504, 578-579, 691, 752-753 (Each accused convicted of the war crime of torture and the crime against humanity of persecution for acts including: “subject[ing] [women] to sexual intimidation or violence in Omarska” camp such as “approach[ing] a female detainee in the eating area, unbutton[ing] her shirt, [drawing] a knife over one of her breasts, and threaten[ing] to cut it off”); *Prosecutor v. Kvočka et al*, IT-98-30/1-A, [\*Judgement\*](#), 28 February 2005 (“Kvočka et al Appeal Judgement”), paras 329-34, 339, 594-599 and pp. 242-243 (overturning Miroslav Kvočka’s conviction for persecution for acts of “rape and sexual assault”, finding that the Trial Chamber erred in determining these acts were committed in Omarska while he was employed there, and overturning Zoran Zigic’s conviction for persecution for these acts, finding that no reasonable finder of fact could have concluded that he participated significantly in the functioning of Omarska camp and could thus be held responsible as a participant in the joint criminal enterprise); *Simić Sentencing Judgement*, para 63 (Milan Simić pled guilty to torture as a crime against humanity for acts including: participating in beating the victim while “[the victim] was forced to pull down his pants and one of the other Serb men who accompanied [the accused] threatened to cut off his penis while brandishing a knife”); *Brđanin Trial Judgement*, paras 516-517, 524, 538, 998, 1013, 1050, 1061, 1088 (Radoslav Brđanin convicted of the crime against humanity of persecutions, incorporating torture, and the war crime of torture for sexual assaults, including: “the threat of rape” and “uncover[ing] the breast of a female detainee, [taking] out a knife, and [running] it along her breast for several minutes”). But see

- c. Causing someone to masturbate himself or herself or another person;<sup>21</sup>
- d. Causing someone to witness acts of a sexual nature;<sup>22</sup>
- e. Forced abortion;<sup>23</sup>
- f. Forced marriage;<sup>24</sup>

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*Brđanin Appeal Judgement*, paras 276, 288-289, and p. 162 (reversing Brđanin's convictions for these crimes, holding that the Trial Chamber erred in finding Brđanin responsible for aiding and abetting torture in the camps and detention facilities).

21. *Prosecutor v Martić*, IT-95-11-T, *Judgement*, 12 June 2007 ("Martić Trial Judgement"), paras 288, fn 899, 454-455, 477, 480, 518 (Milan Martić convicted of the crimes against humanity of persecution and torture and the war crime of torture for acts including: "sexually abus[ing] [detainees] through forced mutual oral sex or oral sex with prison guards, and mutual masturbation"); *Prosecutor v Martić*, IT-95-11-A, *Judgement*, 8 October 2008 ("Martić Appeal Judgement"), paras 185-190, 355 (affirming Martić's convictions for these crimes). See also, *Report on Preliminary Examination Activities 2016*, para 94 (noting, in relation to the preliminary examination in the situation in Iraq/UK, allegations from an Article 15 communication from Public Interest Lawyers of "other forms of sexual violence" including "enforced masturbation").

22. *Furundžija Trial Judgement*, paras 267, 87, 127, 268 and p. 112 (Anto Furundžija convicted of the war crime of torture for acts including: "forc[ing] [a victim] to watch [another soldier's] sexual attacks on [another victim]"); *Prosecutor v. Furundžija*, IT-95-17/1-A, *Judgement*, 21 July 2001 ("Furundžija Appeal Judgement"), p. 79 (rejecting each ground of appeal, dismissing the appeal and affirming Furundžija's conviction); *Brđanin Trial Judgement*, paras 1018, 524, 538, 998, 1013, 1050, 1061, 1088 (Radoslav Brđanin convicted of the crime against humanity of persecution, incorporating torture and the war crime of torture for acts including: forcing "Bosnian Muslims and Bosnian Croats [...] to watch other members of their group being killed, raped and beaten"); *But see Brđanin Appeal Judgement*, paras 276, 288-289, p. 162 (reversing Brđanin's convictions for these crimes, holding that the Trial Chamber erred in finding Brđanin responsible for aiding and abetting torture in the camps and detention facilities); Sesay et al *Trial Judgement*, paras 1194, 1299, 1347, 1352 and pp. 677-678, 680-682, 684-685 (each accused convicted of the war crimes of terrorism and outrages upon personal dignity for acts including: "ordering [the victim] to watch and to count the men raping his wife [while] [h] is children [...] were also watching"); Sesay et al *Appeal Judgement*, pp. 477-479 (affirming the convictions).

23. *Kvočka et al Trial Judgement*, para 180, fn 343 (finding that "Sexual violence would also include such crimes as [...] forced abortion").

24. *Kvočka et al Trial Judgement*, para 180, fn 343 (finding that "Sexual violence would also include such crimes as [...] forced marriage"); Sesay et al *Trial Judgement*, paras 1295-1297, 1301, 1406-1413, 1460-1475, 1562-1565, 1579-1583 and pp 677-678, 680-682, 684-685 (each accused convicted of the war crimes of terrorism and outrages upon personal dignity, as well as the crime against humanity of inhumane acts for acts including "forced marriage"); Sesay et al *Appeal Judgement*, pp. 477-479 (affirming the convictions); Case 002/02, 002/19-09-2007/ECCC/TC, *Judgement*, 16 November 2018, Vol. IV, paras 3686-3694, 4326, and p. 2230 (convicted of the crime against humanity of other inhumane acts through forced marriage). As of the time of writing, the Co-Prosecutor's appeal from the Trial Judgment remained pending. See Case 002/19-09-2007-ECCC/SC, *Co-Prosecutors' Appeal against the Case 002/02 Trial Judgment*, 20 August 2019. *But see The Prosecutor v. Katanga*, ICC-01/04-01/07, *Judgment pursuant to article 74 of the Statute*, 7 March 2014 ("Katanga Trial Judgment"), paras

- g. Having someone undress partially or fully in public while performing physical activities such as dancing, exercising or marching whilst nude;<sup>25</sup>
- h. Inspecting someone's sexual body parts,<sup>26</sup> or the occurrence of menstruation;<sup>27</sup>

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1000, 1001-1023 (*finding* that, in the context of the aftermath of an attack, "the statement that someone was 'taken as a wife' by a combatant or that she was to 'become his wife' is a clear reference to a coercive environment entailing almost certain engagement in acts of a sexual nature" and that such combatants committed the war crime and crime against humanity of sexual slavery); *Katanga Trial Judgement*, paras 1620-1621, 1663-1664 (*acquitting* the accused of these crimes on the basis that they did not fall within the common criminal purpose required to establish liability under Article 25(3)(d)(ii) of the Rome Statute).

**25.** *Akayesu Trial Judgement*, paras 688, 685, 692-695, 697, 731-732, 734 and Section 8. Verdict, p. 293 (Jean Paul Akayesu convicted of the crime against humanity of other inhumane acts and genocide for acts including: "order[ing] 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, constitut[ing] sexual violence"); *The Prosecutor v. Akayesu*, ICTR-96-4-A, *Judgment*, 1 June 2001 ("Akayesu Appeal Judgment"), p. 143 (*dismissing* Akayesu's appeal in its entirety); *Prosecutor v. Kunarac et al*, IT-96-23-T & IT-96-23/1-T, *Judgment*, 22 February 2001 ("Kunarac et al Trial Judgement"), paras 772, 766-771, 773, 782, 886 (Radomir Kovač convicted of the war crime of outrages upon personal dignity for acts including: "forc[ing] [the victims] to strip and dance naked on a table while [the accused] watched them from the sofa, pointing weapons at them"). *Prosecutor v. Kunarac et al*, IT-96-23 & IT-96-23/1-A, *Judgement*, 12 June 2002 ("Kunarac et al Appeal Judgement"), paras 283-285 and pp. 125-126 (*affirming* Kovač's conviction). In relation to forced undressing more generally, see also *Brđanin Trial Judgement*, paras 1013, 524, 538, 998, 1050, 1061 (Radoslav Brđanin convicted of the crime against humanity of persecutions, incorporating torture, and the war crime of torture for sexual assaults, including: "forc[ing] [the victim] to undress herself in front of cheering Bosnian Serb policemen and soldiers"). *But see Brđanin Appeal Judgement*, paras 276, 288-289, p. 162 (*reversing* Brđanin's convictions for these crimes, holding that the Trial Chamber erred in finding Brđanin responsible for aiding and abetting torture in the camps and detention facilities); *The Prosecutor v. Bemba*, ICC-01/05-01/08, *Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo*, 10 June 2008 ("Bemba Arrest Warrant Decision"), paras 39-40 (*finding* that the act of "order[ing] people to undress in public in order to humiliate them" did not qualify as "other forms of sexual violence" under Article 7(1)(g) of the Rome Statute as it "[did] not constitute forms of sexual violence of comparable gravity to the other crimes set forth in article 7(1)(g) of the Statute").

**26.** *Milutinović et al Trial Judgement*, Vol. 2 of 4, paras 631-632, 558, 622, 689-690 and Vol. 3 of 4, paras 472, 476, 629, 631, 633, 785, 788, 928, 931, 1135, 1139, 1206-1212 (Nebojša Pavković convicted of the crime against humanity of persecutions through sexual assault for acts including: "[soldiers] forc[ing] [a victim] to take her clothes off [...] search[ing] [her and] [telling] [her] to lift her blouse and her bra up [...]"; and "[taking] the women out of the room and search[ing] them one by one [and] forcing them to take their clothes off"); *Prosecutor v. Šainović et al*, IT-05-87-A, *Judgment*, 23 January 2014 ("Šainović et al Appeal Judgment"), paras 1550, 1582, 1592, 1604 and pp. 739-740, 742 (*holding* that the Trial Chamber erred in declining to convict Nikola Šainović and Sreten Lukić for these acts, and therefore finding them responsible for persecution as a crime against humanity, through sexual assaults, while declining to enter new convictions).

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

- i. Kissing or licking someone's body, especially a sexual body part;<sup>28</sup>
- j. Touching someone in a sexual way, such as touching a sexual body part, including with a sexual body part, weapon or other object.<sup>29</sup>

(each accused convicted of the war crime of torture and the crime against humanity of persecution for acts including: "forc[ing] [the victim] to prove [she was menstruating] to [a guard]"). But see *Kvočka et al Appeal Judgement*, paras 329-334, 339, 594-599, pp. 242-243 (overturning Miroslav Kvočka's conviction for persecution for acts of "rape and sexual assault", finding that the Trial Chamber erred in determining these acts were committed in Omarska while he was employed there, and overturning Zoran Žigić's conviction for persecution for these acts, finding that no reasonable finder of fact could have concluded that he participated significantly in the functioning of Omarska camp and could thus be held responsible as a participant in the joint criminal enterprise).

