



DOMESTIC IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW PROHIBITING SEXUAL VIOLENCE

A CHECKLIST FOR STATES AND THE INTERNATIONAL RED CROSS AND RED CRESCENT MOVEMENT

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1. INTRODUCTION

International humanitarian law (IHL) prohibits all forms of sexual violence in situations of armed conflict, whether international (IAC) or non-international (NIAC). Serious violations of IHL, including acts of sexual violence, constitute war crimes. To end impunity, it is important that states can investigate and prosecute serious violations of IHL, including acts of sexual violence, under domestic law. Sexual violence is also prohibited by other bodies of international law, including international human rights law (IHRL) and international criminal law (ICL).

This checklist is a resource for legal experts of states and within the International Red Cross and Red Crescent Movement and supports the domestic implementation of IHL rules prohibiting sexual violence. It also sets out the provisions of IHRL and ICL of complementary relevance, as well as a selection of other sources of law and policy that may, depending on the context, inform domestic frameworks governing sexual violence. It can be used by legal experts in their discussions with government authorities and by states when reviewing their own law and policies. It may also inform a state's voluntary IHL implementation report.

While this checklist is intended to be comprehensive, it is not anticipated that all states will be able to implement all proposed provisions, as their ability to do so will depend on their constitutional and other legal frameworks. This checklist is therefore intended as a good-practice guide to developing legislation that addresses sexual violence in armed conflict as comprehensively as possible.

This checklist addresses the content of domestic criminal legislation and associated procedures. It does not address other necessary implementation measures, such as the integration of the prohibition of sexual violence into military manuals, doctrine or training.

Other guidance:

This checklist does not replace or address undertakings that states (and, where relevant, other actors, such as components of the Red Cross and Red Crescent Movement, UN agencies or NGOs) have made under frameworks such as UNSCR 1325 National Action Plans, the Monitoring and Reporting Mechanism on Grave Violations against Children in Situations of Armed Conflict, or the Monitoring, Analysis and Reporting Arrangements (MARA) on conflict-related sexual violence.

How to use this checklist:

Sections 2–7 should be assessed in chronological order, to determine whether a state's domestic legislation complies with its international obligations to prohibit sexual violence. These sections contain *18 questions*. Each question is followed by two columns of information, provided to guide states in improving domestic law in relation to the given question. The first column details treaty and customary international law across IHL, ICL, IHRL and IRL, as relevant, plus other guidance on good practice. These sources may provide a legal or policy basis for strengthening domestic law when this is deemed appropriate by legal advisers. The second column presents good examples of state practice illustrating how obligations may be implemented.

The applicability and relevance of the international law and other guidance identified will need to be assessed on a case-by-case basis. Applicability and relevance will vary depending on factors such as whether a state is party to a treaty and the legislative context (including whether a state has a common or civil law system).

There is a **tick box** above each question, which should be ticked (**as illustrated below**) if the state in question is complying with the given obligations.



TICK AS APPROPRIATE

At the end of the assessment, if one or more boxes are **not ticked**, then these gaps can form the focus of future improvements in domestic legislation. Consultation with local organizations can further inform legislative change in this regard.

Section 8 ('Selected issues') presents *three further questions*, which will only be relevant in certain contexts. These questions signpost to other sources that elaborate on the selected issues ([mandatory reporting procedures](#), [disaster law](#) and the [Maputo Protocol in the African system](#)).

Section 9 (Additional requirements related to criminal repression) contains *seven questions* that present additional general IHL obligations regarding domestic justice processes for criminal repression of war crimes, not specific to the crime of sexual violence. This section contains information on [statutory limitations](#), [universal jurisdiction](#), [extradition](#), [modes of liability](#), [amnesties](#), [defence of superior order](#) and [application of customary international law by domestic courts](#). It should be read in conjunction with existing guidance relating to the criminalization of serious IHL violations in domestic law, such as the [Criminal repression of serious IHL violations: Information Kit](#).

2. INITIAL QUESTIONS

A. DOES DOMESTIC LEGISLATION PROHIBIT SEXUAL VIOLENCE DURING PEACETIME AND ARMED CONFLICT?

This section sets out the various international legal bases for the general prohibitions of sexual violence in peacetime and during armed conflict. To comply with the international law set out in this section, domestic legislation criminalizing sexual violence must permit prosecution of such an act, whether it took place during peacetime or an armed conflict.

When committed during an armed conflict, sexual violence can constitute a war crime. Domestic legislation should permit it to be prosecuted as such: see Section 2(b) of this checklist.

LEGAL BASIS, ADDITIONAL STANDARDS AND OTHER GUIDANCE:	STATE PRACTICE:
<p>IHL:</p> <ul style="list-style-type: none"> • Article 3 common to the Geneva Conventions (CA3); ICRC, Commentary on GCI, 2016, CA3, paras. 696, 699, 701. Sexual violence is prohibited during wartime by the requirement of ‘humane treatment’, and by the prohibitions of ‘violence to life and person’, including ‘cruel treatment and torture’ and ‘outrages upon personal dignity’. See, for example, ICTR, <i>Bagosora</i>, Trial Judgment, 2008, para. 2254, where the ICTR upheld a conviction for rape as an outrage upon personal dignity, violating CA3. • Additional Protocol I (API), Article 75(2)(b). ‘Humiliating and degrading treatment, enforced prostitution and any form of indecent assault’ are prohibited. • Additional Protocol II (APII), Article 4(2)(e). ‘Outrages upon personal dignity’, in particular ‘rape, enforced prostitution, and any form of indecent assault’, are prohibited. • Customary IHL Study, Rule 93. Rape and other forms of sexual violence are prohibited. <p>IHRL, UNCAT:</p> <p>Note: sexual violence is prohibited primarily through prohibitions of torture and cruel, inhuman, degrading treatment or punishment.</p> <ul style="list-style-type: none"> • ICCPR, Article 7. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. • UNCAT, Article 2(1). States parties shall prevent torture in their territories. See Committee Against Torture, <i>Mrs A v. Bosnia and Herzegovina</i>, 2019, where the Committee held that sexual violence amounts to torture. See also the report of the UN Special Rapporteur on Torture, A/HRC/31/57, 2016, para. 51. • CEDAW, Article 1. The prohibition of discrimination against women includes a prohibition of gender-based violence; this prohibition is set out in CEDAW, <i>General Recommendation No. 35</i>, 2017, paras 1–2. • ECHR, Article 3. No one shall be subjected to torture or to inhuman or degrading treatment or punishment. See ECtHR, Grand Chamber, <i>Aydin v. Turkey</i>, Judgment Merits and Just Satisfaction, 1997, para. 86, wherein the ECtHR confirmed that rape constitutes torture. • ACHR, Article 5(2). No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. See IACoMHR, <i>Raquel Martí de Mejía v. Peru</i>, Judgment, 1996, Section V(B)(3)(a), which found sexual violence to be a method of torture. • AfCHPR, Article 5. Prohibition of all forms of exploitation and degradation, including slavery, slave trade, torture, cruel, inhuman or degrading treatment. Maputo Protocol, Article 3(4) further provides that women are protected against sexual and verbal violence. <p>Other:</p> <ul style="list-style-type: none"> • UNGA Resolution, Declaration on the Elimination of Violence Against Women, A/RES/48/104, 1994, Article 4(c). • Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, 2000, Article 5. • SAARC Convention, 2002, Article 3. 	<p>Some states prohibit sexual violence specifically when perpetrated in wartime. These include: Armenia; Australia; Azerbaijan; Bangladesh; Belgium; Bosnia and Herzegovina; Burundi; Canada; China; Colombia; Democratic Republic of the Congo; Croatia; Estonia; Ethiopia; Finland; France; Georgia; Germany; Iraq; Republic of Korea; Lithuania; Mali; Moldova; Mozambique; Netherlands; New Zealand; Norway; Paraguay; Rwanda; Senegal; Serbia; Slovenia; South Africa; Spain; Switzerland; United Kingdom; United States; Uruguay (CIHL Study, Rule 93).</p>

B. DOES DOMESTIC LEGISLATION PERMIT ACTS OF SEXUAL VIOLENCE COMMITTED DURING BOTH IACS AND NIACS TO BE PROSECUTED AS WAR CRIMES?

This section sets out the legal provisions under which acts of sexual violence constitute serious violations of IHL. Serious violations of IHL constitute war crimes ([CIHL Study, Rule 156](#)).

States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects ([CIHL Study, Rule 158](#)).

As sexual violence is a serious violation of IHL in both IACs and NIACs, the law should permit it to be prosecuted as a war crime in both IACs and NIACs.

LEGAL BASIS, ADDITIONAL STANDARDS AND OTHER GUIDANCE:	STATE PRACTICE:
<p>The following rules prohibit acts of sexual violence in international armed conflicts (IACs):</p> <p>IHL:</p> <ul style="list-style-type: none"> • GCI, Article 12; GCII, Article 12; GCIII, Article 13; GCIII, Article 14; GCIV, Article 27(2); API, Article 75(2)(b); ICRC, Commentary on GCI, 2016, CA3, paras. 702–707. Sexual violence is prohibited under: ‘torture’; ‘mutilation or cruel treatment’; ‘inhuman treatment’; ‘acts of violence’; ‘violence to life and person’; ‘respect for their persons or their honour’; ‘outrages upon personal dignity’; ‘humiliating or degrading treatment’; or ‘any form of indecent assault’. • GCI, Article 50; GCII, Article 51; GCIII, Article 130; GCIV, Article 147. Sexual violence is prohibited as a grave breach, under: ‘torture’; ‘inhuman treatment’; or ‘serious injury to body or health’. See, for example, ICTY, Prlić, Trial Judgment, 2013, para. 116, wherein the ICTY held that sexual violence amounts to inhumane treatment under the grave breach regime. • API, Article 76(1). Women shall be protected from rape, forced prostitution and any other form of indecent assault. • API, Article 77(1). Children shall be protected from any form of indecent assault. • CIHL Study, Rule 93. Rape and other forms of sexual violence are prohibited. <p>ICL</p> <ul style="list-style-type: none"> • ICC Statute, Article 8(2)(b)(xxii). Prohibition of rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and any other form of sexual violence also constituting a grave breach under the Geneva Conventions and committed during an IAC. • ICTY Appeals Chamber, Tadić, Interlocutory Appeal, 1995, para. 94. The prohibition of war crimes applies in IACs. <p>The following rules prohibit acts of sexual violence in non-international armed conflicts (NIACS):</p> <p>IHL:</p> <ul style="list-style-type: none"> • CA3; ICRC, Commentary on GCI, 2016, CA3, paras. 696, 699, 704, 705, 706. CA3 implicitly prohibits sexual violence by requiring humane treatment and prohibiting ‘violence to life and person’; ‘mutilation’; ‘cruel treatment’; ‘torture’; and ‘outrages upon personal dignity’. • APII, Article 4(2)(e). Sexual violence can fall within the prohibitions of ‘outrages upon personal dignity, in particular humiliating and degrading treatment’; ‘any form of indecent assault’; ‘rape’; and/or ‘enforced prostitution’. • CIHL Study, Rule 93. Rape and other forms of sexual violence are prohibited. <p>ICL:</p> <ul style="list-style-type: none"> • ICC Statute, Article 8(2)(e)(vi). Prohibition of rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence also constituting a serious violation of CA3. • ICTY Appeals Chamber, Tadić, Interlocutory Appeal, 1995, para. 94. The prohibition of war crimes applies in NIACs. 	<p>United Arab Emirates, Federal Decree No. 12 on International Crimes, 2017, Article 15(2). Acts of sexual violence may amount to a war crime, whether committed <i>in the context of an IAC or NIAC</i>.</p> <p>Moldova, Criminal Code, 2002, Article 137(3). War crimes are criminalized, including acts of sexual violence, <i>whether committed within an IAC or NIAC</i>.</p> <p>Germany, Introducing the International Crimes Code, 2002, Article 1, para. 8(1)(4). Sexual violence is prohibited <i>in connection with an IAC or NIAC</i>.</p> <p>Peru, Code of Military and Police Justice, 2006, Article 90(4). Sexual violence is prohibited, <i>both in IACs and NIACs</i>.</p>

