MODEL LEGISLATIVE PROVISIONS AND GUIDANCE ON INVESTIGATION AND PROSECUTION OF CONFLICT-RELATED SEXUAL VIOLENCE
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The Model Legislative Provisions and Guidance on Investigation and Prosecution of Conflict-Related Sexual Violence was produced by the Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict (OSRSG-SVC). It benefited from the work of Maxine Marcus and Kathy Roberts, Co-Directors of Partners in Justice International (PJI), who were its lead drafters. Working under the auspices of and in close collaboration with the OSRSG-SVC, the drafting team consulted with experts, practitioners, and litigators both inside and outside the UN system, as well as directly with victims and survivors. An early draft of the OSRSG-SVC’s Model Legislative Provisions and Guidance was also subject to a “peer review” process facilitated by the Core Team of the UN Global Focal Point for Rule of Law (GFP). The OSRSG-SVC thanks the Core Team of the GFP and those GFP entities that provided comments during the “peer review” process.
Foreword

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

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

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

United Nations Security Council Resolution 1820 (2008) called upon Member States “to put in the context of justice sector reform efforts, to strengthen legislation and enhance prosecution of sexual violence in conflict and post-conflict situations consistent with the Rome Statute and to remove procedural impediments to justice for victims, such as restrictive immunity periods for filing claims, corroborative requirements that discriminate against victims as witnesses and complainants, exclusion or discrediting of victims’ testimony by law enforcement officials and within judicial and other proceedings, and lack of facilities for closed hearings.”

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

The Model Legislative Provisions and Guidance therefore are fully in line with the spirit of resolution 1820 (2008) regarding a survivor-centered approach in preventing and responding to sexual violence in conflict and post-conflict situations, ensuring that prevention and response are non-discriminatory and specific and respect the rights and priorities of survivors, including groups that are particularly vulnerable or may be specifically targeted.”

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

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

June 2021

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FOREWORD

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Guiding Principles and Methodology

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

Methodology

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

The drafting team studied the relevant national criminal and procedural provisions from 28 States representing a non-exhaustive but nonetheless wide range of legal traditions and geographic locations. Many of the States whose laws were reviewed and analyzed have adopted legislation aimed at addressing international crimes, and several of these States’ courts have held trials on that basis. The States whose laws were selected for review and analysis were: Argentina, Austria, Belgium, Bolivia, Hereditary, Botswana, Canada, Colombia, Denmark, France, Finland, Germany, Guatemala, India, Iraq, Japan, Kenya, Luxembourg, Mali, Namibia, Netherlands, New Zealand, Norway, the Democratic Republic of Congo, South Africa, Sweden, Switzerland, the United States, and the United Kingdom.

The team also reviewed relevant provisions from the International Criminal Court, the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, the Extraordinary Chambers of the Courts of Cambodia, and the Extraordinary Chambers in the Countries of Central Africa.

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

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

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

Guiding Principles

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

a. The Model Legislative Provisions adopt a victim and survivor-centred approach, meaning they prioritise the rights, needs, participation, and voices of the victim or survivor of sexual violence with full respect for their autonomy.

b. The Model Legislative Provisions integrate international human rights norms and standards, including the rights of victims or survivors of gross violations of international human rights law and serious violations of international humanitarian law and the rights of the accused due process and a fair trial.

c. The Model Legislative Provisions draw on comparative and international law to identify widely recognised standards, normative principles, and good practices.

d. The Model Legislative Provisions reflect the need to accommodate the specifics of national legislation and judicial procedures, the legal, social, economic, cultural and geographical conditions of each State and the various main legal traditions (common law, civil law, hybrid legal systems, etc.).

e. The Model Legislative Provisions pay special attention to those provisions whose implementation requires legislation and to key issues related to victims, survivors and witnesses of conflict-related sexual violence crimes.

f. The Model Legislative Provisions are transparent, where they depart significantly from existing codes and developed jurisprudence, proposing new models for assisting and protecting victims or survivors of conflict-related sexual violence in the justice process.

Of worthy note in this regard are two sources: only in certain legal systems. 

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Further adaptation may be required. As one example, in many legal systems, more than one crime may be charged in connection with the same conduct, and the States are encouraged to permit and facilitate cumulative charging in the context of widespread conflict-related sexual violence where multiple crimes are committed within the same pattern of conduct. Recognising that some national systems do not permit cumulative charging, however, it is suggested that practitioners in such systems could use the elements of additional crimes as gravity or aggravating factors for the crimes which are charged. (See Article 3(1), see also Legislative Guidance and Commentary (‘Legislative Guidance’) to Article 3(1) for further discussion of this example).

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

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

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

Another example involves accused persons who should be afforded all the protections required under human rights law, including due process and fair trials. The Model Legislative Provisions reflect this norm however, they do not provide an exhaustive list of protections that should be afforded to accused of criminal offenses. Similarly, survivors or victims of conflict-related sexual violence may include children. The Model Legislative Provisions reflect this reality in certain provisions; however, the provisions are not comprehensive to the rights and needs of child victims and witnesses of crimes in the justice process. For further information about children’s rights in the justice process, please see the United Nations Office on Drugs and Crimes Model Law on Child Survivors and Victims of Conflict and the Model Law on Children’s Rights. (See also the United Nations Model Legislation on Sexual Violence in Conflict.

For the Model Legislative Provisions themselves, we have chosen, however, for both breadth and clarity to use the criminological term ‘victim’ in keeping with other statutes such as the Rome Statute of the International Criminal Court. For further details and more nuanced discussion on this issue, see please the definition of ‘victim’ in the Legislative Guidance.

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Likewise, although mutual legal assistance and extradition are beyond the scope of these Model Legislative Provisions, efficient and effective mutual legal assistance and extradition regimes are necessary to address the often cross-border nature of conflict-related sexual violence and to apprehend individuals who have committed such crimes. Once again, the United Nations Office on Drugs and Crimes Model Law on Extradition and Model Law on Mutual Legal Assistance in Criminal Matters both are invaluable tools for States to create a far more streamlined process than traditional letters rogatory. At the time of this writing, the United Nations is also developing a multilateral treaty on mutual legal assistance for serious international crimes (i.e., war crimes, crimes against humanity and genocide). Although the latter is treaty-based, provisions on mutual legal assistance and extradition can be adopted within domestic law without treatment. Aware that many of the Model Legislative Provisions can also satisfy the obligations of State parties to the Rome Statute, references to the requirements of that treaty are provided throughout the Legislative Guidance. And, while many of the provisions included in this document reflect international law and practice, several provisions have been formulated with the aim of capturing the complete scope of the forms that can be perpetrated and subsequently prosecuted as conflict-related sexual violence. Thus, the Model Legislative Provisions incorporate provisions allowing the prosecution of crimes that may not yet be explicitly codified in international criminal law or in most national jurisdictions.

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

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

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

Note on Terminology

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

1) Option 1: Civil Law Countries


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

Taking into account that conflict-related sexual violence is a crime that is perpetrated against persons of all ages and genders,

Considering also that every victim and survivor of conflict-related sexual violence has the right to have their best interests given primary consideration, while safeguarding due process rights,

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

a) The right to benefit from the implementation of the State’s relevant human rights and other international commitments;

b) The right to be treated with respect and dignity, and for all appropriate measures to be taken to ensure safety and security as well as psychological well-being;

c) The right to adequate, effective, and prompt reparation for the harms suffered;

d) The right to equal and effective access to justice; and

e) The right to prompt and relevant information concerning violations, including on procedures to engage with the justice process and its status, as well as reparations mechanisms,

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

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

2) Option 2: Common Law Countries

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

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

Chapter I Definitions

For the purposes of the present (Act) Law, the following definitions shall apply:

1. "Child" or "Children" refers to every human being below the age of eighteen years.

2. "Conduct" refers to acts or omissions.

3. "Conduct of a sexual nature" is not limited to physical violence and may not involve any physical contact — for example, forced nudity. "Conduct of a sexual nature" therefore, covers both physical and non-physical conduct with a sexual element.
4. “Conflict-related sexual violence” means incidents, or patterns of gender-based violence encompassing any conduct of a sexual nature, including but not limited to rape, committed against women, men, girls, boys, as well as adults or children with diverse expressions of gender identity. Such incidents, or patterns constitute gross violations of international human rights law, serious violations of international humanitarian law, crimes against humanity, or genocide, and can occur in conflict or post-conflict settings that have direct or indirect links with the conflict or that occur in other situations of concern such as in the context of political repression.

5. “Gender” means the social attributes and opportunities associated with being male and female and the relationships between women and men and girls and boys, as well as the relations between women and those between men. These attributes, opportunities and relationships are socially constructed and are learned through socialization processes. They are context, time-specific, and changeable. Gender determines what is expected, allowed and valued in a woman or a man in a given context. In most societies there are differences and inequalities between women and men in responsibilities assigned, activities undertaken, access to and control over resources, as well as decision-making opportunities. Gender is part of the broader socio-cultural context, intersecting with other aspects of identity such as race, social class, ethnicity, sexual orientation, religion, and age as well as other forms of identity.

6. “Gender expression” means the way a person expresses gender through actions and appearance, including dress, speech, and mannerisms. A person’s gender expression is not always linked to the person’s biological sex, gender identity, or sexual orientation.

7. “Gender identity” means the deep-seated experience of a person’s gender. A person’s gender identity may or may not be aligned with the sex assigned to them at birth in accordance with predominant gender norms.

8. “Person” means a natural person or a legal person, such as a corporation or organisation existing under or authorized by the laws of State or the laws of any foreign country.

9. “Sexual orientation” refers to a person’s physical, romantic, affectional, and/or emotional attraction to, and/or intimate relations with, individuals of a different gender. The same gender, no gender, or more than one gender.

10. “Victim” means a person or group of persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights. The term “victim” also includes the immediate family and dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimisation. A foster parent, child, stepfather, stepmother, legal guardian, or other immediate caregiver may be considered “immediate family” in appropriate circumstances. A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, convicted, or otherwise the subject of legal proceedings, and regardless of any family or other relationship between the perpetrator and the victim.

11. “Secondary victimisation” means victimisation that occurs not as a direct result of a criminal act but through the response of institutions and individuals to the victim.

12. “Revictimisation” means a situation in which a person suffers more than one criminal incident consecutively.

13. “Justice process” encompasses detection, identification or ascertainment of the crime, investigation of the crime, reporting, the making of the complaint, prosecution, trial and post-trial procedures, regardless of whether the case is handled in a national, international or regional criminal justice system for adults, juveniles or in customary or informal justice systems.

14. A person may be incapable of giving “genuine consent” if affected by natural, induced, or age-related incapacity, or as set out in the crimes below.

Chapter II  Criminal Law Provisions

War Crimes

Article 1  Sexual Violence as a War Crime
A person is guilty of sexual violence as a war crime if:

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

2) The conduct was of a sexual nature;

3) The conduct took place in the context of an armed conflict and

4) The person who engaged in the conduct was aware of factual circumstances that established the existence of an armed conflict.

Article 2  Rape as Sexual Violence as a War Crime
A person is guilty of rape as sexual violence as a war crime if:

1) The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body;

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

3) The conduct took place in the context of an armed conflict and

4) The person who engaged in such conduct was aware of factual circumstances that established the existence of an armed conflict.

Article 3  Aggravated Sexual Violence as a War Crime
A person is guilty of aggravated sexual violence as a war crime if:

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

2) The conduct was of a sexual nature;

3) The conduct:

a. Resulted in a permanent, chronic, serious physical or mental injury, illness or disability on the victim or another person;

b. Resulted in the pregnancy of the victim;

c. Was carried out by more than one person;

d. Was committed against a child;

e. Resulted in or included mutilation;

f. Included the use of or threat of use of weapons or firearms;

g. Was committed with particular brutality or cruelty;

h. Resulted in the death of the victim or another person;

i. Resulted in a consequence of comparable gravity to any of the above.

4) The conduct took place in the context of an armed conflict and

5) The person who engaged in the conduct was aware of factual circumstances that established the existence of an armed conflict.

Article 4  Enforced Pregnancy as a War Crime
A person is guilty of enforced pregnancy as a war crime if:

1) The person confined one or more persons forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law;

2) The conduct took place in the context of an armed conflict and

3) The person who committed the conduct was aware of factual circumstances that established the existence of an armed conflict.

Article 5  Enforced Impregnation as a War Crime
A person is guilty of enforced impregnation as a war crime if:

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

2) The conduct was of a sexual nature and included a physical invasion;
3) The conduct was committed with the intent to imperil one or more persons;
4) The conduct resulted in the pregnancy of one or more persons;
5) The conduct took place in the context of an armed conflict, and
6) The person who engaged in the conduct was aware of factual circumstances that established the existence of an armed conflict.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1) The person subjected one or more persons to mutilation, such as by permanently disfiguring any part of the person or persons, or by permanently disabling or removing an organ, appendage, or other part of the body;
2) The conduct was of a sexual nature and included a physical invasion;
3) Such person or persons were protected persons or hors de combat, or civilians, or otherwise protected under any of the four Geneva Conventions, Additional Protocol I or II, or under customary international law or conventional international law applicable to armed conflict;
4) The person engaging in this conduct was aware of the factual circumstances that established this status;
5) The conduct took place in the context of and was associated with an armed conflict, and
6) The person was aware of factual circumstances that established the existence of an armed conflict.

