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TRAINING MANUAL

Accountability Mechanisms for Crimes Committed in Syria

November 2018

A Manual of the International Bar Association's Human Rights Institute (IBAHRI)

Supported by the International Legal Assistance Consortium (ILAC) and
by a grant from the Swedish International Development Cooperation Agency (Sida)

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About the International Bar Association's Human Rights Institute (IBAHRI)

The International Bar Association, established in 1947, is the world's leading organisation of international legal practitioners, bar associations and law societies. It has a membership of over 80,000 individual lawyers, and 190 bar associations and law societies, spanning over 160 countries. The IBAHRI, an autonomous and financially independent entity, works with the global legal community to promote and protect human rights and the independence of the legal profession worldwide.

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List of acronyms

CCAIL	Code of Crimes against International Law
DPIA	Data protection impact assessment
DPP	Director of Public Prosecutions
IBAHRI	International Bar Association’s Human Rights Institute
ICC	International Criminal Court
ICL	International Criminal Law
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International humanitarian law
IHRL	International human rights law
ILAC	International Legal Assistance Consortium
IRL	International refugee law
JCE	Joint criminal enterprise
MENA	Middle East and North Africa
OECD	Organisation for Economic Co-operation and Development
OSCE	Organization for Security and Co-operation in Europe
OTP	Office of the Prosecutor
PILPG	Public International Law & Policy Group
Sida	Swedish International Development Cooperation Agency
UN	United Nations
UNSC	United Nations Security Council

Introduction

Background

CONTEXT

Syria is the scene of the 21st century's most bloody and significant conflict.

As it enters its eighth year, more than 500,000 Syrians have lost their lives; some as a direct result of participation in the fight against the regime, but, by far and away the majority, have been killed as innocent civilians, and have been killed following direct targeting by the Assad regime.

Not since the Second World War, have we witnessed global displacement on such a scale, with estimates of over 12 million citizens having been displaced as a direct result of the conflict. Further, not since the Second World War have we seen such a frequency or volume of instances of war crimes and crimes against humanity.

THE NEED FOR ACCOUNTABILITY

A process of accountability is essential in any conflict and post-conflict scenario. Time and time again we see that where such a process is not developed and implemented, a country and its peoples cannot move on and develop.

With such a high death toll in Syria, the majority of which have been civilians, and the majority of which have been targeted by the regime, either individually or collectively, it is beyond doubt that a process of transitional justice and accountability is so desperately needed.

Further, given the tactics displayed in the conflict, such as the detention of civilians en masse, the mass torture and murder of those that seek to oppose the regime, the use of indiscriminate attacks against civilians, the deliberate targeting of hospitals and the use of chemical weapons, the need for justice is as stark as it has ever been in any conflict.

Even if the conflict was to end today, there are victims numbering in their hundreds of thousands, perhaps millions, that would survive, and that would have a desperate need to see justice done through investigation and prosecution.

Without this need being satisfied, there can never be peace. Accordingly, those 'in country', who have, or are willing, to undertake the investigation of alleged offences, and where possible, seek to bring cases against perpetrators or prepare cases to be brought outside Syria, must ensure that those investigations are conducted in accordance with recognised rules and standards.

Any criminal proceedings against individuals will be conducted in accordance with accepted procedural norms, and therefore relevant and appropriate steps will be taken to ensure all individuals, regardless of allegiance, have their fair trial rights respected.

Accordingly, it is essential that the evidence collated, and cases prepared, are not only credible, but also capable of being subjected to appropriate levels of scrutiny. For this reason, lawyers have requested that they be trained in terms of evidence collation and case preparation.

INTERNATIONAL BAR ASSOCIATION'S HUMAN RIGHTS INSTITUTE'S SYRIA PROJECT

The International Bar Association's Human Rights Institute (IBAHRI) has partnered with the International Legal Assistance Consortium (ILAC) to strengthen the capacity of Syrian lawyers to engage with international and national human rights and accountability mechanisms. The project, funded by the Swedish International Development Cooperation Agency (Sida), aims to develop a short and long-term engagement strategy of Syrian justice sector actors with human rights and accountability mechanisms to ensure that Syrian lawyers play an active role in:

- advocating for solutions to issues related to the conflict before the United Nations (UN);
- shaping the development of UN-level recommendations regarding Syria and its transitional justice processes; and
- fighting impunity for crimes committed during the conflict.

The IBAHRI will organise a series of training sessions, including a training workshop on Accountability Mechanisms for Crimes Committed in Syria.

Overview of the manual

SCOPE AND PURPOSE OF THE MANUAL

What is the manual about?

The following training curriculum is aimed at Syrian legal professionals to provide practical training on the documentation, investigation and prosecution of international crimes as part of the armed conflict in the Syrian Arab Republic and provide an insight into the different legal procedures of civil law, common law and international criminal judicial institutions.

How is IBAHRI's training programme different from any other training?

The emphasis on this component of the training programme is 'practical training' providing investigators and lawyers with the skills they require to operate safely and securely in a conflict zone and will look at basic skills, as well as specialised skills, such as chain of custody, data security and dealing with sensitive/traumatised victims and witnesses. The focus will be on national prosecutions under universal jurisdiction, and documentation collection and storage for future prosecutions.

It is noted that Syrian lawyers, judges and human rights activists have undergone significant ‘theoretical’ training on international humanitarian law (IHL) and the documentation of international crimes; however, there has been little practical and structured training on the documentation process in conflict zones, undertaking criminal investigations, rules of evidence and chain of custody considerations, witness handling (particularly sensitive and traumatised victims), case management/preparation and working with national investigative and prosecutorial agencies in universal jurisdiction cases, and most importantly, how to best use limited resources and select cases that have the greatest impact on truth, justice and accountability. There is therefore a critical need for practical training on how to navigate these complex issues and develop a strategy that is meaningful, workable and serves the interests of victims.

As a starting point, this process must be needs driven. In this regard, making a detailed assessment as to what the relevant Syrian institutions require can only be achieved by coordinating with the relevant institutions and organisations involved in the process and making an assessment as to what they require in order to be sustainable. It is essential that Syrian legal professionals and international actors coordinate activities to prevent duplication in an area where time and resources are limited.

One of the critical areas of concern is that the development and training undertaken thus far has not been aimed at developing and strengthening the institutional capacity and sustainability of Syrian legal professionals. This is considered as a core objective of the IBAHRI training programme.

THE TRAINING WORKSHOP

What are the objectives of the training?

The workshop accompanying this manual has been developed with a view to equipping participants with:

- practical skills on the documentation of international crimes;
- knowledge of and practical skills on investigation, litigation and prosecution of international crimes;
- knowledge and understanding of universal jurisdiction in Europe; and
- an understanding of the role of Syrian lawyers in engaging with the European jurisdiction.

The training programme will offer an opportunity for Syrian legal professionals to share their experiences of collecting evidence and engaging with European courts and aims to forge professional networks between Syrian lawyers interested in collaborating on universal jurisdiction cases.

The training will be facilitated in both English and Arabic.

Who are your trainers?

The workshop will be delivered by a team of three legal experts:

- Toby Cadman, UK barrister, Guernica 37 Chambers;
- Anwar Al Bunni, Syrian lawyer, Director of the Syrian Center for Legal Researches & Studies; and
- Natacha Bracq, French lawyer, IBAHRI Programme Lawyer – Middle East and North Africa (MENA) region.

After the training

At the end of the training, the lawyers will take part in a roundtable gathering of European legal professionals and organisations involved in universal jurisdiction cases. They will also be invited to take part in coordination meetings aimed at developing an engagement strategy with international and national accountability and human rights mechanisms.

Section 1: International crimes

Learning objectives

By the end of this section, the participants will be able to:

- define international crimes and their elements;
- identify acts amounting to international crimes;
- develop learning objectives; and
- prepare a training agenda.

Key message

International criminal law (ICL) deals with the criminal responsibility of individuals for international crimes, which include genocide, war crimes and crimes against humanity. Torture is also considered as an international crime under public international law.

It is essential for you to learn about international crimes:

- before you start collecting evidence and interviewing witnesses: the acts criminalised at the domestic level and their legal elements will influence the types of evidence you need to collect and the scope of your investigation; the evidence you need gather in order establish the commission of a crime is called crime base evidence; and
- when you start collecting evidence and interviewing witness: it will inform the types of questions you need to ask.

International crimes

WHAT ARE INTERNATIONAL CRIMES?

ICL deals with the criminal responsibility of individuals for international crimes, which include genocide, war crimes and crimes against humanity. Torture is also considered as an international crime under public international law.

There is no generally accepted definition of international crimes. Definitions can be found in various instruments/sources, such as international customary law, treaties establishing international criminal tribunals and their decisions, and international treaties that require state parties to adopt national legislation for the criminal prosecution of specific conduct.

Since the adoption of the Rome Statute, several states, including France, the United Kingdom, Germany, Sweden and Spain, have criminalised genocide, war crimes and crimes against humanity. While some of them have directly incorporated the definition of these crimes in the Rome Statute

(such as the UK), many states have adopted their own definition, which differs from one country to another (such as Germany and France).

It is beyond the scope of this manual to assess the similarities and differences between international crimes under the International Criminal Court (ICC) and domestic criminal law.

The position adopted for the purpose of this manual is to use international crimes as defined in the Rome Statute¹ and the ICC Elements of Crimes,² and interpreted by the ICC. Particular attention will nonetheless be given to the statutes and case law of the ad hoc tribunals (the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)) as they are also considered as authoritative sources of ICL by international and national tribunals.

WHY IS IT IMPORTANT TO LEARN ABOUT INTERNATIONAL CRIMES?

Before you start collecting evidence and interviewing witnesses

You need to gain in-depth knowledge of international crimes and their definition under ICL and the relevant national criminal legislation. You need to understand the legal elements of genocide, war crimes and crimes against humanity, as well as of their underlying individual acts.

You then need to assess whether there are any differences between the international and national definitions. For example, some war crimes have not been codified at the domestic level, or some countries have adopted additional elements for crimes against humanity or genocide.

The acts criminalised at the domestic level and their legal elements will influence the types of evidence you need to collect and the scope of your investigation. The evidence you need to gather in order to establish the commission of a crime is called crime base evidence (for more details see Section 4).

When you start collecting evidence and interviewing witnesses

You should always have the elements of international crimes in mind, especially when interviewing witnesses, as they will inform the types of questions you need to ask.

For example, the crime of torture as a war crime requires establishing that the acts of torture were inflicted for such purposes as obtaining information or a confession, punishing him, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind. In addition to asking questions related to the pain suffered by the victim, you will also need to gather information related to the purpose of the perpetrator.

1 Rome Statute of the ICC, 2187 UNTS 90, adopted 17 July 1998, entered into force 1 July 2002.

2 ICC, Elements of Crimes, Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3–10 September 2002, www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf accessed 24 September 2018.

Genocide was first defined in Article II of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 as:

‘any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group’.

Article 6 of the Rome Statute uses exactly the same wording to define genocide. The following contextual elements are required to establish genocide:

- One of the acts listed in Article 6 of the Rome Statute was committed, namely killing, causing serious bodily or mental harm, deliberately inflicting conditions of life calculated to bring about physical destruction, imposing measures intended to prevent births, or forcibly transferring children.
- The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious groups, as such.
- The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.³

Regard must be given to the fact that genocide is not necessarily the act of a ‘mass killing’, although this is perhaps the most widely understood position. Genocide does not necessarily present itself in the context of a ‘massacre’ or something similar.

The ICC Elements of Crimes defines the elements of each separate acts of genocide:

‘Article 6(a) – Genocide by killing

1. The perpetrator killed one or more persons.
 2. Such a person or persons belonged to a particular national, ethnical, racial or religious group.
- (...)

Article 6(b) – Genocide by causing serious bodily or mental harm

1. The perpetrator caused serious bodily or mental harm to one or more persons.
 2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
- (...)

³ ICC Elements of Crimes, Art 6.

Article 6(c) – Genocide by deliberately inflicting conditions of life calculated to bring about physical destruction

1. The perpetrator inflicted certain conditions of life upon one or more persons.
2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
(...)
4. The conditions of life were calculated to bring about the physical destruction of that group, in whole or in part.
(...)

Article 6(d) – Genocide by imposing measures intended to prevent births

1. The perpetrator imposed certain measures upon one or more persons.
2. Such person or person belonged to a particular national ethnical, racial or religious group.
(...)
4. The measures imposed were intended to prevent births within that group.
(...)

Article 6(e) – Genocide by forcibly transferring children

1. The perpetrator forcibly transferred one or more persons.
2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
(...)
4. The transfer was from that group to another group.
5. The person or persons were under the age of 18 years.
6. The perpetrator knew, or should have known, that the person or persons were under the age of 18 years.
(...)

The definition of genocide as incorporated into ‘domestic’ legislation and therefore pursued on the basis of universal jurisdiction is based on the Convention on the Prevention and Punishment of the Crime of Genocide or the Rome Statute. For instance, in the UK, the International Criminal Court Act 2001 at section 50,⁴ refers to genocide as being:

‘(1) In this Part –

“genocide” means an act of genocide as defined in article 6 [of the Rome Statute]’.

⁴ See www.legislation.gov.uk/ukpga/2001/17/section/50 accessed 24 September 2018.

As alluded to above, however, there are states that require additional elements, and thus the international definition is not always the sole reference. France as an example, implemented a distinction from the Rome Statute when including genocide in its own domestic Penal Code at part 211-1, in that French law requires a ‘*concerted plan*’ to provide criminal responsibility for the offence.

Germany, as a further example, again makes a distinction, in that German law only requires that ‘*one person*’ (a member of the group) be targeted on the basis of national, racial, religious or ethnic grounds in order to establish genocide, so long as there is the requisite *mens rea*.⁵

The fact that such distinctions are made on occasion reaffirms the point made above, that it is essential that a full understanding is gained, as there are differences in the definitions of offences subject to whether the jurisdiction is national or international.

CRIMES AGAINST HUMANITY

Although long recognised as among the gravest international crimes that carry non-derogable status bestowed by the concept of *jus cogens*, thereby forming part of the growing body of customary international law, ‘crimes against humanity’ remain singularly undefined, as such, in legal discourse. Unlike other international crimes, such as genocide, war crimes and torture, all of which are defined in at least one multilateral treaty, the definition of crimes against humanity varies from one statute to another,⁶ and is therefore supplemented by case law and legal scholarship.

The respective statutes of the ICTY and ICTR laid down a modern definition of crimes against humanity to address serious offences committed in both these regions in the 1990s.

Today, the most widely recognised definition of crimes against humanity is set out in Article 7 of the Rome Statute of the ICC as ‘any of the following acts⁷ when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack’.

However, it must be noted that while the Rome Statute formulation is generally accepted as the most comprehensive and authoritative definition, it does not definitively represent the last word on crimes against humanity. The body of international legal scholarship and jurisprudence emanating from the various ad hoc tribunals, as well as the ICC, also serve as informative and authoritative sources upon which any interpretation of crimes against humanity is shaped.

Before setting out the constituent elements of the crimes against humanity, it is also important to note that, in contrast to previous definitions of crimes against humanity, there is no requirement under Article 7 of the Rome Statute to establish either: (1) a nexus with armed conflict (national or international);⁸ or (2) discriminatory intent (except for the crime of ‘persecution’).⁹

5 Code of Crimes against International Law (CCAIL), entered into force on 30 June 2002.

6 See the ‘Martens Clause’ of The Hague Convention of 1907; the 1945 Charter of the International Military Tribunal (Nuremberg Charter); Control Council Law No 10 of 1945; the Statute of the ICTY; the Statute of the ICTR; and the Rome Statute of the ICC.

7 (1) Murder; (2) extermination; (3) enslavement; (4) deportation or forcible transfer of population; (5) imprisonment or other severe deprivation of physical liberty; (6) torture; (7) rape or any other form of sexual violence of comparable gravity; (8) persecution; (9) enforced disappearance of persons; (10) apartheid; and (11) other inhumane acts. See the Rome Statute of the ICC 1998.

8 In contrast to the definition set in the Nuremberg Charter. See *The Prosecutor v Tadić* (Appeals Judgment) IT-94-I-A (15 July 1999) para 249.

9 In contrast to the definition set in the Nuremberg Charter and Control Council Law No 10 of 1945. Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmschurst. *An Introduction to International Criminal Law and Procedure*, (2nd edn, Cambridge University Press 2010), pp 230–266.

Contextual elements of crimes against humanity

For one of the specific underlying acts to qualify as a ‘crime against humanity’ the following contextual elements must be established:

1. the conduct was undertaken pursuant to or in furtherance of a state policy or plan;
2. the conduct committed was part of a widespread or systematic attack directed against a civilian population;
3. there is a nexus between the act of the perpetrator and the attack; and
4. the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.

State policy or plan

In contrast to ICTY and ICTR jurisprudence, the Rome Statute includes a state or organisational policy element. Under the Rome Statute, an ‘attack’ must meet two sets of threshold requirements:

1. a high threshold that establishes the attack as either ‘widespread or systematic’ (discussed below); and
2. a lower threshold that requires ‘a course of conduct involving the multiple commission of acts... against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack’.¹⁰

This policy requirement ‘requires that the State or organisation actively promote or encourage such an attack against a civilian population’.¹¹ For example, ‘a policy which has a civilian population as the object of the attack would be implemented by State or organisational action... [and] in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack’.¹²

The existence of such a policy cannot be inferred solely from the absence of governmental or organisational action.¹³ The ICC Pre-Trial Chamber has interpreted this policy requirement as being a policy ‘made by groups of persons who govern a specific territory or by any organisation with the capability to commit a widespread or systematic attack against a civilian population’.¹⁴

10 Art 7(2)(a) of the Rome Statute.

11 See n 3 above, Introduction to Art 7 of the Statute, para 3.

12 See n 3 above, Introduction to Art 7 of the Statute, fn 6.

13 *Ibid*, fn 6.

14 *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (Decision on the Confirmation of Charges) ICC-01-04-01 (30 September 2008) para 396.

Widespread or systematic

An attack can be either widespread or systematic. It is the attack itself that must be widespread or systematic, and not the specific acts with which the accused is charged.¹⁵ Therefore, provided there is a sufficient nexus between the individual act and the overall ‘attack’, a single occurrence of a prohibited act, such as a murder committed by an individual, can constitute a crime against humanity if conducted as part of the widespread or systematic attack against the civilian population.

The term ‘widespread’ connotes the large-scale nature of the attack, which should be

‘massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims. It entails an attack carried out over a large geographical area or an attack in a small geographical area directed against a large number of civilians’.¹⁶

The ‘widespread’ characteristic can also refer to the scale of the acts perpetrated and the number of victims.¹⁷ A widespread crime may be the cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude.¹⁸

The term ‘systematic’ is interpreted expansively to refer to the organised nature of the acts of violence and the improbability of their random occurrence.¹⁹ Today, several prominent legal commentators consider the state or organisational policy requirement to be ‘essentially superfluous’ as the ‘widespread or systematic’ nature of an attack on a civilian population itself arguably demonstrates the existence of a plan or policy.^{20,21}

15 *Situation in the Republic of Kenya* (Authorisation Decision) ICC01/09-19-Corr (31 March 2010) para 94. See also *The Prosecutor v Kordić and Čerkez* (Judgment) IT-95-14/2-A (17 December 2004) para 94; *The Prosecutor v Blaskić* (Judgment) IT-95-14-T (3 March 2000) para 101 referring to *The Prosecutor v Kunarac et al* (Appeal Judgment) IT-96-23/1-A (12 June 2002) para 96.

16 *The Prosecutor v Jean-Pierre Bemba Gombo* (Decision Pursuant to Art 61(7) (a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo) ICC-01/05-01/08 (15 June 2009) para 83 and fn 106, 107 referring to *The Prosecutor v Jean-Paul Akayesu* (Judgment) ICTR-96-4-T (2 September 1998) para 580. See also *The Prosecutor v Rutaganda* (Judgment and Sentence) ICTR-96-3-T (6 December 1999) para 69; *The Prosecutor v Musema* (Judgment and Sentence) ICTR-96-13-T (27 January 2000) para 204; *The Prosecutor v Ntakirutimana et al* (Judgment) ICTR-96-10 and ICTR-96-17-T (13 December 2004) para 804; *Situation in the Republic of Côte d'Ivoire* (Corrigendum to Authorisation Decision) ICC-02/11-14-Corr (3 October 2011) para 53; *The Prosecutor v Laurent Koudou Gbagbo* (Decision on Warrant of Arrest) ICC-02/11-01/11-9-Red (3 November 2011) para 49.

17 *The Prosecutor v Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman* (Decision on the Prosecution Application under Art 58(7) of the Statute) ICC-02/05-01/07-1-Corr (27 April 2007) para 62; *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (Decision on the Confirmation of Charges) ICC-01/04-01/07-717 (30 September 2008) para 394; *The Prosecutor v Omar Hassan Ahmad Al Bashir* (Arrest Warrant Decision) ICC-02/05-01/09-2-Conf (4 March 2009) para 50 (public redacted version in ICC-02/05-01/09-3) para 81; *The Prosecutor v Jean Pierre Bemba Gombo* (Decision) ICC-01/05-01/08-424 (15 June 2009) para 83; *The Prosecutor v Callixte Mbarushimana* (Decision on Warrant of Arrest) ICC-01/04-01/10-1 (28 September 2010) para 24; *The Prosecutor v Laurent Koudou Gbagbo* (Decision on Warrant of Arrest) ICC-02/11-01/11-9-Red (3 November 2011) para 49; *The Prosecutor v Germain Katanga* (Judgment) ICC-01/04-01/07-3436 (7 March 2014) para 1123. See also *The Prosecutor v Blaskić* (Judgment) IT-95-14-T (3 March 2000) para 48; *The Prosecutor v Mladen Naletilić and Vinko Martinović* (Judgment) IT-98-34-T (31 March 2003) para 236; *The Prosecutor v Kayishema and Ruzindana* (Trial Judgment) ICTR-95-1; ICTR-96-10 (21 May 1999) para 123; *The Prosecutor v Bagilishema* (Trial Judgment) ICTR-95-1A-T (7 June 2001) para 77; *The Prosecutor v Kordić and Čerkez* (Judgment) IT-95-14/2-A (17 December 2004) para 94.

