

THE HAGUE PRINCIPLES ON
SEXUAL VIOLENCE

Meaningfully addressing sexual violence starts with understanding all forms of sexual violence. Over the course of 2019, over 50 civil society organisations came together to bring the voices of survivors to the forefront of discussions about addressing sexual violence. More than 500 survivors were consulted on what they think makes violence 'sexual'. Information from consultations was complemented by input from civil society, legal practitioners, academics, and policy makers to create The Hague Principles on Sexual Violence.

The Hague Principles on Sexual Violence consist of:

- The Civil Society Declaration on Sexual Violence – providing general guidance on what makes violence 'sexual', especially to survivors;
- International Criminal Law (ICL) Guidelines – a tool for international criminal law practitioners that explains when acts of sexual violence in the Civil Society Declaration amount to international crimes, as well as practical elements to inform the international criminal law prosecution of these acts;
- Key Principles for Policy Makers on Sexual Violence – 10 key principles derived from the Civil Society Declaration to incorporate in policy development and implementation, legislative strategies and legal and judicial procedures.

Table of Contents

CIVIL SOCIETY DECLARATION ON SEXUAL VIOLENCE.....	- 3 -
INTRODUCTION.....	- 4 -
PREAMBLE	- 5 -
PART 1. GENERAL PRINCIPLES.....	- 6 -
PART 2. <i>INDICIA</i> THAT AN ACT IS SEXUAL IN NATURE	- 7 -
PART 3. EXAMPLES OF SEXUAL BODY PARTS	- 7 -
PART 4. EXAMPLES OF ACTS OF SEXUAL VIOLENCE.....	- 8 -
PART 5. FACTORS AFFECTING WHETHER AN ACT OF A SEXUAL NATURE IS COMMITTED WITHOUT GENUINE, VOLUNTARY, SPECIFIC AND ONGOING CONSENT	- 11 -
ANNEX 1. COMMENTARY	- 12 -
ANNEX 2. METHODOLOGY	- 32 -
1. BACKGROUND ON THE <i>CALL IT WHAT IT IS</i> CAMPAIGN	- 32 -
2. DEVELOPMENT OF THE CIVIL SOCIETY DECLARATION AND ITS ANNEXES	- 32 -
3. ANALYSIS AND USE OF INPUT	- 35 -
4. FUTURE REVIEW	- 35 -
INTERNATIONAL CRIMINAL LAW GUIDELINES ON SEXUAL VIOLENCE	- 35 -
INTRODUCTION.....	- 38 -
PART I. ANY OTHER FORM OF SEXUAL VIOLENCE AS A CRIME AGAINST HUMANITY OR A WAR CRIME.....	- 39 -
PART II. OTHER CATEGORIES OF CRIMES FOR WHICH ACTS OF SEXUAL VIOLENCE MAY BE RELEVANT	- 51 -
KEY PRINCIPLES ON SEXUAL VIOLENCE FOR POLICY MAKERS	- 55 -

CIVIL SOCIETY DECLARATION ON
SEXUAL VIOLENCE

Introduction

Over the course of 2019, more than 50 civil society organisations came together to bring the voices of survivors to the forefront of discussions about accountability for sexual violence. Sexual violence is a difficult topic to navigate and is often not well understood. Laws and policies addressing sexual violence often do not reflect the reality of what survivors experience and accountability efforts often fall short as a result. The Civil Society Declaration on Sexual Violence seeks to enhance the understanding of what constitutes an act of sexual violence from the perspective of survivors of sexual violence.

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

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

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

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

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

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

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

Preamble

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

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

Despite its egregious nature in all circumstances and the recognition that sexual violence is a threat to peace and security¹ when used as a tactic of war, there is no universal view of what makes an experience of harm or violence 'sexual'. This is due to the widely varying modes of sexual expression, identities, norms, and perceptions among various nations, regions, cultures, communities, and individuals.

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

To that end, the Civil Society Declaration presents diverse views on how to interpret the concept of sexual violence, based primarily on input from self-identified survivors of sexual violence, with additions from civil society, practitioners, academics, and policy makers.

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

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

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

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

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

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

Part 1. General principles

1. Sexual violence involves singular, multiple, continuous, or intermittent acts² which, in context, are perceived by the victim, the perpetrator, and/or their respective communities as sexual in nature. Such acts are to be characterised as sexually violent if they violate a person's sexual autonomy or sexual integrity.
2. This includes acts which are:
 - a. committed 'forcibly',³ meaning through physical force, threat of force, or coercion, such as that caused by fear of violence, duress, detention, psychological oppression, or abuse of power against any person or persons, or by taking advantage of a coercive environment;
 - b. committed against a person who is unable or unwilling to give genuine, voluntary, specific and ongoing consent.⁴ A person may be incapable of giving relevant consent if affected by natural, induced, or age-related incapacity. Other factors that may affect a person's capacity to give genuine consent include literacy, access to information, and linguistic, educational, and economic positions; or
 - c. physiological reactions should not be considered as a reflection of consent or a suggestion that the circumstances were not coercive.
3. Acts of sexual violence can be committed by and against any person, regardless of age, sex, or gender;
4. Acts of sexual violence can be committed at any time and in any environment, including marital, familial, or intimate;
5. An act can be sexual in nature even in the absence of physical contact;
6. An act can be sexual in nature even if it is neither intended to produce sexual gratification, nor does it produce that result;
7. The sexual nature and the gravity of an act are determined in part by identity, ability, age, race, sex, culture, religion, historical precedents, indigeneity, and other intersecting factors. Therefore, if decision makers take steps to understand the context in which an act occurred, they will be better equipped to determine whether an act is sexual, and to assess the gravity of such acts.

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

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

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

Part 2. *Indicia* that an act is sexual in nature

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

1. The act involved exposing a 'sexual body part'⁵ or physical contact with such a body part, including over clothing;
2. The act was intended to be sexual by the perpetrator or was perceived as such by the affected person or their community as being sexual in nature;
3. The perpetrator or a third party⁶ derived sexual gratification from the act, or intended to do so;
4. The act, while not necessarily sexual in itself, was intended to impact:
 - a. the affected person's sexual autonomy or sexual integrity, including their capacity to engage in sexual activity, feel sexual desire, or have intimate relationships;
 - b. the affected person's sexual orientation or gender identity; or
 - c. the affected person's reproductive capacity or reproductive autonomy;
5. The act involved sexual innuendos or language with implicit or explicit sexual connotations for the affected person, the community, or the perpetrator;
6. The act involved use, interference, control, or degradation of fluids or tissue associated with sexual and reproductive capacity, including semen, vaginal fluids, menstrual blood, breast milk, or placenta.

These indicia are illustrative and non-exhaustive.

Part 3. Examples of sexual body parts

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

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

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

⁵ See Part 3.

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

Part 4. Examples of acts of sexual violence

1. Acts of sexual violence can include:
 - a. acts committed by one person against another;
 - b. acts that one person causes another person to commit against themselves, against a third party (including another person or an animal), or on a dead body; or
 - c. acts orchestrated or facilitated by a group, political or state entity or other organisation.
2. Acts that may be regarded as examples of sexual violence include:
 - a. causing someone to form reasonable apprehension, or fear, of acts of sexual violence;⁷
 - b. depriving someone of reproductive autonomy, such as by subjecting them to forced pregnancy,⁸ forced sterilization,⁹ reproductive sabotage,¹⁰ forced parenthood; or preventing them from making choices as to whether or not to use contraception, undergo sterilization, impregnate another person, or carry a pregnancy in their own body to term;
 - c. depriving someone of access to hygiene, treatment, or medicine related to menstruation, pregnancy, childbirth, fistula care, rectal hematoma, HIV or other sexually transmitted infections, sexual maiming, disfigurement, gynaecological, urological or urinary treatment, or any other aspect of sexual health or reproductive health;
 - d. grooming for sexual activity, including through online communication or social media;
 - e. humiliating or mocking a person based on their perceived sexual orientation, gender identity, sexual performance, sexual reputation, sexual choices, sexual activity (or lack thereof), or sexual body parts;¹¹
 - f. intentionally transmitting HIV or other sexually transmitted infection(s);¹²
 - g. prohibiting someone from engaging in consensual sexual activity due to a person's sex, sexual orientation, gender identity, disability, or any other grounds on which discrimination is prohibited under international law;
 - h. punishing someone for refusing to engage in sexual activity;

⁷ As listed in Part 4 of this Declaration.

⁸ Pursuant to Art. 7.2.f of the Rome Statute, 'forced pregnancy' means "[t]he unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy."

⁹ The ICC Elements of Crimes specifies that forced sterilization occurs where "[t]he perpetrator deprived one or more persons of biological reproductive capacity" and "[t]he conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent". In addition, "[t]he deprivation is not intended to include [birth control] measures which have a non-permanent effect in practice" and "[i]t is understood that 'genuine consent' does not include consent obtained through deception". ICC Elements of Crimes, Art. 7.1.g-5, 8.2.b.xxii-5 and 8.2.e.vi-5.

¹⁰ This includes tampering with or damaging condoms and other contraceptives.

¹¹ See Part 3.

¹² Although civil society and survivors consider this act to be inherently violent, we acknowledge that this also has the potential to be a choice knowingly made by someone who, with the consent of the other person involved, accepts the risk.

- i. punishing or degrading someone's perceived non-compliance with gender norms; their perceived status as neither male nor female; or their perceived sexual behaviour, sexual orientation, or gender identity;
 - j. sexually harassing someone by engaging in (repeated) unwelcome sexual conduct which can be interpreted as offensive, humiliating, or intimidating under the circumstances. Unwelcome sexual conduct may include:
 - i. making noises, statements, or gestures with a sexual overtone;
 - ii. sending sexually explicit messages;
 - iii. using phones or other devices to invade privacy; or
 - iv. staring in a way that could be reasonably interpreted as indicating sexual objectification or sexual desire.
 - k. subjecting a person to child marriage or a sexually exploitative relationship; and
 - l. threatening to violate a person's sexual autonomy or sexual integrity, through any means.
3. Acts that may be regarded as examples of sexual violence where they occur forcibly¹³ or against a person who is unable or unwilling to give genuine, voluntary and specific consent,¹⁴ include:
- a. being confined with another person;
 - b. biting a sexual body part¹⁵ or any other body part with a sexual intention;
 - c. disseminating or producing images, footage, or audio recordings of a person in a state of nudity or partial undress or engaged in acts of a sexual nature (either forced or consensual), including through online communication or social media;
 - d. exposing a person to nudity, especially to naked sexual body parts,¹⁶ or exposing them to acts of a sexual nature,¹⁷ including seeing or hearing through images, descriptions, footage, art, or audio recordings thereof;
 - e. having someone enter into or remain in a marriage or other intimate partnership, including an arranged marriage, temporary marriage, false marriage, transfer of spouse/partner;
 - f. having someone feign sexual desire or sexual enjoyment;
 - g. having someone perform movements, including dance movements, with a sexual association;
 - h. having someone perform, in view of others, bodily functions that are normally conducted in private, including measures related to menstrual hygiene;
 - i. having someone undress completely or partially, including the removal of headwear in cultures where this has a sexual implication, or requiring them to wear clothing with a sexual association;

¹³ See Part 1.2.a.

¹⁴ See Part 1.2.b.

¹⁵ See Part 3.

¹⁶ See Part 3.

¹⁷ As listed in Part 4 of this Declaration.

- j. having someone undergo procedures or rituals to determine or alter their sexual orientation or gender identity;
 - k. impregnating a person, through any means;
 - l. inspecting someone's genitals, anus, breasts, or hymen without medical or similar necessity;
 - m. kissing or licking a person, especially a sexual body part;¹⁸
 - n. making physical contact with a person, including by touching any sexual body part¹⁹ of that person's, touching a person with a sexual body part²⁰, or by sitting or lying on a person;
 - o. marking a person as sexually deviant, sexually impure, or as survivor of sexual violence, by using culturally significant methods, such as by removing their hair, requiring them to wear sexually suggestive symbols, or branding their body;
 - p. mutilating, burning, constricting, or otherwise injuring a sexual body part, including after a person's death;
 - q. penetrating someone's body, however slightly, with a human or animal sexual organ;²¹
 - r. penetrating someone's anal or genital opening, however slightly, with an object or body part;²²
 - s. preparing a person to engage in sexual activity with a third person;
 - t. watching someone in a state of nudity or participating in acts of a sexual nature,²³ including seeing or hearing through images, descriptions, footage, art, or audio recordings thereof.
4. Acts committed as part of a structural or institutional violence, including acts and omission by States and other entities, may also be perceived as sexual violence, as input from survivors, practitioners, and global civil society indicates. This includes:
- a. the perpetration of acts of sexual violence (as previously listed) by State representatives or agents;
 - b. the failure of national authorities to:
 - i. protect people from sexual violence;
 - ii. hold perpetrators of sexual violence to account under national law or refer the matter to a competent court; and/or
 - iii. guarantee remedies and assistance to survivors.
 - c. the adoption of discriminatory laws fostering or allowing impunity for the perpetrator, including through law sentences or allowing a perpetrator to escape justice through marriage to their victim.

¹⁸ See Part 3.

¹⁹ See Part 3.

²⁰ See Part 3.

²¹ In many systems, including the ICC, this conduct constitutes rape if committed forcibly or without genuine, voluntary, specific, and ongoing consent.

²² *Ibid.*

²³ As listed in Part 4 of this Declaration.

These examples are illustrative and non-exhaustive. The acts are organized alphabetically to avoid a perception of hierarchy among them. In particular, this aims to avoid the perspective that acts involving penetration are necessarily more serious than other acts.²⁴

Part 5. Factors affecting whether an act of a sexual nature is committed without genuine, voluntary, specific and ongoing consent²⁵

As noted in Part 2, acts of a sexual nature may violate sexual autonomy or sexual integrity if they are committed forcibly²⁶ or against a person who is unable or unwilling to give genuine, specific, and ongoing consent.²⁷ Factors which may be relevant to the determination of whether an act was committed without such consent include:

1. An unequal power relationship between the perpetrator and the affected person due to a variety of possible factors, including:
 - a. the vulnerability of the affected person due to factors considered by the perpetrator to be strategic advantages, such as the affected person's sex, sexual orientation, gender identity, age, disability, poverty, class, social status, caste, ethnicity, indigeneity, race, religion, illiteracy, or other grounds;
 - b. a context of detention, confinement, or institutionalization;
 - c. a context of migration or displacement;
 - d. a context of genocide, widespread or systematic attack, armed conflict, or national disturbances;
 - e. the perpetrator being in possession of a weapon, and the affected person being unarmed;
 - f. the perpetrator being a person in a position of authority;
 - g. the affected person having any type of dependency (including financial, legal,²⁸ professional, familial, and/or personal) on the perpetrator, or any other type of contextual relationship that gives rise to a risk of exploitation;
 - h. an inability or incapacity of the affected person to consent or control their conduct due to age, mental illness, or temporary intoxication;
 - i. an awareness that the perpetrator has previously used violence against the affected person, or a third party, as punishment for non-compliance with the perpetrator's demands; or
 - j. a situation where there is a reasonable fear of suffering sexual violence based on the surrounding context of terror created by the perpetrator(s).

These examples are illustrative and non-exhaustive.

²⁴ It is acknowledged that the alphabetical order will not be apparent in translations of the Declaration.

²⁵ See Part 1.2.b.