3. DEFINITIONS

A. DOES DOMESTIC LEGISLATION CONTAIN A CONTEMPORARY DEFINITION* OF SEXUAL VIOLENCE?

* '[A] physical invasion of a sexual nature, committed on a person under circumstances which are coercive. ... Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.' (ICTR Trial Chamber, *Akayesu*, Judgment, 1998, para. 688). '[C]oercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion' (ICTR Trial Chamber, *Akayesu*, Judgment, 1998, para. 688).

LEGAL BASIS, ADDITIONAL STANDARDS AND OTHER GUIDANCE:	STATE PRACTICE:
<p>IHL:</p> <ul style="list-style-type: none"> • ICRC, <i>Commentary on GCI, 2016, CA3</i>, para. 697. This commentary refers to the <i>Akayesu</i> definition (see above). <p>ICL:</p> <ul style="list-style-type: none"> • ICTR Trial Chamber, <i>Akayesu</i>, Judgment, 1998, para. 688. See full definition, as quoted above. • ICTY Trial Chamber, <i>Kunarac</i>, Judgment, 2001, para. 438. The ICTY upheld the definition outlined in <i>Akayesu</i> (see above), adding that sexual violence must be 'non-consensual or non-voluntary'. • ICC, <i>Elements of Crimes, 2002</i> on Article 8(2)(b)(xxii) and Article 8(2)(e)(vi). 'The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.' <p>IHRL:</p> <ul style="list-style-type: none"> • CEDAW Committee, <i>General Recommendation No. 35, 2017</i>, para. 29(e). Definitions of sexual crimes are based on a lack of freely given consent and take account of coercive circumstances. • ECtHR, <i>MC v. Bulgaria</i>, Judgment, 2003, para. 166. The Court highlighted the prohibition of non-consensual acts, without requiring proof of physical resistance. • IACtHR, <i>Miguel Castro-Castro Prison v. Peru</i>, Judgment (Merits, Reparations and Costs), 2006, para. 306. The Court said that sexual violence 'consists of actions of a sexual nature, committed with a person without their consent, which besides including the physical invasion of the human body, may include acts that do not imply penetration or even any physical contact whatsoever'. 	<p>Colombia, Law No. 1719 on Access to Justice and Other Matters for Victims of Sexual Violence and Especially of Sexual Violence Related to the Armed Conflict, 2014. The law expands the definition of sexual violence by including crimes such as forced prostitution, forced sterilization, pregnancy, abortion and nudity.</p> <p>New Zealand, LOAC Manual (12.3.10/13.3.12) and Crimes Act, 1961, section 128(A). Consent cannot be recognized as genuine where a person is deprived of liberty and is reliant on the other party for security and the necessities of life.</p> <p>Democratic Republic of the Congo, Penal Code 1940, amendment no. 06/018, 2006, Article 170. Rape is defined by reference to a sexual act initiated through coercion.</p>

B. DOES DOMESTIC LEGISLATION CONTAIN A NON-EXHAUSTIVE* LIST OF PROHIBITED ACTS?

* For example, 'sexual violence encompasses acts *such as* rape, enforced prostitution, indecent assault, sexual slavery, forced pregnancy and enforced sterilization' ([ICRC, Commentary on GCI, 2016, CA3](#), para. 698).

LEGAL BASIS, ADDITIONAL STANDARDS AND OTHER GUIDANCE:	STATE PRACTICE:
<p>IHL:</p> <ul style="list-style-type: none"> ● GCIV, Article 27; API, Article 76; API, Article 75(2)(b); APII, Article 4(2)(e). These articles protect against sexual violence by listing examples of prohibited acts <i>such as</i> rape and enforced prostitution, followed by the statement '<i>or any form of indecent assault</i>', which demonstrates that this list is non-exhaustive. ● ICRC, Commentary on GCI, 2016, CA3, para. 698. The definition of sexual violence from this commentary is quoted above. <p>ICL:</p> <ul style="list-style-type: none"> ● ICC Statute, Articles 8(2)(b)(xxii) and 8(2)(e)(vi). These articles prohibit 'sexual slavery, enforced prostitution, forced pregnancy ... enforced sterilization <i>or any other form of sexual violence</i>' of comparable gravity (emphasis added). ● ICTR Trial Chamber, Akayesu, Judgment, 1998, para. 688. 'The Tribunal considers sexual violence, which includes rape, <i>as any act of a sexual nature</i> which is committed on a person under circumstances which are coercive' (emphasis added). <p>IHRL:</p> <ul style="list-style-type: none"> ● Council of Europe, Convention on Preventing and Combating Violence Against Women and Domestic Violence, Article 36. 'Engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object; engaging in other non-consensual acts of a sexual nature with a person; causing another person to engage in non-consensual acts of a sexual nature with a third person'. <p>Other examples of prohibited acts:</p> <ul style="list-style-type: none"> ● Forced stripping: ICTR Trial Chamber, Akayesu, Judgment, 1998, para. 693. ● Mutilation of sexual organs: ICTR Trial Chamber, Bagosora, Judgment and Sentence, 2008, para. 976. ● Forced public nudity: ICTR Trial Chamber, Akayesu, Judgment, 1998, para. 688; ICTY Trial Chamber, Kunarac, Judgment, 2001, paras 766–774. ● Forcing prisoners to commit sexual acts and sexual mutilation: ICTY Trial Chamber, Tadic, Indictment, 1995, para 6. ● Rape as torture: ICTY Trial Chamber, Delalic, Judgment, 1998, paras 955–965. 	<p>Spain, Law No. 5 amending the Penal Code, 2010, Article 611(9). The article details examples of acts of sexual violence, including the open-ended prohibition of '<i>any other form of sexual assault</i>'.</p> <p>United Arab Emirates, Federal Decree No. 12 on International Crimes, 2017, Article 15(2). This article describes the acts of sexual violence that may constitute war crimes, which includes an open-ended prohibition of '<i>any other form of sexual violence also constituting a serious violation of the four Geneva Conventions of 1949</i>'.</p> <p>El Salvador, Criminal Code, Decree no. 1030, 1998, Articles 165 and 166. These provisions use non-exhaustive terminology to describe prohibited acts of sexual violence: '<i>other behaviour of a sexual nature</i>' and '<i>any sexual act</i>'.</p>

C. DOES DOMESTIC LEGISLATION GOVERNING SEXUAL VIOLENCE AS A WAR CRIME REFLECT A CONTEMPORARY INTERPRETATION OF NEXUS TO ARMED CONFLICT?

When it occurs in the context of and in connection with an armed conflict, domestic legislation should permit sexual violence to be prosecuted as a war crime (see Section 2(b) above). To qualify as a war crime, an act of sexual violence must have a nexus (connection) with an armed conflict; this is what makes it a war crime.

This section addresses what has been interpreted to constitute sufficient nexus to armed conflict in order for sexual violence to constitute a war crime.

LEGAL BASIS, ADDITIONAL STANDARDS AND OTHER GUIDANCE:	STATE PRACTICE:
<p>IHL:</p> <ul style="list-style-type: none"> ● ICRC, Commentary on GCI, 2016, CA3, paras. 460 and 547. The act must be closely related to hostilities for that act to be committed in the context of an armed conflict and for IHL to apply. Acts that do not have such a nexus to an armed conflict remain governed by domestic law and applicable human rights law. The fact that a crime was committed by a member of an armed force or armed group against a member of their own party shall not be a ground on which to deny the victim protection. <p>ICL (establishing nexus in all contexts):</p> <ul style="list-style-type: none"> ● ICC, Elements of Crimes, 2002, on Article 8. ‘The conduct took place in the context of and was associated with an ... armed conflict.’ ● ICTY Appeals Chamber, Kunarac, Judgment, 2002, para. 58. The existence of an armed conflict must, at a minimum, have played a substantial part in either: the perpetrator’s ability to commit the act; their decision to commit it; the manner of commission; or the purpose behind commission. It is enough that the act was committed in ‘furtherance of or under the guise of the armed conflict’. ● ICTY Appeals Chamber, Kunarac, Judgment, 2002, para. 59. To determine whether the conduct is related to an armed conflict, the Court may consider many factors, including: the status of the perpetrator as a combatant; the status of the victim as a non-combatant; the status of the victim as a member of the opposing party; the fact that the act may serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator’s official duties. ● ICTR Appeals Chamber, Akayesu, Judgment, 2002, para. 444. The nexus between an act and an armed conflict implies that, in most cases, the perpetrator of the crime will have a special relationship with one party to the conflict; however, this is not essential. <p>ICL (establishing nexus in cases of intra-party sexual violence):</p> <ul style="list-style-type: none"> ● ICC Appeals Chamber, Ntaganda, Judgment, 2017, paras. 2 and 51. A member of an armed force or group may still be protected against a war crime of sexual violence when it was perpetrated by a member of their own armed force or group. A person may be a victim of a war crime of sexual violence even if they do not meet the definition of a ‘protected person’ under the grave breach provisions or CA3. 	<p>Colombia, Constitutional Court, Judgment, 599/19, 2019, p. 69. The Court referred to the <i>Ntaganda</i> case in affirming that intra-party sexual violence can constitute a war crime. The Court explained that a nexus can be found where the perpetrator is a member of the same armed group as the victim.</p>