18 *The Prosecutor v Kordić and Čerkez* (Judgment) IT-96-14/2-T (26 February 2001) para 179; *The Prosecutor v Kordić and Čerkez* (Judgment) IT-95-14/2-A (17 December 2004) para 94.

19 *The Prosecutor v Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman* (Decision) ICC-02/05-01/07-1-Corr (27 April 2007) para 62; *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (Decision on the Confirmation of Charges) ICC-01/04-01/07-717 (30 September 2008) para 394; *Situation in the Republic of Kenya* (Corrigendum to the Authorisation Decision) ICC-01/09-19-Corr (31 March 2010) para 96; *The Prosecutor v Callixte Mbarushimana* (Decision on Warrant of Arrest) ICC-01/04-01/10-1 (28 September 2010) para 24; *Situation in the Republic of Côte d'Ivoire* (Corrigendum to Authorisation Decision) ICC-02/11-14-Corr (3 October 2011) para 54; *The Prosecutor v Laurent Koudou Gbagbo* (Decision on Warrant of Arrest) ICC-02/11-01/11-9-Red (3 November 2011) para 49; *The Prosecutor v Germain Katanga* (Judgment) ICC-01/04-01/07-3436 (7 March 2014) para 1123.

20 Rodney Dixon in Otto Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court-Observer's Notes, Article by Article* (2nd ed, Nomos Verlag 2008), pp 179–180.

21 Kevin Jon Heller, ‘The Rome Statute in Comparative Perspective’ in Kevin Jon Heller and Markus D Dubber (eds), *The Stanford Handbook of Comparative Criminal Law* (Stanford Law Books, 2009) p 45.

While the ICC, as well as the ICTY, have held the requirements to be alternatives, in practice, these criteria may often be difficult to separate since a widespread attack targeting a large number of victims generally relies on some form of planning or organisation. The consequences of the attack upon the targeted population, the number of victims, the nature of the acts, the possible participation of officials or authorities, or any identifiable patterns of crimes may be taken into account to determine whether the attack satisfies either or both of the ‘widespread’ and ‘systematic’ requirements.²²

Attack

An attack in the context of crimes against humanity is a course of conduct involving the multiple commissions of acts of violence.²³ The notion of a widespread and systematic ‘attack’ is logically and factually distinct from that of armed conflict, and an attack on a civilian population may precede, outlast or continue through an armed conflict.²⁴

Although the Rome Statute makes clear that the prohibited acts must occur as part of an attack, the acts alone could constitute the attack itself.²⁵ The Rome Statute clarifies that the term ‘attack’ does not necessarily equate with ‘military attack’. Indeed, the term refers more generally to a campaign or operation carried out against the civilian population, the appropriate terminology used in Article 7(2) of the Rome Statute being ‘course of conduct’. The attack need not involve any military forces or armed hostilities or even include any acts of violence. It is now part of international customary law that the attack need not take place in the context of armed hostilities or an armed conflict.²⁶

Directed against any civilian population

The Rome Statute, and the ICTY and ICTR Statutes, as well as jurisprudence, state that the attack may be committed against any civilian population.²⁷ This qualification has been interpreted to mean that the inclusion of non-civilians (military forces or those who have previously borne arms in a conflict) does not necessarily deprive the population of its civilian character. However, the targeted population must remain predominantly civilian in nature.²⁸

The attack must be directed against any civilian population and the latter must be the primary object of an attack.²⁹

22 *The Prosecutor v Kunarac et al* (Appeal Judgment) IT-96-23/1-A (12 June 2002) para 95.

23 *Situation in the Republic of Kenya* (Authorisation Decision) ICC-01/09-19 (31 March 2010) para 94; ICTR, *The Prosecutor v Nahimana et al* (Judgment) ICTR-99-52-A (28 November 2007) para 918.

24 *The Prosecutor v Kunarac et al* (Judgment) IT-96-23/1-A (12 June 2002) para 86.

25 See n 20 above, p 174. See also *The Prosecutor v Jean-Paul Akayesu* (Judgment) ICTR-96-4-T (2 September 1998) para 581.

26 *The Prosecutor v Jean-Paul Akayesu* (Judgment) ICTR-96-4-T (2 September 1998) para 581.

27 For a detailed definition of ‘civilian population’ see Art 43, 50(1) and (2) Additional Protocol I of the Third Geneva Convention, as well as Common Art 3 of the Geneva Conventions that stipulates that persons placed *hors de combat* can also be victims of crimes against humanity.

28 *The Prosecutor v Jean Pierre Bemba Gombo* (Judgment) ICC-01/05-01/08-3343 (21 March 2016) paras 153–154; *The Prosecutor v Germain Katanga* (Judgment) ICC-01/04-01/07-3436 (7 March 2014) para 1105.

29 *The Prosecutor v Jean Pierre Bemba Gombo* (Judgment) ICC-01/05-01/08-3343 (21 March 2016) para 154; *The Prosecutor v Germain Katanga* (Judgment) ICC-01/04-01/07-3436 (7 March 2014) para 1104; *The Prosecutor v Jean Pierre Bemba Gombo* (Decision on the Confirmation of Charges) ICC-01/0501/08-424 (15 June 2009) para 76. See *The Prosecutor v Kunarac et al* (Judgment) IT-96-23/1-A (12 June 2002) para 91; *The Prosecutor v Mrkšić* (Appeal Judgment) IT-95-13/1 (5 May 2009) para 23.

In order to determine whether the attack is directed against the civilian population, several factors are taken into account. These include, inter alia:

- the means and methods used in the course of the attack;
- the status of the victims and their number;
- the discriminatory nature of the attack;
- the resistance to the assailants at the time; and
- the extent to which the attacking force may be said to have complied with or attempted to comply with the precautionary requirements of the laws of war.³⁰

Further, according to ICTR and ICTY jurisprudence, it is the situation of the victim at the time of the attack, and not the victim's status, that should be the focus of the inquiry.³¹ Thus, in the context of crimes against humanity, a non-civilian may nevertheless be considered part of the civilian population if at the time of the attack he or she was not participating in the hostilities.

The population requirement refers to the idea that enough people (ie, it need not be the entire population of a town or village) must be targeted to show that the attack was directed against 'a population' as opposed to limited and randomly selected individuals.

Nexus between the individual act and attack

Under Article 7(1) of the Rome Statute, the perpetrator must commit the prohibited acts 'as part' of an attack. Thus, there needs to be a nexus between the prohibited acts of the perpetrator and the attack directed against the civilian population.³²

The acts of the accused must, by their nature or consequences, objectively be a part of the attack, such that they are not wholly divorced from the context of the attack.³³ The crime must not be an isolated act. A crime would be regarded as an isolated act when it is so far removed from that attack that, having considered the context and circumstances in which it was committed, it could not reasonably be said to have been part of the attack.³⁴

Thus, crimes against humanity consist of 'individual acts' that will fall under, be connected with or exist during a larger 'attack'. ICTR jurisprudence has determined that the act does not need to be committed at the same time or place as the attack, or share the same features, but it must, on some essential level, form part of the attack.³⁵ For example, it must share some relation, temporal

30 *The Prosecutor v Germain Katanga* (Judgment) ICC-01/04-01/07-3436 (7 March 2014) para 1104; *The Prosecutor v Jean Pierre Bemba Gombo* (Judgment) ICC-01/05-01/08-3343 (21 March 2016) para 153. See *The Prosecutor v Kunarac et al* (Judgment) IT-96-23/1-A (12 June 2002) para 91.

31 *The Prosecutor v Blaskić* (Judgment) IT-95-14-T (3 March 2000) para 214 ('[T]he specific situation of the victim at the moment of the crimes committed, rather than his status, must be taken into account in determining his standing as a civilian').

32 *The Prosecutor v Jean Pierre Bemba Gombo* (Decision on the Confirmation of Charges) ICC-01/0501/08-424 (15 June 2009) paras 84–88; *The Prosecutor v Kordić and Čerkez* (Judgment) IT-95-14/2-A (17 December 2004) para 99. See n 20 above, p 181–182.

33 *The Prosecutor v Kunarac et al* (Judgment) IT-96-23/1-A (12 June 2002) para 99.

34 *The Prosecutor v Kunarac et al* (Judgment) IT-96-23/1-A (12 June 2002) para 100; *The Prosecutor v Mrkšić* (Appeal Judgment) IT-95-13/1 (5 May 2009), para 41; *The Prosecutor v Semanza* (Trial Judgment) ICTR-97-20 (20 May 2005) para 326.

35 *The Prosecutor v Semanza* (Trial Judgment) ICTR-97-20 (20 May 2005) para 330.

or geographical, with the attack. To meet this requirement, the act does not necessarily have to be committed against the same population as the broader attack of which it is a part.³⁶

Required knowledge

To satisfy the *mens rea* element of crimes against humanity, the accused must be aware of the attack that makes his or her act a crime against humanity. In practice, this means that the perpetrator must have knowledge of the attack and some understanding of the relationship between his or her acts and the attack.³⁷ It is not required to establish that the perpetrator had ‘knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organisation’.³⁸ Under ICTY jurisprudence, knowingly running the risk that an act may be part of a greater attack is sufficient to establish the knowledge requirement.³⁹

It is irrelevant whether the accused intended his or her acts to be directed against the targeted population or merely against his or her victim.⁴⁰ Evidence of knowledge depends on the facts of a particular case; as a result, the manner in which this legal element may be proved may vary according to the circumstances.⁴¹

Underlying prohibited acts for crimes against humanity

The Rome Statute lists specific prohibited crimes that can constitute crimes against humanity. Each of their individual elements must be established in *addition* to the contextual elements that qualify them as falling under the category of crimes against humanity.⁴²

While it is beyond the scope of this manual to provide a detailed account of all of the underlying crimes that can constitute crimes against humanity, the most relevant ones are discussed below.

Murder as a crime against humanity

Murder constitutes a crime against humanity pursuant to Article 7(1)(a) of the Rome Statute. The ICC Elements of Crimes specify the material element specific to murder, this being that ‘the perpetrator killed one or more persons’.⁴³

36 *The Prosecutor v Semanza* (Trial Judgment) ICTR-97-20 (20 May 2005) para 330.

37 *The Prosecutor v Germain Katanga* (Judgment) ICC-01/04-01/07-3436 (7 March 2014) para 1125; *The Prosecutor v Jean Pierre Bemba Gombo* (Decision on the Confirmation of Charges) ICC-01/0501/08-424 (15 June 2009) para 88.

38 See n 3 above, Art 7, para 2; *The Prosecutor v Germain Katanga* (Judgment) ICC-01/04-01/07-3436 (7 March 2014) para 1125.

39 *The Prosecutor v Kunarac et al* (Judgment) IT-96-23/1-A (12 June 2002) para 102.

40 *The Prosecutor v Kunarac et al* (Judgment) IT-96-23/1-A (12 June 2002) para 103.

41 *The Prosecutor v Tihomir Blaškić* (Appeals Judgment) IT-95-14-A (29 July 2004) para 126.

42 The enumerated acts that may rise to the level of crimes against humanity are the same in the ICTY and ICTR Statutes. See Art 5 of the ICTY Statute and Art 3 of the ICTR Statute.

43 See n 3 above, Art 7(1)(a), Crimes against humanity of murder, para 1.

The ICC has held that murder occurs when an individual, by act or omission, caused the death of one or more persons.⁴⁴ The required *mens rea* is that the perpetrator intended to kill or intended to inflict grievous bodily harm likely to cause death but was reckless as to whether death ensued.⁴⁵

It is also important to note that it is not required to recover the body to prove beyond a reasonable doubt that a person was murdered. The fact of a victim's death can be inferred circumstantially from other evidence.⁴⁶ Circumstantial evidence is sufficient as long as 'the *only* reasonable inference is that the victim is dead as a result of the acts or omissions of the accused'.⁴⁷

Torture as a crime against humanity

The elements of 'torture' are embedded in the ICC element of the crimes as being:

- 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; where
- such pain or suffering did not arise only from, inherent in or incidental to, lawful sanctions.⁴⁸

Torture is also listed as a crime against humanity in the ICTR and ICTY Statutes, which interpreted the word 'torture' in accordance with the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, considered as being declaratory of customary international law:⁴⁹

'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person *for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind*, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'⁵⁰ [emphasis author's own].

In contrast to the ICTY and ICTR Statutes and the UN Convention against Torture, the definition of torture as a crime against humanity in the Rome Statute does not require the additional element of a specific purpose (unlike torture as a war crime).⁵¹ In *Kunarac*, the ICTY Trial Chamber also held that, unlike torture under human rights law, the presence of a state official or of any other authority-

44 See *The Prosecutor v Kunarac et al* (Judgment) IT-96-23/1-A (12 June 2002) para 96; and *The Prosecutor v Blaškić* (Appeals Judgment) IT-95-14-A (29 July 2004) para 101.

45 *The Prosecutor v Delalić et al* (Judgment) IT-96-21-T (16 November 1998) para 439; *The Prosecutor v Jean-Paul Akayesu* (Judgment) ICTR-96-4-T (2 September 1998) para 589; *The Prosecutor v Kordić and Čerkez* (Judgment) IT-96-14/2-T (26 February 2001) para 236. See also *The Prosecutor v Germain Katanga* (Judgment) ICC-01/04-01/07-3436 (7 March 2014) para 781; *The Prosecutor v Jean Pierre Bemba Gombo* (Decision on the Confirmation of Charges) ICC-01/0501/08-424 (15 June 2009) para 138.

46 *The Prosecutor v Jean Pierre Bemba Gombo* (Judgment) ICC-01/05-01/08-3343 (21 March 2016) para 88.

47 *The Prosecutor v Brđanin* (Judgment) IT-99-36-T (1 September 2004) para 385.

48 Art 7(1)(f) of the Rome Statute.

49 *The Prosecutor v Delalić et al* (Judgment) IT-96-21-T (16 November 1998) para 459; *The Prosecutor v Kunarac et al* (Judgment) IT-96-23/1-A (12 June 2002) para 146.

50 *The Prosecutor v Jean-Paul Akayesu* (Judgment) ICTR-96-4-T (2 September 1998) para 681.

51 *The Prosecutor v Jean Pierre Bemba Gombo* (Decision on the Confirmation of Charges) ICC-01/0501/08-424 (15 June 2009) para 195.

wielding person in the torture process is not necessary for the offence to be regarded as torture under IHL.⁵²

There remains some ambiguity in international law regarding the distinction between what constitutes torture and any other form of prohibited ill-treatment. In the absence of an objective legal test, much is left to the discretion of the trial judge. However, the accepted judicial approach in assessing whether or not something constitutes torture now appears to be that: (1) the severity of harm rests on an objective test; and (2) the mental and physical suffering of the victim requires a subjective test.⁵³ An ICC Pre-Trial Chamber held that an important degree of pain and suffering has to be reached in order for a criminal act to amount to an act of torture.⁵⁴

In assessing the severity of the pain or suffering inflicted, the judge ‘must take into account all the circumstances of the case, including the nature and context of the infliction of pain, the premeditation and institutionalisation of the ill-treatment, the physical condition of the victim, the manner and method used, and the position of inferiority of the victim. The extent that an individual has been mistreated over a prolonged period of time will also be relevant’.⁵⁵

Deportation or forcible transfer as a crime against humanity

Deportation or forcible transfer is a crime against humanity as provided for in Article 7(1)(d) and Article 7(2)(d) of the Rome Statute. Elements of the crime of deportation or forcible transfer are:

- the perpetrator deported or forcibly transferred, without grounds permitted under international law, one or more persons to another state or location, by expulsion or other coercive acts;
- such person or persons were lawfully present in the area from which they were so deported or transferred; and
- the perpetrator was aware of the factual circumstances that established the lawfulness of such presence.⁵⁶

DEPORTATION OR FORCIBLE TRANSFER

The terms ‘forced’ and ‘forcible’ are not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, or by taking advantage of a coercive environment.⁵⁷ There is no requirement that the perpetrator intended the transfer to be permanent.⁵⁸

52 *The Prosecutor v Kunarac* (Trial Judgment) IT-96-23 & 23/1 (22 February 2001) para 496 and *The Prosecutor v Kunarac et al* (Judgment) IT-96-23/1-A (12 June 2002) para 148.

53 Ilias Bantekas, *International Criminal Law* (Hart Publishing 2010) p 232.

54 *The Prosecutor v Jean Pierre Bemba Gombo* (Decision on the Confirmation of Charges) ICC-01/0501/08-424 (15 June 2009) para 193.

55 *The Prosecutor v Germain Katanga* (Judgment) ICC-01/04-01/07-3436 (7 March 2014) para 767.

56 See n 3 above, Art 7(1)(d).

57 See n 3 above, Art 7(1)(d), Crime against humanity of deportation or forcible transfer of population, fn 12. See also *The Prosecutor v Simić et al* (Trial Judgment) IT-95-9-T (17 October 2003) paras 125–126.

58 *The Prosecutor v Stakić* (Appeal Judgment) IT-97-24-A (22 March 2006) para 317.

OF ONE OR MORE PERSONS

This is to ensure that lower ranking officials could be held criminally responsible for the forcible transfer of a population even though they themselves may have been only responsible for the actual transfer of one or more persons in the context of a larger target group or population.⁵⁹

TO ANOTHER STATE OR LOCATION

Although no separation is made between deportation and forcible transfer in the Rome Statute, it is common to distinguish between deportation, which presumes transfer beyond state borders, and forcible transfer, which relates to displacement within a state.⁶⁰

The issue of the nature of a ‘border’ was raised in *Stakić*, where the following was held by the ICTY Appeal Chamber:

‘The default principle under customary international law with respect to the nature of the border is that there must be expulsion across a de jure border to another country [...]. Customary international law also recognises that displacement from “occupied territory”, as expressly set out in Article 49 of Geneva Convention IV and as recognised by numerous UN Security Council resolutions is also sufficient to amount to deportation [...]. Under certain circumstances displacement across a de facto border may be sufficient to amount to deportation. In general, the question of whether a particular de facto border is sufficient for the purposes of the crime of deportation should be examined on a case by case basis in light of customary international law’⁶¹

BY EXPULSION OR OTHER COERCIVE ACTS

This element is not further defined in the ICC Elements of Crimes or ICC decisions. However, considering the broad definition given to the term ‘forcibly’, it follows that the phrase ‘expulsion or other coercive acts’ must include the full range of coercive pressures on people to flee their homes.⁶²

The ICTY Appeals Chamber has held that

‘it is the absence of genuine choice that makes displacement unlawful...it is impossible to infer genuine choice from the fact that consent was expressed, given that the circumstances may deprive the consent of any value’.⁶³

WITHOUT GROUNDS PERMITTED UNDER INTERNATIONAL LAW

In the *Karadžić* case, the ICTY Trial Chamber noted that:

‘International law recognises certain grounds permitting forced removals, such as the evacuation of: (i) a civilian population for its security or for imperative military reasons; and (ii) prisoners of

59 Christopher K Hall in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court – Observer’s Notes, Article by Article* (2nd ed, Nomos Verlag 2008), p 249.

60 *The Prosecutor v Krstić* (Trial Judgment) IT-98-33-T (2 August 2001) para 521.

61 *The Prosecutor v Stakić* (Appeal Judgment) IT-97-24-A (22 March 2006) para 300.

62 See n 59 above, p 250.

63 *The Prosecutor v Krnojelac* (Appeals Judgment) IT-97-25 (17 September 2003) para 229.

war out of combat zones and into internment facilities, subject to the conditions set out therein. If an act of forced removal is carried out on such bases, that act cannot constitute the actus reus of deportation or forcible transfer. Evacuation is an exceptional measure which is permitted to protect the civilian population'.⁶⁴

LAWFULLY PRESENT

This term refers to not only where the persons are lawfully present under national law, but also where they are lawfully present under international law. This is of particular importance in the context of aliens entering the territory of a state. It is for the court to determine the question of lawful presence.⁶⁵

PERPETRATOR WAS AWARE OF THE FACTUAL CIRCUMSTANCES THAT ESTABLISHED THE LAWFULNESS OF SUCH PRESENCE

This is the only specified mental element for the crime of deportation of forcible transfer as a crime against humanity. There is no need to actually demonstrate that the perpetrator had made any legal determination or was aware of the lawfulness of the victim's presence.

Rape as a crime against humanity

Rape is a crime against humanity as provided for in Article 7(1)(g)-1 of the Rome Statute. The ICC Elements of Crimes define the crime of rape as follows:

1. the perpetrator invaded the body of a person by conduct resulting in penetration, however slight;
 - i. of any part of the body of the victim or of the perpetrator with a sexual organ; or
 - ii. of the anal or genital opening of the victim with any object or any other part of the body;⁶⁶
2. by force;
3. 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;
4. by taking advantage of a coercive environment; or
5. the invasion was committed against a person incapable of giving genuine consent.⁶⁷

The *mens rea* element is established where the accused is proven to have acted with intent and knowledge – ie the accused must have intended to penetrate the victim's body and was aware that the penetration was by force or by the threat of force or coercion, by taking advantage of a coercive environment, or against a person incapable of giving genuine consent.⁶⁸

64 *The Prosecutor v Radovan Karadžić* (Public Redacted Version of Judgment) IT-95-5/18 (24 March 2016) para 492.

65 Under general principles of law common to many legal systems, persons continually present on land can, after a specified lapse of time, gain a valid right to remain. See n 59 above, p 248.