²⁶ See Part 1.2.a.

²⁷ See Part 1.2.b.

²⁸ This includes when a person is a caregiver or tutor.

Annex 1. Commentary

Part 1. General principles

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

1. **Sexual violence involves singular, multiple, continuous, or intermittent acts² which, in context, are perceived by the victim, the perpetrator, and/or their respective communities as sexual in nature. Such acts are to be characterised as sexually violent if they violate a person's sexual autonomy or sexual integrity.**
2. **This includes acts which are:**
 - a. **committed 'forcibly',³ meaning through physical force, threat of force, or coercion, such as that caused by fear of violence, duress, detention, psychological**

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

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

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

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

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

⁶ ICTY, *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Appeals Judgement, IT-96-23&IT-96-23/1-A, 12

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

- b. **committed against a person who is unable or unwilling to give genuine, voluntary, specific and ongoing consent.⁴ A person may be incapable of giving relevant consent if affected by natural, induced, or age-related incapacity. Other factors that may affect a person's capacity to give genuine consent include literacy, access to information, and linguistic, educational, and economic positions; or**
- c. **physiological reactions should not be considered as a reflection of consent or a suggestion that the circumstances were not coercive.**

Freely given consent excludes consent given under coercion or in any situation in which the victim is in a vulnerable position where they are unwilling or unable to consent to a sexual act. Situations of vulnerability that could invalidate consent can be the result of, e.g. captivity,⁵ detention,⁶ or any oppressive circumstances, including abuse of power or conflict.⁷ Part 5 of the Declaration establishes a list of factors affecting whether an act of a sexual nature is committed forcibly or without

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

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

genuine consent. While it is widely accepted that consent should not be an element to take into consideration in the case of international crimes (including genocide, crimes against humanity, and war crimes) or mass violations of human rights, it is still relevant outside of these contexts, mainly in domestic settings and in so called 'peace time'.

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

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

Consistent with Principle 3, gender-neutral language is used throughout the Declaration. To include all people, including those who are intersex, the Declaration uses neutral terms (e.g. 'themselves' rather than 'himself' and 'herself'). It is recommended that gender-neutral language be used in translations of the Declaration. If this is not possible linguistically, it is suggested that translations include a footnote specifying that the Declaration is intended to apply to all people regardless of gender or sex.

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

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

This principle reflects the findings of the consultations with survivors where, in addition to discussing conflict-related sexual violence, participants described

experiences of sexual violence within a family environment, most often at the hands of a husband or intimate partner. These responses are consistent with feminist scholarship, which emphasizes that people – especially women and children – are at risk of violence, including sexual violence, within the intimate sphere of the home and family.

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

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

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

Principle 5 is also consistent with jurisprudence of international courts and tribunals. The term sexual violence is also used to describe acts that do not involve

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

⁹ The issue of 'private' versus 'public' spheres was central in the last decades of the twentieth century. It is now widely

recognised that the difference is not relevant anymore. Any crime, including those of sexual violence, committed in any space, should be prosecuted.

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

physical contact or lead to physical injury, such as forced nudity.¹¹

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

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

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

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

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

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

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

¹² In order to gather input from a broad range of stakeholders, including NGOs, practitioners, experts, and members of the general public, as well as to gather examples of specific acts of

Part 2. *Indicia* that an act is sexual in nature

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

1. The act involved exposing a 'sexual body part'¹⁴ or physical contact with such a body part, including over clothing;

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

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

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

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

In several consultations, participants indicated that an act could be regarded as sexual depending on the intent of the perpetrator. Responses of this kind referred to intent to obtain sexual gratification as well as any intent aimed at associating an act with sexuality – including

a sexual nature from various cultural backgrounds, Women's Initiatives for Gender Justice disseminated an online survey as widely as possible. The survey was made available online between October 2018-August 2019 and was completed by 525 respondents from 84 countries (see Annex 2: Methodology).

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

¹⁴ See Part 3.

intent to mark the affected person as sexually deviant or to diminish their sexual desirability in the eyes of others. This can, for example, include acid attacks intended to affect a person's attractiveness to others.

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

Because survivors are the most affected by an act of violence and because they are the principal beneficiaries of any justice-seeking process, accountability, and/or reparations for the violations, an act should be considered sexual whenever they identify it as such. This interpretation should also include the perception of family and the community of the affected persons.

3. The perpetrator or a third party¹⁵ derived sexual gratification from the act, or intended to do so;

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

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

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

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

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

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

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

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

The view that acts are sexual if they impact a person's sexual capacity, desire, or relationships finds support in the arguments of the Legal Representative for Victims (LRV) in the ICC case *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, concerning Kenya's 2007-2008 post-election violence. In this case, the victims argued (through their lawyer) that the act of forcibly circumcising men should be classified as sexual violence because it "had a detrimental effect on them physically and psychologically, including on their ability to have sexual intercourse". For example, one victim was "unable to sustain an erection and suffers from premature ejaculation," and another had difficulties with sex because he had "a pipe fitted in his urethra in order to urinate".¹⁶

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

Some consultations indicated that an act could be considered sexual if its intent was to affect a person's sexual orientation or gender identity. For example, in

¹⁵ For the purposes of this Declaration, a 'third party' can include an animal or person, living or dead.

¹⁶ ICC, Trial Chamber V, *The Prosecutor v. Muthaura & Kenyatta*, Victims' Observations on the "Prosecution's application for

notice to be given under Regulation 55(2) with respect to certain crimes charged", ICC-01/09-02/11-458, 24 July 2012, para 14.

discussions held in Mexico, participants referred to “the intention to ‘convert’ lesbian victims (corrective acts)” as a factor that could make an act sexual in nature. Participants also raised this point in the online survey,¹⁷ indicating that an act might be sexual when resulting “in a survivor feeling disconnected from their gendered personhood.” Participants from Syria raised such impact, especially affecting men repeatedly raped in detention settings.

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

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

It is important to note that the Declaration does not imply that sexual orientation and gender identity are elements that can be changed. The Declaration only reflects that when this is the intention of the perpetrator, and the purpose they seek to achieve through any other act, then it is qualified as a form of sexual violence.

c. the affected person’s reproductive capacity or reproductive autonomy;

¹⁷ ICTR, *Jean Paul Akayesu*, 2 September 2008, para 10A.

¹⁸ ICC, *Muthaura & Kenyatta*, 24 July 2012, *op. cit.*, para 14.

¹⁹ For more details, see comments of Part 4.2.b on “[d]epriving someone of reproductive autonomy, such as by subjecting them to forced pregnancy, forced sterilization, reproductive sabotage, forced parenthood; or preventing them from making

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

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

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

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

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

Participants generally referred to spoken language, but there is no reason to exclude other acts of speech, such

choices as to whether or not to use contraception, undergo sterilization, impregnate another person, or carry a pregnancy in their own body to term.”

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

as sending emails, text messages, and images, or posting messages on social media.

Both implicit and explicit use of sexual language or language with sexual connotations could amount to sexual harassment, which could amount to an act of sexual violence.

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

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

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

These indicia are illustrative and non-exhaustive.

Part 3. Sexual body parts: Illustrative examples

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

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

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

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

Part 4. Examples of acts of sexual violence

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

In some of the consultations, participants did not delineate between sexual acts and sexual violence. For example, when asked for examples of sexual acts, some participants listed acts that are inherently violent (such as rape). Conversely, when asked for examples of sexual violence, some participants listed acts that are only violent if achieved forcibly or without genuine consent (such as touching a sexual body part). The Declaration does not adopt this approach of treating 'sexual acts' and 'sexual violence' as interchangeable concepts.

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

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

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

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

2. Acts that may be regarded as examples of sexual violence include:

a. causing someone to form reasonable apprehension, or fear, of acts of sexual violence;²²

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

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

A good example of such apprehension was articulated by Yazidi survivors from Iraq. Survivors explained that the Yazidis are specifically targeted by fighters, with women being abducted, forced into unwanted marriages, and mistreated if they resist, creating a widespread fear or apprehension of this happening to Yazidi women at any time.

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

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

characteristics of the victim, e.g. age, gender, and vulnerability.

In the judgment of *Akayesu*, the ICTR recognised that, “the female displaced civilians lived in constant fear and their physical and psychological health deteriorated as a result of the sexual violence and beatings and killings.”²³ This Declaration adopts the view that this constant fear, when consciously induced by the perpetrators, can amount to an act of sexual violence in itself, through the creation of an atmosphere that leads to a reasonable apprehension of sexual violence.

b. depriving someone of reproductive autonomy, such as by subjecting them to forced pregnancy,²⁴ forced sterilization,²⁵ reproductive sabotage,²⁶ forced parenthood; or preventing them from making choices as to whether or not to use contraception, undergo sterilization, impregnate another person, or carry a pregnancy in their own body to term;

Classifying these disparate acts as deprivations of reproductive autonomy serves an important purpose: it indicates that the harm lies in depriving a person of agency over their own reproductive capacity. From this perspective, performing an abortion is not necessarily harmful, nor is providing contraception or impregnating a person. Rather, the harm lies in taking away a person’s choice.

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

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

The practice of requiring a person to use contraception has been employed by several actors during armed

²² As listed in Part 4 of this Declaration.

²³ ICTR, *Jean Paul Akayesu*, 2 September 1998, *op. cit.*, para 12A.

²⁴ Pursuant to Art. 7.2.f of the Rome Statute, “forced pregnancy” means “the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy.”

²⁵ The ICC Elements of Crimes specify that forced sterilization occurs where “[t]he perpetrator deprived one or more persons

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

²⁶ This includes tampering with or damaging condoms and other contraceptives.

conflict, such as ISIS²⁷ and the FARC in Colombia. In Colombia, the policy of forced contraception was often coupled with the policy of forced abortion when contraception failed²⁸.

- Restricting choice as to sterilization (which covers both forced sterilization and denying access to sterilization);
- Restricting choice as to impregnating another person (e.g. forcing a man to impregnate another person). Impregnation can include natural and artificial insemination;
- Restricting choice as to carrying a pregnancy. This includes:
 - Preventing a person from accessing abortion services, such as occurred in Nazi Germany, where women who were expected to give birth to Aryan children were denied access to abortions.²⁹ This is different from forced pregnancy, because it does not require proof that the pregnancy was initiated forcibly;
 - Requiring a person to undergo an abortion; and
 - Causing a person to experience a miscarriage. An example was given in the Mexico consultation, in which participants referred to forced abortions caused by beating and torture as a form of sexual violence. Further evidence of forced miscarriage due to physical or mental violence can be found in cases before the Nuremberg Tribunal, the International Criminal Tribunal for Rwanda, and the Women's International War Crimes Tribunal on Japan's Military Sexual Slavery.³⁰

Regarding forced pregnancy, in the Decision on the confirmation of charges against Dominic Ongwen, the Trial Chamber noted that “the essence of the crime (...) is in unlawfully placing the victim in a position in which she cannot choose whether to continue the pregnancy.”³¹ This is in accordance with the view adopted in this Declaration that depriving a person of their reproductive autonomy constitutes a form of sexual violence.

²⁷ See Dieneke De Vos, “[Can the ICC prosecute forced contraception?](#)”, European University Institute, 14 March 2016.

²⁸ See ABColombia, [Colombia: Women, Conflict-Related Sexual violence and the Peace Process](#), November 2013; See also Francisco Gutiérrez Sanín and Francy Carranza Franco, “[Organizing women for combat: The experience of the FARC in the Colombian war](#)” (2017), *Journal of Agrarian change*, Vol 17(4), p 733-738.

²⁹ See Grey, 2017, *op. cit.*, p 912.

The phenomenon of reproductive coercion also includes interfering with a person’s planned contraception means, dubbed ‘birth control sabotage’, and/or interfering with someone’s reproductive plans, called “pregnancy coercion”.³²

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

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

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

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

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

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

³⁰ *Ibid.*, p 911, 914, and 917.

³¹ ICC, Pre-Trial Chamber II, *The Prosecutor v. Dominic Ongwen*, Decision on the confirmation of charges against Dominic Ongwen, ICC-02/04-01/15, 23 March 2016, Para 99-100.

³² Elizabeth Miller, Beth Jordan, Rebecca Levenson, and Jay G. Silverman, “Reproductive coercion: connecting the dots between partner violence and unintended pregnancy” (2010), *Contraception*, Vol 81(6), p 457–459.

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

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

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

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

e. humiliating or mocking a person based on their perceived sexual orientation, gender identity, sexual performance, sexual reputation, sexual choices, sexual activity (or lack thereof), or sexual body parts;³³

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

In Syria, the Independent International Commission of Inquiry identified similar acts. One woman was called a

“dirty Sunni woman” by a male officer as he went to wash his hands after conducting a genital search.³⁴

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

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

It is also well known that a common practice during the Rwandan genocide was to stereotype Tutsi women as temptresses who were more desirable than Hutu women, which resulted in Tutsi women being targeted for acts of sexual violence.³⁵ For instance, witnesses testified about Interahamwe soldiers objectifying Tutsi women’s sexual organs and body parts. A group of women in a camp were forced to undress and perform exercises in order to “display the thighs of Tutsi women”, after which these women were raped following an Interahamwe soldier saying: “Now, let’s see what the vagina of a Tutsi woman feels like.”³⁶

f. intentionally transmitting HIV or other sexually transmitted infection(s);³⁷

used in the raping and killing of Tutsi women in that sector. The Trial Chamber further found that Nyiramasuhuko gave the following order to the woman to whom she distributed the condoms: “[g]o and distribute these condoms to your young men, so that they use them to rape Tutsi women and to protect themselves from AIDS, and after having raped them they should kill all of them. Let no Tutsi woman survive because they take away our husbands.”

³⁶ *Ibid.*, para 437.

³⁷ Although civil society and survivors consider this act to be inherently violent, we acknowledge that this also has the

³³ See Part 3.

³⁴ Human Rights Council, *‘I Lost My Dignity’: Sexual and Gender-based violence in the Syrian Arab Republic*, Conference room paper of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN Doc. A/HRC/37/CRP.3, 8 March 2018, para. 32.

³⁵ ICTR, *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Appeals Judgement, ICTR, IT-98-42, 14 December 2015, para 540: “The Trial Chamber found that, at the beginning of June 1994, Nyiramasuhuko came to the Cyarwa-Sumo Sector, Ngoma Commune, and distributed condoms for the Interahamwe to be

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

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

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

In the Ecuador report, participants underlined the view that sexual violence is not limited to acts committed against one's sexual integrity; it can also include the prohibition of access to consensual sexual activity and the limitation of one's sexual desire. This relates to the notion of 'sexual normality' (versus 'sexual deviancy') which was considered as affecting mainly – but not only – members of the LGBTQ community and persons with disabilities.

This personal, familial, and/or social prohibition of exercising sexuality can be seen as structural sexual violence and could lead, as has been the case within the conflict in Colombia, to extermination or social cleansing of 'sexually deviant' persons.³⁸

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

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

potential to be a choice knowingly made by someone who, with the consent of the other person involved, accepts the risk.

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

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

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

In the Mexico consultation, participants gave the example of a perpetrator using [unspecified] violence against a lesbian woman in order to "take revenge on her for 'taking away' their women". They also referred to "[d]iscriminatory language based on sexual orientation, and [t]hreatening language because of the victim's sexual orientation".