D. DOES DOMESTIC LEGISLATION RECOGNIZE THAT THE PERPETRATOR OF SEXUAL VIOLENCE MAY BE CIVILIAN OR MILITARY?

LEGAL BASIS, ADDITIONAL STANDARDS AND OTHER GUIDANCE:	STATE PRACTICE:
<p>IHL:</p> <ul style="list-style-type: none"> • API, Article 75(2)(b). This article prohibits ‘outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault’ ... ‘<i>whether committed by civilian or by military agents</i>’ (emphasis added). • CIHL Study, Rule 90 and Rule 93. These rules do not explicitly state who the perpetrator must be for crimes of sexual violence, torture and other cruel, inhuman or degrading treatment. <p>ICL:</p> <ul style="list-style-type: none"> • ICTR Appeals Chamber, Akayesu, Judgment, 2001, paras. 437 and 444. This case concerned the prosecution of a civilian perpetrator of sexual violence. It highlights that the perpetrator need not have a specific link with the parties to the conflict in order to be convicted of a war crime. <p>IHRL:</p> <ul style="list-style-type: none"> • Human Rights Committee, General Comment No.20 on Article 7, 1992, para. 13. Penalties should be specified for acts of torture and cruel, inhuman or degrading treatment or punishment, ‘<i>whether committed by public officials or other persons acting on behalf of the State, or by private persons</i>’ (emphasis added). • Committee on the Elimination of Discrimination Against Women, General Recommendation No. 30, 2013, para. 38(b). ‘The Committee recommends that states parties prevent, investigate and punish all forms of gender-based violence, in particular sexual violence <i>perpetrated by State and non-State actors</i>’ (emphasis added). <p>Other:</p> <ul style="list-style-type: none"> • UN Commission on Human Rights, Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery, and Slavery-like Practices during Wartime, Final Report, 1998, paras. 27–28. This document outlines the prohibition of sexual slavery, ‘<i>whether committed by State actors or private individuals</i>’ (emphasis added). 	<p>Spain, LOAC Manual, 2007. This manual highlights the prohibition of sexual violence ‘<i>whether committed by civilian or military agents</i>’.</p> <p>Non-compliance with Spain’s Manual is enforced via Spain, Military Penal Code Organic Law 14, 2015, Article 38.</p>

E. DOES DOMESTIC LEGISLATION RECOGNIZE THAT VICTIMS OR PERPETRATORS OF RAPE AND OTHER FORMS OF SEXUAL VIOLENCE CAN BE ANY GENDER?

While the majority of victims of sexual violence in armed conflicts are women and girls, any person, including men and boys, can be a victim of sexual violence ([ICRC, Commentary on GCI, 2016, CA3](#), para. 700). Similarly, all genders can perpetrate sexual violence; accordingly, definitions should not, for example, be restrictive in mentioning the body parts that were used to perpetrate the act of sexual violence. Instead, the phrase ‘penetration ... with any object or part of the body’ could be used ([ICC, Elements of Crimes](#), on the definition of rape as a war crime, relating to Articles 8(2)(b)(xxii) and 8(2)(e)(vi) of the ICC Statute).

LEGAL BASIS, ADDITIONAL STANDARDS AND OTHER GUIDANCE:	STATE PRACTICE:
<p>IHL:</p> <ul style="list-style-type: none"> • API, Article 75(2)(b); APII, Article 4(2)(e). Sexual violence is prohibited, regardless of the sex of the victim or perpetrator. • ICRC, Commentary on GCI, 2016, CA3, para. 700. The prohibition of sexual violence encompasses ‘violence not only against women and girls, but any person, including men and boys’. • CIHL Study, Rule 93. The prohibition of sexual violence is non-discriminatory because men and women, as well as adults and children, are equally protected. <p>ICL:</p> <ul style="list-style-type: none"> • ICC Statute, Articles 8(2)(b)(xxii) and 8(2)(e)(vi). Crimes of sexual violence are defined as gender-neutral. • ICC Elements of Crimes, on the definition of rape as a war crime; footnote 50 relating to Article 2(b)(xxii) and footnote 63 relating to Article 8(2)(e)(vi). Rape is defined using the concept of ‘invasion’ broadly. • ICTR Trial Chamber, Akayesu, Judgment, 1998, para. 598. The Chamber defined the victim of sexual violence as ‘a person’. • ICTY, Tadić, Indictment, 1995; ICTY, Češić, Indictment, 1995; ICTY, Todorović, Indictment, 1995; ICTY, Simić, Initial Indictment, 1995. These cases affirm that men can be victims of sexual violence. <p>IHRL:</p> <ul style="list-style-type: none"> • Council of Europe, Convention on Preventing and Combating Violence Against Women and Domestic Violence, Article 36. <p>Other:</p> <ul style="list-style-type: none"> • Yogyakarta, Principle 17(M); and Yogyakarta, Principles 30(G) and (H). Protection against sexual violence and support shall be provided for all persons, regardless of their sexual orientation, gender identity, gender expression and sex characteristics. 	<p>United Arab Emirates, Federal Decree No. 12 on International Crimes, 2017, Article 15(2). The law prohibits sexual violence without specifying genders.</p> <p>Afghanistan, Revised Penal Code, 2017, Article 636. Rape can be committed by any ‘person’ against any other ‘person’.</p> <p>Rwanda, Penal Code, 2018, Article 134. Rape is defined as: ‘a person who commits on another person...’</p> <p>Spain, Penal Code, 1995 (as amended), Articles 178 and 179. The definitions of sexual violence and rape refer to ‘persons’.</p> <p>France, Penal Code, Articles 222 and 223. Rape is defined by reference to ‘persons’ and acts of ‘any nature whatsoever’. Articles 222–227 refer to sexual violence without specifying genders.</p> <p>United Kingdom, Sexual Offences Act, 2003. Under section 1, a rape can be committed against any gender, but the perpetrator is defined as a man. Section 2 defines assault by penetration and section 3 defines sexual assault without specifying gender.</p> <p>Some laws define rape exclusively as ‘penetration of the vagina, however slight, with a sexual organ, other body part or object’. These definitions suggest that victims can only be of a certain sex and also limit the nature of the sexual violence to one particular form of rape.</p>

4. ACCESSIBILITY

A. DOES DOMESTIC LEGISLATION ENSURE THE PROVISION OF ACCESS TO APPROPRIATE CARE FOR ALL VICTIMS/SURVIVORS WITHOUT DISCRIMINATION?

LEGAL BASIS, ADDITIONAL STANDARDS AND OTHER GUIDANCE:	STATE PRACTICE:
<p>IHL:</p> <ul style="list-style-type: none"> • CA3(2), GCI, Article 12; GCII, Article 12; API, Article 10(2), APII, Article 7(2); CIHL Study, Rule 110. IHL requires that the wounded and sick, including victims/survivors of sexual violence in need of medical care, must receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. Further, it provides that no distinction may be made among the wounded and sick founded on any grounds other than medical ones. <p>IHRL:</p> <ul style="list-style-type: none"> • ICESCR, Article 12(1); Committee on Economic, Social and Cultural Rights, General Comment No. 14, 2000, para. 8. The ‘right to health contains both freedoms and entitlements’. ‘The entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.’ • CEDAW, 1979, Articles 11(1)(f), 12 and 14(2)(b); CEDAW Committee, General Recommendation No. 35, 2017, para. 31(a)(iii). Victims/ survivors and their family members shall have access to medical, psychosocial and counselling services. Health-care services shall be responsive to trauma and should include mental, sexual and reproductive health services, including emergency contraception and HIV post-exposure prophylaxis. Adequate shelters should be provided as required. • Maputo Protocol, Articles 12(1)(d) and 14(2)(c). Victims/survivors of abuse or sexual harassment shall be provided with access to counselling and rehabilitation services. In cases of sexual assault and rape, the person’s reproductive rights shall be respected. • Council of Europe, Convention on Preventing and Combating Violence Against Women and Domestic Violence, Articles 20(2) and 25. Parties shall take legislative measures to ensure that victims/survivors have access to health care, social services, medical and forensic examination, trauma support and counselling. <p>IRL:</p> <ul style="list-style-type: none"> • Refugee Convention, 1951, Article 24(1)(b). Refugees shall enjoy access to health equivalent to that of the host population. <p>Other:</p> <ul style="list-style-type: none"> • UN, Guiding Principles on Internal Displacement, Principle 19(1) and (2). All wounded and sick internally displaced persons shall receive medical care and attention as they require. Victims of sexual or other abuses shall be afforded appropriate counselling. • Yogyakarta, Principle 17(M) and Yogyakarta, Principle 30(H). 	<p>Colombia, Law No.1719 on Access to Justice and Other Matters for Victims of Sexual Violence and Especially of Sexual Violence Related to the Armed Conflict, 2014, Chapter 4. The law provides for psychosocial care and free medical attention for victims/survivors of sexual violence.</p> <p>Colombia, Constitutional Court, Judgment, SU-599/19, 2019. The victim/survivor in this case was provided with psychosocial care and medical assistance.</p> <p>Croatia, Law on the Rights of Victims of Sexual Violence in the Homeland War, 2015. Victims of sexual violence have the right to psychosocial support, medical care, medical rehabilitation and health insurance.</p>

B. DOES DOMESTIC LEGISLATION ENSURE THAT A VICTIM/SURVIVOR'S ACCESS TO JUSTICE IS NOT HINDERED – FOR EXAMPLE, BY COUNTER-CHARGES?*

* Counter-charges include laws that criminalize acts such as adultery, even where the act is non-consensual, meaning that the victim may end up facing charges after reporting sexual violence. In general, laws that criminalize homosexuality or adultery can act as barriers for a victim/survivor of sexual violence to accessing justice. Certain evidentiary rules and procedures can also act as hurdles, such as a 'four male witness rule', which makes conviction difficult unless the perpetrator confesses to the crime ([International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), 2nd edition, 2017, p. 69).