28. *Tadić Trial Judgement*, paras 206, 194, 198, 722-726, 730 and p. 285 (Dusko Tadić convicted of the war crime of cruel treatment and the crime against humanity of inhumane acts for acts including: "order[ing] [a prisoner] to lick [another prisoner's] naked bottom and [a different prisoner] to suck his penis and then to bite his testicles"); *Tadić Appeal Judgement*, paras 68, 170-171 and p. 144 (overturning Tadić's acquittal and finding him guilty for these acts, in addition, of the war crimes of torture and wilfully causing great suffering or serious injury to body and health).

29. *Kvočka et al Trial Judgement*, para 180 (finding that "sexual violence [...] includes such crimes as sexual [...] molestation"); *Milutinović et al Trial Judgement*, Vol. 2 of 4, paras 631-632, 689, 558, 622, 690 and Volume 3 of 4, paras 472, 476, 629, 631, 633, 785, 788, 928, 931, 1135, 1139, 1206-1212 (Nebojša Pavković convicted of the crime against humanity of persecution through sexual assault for acts including: "soldier[s] searching [a victim] touch[ing] her breasts and taunt[ing] her with sexual comments", "touch[ing] [victims] in a sexual and threatening manner" and "order[ing] a victim to take her clothes off and [...] touching her breasts and vagina, at which point she fainted"); *Šainović et al Appeal Judgement*, paras 1550, 1582, 1592, 1604 and pp. 739-740, 742 (holding that the Trial Chamber erred in declining to convict Nikola Šainović and Sreten Lukić for these acts and therefore finding them responsible for persecution as a crime against humanity, through sexual assaults, while declining to enter new convictions); *Furundžija Trial Judgement*, paras 264, 40, 267 and p. 112 (Anto Furundžija convicted of the war crime of torture for acts including: interrogating the victim while "[another soldier] rubbed his knife on the inner thighs of [the victim] and threatened to cut out her private parts if she did not tell the truth in answer to the interrogation"); *Furundžija Appeal Judgement*, p. 79 (rejecting each ground of appeal, dismissing the appeal and affirming Furundžija's conviction). See also *Report on Preliminary Examination Activities 2016*, para 94 (noting, in relation to the preliminary examination in the situation in Iraq/UK, allegations from an Article 15 communication from Public Interest Lawyers of "other forms of sexual violence" including "provocative physical touching of detainees' genital and anal area, and touching detainees' body with perpetrators' sexual organs"). But see *Brđanin Trial Judgement*, paras 516-517, 524, 538, 998, 1013, 1050, 1061, 1088 (Radoslav Brđanin convicted of the crime against humanity of persecutions, incorporating torture, and the war crime of torture for acts including: "uncover[ing] the breast of a female detainee, [taking] out a knife, and [running] it along her breast for several minutes"); *Brđanin Appeal Judgement*, paras 276, 288-289, p. 162 (reversing Brđanin's convictions for these crimes, holding that the Trial Chamber erred in finding Brđanin responsible for aiding and abetting torture in the camps and detention facilities); *The Prosecutor v. Rukundo*, ICTR-2001-70-T, *Judgement*, 27 February 2009, paras 381, 574-576, 591 (Emmanuel Rukundo convicted for the crime of genocide for acts including: "forc[ing] sexual contact with [a victim]

12. Convictions have also been secured for acts that were not characterized as sexual by the respective Chamber in a particular judgement but that have been characterized as such by Chambers in other cases, or conceivably could have been, for instance, as the act involved a sexual body part. Such acts have included biting<sup>30</sup> or beating<sup>31</sup> a sexual body part, threatening to inflict severe injury to a sexual body part,<sup>32</sup> and castration.<sup>33</sup>
13. The international jurisprudence has also established the following in relation to acts of a sexual nature:
  - a. An act of a sexual nature can be committed by and against any person regardless of sex or gender and may include same-sex acts;<sup>34</sup>

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by opening the zipper of his trousers, trying to remove her skirt, forcefully lying on top of her and caressing and rubbing himself against her until he ejaculated and lost his erection". The Trial Chamber found that "[t]he actions in question were clearly of a sexual nature: [...] Rukundo's actions and words, such as telling her that if she made love with him he would never forget her, support the Chamber's finding [...]"; *Rukundo v. The Prosecutor*, ICTR-2001-70-A, [Judgement](#), 20 October 2010, paras 236, 227-235, 237-2388, 270 (finding that Rukundo's sexual assault on the victim, "while taking place during a genocide, was not necessarily a part of the genocide itself" and accordingly reversing Rukundo's conviction for genocide, in part, for causing serious mental harm to the victim through this assault).

30. *Prosecutor v. Delalić et al*, IT-96-21-T, [Judgement](#), 16 November 1998 ("Delalić Trial Judgement"), paras 1019, 1035-1048 and p. 442 (Zdravko Mučić convicted of the war crimes of wilfully causing great suffering or serious injury to body or health and cruel treatment for acts including: "the placing of a burning fuse cord around the genital areas"); *Prosecutor v. Delalić et al*, IT-96-21-A, [Judgement](#), 20 February 2001 ("Delalić et al Appeal Judgement"), paras 424, 427 and p. 306 (upholding Mučić's conviction for wilfully causing great suffering or serious injury to body or health for these acts and dismissing the conviction for cruel treatment).

31. *Prosecutor v. Naletilić et al*, IT-98-34-T, [Judgement](#), 31 March 2003, paras 450, 451, 453-454, 721 and pp. 254-255 (Mladen Naletilić convicted of the war crime of wilfully causing great suffering for acts including: "beat[ing] [the victim] on the genitals"); *Prosecutor v. Naletilić et al*, IT-98-34-A, [Judgement](#), 3 May 2006, p. 207 (upholding Naletilić's conviction for these acts).

32. *Furundžija Trial Judgement*, paras 264, 124, 267 and p. 112 (Anto Furundžija convicted of the war crime of torture for acts including: interrogating the victim while "[another soldier] rubbed his knife on the inner thighs of [the victim] and threatened to cut out her private parts if she did not tell the truth in answer to the interrogation"); *Furundžija Appeal Judgement*, p. 79 (rejecting each ground of appeal, dismissing the appeal and affirming Furundžija's conviction).

33. *The Prosecutor v. Niyitegeka*, ICTR-96-14-T, [Judgement and Sentence](#), 16 May 2003, paras 312, 462, 464-467, 480 (Eliézer Niyitegeka convicted of the crime against humanity of other inhumane acts for acts including: castrating a victim and hanging "[h]is genitals [...] on a spike [...] visible to the public."); *Niyitegeka v. The Prosecutor*, ICTR-96-14-A, [Judgement](#), 16 May 2003, para 270 (dismissing Niyitegeka's appeal in its entirety).

34. *The Prosecutor v. Bemba*, ICC-01/05-01/08, [Judgment pursuant to Article 74 of the Statute](#), 21 March 2016 ("Bemba Trial Judgment"), paras 99-100 (finding that the concept of "invasion", as an element of the war crime and crime against humanity of "rape", is gender-

- b. Causing a person to engage in an act of a sexual nature may include not only compelling a person to perform the act on or with the perpetrator but also on the person him or herself or a third party;<sup>35</sup>
- c. Acts of a sexual nature are not limited to those involving physical violence but encompass both physical and non-physical acts with a sexual element;<sup>36</sup> and

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neutral, applying to same-sex penetration, as well as both male and female perpetrators and victims); See also *The Prosecutor v. Ntaganda*, ICC-01/04-02/06, [Judgment](#), 8 July 2019 ("*Ntaganda Trial Judgment*"), paras 932-933 (as of the time of writing, Ntaganda's appeal against his conviction remained pending. See *The Prosecutor v. Ntaganda*, ICC-01/04-02/06-2396, *Mr Ntaganda's Notice of Appeal against the Judgment pursuant to Article 74 of the Statute*, ICC-01/04-02/06-2359, 9 September 2019; ICC OTP, *Policy Paper on Sexual and Gender-Based Crimes*, June 2014, p. 9, fn 6 (noting that the elements of the war crime of rape as set out in the ICC Elements of Crimes are drafted in a gender-neutral way) .

35. *ICC Elements of Crimes*, Articles 7(1)(g)-6, 8(2)(b)(xxii)-6, and 8(2)(e)(vi)-6, Element One. See for example *Delalić et al Trial Judgment*, para 1065; *Todorović Sentencing Judgment*, paras 38-40. See also ECOSOC, *Contemporary forms of slavery, systematic rape, sexual slavery and slavery like practices during armed conflict: Final Report*, para 22 (stating "Sexual violence also characterizes situations in which two victims are forced to perform sexual acts on one another or to harm one another in a sexual manner").

36. *Akayesu Trial Judgment*, para 688 (finding "[s]exual 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"). See also *Furundžija Trial Judgment*, para 186 (finding "international criminal rules punish not only rape but also any serious sexual assault falling short of actual penetration. It would seem that the prohibition embraces all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim's dignity."); *Brima et al Trial Judgment*, para 720 (finding " 'any other form of sexual violence' in the context of crimes against humanity is a residual category of sexual crimes [...] and may encompass an unlimited number of acts. The Trial Chamber agrees with the conclusion of the ICTY Trial Chamber in *Kvočka* that 'sexual violence is broader than rape'. The prohibition embraces all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force or intimidation."); *Brđanin Trial Judgment*, para 1012 (finding "sexual assault [...] embraces all serious abuses of a sexual nature inflicted upon the integrity of a person by means of coercion, threat of force or intimidation in a way that is humiliating and degrading to the victim's dignity"). See also ICC OTP *Policy Paper on Sexual and Gender-Based Crimes*, p.3 (stating that "An act of a sexual nature is not limited to physical violence, and may not involve any physical contact – for example, forced nudity. Sexual crimes, therefore, cover both physical and non-physical acts with a sexual element."). See also ECOSOC, *Contemporary forms of slavery, systematic rape, sexual slavery and slavery like practices during armed conflict: Final Report*, para 21 (stating "Sexual violence covers both physical and psychological attacks directed at a person's sexual characteristics, such as forcing a person to strip naked in public, mutilating a person's genitals, or slicing off a woman's breasts").