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

**Article 11: Trafficking in Persons for the Purpose of Sexual Violence and/or Exploitation as a Form of Enslavement as a War Crime**

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

1) The person was involved in the recruitment, transportation, transfer, harbouring or receipt of one or more persons;
2) The purpose of the conduct, by its nature or context, was to intimidate a population.
3) Such person or persons were protected persons or hors de combat, or civilians, or otherwise protected under any of the four Geneva Conventions, Additional Protocol I or II, or under customary international law or conventional international law applicable to armed conflict;
4) The person engaging in this conduct was aware of the factual circumstances that established this status;
5) The conduct took place in the context of and was associated with an armed conflict, and
6) The person who committed the conduct was aware of factual circumstances that established the existence of an armed conflict.

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

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

1) The person exercised any or all powers attaching to the right of ownership over another person or persons;
2) The conduct took place in the context of and was associated with an armed conflict, and
3) Such person or persons were protected persons or hors de combat, or civilians, or otherwise protected under any of the four Geneva Conventions, Additional Protocol I or II, or under customary international law or conventional international law applicable to armed conflict;
4) The person engaging in this conduct was aware of the factual circumstances that established this status;
5) The conduct took place in the context of and was associated with an armed conflict, and
6) The person was aware of factual circumstances that established the existence of an armed conflict.

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

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

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

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

**Article 14: Terror as a War Crime**

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

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

Where the conduct satisfying element 1 is conduct of a sexual nature, evidence satisfying elements 2 and 3 shall not be required.
The person who engaged in such conduct was aware of factual circumstances that established the existence of an armed conflict.

Sexual Violence as a Crime Against Humanity

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

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

2) The conduct was of a sexual nature;

3) The conduct took place in the context of an armed conflict;

4) The conduct was committed with the intent to impregnate one or more persons;

5) The person who engaged in such conduct was aware of the attack.

Rape as Sexual Violence as a Crime Against Humanity

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

1) The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body;

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

3) The conduct was part of a widespread or systematic attack directed against a civilian population; and

4) The person who engaged in such conduct was aware of the attack.

Enforced Pregnancy as a Crime Against Humanity

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

1) The person forcibly conferred a status of marriage or similar conjugal status upon another person or persons;

2) The conduct took place in the context of an armed conflict;

3) The person who engaged in such conduct was aware of the attack.

Enforced Impregnation as a Crime Against Humanity

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

1) The person confined one or more persons forcibly made pregnant with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law;

2) The conduct was part of a widespread or systematic attack directed against a civilian population; and

3) The person who engaged in such conduct was aware of the attack.

Enforced Sterilisation as a Crime Against Humanity

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

1) The person permanently deprived another person or persons of, or significantly altered their, biological reproductive capacity, in a manner not justified by medical necessity, without the explicit and genuine consent of the person;

2) The conduct was part of a widespread or systematic attack directed against a civilian population; and

3) The person who engaged in such conduct was aware of the attack.

Enforced Marriage/Enforced Imposition of Conjugal Status as a form of Enslavement as a War Crime

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

1) The person exercised any or all of the powers attaching to the right of ownership over another person;

2) The conduct was of a sexual nature;

3) The conduct took place in the context of an armed conflict; and

4) The person who engaged in such conduct was aware of factual circumstances that established the existence of an armed conflict.

Enforced Sterilisation as a form of Enslavement as a War Crime

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

1) The person forcibly conferred a status of marriage or similar conjugal status upon another person or persons;

2) The conduct took place in the context of an armed conflict;

3) The person who engaged in such conduct was aware of the attack.

Enforced Impregnation as a form of Enslavement as a War Crime

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

1) The person confined one or more persons forcibly made pregnant with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law;

2) The conduct was part of a widespread or systematic attack directed against a civilian population; and

3) The person who engaged in such conduct was aware of the attack.

Enforced Marriage/Enforced Imposition of Conjugal Status as a form of Enslavement as a War Crime

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

1) The person exercised any or all of the powers attaching to the right of ownership over another person;

2) The conduct was of a sexual nature;

3) The conduct took place in the context of an armed conflict; and

4) The person who engaged in such conduct was aware of factual circumstances that established the existence of an armed conflict.

Crimes Against Humanity
ARTICLE 24

Enforced Conception as a Crime Against Humanity

A person is guilty of enforced conception as a crime against humanity if:
1) The person engaged in conduct described in, or of similar gravity to, the offences enumerated in Articles 17 through 27 and 30 through 34;
2) The purpose of the conduct, by its nature or context, was to reduce them to slavery;
3) The person was involved in the acquisition of a slave with a view to selling or exchanging them, or, through other similar conduct, engaged in trade or transport in slaves;
4) The conduct was part of a widespread or systematic attack directed against a civilian population; and
5) The person who engaged in such conduct was aware of the attack.

ARTICLE 25

Sexual Slavery as a Form of Enslavement as a Crime Against Humanity

A person is guilty of sexual slavery as a form of enslavement as a crime against humanity if:
1) The person exercised any or all of the powers attaching to the right of ownership over another person or persons;
2) The person committed conduct of a sexual nature against a person or persons or caused such person or persons to be subjected to conduct of a sexual nature within the exercise of their powers of ownership over the person or persons; and
3) The person who engaged in such conduct was aware of the attack.

ARTICLE 26

Other Inhumane Acts as a Crime Against Humanity

A person is guilty of other inhumane acts as a crime against humanity if:
1) The person engaged in conduct described in, or of similar gravity to, the offences enumerated in Articles 17 through 27 and 30 through 34, intentionally causing great suffering, or serious injury to body or to mental or physical harm against a person or persons; and
2) The conduct was part of a widespread or systematic attack directed against a civilian population; and
3) The person who engaged in such conduct was aware of the attack.

ARTICLE 27

Mutilation as a Crime Against Humanity

A person is guilty of mutilation as a crime against humanity if:
1) The person engaged in conduct described in, or of similar gravity to, the offences enumerated in Articles 17 through 27 and 30 through 34;
2) The person inflicted severe physical or mental pain or suffering upon one or more persons;
3) The conduct was part of a widespread or systematic attack directed against a civilian population; and
4) The person who engaged in such conduct was aware of the attack.

ARTICLE 28

Torture as a Crime Against Humanity

A person is guilty of torture as a crime against humanity if:
1) The person inflicted severe physical or mental pain or suffering upon one or more persons;
2) The conduct was part of a widespread or systematic attack directed against a civilian population; and
3) The person who engaged in such conduct was aware of the attack.

ARTICLE 29

Persecution as a Crime Against Humanity

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

ARTICLE 30

Enslavement as a Crime Against Humanity

A person is guilty of enslavement as a crime against humanity if:
1) The person exercised any or all of the powers attaching to the right of ownership over another person or persons;
2) The person engaged in conduct described in, or of similar gravity to, the offences enumerated in Articles 17 through 27 and 30 through 34;
3) The purpose of the conduct, by its nature or context, was to reduce them to slavery;
4) The conduct was part of a widespread or systematic attack directed against a civilian population; and
5) The person who engaged in such conduct was aware of the attack.

ARTICLE 31

Slave Trade as a Crime Against Humanity

A person is guilty of slave trade as a crime against humanity if:
1) The person was involved in the capture, acquisition or disposal of a person or persons with intent to reduce them to slavery;
2) The person purchased or otherwise acquired a slave with a view to selling or exchanging them, or, through other similar conduct, engaged in trade or transport in slaves;
3) The conduct was part of a widespread or systematic attack directed against a civilian population; and
4) The person who engaged in such conduct was aware of the attack.

ARTICLE 32

Terror as a Crime Against Humanity

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

ARTICLE 33

Enslavement as a Crime Against Humanity

A person is guilty of enslavement as a crime against humanity if:
1) The person exercised any or all of the powers attaching to the right of ownership over another person or persons;
2) The person engaged in conduct described in, or of similar gravity to, the offences enumerated in Articles 17 through 27 and 30 through 34;
3) The purpose of the conduct, by its nature or context, was to reduce them to slavery;
4) The conduct was part of a widespread or systematic attack directed against a civilian population; and
5) The person who engaged in such conduct was aware of the attack.

ARTICLE 34

Other Inhumane Acts as a Crime Against Humanity

A person is guilty of other inhumane acts as a crime against humanity if:
1) The person committed, through acts or omissions, other inhumane acts of similar to the offences enumerated in Articles 17 through 27 and 30 through 34, intentionally causing great suffering, or serious injury to body or to mental or physical harm against a person or persons;
A person is guilty of enforced marriage/enforced imposition of conjugal status as a form of enslavement as a crime against humanity if:

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

**Genocide**

A person is guilty of genocide if:

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

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

**Penalties**

**Article 39. Penal Sanctions (Civil Law) or Aggravating Circumstances (Common Law) (Gravity Factors)**

The following factors are non-exhaustive factors of similar importance or consequence can be considered in determining the penalty for persons convicted under Articles 3 through 35:

1. Resulted in a physical invasion of the body with a sexual organ or any other object;
2. Resulted in persistent, permanent, chronic, serious physical or mental injury, illness or disability on the victim or another person, including infection with a sexually transmitted disease including HIV;
3. Resulted in the pregnancy of the victim;
4. Resulted in the termination of pregnancy of the victim without the victim’s genuine and informed consent;
5. Was committed against a child;
6. Resulted in or incited mutilation;
7. Included the use or threat of use of weapons or firearms;
8. Was committed with particular brutality or cruelty;
9. Resulted in the death of the victim;
10. The conduct resulted in communal or familial exile or exclusion;
11. The conduct was carried out against a person of particular vulnerability, due for example to an illness or other condition, age, physical or mental injury, disability or pregnancy, as a result of their economic or social circumstances, or other similar condition;
12. The conduct was carried out by a superior or supervisors or persons with de facto or de jure power of position of trust, authority, influence or power over the victim;
13. The conduct was carried out by more than one person;
14. The conduct was carried out by the victim’s ascendant, descendant, spouse, former spouse, or the person with whom the victim has maintained a familial or conjugal relationship, whether or not these persons lived together, and whether or not the familial or conjugal relationship was the result of an other criminal act, except in cases of forced perpetration;
15. The conduct was carried out in the presence of family members of the victim. The gravity is further increased if it is committed in the presence of family members who are children;
16. The conduct was preceded by or included the administration of a substance on the victim which materially alters their mental capacity or ability to exercise decision making;
17. The conduct occurred in public view of others, or in a place of particular significance to the victim or the community, such as a place of worship or sanctuary.
18. The conduct is being, or threatens to be, shared via technological means so it persists in cyberspace over time;
19. The perpetrator has committed repeated violent acts including, but not limited to, acts of sexual violence; and/or
20. The victim was made to engage in acts of a sexual nature with someone known to them.

**Article 40. Other Penalties for Conflict-Related Sexual Violence Crimes**

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

**Selected Modes of Liability**

1. The person intended for the other person or persons to commit the offence;
2. The person satisfied the mens rea for the offence;
3. The offence was subsequently committed.

A person shall be criminally liable if:

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

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

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

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

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

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

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

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

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

A person shall be criminally liable if:

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

General Principles Of Criminal Law

Article 41. Jurisdiction

1) Courts of [State] shall have jurisdiction over offences and modes of liability enumerated in Articles 1 through 35 of this [Act] [Law], regardless of whether such a crime is alleged to have been committed in the territory of the State or abroad and irrespective of the nationality of the victim or accused, provided that such accused shall be within the territory of the State at the time of the commencement of the trial.

2) In exercising jurisdiction under this [Act] [Law], the courts shall accord priority to the court of the State in whose territory the crime is alleged to have been committed, provided that the State is genuinely willing and able to prosecute.

Article 42. Principle of Non-Discrimination

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

Article 43. Exclusion of Jurisdiction Over Children

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

Article 44. Principle of Legality

1) Criminal offences and criminal sanctions shall be prescribed only by law.

2) No punishment or other criminal sanction may be imposed on any person for an act which, prior to being perpetrated, has not been defined as a criminal offence by national law or international law.

3) Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to customary international law.

Article 45. No Prescription / Non-Applicability of Statutes of Limitations

1) No (prescription) statutes of limitations shall be applied to the criminal offences enumerated in Articles 1 through 35 of this [Act] [Law] not to any conduct which constitutes acts of genocide, crimes against humanity, war crimes, or other criminal offences that, pursuant to international law, are not subject to the statute of limitations.

2) No time limits as to investigation or other procedural rules shall impair or prevent investigation, civil or criminal complaint, indictment, or prosecution of criminal offences identified in paragraph (b) of this article, except as strictly necessary to protect the rights of the accused.