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

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

Across consultations, examples of sexual harassment were prominent. It was raised unanimously in a variety of different forms. Cases of sexual harassment were often broadly recognised as a form of sexual violence which does not include physical contact.

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

³⁸ Amnesty International, *Colombia: "Scarred Bodies, Hidden Crimes": Sexual Violence Against Women in the Armed Conflict*, AMR 23/040/2004, 12 October 2004.

in a manner indicating sexual desire was a form of non-physical sexual aggression.

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

The report from Palestine dedicated an important section to sexual harassment in all its forms. Survivors confirmed that an act is a form of sexual violence when *the conduct implies verbal, physical, and sexual advances offensive to survivors of violence*. Survivors reported that this is a common practice in Palestine and that a majority of them, if not all, “have been verbally harassed while moving from one place to another, in the markets, the streets, public parks, especially during the holidays, and national and cultural occasions”. This involves a sexual act that aims at harassing, undermining, and taking advantage of women and girls. Verbal harassment includes commenting on a woman’s body by explicitly describing her body, intimate body parts, breasts, and genital organs (e.g. making comments such as, “you are pretty”, “you have big breasts”, comments on a girl or woman’s height or bottom, or comments such as “whoever marries you is a lucky man”).

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

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

Sexual harassment relies on the feelings and perception of the affected person(s), regardless of whether the conduct was intended to create such feelings or perceptions. It can be the result of different acts, by different perpetrators, in different places. This is in line with the UN understanding and interpretation of sexual harassment according to which, “sexual harassment has much in common with other sexual abuse, whether it happens in conflict, the home, the street[,] or elsewhere”.³⁹

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

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

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

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

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

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

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

This act also includes conditional threats of sexual violence, such as threats of sexual violence that will occur if the person fails to comply with certain conditions. For example, in the Lebanon consultation, participants gave the example of Person A filming a sexual act with Person B and then threatening to post the film on YouTube if Person B refused to engage in further sexual acts. As disseminating sexual images is itself an act of sexual violence, this threat constitutes sexual violence in its own right.

In the Ukraine consultation, victims talked about incidents of being threatened with a special type of punishment: “One of the female survivors described how her body reacted with stress to the images of violence in her mind arising from the threats. Occasionally, threats did not refer to sexual violence, but the victims were threatened in such a way that they imagined all possible scenarios. Thus, the combatant’s phrase ‘We can do whatever we want to you’ was interpreted by the female

³⁹ UN Women, *Towards an end to Sexual Harassment: The Urgency and Nature of Change in the Era of #METOO*, 2018, p 3.

survivor as a threat, including sexual violence. Victims talked about incidents when they were threatened with a special type of punishment - a transfer to the places of captivity known for the high level of sexual violence.”

3. Acts that may be regarded as examples of sexual violence where they occur forcibly⁴⁰ or against a person who is unable or unwilling to give genuine, voluntary, and specific consent,⁴¹ include:

a. being confined with another person;

During consultations with male survivors, participants raised the example of being locked in the same space with someone of the opposite sex, especially in detention settings. This Declaration adopts the view that this act can be broadened to include all sexual orientations and gender identities depending on the context. As such, being confined with another person of the same sex but with a different sexual orientation, in a state of nudity or any other relevant specific context can have the same effect as being confined with a person with the opposite sexual identity. The fact of being forced to stay in confinement with other persons in state of nudity was also raised by participants in Syria. Although the condition of nudity exacerbates the sexual tension, the close proximity can be sufficient, in the view of survivors, to be considered sexual or create apprehension of sexual violence.

b. biting a sexual body part⁴² or any other body part with a sexual intention;

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

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

An example of this act can also be found in the ICTY case *The Prosecutor v. Duško Tadić*, in which the Trial Chamber

recognised that the fact that a prisoner “was compelled to sexually mutilate [another prisoner] by biting off one of his testicles”,⁴³ was part of a sexual assault.

Biting may also be used to brand a person as a victim of sexual violence. See Part 4.3.0 for more information.

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

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

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

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

d. exposing a person to nudity, especially to naked sexual body parts,⁴⁴ or exposing them to acts of a sexual nature,⁴⁵ including seeing or hearing through images, descriptions, footage, art, or audio recordings thereof;

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

A common example of this act occurs in conflict settings, such as in Myanmar⁴⁶ where people have been forced to watch the rape of a family member. In addition to

⁴⁰ See Part 1.2.a.

⁴¹ See Part 1.2.b.

⁴² See Part 3.

⁴³ ICTY, *Duško Tadić*, Trial Judgement, *op. cit.*, para 198.

⁴⁴ See Part 3.

⁴⁵ As listed in Part 4 of this Declaration.

⁴⁶ Institute for International Criminal Investigations & REDRESS, *Supplement to the International Protocol on the*

constituting an act of sexual violence against the person who was raped, the act of forcing others to witness that act can be regarded as a form of sexual violence against those witnesses. This was a common practice recognised by the Special Court for Sierra Leone (SCSL)⁴⁷ and by the ICTY,⁴⁸ and was raised as an example in consultations by a survivor from South Sudan.

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

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

In the Ecuador consultation, it was found that even when the intention was not necessarily sexual, exposure to nudity (or sexually negligent behaviour) could be considered a sexual act if it affects the perception of one's sexuality.

Being forced to watch/witness nudity or sexual acts, either forced or consensual, was overall considered a violation of one's freedom and personal integrity.⁴⁹

e. having someone enter into or remain in a marriage or other intimate partnership, including an

arranged marriage, temporary marriage, false marriage, transfer of spouse/partner;

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

In the Ongwen case,⁵⁰ the charge of forced marriage as an 'other inhumane act' included as a crime against humanity was established based on previous jurisprudence from the Special Court of Sierra Leone (SCSL)⁵¹ and the Extraordinary Chambers of Cambodia, where it was stated that victims "are forced to enter into conjugal relationships in coercive circumstances" and endure "serious physical or mental suffering or injury or a serious attack on human dignity of a degree of gravity comparable to that of other crimes against humanity."⁵²

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

Documentation and Investigation of Sexual Violence in Conflict: Myanmar, March 2018, p 6-7.

⁴⁷ Special Court for Sierra Leone (SCSL), *The Prosecutor v. Issa Hassan Sesay et al.*, Trial Judgment, SCSL-04-15-T, 2 March 2009, paras 1194 (forcing a man to watch his wife being raped) and 1347 (man forced to watch multiple rapes and killing of his wife, man forced to count each person raping his wife). See also Chris Coulter, *Bush wives and girl soldiers: Women's Lives through War and Peace in Sierra Leone* (Ithaca; London: Cornell University Press, 2009).

⁴⁸ ICTY, *The Prosecutor v. Miroslav Kvočka et al.*, Trial Judgment, IT-98-30/1-T, 2 November 2001, para 98. See also ICTY, *Radoslav Brđanin*, Trial Judgment, *op. cit.*, paras 517 and 1013. Some acts of sexual violence were committed in front of other prisoners at Omarska. In one instance, "an armed man entered the Omarska camp restaurant area where prisoners were eating. He uncovered the breast of a female detainee, took out a knife, and ranit along her breast for several minutes. The other detainees held their breath thinking he might cut off the breast any second" (para 517).

⁴⁹ See Lawyers & Doctors for Human Rights (LDHR), "[The Soul Has Died: Typology, Patterns, Prevalence and the Devastating Impact of Sexual Violence Against Men and Boys in Syrian Detention](#)", March 2019, p 35-37.

⁵⁰ ICC, *Dominic Ongwen*, Confirmation of charges, *op. cit.*, paras 87, 89, 90, 91: "The Chamber agrees that forcing another person to serve as a conjugal partner may, *per se*, amount to an act of a similar character to those explicitly enumerated by article 7(1) of the Statute and may intentionally cause great suffering, and that forced marriage may, in the abstract, qualify as 'other inhumane acts' under article 7 of the Statute rather than being subsumed by the crime of sexual slavery."

⁵¹ SCSL, *The Prosecutor v. Issa Hassan Sesay et al.*, Appeals Judgement, SCSL-04-15-A, 26 October 2009, para 736: "[The] accused, by force, threat of force, or coercion, or by taking advantage of coercive circumstances, causes one or more persons to serve as a conjugal partner, and the perpetrator's acts are knowingly part of a widespread or systematic attack against a civilian population and amount to the infliction of great suffering, or serious injury to body or to mental or physical health sufficiently similar in gravity to the enumerated crimes against humanity."; SCSL, *Prosecutor v. Alex Tamba Brima et al.*, Appeals Judgment, SCSL-2004-16-A, 22 February 2008, para 196.

⁵² Extraordinary Chambers in the Courts of Cambodia (ECCC), *Case 002 Chea Nuon et al.*, Closing Order, 002/19-09-2007-ECCC-OCIJ, 15 September 2010, para 1443.

former Yugoslavia, there are reports from Myanmar of women and girls who have been raped and otherwise sexually abused after being forced into 'marriages' or forced to work as porters or minefield sweepers for the military."⁵³

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

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

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

f. having someone feign sexual desire or sexual enjoyment;

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

The Palestine consultations reveal men requiring their spouses to feign sexual desire and arguing that "the most important thing is the man's enjoyment". There is a social

norm that a man can "enjoy his wife's body any time and under all circumstances, with or without her consent", thus "forcing the wife to have sex during her menstrual period or while pregnant" is something common.

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

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

Several consultation reports mention being coerced into performing any kind of movement, especially - but not necessarily - while naked, in front of or for another person. This could take different forms, including dance, gymnastics, or other physical exercise (e.g. squats and other similar movements).

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

A further example was found by the United Nations Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea (DPRK), which reported that DPRK guards forced prisoners to perform squats while naked.⁵⁴

In the survey, as well as in international jurisprudence, forcing a person to parade naked is recognised as being a form of sexual violence. Forcing victims to parade naked was charged as sexual violence in *The Prosecutor v. Jean-Paul Akayesu* case before the ICTR.⁵⁵

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

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

Similarly, Palestinian survivors described how the toilets are in "Arabic style, which means that the prisoner has to

⁵³ UN Sub-Commission on the Promotion and Protection of Human Rights, *Final Report of the UN Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-like Practices During Armed Conflict*, UN Doc. E/CN.4/Sub.2/1998/13, 1998, para 30.

⁵⁴ Office of the United Nations High Commissioner for Human Rights (OHCHR), *Report of the Detailed Findings of the*

Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea, UN Doc. A/HRC/25/CRP.1', 7 February 2014, p 416-422.

⁵⁵ ICTR, *Jean-Paul Akayesu*, Trial Judgment, *op. cit.*, para 429 and 437.

squat to use it, exposing her body before the soldiers sitting in a transparent glass room opposite the toilets”.

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

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

Support for the first act can be found in the ICTR’s Akayesu case, in which the Trial Chamber held that, “acts of sexual violence include [...]sexual abuse, such as forced nudity”.⁵⁶ In the Kenya consultation, participants referred to the “stripping of women, children[,] or men in public or in the presence of their family members”.

The reference to the removal of headwear takes into account views from the consultations. For example, participants in the Tunisia consultation identified being forced to remove the hijab as a form of sexual violence. In Kosovo, participants referred to “[forcibly] taking off the head scarf or other clothes and disclosing their body or parts of it” as sexual violence.

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

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

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

This act was raised in several consultations. For example, in the Lebanon consultation, participants referred to “the

un-human testing [sic]” of lesbian, gay, bisexual, transgender, and intersex (LGBTI) persons in Syria. Such conduct has also been documented elsewhere. There is evidence that in Nazi Germany, homosexual people were forced to participate in biological experiments aimed at changing their sexual orientation.⁵⁷ To give a more recent example, the Islamic State of Iraq and the Levant has reportedly searched and seized peoples’ cell phones in order to find evidence of homosexual activity.⁵⁸

k. impregnating a person, through any means;

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

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

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

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

This example includes so called “virginity testing”. This testing is still common practice in more than 20 countries and affects many survivors of rape who wish to seek justice, as well as those seeking to be married. In both cases, women undergo an invasive testing procedure, which can be conducted through a variety of methods (mainly to verify the state of the hymen), in order to assess whether they are still a virgin. Another common version of this test is the “two-finger test,” which consists of the insertion of two fingers into the vagina of the person in question to assess its size and elasticity⁵⁹. This can be considered a forcible or non-consensual form of penetration.

⁵⁶ *Ibid.*, para 10A.

⁵⁷ Grey, 2019, *op. cit.*, p 96.

⁵⁸ CUNY School of Law, MADRE, and OWFI, [Communication to the ICC Prosecutor Pursuant to Article 15 of the Rome Statute Requesting a Preliminary Examination into the Situation of Gender-Based Persecution and Torture as Crimes Against](#)

[Humanity and War Crimes Committed by the Islamic State of Iraq](#), 8 November 2017, para 63.

⁵⁹ Dorine Llanta, “[Can two fingers tell the truth?](#)”, International Law Girls, 18 February 2019; WHO, OHCHR, UN Women, [Eliminating Virginity Testing: An Interagency Statement](#), 2018.

Another widely reported example is cavity searches, including vaginal searches, ostensibly for the purpose of finding valuables or documentation. During her 2017 visit to Cox's Bazar to meet with Rohingya people who had fled Myanmar, the UN Secretary General's Special Representative on Sexual Violence in Conflict heard many first-hand accounts of such searches.⁶⁰

This act also includes gynaecological examinations. For example, in the Mexico consultation, participants referred to "improper touching by the [gynaecologist]" as an example of sexual violence. They also mentioned "unnecessary searches (for example, when walking from one area to another in the same space, [where] there was no possibility of hiding something) that included touching and nudity" in the context of security-related searches.

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

m. kissing or licking a person, especially a sexual body part;⁶¹

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

This act, as well as the others, can include a third party. This was illustrated in the ICTY's Tadić case, which included an incident in which a prisoner was forced to lick another prisoner's buttocks.⁶² This was also present in the ICTY case *Prosecutor v. Miroslav Bralo*, where the perpetrator forced a prisoner to lick his penis clean after he had raped her anally.⁶³

n. making physical contact with a person, including by touching a sexual body part⁶⁴ of that person's, touching them with a sexual body part⁶⁵, or by sitting or lying on them;

In the context of this Declaration, this includes the act of one person sitting on any part of another person, with both persons in any state of dress or undress, as long as the act is either perceived as sexual by the affected

person or intended as sexual by the perpetrator. Such a scenario was mentioned in the Mexico consultation.

This act is also in line with international case law. In the ICTR case *The Prosecutor v. Emmanuel Rukundo*, the ICTR mentioned that forcing "sexual contact with [the victim] by opening the zipper of his trousers, trying to remove her skirt, forcefully lying on top of her and caressing and rubbing himself against her until he ejaculated and lost his erection"⁶⁶ was "clearly of a sexual nature." The judges reached the same conclusion regarding "Rukundo's actions and words, such as telling her that if she made love with him, he would never forget her, [which] supports the Chamber's finding that his actions were of a sexual nature".⁶⁷

Consultations with male survivors from Uganda, DRC, Burundi, and South Sudan revealed the example of "being used as a mattress on which another is raped".

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

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

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

⁶⁰ UNSC, *Report of the Secretary-General on Conflict-Related Sexual Violence*, UN Doc. S/2018/250, 16 April 2018, p 55.

⁶¹ See Part 3.

⁶² ICTY, *Duško Tadić*, Trial Judgment, *op. cit.*, para 206.