66 See n 3 above, Art 7(1)(g)-1(1).

67 See n 3 above, Art 7(1)(g)-2(2).

68 *The Prosecutor v Jean Pierre Bemba Gombo* (Judgment) ICC-01/05-01/08-3343 (21 March 2016) para 1112.

It should be noted that the ICTY adopted a different definition of the crime of rape. The *actus reus* of the crime as held by the ICTY Appeal Chamber in *Kunarac et al* is:

1. the sexual penetration, however slight;
2. of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
3. of the mouth of the victim by the penis of the perpetrator;⁶⁹
4. without the consent of the victim.⁷⁰

The *mens rea* element is satisfied by establishing that the accused had the intention to affect this sexual penetration, and the knowledge that it occurred without the consent of the victim.⁷¹

The definition of the conduct under the Rome Statute is more gender-neutral and broad than at the ICTY. In the *Bemba* case, the Trial Chamber noted that that the victim's lack of consent was not a legal element of the crime of rape under the Rome Statute.⁷² As a result, where 'force', 'threat of force or coercion', or 'taking advantage of coercive environment' is proven, the Trial Chamber considers that the prosecution does not need to prove the victim's lack of consent.⁷³

Imprisonment or other severe deprivation of physical liberty as a crime against humanity

Unlawful imprisonment is a crime against humanity under Article 7(1)(e) of the Rome Statute. The ICC has not had any opportunity to interpret this crime yet. The ICC Elements of Crimes define unlawful imprisonment as follows:

- the perpetrator imprisoned one or more persons, or otherwise severely deprived one or more persons of physical liberty;
- the gravity of the conduct was such that it was in violation of fundamental rules of international law; and
- the perpetrator was aware of the factual circumstances that established the gravity of the conduct.⁷⁴

At the ICTY, deprivation of liberty as a crime against humanity is understood as 'arbitrary imprisonment', that is, the deprivation of liberty of an individual without due process of law, as part of a widespread or systematic attack directed against a civilian population.⁷⁵ The elements of imprisonment are:

69 *The Prosecutor v Kunarac et al* (Judgment) IT-96-23/1-A (12 June 2002) para 127.

70 *The Prosecutor v Kunarac et al* (Judgment) IT-96-23/1-A (12 June 2002) para 129. Early ICTY jurisprudence applied a coercion requirement, but after conducting an analysis of various legal systems, it was established by the Appeals Chamber that lack of consent was the correct element.

71 *The Prosecutor v Kunarac et al* (Judgment) IT-96-23/1-A (12 June 2002) para 127; *The Prosecutor v Stakić* (Appeal Judgment) IT-97-24-A (22 March 2006), para 755.

72 *The Prosecutor v Jean Pierre Bemba Gombo* (Judgment) ICC-01/05-01/08-3343 (21 March 2016) para 105.

73 *The Prosecutor v Jean Pierre Bemba Gombo* (Judgment) ICC-01/05-01/08-3343 (21 March 2016) para 106.

74 See n 3 above, Art 7(1)(e).

75 *The Prosecutor v Kordić and Čerkez* (Judgment) IT-95-14/2-A (17 December 2004) paras 115–116; and Trial Judgment, para 302.

- an individual is deprived of his or her liberty;
- the deprivation of liberty is imposed arbitrarily, meaning no legal basis can be invoked to justify the deprivation of liberty;
- the act or omission by which the individual is deprived of his or her physical liberty is performed by the accused or person(s) for whom the accused bears criminal responsibility; and
- the accused has *intent* to deprive the individual arbitrarily of his or her physical liberty or has reasonable knowledge that his or her act or omission is likely to cause arbitrary deprivation of physical liberty.⁷⁶

It is interesting to note the discrepancies in language between the ICTY/ICTR and the ICC. The ICTY, for instance, has held that the deprivation of liberty must be ‘without due process of law’,⁷⁷ while the Rome Statute states that it must be ‘in violation of fundamental rules of international law’.⁷⁸ However, it is recognised that small procedural errors would not be sufficient to constitute imprisonment. The Rome Statute also includes the term ‘or other severe deprivation of physical liberty’ as part of the crime against humanity of unlawful imprisonment to demonstrate that house arrest and other forms could constitute imprisonment.⁷⁹

Other inhumane acts as crimes against humanity

Other inhumane acts as crimes against humanity are provided for in Article 7(1)(k) of the Rome Statute and defined in the ICC Elements of Crimes as follows:

- the perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act;
- such an act was of similar character to other prohibited acts; and
- the perpetrator was aware of the factual circumstances that established the character of the act.⁸⁰

For example, the court considered that forced circumcisions, as well as acts of brutal killings and mutilations in front of the eyes of the victims’ family members caused serious mental suffering and are comparable in their nature and gravity to other acts constituting crimes against humanity.⁸¹

The ICTY and ICTR defined other inhumane acts as those crimes against humanity that are not otherwise specified in the respective statutes, but which are of comparable seriousness. The elements of other inhumane acts are:

- the occurrence of an act or omission of similar seriousness to the other enumerated acts;

76 *The Prosecutor v Krnojelac* (Trial Judgment) IT-97-25 (15 March 2002) para 115.

77 *The Prosecutor v Kordić and Čerkez* (Judgment) IT-96-14/2-T (26 February 2001) para 302.

78 See n 3 above, Art 7(1)(e)(1).

79 Rome Statute, Art 7.

80 See n 3 above, Art 7(1)(k).

81 *The Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (Decision on the Confirmation of the Charges) ICC-01/09-02/11-382-Red (23 January 2012) para 277.

- the act or omission caused serious mental or physical suffering or injury or constituted a serious attack on human dignity; and
- the act or omission was performed deliberately by the accused or person(s) for whose acts and omissions he or she bears criminal responsibility.⁸²

In order to assess the seriousness of an inhumane act or omission, consideration must be given to all the factual circumstances of the case. These may include the nature of the act or omission; the context in which it occurred; the personal circumstances of the victim, including age, sex and health; and the physical, mental and moral effects of the act or omission upon the victim.

The offender must intend to inflict inhumane acts. At the time of the act or omission, the offender had the intention to inflict serious physical or mental suffering, or to commit a serious attack upon the human dignity of the victim or knew that his or her act or omission was likely to cause serious physical or mental suffering or a serious attack upon human dignity.⁸³ It is not required that the accused considered his or her own actions ‘inhumane’.⁸⁴

WAR CRIMES

War crimes can be understood as serious violations of the laws and customs of armed conflict, or IHL.⁸⁵ There is no comprehensive list of war crimes. They vary from one source to another. A list of war crimes can be found in:

- The Geneva Conventions and Protocols;⁸⁶
- customary international law;⁸⁷
- the statute of international tribunals and the Rome Statute;⁸⁸ and
- domestic criminal legislation.

According to Article 8 of the Rome Statute, a war crime is a serious violation of the laws of war, such as grave breaches of the Geneva Conventions, serious breaches of Common Article 3 to the Geneva

82 *The Prosecutor v Kordić and Čerkez* (Judgment) IT-95-14/2-A (17 December 2004) para 117; *The Prosecutor v Galić* (Trial Judgment) IT-98-29-T (5 December 2003) para 152; See also *The Prosecutor v Mladen Naletilić and Vinko Martinović* (Judgment) IT-98-34-T (31 March 2003) para 247; *The Prosecutor v Kayishema and Ruzindana* (Trial Judgment) ICTR-95-1 (21 May 1999) paras 150–151, 154; *The Prosecutor v Jean-Paul Akayesu* (Judgment) ICTR-96-4-T (2 September 1998) para 585.

83 *The Prosecutor v Galić* (Trial Judgment) IT-98-29-T (5 December 2003) para 154; *The Prosecutor v Vasiljević* (Trial Judgment) IT-98-32-T (29 November 2002) para 236; *The Prosecutor v Krnojelac* (Trial Judgment) IT-97-25 (15 March 2002) para 132; *The Prosecutor v Kayishema and Ruzindana* (Trial Judgment) ICTR-95-1 (21 May 1999) para 153.

84 *The Prosecutor v Mucić et al* (Trial Judgment) IT-96-21 (16 November 1998) para 543.

85 IBAHRI, *International Criminal Law Manual*, 2010, p 82.

86 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287; Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3; Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609.

87 For a list of war crimes under international customary law, see the ICRC Customary IHL database, Rule 156 https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule156 accessed 27 September 2018.

88 Art 3, ICTY Statute; Art 4, ICTR Statute; Art 8, Rome Statute.

Conventions, as well as ‘laws and customs applicable in international armed conflict’ and ‘armed conflicts not of an international character’.

Contextual elements of war crimes

To establish whether a crime qualifies as a ‘war crime’, the court must establish that the following contextual elements are met:

- there must be a conflict of an international or non-international nature;
- the conduct took place in the context of and was associated with an armed conflict; and
- the perpetrator must be aware of the factual circumstances that established the existence of an armed conflict.⁸⁹

As noted, determining the elements of a war crime requires scrutiny of the relevant statute (ie, ICTY, ICTR or ICC) or domestic criminal law, as well as reference to the primary source of the crime in IHL (ie, the Geneva Conventions of 1949). Similar to crimes against humanity, it is important also to refer to the ICC Elements of Crimes, a document that assists the court in defining and applying the crimes under its jurisdiction, which set out the requisite mental and physical elements for each of the acts listed under Article 8.⁹⁰

The nexus between the crime and the armed conflict

The essential element for any war crime is the connection between the criminal act and the armed conflict, whether it be an international or non-international conflict. Genocide and crimes against humanity are distinct from war crimes in that they do not need to be committed in times of armed conflict. This requirement is reflective of the approaches taken by both the ICTY and ICTR tribunals, as well as in the ICC Statute. Accordingly, the ICTY held in the *Tadić* case that for a crime to fall within the tribunal’s jurisdiction, a sufficient nexus must be established between the alleged offence, and the armed conflict which gives rise to the applicability of IHL.⁹¹ This principle entails two requirements:

- there is an armed conflict; and
- there is a sufficient connection between the crime and the conflict.⁹²

The ICTY, ICTR and ICC defined armed conflict as existing:

‘whenever there is a resort to armed force between States, or protracted armed violence between governmental authorities and armed groups, or between armed groups within a State. International humanitarian law will therefore apply from the start of an armed conflict, and will extend beyond the cessation of hostilities until a general conclusion of peace; or, in the case of internal conflicts, peaceful settlement, is achieved. Until that moment, international

89 See n 3 above, Art 8 et al.

90 See n 85 above, p 105.

91 See *Prosecutor v Tadić* (Trial Chamber Opinion and Judgment) Case No IT-94-I-T (7 May 1997) para 572.

92 See n 85 above, p 106.

humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there'.⁹³

Article 2(1), common to all four of the Geneva Conventions of 1949, defines international armed conflict as follows:

'the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance'.

The ICC rules in Lubanga that an international armed conflict:

'[...] takes place between two or more States; this extends to the partial or total occupation of the territory of another State, whether or not the said occupation meets with armed resistance. In addition, an internal armed conflict that breaks out on the territory of a State may become international—or, depending upon the circumstances, be international in character alongside an internal armed conflict—if (i) another State intervenes in that conflict through its troops (direct intervention), or (ii) some of the participants in the internal armed conflict act on behalf of that other State (indirect intervention)'.⁹⁴

The Rome Statute does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflict that takes place in the territory of a state when there is protracted armed conflict between governmental authorities and organised armed groups, or between such groups.⁹⁵

Depending on the parties to the armed conflict, a non-international armed conflict and an international armed conflict may occur simultaneously; this is the case in Syria.⁹⁶

After establishing the existence of an armed conflict, it is necessary to prove the nexus between the acts and the armed conflict. All crimes committed during an armed conflict amount to a war crime. This criterion is meant to exclude, for example, domestic crimes.⁹⁷

The ICTY established that 'it is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict'.⁹⁸

On the other hand, it is not necessary to prove that a crime was committed in the course of, or as part of the hostilities in an area controlled by one of the parties, or in furtherance or to take advantage

93 See *Prosecutor v Tadić* (Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) Case No IT-94-1-A (2 October 1995) para 84; *The Prosecutor v Akayesu* (Trial Judgment) ICTR-96-4-T (2 September 1998) paras 619–621, 625; *The Prosecutor v Thomas Lubanga Dyilo* (Judgment) ICC-01/04-01/06 (14 March 2012) para 533.

94 *The Prosecutor v Thomas Lubanga Dyilo* (Judgment) ICC-01/04-01/06 (14 March 2012), para 295.

95 Art 8(2) (d), Rome Statute.

96 *Prosecutor v Tadić* (Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) Case No IT-94-1-A (2 October 1995) paras 72–77; *The Prosecutor v Germain Katanga* (Judgment) ICC-01/04-01/07-3436 (7 March 2014) para 1174.

97 See n 85 above, p 107.

98 *Prosecutor v Tadić* (Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) Case No IT-94-1-A (2 October 1995) para 70.

of, the situation created by the fighting.⁹⁹ Furthermore, it is not necessary to show that the criminal act was part of state policy or practice that is officially endorsed, tolerated or in the interest of one of the parties to the conflict.¹⁰⁰ In addition, it is not a requirement to establish that armed conflict was occurring at the exact time and place as the alleged acts occurred, nor is it necessary that the crime alleged took place during the combat.¹⁰¹

The ICTY in *Kunarac* held that:

‘[...] a war crime is shaped by or dependent upon the environment—the armed conflict—in which it is committed. It need not have been planned or supported by some form of policy. The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator’s ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed. Hence, if it can be established, as in the present case, that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict’.¹⁰²

In determining whether such a nexus exists, the ICTY Chamber may take into account, inter alia, whether the perpetrator is a combatant, whether the victim is a non-combatant, whether the victim is a member of the opposing party, whether the act may be said to serve the ultimate goal of a military campaign and whether the crime is committed as part of or in the context of the perpetrator’s official duties.¹⁰³

The ICC has adopted a similar approach.¹⁰⁴

Mens rea

Finally, in order to be guilty of committing a war crime, it is not enough that a person’s action resulted in the commission of the crime; it must also be established that the perpetrator possessed the necessary mental element of the crime also referred to as *mens rea*. Article 30 of the ICC Statute sets out the requisite mental elements pertaining to all crimes under its jurisdiction. Accordingly, in order to establish that a person is guilty of a crime within the ICC Statute, it must be shown that the prohibited act was carried out with intent and knowledge.¹⁰⁵

Underlying prohibited acts for war crimes

The current prevailing definition of war crimes is set out in Article 8(2) of the Rome Statute. In order to establish the commission of a war crime, in addition to the general requirements common to war

99 See n 85 above, p 108.

100 *Ibid.*

101 *Prosecutor v Tadić* (Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) Case No IT-94-1-A (2 October 1995) para 573.

102 *The Prosecutor v Kunarac et al* (Appeal Judgment) IT-96-23/1-A (12 June 2002) para 58.

103 *The Prosecutor v Kunarac et al* (Appeal Judgment) IT-96-23/1-A (12 June 2002) para 59.

104 *The Prosecutor v Germain Katanga* (Judgment) ICC-01/04-01/07-3436 (7 March 2014) para 1176.

105 See n 85 above, p 110.

crimes described above, one of the specific acts listed in Article 8 must be carried out.¹⁰⁶ This section only lists the main war crimes and does not set out the specific elements pertaining to each of the underlying offences. The ICC Elements of Crimes describe the requisite elements of each specific act listed in the Rome Statute.¹⁰⁷

Article 8(2) of the Rome Statute provides that, for the purpose of the Statute, ‘war crimes’ means:

- grave breaches of the Geneva Conventions of 12 August 1949, namely any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
 - (1) wilful killing; (2) torture or inhuman treatment, including biological experiments; (3) wilfully causing great suffering, or serious injury to body or health; (4) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; (5) compelling a prisoner of war or other protected person to serve in the forces of a hostile power; (6) wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial; (7) unlawful deportation or transfer or unlawful confinement; and (8) taking of hostages;¹⁰⁸ and
- other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, such as intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities, or attacking or bombarding, by whatever means, towns, villages, dwellings or buildings that are undefended and are not military objectives.¹⁰⁹

Article 8(2)(c) and (e) define war crimes in the case of an armed conflict not of an international character as:

- serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949, namely any of the following acts committed against persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:
 - violence to life and person, in particular, murder of all kinds, mutilation, cruel treatment and torture;
 - committing outrages upon personal dignity, in particular, humiliating and degrading treatment;
 - taking of hostages; and
 - the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognised as indispensable; and

106 *Ibid*, p 111.

107 See n 2 above.

108 Art 8(2)(a), Rome Statute.

109 For a full list of the crimes, Art 8(2)(b), Rome Statute.

- other serious violations of the laws and customs applicable in armed conflict not of an international character, within the established framework of international law, such as intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities or declaring that no quarter will be given.¹¹⁰

Despite being extensive, the ICC list of war crimes does not include all of the war crimes under customary law or treaty law, in particular in relation to war crimes in internal conflicts. It has been said that, ‘half of the provisions from international conflicts were transplanted to internal conflicts in the ICC Statute.’¹¹¹

TORTURE

The prohibition of torture is set out in Article 5 of the Universal Declaration of Human Rights and a number of other major international and regional human rights instruments, including the International Covenant on Civil and Political Rights, the European Convention on Human Rights, the American Convention on Human Rights and the African Charter on Human and People’s Rights. The primary purpose of these instruments is the establishment of appropriate preventive and deterrent mechanisms, and they form part of a wider obligation by states in the context of international human rights law (IHRL) generally.

Article 1 of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides the most authoritative definition of torture:

‘the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions’.

States are required to ensure that all acts of torture are criminalised, and that competent authorities proceed with a prompt and impartial investigation of any alleged acts of torture and ill-treatment. Several states, including all European Union Member States, have criminalised acts of torture in their domestic legal system.

As discussed above, acts of torture can also amount to a war crime or a crime against humanity if they fulfil the contextual elements of each respective crime.

¹¹⁰ For a full list of the crimes, See Art 8(2)(e), Rome Statute.

¹¹¹ See n 85 above, p 104.

Section 2: Modes of liability

Learning objectives

By the end of the section, the participants will be able to:

- describe the main modes of liability in ICL; and
- explain why it is essential to understand the applicable modes of liability when collecting evidence and building a case against perpetrators.

Key message

Modes of liability are used to link an alleged perpetrator to a crime. Classic modes of liability under ICL include perpetration, co-perpetration, command responsibility, planning, ordering, instigating, and aiding and abetting.

It is essential for you to learn about modes of liability in the relevant jurisdiction:

- **before you start collecting evidence and interviewing witnesses:** this will allow you to gather relevant linkage evidence; each mode of liability requires different types of linkage evidence; and
- **when you start collecting evidence,** especially when interviewing a witness, as they will inform the types of questions you need to ask.

Modes of liability

WHAT ARE MODES OF LIABILITY?

Modes of liability are used to link an alleged perpetrator to a crime. Classic modes of liability under ICL include perpetration, co-perpetration, command responsibility, planning, ordering, instigating, and aiding and abetting.

Modes of liability significantly differ from one country to another, and from one international tribunal to another. It is beyond the scope of this manual to assess all the modes of liability. The position adopted for the purpose of this manual is to provide a brief description of the modes of liability used by the ICC, ICTY and ICTR.

WHY IS IT IMPORTANT TO LEARN ABOUT MODES OF LIABILITY?

Before you start collecting evidence and interviewing witnesses, you need to understand the modes of liability and their definition as defined in the relevant national criminal legislation. This will allow you to gather relevant evidence, called linkage evidence, which establishes the link between the crimes and the perpetrators. Each mode of liability requires different types of linkage evidence.

For example, a perpetrator can be held responsible for planning the commission of a crime if he or she designed the criminal conduct that is later perpetrated and the planning was a factor substantially contributing to the criminal conduct. Linkage evidence includes information on the method of design or action, procedure or arrangement for the crime and the role of the accused in designing the plan, as well as the link between the plan and the crime.

When you start collecting evidence, you should also have the modes of liability in mind, especially when interviewing a witness as they will inform the types of questions you need to ask.

JOINT LIABILITY

Joint liability is one of the most contentious areas of ICL. The ad hoc tribunals and the ICC have continuously endeavoured to develop a doctrine of joint criminal liability encompassing all the persons involved in the crimes, including those remote from the crimes. To date, there is no universally accepted approach to collective liability. While the ICTY and ICTR have used the concept of joint criminal enterprise (JCE), the Rome Statute has taken a different approach and uses the notion of co-perpetration.¹¹²

JCE is a mode of liability addressing the criminal liability of participants in a common criminal plan. ‘Whoever contributes to the commission of crimes by the group of persons or some members of the group, in execution of a common criminal purpose, may be held to be criminally liable, subject to certain conditions’.¹¹³ All the participants are equally guilty of the crime regardless of the role each played in its commission.¹¹⁴ Three broad forms of JCE have been recognised in the jurisprudence of the international tribunals since the initial adoption of the concept (in its modern guise) by the ICTY in 1992.

In the first form of JCE (JCE I), an individual can be held liable for the actions of other JCE members, or individuals used by them, that further the common criminal purpose.¹¹⁵

The second form of JCE, the ‘systemic’ form (JCE II), is characterised by the existence of an organised criminal system, such as in the case of concentration or detention camps.¹¹⁶

The third, ‘extended’ form of JCE (JCE III) entails responsibility for crimes committed beyond the common purpose, and applies to natural and foreseeable consequences of the commission of the crime.¹¹⁷

112 The extent to which the concept of JCE as applied by the ICTY and ICTR is adopted by the Rome Statute is subject to debate. The basic form of JCE (JCE I) could arguably be partially included under the concept of co-perpetration within the meaning of the Rome Statute. It is suggested that JCE I, when it fails to reach the joint control over crime criteria, can be subsumed under aiding/abetting or complicity in ‘group crimes’. Whether systemic and/or extended forms of JCE (JCE II and III, respectively) might fall under modes of criminal liability provided for by the Rome Statute is questionable. This will be discussed further in the Manual.