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

1) No interest, no necessity of a political, military or national nature, can justify, even as a repeal, the offences enumerated in Articles 1 through 35 of this [Act] [Law].

2) The fact that the accused has acted in accordance with domestic law does not absolve the accused of responsibility if, in the existing circumstances, the law could clearly lead to the commission of one of the offences enumerated by this [Act] [Law].

3) The fact that an accused has acted in accordance with an order of a government or of a superior, whether military or civil, shall not relieve that person of criminal responsibility unless:

a. The person was under a legal obligation to obey orders of the government or the superior in question;

b. The person did not know that the order was unlawful;

c. The order was not manifestly unlawful;

d. For the purposes of this paragraph, orders to commit genocide, crimes against humanity, or sexual violence as a war crime, are manifestly unlawful.

2) This [Act] [Law] applies to all equally, without any distinction based on official status, in particular the official status of head of State or government, member of a government, or parliament, elected representative or agent of a State, does not in any way exempt from criminal liability under this [Act] [Law], nor does it constitute, as such, a ground for reducing the sentence.

Article 47. No Amnesty

1) There shall be no amnesty or pardon offered for offences committed under this [Act] [Law].

2) (For jurisdictions in which an amnesty was previously granted) [Amnesty law] [Peace agreement], to the extent that it provides amnesty for offences covered in Articles 1 through 35, and in conformity with customary international law, is hereby revoked.

Protection and Other Provisions Relating to Victims

Article 48. Respect

1) Victims shall be treated with respect and dignity, in accordance with the principles of Article 41.

2) Victims shall be treated in a respectful and sensitive manner throughout the legal proceedings, considering their personal situations and immediate special needs.

Article 49. Information

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

1) To the protective measures available to them, in particular, the protection measures provided for in Article 55, and how to access them. Victims shall also be informed of any penalties incurred by the perpetrators of the violence and the conditions of execution of any possible convictions;

2) To be heard by investigators and other officials who are the same gender as the victim or victims (as requested);

3) To participate in the criminal proceedings in accordance with international or domestic law (as applicable);

4) To be assisted by a legal representative of their choice or, if at their request, by a special advocate (appointed (referring to the State Free of charge) to the expenses of the victim unless they fulfils the conditions of access to legal aid, explicitly detailing those conditions, or if they benefit from legal protection insurance);

5) To be assisted by a service under one or more relevant public authorities or by an association that is a victim support organisation, which might be a non-governmental organisation;

6) To be provided with any information that may affect their personal security, such as the accused or offender’s release from detention or imprisonment;

7) To be informed of the progress and results of the investigation of their case as well as the scheduling, progress and ultimate disposition of any proceedings;

8) To benefit from an interpreter and translation essential to their understanding of the proceedings in their entirety;

9) To have diplomatic and consular assistance, necessary visas and travel documents, and contact tracing to a victim’s family upon request;
To be accompanied at their request, at all stages of the proceedings, by their legal representative and by a support person of their choice, unless otherwise decided by the competent judicial authority.

To declare as domicile the address of a third party, subject to the express agreement of that third party or otherwise to have the location of their domicile concealed.

To be provided with sexual and reproductive health services free of charge.

To obtain reparation, by compensation and/or by any other appropriate means, considering their personal circumstances and any special needs.

The judge or competent magistrate may order that the support person and the witness not communicate with each other while the victim or witness testifies and be provided free of charge. Such support person will be selected by the victim and be specially trained to assist the victim throughout the justice process. Such support shall be provided free of charge.

In determining whether to make an order under subsection (1), the judge or competent magistrate shall consider:

a. the age of the victim or witness;

b. the victim’s or witness’s mental or physical disabilities, if any;

c. the nature of the offence, including whether the victim or witness may face re-victimisation or secondary victimisation;

d. whether the victim or witness needs the order for their mental and physical security or to protect them from intimidation or retaliation or threat thereof;

e. the nature of any relationship or socially-imposed hierarchy – including customary or societal communal roles – between the victim or witness and the accused;

f. society’s interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice process;

g. any other factor that the judge or competent magistrate considers relevant.

In the case that the victim or witness contemplated under subsection (2) is a child or is incapable of giving genuine consent, the judge or competent magistrate shall order that a support person be permitted to be present and to be close to the victim or witness while the victim or witness testifies and be provided free of charge. Such support person will be selected by the victim or witness, subject to the court’s reasonable management of the proceedings.

The judge or competent magistrate shall not permit a witness to be a support person unless the judge or competent magistrate is of the opinion that doing so is not contrary to the interests of justice.

The judge or competent magistrate may order that the support person and the witness not communicate with each other in any manner during the witness’s testimony in court, and that they not communicate about the context of the witness’s testimony throughout the duration of the presentation of the witness’s evidence.

No adverse inference may be drawn from the fact that an order is, or is not, made under this section.

Individuals working with victims and witnesses of conflict-related sexual violence shall undergo appropriate professional training on issues related to conflict-related sexual violence. The training should cover the following:

a. Relevant human rights norms, standards and principles, including the rights of victims of gross violations of international human rights law and serious violations of international humanitarian law, and the rights contained in this Act (Law);

b. Principles and ethical duties related to the performance of their functions, including on the confidentiality of information;

c. Threat, risk and crisis assessment skills and techniques, with a particular emphasis on security of persons and information;

f. The ethical and legal frameworks on electroconvulsive therapy, with an emphasis placed on the need for confidentiality.

g. Gender issues and the impacts of structural gender inequalities as well as patterns of discrimination against victims and their communities.

h. The dynamics and nature of conflict-related sexual violence, its impact and consequences, including negative physical and psychological effects;

i. Special measures and techniques to assist victims and witnesses of conflict-related sexual violence in the justice process;

j. Information on cross-cultural linguistic, ethnic, religious, social and gender issues, with particular attention to persons from disadvantaged groups, and ensuring inclusion of victims who are men and boys;

k. Interview and assessment techniques that minimize distress or trauma to victims and witnesses, while maximizing the quality of information received from them, including skills to deal with victims and witnesses in a sensitive, understanding, constructive and reassuring manner.

The course and appropriate use of medicines, legal and forensic evidence and:

l. Roles of and methods used by professionals working with victims and witnesses of conflict-related sexual violence;

Individually, working with child victims and witnesses shall, in addition to training on issues related to victims and witnesses of conflict-related sexual violence, undergo appropriate professional training on issues related to child victims and witnesses.

All reasonably necessary measures must be used to avoid secondary victimisation.

All reasonably necessary measures shall be adopted for the well-being of victims to guarantee their personal and family security, both mental and physical, including protection against any action or exposure that could result in an undue attack on their privacy or security. Such measures must not be the detriment of the rights of the accused or of a fair and impartial trial, nor will they be incompatible with them.

To guarantee the physical safety and mental well-being of victim and witness and/or their families, and in respect of their privacy, protective measures may be imposed by the court (pre-trial judge or competent magistrate) on application of the prosecutor or victim representative, or on application of witnesses or victims, or on the court’s (pre-trial judge or competent magistrate’s) own motion, and at any time during the justice process. Such measures may include:

a. Measures to prevent interaction between a victim or witness and the accused or associates of the accused, including in-person meetings, phone calls, email, mail, text, social media or any other form of communication;

b. Restraining orders from a competent court, supported by a restraining and protective order registry system;

c. Orders to place the accused in pretrial detention, with conditions that take into account the safety risks and situation of vulnerability of victims, including no contact” based conditions;

d. An order of house arrest only if the house is shared by a victim, a victim’s relative including their children), or a witness.
...e. Protection for a victim or witness by the police or other relevant agencies and safeguarding the whereabouts of the victim or witness from disclosure;

f. Other protective measures from competent authorities that may be deemed appropriate.

d. Protective measures may be imposed by the (court) (pre-trial judge or competent magistrate) (law) office or on ex partire application of the prosecutor, victim, or victim representative for the identification, tracing and freezing or seizure of proceeds, property and assets and/or instrumentalities of crimes for the purpose of eventual forfeiture as restitution or reparations, without prejudice to the rights of bona fide third parties.

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

Article 55: Principles of Evidence in Cases of Sexual Violence

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

a. No corroboration of the victim’s testimony shall be required.

b. Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim’s ability to give voluntary and genuine consent.

c. Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent.

d. Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to alleged sexual violence.

e. Credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred from the prior or subsequent conduct of a victim or witness.

f. No adverse inference may be drawn solely from a delay of any length between the alleged commission of an offense under this [Act] [Law] and the reporting thereof.

Article 56: In Camera Consideration of Relevance or Admissibility of Evidence

1. Where there is nonetheless a motion to introduce or elicit, including by means of the questioning of a victim or witness, evidence that the victim consented to an alleged crime of sexual violence, notification shall be provided to the court in closed session which shall describe the substance of the evidence intended to be introduced or elicited and the relevance of the evidence to the issues in the case.

2. In determining whether the evidence referred to in subsection 1 is admissible, a court shall hear in camera the views of the prosecutor, the defence, and the victim representative. If, any, as well as the witness or victim if she or he so requests or if the court requires, shall take into account whether that evidence has a sufficient degree of probative value to an issue in the case and the prejudice that such evidence may cause. For the purpose, the court shall be guided by principles of Articles 41, 49, and 51 especially with respect to the proposed questioning of a victim.

3. Where the court determines that the evidence referred to in subsection 2 is admissible in the proceeding, the court shall state on the record the specific purpose for which the evidence is admissible. In evaluating the evidence during the proceeding, the court shall apply Articles 41, 49, and 51.

Article 57: Modes of Victim Participation

1. Where whether they choose to exercise them or not, in addition to the rights recited in this [Act] [Law], victims retain the following rights:

a. Notice of a Proceeding. The (the prosecutor) (the police) (the judicial authority) (or other appropriate government ministry or mechanism) must use best efforts to give the victim reasonable, accurate, and timely notice of any public court proceedings involving the crime.

b. Attending the Proceeding. Victims and their legal representatives should be allowed to attend all public court proceedings in person, or where this would not be practicable given a large number of victims, security, or other considerations, the court shall take all reasonable efforts to ensure that victims are capable of attending public hearings remotely. In the event that the court must exclude a victim who is also a witness from a public court proceeding involving the crime, the court must first determine by clear and convincing evidence that the victim’s or witness’s testimony would be materially altered if the victim were heard other testimony at that proceeding. In determining whether to exclude a victim, the court must make every effort to permit the fullest attendance possible by the victim and must consider reasonable alternatives to exclusion. The reasons for any exclusion must be clearly stated in the record.

c. Time for Deciding a Motion. The court must promptly decide any motion asserting a victim’s rights described in these rules.

d. Right to Be Heard on Release, Plea, or Sentencing. The court must permit a victim to be reasonably heard at any public proceeding concerning release, plea, pardon, sentencing, commutation of sentence involving the crime.

(Option for systems adopting or revising additional forms of victim participation)

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

a. Initiation of Proceedings. The (State) retains the obligation to investigate and prosecute the offenses and modes of liability enumerated by Article 5, through to Article 6 of this [Act] [Law]; however, a victim participant may initiate proceedings by filing a (criminal) complaint in accordance with [State law].

(Option for systems where prosecutors are responsible for responding to complaints)

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

b. Status. A victim whose applications for status to participate are denied by the (court) (pre-trial judge) investigatory magistrate may request reconsideration, and if denied, may appeal to a higher court. Should the basis of such status confirmed cease to be operative while the judicial process continues, a victim participant will retain such status if the (court) (pre-trial judge) investigatory magistrate finds that retaining such status is not contrary to the interest of justice.

c. Access to the Investigative and Judicial File. Victim participants and their legal representatives shall be entitled to inspect, copy or photograph records and physical evidence available to the court or to the prosecutor, unless there is a sound probability that the inspection, copying or photographing may endanger the purpose of the investigation or the lives or health of people or would considerably delay the proceedings, or the victim participant has already been examined as a witness. If the State prosecutor refuses the inspection of the files, the victim participant may file an appeal with the (court) (pre-trial judge) (competent magistrate). The decision of the (court) (pre-trial judge) (competent magistrate) is final.

d. Suggestion of Investigative Steps. Victim participants or their lawyers may suggest investigative steps, formally or informally, to the prosecutor(s) to the court to the competent magistrate.

e. Proposal of Witnesses. Victim participants or their lawyers may propose witnesses, formally or informally, to the prosecutor(s) to the court to the competent magistrate.

f. Examination of Witnesses. Victim participants or their lawyers may call witnesses and examine (and cross-examine) witnesses at trial, subject to the court’s reasonable management of the proceedings.

2. In determining the availability of or the right to inspect, copy or photograph records and physical evidence, the public interest, the rights of persons, and the rights of potential victims shall be given precedence over the rights of bona fide third parties.