LEGAL BASIS, ADDITIONAL STANDARDS AND OTHER GUIDANCE:	STATE PRACTICE:
<p>IHL:</p> <ul style="list-style-type: none"> ● ICRC, Commentary on GCIV, 1958, Article 101. The prohibition of punishment for making even unfounded complaints and petitions finds ample justification from the humanitarian point of view. If the victim were to fear any sort of punishment as a result of their complaint, they would be deprived of a right which, in part, guarantees respect for the person, and which constitutes one of the four fundamental freedoms mentioned in the Preamble to the Universal Declaration of Human Rights. ● ICRC, Commentary on GCIII, 2020, Article 78; ICRC, Commentary on GCIV, 1958, Article 101. Complaints and requests should be transmitted immediately and should never, in any circumstances, give rise to any punishment. <p>IHRL:</p> <ul style="list-style-type: none"> ● CEDAW Committee, General Recommendation No. 35, 2017, para. 29(c). Criminal provisions that are discriminatory against women, such as, among others, those that criminalize adultery, must be repealed. Discriminatory evidentiary rules and procedures must also be repealed, including: procedures allowing for a victim/survivor's deprivation of liberty to protect them from violence; practices focused on 'virginity'; legal defences or mitigating factors based on culture, religion or male privilege, such as the defence of so-called "honour"; traditional apologies; pardons from the victim or survivor's family; the subsequent marriage of the victim/survivor to the perpetrator; procedures that result in the harshest penalties, including stoning, lashing and death, often being reserved for women; judicial practices that disregard a history of gender-based violence; and laws that allow for the prosecution of the victim/survivor when the perpetrator is acquitted. ● Council of Europe, Convention on Preventing and Combating Violence Against Women and Domestic Violence, Articles 48(1) and 54. Parties shall take the necessary legislative or other measures to prohibit mandatory alternative dispute resolution processes, including mediation and conciliation, in relation to all forms of sexual violence. In any civil or criminal proceedings, evidence relating to the sexual history and conduct of the victim shall be permitted only when it is relevant and necessary. <p>Other:</p> <ul style="list-style-type: none"> ● ICRC, Sexual Violence in Detention Briefing, 2017, p. 20. Domestic laws which cast any victim of sexual violence as a criminal are an obstacle to disclosure and protective action. Detainees alleging sexual abuse should receive protection during any investigation and protection should not involve isolation. It is harmful, compounds the original abuse and may be viewed as punishing the victim. 	N/A

5. SPECIAL MEASURES OF PROTECTION

A. DOES DOMESTIC LEGISLATION PROVIDE SPECIAL MEASURES OF PROTECTION FOR CHILD VICTIMS/SURVIVORS?

LEGAL BASIS, ADDITIONAL STANDARDS AND OTHER GUIDANCE:	STATE PRACTICE:
<p>IHL:</p> <ul style="list-style-type: none"> • GCIV, Article 24; GCIV, Article 38(5); GCIV, Article 50; GCIV, Article 76(5); API, Article 70(1); API, Article 77(1); API, Article 78; APII, Article 4(3); CIHL Study, Rule 135. IHL requires that all children affected by armed conflict are afforded special respect and protection. These IHL rules do not specifically state that special measures must feature in domestic legislation for child victims/survivors of sexual violence, rather they are listed here to highlight the general rule that IHL affords children special respect and protection. <p>ICL:</p> <ul style="list-style-type: none"> • ICC Statute, Article 68(1) and (2). The Court and Prosecutor shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses, in particular where the crime involves sexual or gender violence or violence against children. As an exception to the principle of public hearings, the Chambers may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means, in particular for victims of sexual violence or for child victims or witnesses. <p>IHRL:</p> <ul style="list-style-type: none"> • CRC, Articles 19(1) and 34. States parties shall take all appropriate legislative measures to protect children from all forms of physical or mental violence, including sexual violence. • ACHR, Article 19; African Charter on the Rights and Welfare of the Child 1990, Articles 22 and 27; Charter of Fundamental Rights of the European Union, 2000, Article 24; Optional Protocol to the CRC on the sale of children, child prostitution and child pornography, 2000, Articles 1, 4 and 8. These articles require that all children are protected against all forms of violence, including sexual violence. • Council of Europe, Convention on Preventing and Combating Violence Against Women and Domestic Violence, Articles 18(3) and 56(2). Measures shall be taken to ‘address the specific needs of vulnerable persons, including child victims [of sexual violence]’. Child victims of sexual violence shall be afforded, where appropriate, special protection measures, taking into account the best interests of the child. <p>Other:</p> <ul style="list-style-type: none"> • UN Declaration on the Protection of Women and Children in Emergency and Armed Conflict, 1974, para. 4; Observance by UN Forces of IHL, Secretary-General’s Bulletin, 1999, Section 7.4; UN Millennium Declaration, endorsed by the UN General Assembly, Res. 55/2, 2000, para. 26; N’Djamena Declaration (Cameroon, Central African Republic, Chad, Nigeria, Niger, Sudan) 2010, para. 11. These instruments state that children shall be the object of special protection in armed conflicts. 	<p>Myanmar, Child Rights Law, 2019. This law sets out special measures to protect children from the dangers of armed conflict, including sexual violence.</p> <p>Niger, Law No. 74 on the Protection and Assistance of Internally Displaced Persons, 2018, Articles 19 and 30. These articles provide for the criminalization of sexual exploitation of internally displaced children.</p> <p>Ukraine, Law on the Protection of Childhood, 2017, Article 3. This article grants a new legal status for children who have suffered violence, including physical, sexual or psychological abuse during armed conflict.</p>

B. DOES DOMESTIC LEGISLATION PROVIDE SPECIAL MEASURES OF PROTECTION FOR WOMEN VICTIMS/SURVIVORS?

LEGAL BASIS, ADDITIONAL STANDARDS AND OTHER GUIDANCE:	STATE PRACTICE:
<p>IHL:</p> <ul style="list-style-type: none"> • API, Article 76(1); GCI, Article 12(4); GCIII, Article 14(2); GCIV, Article 27(2); GCIV, Article 76; GCIV, Article 85; GCIV, Article 124; CIHL Study, Rule 134. IHL requires that all women affected by armed conflict are afforded special respect and protection. These IHL rules do not specifically state that special measures must feature in domestic legislation for women victims/survivors of sexual violence; they are listed here to highlight the general rule that IHL affords women special respect and protection. <p>ICL:</p> <ul style="list-style-type: none"> • ICC Statute, Article 68(1) and (2). The Court and Prosecutor shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses, in particular where the crime involves sexual or gender-based violence or violence against children. As an exception to the principle of public hearings, the Chambers may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means, in particular for victims of sexual violence or child victims or witnesses. <p>IHRL:</p> <ul style="list-style-type: none"> • CEDAW, Article 2; CEDAW Committee, General Recommendation No. 33, 2015, paras. 14–15. Regarding access to justice the CEDAW notes, for example, that accessibility requires that all justice systems, both formal and quasi-judicial, be secure, affordable and physically accessible to women, and be adapted and appropriate to the needs of women, including those who face intersecting or compounded forms of discrimination. • Council of Europe, Convention on Preventing and Combating Violence Against Women and Domestic Violence, Article 22(2). States parties shall provide or arrange for specialist women’s support services to all women victims of violence and their children. <p>Other:</p> <ul style="list-style-type: none"> • UN Declaration on the Elimination of Violence against Women, 1993, Preamble; UN Declaration on the Protection of Women and Children in Emergency and Armed Conflict, 1974, paras. 4 and 5; Observance by UN Forces of IHL, Secretary-General’s Bulletin, 1999, Section 7.3. Special measures shall be taken to protect women against acts of sexual violence. 	<p>Spain, Law No. 5 Amending the Penal Code, 2010, Article 612(3). There shall be special protections for women and children.</p> <p>Pakistan, Criminal Law (Amendment) (Offences Relating to Rape) Act, 2016, Section 7. Any statements given by victims must be made in the presence of a female police officer or other female family members of the victim.</p> <p>Examples of particular issues to watch out for:</p> <ol style="list-style-type: none"> 1. Laws that prevent or deter women from reporting, such as guardianship laws that deprive women of legal capacity or restrict the ability of women with disabilities to testify in court (CEDAW Committee, General Recommendation No. 35, 2017, para. 29(c)). 2. The practice of ‘protective custody’ (<i>ibid.</i>). 3. Restrictive immigration laws that discourage women, including migrant domestic workers, from reporting sexual violence (<i>ibid.</i>). 4. Laws allowing for dual arrests in cases of domestic violence (<i>ibid.</i>). 5. Laws allowing for the prosecution of women when the perpetrator is acquitted (<i>ibid.</i>). 6. Certain legal defences or mitigating factors, such as the subsequent marriage of the victim/survivor to the perpetrator (<i>ibid.</i>).

C. DOES DOMESTIC LEGISLATION PROVIDE REPORTING PROCEDURES FOR THOSE SUBJECTED TO SEXUAL VIOLENCE DURING DETENTION?

Complaints procedures in places of detention need to allow detainees to report, safely and confidentially, incidences of sexual violence without retaliation of any kind. Complaints must be independently and impartially investigated by the authorities.

Every detainee should have the opportunity, at all times, to make complaints about sexual violence ([ICRC, Sexual Violence in Detention Briefing](#), p. 20). 'It is particularly important that detainees can make complaints directly and confidentially to higher authorities within the detention facility' (*ibid.*). 'The mechanisms should know how to respond and have effective means of response' (*ibid.*).