113 *The Prosecutor v Tadić* (Appeals Judgment) IT-94-1-A (15 July 1999) para 190; *The Prosecutor v Krnojelac* (Appeals Judgment) IT-97-25 (17 September 2003) paras 28–32, 73.

114 *The Prosecutor v Vasiljević* (Trial Judgment) IT-98-32-T (29 November 2002) para 67; *The Prosecutor v Krnojelac* (Trial Judgment) IT-97-25 (15 March 2002) para 82.

115 *The Prosecutor v Tadić* (Appeals Judgment) IT-94-1-A (15 July 1999) para 196; *The Prosecutor v Kvočka et al* (Appeal Judgment) IT-98-30/1 (28 February 2005) para 82.

116 *The Prosecutor v Tadić* (Appeals Judgment) IT-94-1-A (15 July 1999) paras 202–203; *The Prosecutor v Krnojelac* (Appeal Judgment) IT-97-25-A (13 September 2003) para 89; *The Prosecutor v Kvočka et al* (Appeal Judgment) IT-98-30/1 (28 February 2005) para 82.

117 *The Prosecutor v Tadić* (Appeals Judgment) IT-94-1-A (15 July 1999) para 204; *The Prosecutor v Kvočka et al* (Appeal Judgment) IT-98-30/1 (28 February 2005) para 83.

All forms of JCE share a common *actus reus*. The prosecution must prove: (1) a plurality of persons acting in concert;¹¹⁸ (2) the existence of a common plan, design or purpose that amounts to or involves the commission of a crime;¹¹⁹ and (3) the participation of the accused in the JCE in the form of a significant contribution to the crime.¹²⁰

The Rome Statute provides for a different form of joint liability: the notion of co-perpetration. The ICC developed the concept of control over the crime, meaning that principals to the crime are not limited to those who physically carry out the objective elements of the offence, but also include those who, in spite of being removed from the scene of the crime, control or mastermind its commission because they decide whether and how the offence will be committed.¹²¹ The ICC expanded its joint liability to include indirect co-perpetration to capture the relationship between co-perpetrators who controlled separate militias, each committing crimes that were part of the common plan.¹²²

SUPERIOR RESPONSIBILITY

Superior responsibility has been extensively used by international criminal tribunals and is also provided for in many states' criminal legislation. Under the doctrine of command or superior responsibility: 'leaders and commanders may be held responsible not for their direct involvement in the commission of crimes, but for their failure to prevent or to punish the crimes of their subordinates'.¹²³

Superior responsibility is therefore a form of liability for a superior or commander's failure to act where he or she had the duty and the material ability to: (1) prevent his subordinates from committing certain crimes; or (2) punish or take active and legitimate steps to punish them (eg, by reporting their crimes to the appropriate authorities for investigation and/or potential prosecution) for such violations.

Both the ICTR and ICTY jurisprudence recognise that superior responsibility is not restricted to military commanders.¹²⁴ Civilians who hold a position of superior authority or with regard to whom a superior-subordinate relationship can be established may also be held liable under this principle. This was further developed in Article 28 of the Rome Statute, which explicitly requires the prosecution to build its case pursuant to the definition and legal test for command responsibility applicable *either* to military commanders in line with Article 28(a) or civilians pursuant to Article 28(b).

118 *The Prosecutor v Tadić* (Appeals Judgment) IT-94-1-A (15 July 1999) para 227; *Krajisnik* (Trial Judgment) para 884. Also see Antonio Cassese, *Cassese's International Criminal Law* (3rd edn, Oxford University Press 2013) p 163.

119 *The Prosecutor v Tadić* (Appeals Judgment) IT-94-1-A (15 July 1999) para 227.

120 *The Prosecutor v Brdanin* (Judgment) IT-99-36-A (3 April 2007) para 430, citing *The Prosecutor v Kvočka et al* (Appeal Judgment) IT-98-30/1 (28 February 2005) paras 97–98.

121 *Lubanga Dyilo* (Decision on the Confirmation of Charges) ICC-01/04-01/06 (29 January 2007) paras 328–330.

122 *Katanga and Ngujolo Chui* (Decision on the Confirmation of the Charges) ICC-01/04-01/0 (30 September 2008) para 493.

123 Guénaél Mettraux, *The Law of Command Responsibility* (Oxford University Press 2009) p 18.

124 'The fact that any of the acts referred to in articles 2 to 5 of the Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof'.

Aiding and abetting has been extensively used at the ICTY and ICTR, and is also provided for in the Rome Statute.¹²⁵ Aiding and abetting generally involves a lesser degree of direct participation in the crime than ‘committing’.¹²⁶ For an individual to incur liability for aiding and abetting, it is necessary to prove that the accused provided practical assistance, encouragement or moral support to the main offender, which *substantially contributed* to the perpetration of the crime.¹²⁷ Such assistance may: (1) consist of an act or omission; (2) occur before, during or after the act of the principal offender; and (3) be removed in time and place from the actual crime.¹²⁸

For liability to attach, the act or omission of assistance must have had a ‘substantial effect’ on the commission of the crime by the principal offender.¹²⁹ Where the accused is alleged to have rendered knowing assistance after the completion of the core crime, the prosecution must prove a prior agreement between the accused and the perpetrators, such that the latter were genuinely assisted in their conduct.¹³⁰ It is for the court to determine on the facts and evidence as to whether the required level of assistance was provided.

The accused must have possessed knowledge that his or her acts or omissions assisted in the commission of the specific crime in question by the principal offender.¹³¹ Moreover, the material elements of the crime committed by the direct perpetrator, the commission of which have been aided or abetted by the accused, must be established.¹³² The accused must also have been aware of the essential elements of the crime committed by the principal offender, including the principal offender’s state of mind (even for crimes of specific intent),¹³³ and have taken a conscious decision to act or not to act in the knowledge that his or her acts or omissions would thereby support the commission of the crime.¹³⁴

There is no requirement for the prosecution to prove, either, that (1) the aider and abettor shared the intent of the principal offender;¹³⁵ or (2) that the aider and abettor had knowledge of the precise crime that was intended or that was actually committed, as long as he or she was aware that one of a number of crimes would probably be committed, including the one actually perpetrated.

Examples of aiding and abetting by international tribunals have been held to include:

125 See Art 7(1) of the ICTY Statute, Art 6(1) of the ICTR Statute, and Art 25(3) (c) of the Rome Statute.

126 *The Prosecutor v Mucić et al* (Appeal Judgment) IT-96-21-A (20 February 2001) 342-3

127 *The Prosecutor v Delalić et al* (Judgment) IT-96-21-T (16 November 1998) para 327; *The Prosecutor v Blagojević and Jokić* (Judgment on Appeal) IT-02-60-A (9 May 2007) para 127; *The Prosecutor v Simić et al* (Appeal Judgment) IT-95-9-A (28 November 2006) para 85.

128 *The Prosecutor v Blagojević and Jokić* (Judgment on Appeal) IT-02-60-A (9 May 2007) para 127; *The Prosecutor v Blaškić* (Appeals Judgment) IT-95-14-A (29 July 2004) para 48.

129 *The Prosecutor v Blagojević and Jokić* (Judgment on Appeal) IT-02-60-A (9 May 2007) para 127; *The Prosecutor v Brdanin* (Judgment) IT-99-36-A (3 April 2007) para 277; *The Prosecutor v Šainović et al* (Appeal Judgment) IT-05-87-A (23 January 2014) paras 1649–1650.

130 *The Prosecutor v Haradinaj et al* (Trial Judgment) IT-04-84-T (3 April 2008) para 145; *The Prosecutor v Blagojević and Jokić* (Judgment on Appeal) IT-02-60-A (9 May 2007) 731.

131 *The Prosecutor v Blagojević and Jokić* (Judgment on Appeal) IT-02-60-A (9 May 2007) paras 27, 219–221; *The Prosecutor v Brdanin* (Judgment) IT-99-36-A (3 April 2007) para 484.

132 *The Prosecutor v Kupreskić et al* (Appeal Judgment) IT-96-23 & 23/1-A (12 June 2002) para 254.

133 *The Prosecutor v Seromba* (Appeal Judgment) ICTR-01-66-A (12 March 2008) paras 56, 65; *The Prosecutor v Blagojević and Jokić* (Judgment on Appeal) IT-02-60-A (9 May 2007) para 127.

134 *The Prosecutor v Seromba* (Appeal Judgment) ICTR-01-66-A (12 March 2008) para 44.

135 *The Prosecutor v Aleksovski* (Appeal Judgment) IT-95-14/1-A (24 March 2000) para 162.

- standing near victims while armed to prevent the victims from escaping;¹³⁶
- providing weapons to a direct perpetrator;¹³⁷
- taking a direct perpetrator to the scene of a crime and pointing at people to be killed;¹³⁸ and
- sending excavators after the killing of prisoners, which it was found substantially contributed to the crime because the perpetrators knew they could rely on this logistical support.¹³⁹

PLANNING

Planning is a mode of liability under the ICTY and ICTR Statutes.¹⁴⁰ The Rome Statute does not contain a specific planning liability. Planning involves the formulation of a ‘method of design or action, procedure or arrangement for the accomplishment of a particular crime’, by one or more persons.¹⁴¹ Individual responsibility under this mode of liability accrues only when the level of participation in the planning has been substantial – for example, formulating the plan, or endorsing the plan of another.¹⁴² It must also be proved beyond reasonable doubt that the accused was involved in the immediate preparation of the concrete crimes.¹⁴³ The individual must be proven to have possessed the state of mind required by the underlying offence with which he or she is charged, and to have ‘directly or indirectly intended that the crime in question be committed’.¹⁴⁴

To prove ‘planning’, it must also be proved beyond reasonable doubt that the crime actually happened.¹⁴⁵ Without proof of a specific crime, rather than crimes in general, it is impossible to prove the planning of such a crime, and thus an accused’s individual responsibility for the act.

136 *The Prosecutor v Vasiljević* (Appeal Judgment) IT-98-32-A (25 February 2004) para 134.

137 *The Prosecutor v Ntakirutimana et al* (Appeal Judgment) ICTR-96-17 (13 December 2004) para 530.

138 *The Prosecutor v Ntakirutimana et al* (Appeal Judgment) ICTR-96-17 (13 December 2004) para 532.

139 *The Prosecutor v Blagojević and Jokić* (Judgment on Appeal) IT-02-60-A (9 May 2007) paras 766–767.

140 See Art 7(1) of the ICTY Statute and Art 6(1) of the ICTR Statute.

141 *The Prosecutor v Kordić and Čerkez* (Judgment) IT-96-14/2-T (26 February 2001) para 386.

142 *The Prosecutor v Bagilishema* (Trial Judgment) ICTR-95-1A-T (7 June 2001) para 30.

143 *The Prosecutor v Brdanin* (Judgment) IT-99-36-T (1 September 2004) para 380.

144 *The Prosecutor v Blaskić* (Judgment) IT-95-14-T (3 March 2000) para 278; *The Prosecutor v Galić* (Trial Judgment) IT-98-29-T (5 December 2003) para 168; *The Prosecutor v Brdanin* (Judgment) IT-99-36-T (1 September 2004) paras 357–358.

145 *The Prosecutor v Jean-Paul Akayesu* (Judgment) ICTR-96-4-T (2 September 1998) para 475; *The Prosecutor v Rutaganda* (Judgment and Sentence) ICTR-96-3-T (6 December 1999) para 34; *The Prosecutor v Musema* (Judgment and Sentence) ICTR-96-13-T (27 January 2000) para 115.

INCITING/INSTIGATING

Instigation consists of ‘urging, encouraging or prompting’ another to commit an offence.¹⁴⁶ There is a threshold causal requirement – that the act of instigation must constitute a substantial or real contribution to the offence. The accused must have the requisite intention for the crime alleged, and the act of instigation must have been deliberately intended to provoke the commission of the crime.¹⁴⁷

ORDERING

Ordering¹⁴⁸ involves a person deliberately using his or her position of authority – *de jure* or *de facto* – to convince another to commit the offence charged.¹⁴⁹ Though the order may be implicit, it must be proven that the person intended to give the order.¹⁵⁰ It is also not sufficient that a person giving an order knows that there is a risk that a crime will be committed. A person who orders an act or omission must, at a minimum, act with the awareness of the substantial likelihood that a crime will be committed in the execution of that order.¹⁵¹ The ICC has taken a similar approach.¹⁵²

146 See Art 7(1) of the ICTY Statute and Art 6(1) of the ICTR Statute. Although the Rome Statute does not expressly refer to instigation, inducing and soliciting in Art 25(3) (b) have been interpreted as covering the same substantial ground. See Decision on the confirmation of charges against Laurent Gbagbo, Laurent Gbagbo (ICC-02/11-01/11), Pre-Trial Chamber, 12 June 2014, paras 243–243. See also *The Prosecutor v Kordić and Čerkez* (Judgment) IT-95-14/2-A (17 December 2004) para 27.

147 *The Prosecutor v Kordić and Čerkez* (Judgment) IT-96-14/2-T (26 February 2001) para 386.

148 Art 7(1) of the ICTY Statute, Art 6(1) of the ICTR Statute and Art 25(3) (b) of the Rome Statute.

149 *The Prosecutor v Krstić* (Trial Judgment) IT-98-33-T (2 August 2001) para 601.

150 *The Prosecutor v Blaskić* (Judgment) IT-95-14-T (3 March 2000) para 282.

151 *The Prosecutor v Blaškić* (Appeals Judgment) IT-95-14-A (29 July 2004) para 42.

152 *The Prosecutor v Mudacumura* (Decision on the Prosecutor’s Application under Art 58) ICC-01/04-01/12 (13 July 2012) para 63, *Natanga* (see also Decision on the Confirmation of Charges) ICC-01/04-02/06) (9 June 2014) para 145.

Section 3: Jurisdiction

Learning objectives

By the end of the section, the participants will be able to:

- describe the concept of universal jurisdiction; and
- identify countries where cases could be brought for the crimes committed in Syria under the principle of universal jurisdiction.

Key message

It is accepted that, at present, there is no likely route to accountability through the ICC, given its lack of mandate.

Universal jurisdiction is considered as an appropriate alternative route. The term ‘universal jurisdiction’ refers to the principle that a national court may prosecute individuals for a serious crime against international law – such as crimes against humanity, genocide, war crimes and torture – based on the principle that such crimes harm the international community that individual states may act to protect.

Jurisdiction

UNITED NATIONS MECHANISMS

See *IBAHRI, Facilitators’ Guide to UN Human Rights Mechanisms*, 2018.

INTERNATIONAL CRIMINAL COURT

It is accepted that at present, there is no likely route to accountability through the ICC, given its lack of mandate. The jurisdiction of the ICC is, however, addressed in brief here, for the purposes of completeness and to explain why the ICC is not a viable route.

The central purpose of the ICC, when it was initially developed, was to provide a forum for the investigation and subsequent trials of those alleged to be responsible for the most serious of international crimes. The ICC can only exercise jurisdiction over a ‘situation’ if the state in question is a State Party to the Rome Statute, if a non-party state invites the ICC to investigate a situation within its borders, or, if the UN Security Council (UNSC) refers a situation to the ICC through resolution.

The Syrian regime is desperate to avoid, and evade, any form of justice and therefore, given that it is not a State Party to the Rome Statute, it is unlikely in the extreme that it would now take steps to either ratify the Rome Statute, or alternatively, concede jurisdiction to the ICC.

The fall-back position therefore would be a referral from the UNSC. Given the very particular circumstances of the conflict, and its involved parties, the UNSC has shown itself to have zero influence, given the right of ‘veto’ that its permanent members hold.

Russia is allied to the Syrian regime, taking an active role militarily, and thus it has consistently used its veto to prevent any and all attempts by Member States to refer the situation in Syria to the ICC and its investigators.

The situation in Syria therefore perhaps highlights the desperate need for reform in the manner in which matters are referred to the ICC, and further, the workings of the UNSC more generally. This is an issue for another paper and another debate, however.

The conclusion to be drawn therefore, is that, at present, as much as there are many that would like to see the involvement of the ICC, it simply will not happen for the foreseeable future, and until there is a significant change in the position of Russia.

UNIVERSAL JURISDICTION

Countries

The term ‘universal jurisdiction’ refers to the principle that a national court may prosecute individuals for a serious crime against international law – such as crimes against humanity, genocide, war crimes and torture – based on the principle that such crimes harm the international community that individual states may act to protect.

As a general principle, universal jurisdiction is invoked when other, traditional bases of criminal jurisdiction do not exist, for example:

- the defendant did not commit an offence in that state’s territory (territoriality principle);
- the defendant is not a national of the state (active personality principle);
- the defendant did not commit an offence against its nationals (passive personality principle); or
- the state’s own national interests are not adversely affected (protective principle).

Universal jurisdiction is also considered as an appropriate route to accountability when the mechanism of the ICC cannot be used. This situation is unlikely to be resolved within the near future, and therefore alternative methods of investigation and prosecution must be sought and pursued.

In total, 163 of the 193 UN Member States have the ability domestically to exercise universal jurisdiction over one or more crimes under international law, and as of 1 September 2012, a total of 147 states had provided universal jurisdiction over one or more crimes under international law. There is, therefore, a clear appetite among the domestic courts of various nations to deal with such matters.

As a preliminary submission, the jurisdictions of the following countries are to be explored with a view to requests being made to launch an investigation or prosecution into the crimes committed by the Syrian regime:

- Belgium;
- Denmark;
- France;
- Germany;
- the Netherlands;
- Norway;
- Spain;
- Sweden; and
- the UK.

BELGIUM

Belgium did have the most extensive exercise of universal jurisdiction over international crimes of any country. Under the Punishment of Grave Breaches of International Humanitarian Law Act 1993, Belgian courts could try cases of war crimes, crimes against humanity and genocide committed by non-Belgians, outside of Belgium and against non-Belgians, without even the presence of the accused in Belgium.

Given the sharp increase of cases between 1993 and 2002, the law on universal jurisdiction was repealed, and a new law on extraterritorial jurisdiction was adopted. The new law is similar or more restrictive than that of most European countries. The important point to note, however, is that in order to bring a prosecution, a condition that the accused person must be Belgian or present in Belgium was established, thus curtailing its reach significantly.

The fact remains, however, that Belgium is still a competent jurisdiction to look to bring a case.

DENMARK

Section 8(5) of the Danish Penal Code provides for universal jurisdiction over crimes that Denmark has an obligation to prosecute under an international convention. This includes torture and grave breaches of the Geneva Conventions.

The suspect has to be voluntarily present for Danish authorities to exercise jurisdiction over the crimes, and presence is a pre-requisite for a police investigation (although it should be noted that this flies in the face of the legislation as section 8(5) has no requirement that the accused be present, only that the accused be present at the trial phase on the basis that trials in *absentia* are unlawful under Danish law). Should the suspect leave Denmark during an investigation, the investigation will be discontinued, with extradition only being able to be applied for where a suspect has already been charged and has subsequently left the jurisdiction.

Departure can be prevented by making an application to a Danish court for preliminary detention, however, such an order will only be granted where there is substantial reason to believe that a crime

was committed by the suspect and where he or she seeks to leave Denmark, tamper with evidence or commit a crime.

An important point to note is that because Denmark has not legislated international crimes directly into domestic law and prosecutes the domestic law equivalents of international crimes, statutes of limitation apply to prosecutions.

FRANCE

French courts have jurisdiction over war crimes, crimes against humanity and genocide,¹⁵³ as well as torture.¹⁵⁴

Article 689 of the French Code of Criminal procedure limits the use of universal jurisdiction for offences committed outside of France only when provided for by French criminal legislation or an international convention. This applies to the crime of torture as defined in the UN Convention Against Torture.¹⁵⁵ Article 689-1 of the Code of Criminal Procedure requires that the alleged perpetrator be present in France.

Article 689-11 also provides for the use of universal jurisdiction for ICC crimes, but sets out four restricting conditions:

1. the alleged perpetrator should habitually reside in France;
2. the state where the crime took place criminalised the perpetrator's alleged act or that state or the state of the person's citizenship is a party to the Rome Statute;
3. the office of prosecutor is the only authority authorised to initiate criminal prosecution, unlike a classic criminal proceeding, victims cannot file civil party complaints (*déclenchement de l'action publique par voie de constitution de partie civile*); and
4. prosecutions can only be initiated if no other international or national jurisdiction requests the rendition or extradition of the alleged perpetrator. They must first ask the ICC to decline jurisdiction over the case.

GERMANY

The Code of Crimes against International Law (CCAIL), which came into force on 30 June 2002, gives German courts universal jurisdiction over genocide, crimes against humanity and war crimes.

Offences such as torture, rape and enforced disappearance may be constituent acts of crimes against humanity and war crimes but are not defined as separate crimes under the CCAIL, and therefore can only be prosecuted on the basis of the Criminal Code.

Genocide, crimes against humanity and war crimes are defined in accordance with the Rome Statute, subject to additional elements for the crime of genocide. The CCAIL does not make any distinction between offences committed in an international and non-international armed conflict.

153 French Criminal Code, Book II, Title I, Sub-Title I.

154 French Criminal Code, Art 222-1.

155 French Code of Criminal Procedure, Art 689-2.

Germany is one of the few remaining countries with ‘genuine’ universal jurisdiction, in that it does not require any connection between the criminal conduct committed abroad and Germany, prior to any investigation or prosecution.¹⁵⁶

Further, the accused does not have to be present in Germany, and there is no double criminality requirement. The presence of the accused at trial is mandatory, however, except in very limited circumstances.

It ought to be borne in mind, however, that the prosecutorial discretion is wide. As a result, if the suspect is not in Germany, and his or her presence is not anticipated, an investigation may be declined.

THE NETHERLANDS

The International Crimes Act of 19 June 2003 provides for genocide, crimes against humanity and war crimes in accordance with the Rome Statute, as well as torture and enforced disappearance.