3. Where there is nonetheless a motion to introduce or elicit, including by means of the questioning of a victim or witness, evidence that the victim consented to an alleged crime of sexual violence, notification shall be provided to the court in closed session which shall describe the substance of the evidence intended to be introduced or elicited and the relevance of the evidence to the issues in the case.

4. In determining whether the evidence referred to in subsection 2 is admissible, a court shall hear in camera the views of the prosecutor, the defence, and the victim representative. If, any, as well as the witness or victim if she or he so requests or if the court requires, shall take into account whether that evidence has a sufficient degree of probative value to an issue in the case and the prejudice that such evidence may cause. For the purpose, the court shall be guided by principles of Articles 41, 49, and 51 especially with respect to the proposed questioning of a victim.

5. Where the court determines that the evidence referred to in subsection 3 is admissible in the proceeding, the court shall state on the record the specific purpose for which the evidence is admissible. In evaluating the evidence during the proceeding, the court shall apply Articles 41, 49, and 51.

6. Where whether they choose to exercise them or not, in addition to the rights recited in this [Act] [Law], victims retain the following rights:

a. Notice of a Proceeding. The (the prosecutor) (the police) (the judicial authority) (or other appropriate government ministry or mechanism) must use best efforts to give the victim reasonable, accurate, and timely notice of any public court proceedings involving the crime.

b. Attending the Proceeding. Victims and their legal representatives should be allowed to attend all public court proceedings in person, or where this would not be practicable given a large number of victims, security, or other
MODEL LEGISLATIVE PROVISIONS AND GUIDANCE ON INVESTIGATION AND PROSECUTION OF CONFLICT-RELATED SEXUAL VIOLENCE

3)

Multiple victims: if the court finds that the number of victims and victim participants makes it impracticable to accord all of them their rights described in these rules, the court must design a reasonable, gender-sensitive procedure that gives effect to these rights without unduly complicating or prolonging the proceedings and in accordance with Article 42. To safeguard the rights of the victim participants to choose their own legal representation and to avoid any conflict of interest in legal representation, the court may:

a. Request that victims or particular groups of victims choose a common legal representative or representatives to provide common representation to multiple victims;

b. Request that victim representatives limit the number of submissions and interventions where possible through joint positions;

c. Issue other case management orders and directives consistent with the rights of the accused and the victim participants.

Article 60. Investigation

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

1)

All investigations are conducted by professionals trained in accordance with Article 34, or with the assistance of investigators who have received this training.

2)

Investigations shall be conducted in a prompt and professional manner consistent with Articles 42 and 49.

3)

Professionals engaged in the investigation process will ensure that the victim has given informed consent to investigative steps that could affect them, such as being interviewed, photographed, or examined, before proceeding with such investigative steps.

4)

The victim’s security and private information will be protected, including in accordance with Article 55.

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

1)

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

2)

In the case that the victim or witness contemplated under subsection 1 is a child or is incapable of giving genuine consent, the judge or competent magistrate shall allow the accused to personally cross-examine the victim or witness. If such an order is made, the judge or competent magistrate shall appoint counsel to conduct the cross-examination. Such cross-examination may be undertaken by the defence lawyer under the supervision of the judge or competent magistrate, who will have the duty to prevent the asking of any question that may expose the victim to intimidation, hardship, or undue distress.

Article 62. Protective Measures at Trial

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

1)

Each interview of the victim takes place in premises designed or adapted to their situation.

2)

For each interview, the victim may choose to be accompanied by the victim’s legal representative and/or guardian or a support person.

3)

If the victim so requests, the victim is heard by investigators of the same gender as the victim.

4)

Unless it is impossible or the victim requests an alternative, the victim is heard at each interview by the same investigator.

The victim is heard by investigators specially trained in offenses under the Act or with the assistance of investigators who have received this training.

Article 63. Closed Sessions

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

Article 64. Protective Measures at Trial

1)

Taking into consideration that violations of the privacy of witnesses or victims may create risk to their mental and physical security, the court shall be vigilant in controlling the manner of questioning a witness or victim so as to avoid any harassment or intimidation, paying particular attention to attacks on victims of sexual violence.

2)

At the request of a victim or witness or their legal representative, or the prosecutor, or on its own motion, the court may order one or more of the following measures to protect the privacy and physical and mental well-being of the victim or witness and to prevent undue distress and secondary victimisation:

a. Excluding or sparing from the public record any names, addresses, workplace, professions or other evidence or information that could be used to identify the victim or witness.

b. Forbidding the parties from revealing the identity of the victim or witness or disclosing material or information that would enable to identify the victim or witness.

c. Ordering the delayed disclosures to the accused of any records that identify the victim or witness, until such time as the court may find appropriate in consideration of the rights of the accused.

d. Assigning a pseudonym or a number to a victim or witness, in which case the full name and date of birth of the victim shall be revealed to the accused within a reasonable period for the preparation of their defence.

e. Efforts to conceal from the public the features or physical description of the victim or witness, giving testimony or to prevent distress or harm to the victim or witness, including by:

i. Holding the examination behind an opaque shield,

ii. Using image- or voice-altering devices;

iii. Through examination in another place, transmitted simultaneously to the court by means of a closed-circuit television and/or

iv. By way of videotaped examination of the victim or witness prior to the hearing, in which case the counsel for the accused shall attend the examination and be given the opportunity to examine the victim or witness.

f. Holding closed sessions consistent with Article 61.

g. Appointing a support person consistent with Article 52.

h. Designating a victim observation room, from which victims can observe the proceedings in a setting which ensures their privacy and protection and where they can be provided with support services and follow the proceedings. A victim observation room should have a separate entrance and access to separate sanitary facilities so that there is no interaction possible between the victims and the accused or associates of the accused or;

i. Taking any other measure that the court may deem necessary, taking into account the best interests of the victim and the rights of the accused.

[(Option for Common Law and Hybrid System countries)]

Article 65. No Cross Examination by the Accused

1)

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

2)

In the case that the victim or witness contemplated under subsection 1 is a child or is incapable of giving genuine consent, the judge or competent magistrate shall allow the accused to personally cross-examine the victim or witness. If such an order is made, the judge or competent magistrate shall appoint counsel to conduct the cross-examination. Such cross-examination may be undertaken by the defence lawyer under the supervision of the judge or competent magistrate, who will have the duty to prevent the asking of any question that may expose the victim to intimidation, hardship, or undue distress.
Article 64. Victim Impact Statement

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

Article 65. Reparations

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

Article 66. Victim Fund

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

Article 67. Costs

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

6) A full and effective reparation in the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Where reparations are provided, their payments shall be taken in priority to any fines that may be levied.

7) An official declaration or a judicial decision affirming the victim as a fully autonomous and equal member of the community, restoring the reputation and the rights of the victim and of persons closely connected with the victim.

8) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and educational material at all levels.
Introduction to the Legislative Guidance And Commentary On The Model Legislative Provisions On Conflict-Related Sexual Violence

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

The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law adopted by the UN General Assembly in its resolution 60/147 of 16 December 2005 (the “Guidelines”) also form part of the body of the United Nations standards and norms in criminal justice, which are internationally recognized normative principles in that area as developed by the international community since the end of World War II.

The Guidelines provide for several obligations of States with respect to such victims. These include, broadly, an obligation to implement the State’s relevant human rights and other international commitments; an obligation to treat victims with respect and dignity, with care for security and psychological wellbeing; an obligation to provide victims with adequate, effective, prompt reparation for the harms suffered; an obligation to provide victims with equal and effective access to justice; and an obligation to inform victims concerning the truth about violations and the availability of reparations mechanisms.

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

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

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

Although, as noted in the Introduction, the Model Legislative Provisions are based on the UN Security Council’s Resolutions on Women, Peace and Security (2015 et seq.) and the General Assembly’s Guidelines, there are many additional relevant sources in international law which national legislators could refer to. These include, in addition to those treaties and international instruments referred to in the commentaries below, inter alia:

- Convention on the Elimination of All Forms of Discrimination Against Women (adopted on 18 December 1979, entered into force on 3 December 1981);
- Council of Europe Convention on preventing and combating violence against women and domestic violence (“Istanbul Convention”) (adopted on 11 May 2011, entered into force on 1 August 2012);
- Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (“Convention of Belém do Pará”) (adopted on 5 June 1994, entered into force on 5 March 1995);
- Beijing Platform for Action (adopted on 5 September 1995, at the Fourth World Conference on Women);
- Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (adopted on 29 November 1985, by General Assembly resolution 40/34);
- Nairobi Declaration on Women’s and Girls Right to a Remedy and Reparation (adopted 19–21 March 2007 at the International Meeting on Women’s and Girls Right to a Remedy and Reparation held in Nairobi);
- Vienna Declaration and Programme of Action (adopted on 25 June 1993 by the World Conference on Human Rights in Vienna);
- CEDAW General Recommendation No. 35 on Women in Conflict Prevention, Conflict and Post-Conflict Situations, CEDAW/C/GC/35 (20 October 2013);
- CEDAW General recommendation No. 33 on Women’s access to justice, CEDAW/C/GC/33/25, 25 July 2015;

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

Justice practitioners (including judges, prosecutors and lawyers) are called upon to design and implement measures to prevent and combat gender-based violence, and to ensure accountability, in particular in situations of armed conflict. To meet these challenges, it is essential to adopt and implement a comprehensive and independent legal framework, including legislative measures that (subject to available resources) cover all forms of violence against women, men, girls and boys.

On Chapter I Definitions

Child or Childbirth

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

Conflict

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

Conduct of a sexual nature

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

Conflict-related sexual violence

The present definition of “conflict-related sexual violence” is included in the Report of the Secretary-General on Conflict-Related Sexual Violence (S/2013/697, 3 June 2014). The term refers to:

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

The definition of “conflict-related sexual violence” is also drawn in part from the 2014 OHCHR Publication on Sexual and Gender-Based Violence in the context of Transitional Justice and in part from UN Special Rapporteur McDougall, Contemporary Forms of Slavery: Systematic rape, sexual slavery and slavery-like practices during armed conflict, final report (New York: United Nations, 22 June 1998), E/CHN/2/SR.1986, para 78. See also World Health Organisation definition of sexual violence: “any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts of traffic, or otherwise directed, against a person’s sexuality by coercion, by any person regardless of their relationship to the victim, in any setting including, but not limited to, home and work. It may occur without the victim’s consent or awareness.”

See also: The Civil Society Declaration on Sexual Violence prepared through extensive global consultation with survivors, and published by the Women’s Initiatives for Gender Justice, in an effort to convey the views of survivors as to what constitutes “sexual violence” and how to prevent and respond to it, Women’s Initiatives for Gender Justice, Sexual Violence in Conflict, 2013.

The definition is also taken from the UN Analytical and Conceptual Framing of Conflict-Related Sexual Violence, June 2012 and from the Guidance Note of the Secretary-General on Reparations for Conflict-Related Sexual Violence of June 2013.

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

According to the International Protocol on Documentation and Investigation of Sexual Violence in Conflict, Second Edition, “Sexual violence has been referred to as the most immediate and dangerous type of gender-based violence occurring in acute emergencies. Gender-based violence (GBV) is described as any harmful act that is perpetrated against a person’s will and that is based on socially ascribed (i.e., gender) differences between males and females. It includes acts that inflict physical, sexual or mental harm or suffering, threats of such acts, coercion, and/or other derivations of liberty. While all forms of sexual violence can generally be considered to be acts of GBV, not all forms of GBV are sexual in nature.”
Gender
The definition of “gender” is drawn from Gender Mainstreaming: Strategy for Promoting Gender Equality. UN Office of the Special Advisor on Gender Issues and the Advancement of Women (“SAWGA”), rev. Aug. 2003. The last line of the SAWGA’s definition is “Other important criteria for socio-cultural analysis include class, race, poverty level, ethnic group and age,” which was altered slightly.

Gender Expression
The definition derives from the OHCHR publication Born Equal and Free: Sexual Orientation, Gender Identity and Sex Characteristics in International Human Rights Law (2d Edition 2010).

Gender Identity
The definition derives from the OHCHR publication Born Equal and Free: Sexual Orientation, Gender Identity and Sex Characteristics in International Human Rights Law (2d Edition 2010). This definition provides that a person’s gender identity may or may not align with the sex they were assigned at birth. Such assignment is usually based on a person’s physical characteristics relating to sex, including genitilia and other reproductive anatomy, chromosomes and hormones, and secondary physical characteristics emerging from puberty. If not all people are born with sex characteristics that neatly align with the two predominant categories, many people are born with physical sex characteristics that do not fit the normative definitions for male or female bodies. For some intense people, these are apparent at birth, while for others they emerge later in life. Often at puberty, intense persons may have any sexual orientation and gender identity.

While there are no crimes enumerated in the Model Legislative Provisions with explicit reference to a victim’s physical sex characteristics, all people with all sex characteristics, gender identities, gender expressions, and sexual orientations are protected by these provisions, including intense people.