⁶³ ICTY, *Prosecutor v. Miroslav Bralo*, Initial indictment, IT-95-17, 2 November 1995, para 25.

⁶⁴ See Part 3.

⁶⁵ See Part 3.

⁶⁶ ICTR, *The Prosecutor v. Emmanuel Rukundo*, Trial Judgement, ICTR-2001-70-T, 1 December 2010, para 381.

⁶⁷ *Idem*.

- o. marking a person as sexually deviant, sexually impure, or as survivor of sexual violence, by using culturally significant methods, such as by removing their hair, requiring them to wear sexually suggestive symbols, or branding their body;**

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

Historic examples of this act include forcing homosexual men in Nazi concentration camps to wear a pink triangle patch,⁶⁸ and shaving off the hair of women who were accused of having sex with “the enemy”, as happened in France after World War II.⁶⁹

A recent example of this act is the sexual violence perpetrated against the Rohingyas, highlighted by the *Report on Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts*, published in August 2019 by the U.N. Independent International Fact-Finding Mission on Myanmar. According to this report, “[p]erpetrators commonly scarred survivors [of sexual violence] through biting on their cheeks, thighs[,] and other body parts in what appeared to be attempts of ‘branding’.”⁷⁰

Other examples of marking include tattoos, especially in abusive domestic or exploitative relationships.⁷¹

- p. mutilating, burning, constricting, or otherwise injuring a sexual body part, including after a person’s death;**

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

forces in Libya.⁷² In the Kenya consultation report, participants also raised examples of the mutilation of sexual organs, including sexual organs being severed, as well as female genital mutilation.

These acts were raised on several occasions before the SCSL. During the RUF (Revolutionary United Front) case of *The Prosecutor v. Issa Hassan Sesay et al.*, several examples of the slitting of male and female genitals were referenced.⁷³ During *The Prosecutor v. Moinina Fofana, and Allieu Kondewa* (also known as the Civil Defence Forces case), the Prosecution mentioned the practice of putting pepper on or around men’s genitalia in order to burn them.⁷⁴ A similar example raised in consultations with male survivors was “tying a person to the ground and dripping hot candle wax on their testicles and penis”.

Genital mutilation is a very common form of sexual torture against all genders. Many examples of such acts against men, such as squeezing the penis or the testicles (e.g. with the hand, or by closing a drawer on it/them) can be found in the report published by Heleen Touquet in 2018 regarding sexual violence against men.⁷⁵ Female genital mutilation is widely perpetrated against women and girls during both conflict and peace times. Up until 2018, the World Health Organization noted that “[m]ore than 200 million girls and women alive today have been cut in 30 countries in Africa, the Middle East[,] and Asia where FGM is concentrated”.⁷⁶

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

⁶⁸ Heinz Heger, *The Men with the Pink Triangle* (Merlin-Verlag, 1972).

⁶⁹ Antony Beevor, “[An ugly carnival](#)”, *The Guardian*, 5 June 2009.

⁷⁰ Human Rights Council, *Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts*, UN Doc. A/HRC/42/CRP.4, 22 August 2019, paras 75, 96. The biting to mark sexual violence survivors was also raised in Manisha Nandan, Mahipal Singh Sankhla, Mayuri Kumari, Kirti Sharma, and Rajeev Kumar, “Investigation of Sexual Assault Cases through Bite Marks Identification – A Review Study” (2016, *International Journal of Social Relevance & Concern*, Vol 4(9).

⁷¹ See e.g. Annie Kelly, “[‘I carried his name on my body for nine years’: the tattooed trafficking survivors reclaiming their past](#)”, *The Guardian*, 16 November 2014. See also the work of *Survivors’ Ink* to cover tattoos, scars, and other markings of survivors of sexual violence.

⁷² ICC, Pre-Trial Chamber I, *The Prosecutor v. Gaddafi et al.* Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, ICC-01/11-4-Red, 16 May 2011, para 27; *Report of the International Commission of Inquiry on Libya* (2 March 2012) UN Doc. A/HRC/19/68, p 45.

⁷³ SCSL, *Issa Hassan Sesay et al.*, Trial Judgment, *op. cit.*, paras 1307 and 1208.

⁷⁴ SCSL, *The Prosecutor v. Moinina Fofana and Allieu Kondewa*, Trial Judgment, SCSL-04-14-T, 2 August 2007, paras 496 and 520.

⁷⁵ Heleen Touquet, *Unsilenced. International Truth and Justice Project*, 2018. Other examples of mutilation, electrocution, burning, beating and tying the penis can be found in the LDHR report of 2019, *op. cit.*, p 24-32.

⁷⁶ WHO, *Female Genital Mutilation. Key Facts*, 2018.

q. penetrating someone's body, however slightly, with a human or animal sexual organ;⁷⁷

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

"The perpetrator invaded the body of a person by conduct resulting in *penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.*" (emphasis added).

The un-italicized parts of this definition of rape are included elsewhere in Part 3 of the Declaration. The reference to a sexual organ is interpreted here to include penetration with biological *or synthetic* genital organ.

The example of penetration of the ears was raised during the DRC consultations. Similar examples of penetration of the nose were given by Anne-Marie de Brouwer in an analysis of sexual violence perpetrated during the Rwandan genocide.⁷⁸

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

r. penetrating someone's anal or genital opening, however slightly, with an object or body part;⁷⁹

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

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

Dr Heleen Touquet's report, "Unsilenced International Truth and Justice Project", refers to relevant cases and

⁷⁷ In many systems, including the ICC, this conduct constitutes rape if committed forcibly or without genuine, voluntary, specific, and ongoing consent.

⁷⁸ Anne-Marie de Brouwer et al., *And I live on* (Wolf Legal Publishers, 2019).

⁷⁹ *Ibid.*

original statements from witnesses: "In four cases, the perpetrators put a sharp object up the urinary tract. The objects ranged from pieces of wire, a piece of pen, a thin metal rod to the stem of a coconut leaf. In order to insert the object for the perpetrators, the victim is strapped to a table. This type of torture leads to serious injuries."⁸⁰

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

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

During the consultations with male survivors, participants described cases where people were made to prepare a person to have sex with another person (mainly a commander), including by stimulating the person sexually. This involves physical contact but the act of "preparing a person" could be in itself an act of a sexual nature, even without such physical contact. Another example of this act can be found in the case of Dragoljub Kunarac before the ICTY,⁸¹ where the witness D.B. was forced to take a shower and put in condition (through threats) to "satisfy the commander's desire". She then initiated the sexual activity based on the fear of reprisals.⁸² The preparation of the person to engage in sexual activity could be regarded, according to this Declaration and based on survivors' views, as an act of sexual violence if committed forcibly or without consent.

t. watching someone in a state of nudity or participating in acts of sexual nature,⁸³ including seeing or hearing through images, descriptions, footage, art, or audio recordings thereof.

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

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

This includes watching a person through surveillance cameras. In the Mexico consultation, participants referred to guards "gathering in an office to observe the female inmates through security cameras" and

⁸⁰ See Touquet, 2018, *op. cit.*, p 20.

⁸¹ ICTY, *Prosecutor vs. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Trial Judgement, IT-96-23-T&IT-96-23/1-T, 22 February 2001.

⁸² *Ibid.*, para 219.

⁸³ As listed in Part 4 of this Declaration.

masturbating to such footage as an example of sexual violence.

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

4. Acts committed as part of a structural or institutional violence:

Input from survivors, practitioners, and global civil society indicates that acts and omissions by States and other entities may also be perceived as sexual violence. This includes:

- a. the perpetration of acts of sexual violence (as previously listed) by State representatives or agents;
- b. the failure of national authorities to:
 - i. protect people from sexual violence;
 - ii. hold perpetrators of sexual violence to account under national law or refer the matter to a competent court; and/or
 - iii. guarantee remedies and assistance to survivors.
- c. the adoption of discriminatory laws fostering or allowing impunity for the perpetrator, including through law sentences or allowing a perpetrator to escape justice through marriage to their victim.

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

These examples are illustrative and non-exhaustive. The acts are organised alphabetically to avoid a perception of hierarchy among them. In particular, this aims to avoid the perspective that acts involving penetration are necessarily more serious than other acts.⁸⁴

⁸⁴ It is acknowledged that the alphabetical order will not be apparent in translations of the Declaration.

⁸⁵ See Part 1.2.b.

Part 5. Factors affecting whether an act of a sexual nature is committed without genuine, voluntary, specific and ongoing consent⁸⁵

As noted in Principle 2, acts of a sexual nature may violate sexual autonomy or sexual integrity if they are committed forcibly⁸⁶ or against a person who is unable or unwilling to give genuine, specific and ongoing consent.⁸⁷ Factors which may be relevant to the determination of whether an act was committed without such consent include:

1. An unequal power relationship between the perpetrator and the affected person, due to a variety of possible factors, including:
 - a. the vulnerability of an affected person due to factors considered by the perpetrator to be strategic advantages, such as the affected person’s sex, sexual orientation, gender identity, age, disability, poverty, class, social status, caste, ethnicity, indigeneity, race, religion, illiteracy, or other grounds;
 - b. a context of detention, confinement, or institutionalization;
 - c. a context of migration or displacement;
 - d. a context of genocide, widespread or systematic attack, armed conflict, or national disturbances;
 - e. the perpetrator being in possession of a weapon, and the affected person being unarmed;
 - f. the perpetrator being a person in a position of authority;
 - g. the affected person having any type of dependency (including financial, legal, professional, familial, and/or personal) on the perpetrator, or any other type of contextual relationship that gives rise to a risk of exploitation;
 - h. an inability or incapacity of the affected person to consent or control their conduct due to age, mental illness, or temporary intoxication;
 - i. an awareness that the perpetrator has previously used violence against the affected person, or a

⁸⁶ See Part 1.2.a.

⁸⁷ See Part 1.2.b.

third party, as punishment for non-compliance with the perpetrator's demands; or

- j. a situation where there is a reasonable fear of suffering sexual violence based on the surrounding context of terror created by the perpetrator(s).**

These examples are illustrative and non-exhaustive.

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

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

incapacity. Other factors that may affect a person's capacity to give genuine consent include literacy, access to information, and linguistic, educational, and economic status.

Part 5 seeks to complement this general principle by providing, based on input from survivors of sexual violence, civil society, academics, and legal practitioners, a non-exhaustive list of factors that can affect whether an act of a sexual nature is committed without genuine, voluntary, specific, and ongoing consent.

Many examples were raised during the consultations, some more general regarding contexts (e.g. confinement, migration, or detention), and others more specific, such as when a participant from Guinea relayed an example of sexual violence being perpetrated by "blue helmets and red berets", referring to UN Peacekeepers and members of the military.

Some factors mentioned in this list can be found in national legislations and/or international instruments and are already widely accepted.

Annex 2. Methodology

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

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

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

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

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

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

2. Development of the Civil Society Declaration and its Annexes

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

2.1 Desk research

The first step of the campaign was to conduct extensive desk research on the use of the term 'sexual' in various codifications of sexual violence in national and international criminal laws. This desk research led to the realization that no national or international laws, protocols, or policies on sexual violence explain or give

clear guidance as to what survivors may consider a 'sexual act' or an 'act of sexual violence'. This is also true for the legal documents underpinning the jurisdiction of the ICC.

2.2 Online survey

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

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

2.3 Consultations with survivors of sexual violence

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

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

Approximately 450 survivors of sexual violence took part in consultations. The vast majority were women. The overrepresentation of female survivors was noted after the first round of consultations as an unintended outcome. In order to ensure that the voices of male survivors were also heard, WIGJ worked with local NGO partners to conduct consultations specifically intended to gather the views of male survivors.

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

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

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

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

Participants remained anonymous to WIGJ. This anonymity combined with the style of open-ended dialogues encouraged open and honest discussions. In some countries, local organisations involved in the consultations reported that through these discussions, they had identified practices of sexual violence thus far unknown to them, even after years of working in the field of addressing sexual violence. They credited the open and anonymous nature of the consultations as a critical factor in allowing survivors to disclose the wide range of sexual violence they had endured, witnessed or heard about.

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

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

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

2.4 Drafting process and expert review

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

Two annexes were also prepared:

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

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

- Prof Christine Chinkin, Emerita Professor of International Law, Professorial Research Fellow, and Founding Director of the Centre of Women, Peace, and Security at the London School of Economics and Political Science (LSE), London, United Kingdom;
- Prof Valerie Oosterveld, Associate Professor and Associate Dean at the Faculty of Law of Western University, Ontario, Canada;
- Ms Patricia V. Sellers, Special Adviser on Gender for the Office of the Prosecutor of the International Criminal Court, The Hague, The Netherlands;
- Ms Priya Gopalan, Human Rights, International Criminal Law, and Gender practitioner with extensive expertise on sexual and gender-based violence, Switzerland.

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

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

2.5 Finalisation

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

3. Analysis and use of input

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

- developing phrases that captured the multitude of experiences described by participants;
- shaping the responses into a standard format, such as by structuring the illustrative examples given as responses into distinct 'acts';
- adding references to jurisprudence or academic research to illustrate or clarify certain points;
- ensuring that the Declaration was as inclusive and all encompassing; and
- where possible, describing all acts in gender-neutral terms and avoiding discrimination against members of the lesbian, gay, bisexual, transgender, intersex, or queer (LGBTIQ) community.

4. Future review

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

INTERNATIONAL CRIMINAL LAW GUIDELINES
ON SEXUAL VIOLENCE

Introduction

The International Criminal Law (ICL) Guidelines are complementary to the Civil Society Declaration on Sexual Violence. Based on input from self-identified survivors of sexual violence and additionally from civil society, practitioners, academics, and policy makers, the Civil Society Declaration on Sexual Violence outlines the concept of sexual violence. Together with the Key Principles for Policy Makers on Sexual Violence, the three documents form The Hague Principles on Sexual Violence.

The ICL Guidelines are designed to be of use to practitioners working in international and domestic jurisdictions. The starting point of the Guidelines is the Rome Statute of the International Criminal Court (ICC), as it provides a largely accepted description of the individual acts that may be prosecuted as international crimes. As such, the ICL Guidelines focus on:

- The crime against humanity of 'any other form of sexual violence' (Article 7(1)(g));
- The war crime (in an international armed conflict) of 'any other form of sexual violence also constituting a grave breach of the Geneva Conventions' (Article 8(2)(b)(xxii) Rome Statute); and
- The war crime (in a non-international armed conflict) of 'any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions' (Article 8(2)(e)(vi) Rome Statute).

The ICL Guidelines rely upon the jurisprudence of the ICC, the *ad hoc* international criminal tribunals, and the hybrid tribunals to provide an analysis of the material elements necessary to prove the occurrence of 'any other form of sexual violence'. However, in addition to the material elements, the necessary contextual elements attached to any crime against humanity or war crime will also need to be considered when prosecuting these acts.

Crimes of sexual violence can be committed by a variety of actors and is not limited to the individual who personally perpetrated the act. Practitioners should consider all possible modes of liability contained in the Rome Statute,¹ or in their available jurisdiction. In addition, within the framework of the Rome Statute, practitioners should be aware that the material elements of any given crime must have been committed with the intent and knowledge of the perpetrator, as stipulated in Article 30.