Universal jurisdiction over genocide, crimes against humanity, war crimes, torture and enforced disappearances is provided for in the International Crimes Act, which allows Dutch courts to prosecute individuals who committed the criminal acts abroad. Universal jurisdiction is, however, limited to cases where the accused is present on Dutch territory before an investigation can be open.

NORWAY

An important factor of Norwegian legislation is that the suspect does not have to be present on Norwegian territory for an investigation to be opened, but he or she does need to be present for the indictment.

The problem of whether the presence of an accused can be secured by way of extradition does not appear to be dealt with by either legislation or the Supreme Court, arguably, however, there does not appear to be anything preventing such a request from being made.

There is, however, a real commitment in dealing with such crimes in Norway, evidenced in the establishment of a special unit to investigate complaints of this nature.

It is further evident that the process is largely free from political influence, given that the decision of whether to open an investigation lies with the chief prosecutor of the national prosecution office and investigation has to be carried out where there are reasonable grounds to believe that a crime has been committed.

¹⁵⁶ Noting that s 1 of the CCAIL reads ‘This act shall apply to all criminal offences against international law designated under this Act, to serious criminal offences designated therein even when the offence was committed abroad and bears no relation to Germany’.

SPAIN

Spanish courts have jurisdiction over war crimes,¹⁵⁷ crimes against humanity¹⁵⁸ and genocide,¹⁵⁹ as well as torture and against moral integrity.¹⁶⁰

Originally, a court could exercise universal jurisdiction over genocide, crimes against humanity or war crimes, even if the acts were perpetrated by foreigners outside Spanish territory provided that:

- the proceedings were brought against a Spanish citizen or a foreigner whose habitual place of residence was in Spain; or
- a foreigner who was in Spain and whose extradition had been refused by the Spanish authorities.¹⁶¹

Spain's universal jurisdiction legislation has been exercised frequently over recent years. Its scope has, however, been limited. In July 2009, and then again in 2014,¹⁶² the Spanish Congress passed a law reforming and limiting universal jurisdiction to cases where (among other changes):

- Spaniards are victims;
- there is a relevant link to Spain; or
- the alleged perpetrators are in Spain.

The likelihood of bringing a case on the basis of universal jurisdiction in Spain will be increasingly difficult, although, in appropriate circumstances, there is still scope to do so.

SWEDEN

Sweden's act establishing criminal responsibility for genocide, crimes against humanity and war crimes entered into force in 2014. The act also provides for universal jurisdiction over these crimes, regardless of where they have been committed or by whom.

Sweden has already shown its commitment to the principles of universal jurisdiction, and is taking an active role in the investigation and prosecution of crimes committed in Syria.

157 Criminal Code of Spain, Arts 608–614.

158 *Ibid*, Art 607 bis.

159 *Ibid*, Art 607.

160 *Ibid*, Arts 174–177.

161 Organic Law 6/1985, of 1 July, on the Judicial Branch, Art 23.4.

162 Organic Law 1/2014, of 13 March, on Universal Justice.

THE UK

UK courts have universal jurisdiction over:

- War crimes:
 - grave breaches of the Geneva Conventions, grave breaches of the First Protocol and the Third Protocol (only include crimes committed during non-international armed conflict);¹⁶³ and
 - war crimes as defined in Article 8.2 of the Rome Statute (including crimes committed during both international and non-international armed conflict);¹⁶⁴
- crimes against humanity, as defined in Article 7 of the Rome Statute;¹⁶⁵
- genocide, as defined in Article 6 of the Rome Statute;¹⁶⁶ and
- torture.¹⁶⁷

UK courts have jurisdiction to prosecute any person, whatever his or her nationality, who, whether in or outside the UK, committed grave breaches of the Geneva Conventions of 1949 and Additional Protocols I and III,¹⁶⁸ as well as torture.¹⁶⁹

Since the adoption of the ICC Act in 2001, UK courts have also had jurisdiction to prosecute war crimes, genocide and crimes against humanity committed in or outside the UK.¹⁷⁰ However, it limits its exercise to crimes committed on the territory of the UK or by UK nationals, residents and those subject to UK jurisdiction.¹⁷¹

Proceedings for such crimes can only be instituted by or with the consent of the Attorney General.¹⁷² The consent of the Director of Public Prosecutions (DPP) is also needed before an arrest warrant can be issued for the offences of torture and war crimes under the Geneva Conventions Act as amended in 2011.¹⁷³ It is therefore essential that early contact be made with both the Metropolitan Police (the force with responsibility for the investigation of allegations of war crimes), the Crown Prosecution Service and the DPP.

163 Geneva Conventions Act 1957; Geneva Conventions (Amendment) Act 1995, and the Geneva Conventions and United Nations Personnel (Protocols) Act 2009.

164 International Criminal Court Act 2001 (ICC Act 2001), pt 5. The ICC Act did not repeal the Geneva Convention Act but instead made various amendments to the Geneva Conventions Act to ensure that provisions governing the prosecution of grave breaches of the Geneva Conventions under that act are consistent with the newly adopted act.

165 ICC Act 2001, pt 5.

166 ICC Act 2001, pt 5.

167 Criminal Justice Act 1988, s 134.

168 Geneva Conventions Act 1957, s 1(1); Geneva Conventions (Amendment) Act 1995, s 1.

169 Criminal Justice Act 1988, s 134.

170 ICC Act 2001, ss 51(2) and 65A.

171 ICC Act 2001, s 51(2).

172 ICC Act s 53(3); Criminal Justice Act s 135; Geneva Conventions Act s 1A(3)(a).

173 Magistrates' Court Act 1980 s 1, as amended by the Police Reform and Social Responsibility Act 2011 s 153(1).

Selecting jurisdiction

Which jurisdiction to seek to file a case before will likely depend upon the circumstances of the relevant victim.

You will likely be bound by the evidence at your disposal, and as noted, the victim, including his or her nationality.

It is not a case of seeking a 'favourable' jurisdiction to file, and therefore seeking to undertake a process of 'forum shopping', as each jurisdiction will have its own particular criteria to apply when determining whether to accept a case for investigation or otherwise.

To seek to file a case in Spain, for example, you must be able to demonstrate that the victim is indeed a victim for the purposes of Spanish legislation, and an individual of Spanish nationality.

There is no benefit therefore in seeking to 'choose' a jurisdiction on the basis of anything other than where that case is capable of being filed.

Every jurisdiction that recognises universal jurisdiction has its own individual procedural difficulties, as each jurisdiction is ostensibly, a different system, with significant differences to each other.

For instance, the UK works on a 'common law' system, Germany is almost a hybrid of civil and common law, and Spain and France are entirely civil-based systems, with full victim participation as a party to the issue before the court.

In discussing the procedures of differing states, it must be remembered that those delivering the training, although experienced in bringing cases before a number of different national jurisdictions, are not lawyers in all of those jurisdictions, and therefore, as much as the basics can be outlined, it is always advised to seek to partner with a domestic legal team so as to enable the case to be submitted in an appropriate format and on an appropriate basis, taking into account the particular requirements of that jurisdiction, and thus giving the case the best chance for success.

THE UK

Any prosecution that is to be brought in the UK is done by the Crown Prosecution Service, and the formal investigation undertaken by the Metropolitan Police.

It is therefore essential, that any complaint envisaged as being brought is put together as comprehensively as possible, as this will be forwarded to the War Crimes Department at the Metropolitan Police (SO15), who will then undertake what is described as a 'scoping exercise' to ascertain whether the complaint is something that can proceed to a 'full' investigation.

The primary hurdle in the UK (as it is in many jurisdictions), is the issue of 'presence' of the accused, or 'likely presence', in the UK; without this criterion being satisfied, it is unlikely that any investigation will progress further than the 'scoping stage'.

However, if the accused is not in the UK but there is potential for that individual to travel to the UK in the near future, it may be that the police take the decision to put the UK Border Agency on notice so as to enable the police to be notified should a relevant individual enter the country.

Further, as much as any victim will play a vital part in any investigation and subsequent proceedings, there is no ‘direct’ participation in proceedings, other than the giving of evidence and relevant statements.

SPAIN

To bring a case before the Spanish authorities, it must be established that the ‘alleged perpetrators are present in Spain, that there are victims of Spanish nationality, or that there is some relevant link with Spain and, in any event, that no other competent country or international court has initiated proceedings, including an effective investigation and, where appropriate, prosecution, of such crimes’.

The benefit of bringing a case in Spain however, is similar to that in France, in that, subject to fulfilling the relevant criteria on ‘standing’, a victim has direct participation in any individual case, as it is the victim that can prosecute through the institution of a direct complaint, compared with a common law system, where the victim makes a complaint and a national prosecutorial authority deals with the matter.

The basis upon which a case can be brought in Spain, however, has been significantly curtailed of late, as has been outlined in previous chapters of this manual; and thus, as already highlighted, it is essential that appropriate domestic legal assistance is sought, or at least assistance from lawyers with experience in bringing matters before Spanish courts.

GERMANY

As has been previously noted, Germany on the face of it has ‘genuine’ universal jurisdiction, as its laws do not require any connection between the crime committed abroad and Germany, including the issue of ‘presence’ before prosecutors can investigate and prosecute, however, there is wide prosecutorial jurisdiction.

For instance, German federal prosecutors have been criticised in the past for their apparent wide interpretation of who may be considered as immune to prosecution.

Further, as much as there is no ‘presence requirement’, on the basis of section 153f of the Criminal Procedure Code, the federal prosecutor may decline to investigate where the suspect is not in Germany and his or her presence is not anticipated provided neither the suspect nor the victim is a German national; it has been argued, therefore, that this amounts to a de facto presence requirement.

If such a decision is made, an individual bringing a private complaint may challenge the decision in court, however, the courts limit their review to the question of whether the decision was arbitrary, and place a high procedural burden on the party seeking to challenge the decision; such challenges are therefore unlikely to proceed.

With the above in mind, it must be noted, however, that Germany is, of late, proving itself to be leading the way insofar as international accountability is concerned, with a number of matters against the Syrian regime proceeding, at least beyond a preliminary beginning.

It is arguable, therefore, that Germany is the most favourable jurisdiction at present, subject to issues of immunity and wide discretion.

FRANCE

As it is a ‘civil’ jurisdiction, both prosecutors and private parties can initiate proceedings, therefore, victims and other affected parties, including non-governmental organisations (NGOs), can file a criminal complaint directly with investigative judges rather than passing through prosecutors.

As much as the above procedure is favourable, whether a French court can exercise universal jurisdiction varies depending on the crime, and thus, as per criticisms highlighted, there are in effect, two different legal frameworks, namely one that applies to cases involving torture, enforced disappearance and crimes committed in the former Yugoslavia and Rwanda, and another for all other grave international crimes.

For torture and crimes committed in the former Yugoslavia and Rwanda, courts have jurisdiction where the suspect is present in France at the time that a judicial investigation is opened, and thus, the matter can be pursued even if the suspect then flees the jurisdiction after an investigation has been opened.

For all other grave international crimes, courts only have jurisdiction where the accused regularly resides in France.

The issues to be determined therefore in seeking to bring a case in France, is, in the first instance, what the actual offence being pursued is, and thereafter, the issue of presence, as it would appear that much of the time, it is the offence that dictates whether presence is required or otherwise.

Bringing a case

As was noted at the outset and referred to throughout this element of the manual, each jurisdiction has its own particular requirements and peculiarities’ when it comes to bringing cases on a universal jurisdiction basis.

Some are more favourable from the perspective of commencing a case, whereas others are more favourable insofar as direct victim participation is concerned.

The central issue, however, is one of ‘standing’, that is, who is considered to be a victim for the purposes of relevant domestic legislation, and therefore, as was outlined at the outset, it is rare that a victim will be able to engage in a process of ‘forum shopping’, as it is likely that the forum will be dictated by the victim and the evidence available.

Finally, it is essential that appropriate assistance is sought from relevant domestic practitioners in the identified jurisdiction, so as to give the complaint the greatest chance of success.

Section 4: Case Selection

Learning objectives

By the end of the section, the participants will be able to:

- understand case selection strategies; and
- identify how these strategies affect their own investigation.

Key message

Prosecuting authorities usually adopt a case selection strategy, which defines the criteria used to decide whether a case should be prosecuted and sets priorities.

The manner in which cases are selected for investigation and prosecution by domestic court is critically important and will guide your investigation.

Case selection

Leading investigations into crimes of an international character, namely war crimes, crimes against humanity and genocide committed during the armed conflict in the Syrian Arab Republic from March 2011 to the present, is a daunting task for any national prosecuting authority. This is particularly the case in a country still experiencing the effects of the war.

Prosecuting authorities usually adopt a case selection strategy, which defines the criteria used to decide whether a case should be prosecuted and sets priorities.

The manner in which cases are selected for investigation and prosecution by a domestic court is critically important and will guide your investigation.

REVIEW OF OPEN CASE FILES OR THE MAPPING APPROACH

The UN Office of the High Commissioner for Human Rights produced a number of working documents on the concept of case mapping. This involves looking at all criminal reports or open case files and putting them in an order. Comparatively, the Organization for Security and Co-operation in Europe (OSCE) Mission to Bosnia and Herzegovina also took up this process by focusing on the creation of a database that contains details of all war crimes cases registered in Bosnia and Herzegovina for the period of the armed conflict. This proposal is good in theory, but unrealistic and unworkable in practice for the following reasons. First, such an approach focuses on data relevant to making a determination that one case is more serious than another. This is problematic, as any assessment of this kind relies too heavily on subjective qualitative criteria and works under the assumption that all material disclosed in a case file is substantiated; this requires in-depth knowledge of the case file and the underlying criminal allegations. Such an approach cannot be sustained, as many allegations of war crimes are politically and ethnically biased and made at a time for creating

wartime propaganda. For example, this approach would focus on four main categories of criteria: (1) offender criteria; (2) offence criteria; (3) criminal liability criteria; and (4) victim criteria. The proposed criteria are not necessarily wrong to apply, but the results in many cases would be misleading. However, the fundamental problem with using such an approach is that the manner in which the data is to be extracted produces inaccurate and subjective results.

Further, this approach is flawed, as it only focuses on existing case files and fails to take account of crimes that have been previously undetected.

SENIORITY

The ICTY focused on targeting the most senior civilian and military leaders, such as Slobodan Milošević, Radovan Karadžić, Ratko Mladić and several others, and then looking at the charges. This is an ill-defined approach, as it reverses the usual scope of a criminal investigation and presupposes guilt, thereby clouding the judgment of the prosecutor. Further, this approach requires an in-depth knowledge of the conflict and thorough investigation.

This approach is unreliable, as seniority does not necessarily correlate with criminal responsibility and criminal responsibility is not necessarily equally distributed among all ethnic sides to the armed conflict. The approach of selecting a target first and then considering charges later also causes significant problems. Consequently, the case selection and prioritisation strategy of the ICTY became dictated by events and therefore was not truly successful.

THEMATIC APPROACH

Later, the international tribunals developed a thematic approach by focusing, to a large extent, on crimes committed in particular areas by targeting rape and sexual assault as tools of war amounting to crimes against humanity. The ICC in The Hague also uses such an approach and has focused its attention, to a large extent, on the crime of enlisting child soldiers (see eg the *Lubanga* Case) into the Forces Patriotiques pour la Libération du Congo (FPLC) in the Democratic Republic of Congo.

It is recognised that adopting a thematic approach can be a useful tool in addressing mass crimes; however, it certainly cannot be considered the main criterion. It fails to address widespread and systematic crimes of varying degrees. For example, if one agrees with the notion that JCE is in existence targeting members of identified groups in the Syrian Arab Republic by way of deportation, murder, persecution, rape, theft of personal property and destruction of real property, then addressing one aspect of JCE will not address the wider crimes.

AD HOC APPROACH

The question of prosecutorial independence in selecting which cases to prosecute and in which order is an important question. The discretion to prosecute in a continental legal system is very different to a common law system. In the continental legal system, based on the *principle of legality*, there is an *obligation to prosecute*. Accordingly, the concept of prosecutorial independence or prosecutorial

discretion is much more limited, which translates to the notion that if there is sufficient evidence to justify the raising of an indictment, that is, if there is a grounded suspicion, there exists an obligation to investigate the matter and bring a prosecution unless the law prescribes otherwise.

As regards the selection of the order of cases, this may be construed as a tool for selecting which cases to bring in a system that does not openly permit such an approach. The question of how to select the order of cases may be subject to many external factors. For example, selection may be subject to external pressures, such as victims' groups, the media, government and interested parties. The cases may be selected in a purely ad hoc manner. The greatest criticism in having a purely ad hoc approach in which all cases must be prosecuted in a certain order is that it is left to purely subjective selection, and there is little or no accountability as there are no rules or regulations defining selection. Further, it gives a perverse incentive to do the least serious cases first.

CRIME-CENTRED APPROACH

Nations that are recovering from the effects of armed conflict, or civil war or internal unrest are always faced with far more crimes than the national (or for that matter international) criminal justice system can adjudicate, and choosing priorities among crimes, all of which are heinous to some degree, is often politically controversial. The Syrian Arab Republic is by no means an exception and, in fact, depicts the politicisation of the prosecution of war crimes better than any other nation.

Over the past 20 years, there have been many prosecutions before a number of national and international judicial bodies to varying degrees of success. Due to the fact that there is no established judicial mechanism in the Syrian Arab Republic to deal with war crimes, the groups documenting and investigating atrocity crimes are facing an immeasurably more difficult task than previous conflicts, with far fewer resources than is the case with international and hybrid institutions.

This crime-centred study approach to selecting or prioritising war crimes cases is intended to set out a transparent set of principles to guide the setting of priorities among a large number of potential war crimes cases. This will enable those groups working collaboratively to ensure that those who have caused the most human suffering, to the most people, will be prosecuted in a timely fashion. It will also allow the public to understand decisions taken as to priorities, and thus set aside some of the needless controversy that afflicts discussions of atrocity crimes prosecution. Finally, it is hoped that the process can, in this way, offer a model for post-conflict justice in other countries.

Accordingly, in order to factor in all of the aforementioned considerations, a process needs to be put together that focuses on victims rather than perpetrators. This means that an assessment of victim-based crime will be researched in order to better select those cases for prosecution.

Section 5: Investigative planning and standards

Learning objectives

By the end of the section, the participants will be able to:

- plan their investigation;
- describe the main investigative standards and best practices;
- handle witnesses and take into consideration the needs of witnesses with special needs;
- preserve confidentiality of witnesses and preserve confidentiality of the source;
- ensure an effective chain of custody; and
- maintain data security.

Key message

The investigation and gathering of evidence of war crimes, crimes against humanity and genocide on a number of occasions involves the investigation of matters after the fact. Consideration must be given as to what evidence will be required at each stage of the investigation, for example, it might not be enough to have just a statement of a victim; that evidence may need to be supported and given further credibility by the introduction of relevant expert evidence.

The single most important principle of all activities that may be undertaken, including during evidence collation and case preparation, is the principle of ‘do no harm’.

While collecting, it is essential for all relevant and significant issues/steps/observations, to be recorded systematically in writing in order to leave a record that can be used by professional investigators later, and if required, assist in the presentation of a future case.

Any investigation must be objective; be critical and do not assume that information received from others is correct or accurate, as there will always be actors who have a vested interest in distorting the truth.

Investigative planning and standards

INVESTIGATIVE PLANNING

The preparation of a case for submission before a tribunal presents a number of challenges, some of them specific to individual tribunals, but many of them generic to any.¹⁷⁴

The investigation and gathering of evidence of war crimes, crimes against humanity and genocide on a number of occasions involves the investigation of matters after the fact. The conflict is currently

¹⁷⁴ This manual does not seek to address the challenges presented in case before specific individual tribunals, as to do so would result in the document becoming too voluminous at this stage. Further, it is not known before which tribunal cases will be submitted, and therefore a generic approach is taken at this stage.

ongoing in Syria and therefore investigators may find themselves in the midst of a conflict, or further, not welcome in specific areas, and thus their tasks will be hampered. It is, however, noted that there is a substantial amount of evidence that has already been collated and continues to be so. Certain techniques for evidence gathering therefore are not available, such as surveillance, for example.

Accordingly, where evidence can be generated on a contemporaneous basis, it is all the more useful, and all the more essential that appropriate standards are adhered to given its likely probative value.

Consideration must be given as to what evidence will be required at each stage of the investigation, for example, it might not be enough to have just a statement of a victim, that evidence may need to be supported and given further credibility by the introduction of relevant expert evidence.

It is appropriate at each stage of an investigation to plan appropriately and take a rational approach to its conclusion.

Collect contextual evidence

Regard must be had to the fact that no matter which tribunal a case is pursued before, the judges and/or prosecutors will not be from the region, and therefore will not likely have significant knowledge of relevant factors, such as geography, locations where the crimes took place, distances, languages, cultural sensitivities and relevant political or historical background; in short, evidence that sets the context within which the crimes were committed has to be collected and prepared for presentation in court.

In circumstances where the prosecution is reconstructing events after the fact, and on occasion, a considerable time after the fact (as is likely to be the case in Syria), evidence that originates from the time period when the crimes were committed is crucial.

Crime base evidence

As mentioned in Section 2, the acts criminalised at the domestic level and their legal elements will influence the types of evidence to collect and the scope of the investigation. The evidence to gather in order to establish the commission of a crime is called crime base evidence. You always need to have in mind the elements of international crimes when preparing your investigation.

For example, to prove that acts amount to torture, it is necessary to prove that severe pain was inflicted, but also that the perpetrator was acting for one of the prohibited purposes, such as intimidation or obtaining information. Understanding the elements of the crimes is therefore essential to collect the necessary crime base evidence, especially when interviewing witnesses.

Linkage evidence

Linkage evidence is the evidence used to link the perpetrators to the crimes. Understanding the domestic modes of liability will allow you to gather relevant evidence. Each mode of liability requires different types of linkage evidence.