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

Sexual Orientation
The definition derives from the Yogyakarta Principles; the law of the Government of Canada; and the OHCHR publication Born Equal and Free: Sexual Orientation, Gender Identity and Sex Characteristics in International Human Rights Law (2d Edition 2010).

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

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

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

The notion of “victim” is based on the Guidelines, paras. 8 and 9, and the UN Guidance Note of the Secretary-General: Revisions for Conflict-Related Sexual Violence, June 2010, p. 8.

Secondary victimization

Revictimisation
The definition of “revictimisation” draws on the definition contained in Council of Europe Recommendation Rec (2000)8 of the Committee of Ministers to member States on assistance to crime victims, 12 June 2006, p. 10.

Justice Proceedings
It should be noted that the obligation of law enforcement to prevent and protect against, and to investigate, any alleged acts of sexual violence for indeed any other crime does not rely upon a victim making a formal complaint or reporting. As just one example, continuous failure to maintain the law and order and protect the community from acts of terrorism or violent extremism even without a complaint, not waiting for an incident to occur before their law enforcement obligations are triggered by a complaint filed by a victim, so any criminal acts, including those involving sexual violence.

Note on Compliance With the Rome Statute
The Rome Statute of the International Criminal Court (ICC) established the first permanent international criminal court with jurisdiction over the core international crimes.

The permanent court is governed by the principles of complementarity, meaning it will only accept jurisdiction over an investigation or prosecution of core international crimes where the national court with primary jurisdiction is unwilling or unable genuinely to carry out the investigation or prosecution. Rome Statute of the ICC, Art. 17. See also at Preamble para. 10; Articles 18, 19. A State’s willingness and ability to investigate and prosecute core international crimes may be demonstrated at least in part by adoption of legislation allowing for the same.

The Rome Statute of the ICC does not obligate States Parties to incorporate strictly Sunni the core crimes of the Rome Statute and its Elements of Crimes. States Parties may implement the core crimes in their legislation as they see fit. At least three approaches to legislative implementation have been noted. First, States may prosecute international crimes in accordance with existing domestic legislation. This approach has limitations but may be feasible depending on the content of domestic law and domestic legal culture. Second, States may incorporate crimes identical to the ICC Elements of Crimes. This approach has the advantage of certainty that the State’s obligations are being fulfilled, but in respect of legislation, but the disadvantage that inspections or compromises resulting from negotiations in which the State has no clear investment may be imported into the national code. Such provisions may also lack clarity as to their connection to domestic legislation and become out of date as customary international law advances. Third, States may adopt a more dynamic approach, providing a stronger connection to existing criminal offences in domestic legislation, clarifying Rome Statute concepts, and adopting developments in customary international law. See generally, Joseph Lintott, “Power Races to Model: The Impact of Domestic War Crimes Prosecutions on International Impunity,” in Morten Bergsmo (ed.), Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes, Torto Opplust Academics, EJ Publisher (2010-2011). The Model Provisions tend to favor the third of these approaches, while bearing in mind the advantages of the second.

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


War Crimes

Note on Armed Conflict

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

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

International armed conflicts exist whenever there is resort to armed force between two or more States.
2. Non-international armed conflicts are protracted armed confrontations occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State, party to the Geneva Conventions. The armed conflict must reach a minimum level of intensity and the parties involved in the conflict must show a minimum of organisation.


The model provisions follow the trend towards sobering war crimes the same coverage regardless of whether committed in non-international or international conflicts. A helpful analysis including examples of States which have already adopted legislation consistent with this trend is incorporated into the Case Maini Nederland, Implementing the Rome Statute of the International Criminal Court, ODI (ICJ) Tools, Centre for International Law Research and Policy, September 2017, pp 43-44, available at: https://www.legal-tools.org/doc/33030/pdf.

Of note in this analysis in particular are the codes of Bosnia and Herzegovina, Serbia, Montenegro, Croatia, and the Former Yugoslav Republic of Macedonia, which all essentially make reference to “rules of international law in times of war, armed conflict or occupation”, which are applied in the contexts of international or non-international armed conflicts. See id at 44 quoting the Criminal Code of Bosnia Herzegovina.

Article 1. Sexual Violence as a War Crime

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

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

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

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

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

Trial Chamber IV. The Prosecutor v. Bosco Ntaganda. Second decision on the defences’ challenge to jurisdiction of the Court in respect of Counts 6 and 9.

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

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

The Tribunal defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. The Tribunal considers sexual violence, which includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact. The incident described by witnesses in which the accused ordered the Interahamwe to undress a student and force her to do gymnastics naked in the public courtyard of the bureau communal, in front of a crowd, constitutes sexual violence. The Tribunal notes in this context that coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence of interahamwe among refugee Tutsi women at the bureau communal.

Article 3. Aggravated Sexual Violence as a War Crime

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

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Article 3(1)(f) children born as a result of aggravated sexual violence require protection from discrimination, especially in accessing...
resources, identification documents and social services such as education and health care, and have a right to receive reparations as a category of war victims, as per State practice in Colombia, for example. See: Security Council resolution 2477 (2019) operative para. 29 (Article 13). “Aggravated Sexual Violence as a War Crime” the and/or indicates that one of these factors is sufficient, but more than one may be present. Penalties can be increased accordingly depending upon how many gravity factors are present. Article 3(1)(h) Killing and sexual violence resulting in death can be prosecuted as separate offenses, if the jurisdiction so permits.

A change of aggravated sexual violence does not preclude a charge of torture stemming from the same act, if the jurisdiction so permits.

For the crime of torture, the element of severe mental or physical pain or suffering must also be proven.

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

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

Sexual violence committed during armed conflict is often characterized as a “weapon of war” or as a “tactic of war” or “method of war” as sexual violence may be used to weaken the enemy or to target the enemy’s civilian population. The last decades have witnessed numerous situations in which sexual violence has been used in a systematic manner against a civilian population as part of a military strategy. Under the international humanitarian law weapons framework, there is no specific definition unanimously accepted for the terms “weapon or method” and the phrase is interchangeably used with the expression “means and methods of warfare.” P.J. Cameron, The Limitations on Methods and Means of Warfare (Glogau, 2013, 120). An analysis of different definitions adopted at the national and international levels reveals the existence of two common elements in the understanding of the notion “weapon” refers to ill-defined object, material, instrument, mechanism, device or substance that is used to kill, injure, damage, threaten or destroy. Gloria Gaggioli, Sexual violence in armed conflicts: A violation of international humanitarian law and human rights law. International Review of the Red Cross (2012), 94 (894), 503–538.

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

Because all sexual violence is already forbidden in armed conflict, the provision “Sexual Violence as a Method of Warfare as a War Crime” was ultimately not included in the Model Legislative Provisions. However, it is widely recognized that sexual violence is used as a tactic of war and governments and practitioners are encouraged to explore how to use this legal framework as a possible applicable legal framework for accountability for conflict-related sexual violence. The Security Council, through its Resolution 2480 (2019) recognizes that “sexual violence can be used or commissioned as a method or tactic of war.” Resolution 2480 also recognizes that “sexual violence, when used or commissioned as a tactic of war in order to deliberately target civilians or as part of a widespread or systematic attack against civilians, can significantly exacerbate situations of armed conflict and may impede the realization of international peace and security.” Moreover, the Berlin Declaration and Platform for Action also recognizes that “patries to conflict often rape women with impunity, sometimes using systematic rape as a tactic of war and terrorism.” (para. 135).

Article 8 Enforced Impregnation as a War Crime

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

Article 9 Enforced Sterilisation as a War Crime

This provision extends beyond the equivalent provision of the ICC. Elements of Crimes to criminalise “significantly altering” the victim’s biological reproductive capacity. The language of this provisions is drawn from the ICC Elements of Crimes: War crime of enforced sterilisation Article 8 (b)(b)(v)-5, Article 8 (b)(b)(v)-5.

Article 10 Enforced Contraception as a War Crime

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

Article 11 Enforced-Abortion as a War Crime

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

Article 12 Torture as a War Crime

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

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

The language of this provision is drawn from the Geneva Conventions, common Article 3, First Geneva Convention, Article 12, Second Geneva Convention, Article 12, Third Geneva Convention, Article 7, Article 87, Article 89, Fourth Geneva Convention, Article 32, Additional Protocol I, Article 752 and Additional Protocol II article 421, Customary International Law, Rules 90, 91, 92, 93. ICC. Elements of Crimes: War crime of torture Article 8 (b)(b)(iv)-4 and Article 8 (1)(h)-4. See also: The Prosecutor v. Ntaganda, Judgment on the appeal of Mr Ntaganda against the “Second decision on the defendant’s challenge to jurisdiction of the Court in respect of Counts 6 and 9.” ICC-01/04-01/08-Arts. para. 16 (June 2019) finding that “there is never a justification to engage in sexual violence against any person irrespective of whether or not this person may be targeted and killed under international humanitarian law.” Bouncing the Trial Chamber’s Impugned Decision at para. 40.

See also comment to Article 26 below.

Article 13 Mutilation as a War Crime

The language of this provision is taken in part from the ICC’s Elements of Crimes, referencing the ICC. Elements of Crimes Article 8 (b)(b)(v)-4. Note that the ICC’s Elements of Crimes set out that a person is guilty of mutilation if “the person subjected one or more persons...
to mutilation, in particular by permanently disfiguring the person, or by permanently disabling or removing an organ or appendage. This language was incorporated to ensure that no victim of mutilation had ceased to pursue its own private and peaceful occupation, and a large number of other acts of sexual violence, could lead to a situation where the victim who does not disfigure the victim externally, and which also does not cause the victim to lose an organ. It would however, constitute mutilation. The language of the mutilation provision in this legislative guidance ensures that such an act would satisfy the elements of mutilation.

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

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

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

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

Mutilation could also constitute torture.

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

ICRC, Customary International Humanitarian Law Rule 62.52 provides that ‘Rule 62.52: Mutilation, medical or scientific experiments, or any other medical procedure not indicated by the state of health of the person concerned and not consistent with generally accepted medical standards are prohibited.’ It sets out the following in relation to mutilation as a war crime:

“The prohibition of mutilation was already recognized in the Liberian Code (Liberian Code Article 58(b) cited in Vol I. Ch. 31, 1225). Common Article 3 of the Geneva Conventions prohibits ‘torture’ of civilians and persons hors de combat. [Geneva Conventions, common Article 3 (b) § 1217). Mutilation is also prohibited by specific provisions of the Third and Fourth Geneva Conventions (Third Geneva Convention, Article 13 (b) § 1210. Fourth Geneva Convention, Article 32 (b) § 1217). In addition, the prohibition of mutilation is contained in the Additional Protocols I and II (Additional Protocol I Article 7(2)(a) adopted by consensus (ibid § 1219). Mutilation constitutes a war crime in both international and non-international armed conflicts under the Statute of the International Criminal Court, ICC Statute, Article 8(b)(b) and related ibid (§ 1220). It is also recognized as a war crime in non-international armed conflicts under the Statutes of the International Criminal Tribunal for Rwanda and of the Special Court for Sierra Leone. ICTY Statute, Article 8(b)(b) (§ 1221). Statute of the Special Court for Sierra Leone, Article 8(b)(b) (§ 1222).”

Article 11: ‘Terror’ as a War Crime

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

The crimes of enslavement, sexual slavery, trafficking in persons, and enforced marriage are included as forms of slavery. Note that the Extraordinary African Chambers (EAC) in the habeas corpus case observed that sexual slavery constitutes part of the active nexus of enslavement as crime against humanity and of slavery as a war crime. This analysis considers sexual slavery as a form of slavery rather than a separate crime reflecting a form of “indentured” slavery. Considering that “sexual slavery” comprises an active nexus or indicator of slavery, scholars suggest that sexual violence and sexual integrity harms ought to be re-folded into the conceptualisation of all forms of slavery as an international crime.


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

**Article 1: Enslavement as a War Crime**

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

Enslavement is the overarching crime of slavery.

The language of this provisions is drawn from the Geneva Conventions Additional Protocol I (article 48), the Convention to Suppress the Slave Trade and Slavery of 1926; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956; and the ICCR Rule 4 of Customary International Humanitarian Law.

This provision is consistent with the national codes of several States, who have broadly defined the category of persons to be protected by IHL. See Case Machel Network, Implementing the Rome Statute of the International Criminal Court, OHCHR (Oct. 2017), available at https://www.legal-tools.org/doc/14112/pdf/

The language of this provision is drawn from the Convention to Suppress the Slave Trade and Slavery of 1926; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956.

There is no exhaustive list of situations or circumstances which can be the exercise of a power of ownership. In determining whether the perpetrator exercised such a power, the Chamber must take into account various factors, such as control of the victim’s movement, the nature of the physical environment, psychological control, measures taken to prevent or deter escape, use of force or threats of use of force or other forms of physical or mental coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality, forced labour, and the victim’s vulnerability. The exercise of the right of ownership over someone need not entail a commercial transaction. Separate deprivation of liberty may take various forms. It may occur, for example, when the victim is removed from their home without their presence and is then transported to another location, and the forms of violence, ill-treatment and abuse inflicted on them may lead to physical or mental deprivation of liberty. In some cases, it may occur over long periods of time.