- d. In determining what constitutes sexual violence, the sexual humiliation and degradation of the victim are more pertinent factors than whether the perpetrator was sexually gratified by the act.<sup>37</sup>
14. Part 2 of the Civil Society Declaration on Sexual Violence should be consulted for a non-exhaustive list of indicators of whether an act is sexual in nature.<sup>38</sup> Part 3 of this Declaration provides a non-exhaustive list of sexual body parts.<sup>39</sup>

*Acts of a sexual nature from a survivor's viewpoint*

15. The acts of a sexual nature enumerated above are those that have been established to constitute crimes against humanity and war crimes in the international jurisprudence. The list is not exhaustive.<sup>40</sup>
16. As reflected in the Civil Society Declaration on Sexual Violence,<sup>41</sup> other acts of a sexual nature may amount to sexual violence from the experience and perspective of survivors. These can fall into two categories:
- a. acts of a sexual nature deemed inherently violent; and

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37. *Milutinović et al Trial Judgement*, Vol. 1 of 4, para 199 (finding "it would be inappropriate to place emphasis on the sexual gratification of the perpetrator in defining the elements of "sexual assault". In the context of an armed conflict, the sexual humiliation and degradation of the victim is a more pertinent factor than the gratification of the perpetrator, and it is this element that provides specificity to the offence").

38. See Civil Society Declaration on Sexual Violence, Part 2, "Indicia that an act is sexual in nature".

39. See Civil Society Declaration on Sexual Violence, Part 3, "Examples of sexual body parts".

40. It is important to note that this list is not exhaustive and therefore does not limit the possibilities of prosecuting other acts as sexual violence. As mentioned in 2010 by the UN Department of Peacekeeping Operations, "judgments of the ICTY, ICTR and SCSL cannot be said to reflect the totality of sexual-violence crimes – whether they amount to atrocity crimes or not – committed against civilians, including women, in the relevant armed conflicts that convulsed the former Yugoslavia, Rwanda and Sierra Leone. Sexual violence in armed conflicts, including grave sexual crimes amounting to atrocity crimes, is a much bigger problem than reflected in these judgments." UN Department of Peacekeeping Operations, [Review of the Sexual Violence Elements of the Judgments of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone in the Light of Security Council Resolution 1820](#), 2010, para 27.

41. See Civil Society Declaration on Sexual Violence, Part 4, "Examples of acts of sexual violence", para 2.

- b. acts of a sexual nature that may amount to sexual violence if they occur forcibly<sup>42</sup> or against a person who is unable or unwilling to give genuine, voluntary and specific consent.<sup>43</sup>
17. Acts of a sexual nature that may be regarded from the experience and perspective of survivors as inherently violent include the following:
- a. Depriving someone of access to hygiene, treatment, or medicine related to menstruation, pregnancy, childbirth, fistula care, rectal hematoma, HIV or other sexually transmitted infections, sexual maiming, disfigurement, gynaecological, urological, or urinary treatment, or any other aspect of sexual or reproductive health;
  - b. Depriving someone of reproductive autonomy, such as subjecting them to forced pregnancy, forced sterilization,<sup>44</sup> reproductive sabotage,<sup>45</sup> forced parenthood, forced abortion, or preventing one from making choices as to whether or not to use contraception, undergo sterilisation, or impregnate another person;
  - c. Grooming for sexual activity, including through online communication or social media;
  - d. Humiliating or mocking a person based on their perceived sexual orientation, gender identity, sexual performance, sexual reputation, sexual choices, sexual activity (or lack thereof), or sexual body parts;<sup>46</sup>
  - e. Prohibiting someone from engaging in consensual sexual activity, including due to a person's sex, sexual orientation, gender identity, disability, or any other grounds on which discrimination is prohibited under international law;
  - f. Punishing or degrading someone's perceived non-compliance with gender norms; their perceived status as neither male nor female; or their perceived sexual behaviour, sexual orientation, or gender identity;

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42. See Civil Society Declaration on Sexual Violence, Part 1.2.a.

43. See Civil Society Declaration on Sexual Violence, Part 1.2.b.

44. The ICC Elements of Crimes specifies that enforced sterilization occurs where "[t]he perpetrator deprived one or more persons of biological reproductive capacity" and "[t]he conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent". ICC Elements of Crimes, Articles 7(1)(g)-5, 8(2)(b)(xxii)-5 and 8(2)(e)(vi)-5.

45. This includes tampering with or damaging condoms and other contraceptives.

46. See Civil Society Declaration on Sexual Violence, Part 3, "Examples of sexual body parts".

- g. Punishing someone for refusing to engage in sexual activity;
  - h. Sexually harassing someone by engaging in unwelcome sexual conduct which can be interpreted as offensive, humiliating, or intimidating under the circumstances. Unwelcome sexual conduct may include:
    - v. making noises, statements, or gestures with a sexual overtone;
    - vi. sending sexually explicit messages;
    - vii. using phones or other devices to invade privacy; or
    - viii. staring in a way that could be reasonably interpreted as indicating sexual objectification or sexual desire;
  - i. Subjecting a person to child marriage or an otherwise sexually exploitative relationship.
18. The Civil Society Declaration also lists the following acts of a sexual nature that may amount to sexual violence from the experience and perspective of survivors if they occur forcibly<sup>47</sup> or against a person who is unable or unwilling to give genuine, voluntary and specific consent,<sup>48</sup> including:
- a. Being confined with another person;
  - b. Burning, constricting, forcibly circumcising, or otherwise injuring a sexual body part, or any other body part with a sexual intention, including after a person's death;
  - c. Disseminating or producing images, footage, or audio recordings of a person in a state of nudity or partial undress or engaged in acts of a sexual nature, including through online communication or social media;<sup>49</sup>
  - d. Exposing a person to nudity, especially to naked sexual body parts,<sup>50</sup> or exposing them to acts of a sexual nature, including seeing or

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47. See Civil Society Declaration on Sexual Violence, Part 1.2.a.

48. See Civil Society Declaration on Sexual Violence, Part 1.2.b.

49. See [Report on Preliminary Examination Activities 2016](#), para 94: "In addition, detainees were [...] repeatedly [...] photographed whilst naked"; Women's Refugee Commission, ["More Than One Million Pains": Sexual Violence against Men and Boys on the Central Mediterranean Route to Italy](#)", March 2019.

50. See Civil Society Declaration on Sexual Violence, Part 3, "Examples of sexual body parts".

hearing through images, descriptions, footage, art, or audio recordings thereof;<sup>51</sup>

- e. Having someone enter into or remain in an intimate partnership, including an arranged marriage, temporary marriage, false marriage, transfer of spouse/partner;
- f. Having someone feign sexual desire or sexual enjoyment;
- g. Having someone perform movements, including dance movements, with a sexual association;
- h. Having someone perform, in view of others, bodily functions that are normally conducted in private, including measures related to menstrual hygiene;
- i. Having someone undergo procedures or rituals to determine or alter their sexual orientation or gender identity;
- j. Having someone undress completely or partially, including the removal of headwear in cultures where this has a sexual implication, or requiring them to wear clothing with a sexual association;
- k. Having an animal penetrate someone's body, however slightly, with its sexual organ;
- l. Marking a person as sexually deviant, sexually impure, or as a survivor of sexual violence, by using culturally significant methods, such as by removing their hair, requiring them to wear sexually suggestive symbols, or branding their body;
- m. Preparing a person to engage in sexual activity with a third person;
- n. Transmitting HIV or other sexually transmitted infection(s); and
- o. Watching someone in a state of nudity or participating in acts of a sexual nature, including seeing or hearing through images, descriptions, footage, art, or audio recordings thereof.

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51. See, e.g., [Report on Preliminary Examination Activities 2016](#), para 94 (stating "In addition, detainees were [...] repeatedly exposed to genitalia and pornography").

**Lack of consent, force, threat of force, coercion, or taking advantage of a coercive environment or of a person's incapacity to give genuine consent**

*Lack of consent (customary international law)*

19. As noted above, in defining the elements of the crime of sexual violence, the Trial Chambers of the ad hoc tribunals have differed in their treatment of the issue of consent. In the sole Appeal Judgement pronouncing on issue, the Appeals Chamber in the *Đorđević* case held that lack of consent is a material element of the crime.<sup>52</sup> The Chamber was careful to emphasize, however, that:

- a. A lack of consent may be demonstrated by “any form of coercion, including acts or threats of (physical or psychological) violence, abuse of power, [or] any other forms of duress and generally oppressive surrounding circumstances”;<sup>53</sup>
- b. Detention, in particular during armed conflict, will generally “vitiolate consent”;<sup>54</sup> and
- c. All forms of coercion, such as “acts or threats of violence, detention, and generally oppressive surrounding circumstances” are evidence proving lack of consent.<sup>55</sup>

20. In the *Kunarac et al* and *Gacumbitsi* Appeal Judgements, the ICTY and ICTR Appeals Chambers, respectively, took a similar view with respect to the statutorily enumerated CARSV crime of rape, finding that the *actus reus* constitutes “sexual penetration” committed “without the consent of the victim”.<sup>56</sup> Based on this jurisprudence, it may be concluded that lack of consent is an element of the crime of sexual violence under customary international law.

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52. See para 8, *supra*.

53. *Đorđević Appeal Judgement*, para 852.

54. *Đorđević Appeal Judgement*, para 852. See also *Milutinović et al Trial Judgement*, Vol. 1 of 4, para 200 (*finding that “when a person is detained, particularly during an armed conflict, coercion and a lack of consent can be inferred from these circumstances”*). This finding was affirmed in the *Đorđević Appeal Judgement*, para 851).

55. *Milutinović et al Trial Judgement*, Vol. 1 of 4, para 200 (affirmed on appeal in the *Đorđević Appeal Judgement*, para 851).

56. *Kunarac et al Appeal Judgement*, paras 127-128. See also *Gacumbitsi v. The Prosecutor*, ICTR-2001-64-A, *Judgement*, 7 July 2006 (“*Gacumbitsi Appeal Judgement*”), paras 152-153 (*adopting the definition set out by the Appeals Chamber in the Kunarac et al Appeal Judgement*).