Part I describes the material elements necessary to prove the commission of 'any other form of sexual violence'. The Guidelines recommend the charging and prosecution of acts contained within these Guidelines as acts of 'any other form of sexual violence' in order to reflect their sexual nature. Nonetheless, it is recognised that this crime may not be available in all jurisdictions and that acts of a sexual nature might be prosecuted, for different reasons, under other categories of crimes, such as other inhumane acts or treatments.

Part II outlines a number of other crimes that may fulfil some elements of acts constituting sexual violence. These include the crimes of apartheid, deportation or forcible transfer of a population, enslavement, extermination, genocide, outrages upon personal dignity, persecution, torture, and wilfully causing great suffering or serious injury to body or health.

¹ Rome Statute, Article 25 and 28, namely: commission by an individual, jointly with another or through another person (Article 25(3)(a)); ordering, soliciting, or inducing (Article 25(3)(b)); aiding, abetting, or otherwise assisting (Article 25(3)(c)); contributing in any other way to the commission or attempted commission of a crime by a group of persons acting with a common purpose (Article 25(3)(d)); and command/superior responsibility (Article 28).

Part I. Any other form of sexual violence as a crime against humanity or a war crime

1. To prosecute the crime against humanity or war crime(s) of 'any other form of sexual violence', the ICC Elements of Crimes require that the following material elements must be established:
 - a. The perpetrator committed an act of a sexual nature against one or more persons, or caused the person to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression, or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.²
 - b. Such conduct has a gravity comparable to:
 - i. other crimes against humanity in Article 7(1)(g), namely rape, sexual slavery, enforced prostitution, forced pregnancy, and enforced sterilization (Article 7(1)(g)-6);³
 - ii. that of a grave breach of the Geneva Conventions (Article 8(2)(b)(xxii)-6));⁴ or
 - iii. that of a serious violation of Article 3 common to the four Geneva Conventions (Article 8(2)(e)(vi)-6).⁵

An act of a sexual nature

2. It must be demonstrated that: "The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature [...]".⁶
3. Acts of a sexual nature can be committed by and against any person regardless of age, sex, or gender. This includes same-sex acts.⁷
4. This element may be fulfilled either by the perpetrator:
 - a. committing an act of a sexual nature against one or more persons, or

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

³ ICC Elements of Crimes, Article 7(1)(g)-6, Element Two.

⁴ ICC Elements of Crimes, Article 8(2)(b)(xxii)-6, Element Two.

⁵ ICC Elements of Crimes, Article 8(2)(e)(vi)-6, Element Two.

⁶ ICC Elements of Crimes, Articles 7(1)(g)-6, 8(2)(b)(xxii)-6, Article 8(2)(e)(vi)-6, Element One. This is also a constituent element of the crimes against humanity and war crimes of sexual slavery and enforced prostitution. See respectively ICC Elements of Crimes, Article 7(1)(g)-2, 8(2)(b)(xxii)-2 and 8(2)(e)(vi)-2, Element Two: "The perpetrator caused such person or persons to engage in one or more acts of a sexual nature," and Article 7(1)(g)-3, 8(2)(b)(xxii)-3 and 8(2)(e)(vi)-3, Element One: "The perpetrator caused one or more persons to engage in one or more acts of a sexual nature [...]".

⁷ *Prosecutor v Bemba*, ICC-01/05-01/08, Judgment pursuant to Article 74 of the Statute, 21 March 2016 ('[Bemba Trial Judgment](#)'), para 100; *Prosecutor v Ntaganda*, ICC-01/04-2/06, Judgment, 8 July 2019 ('[Ntaganda Trial Judgment](#)'), para 933. See also, ICC Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes*, June 2014 ('[Policy Paper on Sexual and Gender-Based Crimes 2014](#)'), fn 6.

- b. causing the person to engage in an act of a sexual nature (for example, on the perpetrator, themselves or a third party).⁸
5. An act that is sexual in nature includes both physical and non-physical acts.⁹ As well as the sexual gratification of the perpetrator, the sexual nature of an act may be determined by the sexual humiliation and degradation of the victim.¹⁰
6. Part II of the Civil Society Declaration on Sexual Violence should be consulted for a non-exhaustive list of indicators of whether an act is sexual in nature. Part III of this Declaration also provides a non-exhaustive list of sexual body parts.

Acts considered sexual in nature, taken from jurisprudence

7. Relying upon the international jurisprudence¹¹, whether the acts were prosecuted as such or under another category (especially as other inhumane acts or treatments)¹², the following is a representative list of acts considered to be 'sexual' in nature:
 - a. Beating or causing injury to a sexual body part;¹³
 - b. Biting a sexual body part;¹⁴

⁸ ICC Elements of Crimes, Articles 7(1)(g)-6, 8(2)(b)(xxii)-6, and 8(2)(e)(vi)-6, Element One. See for example, *Prosecutor v Delalić et al.*, IT-96-21-T, Judgment, 16 November 1998 ('*Delalić et al.*, Trial Judgment'), para 1065; *Prosecutor v Todorović*, IT-95-9/1-S, Sentencing Judgment, 31 July 2001 ('*Todorović* Sentencing Judgment'), paras 38-40.

⁹ *Prosecutor v Akayesu*, ICTR-96-4-T, Judgment, 2 September 1998 ('*Akeyesu* Trial Judgment'), para 688; *Prosecutor v Furundžija*, IT-95-17/1-T, Judgment, 10 December 1998 ('*Furundžija* Trial Judgment'), para 186; *Brima et al.*, SCSL-04-16-T, Judgment, 20 June 2007 ('*Brima et al.* Trial Judgment'), para 720; *Prosecutor v Milutinović et al.*, IT-05-87-T, Judgment, 26 February 2009 ('*Milutinović et al.* Trial Judgment'), paras 194-195; *Prosecutor v Rukundo*, ICTR-2001-70-T, Judgment, 27 February 2009 ('*Rukundo* Trial Judgment'), para 380. See also, *Policy Paper on Sexual and Gender-Based Crimes 2014*, p.3; UNHCR, Sub Commission on Prevention of Discrimination and Protection of Minorities, *Contemporary forms of slavery, systematic rape, sexual slavery and slavery like practices during armed conflict: Final Report submitted by Ms. Gay J. McDougall, Special Rapporteur*, 22 June 1998, E/CN.4/Sub.2/1998/13 ('UNHCR Contemporary forms of slavery, systematic rape, sexual slavery and slavery like practices during armed conflict: Final Report'), para 21-22.

¹⁰ *Milutinović et al.* Trial Judgment, para 199.

¹¹ To date (November 2019), the crime of 'any other form of sexual violence' has not been successfully prosecuted before the ICC. The list is therefore based on the jurisprudence of the *ad hoc* tribunals and, where relevant, other hybrid and internationalized courts.

¹² Whilst these Guidelines recommend the charging and prosecution of such acts as 'any other form of sexual violence' where this crime is available, the jurisprudence originates from a variety of other crimes, including inhumane treatment, torture, and persecution.

¹³ *Delalić et al.*, Trial Judgment, para 1019, 1035, 1038-1040 (*in relation to the war crime of causing great suffering or serious injury and the war crime of cruel treatment*: "the placing of a burning fuse cord around the genital areas"); *Todorović* Sentencing Judgment, para 38 (*in relation to sexual assault as the underlying criminal conduct of the crime against humanity of persecution*: the accused "began to beat him and kick him in the genital area"); *Prosecutor v Simić*, IT-95-9/2-S, Sentencing Judgment, 17 October 2002 ('*Simić* Sentencing Judgment'), para 63 (*in relation to the crime against humanity of inhumane acts*: "kicks to their genitals"); *Prosecutor v Naletilic et al.*, IT-98-34-T, Judgment, 31 March 2003 ('*Naletilic* Trial Judgment'), para 450 (*in relation to the war crimes of cruel treatment and willfully causing great suffering*: "beat the victim on the genitals"); *Prosecutor v Brdanin*, IT-99-36-T, Judgment, 1 September 2004 ('*Brdanin* Trial Judgment'), para 498 (*in relation to the crime against humanity and war crime of torture*: "kicked him in his genitals").

¹⁴ *Prosecutor v Tadić*, Opinion and Judgment, IT-94-1-T, 7 May 1997 ('*Tadić* Opinion and Judgment'), para 198 (*in relation to the war crime of torture and inhumane treatment, the war crime of willfully causing great suffering or serious injury to body and health, the war crime of cruel treatment, and the crime against humanity of inhumane acts*: "compelled to sexually mutilate [another prisoner] by biting off one of his testicles"); *Todorović* Sentencing Judgment, para 38 (*in relation to sexual assault as the underlying criminal conduct of the crime against humanity of persecution*: "bit into his penis").

- c. Causing someone to form a reasonable apprehension or fear of acts of sexual violence, including through sexual threats;¹⁵
- d. Forced abortion;¹⁶
- e. Forced marriage;¹⁷
- f. Causing the victim to witness acts of a sexual nature;¹⁸
- g. Having someone perform movements, including dance movements, with a sexual association or whilst partially or fully undressed;¹⁹
- h. Inspecting someone's sexual body parts,²⁰ or the occurrence of menstruation cycles;²¹
- i. Kissing or licking their body, especially a sexual body part;²²
- j. Causing the victim to masturbate himself or herself or another person;²³
- k. Mutilating, burning, constricting, forcibly circumcising, or otherwise injuring a sexual body part;²⁴

¹⁵ *Furundžija* Trial Judgment, para 264: (in relation to the war crime of torture: "Accused B rubbed his knife on the inner thighs of Witness A and threatened to cut out her private parts if she did not tell the truth in answer to the interrogation"); *Prosecutor v Kvočka et al.*, IT-98-30/1-T, Judgment, 2 November 2001 ('*Kvočka et al.* Trial Judgment'), para 98 (in relation to the war crimes of torture and outrages upon personal dignity and the crimes against humanity of torture, inhumane acts and persecution: "it was commonplace for women to be subjected to sexual intimidation or violence"); *Simić* Sentencing Judgment, para 63 (in relation to torture: "had to face threats that his penis would be cut off"); *Brdanin* Trial Judgment, para 516 (in relation to the crime against humanity and war crime of torture: "the threat of rape constituted a sexual assault vis-à-vis the female detainee").

¹⁶ *Kvočka et al. Trial Judgment*, para 180, fn 343: "Sexual violence would also include such crimes as [...] forced abortion".

¹⁷ *Kvočka et al. Trial Judgment*, para 180, fn 343: "Sexual violence would also include such crimes as [...] forced marriage"; Case 002/02, 002/19-09-2007/ECCC/TC, Judgment, 16 November 2018, para 3686-3694 (in relation to other inhumane acts through conduct characterised as forced marriage). See also, in relation to the crime against humanity and the war crime of sexual slavery, *Prosecutor v Sesay et al.*, SCSL-04-15-T, Judgment, 2 March 2009 ('*Sesay et al. Trial Judgment*'), para 1296-1297, 1460-1473, 1579-1582; *Prosecutor v Katanga*, ICC-01/04-01/07, Judgment pursuant to article 74 of the Statute, 7 March 2014 ('*Katanga Trial Judgment*'), para 1000.

¹⁸ *Furundžija Trial Judgment*, para 267(ii) (in relation to the war crime of torture: "Witness D was then forced to watch Accused B's sexual attacks on Witness A"); *Brdanin Trial Judgment*, para 1018 (in relation to the crime against humanity of persecution: "Bosnian Muslims and Bosnian Croats were forced to watch each other's members of their group be killed, raped and beaten"); *Sesay et al. Trial Judgment*, para 1194, 1347 (in relation to sexual violence as acts of terrorism: the witness' wife "was raped by eight rebels and he and his children were forced to watch").

¹⁹ *Prosecutor v Kunarac et al.*, IT-96-23-T & IT-96-23/1-T, Judgment, 22 February 2001 ('*Kunarac et al.*, Trial Judgment'), para 768-9, 772 (in relation to the crime against humanity of outrages on personal dignity: "were forced to strip and dance naked on a table").

²⁰ *Milutinović et al. Trial Judgment*, para 631-2 (in relation to the crime against humanity of persecution through sexual assaults: "[t]he soldier searching her touched her breasts and taunted her with sexual comments" [...] "took the women out of the room and searched them one by one, forcing them to take their clothes off").

²¹ *Kvočka et al. Trial Judgment*, para 106 (in relation to the war crimes of torture and outrages upon personal dignity and the crimes against humanity of torture, inhumane acts and persecution: "he forced her to prove [she was menstruating] to him").

²² *Tadić* Opinion and Judgment, paras 198, 206 (in relation to the war crime of torture and inhumane treatment, the war crime of willfully causing great suffering or serious injury to body and health, the war crime of cruel treatment and the crime against humanity of inhumane acts: "Witness H was ordered to lick his naked bottom and G to suck his penis and then to bite his testicles").

²³ *Prosecutor v Martić*, IT-95-11-T, Judgment, 12 June 2007, para 288, fn 899 (in relation to the crime against humanity of persecution: "[f]ormer detainees reported that detainees were sexually abused through forced mutual oral sex or oral sex with prison guards, and mutual masturbation"). See also, Report on Preliminary Examination Activities 2016, para 94: "These alleged acts included, *inter alia* [...] enforced masturbation".

²⁴ *Kvočka et al. Trial Judgment*, para 180, fn 343: "Sexual violence would also include such crimes as sexual mutilation"; *Prosecutor v Kajelijeli*, ICTR-98-44A-T, Judgment and Sentence, 1 December 2003, para 678, 934-6 (in relation to the crime against humanity of other inhumane acts: "[c]utting a woman's breast off and licking it, and piercing a woman's sexual organs with a spear"); *Prosecutor v Krajišnik*, IT-00-39-T, Judgment, 27 September 2006, para 372, 800 (in relation to the war crime of cruel or inhumane treatment: "at least two men were sexually mutilated"); *Sesay et al. Trial Judgment*, para 1307 (in relation to the war crime of outrages on personal

- l. Causing someone to undress or partially undress;²⁵
- m. Sexual slavery;²⁶
- n. Touching a sexual body part, touching the victim with a sexual body part, or touching them in a sexual way;²⁷
- o. Touching a sexual body part with a weapon or other object.²⁸

dignity: "slitting the genitalia of several male and female civilians"; *Prosecutor v Niyitegeka*, ICTR-96-14-T, Judgment, 16 May 2003, para 312, 462 (*in relation to the crime against humanity of other inhumane acts*: "Kabanda was killed and subsequently decapitated and castrated."). See also, UNHCR Contemporary forms of slavery, systematic rape, sexual slavery and slavery like practices during armed conflict: Final Report, para 21: sexual violence includes acts such as "mutilating a person's genitals or slicing of a women's breasts". However, the ICC has considered that the forced circumcision of men was not of a sexual nature: *Muthaura et al.*, ICC-01/09-02/11, Decision on the Confirmation of Charges, 23 January 2012 (*'Muthaura et al. Decision on the Confirmation of Charges'*), para 265-271. The OTP has indicated that it will continue to present such acts as sexual crimes despite the *Muthaura et al. Decision*: Policy Paper on Sexual and Gender-Based Crimes 2014, fn 14: "The Office will continue to present acts of genital mutilation or deliberate injuries to the genitalia as sexual crimes"; Report on Preliminary Examination Activities 2016, para 94: "the alleged acts included, *inter alia*, inflicting physical injuries to the genitalia of detainees".