LEGAL BASIS, ADDITIONAL STANDARDS AND OTHER GUIDANCE:	STATE PRACTICE:
<p>IHL:</p> <ul style="list-style-type: none"> • GCIII, Article 121; GCIV, Article 131. Every death or serious injury of an internee shall be immediately followed by an official enquiry by the Detaining Power. The evidence of any witnesses shall be taken, and a report including such evidence shall be prepared. If the enquiry indicates the guilt of one or more persons, the Detaining Power shall take all necessary steps to ensure the prosecution of the person or persons responsible. <p>Other:</p> <ul style="list-style-type: none"> • UN, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 32(1). A detained person or their counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority, to challenge the lawfulness of their detention in order to obtain their release without delay, if it is unlawful. • Nelson Mandela Rules, 'The United Nations Standard Minimum Rules for the Treatment of Prisoners', 2015, Rule 8(d). Complaints shall be entered in the prisoner file-management system in the course of imprisonment, including allegations of torture or other cruel, inhuman or degrading treatment or punishment, unless they are of a confidential nature. • ICRC, Sexual Violence in Detention Briefing, p. 20. 'Bearing in mind the closed environment of detention, and that detainees may be dependent on those inflicting sexual violence (be they staff or fellow detainees), it is particularly important that detainees can make complaints directly and confidentially to higher authorities within the detention facility, to bodies that have a supervisory function over detention facilities, and be visited by external bodies independent of the place of detention.' 	<p>US, Prison Rape Elimination Act, 2003. This Act created a system for reporting incidents of rape perpetrated in detention that ensures the confidentiality of complaints; protects the reporter from retaliation; and ensures the impartial resolution of complaints.</p>

D. DOES DOMESTIC LEGISLATION PROVIDE MEASURES OF PROTECTION FOR MIGRANTS (INCLUDING ASYLUM SEEKERS AND REFUGEES)?

While IHL rules do not specifically state that measures of protection must be articulated in domestic legislation for migrants who are victims/survivors of sexual violence, they do highlight the special attention afforded to relevant persons under IHL generally.

LEGAL BASIS, ADDITIONAL STANDARDS AND OTHER GUIDANCE:	STATE PRACTICE:
<p>IHL:</p> <ul style="list-style-type: none"> • GCIV, Article 44; API, Article 73. Refugees and stateless persons affected by armed conflict shall receive attention. • CIHL Study, Rule 131. Displaced civilians shall be received under satisfactory conditions of shelter, hygiene, health and safety. They shall be protected like other civilians. <p>IHRL:</p> <ul style="list-style-type: none"> • ICCPR, Article 14(3)(a) and (f). The person shall be informed of the charge in a language they understand. They should have the free assistance of an interpreter if they cannot understand or speak the language used in court. • Maputo Protocol, Article 11(3). States parties shall ensure that sexual violence committed against displaced persons is prosecuted as an international crime before a competent body. • CEDAW Committee, General Recommendation No. 35, 2017, para. 29(c). Restrictive immigration laws that discourage migrants from reporting sexual violence must be repealed. <p>IRL:</p> <ul style="list-style-type: none"> • The Refugee Convention, 1951, Article 16(1). A ‘refugee shall have free access to the courts of States Parties’. <p>Other:</p> <ul style="list-style-type: none"> • UN International Organization for Migration, Access to Justice: A Migrant's Right, 2019, pages 4–5. States must ensure that migrants are granted the right to standing and recognition before the law. • UNHCR, Detention Guidelines, 2012, Guideline 9.1, para. 49. Asylum seekers who are a victim or survivor of sexual violence require special attention and should generally not be detained. 	<p>Ukraine, Law on the Protection of Childhood, 2017, Article 2(3). This law provides protection for children who have suffered psychological violence, which covers any kind of suffering experienced due to displacement or relocation from the armed conflict area.</p> <p>Peru, Legislative Decree No. 1236 on Migrations, 2015, Articles 17 and 59. These articles grant special protection to foreigners who have been a victim or survivor of sexual violence. Article 59 creates a humanitarian immigration status to protect people in vulnerable situations (including victims of human trafficking) but who cannot apply for asylum or refugee status.</p>

E. DOES DOMESTIC LEGISLATION PROVIDE MEASURES OF PROTECTION FOR INTERNALLY DISPLACED PERSONS (IDPs)?

As IDPs are typically citizens or habitual residents of the state in which they find themselves, they should enjoy the same rights and freedoms, without discrimination, as anyone else in the country. As such, IDPs shall be protected against sexual violence, indecent assault, torture and other cruel, inhuman, degrading treatment or punishment.

LEGAL BASIS, ADDITIONAL STANDARDS AND OTHER GUIDANCE:	STATE PRACTICE:
<p>IHL:</p> <ul style="list-style-type: none"> ● CIHL Study, Rule 131. Displaced civilians shall be received under satisfactory conditions of shelter, hygiene, health and safety. They shall be protected like other civilians. <p>IHRL:</p> <ul style="list-style-type: none"> ● ICCPR, Article 14(3)(a) and (f). The person shall be informed of the charge in a language they understand. They should have the free assistance of an interpreter if they cannot understand or speak the language used in court. ● Maputo Protocol, Article 11(3). States parties shall ensure that sexual violence committed against displaced persons is prosecuted as an international crime before a competent body. ● African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), 2009, Article 7(5)(f). Armed groups are prohibited from engaging in sexual slavery and trafficking of persons, especially women and children. ● Great Lakes Region Protocol on the Protection and Assistance to Internally Displaced Persons, 2006, Article 4(1)(b). Member States must respect and uphold the provisions of UN Security Council Resolution 1325 applicable to the protection of women and their role during armed conflict. <p>Other:</p> <ul style="list-style-type: none"> ● UN, Guiding Principles on Internal Displacement, 2004, Principle 11(2)(a). 'IDPs shall be protected in particular against rape, mutilation, torture, cruel, inhuman or degrading treatment or punishment, and other outrages upon personal dignity, such as acts of gender-specific violence, forced prostitution and any form of indecent assault'. ● Kampala Convention, 2009, Article 9(1)(d). IDPs shall be protected from, among others, '[s]exual and gender-based violence in all its forms, notably rape, enforced prostitution, sexual exploitation and harmful practices, slavery, recruitment of children and their use in hostilities, forced labour and human trafficking and smuggling'. 	<p>Niger, Law No. 74 on the Protection and Assistance of IDPs, 2018, Article 30. All forms of sexual exploitation against internally displaced children are prohibited.</p> <p>El Salvador, Special law for the comprehensive care and protection of people in conditions of forced internal displacement, 2020, Article 13(1)(b). IDPs are protected from harassment, rape, mutilation, forced prostitution, trafficking, sexual exploitation or any other form of sexual violence.</p> <p>Mexico, Law for the Prevention of and Response to Internal Displacement in the State of Guerrero, Decree No. 487, 2014, Article 20. IDPs are protected from rape and sexual harassment.</p> <p>Peru, Regulation on the Law on Internal Displacement, 2005. Special protections from sexual violence are provided, and special attention is afforded to the health of victims.</p>

F. DOES DOMESTIC LEGISLATION ESTABLISH MEASURES TO ENSURE THE SAFETY AND CONFIDENTIALITY OF VICTIMS/SURVIVORS OF AND WITNESSES TO SEXUAL VIOLENCE?

LEGAL BASIS, ADDITIONAL STANDARDS AND OTHER GUIDANCE:	STATE PRACTICE:
<p>IHL:</p> <ul style="list-style-type: none"> ● GCI, Article 28; ICRC, Commentary on GCI, 2016, Article 28, para. 2168. '[M]edical care must be provided in accordance with contemporary professional ethics. These ethics are set down in the rules and codes of conduct for health-care professionals, the core elements of which include ... informed consent and medical confidentiality.' ● API, Article 16; ICRC, Commentary on API, 1987, Article 16, para. 670. Medical confidentiality requires that the patient should not be denounced. ● APII Article 10(2); ICRC, Commentary on APII, 1987, Article 10, para. 4684. The professional obligation of medical personnel to maintain confidentiality will be respected; therefore, doctors who refuse to give information shall not be punished. ● CIHL Study, Rule 26. A person engaged in medical activities cannot be compelled to perform acts contrary to medical ethics. A person cannot be punished for performing medical duties compatible with medical ethics. <p>IHRL:</p> <ul style="list-style-type: none"> ● ACHR, Article 11; ECHR, Article 8; ICCPR, Article 17. These articles protect the right to privacy, which may be interpreted as including a right to confidentiality of medical information. ● CEDAW Committee, General Recommendation No. 35, 2017, para. 30(e)(i). There should be due respect for the survivor's privacy, confidentiality, free and informed consent. ● Council of Europe, Convention on Preventing and Combating Violence Against Women and Domestic Violence, Article 56(1)(f). Measures may be adopted to protect the privacy and the image of the victim/survivor of sexual violence. <p>Other:</p> <ul style="list-style-type: none"> ● UN, Report of the Secretary-General, Conflict-Related Sexual Violence, 2019, Recommendation 127(b). All efforts to document and investigate sexual violence should be survivor-centred, well-coordinated and adhere to the principles of safety, confidentiality and informed consent. ● OHCHR, Protection of victims of sexual violence: lessons learned, workshop report, 2019, p. 9. The testimonies of other victims should never be referenced while interviewing another victim. ● WHO, Responding to intimate partner violence and sexual violence against women, WHO Clinical and Policy Guidelines, Recommendation 1.2, p. 16. Privacy and confidentiality of the victim/survivor reporting an incident of sexual violence should be a priority. 	<p>Pakistan, Criminal Law (Amendment) (Offences Relating to Rape) Act, 2016, Section 6. This Act amends the Pakistan Penal Code of 1860. By virtue of Section 6 of this amendment, it is now prohibited to disclose the identity of a victim/survivor of rape.</p> <p>Democratic Republic of the Congo, Congolese Criminal Procedure Code 1959, amended by Law No. 06/019, 2006, Article 74(bis). Measures shall be taken to protect the security, physical and psychological well-being, dignity and privacy of victims and survivors of sexual violence and any other person involved.</p>

G. GOOD PRACTICE: DOES DOMESTIC LEGISLATION ESTABLISH A BODY WHOSE MEMBERS ARE TRAINED TO DEAL WITH THE SPECIFIC NATURE OF SEXUAL VIOLENCE CASES?

States must investigate war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects ([CIHL Study, Rule 158](#)). Some States have created special units at the domestic level for the prosecution of international crimes, including war crimes, a strategy which reinforces the efficiency of investigations and the likelihood of success of prosecutions ([ICRC, Commentary on GCI, 2016, Article 49](#), para. 2893).

Owing to the sensitivities involved in investigating sexual violence, it may be beneficial for states to create a specialized body whose members are trained to investigate sexual violence cases. The following provisions do not set out a legal requirement to establish such a body, but the examples in the adjacent column illustrate the measures taken by some states to ensure sexual violence-sensitive expertise is available during the types of investigation and prosecution described below.