**Article 2: Slave Trade as a War Crime**

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

The trade in persons has been recognized as a peremptory norm, a crime under customary international law and humanitarian law. See e.g. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II - Article 48); Rule 4(a) of the ICCR Database on Rules of Customary International Humanitarian Law. However, the crime of slave trade has never been prosecuted by any international tribunal, nor has it been included in the Rome Statute. This model legislative provision seeks to fill this legislative and accountability gap.
Crimes Against Humanity

These Model Legislative Provisions include selected acts which relate or may relate conflict-related sexual violence crimes, including acts not specifically criminalised in the Rome Statute. Many States have not limited the acts that would constitute crimes against humanity to those in the Rome Statute, instead including crimes against humanity taken from customary international law. See Case Matrix Network, available at https://www.legal-tools.org/doc/e05157/pdf/ (last accessed 20 November 2019). For example, Kenyan law defines crimes against humanity to include “an act, defined as crimes against humanity, for instance, customarily international law that is not otherwise dealt with in the ICC Statute or in the Act.” Kenyan International Crimes Act 2008, para. 708.

The language of this provision is taken in part from the ICC Elements of Crimes, referencing the ICC Elements of Crimes Article 8 (1) (b) 4-6 referencing the war crime of mutilation. That document goes on to note: Consent is not a defence to this crime. The crime prohibits any medical practice which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the party conducting the procedure and who are in no way deprived of liberty. The Rome Statute does not include the crime of mutilation as a crime against humanity.

See comments to Article 10.

Article 19 - Enforced Abortion as a Crime Against Humanity

See comments to Article 18.

Enforced Marriages as a Crime Against Humanity

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

See comments to Article 17.

Aggravated Sexual Violence as a Crime Against Humanity

See comments to Article 16.

Part II - Legislative Guidance & Commentary

See comments to Article 15.

Rape as Sexual Violence as a Crime Against Humanity

See comments to Article 14.

See comments to Article 13.

Aggravated Sexual Violence as a Crime Against Humanity

See comments to Article 12.

See comments to Article 11.

See comments to Article 10.

See comments to Article 9.

See comments to Article 8.

See comments to Article 7.

See comments to Article 6.

See comments to Article 5.

See comments to Article 4.

See comments to Article 3.

See comments to Article 2.

See comments to Article 1.

Aggravated Sexual Violence as a Crime Against Humanity

See comments to Article 3.

Forced Pregnancy as a Crime Against Humanity

See comments to Article 4.

See comments to Article 5.

See comments to Article 6.

See comments to Article 7.

See comments to Article 8.

Mutilation as a Crime Against Humanity

See comments to Article 9.

Torture as a Crime Against Humanity

See comments to Article 10.

Aggravated Sexual Violence as a Crime Against Humanity

See comments to Article 11.

Persecution as a Crime Against Humanity

See comments to Article 12.

Aggravated Sexual Violence as a Crime Against Humanity

See comments to Article 13.

Aggravated Sexual Violence as a Crime Against Humanity

See comments to Article 14.

Aggravated Sexual Violence as a Crime Against Humanity

See comments to Article 15.

Aggravated Sexual Violence as a Crime Against Humanity

See comments to Article 16.

Aggravated Sexual Violence as a Crime Against Humanity

See comments to Article 17.
There is precedent for considering the addition of “tribal” groups to the list of protected groups to conform with customary international law as found, for example, by the International Tribunal for Rwanda. See The Prosecutor v. Akayesu ICTR-96-1-T, Judgment, 2 September 1998. The Prosecutor v. Kayishema and Rutaganda ICTR-95-1-T, Judgment, 25 May 2000. See also Report of the International Commission of Inquiry on Darfur to the Secretary-General 5/2005/RSL, paras 128-129.

Some jurisdictions have also added “political” groups to the list of protected groups. Although not protected explicitly under the Genocide Convention, “political” groups have been explicitly protected in national legislations in at least twelve countries in their domestic genocide statutes: Bangladesh, Cambodia, Colombia, Costa Rica, Croatia, Cuba, Ecuador, Ethiopia, Lithuania, Panama, Poland, Switzerland, and Slovenia. David L. Nekrasov, Genocide and Political Groups 1 (2001); William A. Schabas, Genocide in International Law 2 (ed. 2000). See also Beth Van Schaack, The Crime of Political Genocide: Repairing the Genocide Convention’s Blind Spot (May 1997).

In this regard:

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


See id at 388, describing the Scilingo Case before the Spanish National Appellate Court; SAN (Spanish National Appellate Court), Sala de lo Penal (Criminal Chamber), Nov. 4, 1996 (No. Burgiú 36 Case) Scilingo, Case No. Burgiú at “Fundamentos de Derecho: Quinto” finding that atrocities committed in Argentinians Dirty War amounted to genocide because the category “national groups” should be extended to include groups targeted by the State because they were perceived to be opposed to the government’s goals. An additional ten countries’ penal codes recognize a broad form of idea of groups based on any arbitrary criterion: Belarus, bathtub, Canada, DR Congo, Estonia, Panama, Latvia, Peru, and Romania. David L. Nekrasov, Genocide and Political Groups 1 (2001). This is in keeping with the decision of the Trial Chamber in Akayesu, which opined that it is particularly important to respect the intention of the drafters of the Genocide Convention, which according to the travaux preparatoris, was patently to ensure the protection of any stable and permanent group. The Prosecutor v. Akayesu, ICTR-96-1-T, Judgment, 2 September 1998, para 155.

Penalties

Article 31. Penal Sanctions (Civil Law) or Aggravating Circumstances (Common Law) (Gravity Factors)

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

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

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

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

Article 26. Other Inhumane Acts as a Crime Against Humanity

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

Article 27. Terrors as a Crime Against Humanity

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

See comment to Article 11.

Article 28. Enslavement as a Crime Against Humanity

See comment to Article 12.

Article 29. Slave Trade as a crime against humanity.

See comment to Article 13.

Article 30. Trafficking in Persons for the Purpose of Sexual Violence and/or Exploitation as a form of Enslavement as a Crime Against Humanity

See comment to Article 14.

Article 31. Sexual Slavery as a Form of Enslavement as a Crime Against Humanity

See comment to Article 15.

Article 32. Enforced Marriage/Enforced Imposition of conjugal status as a form of Enslavement as a Crime Against Humanity

See comment to Article 16.

Article 33. Genocide

Genocide

Sexual violence, including rape, can be a constituent act of genocide. It should be noted that the Malabo Protocol incorporates rape or other forms of sexual violence as a separately enumerated act of genocide. See also The Prosecutor v. Akayesu ICTR-96-1-T, Judgment, 2 September 1998 holding that rape and other acts of sexual violence satisfy the factual elements of genocide.

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

The first draft of the Genocide Convention defined protected groups as racial, national, linguistic, religious and political groups. Article 1 (Draft Convention on the Crime of Genocide Economic and Social Council, 26 June 1943. By including racial, national, linguistic, religious or political groups of human beings), the draft Convention was designed to provide the widest possible protection for all such groups. After the negotiation leading to the adoption of the Convention on the Prevention and Punishment of the Crime in Genocide, the definition of protected groups was reduced to national, ethnic, racial or religious groups.
See in particular the EU Genocide Network and Enquête report on cumulative charging. “Cumulative Prosecution Of Foreign Terrorist Fighters For Core International Crimes And Terrorism-Related Offences,” concluding that “existing national jurisprudence of EU Member States and developing national practice demonstrate that it is possible to cumulatively prosecute and hold ITTFs foreign terrorist fighters accountable for war crimes, crimes against humanity and the crime of genocide, in addition to terrorism-related offences.” Available at: https://www.eurojust.europa.eu/doclibrary/genocide-network/KnowledgeSharing/Cumulative%20prosecution%20of%20foreign%20terror

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

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

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

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

Selected Modes Of Liability

Note on Common Modes Of Liability

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

Co-perpetrating

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

Ordering

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

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

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

Instigation

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

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

Aiding and Abetting

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

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

Corporate Criminal Liability

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

Twenty-three executives of chemical company IG Farbenindustrie (IG Farben) were prosecuted for their role in violating customary international law by the United States Military Tribunal, established under Control Council Law No. 10, for“Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Aggression, and of War Criminals,” in its (1945-1946). IG Farben is perhaps best known for having manufactured the inescapable by means of which millions of people were exterminated in gas chambers at Auschwitz. See Joseph Borkin, “The Crime and Punishment of IG Farben: A Partial Accounting,” London 1998 at 122-23, and “The Farben Case: II, Trials of War Criminals (1961).” Several IG Farben executives were convicted, inter alia of slavery and murder, and, although the company itself was not halted before the bar, the Tribunal implied that IG Farben’s actions constituted a violation of international law.

You find that the proof establishes beyond a reasonable doubt that offenses against property as defined by Control Council Law No. 10 were committed by IG Farben and its representatives; cannot be differentiated from acts of plunder or pillage committed by officers, soldiers or public officials of the German Reich.

The Farben Case: II Trials of War Criminals (1961)

“The Allied Control Council had dismantled IG Farben and seized all of its assets by the time its executives went on trial. Brief for Petitioners to the Supreme Court of the United States, Aebisher v. Royal Dutch Petroleum, No. 10-34, at 50-52, April 2012, citing Control Council Law No. 9: Providing for the Termination and Liquidation of the Nazi Organisations (Oct. 10, 1945); Control Council Law No. 9: Providing for the Seizure of Property Owned by IG Farbenindustrie and the Council Thence (Nov. 30, 1945).” (The dissolution of IG Farben was not clearly related to its complicity in crimes against humanity, slave labor, or poison gas, crimes of which the Allies were as yet only dimly conscious.” Brief Amici Curiae of Nuremberg Historians and International Lawyers in Support of Neither Party before the Supreme Court of the United States, Aebisher v. Royal Dutch Petroleum, No. 10-34, at 34, 37, 39 December 2011.)

Despite the implicit acknowledgment of corporate responsibility at Nuremberg, the Rome Statute of the ICC contains no provision for imposing criminal penalties on legal persons. The reason for this is related to the diversity of approaches to criminal liability for corporations worldwide. “Whereas it is universally accepted that corporations are subject to civil liability under domestic law, practice varies considerably in national systems around the globe on the criminal liability of corporations and the penalties associated therewith.” Brief of Amici Curiae David J. Schleifer, Northeastern University School of Law, Amicus Curiae in Support of the Petitioners, Aebisher v. Royal Dutch Petroleum, No. 10-34, at 3, 5, 21 December 2011. “There was no consensus among delegations in Rome about how to impose criminal penalty, upon a corporate defendant, and that indecision severely undermined talks about how to extend the Court’s criminal jurisdiction to legal persons.” Id at 6. However, once the conclusion of the negotiations on the Rome Statute, the trend has been toward more corporate criminal liability, not less, both at the national level and in multilateral treaties.” Id at 9.

While the model provisions are intended to apply to legal as well as natural persons, due to the variety of corporate accountability laws around the world; the Model Legislative Provisions do not include a model provision for corporate criminal liability. States wishing to incorporate corporate criminal liability for the first time may wish to consider Article 8C of the Rome of the Manual Protocols on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, which defines Corporate Criminal Liability in these terms.
1. For the purpose of this Statute, the Court shall have jurisdiction over legal persons, with the exception of States.
2. Corporate intention to commit an offence may be established by proof that it was the policy of the corporation to do the act which constituted the offence.
3. A policy may be attributed to a corporation where it provides the most reasonable explanation of the conduct of that corporation.
4. Corporate knowledge of the commission of an offence may be established by proof that the actual or constructive knowledge of the relevant information was possessed within the corporation.
5. Knowledge may be possessed within a corporation even though the relevant information is divided between corporate personnel.
6. The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes.

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

**Attempt**

A person shall be criminally liable who attempts to commit a crime:
1. By taking action that commences the execution of the crime by means of a substantial step; and
2. The offense was not subsequently committed.

**Incitement**

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

Although he was convicted on a theory of complicity rather than incitement, Streicher’s conviction was based on his writings, which advocated for participation in the Holocaust. Thus, “Streicher could easily have been found guilty of inciting genocide had the offense existed at the time” (Robert Cryer, Incitement (October 2019), available at [https://encyclopedia.ushmm.org/content/en/article/incitement-to-genocide-in-international-law](https://encyclopedia.ushmm.org/content/en/article/incitement-to-genocide-in-international-law)).