As mentioned in Section 2, a perpetrator can be held responsible for planning the commission of a crime if he or she designed the criminal conduct that is later perpetrated and the planning was a factor substantially contributing to the criminal conduct. Linkage evidence includes information on the method of design or action, procedure or arrangement of the crime and the role of the accused in designing the plan, as well as the link between the plan and the crime.

Senior leaders rarely document the overall criminal purpose or detail each criminal step of the implementation of an operation (although Syria currently does appear to be the exception to this rule given the wealth of documentary evidence seized). It is very difficult to find direct orders or evidence necessary to establish the liability of the perpetrators.

That said, contemporaneous records, notes, videos, minutes of meetings, orders, diaries, intercepts and photographs are essential in seeking to portray the general military or civil structure at the time. It will allow the prosecution to understand the general chain of command and infer the role of the accused.

In matters before other international tribunals, records of governmental assembly meetings, crisis staff meetings, reports of the police department, newspaper articles, speeches and television interviews have all proved to be significant in identifying responsible leaders and the roles played.

Further, another significant form of contemporaneous record consists of military documentation. Military orders, communication logbooks, combat reports, duty officers' books and war diaries are examples of records found to be useful.

Sophisticated or specialised knowledge

In seeking to prosecute large-scale crimes, each level of investigation may often require sophisticated or specialised knowledge:

- medical or professional expertise: even at the most basic level, there may be a need for medical or professional expertise, specifically for issues such as exhumations, identification of bodies and autopsies; and
- military expertise: specialised knowledge may be required for military analysis in relation to targeting and weapon use, or demographic evidence for establishing population transfer. The collections of evidence related to senior military or political leaders will require, for example, knowledge of military and/or political structures and their hierarchical relationship in times of armed conflict.

INVESTIGATIVE STANDARDS

General principles

In deciding what information to collect and how to collect it, it is useful to commence by giving consideration to the principles that guide the work of human rights monitors.

DO NO HARM

The single most important principle of all activities that may be undertaken as part of a criminal investigation and documentation process, including evidence collation and case preparation, is the principle of ‘do no harm’.

Action that could put any individual in harm’s way must be avoided. This is particularly crucial when making decisions about whether to speak with witnesses to human rights abuses or violations of IHL.

Care must also be taken when mentioning names in any report or submission, as the safety of the persons you interviewed may be at risk. Their safety must be seen as paramount. In this regard, protocols need to be adopted as to confidentiality and data security.

COLLECT AND RECORD ALL INFORMATION

While collecting evidence, it is essential that all relevant and significant issues/steps/observations are recorded systematically in writing, through established protocols, in order to maintain a well-documented record with a full chain of custody that can be used later for professional analysis, and if required, assist in the presentation of a future case.

Regular and timely record-keeping is highly preferred in such circumstances.

OBJECTIVITY AND IMPARTIALITY

- Any investigation must be objective.
- Be critical and do not assume that information received from others is correct or accurate, as there will always be actors who have a vested interest in distorting the truth.

In taking statements and discussing evidence, certain basic questions are essential:

- What happened?
- When and where did the event occur?
- How can the time and location of the event be established/proven?
- Who was involved, who were the alleged victims and who were the alleged perpetrators?
- Why did the event take place?
- What is the source of the information and how can it be corroborated?
- What kind of uniforms, insignia, vehicles and weaponry did the perpetrators use?
- Were there any unique features that could help identify individuals, for example, uniform patches or insignia, licence plates and equipment?
- What languages were spoken by the perpetrators?
- How can the authority of commanders be established?

- What official or improvised military or police facilities (barracks, bases, staging areas, civilian buildings converted for military or police use etc) were located in the vicinity?

The determination of what information can constitute evidence rests on issues of the relevance, credibility, accuracy and reliability of that evidence. It is critical to ensure that effective steps have been taken to ensure reliability, authenticity and corroboration.

The relevance of information depends on the extent to which it connects to the subjects and issues under investigation.

A general rule is that more detailed information is desirable, however, and conversely, overly detailed information can lead to questions about the credibility of that information, for example, a witness can bring his or her own credibility into question if his or her allegations are so specific that they exceed what a witness could reasonably have known.

Crime scene

The first point to recognise is that a crime scene must be deemed safe prior to it being entered, recognising that such scenes are often subject to ‘booby traps’. Appropriate personnel must therefore be tasked to check and secure the scene. A primary issue to consider is preserving the integrity of it. It is of equal importance to ensure the integrity of the crime scene to ensure that evidence is not lost or compromised.

For more details, please see **Section 5: Data from a Crime Scene**.

Witness handling

- Quite often, people try to please the interviewer. Make sure the witness understands that it is ok if he or she does not know or remember something as clearly as they would like.
- Question the witness on how he or she knows what he or she does.
- Address all questions to and look at the witness, not the interpreter during the interview. Likewise, even when the interpreter is translating the answers of the witness, your primary attention should be directed towards the witness rather than the interpreter. This helps to create a feeling of trust and interest.
- Avoid asking leading questions that suggest which information you wish to obtain. You can start the interview by asking the witness to provide an overview in his or her own words of important events. Inform the witness about the need to focus on facts rather than on his or her own opinions or analysis of events.
- Interviewing a witness can be conducted in stages. The first stage is an evidentiary scoping exercise. Identify whether the witness has relevant information. This can form the basis for a more detailed, in-depth interview.
- Depending upon the jurisdiction, ensure that you are aware of the procedural rules of witness interviews and statement recording.

- Leave your contact details and that of your organisation (in case you are rotated out of the area) with the witness in case he or she wants to send you more information or needs your assistance.

For more details, please see **Section 4: Witness Handling**.

Interpreters

Try to provide them beforehand with a list of important (technical) terminology that will be essential to conduct the interview.

Be careful in choosing interpreters. Past experience in conflict zones shows that infiltration of a mission is most frequently accomplished through the use of interpreters and other local staff. Be aware of what information is made available to the interpreters, and avoid sharing too much information or, in particular, discussing witness interview plans with interpreters. Try to work on a 'need to know basis' at all times. Ensure that all information pertaining to the interview, and in particular, the identity of the persons being interviewed, is kept confidential by the interpreter.

Remember that local interpreters may also be at risk because of their role in witness interviews. This should be discussed with your interpreters so that any risks can be minimised.

Prior to the interview, explain clearly to the interpreter that his or her role is to translate what is asked and answered, and not to embellish or seek to explain further.

Documentary/other physical evidence

In taking possession of documentary or other physical evidence, you, or the person taking possession of them, are responsible for documenting, storing and maintaining a chain of custody.

It is therefore essential that you draft an appropriate witness statement, detailing:

- what the evidence is;
- where it came from and how you obtained it;
- the date it was received; and
- where it was stored.

Thereafter, an appropriate chain of custody procedures should be followed as per the attached sample documentation in Annex 2.

It is important to remember that while the evidence is in your possession or in storage under your supervision, you are responsible for the integrity of that evidence, and thus, you should be prepared to answer relevant question by other investigative or prosecutorial agencies should there be a need to do so.

Section 6: Collection and storage of evidence

Learning objectives

By the end of the section, the participants will be able to:

- collect and store evidence in accordance with international standards; and
- maintain the chain of custody of a document or item collected.

Key message

Rules of Procedure and Evidence of the ICC provide relevant and key guiding principles. If evidence is collated, matters investigated and cases filled with these rules in mind, they are more likely to be deemed appropriate in competent domestic jurisdictions.

Different types of crimes may require more specific approaches to the collection and storage of data. However, when data is collected and stored, certain general rules can apply in relation to how data should be properly collected and stored.

To maintain the chain of custody of a document or item, practitioners need to record:

- how the document or item was collected; and
- whether (and how) possession of the document or item was transferred between different individuals and/or organisations.

Investigators should also be aware of the legal requirements in the relevant jurisdiction concerning chain of custody.

Collection and storage of evidence

As outlined above, the focus of the manual is not the preparation of cases before the ICC, given the lack of jurisdiction of the court at this stage. The focus of the manual is the filing of cases before national jurisdictions. In seeking to submit a file of evidence to a domestic investigative or prosecutorial agency, such as the UK, Germany or Spain, for instance, the evidence must comply with the relevant standards and procedures in those countries.

It is, however, beyond the scope of this manual to assess the rules of evidence and procedure of all relevant national jurisdictions. Further, it ought to be borne in mind that in the event a special international tribunal is created – for instance, an ad hoc tribunal – a specific statute is likely to be drafted, along with complementary and specific rules of evidence and procedure.

In light of the above, the position adopted for the purpose of this manual is to use the Rules of Procedure and Evidence of the ICC as our guiding principles. If evidence is collated, matters investigated and cases filled with these rules in mind, they are more likely to be deemed appropriate in competent domestic jurisdictions.

We would further advise that consideration be given to the ‘Syracusa Guidelines for International, Regional and National Fact-Finding Bodies’. Although not specific to the criminal standard of proof, the guidelines were developed with a view to setting up appropriate tests that are transferrable in any situation, including for evidence collation, storage and submission.

Specifically, the following individual ‘Guidelines’ are relevant (see **Annex 1**).

PRELIMINARY CONSIDERATIONS

Data, including documentary, digital (electronic) and other physical evidence, can be useful to strengthen and corroborate evidence obtained through interviews, and, in some cases, open new avenues of inquiry. It may also sometimes be required by international courts and tribunals, and domestic jurisdictions to corroborate other evidence, such as witness evidence.

It is important to have in place specific policies and protocols on data collection and storage, and to adhere to them strictly to avoid any accusations of tampering with evidence. These policies should be dated and readily available for inspection.

Before any data is collected, it is important to plan how it is going to be collected, handled and stored. Certain types of evidence, such as physical evidence, may require specific legal authorisation to collect, and/or should only be processed, handled or stored by trained professionals. Investigators, who do not have the necessary authority or training should not collect such information as they may mishandle and contaminate it, making it inadmissible in courts. That said, they may record or document it in other ways, for example, by photographing or video-recording it.

DATA COLLECTION

Different types of crimes may require more specific approaches to collection and storage of data. However, when data is collected and stored, certain general rules can apply in relation to how data should be properly collected and stored.

Origin and authenticity of the data

Investigators must be able to demonstrate when, where, from whom and how they collected the data. This information should be the first entry in the chain of custody log. This information should be recorded for each piece of data collected in order to show the authenticity and assist future verification of the document or physical evidence. Investigators should preserve records of the chain of custody (see below).

In data collection and storage, the most important element is to ensure that the origin and authenticity of all material is verifiable. Therefore, investigators should accurately record how the data was found and/or received. The following information should be recorded:

- the circumstances under which the data was found or received;
- the location where it was found;
- from whom it was received; and
- who else was present, and statements should be taken from those present, if possible.

If data is provided by a third party, investigators should obtain a statement from the third party setting out:

- the circumstances under which the third party obtained the data;
- when and from whom he or she received it;
- whether the data is an original or a copy;
- an explanation of the meaning or significance any of seals, signatures and names, if contained in the data; and
- how the third party knows this information.

If the data is a copy, investigators should ensure that the copy is clear; that both the front and back are copied, if necessary; and record how and when it was copied and by whom. It is also important to ensure, where possible, that the certification of the copy as a true copy of the original is obtained with an appropriate declaration.

It is important to obtain contact details for the provider of information or testimony as there may be some follow up questions. Investigators should make sure that the data providers have contact details for them in case they have some further information to provide.

Confidentiality

Issues of confidentiality may arise. These are complex issues, and for the relevant court or tribunal to decide, they cannot be controlled by investigators once they have provided information to representatives of these institutions. Therefore, if investigators believe that the nature of the information is such that it will be relevant for international criminal courts, they should inform the provider of the possibility that they will hand the documentation over to such courts, and that it may be used in a public trial at such courts. Investigators should avoid providing assurances of confidentiality. If they are operating in an area in which such courts have field offices or investigators operating in the field, they should encourage the provider to approach these persons directly if they feel safe doing so.

Methods of collection

In order to protect and preserve the integrity of the data and to avoid suspicion of selective data collection, investigators should collect full data (eg, a complete document with all the pages in sequence), which may contain damning as well as exonerating evidence.

Investigators should document data collection by taking photographs or video-recording the process of data collection, which will capture the sequence of events and the condition of the data collected. It is important for investigators to have good quality cameras and video-recording equipment. They should be proficient in operating it. In particular, they should learn how to operate the date and time function, and how to balance colour and light. If working across multiple time zones, they should set their camera always to one time zone, for example, Greenwich Mean Time (GMT). If relevant, they should learn how to enable the geotagging feature in their equipment. If taking photographs/videos of individuals, investigators should always obtain their informed consent to take the photographs/videos.

Once photographs/videos have been taken, investigators need to link the individual's identity to the photographs/videos (eg, ensure that every photograph/video contains a case identifier or, alternatively, print or write the case identifier on a sheet of paper and photograph/film this sheet at the beginning and end of the roll of film or memory card – the investigator should note that this case identifier should not include details that divulge the individual's name and address).

Photographs/videos are rarely self-authenticating, although metadata and data coordinates can be used as a way to authentic time and place. Therefore, where possible investigators should take testimony from a witness to explain what is in the photograph/video; when, where and why the photograph was taken and by whom; and to provide the context for what is being seen in the photograph/video. Where a witness is available, the investigator should not narrate the video, but rather let the witness to do it in his or her testimony.

When video-recording, investigators should set the time/date accurately; record the object of interest, but also its surrounds in 360 degrees continuously in circle on the macro level and detail on the micro level; and try not to stop and start filming too often when filming the same event or location. This will help to avoid accusations of having cut out a part of the video. It is also important to ensure that recognisable sights are included in the photograph/video to ensure that the location can be corroborated, and where photographs of mortar attacks and bombardment are the subject of the documentation, that simple tools, such as rulers and cigarette packets, are placed in the image frame to establish size and proportion, which will allow the determination of the type of weaponry incorporated.

Investigators need to take clear and accurate photographs from different angles and using scales.

Investigators need to ensure that they write down all information about:

- who is taking photographs/filming;
- who else was present;
- the date, time and place of the recording;
- all those who have custody of the photographs/film/equipment from the moment of taking photographs/filming onwards (see chain of custody below); and
- any copies made of the video and who made or kept the copy.

All photograph/video evidence should be catalogued within an established numbering system, and that numbering system should link to the other corroborative evidence in relation to this particular photograph/video.

TYPES OF DATA COLLECTED

Non-official investigators should, as a rule, avoid seizing data from any organisation, government or military body, or individual. Investigators should put in place procedures that set out what steps to take if they should find themselves in a situation where they come across or are being provided with documentation relevant to their work. Although such practitioners should never seize documentation without express authorisation to do so unless there is a risk of destruction, it may be possible to accept documentation voluntarily handed over, providing that procedures are in place and that the practitioner collects sufficient information relating to the document itself.

Some documentary data, such as medical records, require obtaining prior specific informed consent from the person whose data is being collected. It is important to have a policy in place as to whether original data is collected or copies (as an original medical record will need to be kept by its owner for use in the course of medical treatment, etc). It is also important to only collect data that is relevant rather than all medical records.

DATA FROM A CRIME SCENE

Collecting physical evidence from the sites of violations should only be done by trained professionals with the mandate, capacity, skills and equipment to do so. Only official investigators should collect any relevant physical, documentary or forensic evidence from sites of violations. Investigators without the appropriate training to collect such types of evidence should, as a rule, only record and document the site. Physical/documentary evidence found at those sites should not be moved; instead, these steps should be followed:

- the site should be cordoned off and access to it limited;
- the location of the site should be accurately recorded, preferably with Global Positioning System (GPS) coordinates;
- the date and time should be noted;
- a neutral, trustworthy site manager should be appointed;
- a log of everyone who visits the site should be established;
- detailed notes of all actions taken at the site should be recorded;
- photographs/video-recordings of the site, including the location of potential evidence, should be taken;
- a sketch should be made of the site, including the location and details of potential evidence; and
- the site should be left as found.

If people voluntarily approach you with information while on a crime scene, it is recommended to avoid asking detailed questions at this stage and conduct a scoping exercise:

- Take summary notes (including identifying and contact information) that will guide an eventual formal interview at a later stage.
- Avoid giving assurances to the person about what will happen after they have spoken to you; specifically, do not make any promises unless you are completely certain that you can deliver.

DATA STORAGE

Data should as soon as possible be transported to a designated secure location for storage that is locked, and away from heat, damp and other adverse conditions. The data can be stored in a manual storage system, digitally or a combination of the two. Storage preferences may differ based on the evidence.

As soon as the data arrives at the designated place of storage it should be properly catalogued with a unique identifying number (UIN) and registered in an evidence log. It is important to have a data management system in place.

Once in storage, access to data should be limited to persons who need to have access to the data, and a record should be kept of who accessed the data, when and why. This will protect investigators from any accusations of tampering with evidence. Ideally, a separate person should be appointed as an evidence officer to ensure data security and chain of custody.

It may be advisable, if possible, to store as much data electronically as possible. This will protect the stored evidence from damage if it needs to be used repeatedly, and will provide backup.

Investigators should consult experts regarding the assessment of technologies for digital data storage that are the most appropriate for their purpose and context in terms of data collection and storage. Investigators should check whether their regulator has any limitation on which technologies cannot be used for the purpose of data storage. The data security and document management system adopted must be end-to-end encrypted to ensure the appropriate security of the data and confidentiality of sources.

Investigators should:

- protect all digital data with strong passwords (and the access to those passwords);
- change passwords regularly; and
- ensure that the data is encrypted with trusted software (and access to the encryption and decryption keys limited).

Where possible, investigators and practitioners should take additional measures to protect sensitive information by using more advanced procedures and methods, such as encrypting drives and ensuring safe transmission of digital information.

Investigators need to remember that encrypting data in some countries is illegal, in which case, the mere existence of encrypted files may be incriminating. Investigators may consider hiding encrypted files (eg, by renaming them and making them look like music or image files) or consider alternatives.

Investigators should limit access to such data only to those who need to access it, and keep a detailed log.

Investigators should make and keep two copies of all digital files by transferring and storing them on a computer, memory key/USB and/or read-only CD, which is kept separately/outside of the office at a secure location. In addition, investigators should consider a remote backup/storage system, especially if digital files can be encrypted before being sent.

There should also be a plan in place in case of an emergency to ensure the personal safety of those staff with access to relevant passwords and protected files. In addition, investigators may want to consider preparing a plan for the speedy destruction of locally stored digital evidence ahead of an impending raid or other immediate threat. This presupposes previously created accessible backup copies of all locally held digital evidence for recovery after deletion and once the threat is no longer active.

Investigators should take appropriate precautions, such as using anti-virus software and backing up database files.

The digital data storage system should automatically record any access to the digital files and have an edit-trail facility on the database so that any additions/deletions or alterations to a note or record are logged to a particular user.

In instances where chain of custody must be rigorously maintained for evidence to be used in criminal cases, digital storage systems must be demonstrably inaccessible and untampered with, as well contain an evidence/affidavit package for each individual piece of evidence in the database to support its claims to authenticity.

CHAIN OF CUSTODY

To maintain the chain of custody of a document or item, investigators need to record:

- how, where and when the document or item was collected;
- whether (and how) possession of the document or item was transferred between different individuals and/or organisations.

Investigators should also be aware of the legal requirements in the relevant jurisdiction concerning chain of custody.

It is important to note that every stage of the process must be recorded by an evidence officer or other appropriate individual within the organisation to ensure that there is no break in the custody record.

How was the document or item collected?

The general principle is that each document or item should be labelled with at least the following information:

- a case identifier – a number assigned to a particular case that can link all the information pertaining to that case;
- the date of collection, the name of the practitioner who collected the document or item and the names of any other people present during the collection;
- the precise location of the document or item when it was collected, and who or what it was collected from;
- the kind of document/evidence that was collected;
- the measures that were put in place to ensure that the document or item was kept secure while it was in the practitioner's possession (eg, it was kept in a locked cupboard that only the practitioner's team had access to);
- the preservation conditions, if relevant, for example, for a blood or other biological sample – noting that it was preserved and refrigerated within a certain temperature range to enable DNA extraction; and
- if investigators did not collect the document or item themselves, details of any agreement, terms or discussion as to the use of the document or item between the person handing over the document or physical evidence and investigators.

Any document or item that investigators collect should be placed with care in an evidence bag (an easily sealable plastic bag will suffice if there is no water/dampness on the document; an acid-free paper envelope is preferable if water/dampness is present). Investigators should ensure that:

- the evidence bag/envelope is sealed;
- the seal is signed by the person who collected the document or item; and
- the evidence bag/envelope is not opened at any time.

Ideally, all the notes should be set out on a single sheet of paper that is attached to the evidence bag/envelope in which the document or item has been placed (see sample Evidence Chain Custody Tracking Form below).

For large volumes collected from a single source and by a single individual, for example, the information can be completed for the volume, and if necessary, boxed. However, the process should be repeated where any of these variables differ, in particular, the source of the documents or items.

Was the possession of the document or item ever transferred between individuals or organisations?

If a document or item has ever been transferred between individuals or organisations, it is important to keep a record of the details of that transfer. This can easily be shown in the Chain of Custody Tracking Form and a separate transfer log. This transfer log should set out for each transfer of each document or item:

- the case identifier – a number attributed to a particular case that can link all the information pertaining to that case;
- the type of document or evidence collected;
- the date of transfer;
- the reason for the transfer;
- the signatures of both the transferor and transferee; and
- if possible, the security conditions observed during handling or storage of the document or item.

In general, it is best to try to keep the number of transfers of custody as low as possible.

DIGITAL EVIDENCE BEFORE INTERNATIONAL COURTS

Digital evidence for the purpose of this chapter refers to evidence taken from and created by digital devices and via technology such as mobile devices and cameras, rather than otherwise documentary evidence that has since been digitised for the purposes of presentation and/or disclosure.