21. In relation to this element, the ICTY and ICTR Appeals Chambers have further established:

- a. It is not required to show that the victim resisted to demonstrate a lack of consent;<sup>57</sup>
- b. While force or threat of force provides clear evidence of non-consent, it is not an element of the crime;<sup>58</sup>
- c. "The circumstances [...] that prevail in most cases charged as either war crimes or crimes against humanity will be almost universally coercive" such that "true consent will not be possible";<sup>59</sup> and
- d. Non-consent can be inferred from the circumstances, "such as an ongoing genocide campaign or the detention of the victim".<sup>60</sup>

*Force, threat of force, coercion, or taking advantage of a coercive environment or of a person's incapacity to give genuine consent (statutory law)*

22. According to the ICC Elements of Crimes, lack of consent is not a material element of the crime of "any other form of sexual violence" under the Rome Statute. Instead, it must be proven that the act of a sexual nature was committed "by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent".<sup>61</sup>

23. In the context of rape as a crime against humanity or war crime, which contains the same material element,<sup>62</sup> ICC Chambers have explained

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57. *Kunarac et al Appeal Judgement*, para 128.

58. *Kunarac et al Appeal Judgement*, para 129 (explaining that "[a] narrow focus on force or threat of force could permit perpetrators to evade liability for sexual activity to which the other party had not consented by taking advantage of coercive circumstances without relying on physical force"). See also *Gacumbitsi Appeal Judgement*, para 155.

59. *Kunarac et al Appeal Judgement*, para 130.

60. *Gacumbitsi Appeal Judgement*, para 155.

61. *ICC Elements of Crimes*, Articles 7(1)(g)-6, 8(2)(b)(xxii)-6 and 8(2)(e)(vi)-6, Element One. This element is also a material element of rape and enforced prostitution as crimes against humanity and/or as war crimes. See respectively *ICC Elements of Crimes*, Article 7(1)(g)-1, 8(2)(b)(xxii)-1 and 8(2)(e)(vi)-1, Element Two and Articles 7(1)(g)-3, 8(2)(b)(xxii)-3 and 8(2)(e)(vi)-3, Element One.

62. The ICC Elements of Crimes provides that the crime against humanity and war crimes of rape require, inter alia, that "[t]he invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression

that because “the Elements of Crimes do not refer to the victim’s lack of consent [...] this need not be proven”.<sup>63</sup> Rather, “[t]he establishment of at least one of the coercive circumstances or conditions set out is sufficient” for the act of a sexual nature in question to amount to “any other form of sexual violence”.<sup>64</sup>

24. With regard to these coercive circumstances or conditions, ICC jurisprudence has further established:

- a. Force: although sexual violence may be committed using force, a showing of force is not necessary to establish the crime.<sup>65</sup>
- b. Threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression, or abuse of power:
  - i. “Threats, intimidation, extortion, and other forms of duress that prey on fear or desperation may constitute coercion”.<sup>66</sup>
  - ii. Coercive circumstances do not require the presence of physical force.<sup>67</sup>

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or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent”. See Articles 7(1)(g)-1, 8(2)(b)(xxii)-1, and 8(2)(e)(vi)-1, Element Two.

63. *Katanga Trial Judgment*, para 965; *Bemba Trial Judgment*, paras 105-106; *Ntaganda Trial Judgment*, para 934.

64. *Katanga Trial Judgment*, para 965; *Bemba Trial Judgment*, para 105 (note that while the accused was acquitted on appeal, the Appeals Chamber did not overturn the Trial Chamber’s legal findings regarding the elements of the crime of rape). See *The Prosecutor v. Bemba*, ICC-01/05-01/08 A, *Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s “Judgment pursuant to Article 74 of the Statute”*, 8 June 2018, paras 196-198; *Ntaganda Trial Judgment*, para 934. See also, *Kunarac et al. Appeal Judgement*, para 129 (stating that “[a] narrow focus on force or threat of force could permit perpetrators to evade liability for sexual activity to which the other party had not consented by taking advantage of coercive circumstances without relying on physical force”); *The Prosecutor v Muhimana*, ICTR-95-1B-T, *Judgement and Sentence*, 28 April 2005, para 546 (stating that “circumstances prevailing in most cases charged under international criminal law, as either genocide, crimes against humanity, or war crimes, will be almost universally coercive, thus vitiating true consent.”); *Gacumbitsi Appeal Judgement*, para 153.

65. *Ntaganda Trial Judgment*, paras 934-935. See also, *Akayesu Trial Judgement*, para 688; *Kunarac et al Appeal Judgement*, para 129; *Prosecutor v Taylor*, SCSL-03-01-T, *Judgement*, 18 May 2012 (“*Taylor Trial Judgement*”), para 416; *Prosecutor v Prlić et al*, IT-04-74-T, *Judgement*, 27 May 2013, Vol. 1, para 70.

66. *Ntaganda Trial Judgment*, para 935. See also *Akayesu Trial Judgement*, para 688.

67. *Bemba Trial Judgment*, para 103; *Ntaganda Trial Judgment*, para 935. See also, *Akayesu Trial Judgment*, para 688; *Taylor Trial Judgement*, para 416.

- iii. Examples of threats of force or coercion include, but are not limited to:
  - A. Threatening or intimidating a person using a weapon;<sup>68</sup>
  - B. Threats made against the victim, such as threats to kill;<sup>69</sup>
  - C. Detention;<sup>70</sup>
  - D. Psychological oppression and being kept in a constant state of fear;<sup>71</sup>
- c. By taking advantage of a coercive environment:
  - i. Coercion may be inherent in certain environments, such as armed conflict or the military presence of hostile forces among the civilian population.<sup>72</sup>
  - ii. Several factors may contribute to creating a coercive environment, including:
    - A. The number of people involved in the commission of the crime;
    - B. Whether the sexual violence was committed during or immediately following a combat situation;<sup>73</sup> and
    - C. Whether the sexual violence was committed together with other crimes.<sup>74</sup>
  - iii. It must be shown that the conduct of the perpetrator(s) involved 'taking advantage' of such a coercive environment.<sup>75</sup>

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68. *Ntaganda Trial Judgment*, para 944, 946. See also *Delalić et al Trial Judgment*, paras 958, 962

69. *Ntaganda Trial Judgment*, paras 944, 977. See also *Kunarac et al Trial Judgment*, paras 645-646, 653;.

70. *Ntaganda Trial Judgment*, paras 934, 976, 978; See also *Kunarac et al Appeal Judgment*, para 132; *Kunarac et al Trial Judgment*, paras 464, 542; *Furundžija Trial Judgment*, para 271; *Brima et al Trial Judgment*, para 694.

71. *Ntaganda Trial Judgment*, paras 934-935. See also *Kunarac et al Trial Judgment*, paras 747, 570, 759, 761-762m 765, 780, 782.

72. *Bemba Trial Judgment*, paras 103-104; *Ntaganda Trial Judgment*, paras 935, 945; *Akayesu Trial Judgment*, para 688; *Delalić et al Trial Judgment*, para 495; *Kunarac et al Appeal Judgment*, paras 129-130; *Brima et al Trial Judgment*, para 694.

73. *Bemba Trial Judgment*, para 104; *Ntaganda Trial Judgment*, paras 935, 945.

74. *Bemba Trial Judgment*, para 104; *Ntaganda Trial Judgment*, paras 935, 945.

75. *Bemba Trial Judgment*, para 104; *Ntaganda Trial Judgment*, para 935.



- d. Against a person incapable of giving genuine consent. A person may be incapable of giving genuine consent if affected by natural, induced, or age-related incapacity,<sup>76</sup> such as when:
    - i. Suffering from an illness or disability;<sup>77</sup>
    - ii. Under the influence of a substance;<sup>78</sup> or
    - iii. Not old enough to give genuine consent.<sup>79</sup>
25. The ICC Rules of Procedure and Evidence also contain special evidentiary rules governing the admissibility of any evidence presented in defence that the victim consented to an alleged crime of sexual violence.<sup>80</sup>

### Comparable gravity

26. The ICC Elements of Crimes stipulates a third material element of the crime against humanity or war crime(s) of “any other act of sexual violence”. Specifically, as noted above:
- a. For an act of sexual violence to amount to a crime against humanity, it must be of a gravity comparable to other crimes against humanity involving sexual violence, listed in Article 7(1)(g) the Rome Statute, namely: rape, sexual slavery, enforced prostitution, forced pregnancy, and enforced sterilization.<sup>81</sup>
  - b. For an act of sexual violence to amount to a war crime in the context of an international armed conflict, it must be of a gravity comparable to that of a grave breach of the Geneva Conventions, namely: wilful killing;

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76. *ICC Elements of Crimes*, fn 16, 51 and 64; *Bemba Trial Judgment*, para 107; *Ntaganda Trial Judgment*, para 981

77. *Sesay et al Trial Judgement*, para 148.

78. *Sesay et al Trial Judgement*, para 148.

79. *Ntaganda Trial Judgment*, para 981; *Kunarac et al Trial Judgment*, paras 591, 762; *Sesay et al Trial Judgment*, para 148.

80. See Rule 70 of the ICC Rules of Procedure and Evidence, which provides, *inter alia*: “(a) 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; (b) Consent cannot be inferred by reason or any words or conduct of a victim where the victim is incapable of giving genuine consent; [and] (c) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence”.

81. *Rome Statute*, Article 7(1)(g); *ICC Elements of Crimes*, Article 7(1)(g)-6, Element Two, referring to the crimes against humanity of: rape; sexual slavery; enforced prostitution; forced pregnancy; or enforced sterilization.

torture, or inhumane treatment, including biological experiments; wilfully causing great suffering or serious injury to body or health; extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; compelling a prisoner of war or other protected person to serve in the forces of a hostile power; wilfully depriving a protected person of the rights of fair and regular trial; unlawful deportation or transfer or unlawful confinement; and taking hostages.<sup>82</sup>

- c. For an act of sexual violence to amount to a war crime in the context of a non-international armed conflict, it must be of a gravity comparable to that of a serious violation of Article 3 common to the four Geneva Conventions, namely: violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; committing outrages upon personal dignity, in particular humiliating and degrading treatment; taking of hostages; the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognised as indispensable.<sup>83</sup>

27. To date, the only jurisprudence addressing the “comparable gravity” criterion emanates from the Bemba Arrest Warrant Decision, in which an ICC Pre-Trial Chamber declined to include in the warrant a charge of other forms of sexual violence as a crime against humanity for “order[ing] people to undress in public in order to humiliate them”.<sup>84</sup> The Pre-Trial Chamber reasoned that “the facts submitted by the Prosecutor do not constitute

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82. *Rome Statute*, Article 8(2)(c); *ICC Elements of Crimes*, Article 8(2)(e)(vi)-6, Element Two: the conduct must be comparable gravity to: violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; committing outrages upon personal dignity, in particular humiliating and degrading treatment; taking of hostages; the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognised as indispensable.