²⁵ *Akayesu Trial Judgment*, para 688 (*in relation to the crime against humanity of other inhumane acts, the war crime of outrages upon personal dignity and genocide by serious bodily or mental harm*: "[t]he incident described by Witness KK in which the Accused ordered the Interahamwe to undress a student and force her to do gymnastics naked in the public courtyard of the bureau communal, in front of a crowd, constitutes sexual violence"); *Kunarac et al. Trial Judgment*, para 769, 772 (*in relation to the crime against humanity of outrages on personal dignity*: "forced to strip naked and dance on a table"); *Kvočka et al. Trial Judgment*, para 170 (*in relation to outrages on personal dignity*: "forced public nudity"); *Brdanin Trial Judgment*, para 1013 (*in relation to the crime against humanity of persecution*: the victim was "forced to undress herself in front on cheering Bosnian Serb policemen and soldiers"); *Brima et al. SCSL-2004-16-A*, Judgment, 22 February 2008 (*'Brima et al. Appeal Judgment'*), para 184: "[t]he jurisprudence of international tribunals shows that a wide range of criminal acts, including sexual crimes, have been recognised as 'Other Inhumane Acts'. These include [...] forced undressing of women and marching them in public, forcing women to perform exercises naked". However, the ICC Pre-Trial Chamber found that forcible undressing was not of comparable gravity to the other crimes in Article 7(1)(g): *Prosecutor v Bemba*, ICC-01/05-01/08, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, 12 June 2008 (*'Bemba Arrest Warrant Decision'*), para 40.

²⁶ *Rome Statute*, Article 7(1)(g), Article 8(2)(b)(xxii), Article 8(2)(e)(iv). According to the *ICC Elements of Crimes* (Article 7(1)(g), Article 8(2)(b)(xxii), Article 8(2)(e)(iv)), sexual slavery requires that: "1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as purchasing, selling, lending or bartering such as a person, or by imposing on them a similar deprivation of liberty. 2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature." *Katanga Trial Judgment*, para 1000-1023; *Ntaganda Trial Judgment*, para 954-961, 974-982. See also, *Brima et al. Trial Judgment*, paras 1105-1109, 1113-4, 1136-1141, 1152-1160; *Sesay et al. Trial Judgment*, para 1294, 1579-1582.

²⁷ *Kvočka et al. Trial Judgment*, para 180, fn 343: "Sexual violence would also include such crimes as [...] sexual [...] molestation"; *Milutinović et al. Trial Judgment*, para 631-2, 689 (*in relation to the crime against humanity of persecution through sexual assault*: "touched in a sexual and threatening manner"); *Rukundo Trial Judgment*, para 381 (*in relation to the crime of genocide*: "Rukundo forced sexual contact with her by opening the zipper of his trousers, trying to remove her skirt, forcefully lying on top of her and caressing and rubbing himself against her until he ejaculated and lost his erection"). See also, ICC OTP, *Report on Preliminary Examination Activities 2016* (14 November 2016) (*'Report on Preliminary Examination Activities 2016'*), para 94: "the alleged acts included, *inter alia* [...] provocative physical touching of detainees' genital and anal area, and touching detainees' bodies with perpetrators' sexual organs".

²⁸ *Furundžija Trial Judgment*, para 40 (*in relation to the war crime of torture*: "Accused B rubbed his knife on the inner thighs of Witness A"); *Brdanin Trial Judgment*, para 517 (*in relation to the crime against humanity and war crime of torture*: "uncovered the breast of a female detainee, took out a knife, and ran it along her breast for several minutes") and para 1013 (*in relation to the crime against humanity of persecution*: "a knife was run along the breast of a Bosnian Muslim woman").

List of other elements from the Civil Society Declaration on Sexual Violence and other documents

8. It should be acknowledged that the acts of a sexual nature enumerated above are those that have been discussed before the international criminal courts. The list is not exhaustive.²⁹ As indicated in the Civil Society Declaration on Sexual Violence, other acts of a sexual nature may include the following:
- a. Depriving someone of reproductive autonomy, such as subjecting them to reproductive sabotage,³⁰ forced parenthood, or preventing them from making choices as to whether or not to use contraception, undergo sterilisation, impregnate another person, or carry a pregnancy in their own body to term;
 - b. Depriving someone of access to hygiene, treatment, or medicine related to menstruation, pregnancy, childbirth, fistula care, rectal hematoma, HIV or other sexually transmitted infections, sexual maiming, disfigurement, gynaecological, urological, or urinary treatment, or any other aspect of sexual or reproductive health;
 - c. Grooming for sexual activity, including through online communication or social media;
 - d. Having someone perform, in view of others, bodily functions that are normally conducted in private, including measures related to menstrual hygiene;
 - e. Punishing a person based on their perceived sexual orientation, sexual performance, sexual reputation, sexual choices, sexual activity (or lack thereof), or sexual body parts;
 - f. Intentionally transmitting HIV or other sexually transmitted infection(s);
 - g. Punishing someone for refusing to engage in sexual activity;
 - h. Sexually harassing someone by engaging in (repeated) unwelcome sexual conduct that can be interpreted as offensive, humiliating, or intimidating under the circumstances;
 - i. Subjecting a person to child marriage or a sexually exploitative relationship;
 - j. Disseminating or producing images, footage, or audio recordings of a person in a state of nudity or partial undress or engaged in acts of a sexual nature, including through online communication or social media;³¹

²⁹ It is important to note that this list is not exhaustive, and therefore does not limit the possibilities of prosecuting other existing forms of sexual violence. As mentioned in 2010 by the UN Department of Peacekeeping Operations, "judgments of the ICTY, ICTR and SCSL cannot be said to reflect the totality of sexual-violence crimes – whether they amount to atrocity crimes or not – committed against civilians, including women, in the relevant armed conflicts that convulsed the former Yugoslavia, Rwanda and Sierra Leone. Sexual violence in armed conflicts, including grave sexual crimes amounting to atrocity crimes, is a much bigger problem than reflected in these judgments." UN Department of Peacekeeping Operations, [Review of the Sexual Violence Elements of the Judgments of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone in the Light of Security Council Resolution 1820](#). 2010, para 27.

³⁰ This includes tampering with or damaging condoms and other contraceptives.

³¹ See Report on Preliminary Examination Activities 2016, para 94: "In addition, detainees were [...] repeatedly [...] photographed whilst naked"; Women's Refugee Commission, "More Than One Million Pains': Sexual Violence against Men and Boys on the Central Mediterranean Route to Italy", March 2019.

- k. Exposing a person to nudity, especially to naked sexual body parts, or exposing them to acts of a sexual nature, including seeing or hearing through images, descriptions, footage, art, or audio recordings thereof;³²
- l. Having someone undergo procedures or rituals to determine or alter their sexual orientation or gender identity;
- m. Marking a person as sexually deviant, sexually impure, or as a survivor of sexual violence by using culturally significant methods, such as removing their hair, requiring them to wear sexually suggestive symbols, or branding their body.

Force, threat of force or coercion, taking advantage of a coercive environment or of a person incapable of giving genuine consent

- 9. A crime or crimes against humanity and war crimes consisting of 'other forms of sexual violence' require the act of a sexual nature to have been committed "by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent".³³
- 10. If at least one of the coercive circumstances or conditions set out in the ICC Elements of Crimes is established, this alone is sufficient for the act of a sexual nature in question to amount to 'any other form of sexual violence'.³⁴ Consequently, proving a lack of consent or demonstrating the non-consent of the victim is not a legal element of the crime of 'other forms of sexual violence' crimes under the Rome Statute.³⁵
- 11. To the extent that consent may play a role as a defence, the ICC Rules of Procedure and Evidence make clear that consent cannot be inferred by reason of:
 - a. Any words or conduct of a victim where force, threat of force or coercion, or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent.³⁶
 - b. Any words or conduct of a victim where the victim is incapable of giving genuine consent.³⁷
 - c. The silence of, or lack of resistance by, a victim to the alleged sexual violence.³⁸

³² See Report on Preliminary Examination Activities 2016, para 94: "In addition, detainees were [...] repeatedly exposed to genitalia and pornography".

³³ ICC Elements of Crimes, Article 7(1)(g)-6, 8(2)(b)(xxii)-6 and 8(2)(e)(vi)-6, Element One. This element is also a constituent element of rape and enforced prostitution as crimes against humanity and/or as war crimes. See respectively ICC Elements of Crimes, Article 7(1)(g)-1, 8(2)(b)(xxii)-1 and 8(2)(e)(vi)-1, Element Two and Article 7(1)(g)-3, 8(2)(b)(xxii)-3 and 8(2)(e)(vi)-3, Element One.

³⁴ *Katanga* Trial Judgment, para 965; *Bemba* Trial Judgment, para 105-106; *Ntaganda* Trial Judgment, para 934.

³⁵ *Katanga* Trial Judgment, para 965; *Bemba* Trial Judgment, para 105; *Ntaganda* Trial Judgment, para 934. See also, *Prosecutor v Kunarac et al.*, IT-96-23 & IT-96-23/1-A, Judgment, 12 June 2002 ('*Kunarac et al.*, *Appeal Judgment*'), para 129; *Kunarac et al. Trial Judgment*, para 129, 130; *Prosecutor v Muhimana*, ICTR-95-1B-T, Judgment and Sentence, 28 April 2005 ('*Muhimana Judgment and Sentence*'), para 546; *Prosecutor v Gacumbitsi*, ICTR-2001-64-A, *Judgment*, 7 July 2006, para 153.

³⁶ ICC, Rules of Procedure and Evidence, ICC-ASP/1/3 and Corr.1, 3-10 September 2002 (as amended) ('*Rules of Procedure and Evidence*'), Rule 70(b).

³⁷ *Rules of Procedure and Evidence*, Rule 70(b).

³⁸ *Rules of Procedure and Evidence*, Rule 70(c).

12. The victim's active participation in the sexual act or any physiological reaction does not indicate consent.³⁹
13. The credibility, character, or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of any prior or subsequent conduct of a victim or witness.⁴⁰
14. The crime of sexual violence occurs when an act of a sexual nature is committed under one of the following coercive circumstances or conditions:⁴¹
 - a. Force:
 - i. Although sexual violence may be committed using force, force is not a necessary component.⁴²
 - ii. The force may be directed against the victim or a third person.⁴³
 - b. Threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression, or abuse of power:
 - i. A threat of force or coercion may be directed towards the victim or a third person.⁴⁴
 - ii. Coercion includes that caused by fear of violence, duress, detention, psychological oppression, or abuse of power.⁴⁵ Threats, intimidation, extortion, and other forms of duress that prey on fear or desperation may constitute coercion.⁴⁶
 - iii. Coercion does not require physical force.⁴⁷
 - iv. Examples of threats of force or coercion include, but are not limited to:
 - A. Threats or intimidation using a weapon;⁴⁸
 - B. Threats made against the victim or third person, such as threats to kill or injure,⁴⁹ harm sexual body parts;⁵⁰

³⁹ *Kunarac et al. Trial Judgment*, para 644.

⁴⁰ *Rules of Procedure and Evidence*, Rule 70(d).

⁴¹ *ICC Elements of Crimes*, Articles 7(1)(g)-6, 8(2)(b)(xxii)-6, and 8(2)(e)(vi)-6, Element One. See also, *Ntaganda Trial Judgment*, para 934.

⁴² *Ntaganda Trial Judgment*, para 934. See also, *Akeyesu Trial Judgment*, para 688; *Kunarac et al. Appeal Judgment*, para 129; *Prosecutor v Taylor*, SCSL-03-01-T, *Judgment*, 18 May 2012, para 416; *Prosecutor v Prlić et al.*, IT-04-74-T, *Judgment*, 27 May 2013, para 70.

⁴³ See *Ntaganda Trial Judgment*, para 943. See also, *Akeyesu Trial Judgment*, para 424, 437; *Delalić et al. Trial Judgment*, para 937; *Furundžija Trial Judgment*, para 82; *Kunarac et al. Appeal Judgment*, para 301; *Muhimana Judgment and Sentence*, para 297.

⁴⁴ *ICC Elements of Crimes*, Articles 7(1)(g)-6, 8(2)(b)(xxii)-6, and 8(2)(e)(vi)-6, Element One. See also, *Ntaganda Trial Judgment*, para 944; *Kunarac et al. Appeal Judgment*, para 130; *Kunarac et al. Trial Judgment*, para 711.

⁴⁵ *ICC Elements of Crimes*, Articles 7(1)(g)-6, 8(2)(b)(xxii)-6, and 8(2)(e)(vi)-6, Element One; *Katanga Trial Judgment*, para 965; *Bemba Trial Judgment*, para 105-106; *Ntaganda Trial Judgment*, para 934.

⁴⁶ *Ntaganda Trial Judgment*, para 935; *Akeyesu Trial Judgment*, para 688.

⁴⁷ *Bemba Trial Judgment*, para 103; *Ntaganda Trial Judgment*, para 935. See also, *Prosecutor v Katanga & Chui*, ICC-01/04-01/07, Decision on the Confirmation of Charges, 30 September 2008 ('*Katanga & Chui Decision on the Confirmation of the Charges*'), para 440; *Akeyesu Trial Judgment*, para 688.

⁴⁸ *Ntaganda Trial Judgment*, para 944; *Delalić et al. Trial Judgment*, para 958; *Kunarac et al. Trial Judgment*, para 667.

⁴⁹ *Ntaganda Trial Judgment*, paras 944, 977. See also, *Katanga & Chui Decision on the Confirmation of the Charges*, para 440, fn. 592; *Kunarac et al. Trial Judgment*, para 68, 711; *Prosecutor v Musema*, ICTR-96-13-A, *Judgment and Sentence*, 27 January 2000, para 833.

⁵⁰ *Furundžija Trial Judgment*, para 82.

- C. Regular threats of being subjected to sexual violence;⁵¹
 - D. Detention (whether the detention is legal or illegal);⁵²
 - E. Regular violence committed against detainees;⁵³
 - F. Capture and restraint of victims;⁵⁴
 - G. Abuse of power, with particular consideration for factors such as the age of the victim(s) or perpetrators in positions of authority (such as a soldier, person in an official capacity, or local authorities);⁵⁵
 - H. Psychological oppression and the instilment of a state of constant fear;⁵⁶
 - I. Promises made to the victim, including promises to spare family members.⁵⁷
- c. By taking advantage of a coercive environment:
- i. Some environments are inherently coercive, such as attacks against the civilian population or the military presence of armed groups in an area.⁵⁸ Several factors may contribute to creating a coercive environment, including:
 - A. The number of people involved in the commission of the crime;
 - B. Whether the sexual violence was committed during or immediately following a combat situation; and
 - C. Whether the sexual violence was committed together with other crimes.⁵⁹
 - ii. It has been recognised that the circumstances which prevail in most cases charged as either war crimes or crimes against humanity will be almost universally coercive.⁶⁰
 - iii. It must be shown that the conduct of the perpetrator(s) involved 'taking advantage' of such a coercive environment.⁶¹
- d. Against a person incapable of giving genuine consent. A person may be incapable of giving genuine consent if affected by natural, induced, or age-related capacity.⁶² For example, if the victim was:

⁵¹ *Kvočka et al. Trial Judgment*, para 561.

⁵² *Ntaganda Trial Judgment*, para 934, 976, 978; *Katanga & Chui Decision on the Confirmation of the Charges*, para 353, 434. See also, *Kvočka et al. Trial Judgment*, para 98, 555; *Delalić et al., Trial Judgment*, para 495; *Kunarac et al. Appeal Judgment*, para 132; *Kunarac et al. Trial Judgment*, para 464, 542, 574; *Furundžija Trial Judgment*, para 271.