A key issue regarding this particular ‘brand’ of evidence is its ‘reliability’ or otherwise. It is therefore often essential that the presentation of such evidence is assisted by a competent expert who is in a position to explain the science or technology behind the evidence, and the conditions within which it was created, thus leading to a more informed decision regarding its credibility.

Again, a rigorously complied with chain of custody is essential when dealing with such evidence, so as to prevent certain limbs of challenge before they have been advanced.

The cases decided by international criminal tribunals suggest that international criminal courts establish the authenticity of digital evidence in two distinct ways:

- either the prosecution uses an indicator to establish the authenticity of digital evidence; or
- the prosecution uses digital evidence to establish the authenticity of an indicator.

For example, a prosecutor may use a transcript (indicator) to prove the authenticity of a video (digital evidence).¹⁷⁵ Conversely, the prosecution may use a photograph (digital evidence) to prove the

¹⁷⁵ See *The Prosecutor v Karemera, et al* (Judgment) IT-98-44-T (2 February 2012) paras 169–173, 205 (the transcript of a radio broadcast authenticated the date of the video of a rally and corroborated evidence that the accused was in attendance); *The Prosecutor v Bagosora* (Judgment and Appeals Judgment) IT-98-41-T (8 December 2008 and 14 December 2011) paras 2029–2031, 460 (the transcript authenticated video footage corroborating evidence that the accused was acting as Minister of Defence and exercised control over the army).

authenticity of testimonial evidence (indicator).¹⁷⁶ Nevertheless, courts appear to favour authenticity of digital evidence through external indicators, such as a transcript or testimony.¹⁷⁷ Corroboration of digital evidence is thus critical to proving its authenticity.

Factors that improve the probative value of digital evidence hearsay include corroborating evidence, such as live testimony, and explanations of the procedures by which the digital evidence was obtained, including testimony of those involved in obtaining it.¹⁷⁸ Reliability is also strengthened by creating a chain of custody in the presentation of the evidence.¹⁷⁹ The evidence can also be further corroborated by the presentation of other evidence that has a higher probative value, increasing the total weight of the evidence.¹⁸⁰ Yet to be assessed is whether digital evidence hearsay can ever be admitted on its own, or for the truth of the matter. Such situations could include digital documents of communications of deceased persons. An unresolved issue is also to what extent is the presentation of chain of custody and expert testimony about digital evidence sufficient for it to be reliable.

At the admissibility stage, there is no typical amount of author testimony required, and the bar for admission is usually low.¹⁸¹ Cases from the ad hoc tribunals offer different approaches to the question of whether it is necessary for the author of digital evidence to testify to establish provenance: some have not automatically refused evidence submitted without author testimony, while others have refused to admit even corroborating witness testimony without testimony from the author.¹⁸² However, international courts appear to prefer the prosecution to provide testimony from a live witness, usually the author, before admitting or giving weight to digital evidence. When courts assign evidentiary weight to digital evidence, the record suggests that the greatest evidentiary weight is given to live witness testimony that establishes the chain of custody.

The author's testimony should play the lead role here. When author testimony is unavailable or imprecise, other testimony can give weight to the evidence. Such testimony includes witness corroboration (or sometimes, corroboration by multiple witnesses), as well as testimony of other parties (such as investigators who obtained information).¹⁸³ Overall, the case law demonstrates that authorship, although it is not concretely defined, is the most prevalent consideration when determining the weight of the evidence based on provenance.

176 *The Prosecutor v Nyiramasuhuko, et al* (Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence) ICTR 98-42AR73.2 (October 2004) para 7 (photographs used to authenticate the witness' testimony, yet ultimately deemed inadmissible because of inconsistencies between the testimony and indictment timeline).

177 *Ibid.*

178 *The Prosecutor v Tolimir* (Trial Judgment) IT-05-88/2 (12 December 2012) para 64 (evidence was shown to be reliable in the practices followed by the interceptors).

179 *Ibid.*, para 64, fn 165.

180 *Ibid.*, para 65.

181 *The Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) para 30, n 72 (handwritten notebooks of radio intercept recordings accepted without complete audiotape recordings when accompanied by testimony of intercept operators despite defence objections to unreliable transcriptions, lack of operator training and substandard equipment, and the prosecution's failure to admit original recordings); *The Prosecutor v Blagojević and Jokić* (Decision on the Admission into Evidence of Intercept-Related Materials) IT-02-60-T (18 December 2003) para 2 (the court concluded that the operators described procedures with sufficient similarity and 'took their task seriously').

182 *The Prosecutor v Brdanin* (Order on the Standards Governing the Admission of Evidence) IT-05-88/2 (15 February 2002) para 20, but see also *The Prosecutor v Renzaho* (Judgment and Sentence) ICTR-97-31-T (14 July 2009) para 841; *The Prosecutor v Renzaho* (Decision on Exclusion of Testimony and Admission of Exhibit) ICTR-97-31-T (20 March 2007) paras 1–2.

183 See *The Prosecutor v Tolimir* (Trial Judgment) IT-05-88/2 (12 December 2012) paras 64–70; *The Prosecutor v Brdanin* (Judgment) IT-99-36-T (1 September 2004) para 34, n 38, but see also *The Prosecutor v Renzaho* (Decision on Exclusion of Testimony and Admission of Exhibit) ICTR-97-31-T (20 March 2007) paras 1–2.

So far, international criminal courts have provided little guidance on the best means of preserving digital evidence. Additionally, the ICC does not appear to take measures to ensure digital information has been properly preserved before investigators obtain it. Therefore, questions arise as to what methods should be used to ensure evidence is preserved in a manner that will satisfy chambers. It is especially uncertain what methods of preservation are appropriate for evidence obtained from unverifiable sources, such as videos uploaded to the internet without identity information of the owner. See **Annex 2 (Evidence Chain of Custody Tracking Form)**.

Section 7: Witness interviews and witness handling (sensitive witnesses)

Learning objectives

By the end of the section, the participants will be able to:

- identify the main steps that need to be taken to handle sensitive witnesses; and
- identify the tasks to complete during witness interviews.

Key message

The Public International Law & Policy Group (PILPG) Protocol on Investigation and Documentation Field Guide provides guidelines for conducting an interview. They present the five stages of an interview called PEACE:

1. planning and preparation;
2. engaging with the victim/witness;
3. obtaining the account;
4. closing an interview appropriately; and
5. conducting an evaluation after the interview took place.

Witness interviews and witness handling (sensitive witnesses)

WITNESS INTERVIEWS

Reminder: When conducting interviews, you need to have in mind:

- the elements of war crimes, crimes against humanity and genocide, as well as their underlying individual acts; and
- the various modes of liability and their elements.

The IBAHRI does not recommend formally interviewing a witness. This is the role of professional investigators who have received special training. It is preferable to prepare a summary of the information.

The PILPG Protocol on Investigation and Documentation Field Guide provides guidelines for conducting an interview. They present the five stages of an interview called PEACE:

1. planning and preparation;
2. engaging with the victim/witness;

3. obtaining the account;
4. closing an interview appropriately; and
5. conducting an evaluation after the interview took place.

Your goal is to document your interview in a way that will allow you to reconstruct the entire interview at a later date without compromising the integrity of the information gathered. This means making clear notes listing all the details of your interview with the witness and a summary of what was said. You should strive to be as objective as possible in your record of the questions asked and of the witness's responses. Under no circumstances should you embellish or otherwise alter the information provided by the witness. See **Annexes 3 (Authority Template) and 4 (Witness Examination Record)**.

Investigation guidelines

List of tasks that need to be completed during interviews

1) Introduction

- Name of witness and nature of action, that is, witness interview of Mr X
- Date, time and location (including venue and city)
- People present in the room and their role
- Case number, if any

2) Official record

- Record Keeper/Interpreter reads out the template of warnings and other information to the witness. At the conclusion of the interview, off record, this is printed out and the witness signs the record.

3) Summary of interview

- Take notes, and at the completion of the interview, write a brief summary of the interview in the form of an official note.

4) Confirmation of prior statement

- If it is the second interview, the witness confirms each paragraph of his or her statement prior to commencing with new areas of inquiry.

5) Break in interview

- Introduction: Part X of Mr Y's witness interview.
- Note time prior to taking the break and the time upon resuming the interview.
- Upon resuming the interview, also confirm that no discussion took place while on the break, and confirm the people present in the room.

6) Conclusion of interview

- Witness is asked if he or she has anything to add or clarify.
- Witness is asked if he or she would like to view the audio/video.
- Witness should confirm that the contents of the statement are true.
- Witness should be asked if he or she has any objections to how the interview was conducted or to the contents of the interview record that he or she reviews and signs.
- Witness initials each page of the record.

The interview record at the end is **signed by the interpreter, record keeper and interviewer.**

Make a note of any concerns or impressions that you have after the interview. Keep this separate from your notes containing the facts and label it clearly as a note to yourself.

SENSITIVE WITNESSES

Being an eyewitness to a crime is, under any circumstances, a difficult experience, and it takes motivation and courage to come forth and speak about such events to outsiders. This difficulty is even greater when the witnesses are themselves victims of a crime, regardless of whether this is a single crime or a series of repeated violations. For such victim-witnesses, speaking about the abuses and crimes committed against them carries with it a very high risk of re-traumatisation, which is basically defined as a delayed reaction to, or reactivation of, the initial trauma.

You must be aware of this risk and try to avoid exacerbating the situation. Trauma and re-traumatisation do not necessarily manifest themselves in a physical or visible form. Psychological or mental trauma often remains hidden in the short term to those interacting with victims. Some specialists on victim trauma have called for a ‘universal presumption of trauma’. This entails assuming that every individual with whom we interact may have undergone trauma and may therefore be vulnerable to re-traumatisation.

For this reason, it is important that great care be taken in the course of interviews of victims. **Under no circumstances should interviews with vulnerable individuals be conducted by individuals who do not have significant interviewing experience or the appropriate training. You should avoid engaging in interviews of witnesses with special needs unless this is absolutely necessary.**

Special categories of victims include victims of sexual crimes and children. Victims of sexual crimes, who are usually overwhelmingly women, experience very high and often chronic levels of trauma after experiencing abuses. Victims of sexual violence also often face stigmatisation in their own communities if it becomes publicly known that they have been sexually abused. If at all possible, avoid interviews of female victims of sexual violence by male interviewers. Keep in mind that men can also be victims of sexual violence, which is a common method of torture in war and in repressive regimes.

Children are considered as a category of vulnerable individuals, and they are often disproportionately affected by human rights abuses and violence during armed conflict (in the case of children who have themselves been combatants in combat zones, they occupy a double role, as they are simultaneously victims and perpetrators). Numerous studies have also documented that children are more susceptible to long-term traumatisation than adults.

You should also be aware of the potential impact of interviews on your own mental and physical health. Interviewing traumatised victims can also be a very stressful experience for the interviewer. In some cases, the interviewer will him/herself need counselling afterwards. You therefore need to monitor yourself during interviews. If you are becoming stressed, depressed or aggravated, you should not continue to conduct interviews. This applies to interpreters as well.

Section 8: Data security and communications

Learning objectives

By the end of the section, the participants will be able to:

- ensure the security of the data collected; and
- manage and process data according to international standards.

Key message

The International Committee of the Red Cross (ICRC) provided guidance and principles on how particularly sensitive data should be handled:

- **General standards for the management of data and information:** They apply throughout the data and information life cycle, from their collection and analysis, to their use, sharing, correction, deletion and archiving.
- **Specific standards for the management of personal data and sensitive protection data and information:** They too apply throughout the data and information life cycle, from their collection and analysis to their use, sharing, correction, deletion and archiving. These standards must be applied when handling personal data. Failure to do so may cause harm to the individuals whose data are processed, and may have legal consequences for the protection actor. Where the practitioner is managing sensitive protection data and information that do not contain personal data, these standards must also be applied as a matter of best practice. These standards may also be applied to protection data and information that neither contain personal data nor are sensitive; application of the standards in this context is particularly encouraged, when appropriate.
- **Assessing the risks:** This includes practical advice for carrying out a data protection impact assessment (DPIA) to identify and mitigate any risks to personal data and sensitive protection data and information. More generally, DPIAs may also be used when assessing risks relating to the management of protection data and information that do not contain personal data and/or are not sensitive.

Data security and communications

CONFIDENTIALITY BEFORE INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS

Due to the sensitive nature of human rights and international crimes, there will be cases in which the provider of the information will not want to reveal his or her identity to investigators. Investigators may choose to accept the information if the provider is willing to provide it under a pseudonym or code name, although this is not an ideal situation, as investigators may, in some situations, need to

disclose the identity of their source for that data to be used before international or national criminal courts and tribunals. International and national criminal courts and tribunals have legal mechanisms for accepting information confidentially and for protecting the confidentiality of the provider (eg, Article 54(3) (e) of the Rome Statute, in the case of the ICC).

Investigators should, however, avoid giving any assurances of confidentiality. The identity of witnesses may have to be disclosed depending on the jurisdiction in charge of the case, whether national or international. For example, the Rome Statute requires that all potentially exonerating facts must be disclosed to the defence. In practice, this results in situations in which the obligation of the prosecutor to disclose information to the defence overrides whatever assurances of confidentiality the prosecutor has given. If the security of the provider of the information is assessed to be at risk, the court can order the defence to treat the identity of the source and the information provided confidentially.

These are complex issues for the relevant court or tribunal to decide, and they cannot be controlled by investigators once they have provided information to representatives of these institutions. Therefore, if investigators believe that the nature of the information is such that it will be relevant for international or national criminal courts and tribunals, they should inform the provider of the possibility that an investigator will hand the documentation over to such courts, and that it may be used in a public trial at such courts.

DIGITAL STORAGE OF DATA SECURITY

Before starting the collection of information that will be stored digitally, a risk assessment should be conducted, and a digital security protocol should be put in place. Information management and digital security specialists should be consulted for this purpose.

All digital information should be password protected (and access to that password limited) and encrypted. Where possible, practitioners should take additional measures to protect sensitive information by using more advanced procedures and methods, such as encrypting drives and ensuring the safe transmission of digital information.

INTERNATIONAL COMMITTEE OF THE RED CROSS PRINCIPLES

General standards for the management of data and information

COMPETENCIES AND CAPACITIES

Protection data and information management must be carried out only by skilled and trained staff, using appropriate information management systems and protocols.

INCLUSIVE PEOPLE-CENTRED APPROACH

Protection data and information management must be guided by the interests and wellbeing of the population affected and other persons providing information. They should be given an opportunity

to influence the design and approach of all stages of the data and information management process that affect them.

CLEARLY DEFINED, SPECIFIC PURPOSE

Protection data and information management must serve clearly defined, specific purposes, and aim at achieving protection outcomes.

Without this clarity, investigators may omit valuable information because they do not realise its importance; or they may collect sensitive information that is not relevant to the defined purpose and objectives, and will therefore not be used.

COOPERATION AND EXCHANGE

Protection actors¹⁸⁴ must avoid, to the extent possible, duplication of information collection efforts, in order to avoid unnecessary burdens and risks for persons affected, witnesses and communities.

AVOIDING BIAS AND DISCRIMINATION

Protection actors must gather and subsequently process protection data and information in an objective, impartial and transparent manner, to avoid or minimise the risk of bias and discrimination. Management of protection data and information must be sensitive to age, gender and other factors of diversity.

Protection actors should, to the degree possible, keep the persons who provided information informed of the action that has been taken on their behalf – and of the ensuing results.

Protection actors should be explicit about the level of reliability and precision of the data and information they collect, use or share.

Data and information collected by protection actors may not always be representative and accurate, and may contain gaps as a result of bias. Bias should be minimised by designing data collection procedures that ensure that sampling is as representative as possible and is non-discriminatory.

Specific standards for the management of personal data and sensitive protection data and information

COMPLIANCE WITH RELEVANT LEGAL FRAMEWORKS

Protection actors must collect and handle information containing personal data in accordance with the rules and principles of international law, and relevant regional and national laws on data protection.

184 'Protection actors' refers to humanitarian and human rights organisations that seek to ensure that obligations under IHL, IHRL and international refugee law (IRL) are respected, and that the rights enshrined therein are enjoyed without discrimination. The term also refers to professionals working in humanitarian or human rights responses. However, there are no reasons why it could not be applied to other data collectors more broadly, such as investigators.

Without adequate awareness of the applicable legal framework, protection actors may be prevented from collecting information, compelled to disclose it or face legal action by the state or the individuals concerned.¹⁸⁵ Prior to collecting or processing data, protection actors must therefore assess the international, regional and national legal frameworks for data protection for their applicability.¹⁸⁶

LEGITIMATE AND FAIR PROCESSING

Personal data and sensitive information must be processed only if there is a legitimate basis for doing so. If there is no legitimate basis for doing so, they must not be processed.

Data processing must be transparent to the persons concerned, who must be given a certain minimum amount of information about the processing.

Legitimate basis includes the following: specific informed consent of the person concerned, vital interest of the person providing the data or another person, public interest, legitimate interest, performance of a contract and compliance with a legal obligation.

DATA MINIMISATION

Protection data and information must be adequate and relevant to the clearly defined, specific purposes for which they are collected and processed. This means that the data processed must not exceed the purpose(s) for which it was collected.

DATA QUALITY

Personal data must be as accurate and up to date as possible. Inaccurate personal data must be corrected or deleted without undue delay.

DATA RETENTION

In order to ensure that personal data and sensitive data are not kept longer than necessary, a minimum retention period must be set, at the end of which a review must be carried out to determine whether the retention period should be extended, or the data erased or archived.

DATA SECURITY

Personal data and sensitive information must be processed in a manner that ensures an appropriate degree of security for as long as data is retained.

185 Domestic or regional laws may contain provisions imposing the disclosure of confidential information, with a view to protecting public order and the rule of law – eg, in criminal cases. In such cases, the protection actor must adopt clear internal guidelines defining the types of data to be collected and the circumstances in which they will be shared so as to avoid additional risks for both the victim and the actor involved.

186 See also UN, Guidelines for the Regulation of Computerized Personal Data Files, A/RES/45/95, 14 December 1990 – especially the ‘Humanitarian clause’, which calls for particular care and flexibility when applying data protection principles in the humanitarian sector; International Standards on the Protection of Personal Data and Privacy; Organisation for Economic Co-operation and Development (OECD) Guidelines on the Protection of Privacy and Transborder Flows of Personal Data; Council of Europe, Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, opened for signature on 28 January 1981, in force 1 October 1985, ETS 108; Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (EU General Data Protection Regulation), [2016] OJ L119/1.

Security safeguards, appropriate to the sensitivity of the information, must be in place prior to any collection of information – to ensure protection from loss or theft, unauthorised access, disclosure, copying, use or modification – whatever the format in which the data is kept or transferred, paying particular attention to security threats inherent to information and communications technology (ICT).

The primary objective of data security is to mitigate the risk of unintended third parties gaining access to data processed by protection actors, which may result in harm to the persons and communities on whose behalf protection actors are working.

Therefore, the protection actor (and any other responsible entity and processing service provider working on their behalf) must protect the data that is being processed with the appropriate legal, technical and organisational measures, and ensure, at all times, their integrity, confidentiality and availability. These measures depend on the existing risk, possible consequences to the persons concerned, sensitivity of the data, context in which the processing is being carried out and, where appropriate, obligations contained in the applicable national legislation.

The transfer of personal data and sensitive information (eg, from one office to another of the same organisation, or to another protection actor) must also be done by the safest means possible, using the appropriate tools (eg, encryption). If an appropriate level of confidentiality and security for personal data or sensitive protection information cannot be guaranteed, the protection actor should refrain from collecting the data or from transferring it. If security challenges develop owing to a change in the environment since the data collection, the protection actor should destroy the data if he or she is not able to mitigate the risks to data security.

Data security is thus a crucial component of an effective data protection system. Personal data and sensitive information must be processed in a manner that ensures appropriate security, including the prevention of unauthorised access and use. Data security relates, in particular, to access rights to databases, physical security, computer security or cybersecurity, the duty of discretion, and the conduct of staff and their awareness of general data security rules. It also entails the secure destruction or anonymisation of personal data and backups when retaining them is no longer necessary.

In order to ensure and maintain appropriate data security, protection actors are required to evaluate the specific risks associated with the processing, and to implement the organisational and technical measures necessary to mitigate those risks and ensure that data is protected from unauthorised access, theft, damage and loss throughout the data and information management process. These measures should ensure an appropriate level of security (taking into account available technology, prevailing security and logistical conditions, and the costs of implementation) in relation to the risks and the nature of the data and information to be protected.

These measures may include the taking of steps related to the following:

- staff training;
- office security;
- management of individual access rights to databases containing personal data;
- safeguards for the intended use of the data/information (eg, consent);
- clearly defined staff roles and responsibilities;
- physical security of databases – file management;
- information technology (IT) security;
- discretion clauses in employment and internship contracts or professional codes of conduct – quality control mechanisms;
- internal procedures for supervising the implementation of security measures; and
- delays and methods of destruction of personal data.

The objective of these measures is to ensure that personal data and sensitive information are kept secure, both technically and organisationally, and protected by reasonable and appropriate measures against unauthorised modification, copying, tampering, unlawful destruction, accidental loss, improper disclosure or undue transfer.

Some basic steps can be taken to improve data security. For instance, it may be necessary to blunt the precision of some data (of incidents or of interviews with victims, and concerning time and location) or reduce their granularity (number of persons interviewed and area affected by a certain issue) in order to ensure that a data set does not inadvertently reveal the actual location of at-risk individuals or groups.

Data security measures may vary, depending on the following elements:

- type of protection activity;
- nature and sensitivity of the data;
- form or format of storage;
- environment/location of the specific personal data; and
- prevailing security and logistical conditions (including the estimated surveillance capabilities of the different parties to a conflict or other situation of violence).