83. *Rome Statute*, Article 8(2)(c); *ICC Elements of Crimes*, Article 8(2)(e)(vi)-6, Element Two: the conduct must be comparable gravity to: violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; committing outrages upon personal dignity, in particular humiliating and degrading treatment; taking of hostages; the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognised as indispensable.

84. *Bemba Arrest Warrant Decision*, para 39.

other forms of sexual violence of comparable gravity to the other forms of sexual violence set forth in Article 7(1)(g)" of the Rome Statute.<sup>85</sup>

28. It should be noted that the language "of a gravity comparable to" utilized in the Elements of Crimes in defining the war crimes of "sexual violence" differs from the language used in the Rome Statute, which prohibits "any other form of sexual violence also constituting" a grave breach of the Geneva Conventions or a serious violation of Article 3 common to the four Geneva Conventions.<sup>86</sup>
29. In relation to crimes of "any other form of sexual violence", findings from the Call it what it is campaign with survivors of sexual violence suggest that the gravity of the act may be exacerbated if, among other things:
- a. The act occurred in public or in view of others, or is being shared or threatened to be shared via technological means;
  - b. The act was committed by multiple perpetrators;
  - c. The act was repeated more than once;
  - d. The act was accompanied by physical and/or psychological violence (including through degradation, insult, humiliation, and/or any other verbal abuse);
  - e. The act was perpetrated against a child or other vulnerable person;
  - f. The affected person was forced to engage in acts of a sexual nature with someone known to them, such as with a family member;
  - g. The act was committed for purposes such as obtaining information or a confession, punishment, humiliation, intimidation, or coercion;
  - h. The act was committed based on discrimination of any kind;
  - i. The act was committed with an intent to destroy in whole or in part, a national, ethnic, racial, or religious group;
  - j. The act was committed with an intent to displace or persecute a group of which the affected person was part;

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85. *Bemba Arrest Warrant Decision*, para 40. Note, however, that there is a line of jurisprudence from the *ad hoc* tribunals that confirms that forced nudity is to be considered as an act of sexual violence. See *supra*, para 11(g) and fn 24.

86. *Rome Statute*, Articles 8(2)(b)(xxii) and 8(2)(e)(vi).

- k. The affected person experienced rejection by family, spouse, or community as a result of the act, including if it made the person appear 'unmarriageable' in societies where marriage is necessary for social acceptance and/or economic security;
- l. The affected person contracted an infection, a secondary illness, HIV, or another sexually transmitted infection as a result of the act;
- m. The affected person suffered adverse economic consequences, including a loss of earning capacity or livelihood, as a result of the act;
- n. The affected person experienced a loss of reproductive autonomy or reproductive capacity as a result of the act, including such examples as where they were forced to impregnate, 'breed', or to conceive; or where the act or omission led to infertility, amenorrhea, pregnancy, miscarriage, unsafe abortion, or difficulties in conception, pregnancy, childbirth, or parenthood;
- o. The act was performed by United Nations officials or any other humanitarian actors;
- p. The act was performed or endorsed by State officials, or was tacitly permitted by the State as evinced, among other things, by a failure to genuinely investigate or prosecute the act or refer the act to a competent court;
- q. The act was performed by someone with a fiduciary relationship, familial relationship, or intimate relationship to the affected person;
- r. The affected person experienced difficulty engaging in consensual sexual activity as a result of the act.

## PART B.

### SUBJECTIVE ELEMENTS

#### (*MENS REA*)

#### ***Ad hoc* tribunals**

- 30. The *ad hoc* tribunals have defined the *mens rea* elements of sexual violence as follows:
  - a. The physical perpetrator intentionally commits the act; and

- b. The physical perpetrator is aware that the act occurred without the consent of the victim.<sup>87</sup>
31. As noted above, while the crime of “any other form of sexual violence” is not codified in the statutes of the *ad hoc* tribunals, acts of sexual violence have been qualified and prosecuted as underlying acts of other war crimes and crimes against humanity that have been specifically enumerated. In such instances, the *mens rea* of the overarching crime has been established.<sup>88</sup>

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87. *Milutinović et al Trial Judgement*, Vol. 1 of 4, para 201; *Đorđević Trial Judgement*, para 1768 (adopting the definition of sexual assault established in the *Milutinović et al Trial Judgement*); *Đorđević Appeal Judgement*, para 851 (affirming the definition of sexual assault established in the *Milutinović et al Trial Judgement*).

88. For instance, in the *Kunarac* case, the Trial Chamber set out the *mens rea* of outrages upon personal dignity as: (1) “the accused intentionally committed or participated in an act or omission which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity”; and (2) “he knew that the act or omission could have that effect”. *Kunarac et al Trial Judgement*, para 514. In convicting Radomir Kovač of the war crime of outrages upon personal dignity for acts of sexual violence, the Chamber found that the accused “certainly knew that, having to stand naked on a table, while the accused watched them, was a painful and humiliating experience for the three women involved, even more so because of their young age”. The Chamber was thus “satisfied that Kovac must have been aware of that fact, but he nevertheless ordered them to gratify him by dancing naked for him”. The Chamber further noted that “[t]he Statute does not require that the perpetrator must intend to humiliate his victim, that is that he perpetrated the act for that very reason. It is sufficient that he knew that his act or omission could have that effect. This was certainly the case here”. See *Kunarac et al Trial Judgement*, paras 773, 774, 766, 781-782. In the *Martić* case, concerning the *mens rea* of torture as a war crime and crime against humanity, the Trial Chamber found that: (1) “the perpetrator’s acts or omissions must be committed for a prohibited purpose. There is no requirement that the act of the perpetrator be committed solely or predominantly to serve this prohibited purpose”; and (2) “In addition, it needs to be established that the perpetrator acted or omitted to act with direct or indirect intent”. In convicting Milan Martić of torture as a war crime and crime against humanity for acts of sexual violence, the Chamber found “in light of all the circumstances in which beatings and mistreatment were carried out, that such acts caused serious physical and/or mental suffering to the detainees” and that “in some instances the mistreatment was carried out intentionally for the prohibited purposes of obtaining information and/or to discriminate against them because of their ethnicity”. *Martić Trial Judgement*, paras 77, 408, 288, 413, 415, 480. In *Martić*, the Trial Chamber set out the *mens rea* of persecution as a crime against humanity as “a specific intent to discriminate on political, racial or religious grounds” and “to cause injury to a human being because he belongs to a particular community or group”. *Martić Trial Judgement*, para 120. In convicting Milan Martić of persecution as a crime against humanity for the same acts of sexual violence, the Chamber found that “the crimes of [...] torture [...] were carried out with intent to discriminate on the basis of ethnicity”. *Martić Trial Judgement*, paras 411, 120, 288, 416, 480. In the *Sesay et al* case, the Trial Chamber set out the *mens rea* of the crime of other inhumane acts as a crime against humanity as “[t]he Accused, at the time of the act or omission, intended to inflict great suffering or serious injury to body, or to mental or physical health of the victim, or [...] had reasonable knowledge that the act or omission would likely inflict great suffering or serious injury to body, or to mental

## The Rome Statute

32. "Under the ICC Statute, the *mens rea* required to establish the crime against humanity and war crime(s) of 'any other form of sexual violence' is set out in Article 30, which provides:

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements (*actus reus*) are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
  - a. In relation to conduct, that person means to engage in the conduct;
  - b. In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
3. For the purposes of this article, 'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. 'Know' and 'knowingly' shall be construed accordingly."

33. Considering the *actus reus* of sexual violence, the *mens rea* may be characterized as follows:<sup>89</sup>

- a. "The perpetrator meant to engage in committing an act of a sexual nature or causing a person or persons to engage in an act of a sexual nature;
- b. The perpetrator:
  - i. meant to commit an act of a sexual nature or to cause a person or persons to engage in an act of a sexual nature; or

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or physical health". *Sesay et al Trial Judgement*, para 170. In convicting each accused of other inhumane acts for acts of sexual violence, namely forced marriage, the Chamber found that "the perpetrators' actions in taking 'wives' in Koidu inflicted grave suffering and serious injury to the physical and mental health of the victims, and that the perpetrators were aware of the gravity of their actions". *Sesay et al Trial Judgement*, paras 1296, 1297 and pp 678, 682, 685.

**89.** As to date, "any other form of sexual violence" as a crime against humanity or war crime has not been successfully prosecuted before the ICC, the *mens rea* elements of the crime have not been elucidated in the jurisprudence. The *mens rea* elements detailed herein reflect those set out in the Case Matrix Network's International Criminal Law Guidelines: Legal Requirements of Sexual and Gender-based Violence Crimes, June 2017, pp 64-65.

- ii. the perpetrator was aware he or she would commit an act of a sexual nature or would cause a person or persons to engage in an act of a sexual nature in the ordinary course of events;
- c. The perpetrator was aware of the use of force, threat of force or coercion or taking advantage of a coercive environment or of a person's incapacity to give genuine consent;
- d. The perpetrator was aware of the factual circumstances that established the gravity of the conduct."

## PART C.

### CONTEXTUAL ELEMENTS

34. To establish that "any other form of sexual violence" constitutes a crime against humanity or a war crime, it must be demonstrated that the prohibited act was connected to a specific context. Consequently, in addition to the material and subjective elements outlined above, the following contextual elements must be established.

#### ***Ad hoc* tribunals**

35. Before the *ad hoc* tribunals, to prove a crime against humanity, it must be demonstrated that the sexual violence: (1) formed part of a widespread or systematic attack directed against a civilian population; and (2) was carried out knowing, or taking the risk, that it comprised part of the attack.<sup>90</sup> The term "widespread" signifies the "large-scale nature of the attack and the number of victims".<sup>91</sup> The term "systematic" signifies "the organized nature

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90. *Kunarac et al Appeal Judgement*, paras 85, 102. See also, e.g., *Kvočka et al Trial Judgement*, paras 129, 121-122, 728, 737, 790 (*finding* that crimes committed in Omarska camp, which included sexual violence, "formed part of an attack directed against the civilian population and this would have had to have been known to all who worked in or regularly visited the camp"); *Milutinović et al Trial Judgement*, Vol. 2 of 4, paras 1184-1187 (*finding* that the detention, harassment, and physical assault of civilians, including the sexual assault of two women, who were then "expelled from the village in an organized manner" by police and military forces "amounted to an attack upon the civilian population", comprising "part of a widespread and systematic attack" on the civilian population, and concluding, in light of comments made, that "the physical perpetrators [...] were undoubtedly aware that they were acting in the context of a larger attack upon the [...] population").