LEGAL BASIS, ADDITIONAL STANDARDS AND OTHER GUIDANCE:	STATE PRACTICE:
<p>IHL:</p> <ul style="list-style-type: none"> Sexual violence may amount to a war crime via the grave-breach regime (as detailed in Section 2(b) of this checklist) or otherwise as a serious violation of IHL (CIHL Study, Rule 156). GCI, Article 49; GCII, Article 50; GCIII, Article 129; GCIV, Article 146. States have an obligation to search for persons alleged to have committed grave breaches, and to bring them before their courts ‘regardless of their nationality’. Article 1 common to the Geneva Conventions. States parties undertake to respect and ensure respect for the Geneva Conventions. CIHL Study, Rule 157. States party to the GCs and states party to API are <i>obliged</i> to provide for universal jurisdiction in their national courts over grave breaches, and they have the <i>right</i> to vest universal jurisdiction in their national courts over war crimes that do not constitute a grave breach of the GCs or API. CIHL Study, Rule 158. States must investigate war crimes falling within their jurisdiction and, if appropriate, prosecute the suspects. <p>ICL:</p> <ul style="list-style-type: none"> ICC Statute, Preamble. Each state party to the ICC Statute shall ‘exercise its criminal jurisdiction over those responsible for international crimes’. <p>UNCAT:</p> <ul style="list-style-type: none"> UNCAT, Article 12. Each state party shall conduct a prompt and impartial investigation whenever there is reasonable ground to believe that an act of torture has been committed within their jurisdiction. 	<p>Croatia, Law on the Rights of Victims of Sexual Violence in the Homeland War, 2015, Article 10. An independent expert body was created to give its opinion on sexual violence cases.</p> <p>Bolivia, Law No. 879 of the Truth Commission, 2016. A Commission was established to investigate human rights violations, including sexual violence.</p> <p>Tunisia, Decree 4555 establishing Criminal Chambers Specialized in Transitional Justice, 2014; Tunisia, Organic Law No. 53 Establishing and Organizing Transitional Justice, 2013. Specialized chambers were established to adjudicate in cases of sexual violence, and a Commission was established to report on serious violations of human rights.</p> <p>UK, Service Police’s Special Investigation Branch, Section IX. Members of the UK’s military police services receive ongoing training in handling sexual crimes committed by or against the military. They are independent of the chain of command and the Ministry of Defence. The investigator provides victim support.</p>

6. PENALTIES

A. DOES DOMESTIC LEGISLATION SET OUT PENALTIES THAT REFLECT THE SEVERITY OF THE OFFENCE?

The choice of penalties rests with each state party. Even though there will be no uniformity in the penalties applied by states parties, the grave breaches regime aims for uniformity in sanctioning all grave breaches listed therein ([ICRC, Commentary on GCI, 2016, Article 49, para. 2844](#)).

The penalties in existing law for domestic crimes might not be appropriate in light of the seriousness of the war crimes or grave breaches in question ([ICRC, Commentary on GCI, 2016, Article 49, para. 2848](#)).

LEGAL BASIS, ADDITIONAL STANDARDS AND OTHER GUIDANCE:	STATE PRACTICE:
<p>IHL:</p> <ul style="list-style-type: none"> • GCIV, Article 67. The penalty shall be proportionate to the offence. • GCI, Article 49; GCII Article 50, GCIII Article 129, GCIV Article 146. ‘The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches’. • ICRC, Commentary on GCI, 2016, Article 49, para. 2830. Complete respect for the Conventions must be based on the imposition of effective penalties on those guilty of violating them. • ICRC, Commentary on GCI, 2016, Article 49, paras. 2844 and 2848. The choice of penalties rests with each state party. The penalties in existing law for domestic crimes might not be appropriate in the light of the seriousness of the war crime or grave breach in question. <p>ICL:</p> <ul style="list-style-type: none"> • ICC Statute, Article 78(1). In determining the penalty, the Court shall take into account such factors as the gravity of the crime and the individual circumstances of the convicted person. <p>IHRL, UNCAT:</p> <ul style="list-style-type: none"> • CEDAW Committee, General Recommendation No. 35, 2017, paras. 29(a) and 32(a). Legal sanctions shall be introduced which are commensurate with the gravity of the offence. • UNCAT, Article 4(2). Each state party shall punish torture by appropriate penalties which take into account its grave nature. <p>Other:</p> <ul style="list-style-type: none"> • Report of the UN Secretary-General pursuant to para. 2 of UNSC Resolution 808 S/25704, 1993, para. 36. Reference should be made to domestic practices to determine penalties for violations of IHL. 	<p>Spain, Law No. 5 amending the Penal Code, 2010, Article 180. Penalties will be increased in cases where the victim was vulnerable.</p> <p>El Salvador, Criminal Code, Decree No. 1030, 1998, Articles 161 and 162. The penalty for sexual violence will be increased where the victim/survivor was a minor; a family member of the perpetrator; in the custody of the perpetrator; or incapacitated.</p> <p>Burundi, Penal Code, 2009 (amendment), Articles 200 and 558. The penalty for war crimes and, under certain circumstances, rape is life imprisonment.</p>

7. REMEDIES

A. DOES DOMESTIC LEGISLATION PROVIDE REMEDIES FOR ALL VICTIMS/SURVIVORS THAT REFLECT THE GRAVITY OF THE OFFENCE?

Remedies may be provided by the responsible state or the individual perpetrator. Adequate remedies for victims/survivors of sexual violence encompass a combination of different forms of reparations, including: restitution, compensation, satisfaction, rehabilitation and guarantees of non-repetition ([CEDAW Committee, General Recommendation No. 35, 2017](#), paras. 29(a) and (b), and 33; [Guidance Note of the Secretary-General, Reparations for Conflict-Related Sexual Violence, 2014](#), pages 5–6).

LEGAL BASIS, ADDITIONAL STANDARDS AND OTHER GUIDANCE:	STATE PRACTICE:
<p>ICL:</p> <ul style="list-style-type: none"> • ICC Statute, Article 75. The Court shall determine reparations for victims of crimes within the Court's jurisdiction. <p>IHRL:</p> <ul style="list-style-type: none"> • Where a human rights body finds a violation of a right set out in its Convention, it shall order or recommend that reparations be made to the injured party (ECHR, Article 41; ICCPR, Article 2(3); UNCAT, Article 14; ACHR, Article 63). • CEDAW Committee, General Recommendation No. 35, 2017, paras. 29(a) and (b), and 33. Effective reparations shall be provided to victims/survivors of sexual violence. Reparations should include different measures, such as: monetary compensation; the provision of legal, social and health services to promote a complete recovery; satisfaction and guarantees of non-repetition. Such reparations should be adequate and proportionate to the gravity of the harm suffered. • Maputo Protocol, Articles 4(2)(f) and 25. States parties shall provide effective reparations for victims, which shall be determined by competent judicial, administrative or legislative authorities. • Council of Europe, Convention on Preventing and Combating Violence Against Women and Domestic Violence, Article 29. <p>Other:</p> <ul style="list-style-type: none"> • Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by General Assembly Resolution 60/147, 2005, paras. 8, 11, 12 and 15. The remedies for victims should be provided equally and promptly. Victims should be given all relevant information concerning the violations and reparation mechanisms. Reparations should be proportional to the gravity of the violation and the harm suffered. • Guidance Note of the Secretary-General, Reparations for Conflict-Related Sexual Violence, 2014. Adequate reparation for victims of conflict-related sexual violence entails a combination of different forms of reparations, including restitution, compensation, satisfaction, rehabilitation, and guarantees of non-repetition. They may include urgent interim reparations to address immediate needs and avoid irreparable harm. 	<p>Colombia, Constitutional Court, Judgment, 2019. Victims of sexual violence have a right to remedies, and a gender-sensitive approach shall be adopted.</p> <p>Peru, Integral Plan of Reparations, 2006. Victims of sexual violence will be provided with reparations relating to health, education, housing, as well as symbolic measures, such as public gestures.</p> <p>Peru, Programme for Comprehensive Reparation, 2005. Reparations may be provided for direct victims of sexual violence; indirect victims (family members, children born following sexual violence); and communities.</p>

8. SELECTED ISSUES

A. DOES DOMESTIC LEGISLATION CONTAIN MANDATORY REPORTING PROCEDURES* FOR INCIDENTS OF SEXUAL VIOLENCE?

* Mandatory reporting is the obligation in certain countries for health-care personnel and other professionals to report known or suspected cases of sexual or gender-based violence to designated public authorities, notably law enforcement agencies. It includes providing identifying information, without requiring the consent of the victim/survivor. In some contexts, the victim/survivor is required to report as a precondition for accessing care. While the introduction of mandatory reporting may be intended to address impunity, prevent future crimes and protect victims/survivors, it is potentially incompatible with international law and medical ethics, and can create legal and ethical dilemmas for health-care providers.

The British Red Cross and the ICRC have produced a humanitarian research report exploring the humanitarian impacts of mandatory reporting on access to health care for victims/survivors of sexual violence in armed conflict and other emergencies. Research was conducted in health-care settings in four countries affected by armed conflict or other emergencies. This research, which focused on adult victims/survivors, revealed that mandatory reporting of sexual violence in these contexts can obstruct access to health care for the victims/survivors of these crimes and may expose them to increased risk of secondary violence and harm.

The report makes recommendations to states that have mandatory reporting regimes, as well as to donors, health-care providers and the International Red Cross and Red Crescent Movement, on how to respond to these dilemmas and better protect the health, safety and well-being of survivors.

To download the report, visit: [Forced to Report: The humanitarian impact of mandatory reporting on access to health care for victims/survivors of sexual violence in armed conflict and other emergencies.](#)

B. IS DOMESTIC LEGISLATION IN LINE WITH EXISTING INTERNATIONAL STANDARDS RELATING TO GENDER AND SGBV IN DISASTER LAW?*

The International Federation of Red Cross and Red Crescent Societies' (IFRC) Disaster Law Programme develops and disseminates guidance on best practice in disaster law and policy. It also provides technical assistance to governments in strengthening their laws and builds the capacity of National Red Cross and Red Crescent Societies and other stakeholders on disaster law.

* A person's gender and other diversity factors (including age and sexual orientation) shape the extent to which the person is at risk from and affected by disasters. Further, IFRC research indicates that the incidence of sexual and gender-based violence (SGBV) often increases during disasters, and that SGBV is present to a significant extent in every disaster-affected population that has been studied. Therefore, disaster-related domestic legislation and policy should include provisions to achieve gender equality and inclusion, and to address SGBV (IFRC, [Checklist on Law and Disaster Preparedness and Response, 2019](#)).