⁵³ *Kunarac et al. Trial Judgment*, para 574; *Kvočka et al. Trial Judgment*, para 561.

⁵⁴ *Ntaganda Trial Judgment*, para 943.

⁵⁵ *Ntaganda Trial Judgment*, para 943. See also, *Delalić et al., Trial Judgment*, para 495; *Kunarac et al. Trial Judgment*, para 542, 576, 780; *Kvočka et al. Trial Judgment*, para 543, 548, 561.

⁵⁶ *Kunarac et al. Trial Judgment*, para 747.

⁵⁷ *Kunarac et al. Trial Judgment*, para 780; *Kvočka et al. Trial Judgment*, para 551, 555.

⁵⁸ *Bemba Trial Judgment*, para 103; *Ntaganda Trial Judgment*, para 935, 945; *Akeyesu Trial Judgment*, para 688; *Delalić et al., Trial Judgment*, para 495; *Kunarac et al. Appeal Judgment*, para 129-130; *Brima et al. Trial Judgment*, 694-695.

⁵⁹ *Bemba Trial Judgment*, para 104; *Ntaganda Trial Judgment*, para 935, 945; *Brima et al. Trial Judgment*, para 1287.

⁶⁰ *Kunarac et al. Appeal Judgment*, para 130.

⁶¹ *Bemba Trial Judgment*, para 104; *Ntaganda Trial Judgment*, para 935.

⁶² *ICC Elements of Crimes*, fn 16, 51 and 64; *Bemba Trial Judgment*, para 107; *Ntaganda Trial Judgment*, para 981.

- A. Suffering from an illness or disability;⁶³
- B. Under the influence of some substance;⁶⁴ or
- C. Not old enough to give genuine consent.⁶⁵

Comparable Gravity

15. Pursuant to the ICC Elements of Crimes, an act of sexual violence must be of a gravity comparable⁶⁶ to:
- a. Other offences in Article 7(1)(g) of the Rome Statute (Article 7(1)(g)-6);⁶⁷
 - b. That of a grave breach of the Geneva Conventions (Article 8(2)(b)(xxii)-6);⁶⁸ or
 - c. That of a serious violation of Article 3 common to the four Geneva Conventions (Article 8(2)(e)(vi)-6).⁶⁹
16. It should be noted that the language contained in the Elements of Crimes for the war crimes 'of other forms of sexual violence' (namely, that the act of sexual violence must be of 'comparable gravity') differs from the language used in the Rome Statute, which prohibits "any other form of sexual violence also constituting" a grave breach of the Geneva Conventions or a serious violation of Article 3 common to the four Geneva Conventions.⁷⁰ Nonetheless, it is recognised that the majority of delegations in the

⁶³ *Kunarac et al.* Trial Judgment, para 387; *Sesay et al.* Trial Judgment, para 148.

⁶⁴ *Milutinović et al.* Trial Judgment, para 880; *Sesay et al.* Trial Judgment, para 148.

⁶⁵ *Kunarac et al.* Trial Judgment, para 591, 762; *Sesay et al.* Trial Judgment, para 148.

⁶⁶ To date, the only jurisprudence related to the 'comparable gravity' criterion emanates from the *Bemba* Warrant of Arrest Decision. In this case, the Pre-Trial Chamber found that forcible undressing was not of comparable gravity to the other crimes in Article 7(1)(g). See *Bemba* Arrest Warrant Decision, para 40.

However, there is a line of jurisprudence from the *ad hoc* tribunals that confirms that forced nudity is to be considered as an act of sexual violence. *Akeyesu* Trial Judgment, para 688 (*in relation to the crime against humanity of other inhumane acts, the war crime of outrages upon personal dignity, and genocide by serious bodily or mental harm*: "[t]he incident described by Witness KK in which the Accused ordered the Interahamwe to undress a student and force her to do gymnastics naked in the public courtyard of the bureau communal, in front of a crowd, constitutes sexual violence"); *Kunarac et al.* Trial Judgment, para 769, 772: (*in relation to the crime against humanity of outrages on personal dignity*: "forced to strip naked and dance on a table"); *Kvočka et al.* Trial Judgment, para 170 (*in relation to outrages on personal dignity*: "forced public nudity"); *Brdanin* Trial Judgment, para 1013 (*in relation to the crime against humanity of persecution*: the victim was "forced to undress herself in front on cheering Bosnian Serb policemen and soldiers"); *Brima et al.* Appeal Judgment, para 184 ("[t]he jurisprudence of international tribunals shows that a wide range of criminal acts, including sexual crimes, have been recognised as 'Other Inhumane Acts'. These include [...] forced undressing of women and marching them in public, forcing women to perform exercises naked"). See also, UNHCR Contemporary forms of slavery, systematic rape, sexual slavery, and slavery like practices during armed conflict: Final Report, para 21: Sexual violence includes acts such as "forcing a person to strip naked in public"; Report on Preliminary Examination Activities 2016, para 94: "In addition, detainees were forcibly maintained in a state of forced nudity, compelled to perform physical exercises naked [...]"; Policy Paper on Sexual and Gender-Based Crimes 2014, p.3: "An act of a sexual nature is not limited to physical violence, and may not involve any physical contact – for example, forced nudity."

⁶⁷ Rome Statute, Article 7(1)(g); ICC Elements of Crimes, Article 7(1)(g)-6, Element Two: the conduct must be of comparable gravity to: rape; sexual slavery; enforced prostitution; forced pregnancy; or enforced sterilization.

⁶⁸ Rome Statute, Article 8(2)(b)(xxii); ICC Elements of Crimes, Article 8(2)(b)(xxii)-6, Element Two: the conduct must be of comparable gravity to willful killing, torture, or inhumane treatment, including biological experiments; willfully causing great suffering or serious injury to body or health; extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; compelling a protected person to serve in the forces of a hostile power; willfully depriving a protect person of the right to a fair and regular trial; unlawful deportation or transfer or unlawful confinement; and taking hostages.

⁶⁹ Rome Statute, Article 8(2)(e)(vi); ICC Elements of Crimes, Article 8(2)(e)(vi)-6, Element Two: the conduct must be comparable gravity to: violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; outrages upon personal dignity, in particular humiliating and degrading treatment; taking of hostages; the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are generally recognised as indispensable.

⁷⁰ Rome Statute, Article 8(2)(b)(xx) and 8(2)(e)(vi).

Preparatory Commission and Assembly of State Parties, in addition to academics, considered the Rome Statute as the introduction of a specific threshold as to the seriousness of the crime, and not as an additional factor requiring it to be a grave breach or serious violation of common Article 3.⁷¹

17. An act that is sexual in nature includes both physical and non-physical acts.⁷² Consequently, the gravity criterion should not be understood to exclude acts that do not involve penetration or physical contact.⁷³
18. The concept of 'gravity' is also relevant to the admissibility of cases and the sentencing of convicted persons. The Court's analysis of gravity in these circumstances may inform how the Court will assess the 'comparable gravity' criterion for 'other forms of sexual violence'. In particular, it is clear that the court employs both a quantitative and qualitative assessment.⁷⁴ Consequently, the following factors may be considered:
 - a. The scale and widespread nature of the crimes committed, including an assessment of geographical and temporal intensity,⁷⁵ or the number of victims;⁷⁶
 - b. The nature of the unlawful behaviour;⁷⁷
 - c. The manner of the crimes and the means employed to execute the crime⁷⁸ in particular, the commission of the crime in a particularly violent or cruel manner;⁷⁹

⁷¹ R. Arnold & S. Wehrenberg 'Article 8', in O. Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2nd ed. Beck/Hart 2008), p. 503; K Dörmann (ed), *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge University Press 2003), p. 332.

⁷² *Akayesu Trial Judgment*, para 688; *Furundžija Trial Judgment*, para 186; *Brima et al. Trial Judgment*, para 720; *Milutinović et al. Trial Judgment*, para 194-195; *Rukundo Trial Judgment*, para 380. See also, *Policy Paper on Sexual and Gender-Based Crimes 2014*, p. 3; UNHCR Contemporary forms of slavery, systematic rape, sexual slavery, and slavery like practices during armed conflict: Final Report, para 21-22.

⁷³ C. Hall, J. Powderly and N. Hayes 'Article 7', in O. Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2nd ed. Beck/Hart 2008), p. 216.

⁷⁴ In relation to admissibility: *Prosecutor v Abu Garda*, ICC-02/05-02/09, Decision on the Confirmation of Charges, 8 February 2010 ('*Abu Garda* Decision on the Confirmation of Charges'), para 31; *Situation in the Republic of Kenya*, ICC-01/09-19-Corr, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya, 31 March 2010 ('*Kenya* Decision on Authorisation of an Investigation'), para 62; *Situation in the Republic of Cote d'Ivoire*, ICC-02/11-14-Corr, Corrigendum to 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Cote d'Ivoire, 3 October 2011 ('*Cote d'Ivoire* Decision on the Authorisation of an Investigation'), para 203. In relation to sentencing: *Prosecutor v Katanga*, ICC-01-04-01/07, Decision on Sentence Pursuant to Article 76 of the Statute, 23 May 2014 ('*Katanga* Sentencing Decision'), para 43.

⁷⁵ *Prosecutor v Lubanga*, ICC-01/04-01/06, Decision on Sentence pursuant to Article 76 of the Statute, 10 July 2012 ('*Lubanga* Sentencing Decision'), para 49; *Katanga* Sentencing Decision, para 45-52. See also, *Abu Garda* Decision on the Confirmation of Charges, para 31; *Kenya* Decision on Authorisation of an Investigation, para 62; *Cote d'Ivoire* Decision on the Authorisation of an Investigation, paras 204; *Muthaura et al.* Decision on the Confirmation of Charges, para 50; See also, *Policy Paper on Case Selection and Prioritisation*, para 37.

⁷⁶ Rules of Procedure and Evidence, Rule 145(2)(b).

⁷⁷ Rules of Procedure and Evidence, Rule 145(1)(c); *Prosecutor v Al Mahdi*, ICC-01-12-01/15, Judgment and Sentence, 27 September 2016 ('*Al Mahdi* Judgment and Sentence'), para 76; *Abu Garda* Decision on the Confirmation of Charges, para 31, 32; *Kenya* Decision on Authorisation of an Investigation, para 62, 188; *Cote d'Ivoire* Decision on the Authorisation of an Investigation, para 204; *Muthaura et al.* Decision on the Confirmation of Charges, para 50. See also, *Policy Paper on Case Selection and Prioritisation*, para 37.

⁷⁸ Rules of Procedure and Evidence, Rule 145(1)(c); *Al Mahdi* Judgment and Sentence, para 76; *Abu Garda* Decision on the Confirmation of Charges, para 31, 32; *Kenya* Decision on Authorisation of an Investigation, para 62, 188; *Cote d'Ivoire* Decision on the Authorisation of an Investigation, para 204; *Muthaura et al.* Decision on the Confirmation of Charges, para 50. See also, *Policy Paper on Case Selection and Prioritisation*, para 37.

⁷⁹ Rules of Procedure and Evidence, Rule 154(2)(b); *Katanga* Sentencing Decision, para 46-52.

- d. The circumstances of manner, time, and location;⁸⁰
 - e. The impact of the crimes and the extent of the damage caused,⁸¹ in particular the harm caused to the victims and their families,⁸² including mental harm such as depression and dissociation or suicidal behaviour;⁸³
 - f. Commission of the crime where the victim is particularly defenceless⁸⁴ or vulnerable, including against children;⁸⁵
 - g. Commission of the crime for any motive involving discrimination;⁸⁶ and
 - h. Abuse of power or the official capacity of the perpetrator.⁸⁷
19. The Court's jurisprudence in relation to the crime against humanity of 'other inhumane acts' may also inform the analysis of gravity. Inhumane acts must be of 'a character similar to any other act' constituting a crime against humanity in the Rome Statute. The Elements of Crimes notes that 'character' refers to the nature and gravity of the crime.⁸⁸ In determining this, factors relevant may include:
- a. The nature of the act or omissions;⁸⁹
 - b. The context in which it occurred;⁹⁰
 - c. The personal circumstances and vulnerability of the victim(s), including age, sex, and health;⁹¹ and

⁸⁰ Rules of Procedure and Evidence, Rule 145(1)(c); 23; *Katanga* Sentencing Decision, para 40; *Al Mahdi* Judgment and Sentence, para 76.

⁸¹ *Al Mahdi* Judgment and Sentence, para 76.

⁸² Rules of Procedure and Evidence, Rule 145(1)(c); *Katanga* Sentencing Decision, para 55-60; *Abu Garda* Decision on the Confirmation of Charges, para 31, 32; *Kenya* Decision on Authorisation of an Investigation, para 62, 188; *Cote d'Ivoire* Decision on the Authorisation of an Investigation, para 204; *Muthaura et al.* Decision on the Confirmation of Charges, para 50. See also, Policy Paper on Case Selection and Prioritisation, para 37.

⁸³ *Lubanga* Sentencing Decision, para 41.

⁸⁴ Rules of Procedure and Evidence, Rule 154(2)(b).

⁸⁵ *Lubanga* Sentencing Decision, para 37-44.

⁸⁶ Rules of Procedure and Evidence, Rule 154(2)(b); *Katanga* Sentencing Decision, para 53-54.

⁸⁷ Rules of Procedure and Evidence, Rule 154(2)(b).

⁸⁸ ICC Elements of Crimes, Article 7(1)(k), fn. 30; *Katanga & Chui* Decision on the Confirmation of the Charges, para 448, 451; *Muthaura et al.* Decision on the Confirmation of Charges. 269, 277; *Prosecutor v Ongwen*, ICC-02/04-01/15, Decision on the Confirmation of Charges against Domonic Ongwen, 23 March 2016 ('*Ongwen* Decision on the Confirmation of Charges'), para 88. See also, *Brima et al.* Appeal Judgment, para 198.

⁸⁹ *Katanga & Chui* Decision on the Confirmation of the Charges, para 449; *Prosecutor v Vasiljević*, IT-98-32-A, Judgment, 3 March 2000 ('*Vasiljević* Appeal Judgment'), para 165; *Brima et al.* Appeal Judgment, para 200; *Nuon & Khieu*, 002/19-09-2007/ECCC/TC, Case 002/01, Judgment, 7 August 2014 ('Case 002/01 Trial Judgment'), para 438. See also, *Delalić et al.* Trial Judgment, para 536; *Prosecutor v Krnojelac*, IT-97-25-T, Judgment, 15 March 2002 ('*Krnojelac* Trial Judgment'), para 131.

⁹⁰ *Katanga & Chui* Decision on the Confirmation of the Charges, para 449; *Vasiljević* Appeal Judgment, para 165; *Brima et al.* Appeal Judgment, para 200; Case 002/01 Trial Judgment, para 438. See also, *Delalić et al.*, Trial Judgment, para 536; *Krnojelac* Trial Judgment, para 131.

⁹¹ *Katanga & Chui* Decision on the Confirmation of the Charges, para 449; *Vasiljević* Appeal Judgment, para 165; *Brima et al.* Appeal Judgment, para 200; Case 002/01 Trial Judgment, para 438. See also, *Delalić et al.*, Trial Judgment, para 536; *Krnojelac* Trial Judgment, para 131.