91. *Kunarac et al Appeal Judgement*, para 94.

of the acts of violence and the improbability of their random occurrence”, which can be demonstrated by showing “patterns of crimes”.<sup>92</sup>

36. In addressing sexual violence as a crime against humanity, practitioners should bear in mind the following key factors established before the *ad hoc* tribunals:
- a. It is not required that the individual acts of sexual violence are widespread or systematic, rather the overall attack, of which those acts formed a part, must be widespread or systematic;<sup>93</sup>
  - b. A single or limited number of sexual violence crimes can qualify as a crime against humanity, unless those crimes are so far removed from the overall attack that no nexus to it can be established;<sup>94</sup>
  - c. While the act must be part of the attack, it is not required to have been committed in the midst of the attack, so long as it is sufficiently connected;<sup>95</sup> and
  - d. A perpetrator’s motives for inflicting sexual violence, such as personal gain or gratification, or previous acquaintance with the victim, do not negate the existence of a nexus to the overall attack. Crimes against humanity can be committed for purely personal reasons.<sup>96</sup>
37. To prove a war crime, it must be demonstrated that the sexual violence was “closely related to the armed conflict” and that the perpetrator had knowledge of this nexus.<sup>97</sup> In addressing sexual violence as a war crime, practitioners should bear in mind the following key factors established before the *ad hoc* tribunals:
- a. It is not necessary to establish that the armed conflict caused the commission of the crime, however, it must at minimum have played

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92. *Kunarac et al Appeal Judgement*, para 94.

93. *Gacumbitsi Appeal Judgement*, para 102 (*holding* that the Trial Chamber reasonably concluded that there was a widespread and systematic attack and that the fact that the act of sexual violence was isolated, as the victim had known her attacker previously, did not mean the act was isolated from the widespread and systematic attack); *Kunarac et al Appeal Judgement*, para 96.

94. *Kunarac et al Appeal Judgement*, paras 96, 100; *Tadić Trial Judgment*, para 649; *Prosecutor v. Mrkšić and Šljivančanin*, IT-95-13/1-A, *Judgement*, 5 May 2009, para 41.

95. *Kunarac et al Appeal Judgement*, para 100.

96. *Kvočka Appeal Judgement*, para 689; *Gacumbitsi Appeal Judgement*, para 103; *Kunarac et al Appeal Judgement*, para 103.

97. *Kunarac et al Appeal Judgement*, para 55.



- a substantial part in (1) the perpetrator's ability to commit it; (2) the perpetrator's decision to commit it; (3) the manner in which it was committed; or (4) the purpose for which it was committed;<sup>98</sup>
- b. In determining whether or not the sexual violence is sufficiently related to the armed conflict, the following factors may be taken into account:
    - i. The perpetrator's status as a combatant;
    - ii. The victim's status as a non-combatant;
    - iii. The fact that the victim belongs to the opposing party;
    - iv. The fact that the sexual violence crime may be said to serve the ultimate goal of a military campaign; and
    - v. The fact that the sexual violence crime is committed as part of or in the context of the perpetrator's official duties.<sup>99</sup>
  - c. To establish the existence of an armed conflict, it is not necessary to demonstrate that "there was an armed conflict in each and every square inch of the general area"; a "state of armed conflict is not limited to the areas of actual military combat but exists across the entire territory under the control of the warring parties";<sup>100</sup>
  - d. To establish a nexus between the sexual violence and the armed conflict, it is not necessary for the crime to have been committed "whilst fighting is actually taking place, or at the scene of combat"; it suffices "that the crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict".<sup>101</sup>

## The Rome Statute

38. The ICC Elements of Crimes provides that to establish "any other form of sexual violence" as a crime against humanity, it must be demonstrated that:
  - a. The conduct was committed as part of a widespread or systematic attack directed against a civilian population;<sup>102</sup> and

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98. *Kunarac et al Appeal Judgement*, para 58.

99. *Kunarac et al Appeal Judgement*, para 59.

100. *Kunarac et al Appeal Judgement*, para 64.

101. *Kunarac et al Trial Judgement*, para 568.

102. *ICC Elements of Crimes*, Article 7(1)(g)-6, Element Four. Article 7(3) of the Elements of Crimes explains that "Attack directed against a civilian population" refers to "a course of

- b. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.<sup>103</sup>

Article 7(2)(a) of the ICC Statute clarifies that “Attack directed against a civilian population” refers to “a course of conduct involving the multiple commission of acts referred to in [Article 7(1) of the Statute] against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack”.<sup>104</sup>

- 39. ICC jurisprudence has interpreted the terms “widespread” and “systematic” consistent with the interpretation of the *ad hoc* tribunals. Namely, “widespread” refers to the large-scale nature of the attack and number of targeted persons, while “systematic” refers to the organized nature of the acts of violence, and the improbability of their random occurrence. Further the systematic character of the attack refers to the existence of “patterns of crimes”.<sup>105</sup>
- 40. In addressing “any other form of sexual violence” as a crime against humanity, practitioners should bear in mind the following key factors established before the ICC:
  - a. In determining whether the required nexus between the sexual violence and the armed conflict exists, the Chamber will make “an objective assessment, considering, in particular, the characteristics, aims, nature and/or consequences of the act”,<sup>106</sup> and
  - b. “Isolated acts”, which “clearly differ in their context and circumstances from other acts that occur during an attack” will not meet the nexus requirement.<sup>107</sup>
- 41. To establish “any other form of sexual violence” as a war crime, it must be demonstrated that:

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conduct involving the multiple commission of acts referred to in article 7, paragraph 1, of the [ICC] Statute against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such an attack”.

**103.** *ICC Elements of Crimes*, Article 7(1)(g)-6, Element Five.

**104.** See also *ICC Elements of Crimes*, Article 7(3).

**105.** *Bemba Trial Judgment*, para 163; *Katanga Trial Judgment*, para 1123.

**106.** *Bemba Trial Judgment*, para 165.

**107.** *Bemba Trial Judgment*, para 165; *Katanga Trial Judgment*, para 1124.

- a. "The sexual violence took place in the context of and was associated with an international<sup>108</sup> or non-international armed conflict";<sup>109</sup> and
  - b. "The perpetrator was aware of factual circumstances that established the existence of an armed conflict".<sup>110</sup>
42. As to date, "any other form of sexual violence" has not been successfully prosecuted before the ICC, the manner in which the contextual elements of the crime are to be addressed remains to be seen. However, insight may be gleaned from the court's treatment of specific sexual violence crimes, such as rape and sexual slavery, which contain the same contextual elements.<sup>111</sup>
43. For instance, in the *Katanga* case, the Trial Chamber held that rape as both a war crime and crime against humanity had been committed by militia forces.
44. The Chamber relied upon the following factual findings in concluding that the contextual elements of rape and sexual slavery as crimes against humanity were satisfied:
- a. The militia targeted the civilian population of a village in an attack, involving the commission of multiple acts;<sup>112</sup>
  - b. The militia constituted an organization within the meaning of Article 7(2) of the ICC Statute;<sup>113</sup>
  - c. The attack was carried out pursuant to a policy;<sup>114</sup>
  - d. The attack was of a systematic nature;<sup>115</sup>

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108. *ICC Elements of Crimes*, Article 8(2)(b)(xxii)-6, Element Four.

109. *ICC Elements of Crimes*, Article 8(2)(e)(vi)-6, Element Four.

110. *ICC Elements of Crimes*, Articles 8(2)(b)(xxii)-6 and 8(2)(e)(vi)-6, Element Five.

111. For the crime against humanity and war crime(s) of rape, see *ICC Elements of Crimes*, Articles 7(1)(g)-1, 8(2)(b)(xxii)-1, and 8(2)(e)(vi)-1, Element Three. For the crime against humanity and war crime(s) of sexual slavery, see *ICC Elements of Crimes*, Articles 7(1)(g)-2, 8(2)(b)(xxii)-2, and 8(2)(e)(vi)-2, Element Three.

112. *Katanga Trial Judgment*, paras 1134-1138.

113. *Katanga Trial Judgment*, paras 1139-1141.

114. *Katanga Trial Judgment*, paras 1142-1156.

115. *Katanga Trial Judgment*, paras 1157-1162.

- e. The acts of violence, including rape and sexual slavery, were committed by the militia during the attack and directed against the civilian population.<sup>116</sup>
45. In relation to the acts of sexual violence, the Chamber recalled: “it need not be shown that each act was committed pursuant to or in furtherance of the policy, but rather that a nexus between the act and the attack must be established”.<sup>117</sup> The Chamber further found that the acts “objectively formed part of” the attack, and did not constitute isolated acts.<sup>118</sup>
46. The Chamber relied upon the following factual findings in concluding that the contextual elements of the war crimes of rape and sexual slavery were satisfied:
- a. An armed conflict existed in the relevant territory at the time of the attack;<sup>119</sup>
  - b. The armed conflict was non-international in nature;<sup>120</sup> and
  - c. The acts of sexual violence, including rape and sexual slavery, were connected to the ongoing hostilities, and the perpetrators, who took an active part in that armed conflict, were aware of the factual circumstances establishing the existence of the conflict.<sup>121</sup>

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116. *Katanga Trial Judgment*, paras 1163-1166.

117. *Katanga Trial Judgment*, para 1165.

118. *Katanga Trial Judgment*, para 1165.

119. *Katanga Trial Judgment*, para 1216.

120. *Katanga Trial Judgment*, paras 1218, 1229.

121. *Katanga Trial Judgment*, paras 1233-1234.