**Article 38. Incitement**

Article 38 of the Genocide Convention and Rome Statute Article 93(1) retain the concept of individual criminal responsibility for incitement, but only in respect of genocide and only for “direct and public” incitement. The model provision has retained the “direct” element but eliminates the “public” element, the definition of which has been “wildly inconsistent” in jurisprudence. See Gregory Gordon’s chapters “Problems Regarding the Crime of Direct and Public Incitement to Genocide” and “Fixing Incentive to Commit Genocide” in his book, Atrocity Speech Law: Foundation, Fragmentation, Pluton (Oxford 2017), especially pages 293-295 regarding elimination of the “public” element and finding that there is no compelling articulable reason for its inclusion.

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

**Article 39. Joint Criminal Enterprise**

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

**Article 40. Superior or Command Responsibility**


**Chapter III. Criminal Procedure Provisions**

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

**General Principles Of Criminal Law**

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

**Right To A Fair Trial**

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

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

The language of this provision is drawn from the Universal Declaration of Human Rights Article 13, the International Covenant on Civil and Political Rights Article 14, the American Convention on Human Rights Article 5 and the European Convention on Human Rights Article 6.

Additional protections for defendants might need to be made, depending on the existing domestic law. See e.g., ICC Elements of Crimes Article 31: “Grounds For Excluding Criminal Responsibility” and Article 37: “Mistake of Fact or Law.”

**Article 41. Jurisdiction**

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

**PART II - LEGISLATIVE GUIDANCE & COMMENTARY**
The final version of the AU’s Model Law adopted in July 2012 provides simply that the person “shall be within the territory of the State” African Union Model National Law on Universal Jurisdiction over International Crimes, adopted 9 July 2012 at the 11th Ordinary Session of the Executive Council of the African Union vide decision EXCL/Dec(2006)16. Addis Ababa. Ethiopia. Either provision is somewhat more restricted than pure universal jurisdiction, conforming instead to what is described by Langer’s research, which finds that while the use of extraterritorial jurisdiction for core international crimes is expanding, those countries that prosecute international crimes without any territorial, nationality or-oriental nexus are increasing in number. For this reason, prohibiting the perpetration of their territory. See Langer & Eason, The Quest for Global Jurisdiction in International Criminal Justice. 1999. Many States will be obliged to provide jurisdiction in this context on treaty commitments in any event. This provision is not meant to reduce any existing basis of jurisdiction over an organisation or corporate defendant. See Spain’s Organic Act no. 45/1995, and Belgium’s “Law Relative to the Repression of Severe Violations of the International Conventions of Geneva of August 12, 1949, and the Protocols I and II of June 8, 1977” both of which provide for a more “pure form of universal jurisdiction.” See also Guidelines para. 15.

Paragraph 2 articulates a priority for the home jurisdiction of the victim when jurisdictional conflicts arise. Jurisdictional conflicts on conflicting extradition requests lead to be solved on a case-by-case basis and offer between civil and criminal law jurisdiction. Since conflicts may arise where the country of the alleged, for example, may prefer to try their own soldiers rather than render them to the country on whose territory the crime took place, such conflicts would be resolved in favour of the victim’s home jurisdiction, at least initially, as the victim is genuinely wronged and able to prosecute.

Article 19: Principle of Non-Discrimination

In the investigation and prosecution of cases involving conflict-related sexual violence, extra efforts may be necessary to ensure that members of previously marginalized groups, including women and girls, will have access to justice. Harmful stereotypes based on gender or other social categories may not be applied to avoid. See Guidelines para. 25. and The ICC Elements of Crimes. Article 2.1. (“The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.”) Of particular note, the inclusion of the term “birth” here should be understood to include protection against discrimination against children born as a result of sexual violence crimes.

Article 20: Exclusion of Jurisdiction Over Persons Under Eighteen

The language of this provision is taken from Article 26 of the Rome Statute and is consistent with the widely recognized principle that children under the age of eighteen are not considered to be criminally responsible while they are associated with armed forces or armed groups, including terrorist or violent extremist groups. The language of this provision is taken from Article 26 of the Rome Statute and is consistent with the widely recognized principle that children under the age of eighteen are not considered to be criminally responsible while they are associated with armed forces or armed groups, including terrorist or violent extremist groups. The language of this provision is taken from Article 26 of the Rome Statute and is consistent with the widely recognized principle that children under the age of eighteen are not considered to be criminally responsible while they are associated with armed forces or armed groups, including terrorist or violent extremist groups. The language of this provision is taken from Article 26 of the Rome Statute and is consistent with the widely recognized principle that children under the age of eighteen are not considered to be criminally responsible while they are associated with armed forces or armed groups, including terrorist or violent extremist groups. The language of this provision is taken from Article 26 of the Rome Statute and is consistent with the widely recognized principle that children under the age of eighteen are not considered to be criminally responsible while they are associated with armed forces or armed groups, including terrorist or violent extremist groups.

Paragraph 3. The language of this provision is inspired by the procedural code for Bosnia Herzegovina, the Rules of Procedure and Evidence of the International Criminal Court, and many other sources. The principle of legality embodies a core concept of human rights law. The innovation in this provision is that it identifies international law as an exception for satisfying the principle of legality. In other words, this provision means that the criminal offenses enumerated in the Model Legislative Provisions may be prosecuted even if they are not articulated in national law at the time of their commission, so long as they were prohibited by international law. This innovation is consistent with Article 22 of the ICC Elements of Crimes. It is also supported by Article 16 of the International Covenant on Civil and Political Rights, which states:

11 No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

12 Nothing in this Article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

The provision is also consistent with Article 16 of the United Nations Charter of Rights. Article 49 of which provides: “no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed.” Legislators are encouraged to include this provision with caution. International criminal courts and tribunals have adopted a more flexible approach to the principle of legality that most domestic legal systems, in part due to the nature of international crimes, which often occur where a State is held captive to one or more criminal organizations, and customary international law, which is not always written down in the same manner as a national penal code. Thus, this approach is appropriate for prosecution of those crimes enumerated in the Model Legislative Provisions, especially by those states bound by the CCPR Article 15(2) or EU-CTR Article 49.

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

Article 21: No Prescription / No Applicability of Statutes of Limitations

The language of the first paragraph of this provision is drawn from international law and from the codes in Canada, Bosnia Herzegovina, and others. It is consistent with the ICC Elements of Crimes Article 49. See also Guidelines para. 5. 7.

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

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

Article 22: No Defence by Necessity, Law, Order or Official Status

The language of this provision is drawn largely from the laws of Belgium and Burkina Faso, and it is also informed by the International Law Commission’s draft articles on Crimes Against Humanity available at: http://www.un.org/law/gacia.html. See also Articles 27. and 55 of the Rome Statute.

Article 23: No Amnesty

Amnesties are never legitimate where States have an obligation to prosecute, whether by treaty or customary international law, and this includes war crimes, crimes against humanity, genocide, and torture (as at the crimes enumerated in the Model Legislative Provisions). See Luis. A. L. L’Affaire. Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes, 99 Va. L. Rev. 915, 941-43 (2013). See also Security Council Resolutions 2066 (2013) and 2580 (2020). No illegal violence crimes should be excluded from amnesty and immunity provisions. By the same token, use of an amnesty to avoid prosecutions is also illegitimate. See Belgium v. General, 2009 ICJ 1 at para. 16. See also Application of Convention on Prevention and Punishment of Crimes of Genocide in Bosnia & Herz. v. Serbia & Montenegro 1996 ICJ 1 at para. Further, the jus cogens nature of a crime, such as torture, “serves to internationally de-legitimise any legislative, administrire in judicial act authorising” the crime. The Prosecutor v. Jurukudo, IT-95-07-T, Judgment, 1998, para. 65). States that have declared amnesties for those offenses enumerated in these Model Legislative Provisions are urged to revoke them. States which observe amnesties de facto for these crimes are urged to proceed without delay to investigate, prosecute or extradite, as appropriate.

Article 24: Foreign Official Immunity

Paragraph 1 of this provision tracks closely the language of Draft Article 7 as proposed by the Special Rapporteur in her fifth report (U.N. A/67/10 Draft Article, considered by the International Law Commission [ILC] in its sixty-ninth session See: Un report of the International Law Commission, Sixty-ninth session, 28 May – 2 June and 3 July – 6 August 2015, General Assembly Official Records, Seventh–seventy-second Supplement No 10 [A/70/10], available at http://www.un.org/law/gacia.html. (TLC Report). Although this language was ultimately altered by the Commission and continues to be debated, the provisions offered in this paragraph are consistent with the views of the Commission as expressed in the ILC Report. Similar provisions can be found in a variety of State procedural codes.
Under customary international law, State officials under a government officials, intelligence officers, and military personnel generally enjoy immunity from criminal prosecution by foreign States with respect to acts performed in their official capacity. Whether this conduct-based immunity—or immunity based on nationality—extends to international crimes, such as genocide, crimes against humanity, and war crimes has been described as one of the most important questions facing international law today. See Alexandra Marie, Immunity for International Crime: Where Do States Really Stand? Just Security, 17 Apr 2018, available at

www.oas.org/juridico/english/treaties/a-60.htm

There is no treaty which expressly and comprehensively addresses the question of exceptions to immunity from criminal jurisdiction over State officials; however, several may be seen to do so implicitly. These include the Convention on the Prevention and Punishment of the Crime of Genocide 29 December 1950 (United Nations Treaty Series, vol. 29, No. 1275, p. 75); the International Convention on the Suppression and Punishment of the Crime of Apartheid 30 November 1973 (United Nations Treaty Series, vol. 34, No. 1676, p. 21); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 10 December 1984 (United Nations Treaty Series, vol. 199, No. 3402, p. 193); the International Convention for the Protection of All Persons from Enforced Disappearance 22 December 2006 (A/RES/60/147; Inter-American Convention to Prevent and Punish Torture (Caracas) 9 December 1985; OAS Treaty Series, No. 67; Inter-American Convention on Forced Disappearance of Persons (Buenos Aires) 9 June 1985; available at


The language of the provisions of this section is drawn largely from the law of France, and it accords with the victim's right to truth.

The concept of the inherent human dignity of all human persons can be found in numerous human rights instruments (including the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights) and various national constitutions. The Federal Constitutional Court of Germany has described the concept of dignity as being based on a conception of the human being “as a spiritual being endowed with the freedom to determine and develop himself,” and goes on to describe this freedom as being that of an isolated and self-regarding individual, but rather that of a person relating to and bound by the community. [This means that the state must regard every individual within society with equal worth. It is contrary to human dignity to make persons the mere tools of the State’s life improvement Casey v. Board of Ed. [1977] quoted in Evadné Grant, “Dignity and Equality” Human Rights Law Review Volume 7, Issue 2, 2007 Pages 299-329 at 305 listing translation in Kannm.


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

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

Article 51- Information

The language of the provisions of this section is drawn largely from the law of France, and it accords with the victim’s right to truth. See also Guidelines pages 31 and 32.

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

Subparagraphs (i) and (ii) refer to the right to be provided with any information that may affect a victim’s personal security along with procedures under which they may be available. Article 51(1)(g), (h) and (k) are examples of some of the measures that should be available at any stage of the process, but whether and when to invoke such measures is impossible to ascertain without information.

Subparagraph (iii) refers to the right to participate in criminal proceedings in accordance with international domestic law. It would include but is not limited to the rights enumerated in Article 51(8) of the Model Legislative Provisions.

Subparagraph (iv) refers to the right to be assisted by a legal representative of the victim’s choice. Because systems vary widely as to the availability and form of legal aid the various brackets within the provision and corresponding Article 51(9) reflect this reality, and are meant to assist the legislators in drafting the appropriate language for their unique legal system.
The language of this provision is based on the law of France and will be most familiar to litigators in civil law systems. However, witnesses in common law systems are also entitled to a lawyer, even if they are not parties to the case. It is more protective of victims to advise them of this right.

The second paragraph of this provision emphasizes that victims have the right to the attorney of their choice.

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

The language of this article is drawn largely from Justice in Matters Involving Child Victims and Witnesses of Crime Model Law and Related Commentary UNODC 2009. See also Guidelines paras 1-2.

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

The language of this article is drawn largely from the law of the Netherlands and from Justice in Matters Involving Child Victims and Witnesses of Crime Model Law and Related Commentary UNODC 2009. See also Guidelines paras 1-2.

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

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

Paragraph 3 of this Article provides for protective measures for the physical safety and mental well-being of victims and witnesses, and in respect of their privacy. A selection of illustrative examples is provided, however, sub-section f) clarifies that the court may issue other protective measures deemed appropriate.
Paragraph (3)(b) relies on a registry system for restricting and protective orders. It can be critical for a judge who presides over conflict-related sexual violence cases, or for investigators working on such cases, to have the ability to get immediate access to court protective or restraining orders, both to enhance victim safety and to help ensure that judges don’t make duplicate or conflicting court orders.