Data security measures should be routinely reviewed and upgraded to ensure a level of data protection that is appropriate to the sensitivity of the personal data.

To strengthen compliance with data security procedures within an organisation, monitoring mechanisms and corrective measures should be put in place to deal with data security breaches and mitigate their impact. Furthermore, any breach of security leading to the accidental or unlawful destruction, loss or alteration of – or to the unauthorised disclosure of or access to – personal data or sensitive information should be reported, if possible and deemed appropriate, to the persons affected by the data breach, in particular when the data breach puts them at risk.

CONFIDENTIALITY

The confidentiality of personal data and sensitive information must be maintained at all times.

Protection actors increasingly work in partnership and seek to ensure complementarity with other sectors, while avoiding duplication. The sharing and transfer of personal data and sensitive information among protection actors and with third parties (including across borders) is therefore a routine operational requirement in protection activities, essential to ensuring an effective, timely and collaborative response to the needs of the populations affected and to the protection threats they face.

However, the need to share information must be balanced with the need to protect the privacy, wellbeing and security of populations affected, and with the ‘do no harm’ principle. Protection actors should transfer or share information only if it serves a protection purpose and if there is a legitimate basis for doing so. Transferring, sharing or publishing personal data and sensitive protection data and information must be done in a safe and responsible manner. Since data sharing is a form of data processing, it requires paying due regard to all the standards listed in this chapter.

Furthermore, most national data protection laws place restrictions on the sharing of personal data with third parties, in particular, across national borders. Some national legislation even restricts the sharing of personal data outside the country where the data was originally collected or processed, even if the data is to be transferred to an office of the same protection actor in another country.

The following steps should be followed when transferring personal data and sensitive information internationally:

- All applicable data protection rules or privacy requirements (including all applicable local legal data protection or privacy requirements) should be satisfied prior to the transfer.
- It must be confirmed or verified that there is a legitimate basis for the transfer.
- A risk assessment (such as a DPIA – see below) should be carried out prior to the transfer to confirm that the transfer does not present unacceptable risks for the individual concerned.
- The protection actor initiating the transfer must be able to demonstrate that adequate measures have been undertaken to ensure compliance by the recipient entity with the principles of data protection (outlined in these professional standards) in order to maintain the proper level of protection of data.

- The person whose personal data is being transferred should be informed about the recipient(s) of the transfer and given an opportunity to either consent or object to the transfer. The data must be transferred using appropriate safety measures, such as encryption, to protect against interception and unauthorised access.

Sharing, transferring and publishing

Data must be transferred to or shared with only those recipients who offer the required level of data security and protection.

As there is a very high risk of causing harm if personal data or sensitive protection data and information are mismanaged, protection actors must ensure that data are transferred to or shared with only those entities that offer the required level of data security and protection. They must also ensure that the actual transfer is done through the safest means possible, using security measures such as encryption, as needed.

Protection actors must also take measures to ensure that the sharing of personal data, and sensitive protection data and information does not compromise the identity or character – humanitarian or human rights, non-political – of these actors, jeopardise human rights or undermine the climate of trust and confidence that has to exist between humanitarian and human rights actors, and the persons approaching them for protection and/or assistance.

When sharing non-personal data, such as aggregated or statistical data, or general protection information about a situation, protection actors should also take the following precautions:

- prioritise protection outcomes, and the safety and wellbeing of the persons or populations concerned;
- be transparent about the accuracy and reliability of the information and/or data provided so as to minimise the risk of presenting an incorrect or incomplete image of the issues they intend to address;
- always consider the sensitivities of or the potential risks for the persons (individuals or communities) whose data are shared (even if informed consent has been provided); and
- consider, when sharing aggregate or statistical data, whether the sample is sufficiently large or the granularity of data is sufficient to provide meaningful and accurate statistics and/or descriptions of trends, and whether there is any risk of individuals and communities being identified from the sample alone or in combination with other data/information and being adversely affected as a consequence.

ACCOUNTABILITY

Protection actors must ensure accountability for the processing of personal data and sensitive information. They must establish formal procedures for the data and information management process, from collection to exchange and archiving or destruction, including coaching of staff and volunteers, monitoring of quality and supervisory mechanisms.

The principle of accountability is premised on the responsibility of protection actors who process data to comply with the standards set out in this section, and with the applicable legislation. Protection actors must be in a position to demonstrate that adequate and proportionate measures have been undertaken within their respective organisations to ensure compliance, and to prevent the harm that may result from unauthorised access.

These procedures are especially useful for ensuring the relevance and quality of information, and accountability in its use, and for defining security rules. As a minimum, they should:

- incorporate, from the outset, key elements linked to preparation for data collection, particularly with respect to informed consent, privacy, transmissibility and restriction of access. This is of critical importance in emergency situations, where staff turnover is often high, and especially when institutional memory is limited;
- define access rights and clarify the obligations of staff handling data and what they are authorised to do, and what they are not permitted to do;
- set out the conditions for use and onward sharing;
- set out the security safeguards; and
- clarify rules and timelines for archiving and/or destroying data – clarify how confidential information will be securely stored.

Assessing the risks

Protection actors must assess the risks at each step of collecting and processing data and information, and must mitigate any potential adverse consequences for those providing them, and for their families and communities.

Section 9: Preparing legal submissions

Learning objectives

By the end of the section, the participants will be able to:

- prepare legal submissions.

Key message

Your legal submission should present as complete a case as possible to the investigative/prosecutorial authority so as to show that there is no reason why a domestic investigation/prosecution cannot take place.

Preparing legal submissions

PRELIMINARY REMARKS

Filing a legal submission before domestic courts is a difficult and technical task. It requires in-depth knowledge of domestic criminal laws and procedures. The IBAHRI strongly recommends working in collaboration with local organisations or lawyers. Close collaboration will not only ensure that your submission complies with domestic standards but also guarantee coordination and discussions with local judicial and prosecutorial authorities on investigations and prosecutions.

LEGAL SUBMISSIONS

Matters that lawyers and investigators will seek to prepare for submission to domestic authorities will, in the first instance, be passed to the relevant investigative agency, who will in turn conduct its own investigation into the matter, to a greater or lesser extent.

The purpose of any submission therefore is not necessarily to argue a case before a court, although the evidence collated will, of course, form part of any eventual case.

The purpose of the submission will be to justify why that relevant domestic agency ought to open its own investigation with a view to an eventual prosecution before the courts.

Accordingly, there are no exacting rules that dictate what format any such submission should take at this stage, and the position is unlikely to change regardless of the domestic jurisdiction where the matter is eventually brought.

As far as good practice is concerned, however, it is suggested that an appropriate format for the submission is adopted, ensuring that essential 'heads' and 'limbs' of relevant argument and evidence assessment are included in such a submission.

The ‘idea’ is to present as complete a case as possible to that investigative/prosecutorial authority so as to show that there is no reason why a domestic investigation/prosecution cannot take place.

It is suggested, therefore, that a format based on the following example, or derivative thereof, ought to be adopted insofar as section headings are concerned:¹⁸⁷

- **Introduction:** To include the purpose of the submission, for example, to formally request that the police open, and undertake, a full criminal investigation.
- **Procedure for investigation**
- **Jurisdiction to investigate:** Having regard to the relevant domestic legislation, discuss why the relevant domestic authority has the jurisdiction to investigate the allegations being made in the submission.
- **The complaint:** In detail, set out what the complaint is, including specifics of the allegations and victims.
- **Discussion:** In detail analyse the complaint and evidence, against the domestic legislation and argue why an investigation ought to be open, and why there is no barrier to doing so.

Subsequent paragraphs ought to go on to deal with any other relevant specific issues, such as how the conditions of universal jurisdiction have been fulfilled (ie, ‘presence’ and ‘identifiable individual’).

These paragraphs will of course differ depending on the domestic jurisdiction seized.

It is therefore advisable for a ‘local’ lawyer to be engaged so as to ensure appropriate arguments are raised.

¹⁸⁷ The example used here is based on the format of submission under the principle of universal jurisdiction advanced before the Metropolitan Police War Crimes Department of the UK, submitted by members of Guernica Chambers, and further, Art 15 submissions filed with the Office of the Prosecutor (OTP) at the ICC, again, drafted by members of Guernica Chambers.

Annexes

Annex 1: Siracusa Guidelines for International, Regional and National Fact-Finding Bodies

Guideline 7 – Investigative Plan

‘The fact-finding body (in the instant case, any investigator or individual) should establish an Investigation Plan outlining its strategic objective, the methodology of the investigation and relevant evidence and other information needed to fulfil the mandate.

- 7.1 The Investigation Plan should identify allegations of facts or circumstances that should be investigated.
- 7.2 The Investigation Plan should identify the applicable laws or other obligations that are alleged to have been violated, it should describe the nature of the allegations under investigation and the elements that need to be proven to establish that a violation or crime has occurred.
- 7.3 The Investigation Plan should identify the priorities of the fact-finding body and the tasks to be completed during the investigation, including methods used to collect evidence and other information.
- 7.4 The Investigation Plan should identify the resources required to conduct the investigation, including the need for specialised equipment or expertise, such as forensic experts.
- 7.5 The Investigation Plan should include a protocol for making logistical arrangements needed to carry out the investigation.
- 7.6 Depending upon the circumstances and needs of the fact-finding body, the Investigation Plan may need to be revised or updated during the mission.

Guideline 8 – Standards for the Collection and Review of Evidence and Other Information

The fact-finding body should adopt standards for the collection, review and evaluation of evidence and other information which provide it with a degree of certainty with regard to its findings. The fact-finding body should also adopt methods for the collection of evidence and other information sufficient to enable an assessment of the reliability of the sources of evidence and other information.

- 8.1 The fact-finding body should collect evidence and other information that is credible and relevant.
- 8.2 There should be a protocol for the collection, processing, management, recording and storage of evidence and information including physical evidence. Physical evidence should be easily identified and located.
- 8.3 The fact-finding body should establish a protocol regarding the assessment and weighing of evidence and other information. The fact-finding body should clearly articulate the standard it has used to make its findings. The minimum standard for the review and evaluation of evidence and other information should be a balance of probabilities.¹⁸⁸
- 8.4 Evidence or other information that is hearsay evidence i.e. other than directly from the source, should be distinguished from direct evidence or information. The fact that internal protocols for the fact-finding body may allow consideration of hearsay evidence should not encourage complacency or diminish the importance of locating direct sources of evidence or other information where possible.
- 8.5 Investigators should test and note their own findings regarding the credibility and reliability of witnesses.
- 8.6 The fact-finding body should establish a chain of custody protocol for the physical evidence ensuring that the chain of custody is not broken and that the chronological order of ownership, custody or possession of the physical evidence is recorded.
- 8.7 Physical evidence should be properly preserved and protected from contamination while in the custody of the fact-finding body.

¹⁸⁸ It is, of course, the position that the standard of proof in a criminal trial is one of 'beyond reasonable doubt' and there is no suggestion that this ever ought to change; however, for the purposes of analysis and submission to a relevant prosecutorial or investigative agency for further review or prosecution, a lower standard is suggested as being acceptable, as the central aim of the submission is for proceedings to be brought. It is the court that will test the veracity of the evidence and thus determine whether the allegations are substantiated. This is not the job of the investigator or the lawyer submitting the filing.

Guideline 9 – Recording of Evidence and Other Information

The fact-finding body should develop an effective mechanism for the preservation, recording and analysis of evidence and other information, including a database to aid in categorising and sorting out evidence and other information and their analysis.

- 9.1 The fact-finding body should develop an effective database system that records evidence and other information obtained from witnesses and through other activities undertaken by the fact-finding body. The database system should be organised to assist with the investigation, provide target/theme specific information and provide a witness management system to store and track witness statements and information about witnesses.
- 9.2 Data entry protocols should be established before investigation activities begin and should be designed to ensure that the data will be entered in a standard format. The database system should be easily adaptable to needs as they develop throughout the work of the fact-finding body.
- 9.3 Where applicable, a witness management system should include, at a minimum, the following:
 - 9.3.1 Brief biographical information
 - 9.3.2 Contact details, including a contact person(s) who can reliably contact the witness.
 - 9.3.3 Protocols to prevent witness record duplication should be implemented, particularly in situations in which a witness may submit multiple statements or when different transliterations of names for the same witness may be used.
 - 9.3.4 Any specific security concerns related to the witness, any reported instances of witness intimidation and information related to witness protection that have may have been recorded with regard to any witness.
 - 9.3.5 A sequence of events reported by the witness making the statement, in chronological order.
 - 9.3.6 Information on the alleged perpetrator(s).
 - 9.3.7 A comprehensive description of all violations of applicable law or other obligations witnessed including any words spoken by alleged perpetrators(s) and by other people in the presence of the alleged perpetrator(s).
 - 9.3.8 Information relevant to assisting the fact-finding body in determining the credibility of the witness, including information on the ability and the possibility of the witness to observe/see events or to hear the words the witness is describing in his/her statement.
 - 9.3.9 Physical evidence submitted by the witness should be recorded in accordance with the chain of custody protocol.
 - 9.3.10 Evidence or other information that is hearsay, that is, other than directly obtained from the source, should be distinguished from direct evidence or testimony.
- 9.4 A system of evidence numbering should be used to facilitate the recording, access to and management of evidence. The numbering system should be simple and sequential.

Annex 2: Evidence Chain of Custody Tracking Form

EVIDENCE CHAIN OF CUSTODY TRACKING FORM

Case Number: _____ Offence: _____

Submitting Officer: (Name/ID#) _____

Victim: _____

Suspect: _____

Date/Time Seized: _____ Location of Seizure: _____

Description of Evidence		
Item #	Quantity	Description of Item (Model, Serial #, Condition, Marks, Scratches)

Chain of Custody				
Item #	Date/Time	Released by (Signature & ID#)	Received by (Signature & ID#)	Comments/Location

EVIDENCE CHAIN-OF-CUSTODY TRACKING FORM

Chain of Custody				
Item #	Date/Time	Released by (Signature & ID#)	Received by (Signature & ID#)	Comments/Location

Final Disposal Authority

Authorisation for Disposal

Item(s) #: _____ on this document
 pertaining to (suspect): _____
 is(are) no longer needed as evidence and is/are authorized for disposal by (check appropriate disposal method)

Return to Owner Auction/Destroy/Divert

Name & ID# of Authorising Officer: _____
 Signature: _____ Date: _____

Witness to Destruction of Evidence

Item(s) #: _____ on this document
 were destroyed by Evidence Custodian _____
 _____ ID#: _____ in my presence on (date) _____
 Name & ID# of Witness to destruction: _____
 Signature: _____ Date: _____

Release to Lawful Owner

Item(s) #: _____ on this document
 was/were released by Evidence Custodian _____
 _____ ID#: _____ to Name _____
 Address: _____ City: _____
 State: _____ Zip Code: _____ Telephone Number: (____) _____

Under penalty of law, I certify that I am the lawful owner of the above item(s).

Signature: _____ Date: _____

Copy of Government-issued photo identification is attached Yes No

This Evidence Chain-of-Custody form is to be retained as a permanent record.

Annex 3: Authority Template

AUTHORITY TEMPLATE

TO WHOM IT MAY CONCERN

I _____

Of _____

Acknowledge that by signing this document otherwise known as ‘the authority’, I hereby give permission to _____ of _____ to act on my behalf in respect of any legal action that may be taken as a result of the information that I have provided.

I also acknowledge and agree that in signing this document I give permission for any information that I provide to be disclosed to any third party deemed appropriate.

This authority is to remain in force until such time as rescinded in writing by me.

Signed _____

Print _____

Date _____

Annex 4: Witness Examination Record

Case No. _____

Date: _____

WITNESS EXAMINATION RECORD

Location of Examination: _____

Criminal Case Number: _____

Criminal Offence Provision: _____

Suspects / Criminal Act: _____

Witness Summons Issued By: _____

Date of Witness Summons: _____

ATTENDEES:

Prosecutor: Witness: _____

Legal Officer/Associate Interpreter: _____

Record-taker: Investigator: Observer: _____

Commenced at: _____ : _____ hrs

NOTICES AND WARNINGS

1. The witness examination may be conducted in Arabic or English. If you do not understand the language of the interviewer, you will be provided with interpretation of your statement, as well as translations of documents and other pieces of evidence where necessary.
2. Interpretation from English language used by the interviewer is provided for you.*
3. I confirm that I am able to understand the language used during this examination.

YES: Witness signature _____ **TIME:** _____ : _____ hrs

1

Witness signature _____

4. I confirm that Latin script may be used to record this examination.

Witness signature _____ **TIME:** _____ : _____ hrs

5. **AUDIO/VIDEO RECORDING.** The interview will be video/ audio* recorded.

6. You must provide the following personal data

Name and last name: _____

Father's name: _____

Mother's name: _____

Mother's maiden name: _____

Date of birth: _____

Place of birth: _____

Occupation: _____

Current employer: _____

Place of employment: _____

Marital status: _____

Citizenship: _____

Ethnicity: _____

The exact address where you want to receive writs: _____

Telephone number: _____

7. You are cautioned that it is your obligation to inform the interviewer of any change of address or place of residence.

8. You are not under an obligation to testify. You may refuse to testify if you are the spouse or a close relative of the suspect. You may refuse to testify if your answer will incriminate your spouse or a close relative. You are entitled to refuse to answer such questions with respect to which a truthful reply would result in the danger of bringing prosecution on yourself.

9. You must tell the truth.

10. You must not withhold anything.

Witness signature _____

11. You are cautioned that giving of a false statement constitutes a criminal offence and you can be imprisoned for doing so.
12. If you or your family are under serious risk or threat, you may request to be heard in the capacity of a protected witness.
13. You are entitled to read the record or to have it read to you, and make corrections to it before signing it.
14. *The record will be dictated to the record keeper. You must follow the record being typed. You must watch the computer screen in front of you as it is being typed. If you believe there is an error, you may correct it as it is being compiled and at the end of the examination.
15. *The record will be recorded verbatim. You must follow the record being typed. You must watch the computer screen in front of you as it is being typed. If you believe there is an error, you may correct it as it is being compiled and at the end of the examination.
16. *The record will be transcribed from the audio/video-recording.

I sign to confirm that I understand all the notices and warnings above

Witness signature _____ **TIME:** _____ : _____ hrs

*** NOTE TO RECORD KEEPER: *delete as applicable ***

3

Witness signature _____

Witness statement commenced at: _____ : _____ hrs

1. My name is _____. I answered the request dated _____ to give a statement today. I confirm that I have signed to confirm that I have understood the notices and warnings before giving this statement. I make this statement voluntarily and that no promises and no guarantees have been made to me.

2. BREAK BETWEEN _____ : _____ hrs and _____ : _____ hrs. I confirm that I did not speak about the investigation during the break.

3. BREAK BETWEEN _____ : _____ hrs and _____ : _____ hrs. I confirm that I did not speak about the investigation during the break.

4. BREAK BETWEEN _____ : _____ hrs and _____ : _____ hrs. I confirm that I did not speak about the investigation during the break.

5. BREAK BETWEEN _____ : _____ hrs and _____ : _____ hrs. I confirm that I did not speak about the investigation during the break.

6. BREAK BETWEEN _____ : _____ hrs and _____ : _____ hrs. I confirm that I did not speak about the investigation during the break.

7. BREAK BETWEEN _____ : _____ hrs and _____ : _____ hrs. I confirm that I did not speak about the investigation during the break.

8. BREAK BETWEEN _____ : _____ hrs and _____ : _____ hrs. I confirm that I did not speak about the investigation during the break.

9. BREAK BETWEEN _____ : _____ hrs and _____ : _____ hrs. I confirm that I did not speak about the investigation during the break.

4

Witness signature _____

10. I confirm that I have nothing further to add.

11. I confirm that I have no objections to how the interview was conducted and no threats and no promises were made to me.

12. I confirm that the answers are true to the best of my knowledge and belief.

13. *I confirm that I have read the witness statement and I confirm that it is an accurate record of the examination and I will sign the record below and on the top and bottom of each page.

14. *I confirm that the witness statement was read to me and I confirm that it is an accurate record of the examination and I will sign the record below and on the top and bottom of each page.

Witness statement completed at: _____ : _____ hrs

Record-taker

Witness

Interviewer

name

name

name

Investigator

Legal Officer / Associate

Observer

name

name

name

5

Witness signature _____

Useful resources

D Groome, *Handbook of Human Rights Investigation* (2nd edn, CreateSpace Independent Publishing Platform 2011).

Institute for International Criminal Investigations, *Investigators Manual* (3rd edn, Institute for International Criminal Investigations 2006).

M Bergsmo and W H Wiley, 'Human Rights Professionals and the Criminal Investigation and Prosecution of Core International Crimes' in S Skåre, I Burkey and H Mørk (eds), *Manual on Human Rights Monitoring: An Introduction for Human Rights Field Officers* (3rd edn, Norwegian Centre for Human Rights 2008).

C A Nielsen and J K Kleffner in M Nystedt (ed), *A Handbook on Assisting International Criminal Investigations* (Strokirk-Landströms AB 2011).

PILPG, Field Guide for Civil Society Investigation and Documentation of Gross Human Rights Violations, 2015 <http://publicinternationallawandpolicygroup.org/wp-content/uploads/2015/11/Reference-Book-to-Field-Guide-on-CSOInvestigations-Selected-Sample.pdf>.

PILPG, Protocol on the Investigation and Documentation of Gross Human Rights Violations: A Field Guide, 2015 <http://publicinternationallawandpolicygroup.org/wpcontent/uploads/2015/11/PROTOCOLS-ON-INVESTIGATION-AND-DOCUMENATIONField-Guide-Couch-20.11.15.pdf>.

UC Berkley School of Law Human Rights Center, First Responders: An International Workshop on Collecting and Analyzing Evidence of International Crimes, September 2014 www.law.berkeley.edu/files/HRC/First_Responders_final_with_cover4.pdf.



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