# ANNEX

## Established jurisprudence chart

### a. Beating, biting, mutilating or otherwise causing injury to a sexual body part

- *Todorović* [Sentencing Judgement](#), paras 38, 34, 37 (Stevan Todorović pled guilty to sexual assault as the underlying criminal conduct of the crime against humanity of persecution for acts including: “beat[ing] [the victim] and kick[ing] him in the genital area” and ordering the victim to bite another man’s penis);
- *Simić* [Sentencing Judgement](#), para 63 (Milan Simić pled guilty to torture as a crime against humanity for acts including: “order[ing] [victims] to stand with their legs apart in order to receive forceful kicks to their genitals”);
- *Tadić* [Trial Judgement](#), paras 206, 194-198, 720, 722-730 and p.285 (Dusko Tadić convicted of the war crime of cruel treatment and the crime against humanity of inhumane acts for acts including: ordering a prisoner to “hit and bite [another prisoner’s] genitals” and “bit[e] off one of [his] testicles”); *Tadić* [Appeal Judgement](#), paras 68, 170-171 and p. 144 (*overturning* Tadić’s acquittal and entering convictions for the war crimes of torture and wilfully causing great suffering or serious injury to body and health based, inter alia, on these acts);
- *Kvočka et al* [Trial Judgement](#), para 180, fn 343 (*finding that* “Sexual violence would also include such crimes as sexual mutilation”);
- *Sesay et al* [Trial Judgement](#), paras 1208, 1307-1309, 1347, 1352, 2063 and pp 677-678, 680-682, 684-685 (each accused convicted of the war crimes of terrorism and outrages on personal dignity for acts including: “slitting the [genitalia] of several male and female civilians with a knife”); *Sesay et al* [Appeal Judgement](#), pp. 477-479 (*affirming* the convictions).
- *Brđanin* [Trial Judgement](#), paras 498, 524, 538, 998, 1050, 1061, 1088 (Radoslav Brđanin convicted of the crime against humanity of persecutions, incorporating torture, and the war crime of torture for acts including: “kick[ing] [the victim] in [his] genitals”); *Brđanin* [Appeal Judgement](#), paras 276, 288-289, and p. 162 (*reversing* Brđanin’s convictions for these crimes, holding that the Trial Chamber erred in finding Brđanin responsible for aiding and abetting torture in the camps and detention facilities);
- *Kajelijeli* [Judgment and Sentence](#), paras 936, 678, 683, 934-40, 942 (*finding that* the Interahamwe committed rapes and sexual assaults, constituting inhumane acts, including “[c]utting a women’s breast off and licking it, and piercing a woman’s sexual organs with a spear”, *but acquitting* Juvénal Kajelijeli of the crime against humanity of other inhumane acts for these acts as the Prosecution did not prove that he was physically present during, gave an order for or knew or had reason to know about their commission); *Kajelijeli* [Appeal Judgement](#), paras 4, 325 (*affirming* Kajelijeli’s acquittal of this crime);

- *Krajišnik Judgement*, paras 372, 800, 803-806, 1126 (Momcilo Krajišnik convicted of the crime against humanity of persecution for acts including: “sexually mutilat[ing] [male detainees]”); *Krajišnik Appeal Judgement*, paras 283-4, 820 (reversing Krajišnik’s conviction for the crime against humanity of persecution for all underlying acts other than forcible transfer and deportation);
- *Kenyatta et al Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute*, paras 265-266, 264 (finding “every act of violence which targets parts of the body commonly associated with sexuality should [not] be considered an act of sexual violence”, that such determinations are “inherently a question of fact”, that “the evidence placed before it [did] not establish the sexual nature of the acts of forcible circumcision and penile amputation”, and therefore “the acts under consideration do not qualify as other forms of sexual violence” under the Rome Statute. Nevertheless, following this determination, the ICC OTP undertook to: “continue to present acts of genital mutilation or deliberate injuries to the genitalia as sexual crimes”. See *Policy Paper on Sexual and Gender-Based Crimes 2014*, fn 14.
- See also ICC OTP, *Report on Preliminary Examination Activities 2016*, para 94 (noting, in relation to the preliminary examination in the situation in Iraq/UK, allegations from an Article 15 communication from Public Interest Lawyers of “other forms of sexual violence”, including “inflicting physical injuries to the genitalia of detainees”).
- See also UN ECOSOC, “Contemporary forms of slavery, systematic rape, sexual slavery and slavery like practices during armed conflict: Final Report”, para 21 (stating that “sexual violence covers both physical and psychological attacks directed at a person’s sexual characteristics, such as mutilating a person’s genitals, or slicing off a women’s breasts”).

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#### **b. Causing someone to form a reasonable apprehension or fear of acts of sexual violence, including through sexual threats**

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- *Kvočka et al Trial Judgement*, paras 98, 108, 229, 234, 319-321, 408, 415, 419-420, 470, 504, 578-579, 691, 752-753 (Each accused convicted of the war crime of torture and the crime against humanity of persecution for acts including: “subject[ing] [women] to sexual intimidation or violence in Omarska” camp such as “approach[ing] a female detainee in the eating area, unbutton[ing] her shirt, [drawing] a knife over one of her breasts, and threaten[ing] to cut it off”); *Kvočka et al Appeal Judgement*, paras 329-34, 339, 594-599 and pp. 242-243 (overturning Miroslav Kvočka’s conviction for persecution for acts of “rape and sexual assault”, finding that the Trial Chamber erred in determining these acts were committed in Omarska while he was employed there, and overturning Zoran Zigic’s conviction for persecution for these acts, finding that no reasonable finder of fact could have concluded that he participated significantly in the functioning of Omarska camp and could thus be held responsible as a participant in the joint criminal enterprise);
- *Simić Sentencing Judgement*, para 63 (Milan Simić pled guilty to torture as a crime against humanity for acts including: participating in beating the victim while “[the victim] was forced to pull down his pants and one of the other Serb men who accompanied [the accused] threatened to cut off his penis while brandishing a knife”);
- *Brđanin Trial Judgement*, paras 516-517, 524, 538, 998, 1013, 1050, 1061, 1088 (Radoslav Brđanin convicted of the crime against humanity of persecutions, incorporating torture, and the war crime of torture for sexual assaults, including: “the threat of rape” and “uncover[ing] the breast of a female detainee, [taking] out a knife, and [running] it along her breast for several minutes”). But see *Brđanin Appeal Judgement*, paras 276, 288-289, and p. 162 (reversing Brđanin’s convictions for these crimes, holding that the Trial Chamber erred

in finding Brđanin responsible for aiding and abetting torture in the camps and detention facilities).

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#### c. Causing the victim to masturbate himself or herself or another person

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- *Martić Trial Judgement*, paras 288, fn 899, 454-455, 477, 480, 518 (Milan Martić convicted of the crimes against humanity of persecution and torture and the war crime of torture for acts including: "sexually abus[ing] [detainees] through forced mutual oral sex or oral sex with prison guards, and mutual masturbation"); *Martić Appeal Judgement*, paras 185-190, 355 (affirming Martić's convictions for these crimes).
- See also, *Report on Preliminary Examination Activities 2016*, para 94 (noting, in relation to the preliminary examination in the situation in Iraq/UK, allegations from an Article 15 communication from Public Interest Lawyers of "other forms of sexual violence" including "enforced masturbation").

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#### d. Causing the victim to witness acts of a sexual nature

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- *Furundžija Trial Judgement*, paras 267, 87, 127, 268 and p. 112 (Anto Furundžija convicted of the war crime of torture for acts including: "forc[ing] [a victim] to watch [another soldier's] sexual attacks on [another victim]"); *Furundžija Appeal Judgement*, p. 79 (rejecting each ground of appeal, dismissing the appeal and affirming *Furundžija's conviction*);
- *Brđanin Trial Judgement*, paras 1018, 524, 538, 998, 1013, 1050, 1061, 1088 (Radoslav Brđanin convicted of the crime against humanity of persecution, incorporating torture and the war crime of torture for acts including: forcing "Bosnian Muslims and Bosnian Croats [...] to watch other members of their group being killed, raped and beaten"); *But see Brđanin Appeal Judgement*, paras 276, 288-289, p. 162 (reversing Brđanin's convictions for these crimes, holding that the Trial Chamber erred in finding Brđanin responsible for aiding and abetting torture in the camps and detention facilities);
- *Sesay et al Trial Judgement*, paras 1194, 1299, 1347, 1352 and pp. 677-678, 680-682, 684-685 (each accused convicted of the war crimes of terrorism and outrages upon personal dignity for acts including: "ordering [the victim] to watch and to count the men raping his wife [while] [h]is children [...] were also watching"); *Sesay et al Appeal Judgment*, pp. 477-479 (affirming the convictions).

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#### e. Forced abortion

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- *Kvočka et al Trial Judgement*, para 180, fn 343: (finding that "Sexual violence would also include such crimes as [...] forced abortion").

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#### f. Forced marriage

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- *Kvočka et al Trial Judgement*, para 180, fn 343: (finding that "Sexual violence would also include such crimes as [...] forced marriage");
- *Sesay et al Trial Judgement*, paras 1295-1297, 1301, 1406-1413, 1460-1475, 1562-1565, 1579-1583 and pp 677-678, 680-682, 684-685 (each accused convicted of the war crimes of terrorism and outrages upon personal dignity, as well as the crime against humanity of inhumane acts for acts including "forced marriage"); *Sesay et al Appeal Judgment*, pp. 477-479 (affirming the convictions);
- Case 002/02 *Judgment*, paras 3686-3694, 4326, and p. 2230 (convicted of the crime against humanity of other inhumane acts through forced marriage). As of the time of writ-

ing, the Co-Prosecutor's appeal from the Trial Judgment remained pending. See Case 002 [Co-Prosecutors' Appeal against the Case 002/02 Trial Judgment](#).

- *Katanga Trial Judgment*, paras 1000, 1001-1023 (*finding that*, in the context of the aftermath of an attack, "the statement that someone was 'taken as a wife' by a combatant or that she was to 'become his wife' is a clear reference to a coercive environment entailing almost certain engagement in acts of a sexual nature" and that such combatants committed the war crime and crime against humanity of sexual slavery); and paras 1620-1621, 1663-1664 (*acquitting* the accused of these crimes on the basis that they did not fall within the common criminal purpose required to establish liability under Article 25(3)(d)(ii) of the Rome Statute).