Paragraph (4) of this Article provides for protective measures pertaining to the identification, tracing, and freezing of assets and property that may be forfeited as restitution or reparations. The language of this paragraph stems from Rome Statute Article 51(1) to. See also The Prosecutor v. Katanga. Urgent Request to the Democratic Republic of the Congo for the purpose of obtaining the identification, tracing, freezing, and seizure of property; and assets of Germain Katanga, Preliminary Chamber I 16 July 2007, ICC-01/04-01/07; Prosecutor v. Lubanga. Request to States Parties to the Rome Statute for the identification, tracing and freezing or seizure of the property and assets of Mr Thomas Lubanga Dyilo. Register, 3 March 2006, ICC-Ct04-05-06. See also the United Kingdom case Makeva v. Makeva. Once international tribunals have jurisdiction, they may provide a benchmark against which to measure existing practice. In systems where victims are provided with more robust protection and power, nothing in these model provisions should lead to their curtailment or restriction.

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

Paragraph (4) of this section provides a list of several possible rights of victim participation which States may consider incorporating into their national law. States which do not already provide formal status to victim participants may wish to consider allowing participation in accordance with these provisions, which may be tailored to fit their system.

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

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

Subparagraph (f) provides for victims who have applied for status as victim participants to appeal a denial of status. Where national procedural provisions do not provide for such, a similar mechanism for reconsideration of status denial decisions should be put in place to ensure exercise of a victim’s right to be a formal participant in proceedings. Subparagraph (h) also provides for victims to retain such status when the basis of such status ceases to be operative. This occurred, for example, in Case 0001/02 at the Extraordinary Chambers of the Courts of Cambodia, when the charges were removed. Victims whose specific crimes were no longer subject to prosecution were allowed to continue as victims, having already satisfied the initial requirements. The interests of justice limit the right to retain status.

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

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

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

Paragraph (5) of this section draws on research in the Redress/SSS Study on Victim Participation in Legal Proceedings (2005), which surveys domestic practice in this area, and in particular on the law and practice of the United States, Colombia, and the Extraordinary Chambers of the Courts of Cambodia. One practice that is not expressly listed here but which would generally comply with this paragraph is the established practice in Colombia, where during the hearing on the indictment, the judge can limit the number of victim representatives intervening in the trial to the number of defendants. Of course, such a practice cannot be applied rigidly, for example, in a case with multiple defendants and multiple conflicts of interest. It should be noted that management of large numbers of victims through means suggested by this paragraph will not always solve the problems of representability where this is individually tailored as required by Article 66.

Subparagraph (a) Investigation of Conflict-Related Sexual Violence

Investigation into conflict-related sexual violence, whether carried out by law enforcement, prosecutors, victim representatives, or others charged with the investigation of sexual violence crimes for the purpose of criminal action, will ensure the principles enumerated in this
provision are respected. These principles pertain both to legal rights of victims and to professional ethical obligations of practitioners. "Investigator" as used in this section refers to anyone carrying out such an investigation.

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

Paragraph (c) refers to the articles on non-discrimination and respect for victims. It requires prompt investigation agreed with the primary ethical duty to do no harm.

1. The key ethical principle of Do No Harm should guide any investigation into conflict-related sexual violence: it is a minimum requirement. Do No harm means:

a. Giving deliberate and careful thought to all possible negative impacts of investigation on victims/witnesses, the wider community and the investigation team.

b. Being prepared for the harm those impacts may cause.

c. Making every possible effort to prevent, minimise or respond to potential harm, or changing or ceasing investigative activities if harm cannot be prevented or appropriately minimised.

2. A professional approach also requires that investigators:

a. Understand how information is created and its reliability.

b. Be aware of the power of words and the potential of language and facial expressions to influence the tone of material.

c. Be aware of and decline a conflict of interest.

d. By way of example, investigators should try to meet victims and witnesses in a discreet location and make sure the surroundings are comfortable and safe.

e. If they cannot guarantee visual privacy, investigators should try to ensure that they cannot be overheard.

3. Such ethical principles should be adhered to at each stage of an investigation.

4. Informed Consent.

Paragraph (d) refers to the two key principles of victim-centred litigation:

a. Making every possible effort to prevent, minimise or respond to potential harm, or changing or ceasing investigative activities if harm cannot be prevented or appropriately minimised.

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

c. The victim or witness should be informed about their right to withdraw from the process at any time. Informed consent to confidential investigation includes informed consent to:

• How severe would the impact be?
• How likely is it that the threat will become a reality?
• How severe would the impact be?
• What to expect at each stage of the process.

The language of this provision is drawn from the French code. The French code is actually more protective, but given the length of time necessary to investigate a conflict-related sexual violence case, we had to allow for the possibility that the same investigators may no longer be able to hear the victim. The Maya Achí case in Guatemala was also borne in mind, during which testimony was thrown out, inter alia, because the investigative interview took place at the victim's lawyer's offices rather than at the attorney general's offices (at the victim's request). See Butt & Estrada, In Major Setback, Judge Dismisses Charges in the Maya Achí Sexual Violence Case, International Justice Monitor (31 June 2019), available at https://www.ijmonitor.org/2019/06/in-major-setback-judge-dismisses-charges-in-the-maya-achi-sexual-violence-case. Additionally, in the conflict-related sexual violence case, the victim was instructed to remove her identification from every phase of the investigation. This type of accommodation should be encouraged rather than discouraged.

Training should be provided to all investigating teams and trained investigators should be present at all stages of the investigation. The aim is to ensure that the investigation is conducted in a manner that respects the rights of the victim/witness and the principle of non-discrimination. All courts are expected to follow the guidelines set out in this protocol.
Article 61: Closed Sessions
The language of the provisions of this section is drawn from the French code but find their counterpart in many others.

Article 62: Protective Measures at Trial
The language of the provisions of this section are drawn from criminal procedural codes in Guatemala, France, Colombia, the Netherlands, and from the experience and suggestions of experts and practitioners. See also Guidelines para. 12. The solutions suggested in this article will not necessarily be high-tech. An “opaque shield” could be achieved through hanging of a curtain, for example.

Article 63: No Cross Examination by Accused
This section is drawn from Canadian law. See also Guidelines para. 10.

Article 64: Victim Impact Statement
The language of this article is drawn from The Netherlands, which is in the process of extending this right. See also Guidelines para. 12. Several common law countries also allow victim impact statements. Not all allow for cross-examination. Best practice would be to consider the presentation of background witnesses and experts who can give context to the victim’s testimony. Courts in systems that provide a more robust array of victim participation opportunities but which do not separate liability and sentencing phases of trial may wish to combine the victim impact statement with the victims’ closing statement.

Article 65: Victim Fund
The language of this article is drawn largely from Justice in Matters Involving Child Victims and Witnesses of Crime Model Law and Related Commentary, UNODC (2009). See also Guidelines para. 16, 25.

Article 66: Reparations
This provision is designed to give the litigants and judges flexibility to design a remedy tailored to the needs of the victims. Providing a full remedy with all its many dimensions is all the more important in cases involving large numbers of victims. The language of this provision is drawn mainly from the Guidelines, paragraphs 15-23 as well as the UN Secretary-General’s Guidance Note on Reparations for Conflict-Related Sexual Violence (2014).

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

Paragraph (2) is provided in three variations to reflect different legal cultures. Legislators may adjust these provisions to suit their individual legal cultures but are urged to leave room for litigants and courts to be creative in fashioning appropriate remedies for extraordinary harms.

Paragraphs (2) assigns costs in the first instance to the convicted offender but allow for situations when the offender is indigent, when there are a large number of victims, when the State was implicated in the violations, when the accused was a high-level perpetrator acting under color of law of the State such that the State or a State fund may be an appropriate source for funding reparations.

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

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

Article 67: Information on the Outcome of the Trial
This provision, while arguably covered in other provisions within the Model Legislative Provisions, calls out the importance of the right of the victims to know the outcome of the trial, as this may directly impact on their security, their right to reparations, their empowerment in the process, and in unexpected additional ways.
Model Legislative Provisions and Guidance on Investigation and Prosecution of Conflict-Related Sexual Violence

Part III
Model Indictment

The first Trial for Sexual Violence in Conflict was in 1974.

INDICTMENT TEMPLATE FOR INTERNATIONAL CRIMES

[full name of court]
CASE NUMBER

THE PROSECUTOR

Against

(fail name of first accused) also known as [nickname if any], hereinafter "the first Accused"
and

(fail name of second accused, if any) also known as [nickname if any], hereinafter "the second Accused".

INDICTMENT

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

(fail name of first accused) also known as [nickname if any]

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

INTRODUCTION

(Brief Factual Contextual Narrative)

THE ACCUSED

The ACCUSED was born on or about [DOB] in [birth place].

[Additional facts describing the background of the accused, sufficient to identify him specifically, and his role or position within the relevant armed group or structure]

GENERAL ALLEGATIONS

A. At all times relevant to this indictment, a state of [internal and/or international armed conflict existed within the territory of geographic scope]. For the purposes of this indictment, organised armed factions involved in this conflict included [list the armed groups/factions who were engaging in hostilities].

B. A nexus existed between the armed conflict and all acts or omissions charged herein as Violations of the Laws and Customs of War and/or Violations of International Humanitarian Law.

C. Victims of crimes charged in this indictment were at the time of the commission of the crimes protected under the provisions of International Humanitarian Law, were civilians, and/or were hors de combat – who took no active part in hostilities.

D. All acts and omissions charged herein as Crimes Against Humanity were committed as part of a widespread or systematic attack directed against a civilian population.

E. All offenses alleged herein were committed within the territory of [relevant geographic scope] during the period [specific dates].

F. [Any additional material facts which are applicable to the entirety of the relevant context, such as the date on which a conflict began; the date on which a peace agreement was signed ending the conflict; a description of the relevant organised armed factions; key relevant events such as a coup d'état or key leadership changes, etc.]

1. Accused persons may be prosecuted individually or jointly where appropriate.
2. This can be omitted for indictments which only contain charges of sexual violence crimes, as it is not an element requiring proof.

PART III - MODEL INDICTMENT
PART III - MODEL INDICTMENT

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

INDIVIDUAL CRIMINAL RESPONSIBILITY 

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

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

**JCE I**

a. At all times relevant to this Indictment, the ACCUSED, through his association with (other members of the JCE), acted in concert with (other members of the JCE).

b. JCE members, including the ACCUSED, and (other JCE members) shared a common plan, purpose or design (joint criminal enterprise) to commit the crimes alleged in this Indictment.

c. The ACCUSED furthered the joint criminal enterprise through (conduct in furtherance of the JCE) which included the crimes alleged in this Indictment.

d. The ACCUSED intended to participate in the joint criminal enterprise and intended that the crimes be committed in furtherance of the joint criminal enterprise.

(Narrative description of the material facts which underpin the JCE II mode of liability)

**JCE II**

a. At all times relevant to this Indictment, the ACCUSED, through his association with (other members of the JCE), acted in concert with (other members of the JCE).

b. JCE members, including the ACCUSED, and (other JCE members) shared a common plan, purpose or design (joint criminal enterprise) to commit the crimes alleged in this Indictment.

c. The ACCUSED furthered the joint criminal enterprise through (conduct in furtherance of the JCE) which included the crimes alleged in this Indictment.

d. The ACCUSED intended to participate in the joint criminal enterprise, was aware that the crimes alleged in this Indictment were a reasonably foreseeable consequence of the common plan, purpose or design, and continued to participate in the joint criminal enterprise, assuming the risk that his acts in furtherance of the JCE would involve the commission of the crimes alleged in this Indictment.

Superior Responsibility

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

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

a. The ACCUSED had effective control over those who directly committed the crimes alleged in this Indictment.

b. The ACCUSED knew, had reason to know, should have known, or was deliberately ignorant of the crimes committed by such persons and, in the circumstances, should have taken steps to prevent such crimes or had already done so and

c. The ACCUSED failed to take the necessary and reasonable measures to prevent such acts or to punish the direct perpetrators.

**COUNTS 3-6: Sexual violence**

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

**COUNTS 1-2: Sexual violence as a WAR CRIME, CRIME AGAINST HUMANITY, and/or as a joint criminal enterprise**

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

And

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

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

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

**COUNTS 5-6: Torture**

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

**COUNTS 3-4: Aggravated Sexual Violence as a WAR CRIME, CRIME AGAINST HUMANITY, and/or, as part of a joint criminal enterprise**

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

And

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

**COUNTS 5-6: Torture as a WAR CRIME, CRIME AGAINST HUMANITY, and/or, as part of a joint criminal enterprise**

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

And

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

**COUNTS 3-4: Aggravated Sexual Violence as a WAR CRIME, CRIME AGAINST HUMANITY, and/or, as part of a joint criminal enterprise**

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

And

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

**COUNTS 5-6: Torture as a WAR CRIME, CRIME AGAINST HUMANITY, and/or, as part of a joint criminal enterprise**

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

And

Count 6: Torture as a CRIME AGAINST HUMANITY, punishable under [relevant provision of Penal Code or International Crimes Act or other domestic legislation domesticating the Rome Statute or otherwise criminalising torture as a crime against humanity] and customary international law.
Count 7: Persecution

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

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

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

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

Dated this [month][day][year]
At [location]
[Signature and full name of Prosecutor]