At its 33rd International Conference in December 2019, the International Red Cross and Red Crescent Movement formally adopted [The Checklist on Law and Disaster Preparedness and Response](#) ('DPR Checklist'). The DPR Checklist is a practical assessment tool developed by the IFRC's Disaster Law Programme to provide guidance on how to identify and address gaps in domestic law and policy relating to disaster preparedness and response (DPR). The DPR Checklist and its accompanying [Multi-Country Synthesis Report](#) make several recommendations relating to gender and SGBV. Specifically, they recommend that law and/or policy should:

- prohibit all forms of discrimination in disaster preparedness and response, including gender discrimination
- mandate the collection of sex-disaggregated data in risk, vulnerability and needs assessments, and in relation to disaster impacts, i.e. morbidity, mortality, economic losses
- mandate government DPR actors to participate in training designed to make them aware of the specific needs and vulnerabilities of different groups, including women and girls
- require government entities responsible for protecting people from SGBV during normal times to develop disaster contingency plans aimed at ensuring continuity of SGBV services during major disasters, including clinical management of sexual violence and access to reporting systems and legal assistance
- mandate that post-disaster shelter is designed and managed in a manner that prevents and mitigates SGBV, e.g. including measures such as lockable, sex-segregated toilets and showers, bright lighting in communal areas, gender-balanced security staff, and
- mandate SGBV-awareness training for government DPR actors, especially the military and the police.

Similarly, the [Checklist](#) and accompanying [Handbook](#) on Law and Disaster Risk Reduction, developed by the IFRC and UNDP, recommend that law and policy relating to disaster risk reduction should include provisions to ensure that gender-related needs and vulnerabilities are identified and taken into account.

C. FOR AFRICAN STATES: HAS THE STATE RATIFIED THE MAPUTO PROTOCOL (INCLUDING ARTICLE 14(2)(C))?*^{*}

* The [Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa](#) ('Maputo Protocol') is only applicable to African States.

The Maputo Protocol contains requirements related to sexual and reproductive health care for victims of sexual violence. Specifically, the Maputo Protocol provides that 'States Parties shall take all appropriate measures to protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus' (Article 14(2)(c)).

As of 2020, there were 42 African states party to the Maputo Protocol. Three states parties (Cameroon, Kenya and Uganda) [entered reservations](#) to Article 14(2)(c). Rwanda withdrew its reservation to Article 14(2)(c) in 2012.

The domestic legal frameworks of states party to the Maputo Protocol must reflect their obligations under this treaty.

9. ADDITIONAL REQUIREMENTS RELATED TO CRIMINAL REPRESSION

A. DOES DOMESTIC LEGISLATION ENSURE THAT SEXUAL VIOLENCE IN ARMED CONFLICT CAN BE PROSECUTED AT ANY TIME, WITHOUT BEING SUBJECT TO A STATUTE OF LIMITATION?

LEGAL BASIS, ADDITIONAL STANDARDS AND OTHER GUIDANCE:	STATE PRACTICE:
<p>IHL:</p> <ul style="list-style-type: none"> • CIHL Study, Rule 160. A statute of limitation may not be applied to war crimes. <p>ICL:</p> <ul style="list-style-type: none"> • ICC Statute, Article 29. ‘The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.’ <p>IHRL:</p> <ul style="list-style-type: none"> • CEDAW Committee, General Recommendation on Women’s Access to Justice, 2015, Recommendation 19(f). Statute of limitations for gender-based human rights violations such as sexual violence should be rejected. <p>Other:</p> <ul style="list-style-type: none"> • UN, Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 1968, Preamble and Article 1. War crimes shall not be subject to a statute of limitation. • European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes, 1974, Article 1. Statutory limitation shall not apply for war crimes. • UN, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly Resolution 60/147, 2005, Section IV, Principles 6 and 7. ‘Statutes of limitations shall not apply to gross violations of IHRL and serious violations of IHL which constitute crimes under international law’. 	<p>Colombia, Law No. 1719 on Access to Justice and Other Matters for Victims of Sexual Violence and Especially of Sexual Violence Related to the Armed Conflict, 2014, Article 16. There is no statute of limitations for war crimes, crimes against humanity or genocide.</p> <p>Spain, Law No. 5 amending the Penal Code, 2010, amendments to Articles 130 and 131. Pursuant to these amendments, a statute of limitations shall not apply to war crimes, crimes against humanity or genocide.</p> <p>Ethiopia, Special Prosecutor’s Office, Mengistu and others, 1995, para. 828. The Prosecutor stated that it is a well-established custom that war crimes are not barred by a statutory limitation.</p> <p>Kyrgyzstan, Criminal Code, 2017, Article 62. Statute of limitations does not apply to war crimes, including to ‘intentional infliction of serious suffering and psychological distress’ on protected persons.</p> <p>El Salvador, Code of Criminal Procedure, Decree no. 733, 2009, Article 32. There shall be no statute of limitation for acts of torture, violations of the laws or customs of war, and sexual violence, where this conduct commenced after the validity of this code.</p> <p>Burundi, Penal Code, 2009 (amended), Article 155. There shall be no statute of limitation for war crimes.</p>

B. DOES DOMESTIC LEGISLATION VEST UNIVERSAL JURISDICTION IN NATIONAL COURTS OVER ACTS OF SEXUAL VIOLENCE THAT AMOUNT TO A GRAVE BREACH?

States party to the GCs and states party to API are obliged to provide for universal jurisdiction in their national legislation over those war crimes known as ‘grave breaches’, which may be committed in IACs ([GCI, Article 49](#); [GCII, Article 50](#); [GCIII, Article 129](#); [GCIV, Article 146](#); [API, Article 85\(1\) and \(5\)](#); [CIHL Study, Rule 157](#)). States have the right to provide for universal jurisdiction in their national legislation over other serious violations of IHL, not constituting a grave breach but still amounting to a war crime, in an IAC or NIAC ([CIHL Study, Rule 157](#)). States must investigate war crimes over which they have jurisdiction and, if appropriate, prosecute ([CIHL Study, Rule 158](#)).

Some states have added conditions to the application of universal jurisdiction over grave breaches or other serious violations of IHL – for example, the presence of the accused on the state’s territory ([ICRC, ‘Preventing and Repressing International Crimes: Towards an “Integrated” Approach Based on Domestic Practice’](#), pages 53–122). ‘Those conditions must be aimed at increasing the effectiveness and predictability of universal jurisdiction and not at unnecessarily restricting the possibility of bringing suspected offenders to justice’ ([ICRC, Statement to UN General Assembly Sixth Committee Meeting on ‘the scope and application of the principle of universal jurisdiction’](#), 2019).

LEGAL BASIS, ADDITIONAL STANDARDS AND OTHER GUIDANCE:	STATE PRACTICE:
<p>Grave breaches:</p> <ul style="list-style-type: none"> Grave breaches of the GCs and API are war crimes (API, Article 85(5); CIHL Study, Rule 156; ICC Statute, Article 8(2)(a)). Sexual violence is prohibited as a grave breach, under the wording ‘torture’, ‘inhuman treatment’ or ‘serious injury to body or health’ of GCI, Article 50; GCII, Article 51; GCIII, Article 130; GCIV, Article 147 (see Section 2(b) of this checklist). States parties are <i>obliged</i> to search for persons alleged to have committed, or to have ordered to be committed, grave breaches, and to bring them before their courts ‘<i>regardless of their nationality</i>’ (GCI, Article 49; GCII, Article 50; GCIII, Article 129; GCIV, Article 146). <p>Other serious violations of IHL not constituting grave breaches:</p> <ul style="list-style-type: none"> States have a <i>right</i> to vest universal jurisdiction in their national legislation over serious violations of IHL, other than grave breaches, that are war crimes (CIHL Study, Rule 157). They <i>must</i>, at the very least, exercise jurisdiction over war crimes allegedly committed by their nationals or armed forces or on their territory (CIHL Study, Rule 158). <p>ICL:</p> <ul style="list-style-type: none"> ICC Statute, Preamble. States shall exercise their jurisdiction over international crimes. 	<p>Grave breaches:</p> <p>Some states have complied with their obligation to vest universal jurisdiction in their courts over grave breaches, including: Australia, Austria, Azerbaijan; Bangladesh; Barbados; Belarus; Belgium; Botswana; Bulgaria; Canada; Cook Islands; Cuba; Cyprus; Denmark; Finland; France; Germany; Guatemala; Israel; Kenya; Luxembourg; Malawi; Malaysia; Mauritius; New Zealand; Nigeria; Papua New Guinea; Paraguay; Poland; Russian Federation; Seychelles; Singapore; South Africa; Spain; Switzerland; Uganda; United Kingdom; Vanuatu; and Zimbabwe (CIHL Study, Rule 157, footnote 17).</p> <p>Other serious violations of IHL not constituting grave breaches:</p> <p>Some states have vested universal jurisdiction in their courts over war crimes (other than a grave breach), including: Belgium, Canada, Germany, New Zealand and the United Kingdom (CIHL Study, Rule 157, footnote 11).</p> <p>Canada, Quebec Court of Appeals, <i>Désiré Munyaneza</i>, 2014.</p> <p>The Court exercised universal jurisdiction to prosecute acts of sexual violence constituting war crimes, perpetrated during a NIAC (not constituting a grave breach).</p>

C. (OPTIONAL) DOES DOMESTIC LEGISLATION PROVIDE DOMESTIC COURTS WITH THE MEANS TO EXTRADITE* SUSPECTS OR PROVIDE MUTUAL LEGAL ASSISTANCE IN PROSECUTING?

* Extradition involves the handing over of suspects for trial to another party concerned, provided that such a party has made out a *prima facie* case for trial ([GCI, Article 49](#); [GCII, Article 50](#); [GCIII, Article 129](#); [GCIV, Article 146](#)).