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#### g. Having someone undress partially or fully in public while performing physical activities such as dancing, exercising or marching whilst nude

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- *Akayesu Trial Judgment*, paras 688, 685, 692-695, 697, 731-732, 734 and Section 8. Verdict, p. 293 (Jean Paul Akayesu convicted of the crime against humanity of other inhumane acts and genocide for acts including: "order[ing] 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, constitut[ing] sexual violence"); *Akayesu Appeal Judgment*, p. 143 (*dismissing* Akayesu's appeal in its entirety);
- *Kunarac et al Judgment*, paras 772, 766-771, 773, 782, 886 (Radomir Kovač convicted of the war crime of outrages upon personal dignity for acts including: "forc[ing] [the victims] to strip and dance naked on a table while [the accused] watched them from the sofa, pointing weapons at them"). *Kunarac et al Appeal Judgment* paras 283-285 and pp. 125-126 (*affirming* Kovač's conviction).
- *Brđanin Trial Judgment*, paras 1013, 524, 538, 998, 1050, 1061 (Radoslav Brđanin convicted of the crime against humanity of persecutions, incorporating torture, and the war crime of torture for sexual assaults, including: "forc[ing] [the victim] to undress herself in front of cheering Bosnian Serb policemen and soldiers"). *But see Brđanin Appeal Judgment*, paras 276, 288-289, p. 162 (*reversing* Brđanin's convictions for these crimes, holding that the Trial Chamber erred in finding Brđanin responsible for aiding and abetting torture in the camps and detention facilities);
- *Bemba Arrest Warrant Decision*, paras 39-40 (*finding* that the act of "order[ing] people to undress in public in order to humiliate them" did not qualify as "other forms of sexual violence" under Article 7(1)(g) of the Rome Statute as it "[did] not constitute forms of sexual violence of comparable gravity to the other crimes set forth in article 7(1)(g) of the Statute").

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#### h. Inspecting someone's sexual body parts, or

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- *Milutinović et al Trial Judgment*, Vol. 2 of 4, paras 631-632, 558, 622, 689-690 and Volume 3 of 4, paras 472, 476, 629, 631, 633, 785, 788, 928, 931, 1135, 1139, 1206-1212 (Nebojša Pavković convicted of the crime against humanity of persecutions through sexual assault for acts including: "[soldiers] forc[ing] [a victim] to take her clothes off [...] search[ing][her and] [telling] [her] to lift her blouse and her bra up [...]"; and "[taking] the women out of the room and search[ing] them one by one [and] forcing them to take their clothes off");
- *Šainović et al Appeal Judgment*, paras 1550, 1582, 1592. 1604 and pp. 739-740, 742 (*holding* that the Trial Chamber erred in declining to convict Nikola Šainović and Sreten Lukić



for these acts, and therefore finding them responsible for persecution as a crime against humanity, through sexual assaults, while declining to enter new convictions).

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#### i. The occurrence of menstruation

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- *Kvočka et al Trial Judgement*, paras 105, 415, 419-420, 470, 504, 578-579, 691, 752-753 (each accused convicted of the war crime of torture and the crime against humanity of persecution for acts including: “forc[ing] [the victim] to prove [she was menstruating] to [a guard]”). *But see Kvočka et al Appeal Judgement*, paras 329-334, 339, 594-599, pp. 242-243 (overturning Miroslav Kvočka’s conviction for persecution for acts of “rape and sexual assault”, finding that the Trial Chamber erred in determining these acts were committed in Omarska while he was employed there, and overturning Zoran Žigić’s conviction for persecution for these acts, finding that no reasonable finder of fact could have concluded that he participated significantly in the functioning of Omarska camp and could thus be held responsible as a participant in the joint criminal enterprise).

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#### j. Kissing or licking the victim’s body, especially a sexual body part

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- *Tadić Trial Judgement*, paras 206, 194, 198, 722-726, 730 and p. 285 (Dusko Tadić convicted of the war crime of cruel treatment and the crime against humanity of inhumane acts for acts including: “order[ing] [a prisoner] to lick [another prisoner’s] naked bottom and [a different prisoner] to suck his penis and then to bite his testicles”); *Tadić Appeal Judgement*, paras 68, 170-171 and p. 144 (overturning Tadić’s acquittal and finding him guilty for these acts, in addition, of the war crimes of torture and wilfully causing great suffering or serious injury to body and health).

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#### k. Touching the victim in a sexual way, such as touching a sexual body part, including with a sexual body part, weapon or other object

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- *Kvočka et al Trial Judgement*, para 180: finding that “sexual violence [...] includes such crimes as sexual [...] molestation”;
- *Milutinović et al Trial Judgement*, Vol. 2 of 4, paras 631-632, 689, 558, 622, 690 and Volume 3 of 4, paras 472, 476, 629, 631, 633, 785, 788, 928, 931, 1135, 1139, 1206-1212 (Nebojša Pavković convicted of the crime against humanity of persecution through sexual assault for acts including: “soldier[s] searching [a victim] touch[ing] her breasts and taunt[ing] her with sexual comments”, “touch[ing] [victims] in a sexual and threatening manner” and “order[ing] a victim to take her clothes off and [...] touching her breasts and vagina, at which point she fainted”);
- *Šainović et al Appeal Judgement*, paras 1550, 1582, 1592, 1604 and pp. 739-740, 742 (holding that the Trial Chamber erred in declining to convict Nikola Šainović and Sreten Lukić for these acts and therefore finding them responsible for persecution as a crime against humanity, through sexual assaults, while declining to enter new convictions);
- *Furundžija Trial Judgement*, paras 264, 40, 267 and p. 112 (Anto Furundžija convicted of the war crime of torture for acts including: interrogating the victim while “[another soldier] rubbed his knife on the inner thighs of [the victim] and threatened to cut out her private parts if she did not tell the truth in answer to the interrogation”); *Furundžija Appeal Judgement*, p. 79 (rejecting each ground of appeal, dismissing the appeal and affirming *Furundžija’s* conviction).
- *But see Brđanin Trial Judgement*, paras 516-517, 524, 538, 998, 1013, 1050, 1061, 1088 (Radoslav Brđanin convicted of the crime against humanity of persecutions, incorporating torture, and the war crime of torture for acts including: “uncover[ing] the breast of a female

detainee, [taking] out a knife, and [running] it along her breast for several minutes"); *Brđanin Appeal Judgement*, paras 276, 288-289, p. 162 (reversing Brđanin's convictions for these crimes, holding that the Trial Chamber erred in finding Brđanin responsible for aiding and abetting torture in the camps and detention facilities);

- *Rukundo Judgement*, paras 381, 574-576, 591 (Emmanuel Rukundo convicted for the crime of genocide for acts including: "forc[ing] sexual contact with [a victim] by opening the zipper of his trousers, trying to remove her skirt, forcefully lying on top of her and caressing and rubbing himself against her until he ejaculated and lost his erection". The Trial Chamber found that "[t]he actions in question were clearly of a sexual nature: [...] Rukundo's actions and words, such as telling her that if she made love with him he would never forget her, support the Chamber's finding [...]"); *Rukundo Appeal Judgement*, paras 236, 227-235, 237-2388, 270 (finding that Rukundo's sexual assault on the victim, "while taking place during a genocide, was not necessarily a part of the genocide itself" and accordingly reversing Rukundo's conviction for genocide, in part, for causing serious mental harm to the victim through this assault).
- See also *Report on Preliminary Examination Activities 2016*, para 94 (noting, in relation to the preliminary examination in the situation in Iraq/UK, allegations from an Article 15 communication from Public Interest Lawyers of "other forms of sexual violence" including "provocative physical touching of detainees' genital and anal area, and touching detainees' body with perpetrators' sexual organs").



# KEY PRINCIPLES FOR POLICY MAKERS ON SEXUAL VIOLENCE

Meaningfully addressing sexual violence starts with understanding what constitutes an act of sexual violence. By incorporating these ten principles in policy development and implementation, legislative strategies and legal and judicial procedures, the risk of overlooking or trivialising sexual violence - in all its forms - can be mitigated and addressed more effectively. The ten Key Principles on Sexual Violence are derived from the Civil Society Declaration on Sexual Violence.

**Principle 1:** There is no universal view of what makes an experience of harm or violence ‘sexual’;<sup>1</sup>

**Principle 2:** Sexual violence involves singular, multiple, continuous, or intermittent acts<sup>2</sup> which, in context, are perceived by the victim, the perpetrator, and/or their respective communities as sexual in nature. This includes acts that are committed ‘forcibly’<sup>3</sup> or against a person who is unable or unwilling to give genuine, voluntary, specific, and ongoing consent;<sup>4</sup>

1. This is due to the widely varying modes of sexual expression, identities, norms, and perceptions among various nations, regions, cultures, communities, and individuals.

2. For the purposes of these principles, the term ‘act’ refers to an active or passive action as well as a deliberate omission.

3. For the purposes of these principles, the term ‘forcibly’ is not limited to physical force and could also include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression, or abuse of power against any person or persons, or by taking advantage of a coercive environment. This is consistent with the International Criminal Court Elements of Crimes, Art. 7(1)(g)-1, element 1; 7(1)(g)-3, element 1; 7(1)(g)-6, element 1.

4. Consent to the relevant sexual activity must be specific and ongoing. Thus, it will not suffice if the person has consented to similar conduct, or if they consented to the relevant on a previous occasion, or if they initially consented but later withdrew that consent, or if the nature of the sexual activity changes without their consent. The consent should not be considered as freely given when occurred in a situation of vulnerability. A person may be incapable of giving relevant consent if affected by natural, induced, or age-related incapacity. Other factors that may affect a person's capacity to give genuine consent include literacy, access to information,

- Principle 3:** An act can be sexual in nature even in the absence of physical contact;
- Principle 4:** An act can be sexual in nature even if it is neither intended to nor in fact produces the result of sexual gratification;
- Principle 5:** Acts of sexual violence are deeply rooted in every society and can be committed at any time and in any environment, including in the context of marital, familial, or intimate relationships;
- Principle 6:** Acts of sexual violence can be committed by and against any person, regardless of age, sex, or gender;
- Principle 7:** Understood broadly, the concept of 'sexual violence' encompasses all violations of sexual autonomy and sexual integrity;
- Principle 8:** The sexual nature and the gravity of an act are determined in part by individual factors, including the identity, ability, age, race, and sex of the survivor and the perpetrator, as well as contextual factors, including culture, religion, historical precedents, indigeneity, and other intersecting factors;
- Principle 9:** The impact of sexual violence is felt by individuals, but also by families, communities, and societies, and can persist for generations;
- Principle 10:** Practitioners will be better equipped to determine whether an act is sexual, and to assess the gravity of such acts, when they take steps to understand the lived experience of survivors<sup>5</sup> and to understand the context in which an act occurred through thoughtful engagement.

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and linguistic, educational, and economic positions. Physiological reactions should not be considered as a reflection of consent.

5. United Nation Security Council, [Resolution 2467 \(2019\)](#), 23 April 2019, para 16.