- d. The impact of the act upon the victim, including the physical, mental, and moral effects of the act upon the victim.⁹²
20. In relation to crimes of 'other forms of sexual violence', findings from the *Call it what it is* campaign with survivors of sexual violence⁹³ suggest that the gravity of the act may be exacerbated if, among other things:
- a. The act occurred in public or in view of others, or is being shared or threatened to be shared via technological means;
 - b. The act was committed by multiple perpetrators;
 - c. The act was repeated more than once;
 - d. The act was accompanied by physical and/or psychological violence (including through degradation, insult, humiliation, and/or any other verbal abuse);
 - e. The act was perpetrated against a child or other vulnerable person;
 - f. The affected person was forced to engage in acts of a sexual nature with someone known to them, especially with a family member or the like;
 - g. The act was committed for purposes such as obtaining information or a confession, punishment, humiliation, intimidation, or coercion;
 - h. The act was committed based on discrimination of any kind;
 - i. The act was committed with an intent to destroy in whole or in part, a national, ethnic, racial, or religious group;
 - j. The act was committed with an intent to displace or persecute a group of which the affected person was part;
 - k. The affected person experienced rejection by family, spouse, or community as a result of the act, including if it made the person appear 'unmarriageable' in societies where marriage is necessary for social acceptance and/or economic security;
 - l. The affected person contracted an infection, a secondary illness, HIV, or another sexually transmitted infection as a result of the act;
 - m. The affected person suffered adverse economic consequences, including a loss of earning capacity or livelihood, as a result of the act;
 - n. The affected person experienced a loss of reproductive autonomy or reproductive capacity as a result of the act, including such examples as where they were forced to impregnate, 'breed', or to

⁹² *Katanga & Chui* Decision on the Confirmation of the Charges, para 449; *Muthaura et al.* Decision on the Confirmation of Charges, para 277, 279; *Vasiljević* Appeal Judgment, para 165; *Brima et al.* Appeal Judgment, para 200; Case 002/01 Trial Judgment, para 438. See also, *Delalić et al.*, Trial Judgment, para 536; *Krnjelac* Trial Judgment, para 131.

⁹³ This list was initially part of the Civil Society Declaration on Sexual Violence but was removed as it is more applicable to the legal and judicial Guidelines rather than a broader civil society instrument.

- conceive; or where the act or omission led to infertility, amenorrhea, pregnancy, miscarriage, unsafe abortion, or difficulties in conception, pregnancy, childbirth, or parenthood;
- o. The act was performed by United Nations officials or any other humanitarian actors;
 - p. The act was performed or endorsed by State officials, or was tacitly permitted by the State as evinced, among other things, by a failure to genuinely investigate or prosecute the act or refer the act to a competent court;
 - q. The act was performed by someone with a fiduciary relationship, familial relationship, or intimate relationship to the affected person;
 - r. The affected person experienced difficulty engaging in consensual sexual activity as a result of the act.

Part II. Other categories of crimes for which acts of sexual violence may be relevant

As mentioned in the introduction, the specification of ‘other forms of sexual violence’ is designed to criminalize conduct not adequately captured by the specific sexual violence crimes contained in the Rome Statute, namely crimes against humanity or war crimes of rape, sexual slavery, enforced prostitution, forced pregnancy, and enforced sterilization. The acts previously identified under this category can also be taken into account to determine whether other war crimes and crimes against humanity have been committed that may have all or some of their elements fulfilled by acts of sexual violence. Better understanding what these acts of sexual violence are can therefore help prove other crimes (providing that the contextual elements and other additional elements from the definition are met), including:

1. Apartheid⁹⁴

According to the Rome Statute, apartheid “means inhumane acts [...] committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime”.⁹⁵ The definition refers to ‘inhumane acts’ which, as mentioned in Part I.7 of this document, comprise acts of sexual violence.⁹⁶

2. Deportation or forcible transfer of population⁹⁷

According to the Rome Statute, deportation or forcible transfer of a population is defined as the “[f]orced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law”.⁹⁸ The ‘other coercive acts’ referred to in the definition can be understood as including acts of sexual violence.⁹⁹

⁹⁴ Rome Statute, Article 7(1)(j).

⁹⁵ Rome Statute, Article 7(2)(h).

⁹⁶ The crime of apartheid has not been litigated before international criminal tribunals, but for the purpose of these guidelines, it is assumed that acts of sexual violence can constitute inhumane acts that would contribute to the oppression of a racial group.

⁹⁷ Rome Statute, Article 7(1)(d).

⁹⁸ Rome Statute, Article 7(2)(d). This also constitutes a war crime under Article 8(2)(a)(vii)-1. As a war crime, however, it is only specified that “[t]he perpetrator deported or transferred one or more persons to another State or to another location.” See ICC Elements of Crimes Article 8(2)(a)(vii)-1.

⁹⁹ See *Prosecutor v Dordevic*, IT-03-70-I, Indictment, 25 September 2003, para 29, where sexual assault was used as an example of an act that “[c]reated an atmosphere of fear and oppression” in order to “facilitate [...] expulsions and displacements”.

3. Enslavement¹⁰⁰

According to the Rome Statute, enslavement “means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children”.¹⁰¹ Even if acts of a sexual nature committed within enslavement are very likely to constitute the independent crime of sexual slavery,¹⁰² sexual violence can also be relevant for the broader crime of enslavement.¹⁰³

4. Extermination¹⁰⁴

According to the Rome Statute, extermination “[i]ncludes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population”.¹⁰⁵ Inflicting conditions of life calculated to bring about the destruction of part of a population can involve acts of sexual violence.¹⁰⁶

5. Genocide¹⁰⁷

According to the Rome Statute, the crime of genocide, implying an “intent to destroy, in whole or in part, a national, ethnical, racial or religious group,” may be committed by causing serious bodily or mental harm¹⁰⁸ to one or more persons, including by acts of rape and sexual violence.¹⁰⁹ The ‘serious bodily or mental harm’ can include rape,¹¹⁰ as well as a broad range of other forms of sexual violence of sufficient gravity¹¹¹ affecting the targeted group.¹¹²

6. Outrages upon personal dignity¹¹³

According to the Elements of Crimes of the ICC, the outrages upon personal dignity implies that “[t]he perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons” with severity.¹¹⁴ As mentioned before and as underlined in the Civil Society Declaration on Sexual Violence, all forms of sexual violence can be used as a mean to humiliate, degrade, or violate another person’s integrity and autonomy, and consequently, their dignity. Acknowledging that acts of sexual violence have been committed can therefore help identify whether or not an act can be characterised as the war crime of outrages upon personal dignity.¹¹⁵

¹⁰⁰ Rome Statute, Article 7(1)(c).

¹⁰¹ Rome Statute, Article 7(2)(c).

¹⁰² Rome Statute, Article 7(1)(g).

¹⁰³ See *Kunarac et al. Trial Judgment*, para 543, where the control of someone’s sexuality was considered a relevant factor to determine enslavement.

¹⁰⁴ Rome Statute, Article 7(1)(b).

¹⁰⁵ Rome Statute, Article 7(2)(b).

¹⁰⁶ For instance, the fear of sexual violence created by a campaign of sexual terror (reasonable fear or apprehension) can lead to the fear of travel to go look for water, medicine etc. “Infliction of conditions of life” can also include, among others, deprivation of sexual autonomy and reproduction (mainly preventing somebody to carry a pregnancy), or access to sexual hygiene.

¹⁰⁷ Rome Statute, Article 6.

¹⁰⁸ Rome Statute, Article 6(c).

¹⁰⁹ Elements of Crimes, Article 6(b), fn 3.

¹¹⁰ *Akeyesu Trial Judgment*, para 731-34; *Prosecutor v Gacumbitsi*, ICTR 2001-64-T, *Trial Judgment*, 17 June 2004, para 291-93; *Muhimana Judgment and Sentence*, para 552-63.

¹¹¹ In the appeal judgment of *Seromba*, judges noted that “[t]he quintessential examples of serious bodily harm are torture, rape, and non-fatal physical violence that causes disfigurement or serious injury to the external or internal organs.” *Prosecutor v Athanese Seromba*, ICTR-2001-66-A, *Appeal Judgment*, 12 March 2008, para 46.

¹¹² Although the jurisprudence has focused mainly on rape as an element of genocide, other acts have also been considered by the judges for a better understanding of the genocidal context. See for example *Rukundo Trial Judgment*, para 381.

¹¹³ Rome Statute, Article 8(2)(b)(xxi) and 8(2)(c)(ii).

¹¹⁴ Elements of Crimes, Article 8(2)(b)(xxi) and 8(2)(c)(ii), Elements 1 and 2.

¹¹⁵ This finds support in the jurisprudence, especially in relation to forced nudity and other acts performed while in a state of undress. See *Kunarac et al.*, *Trial Judgment*, para 768-9: victims “were forced to strip and dance naked on a table” and para 769, 772: victims

7. Persecution¹¹⁶

According to the Rome Statute, persecution as a crime against humanity “means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity”.¹¹⁷ This includes the deprivation of physical and psychological integrity through acts of sexual violence. These acts and the context in which they are committed can constitute underlying criminal conduct of persecution and be a critical piece of proof of persecutory behaviours.¹¹⁸

8. Torture¹¹⁹

According to the Rome Statute, torture is “the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions”.¹²⁰ Rape has often been characterised as a form of torture.¹²¹ However, this is not the only crime of a sexual nature which can cause “severe pain and suffering”. All acts listed in these Guidelines, whether extracted from the jurisprudence¹²² or from the Civil Society Declaration on Sexual Violence, should therefore be taken into consideration when it comes to the evaluation of a crime of torture.

9. Wilfully causing great suffering, or serious injury to body or health¹²³

According to the Elements of Crimes of the ICC, this crime is characterised by “[t]he perpetrator [having] caused great physical or mental pain or suffering to, or serious injury to body or health of, one or more persons”. Similar to ‘other inhumane acts’ and torture or inhuman treatment, this crime implies great pain or suffering, either physical or mental.¹²⁴ This suffering can be the result of acts of sexual violence as listed above.

were “forced to strip naked and dance on a table”; *Sesay et al.* Trial Judgment, para 1307: acts of “slitting the genitalia of several male and female civilians”; *Kvočka et al.* Trial Judgment, para 173: “perform[ing] subservient acts” and “endur[ing] the constant fear of being subjected to physical, mental or sexual violence” in camps.

¹¹⁶ Rome Statute, Article 7(1)(h).

¹¹⁷ Rome Statute, Article 7(2)(g).

¹¹⁸ Several acts were taken into consideration by the tribunals in relation to persecution. See the following examples: *Todorović* Sentencing Judgment, para 38: the accused “began to beat him and kick him in the genital area” and “bit into his penis”; *Brdanin* Trial Judgment, para 1013: the victim was “forced to undress herself in front of cheering Bosnian Serb policemen and soldiers”, “a knife was run along the breast of a Bosnian Muslim woman”, and para 1018: “Bosnian Muslims and Bosnian Croats were forced to watch each other’s members of their group be killed, raped and beaten”; *Milutinović et al.* Trial Judgment, para 631-2: “[t]he soldier searching her touched her breasts and taunted her with sexual comments”, he “took the women out of the room and searched them one by one, forcing them to take their clothes off”; *Kvočka et al.* Trial Judgment, para 98: “it was commonplace for women to be subjected to sexual intimidation or violence” (also in relation to the war crimes of torture and outrages upon personal dignity and crimes against humanity consisting of torture and inhumane acts).

¹¹⁹ Rome Statute, Article 7(1)(f).

¹²⁰ Rome Statute, Article 7(2)(e).

¹²¹ *Delalić et al.*, Trial Judgment, para 495; ECHR, *Aydin v Turkey*, Judgment, 25 September 1997, para 86; Inter-American Commission on Human Rights, *Raquel Mejía v Peru*, Case 10.970, OEA/Ser.L/V/II.91, 1 March 1996.

¹²² Acts of sexual violence have been considered to determine whether or not torture took place in several cases. See *Brdanin* Trial Judgment, para 498 (kicking in the genitals) and para 517 (“uncovered the breast of a female detainee, took out a knife, and ran it along her breast for several minutes”); *Tadić* Opinion and Judgment, para 198 and 206 (mutilation and biting of testicles, also in relation to the war crimes of inhumane treatment, of wilfully causing great suffering or serious injury to body and health and the crime against humanity of inhumane acts); *Furundžija* Trial Judgment, para 267(ii): “Witness D was then forced to watch Accused B’s sexual attacks on Witness A” and para 264: “Accused B rubbed his knife on the inner thighs of Witness A and threatened to cut out her private parts if she did not tell the truth in answer to the interrogation”. For other examples of explicit or implicit threats of sexual violence (against men and women) see *Simić* Sentencing Judgment, para 63 and *Brdanin* Trial Judgment, para 516 (“the threat of rape constituted a sexual assault vis-à-vis the female detainee”).

¹²³ Rome Statute, Article 8(2)(a)(iii).

¹²⁴ This is consistent with the jurisprudence which often mentioned both crimes together in relation to certain acts. *Naletilić Trial Judgment*, para 450: “beat[ing] the victim on the genitals”; *Tadić* Opinion and Judgment, para 198 and 206: “compelled sexually to mutilate [another prisoner] by biting off one of his testicles”.

KEY PRINCIPLES ON
SEXUAL VIOLENCE
FOR POLICY MAKERS

Meaningfully addressing sexual violence starts with understanding what constitutes an act of sexual violence. By incorporating these 10 principles in policy development and implementation, legislative strategies and legal and judicial procedures, the risk of overlooking or trivialising sexual violence - in all its forms - can be mitigated and addressed more effectively. The 10 Key Principles on Sexual Violence are derived from the Civil Society Declaration on Sexual Violence.

- Principle 1: There is no universal view of what makes an experience of harm or violence 'sexual';¹
- Principle 2: Sexual violence involves singular, multiple, continuous, or intermittent acts² which, in context, are perceived by the victim, the perpetrator, and/or their respective communities as sexual in nature. This includes acts that are committed 'forcibly'³ or against a person who is unable or unwilling to give genuine, voluntary, specific, and ongoing consent;⁴
- Principle 3: An act can be sexual in nature even in the absence of physical contact;
- Principle 4: An act can be sexual in nature even if it is neither intended to nor in fact produces the result of sexual gratification;
- Principle 5: Acts of sexual violence are deeply rooted in every society and can be committed at any time and in any environment, including in the context of marital, familial, or intimate relationships;
- Principle 6: Acts of sexual violence can be committed by and against any person, regardless of age, sex, or gender;
- Principle 7: Understood broadly, the concept of 'sexual violence' encompasses all violations of sexual autonomy and sexual integrity;
- Principle 8: The sexual nature and the gravity of an act are determined in part by individual factors, including the identity, ability, age, race, and sex of the survivor and the perpetrator, as well as contextual factors, including culture, religion, historical precedents, indigeneity, and other intersecting factors;
- Principle 9: The impact of sexual violence is felt by individuals, but also by families, communities, and societies, and can persist for generations;
- Principle 10: Practitioners will be better equipped to determine whether an act is sexual, and to assess the gravity of such acts, when they take steps to understand the lived experience of survivors⁵ and to understand the context in which an act occurred through thoughtful engagement.

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

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

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

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

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