LEGAL BASIS, ADDITIONAL STANDARDS AND OTHER GUIDANCE:	STATE PRACTICE:
<p>IHL:</p> <ul style="list-style-type: none"> • GCI, Article 49; GCII, Article 50; GCIII, Article 129; GCIV, Article 146. Each state party is under an obligation to search for persons alleged to have committed, or to have ordered to be committed, a grave breach, and to bring such persons before its own courts or extradite them (sexual violence constitutes a grave breach – see Section 2(b) of this checklist for further details on grave breaches). • API, Article 88. States parties shall mutually assist one another in connection with criminal matters brought in respect of grave breaches. Mutual legal assistance includes cooperation in the matter of extradition of suspected offenders. • API, Article 89. In situations of serious violations of the GCs or API (including acts of sexual violence), states parties shall act jointly or individually in cooperation with the UN. • CIHL Study, Rule 161. In both IACs and NIACs, states must make every effort to cooperate, to the extent possible, with each other in order to facilitate the investigation of war crimes and the prosecution of the suspects. • Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 1999, Article 19(1). States parties shall provide assistance with investigations, criminal or extradition proceedings, including in obtaining evidence at their disposal. <p>ICL:</p> <ul style="list-style-type: none"> • ICC Statute, Article 89. If the Court requests that a state party arrest or surrender a person suspected to have committed a crime within the Court's jurisdiction (including sexual violence as war crimes), the state party shall cooperate. <p>IHRL, UNCAT:</p> <ul style="list-style-type: none"> • Optional Protocol to the CRC on the sale of children, child prostitution and child pornography, 2000, Article 10(1). States parties shall cooperate in the prevention, detection, investigation, prosecution and punishment of those responsible for exploiting children. • UNCAT, Articles 3, 7(1), 8 and 9(1). No state party may extradite a person to another state where there are substantial grounds for believing that they would be in danger of being subjected to torture (sexual violence can amount to torture, as detailed in Section 2(a) of this checklist). States parties may either submit a case concerning torture to their competent authorities for the purpose of prosecution, provided that it falls within their jurisdiction, or they may extradite the suspect. The offence of torture shall be deemed an extraditable offence. States parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of acts of torture, including the supply of all evidence at their disposal necessary for the proceedings. • Council of Europe, Convention on Preventing and Combating Violence Against Women and Domestic Violence, Articles 18(2) and 62. 	<p>UK, Extradition Act, 2003, Section 196; United Kingdom, Magistrates' Court, Ganić, 2010, para. 6. Conduct constituting a grave breach amounts to an extraditable offence.</p> <p>Portugal, International Judicial Cooperation in Criminal Matters Law, 1999. Portugal shall cooperate with other states in criminal matters (including extradition, transfer of proceedings and persons, enforcement of judgments and mutual legal assistance). There is no exception to the duty of cooperation for war crimes and other violations of the GCs (Article 7).</p>

D. DOES DOMESTIC LEGISLATION DISTINGUISH BETWEEN DIFFERENT MODES OF LIABILITY, SUCH AS INDIVIDUAL, COMMANDER AND SUPERIOR RESPONSIBILITY?

‘Commanders and other superiors are criminally responsible for war crimes committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or, if such crimes had been committed, to punish the persons responsible’ ([CIHL Study, Rule 153](#)). ‘The case law has also made it clear that belonging to the military is not a necessary condition, as political leaders or civilian, hierarchical superiors can also be held responsible for war crimes committed by subordinates’ ([ICRC Legal Factsheet, ‘Command Responsibility and Failure to Act’, 2013](#), p. 2). Ad hoc international tribunals have confirmed that if the superior had ‘effective control’ over their subordinate’s conduct (a material ability to prevent and punish), then the superior could be held responsible if they failed to take action in response to the criminal conduct of their subordinate ([ibid.](#)).

LEGAL BASIS, ADDITIONAL STANDARDS AND OTHER GUIDANCE:	STATE PRACTICE:
<p>IHL:</p> <ul style="list-style-type: none"> • GCI, Article 49; GCII, Article 50; GCIII, Article 129; GCIV, Article 146. ‘Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches’ (emphasis added). • API, Article 86(2). A superior will be individually responsible for their subordinates, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that their subordinate was committing or was going to commit such a grave breach of the GCs or API, and if they did not take all feasible measures within their power to prevent or repress the breach (superior responsibility). • API, Article 87(3). A military commander will be individually responsible for their subordinates if they do not prevent violations by their subordinates or initiate disciplinary or penal action against violators (commander responsibility). • CIHL Study, Rule 153. As detailed above. <p>ICL:</p> <ul style="list-style-type: none"> • ICC Statute, Article 25(2) and (3). A person may be individually responsible for a crime within the ICC’s jurisdiction (including sexual violence as a war crime), if they: commit the crime individually or jointly; attempt to commit a crime; or if they order, solicit, induce, aid, abet, assist or contribute to the commission or attempted commission of the crime. • ICC Statute, Article 28(a) and (b). A military commander or other superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces or subordinates under their effective command and control, or effective authority and control, as a result of their failure to exercise control properly over such forces or subordinates. <p>IHRL:</p> <ul style="list-style-type: none"> • Council of Europe, Convention on Preventing and Combating Violence Against Women and Domestic Violence, Article 41. Commission, aiding or abetting, and attempt are modes of liability. <p>Other:</p> <ul style="list-style-type: none"> • ICRC Factsheet, ‘Command Responsibility and Failure to Act’, 2013, p. 2. Superior responsibility is proportionate to the gravity of the act. 	<p>Germany, Higher Regional Court of Stuttgart, Judgment, Ignace Murwanashyaka and Straton Musoni, 2015. The Court upheld the convictions of two leaders of a Hutu militia group in Rwanda for grave breaches of the GCs, on the basis that they were the <i>leaders</i> of foreign terrorist organizations, and for <i>aiding</i> in the <i>commission</i> of war crimes.</p> <p>Belarus, Criminal Code, 1999, Article 137. A commander will be held responsible for failure to prevent and suppress war crimes committed by his/her subordinates.</p>

E. DOES DOMESTIC LEGISLATION ENSURE THAT AMNESTIES* ARE PROHIBITED FOR WAR CRIMES?

* An amnesty is an official legislative or executive act whereby criminal investigation or prosecution of an individual, a group or class of persons and/or certain offences is prospectively or retroactively barred, and any penalties cancelled (ICRC Legal Factsheet, 'Amnesties and IHL: Purpose and Scope', 2017, p. 1). Amnesties for war crimes would be incompatible with the rule obliging states to investigate and prosecute persons suspected of having committed war crimes (CIHL Study, Rule 158).

LEGAL BASIS, ADDITIONAL STANDARDS AND OTHER GUIDANCE:	STATE PRACTICE:
<p>IHL:</p> <ul style="list-style-type: none"> ● CIHL Study, Rule 158. As detailed above. ● CIHL Study, Rule 159. 'At the end of hostilities, the authorities in power must endeavour to grant the broadest possible amnesty to persons who have participated in a NIAC, or to those deprived of their liberty for reasons related to the armed conflict, <i>with the exception of persons suspected of, accused of or sentenced for war crimes</i>' (emphasis added). ● ICRC, Commentary on GCI, 2016, Article 49, para. 2845. Amnesties granted to persons who have participated in an armed conflict shall not extend to those who are suspected of having committed grave breaches or other serious violations of IHL. <p>ICL:</p> <ul style="list-style-type: none"> ● Extraordinary Chambers in the Courts of Cambodia, Decision on Ieng Sary's Rule 89 Preliminary Objections, 2011, para. 39; ICTY Trial Chamber, Furundžija, Judgment, 1998, para. 155. International criminal courts and tribunals have held that an amnesty law cannot relieve the relevant state from its obligation to ensure the prosecution or punishment of perpetrators of grave breaches, torture, or war crimes in general. As detailed in Section 2(a) of this checklist, sexual violence is a form of torture. ● Statute of the Special Court for Sierra Leone, Article 10. An amnesty shall not be a bar to prosecution for war crimes. Special Court for Sierra Leone, Appeals Chamber, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 2004, paras. 71–72. The Court confirmed that an amnesty law did not rule out prosecution for war crimes. <p>IHRL:</p> <ul style="list-style-type: none"> ● IACtHR, Massacres of El Mozote and Nearby Places v. El Salvador, 2012, para. 286. In the context of a NIAC, the IACtHR considered that an amnesty law does not preclude the investigation and prosecution of war crimes. ● Human Rights Committee, General Comment No. 20, 1992, para. 15. Amnesties are generally incompatible with the duty of states to investigate acts of torture. 'States may not deprive individuals of the right to an effective remedy'. ● CEDAW Committee, General Recommendation on Women's Access to Justice, 2015, Recommendation 19(f). Amnesties for gender-based human rights violations such as sexual violence should be rejected. <p>Other:</p> <ul style="list-style-type: none"> ● UN Security Council, S/Res/1315, 2000, Preamble. The UN Security Council confirmed that amnesties may not apply to war crimes. 	<p>Philippines, Proclamation No. 1377, 2007. This law excludes certain crimes from amnesty laws, including rape and torture.</p> <p>Democratic Republic of the Congo, Law No. 14/006 on Amnesties for Insurrectional Facts, Facts of War and Political Offences, 2014. This law excludes various crimes from the scope of the domestic amnesty law, including war crimes, offences of torture, rape and other forms of sexual violence.</p> <p>Burundi, Penal Code, 2009, Article 171. There shall be no amnesties for war crimes, genocide and crimes against humanity.</p>

F. DOES DOMESTIC LEGISLATION ENSURE THAT THE DEFENCE OF SUPERIOR ORDER* IS PROHIBITED IN THE CASE OF WAR-CRIME CHARGES?

* Defence of superior order: a claim that a crime was committed by a person pursuant to an order of a Government or of a superior (military or civilian) ([ICC Statute](#), Article 33(1)).

LEGAL BASIS, ADDITIONAL STANDARDS AND OTHER GUIDANCE:	STATE PRACTICE:
<p>IHL:</p> <ul style="list-style-type: none"> • CIHL Study, Rule 154. Every combatant has a duty to disobey a manifestly unlawful order. • CIHL Study, Rule 155. Obeying a superior order does not relieve a subordinate of criminal responsibility if the subordinate knew that the act was unlawful or should have known because of the manifestly unlawful nature of the act ordered. <p>ICL:</p> <ul style="list-style-type: none"> • ICC Statute, Article 33(1). ‘The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless: (a) the person was under a legal obligation to obey orders of the Government or the superior in question; (b) the person did not know that the order was unlawful; or (c) the order was not manifestly unlawful.’ • ICTY Statute, 1993, Article 7(4); ICTR Statute, 1994, Article 6(4); Statute of the Special Tribunal for Lebanon, Article 3(3); Statute of the Special Court for Sierra Leone, Article 6(4). The fact that the person acted pursuant to an order of a Government or of a superior shall not relieve them of criminal responsibility but may be considered in mitigation of punishment if the Court or Tribunal determines that justice so requires. <p>UNCAT:</p> <ul style="list-style-type: none"> • UNCAT, Article 2(3). An order from a superior officer or public authority may not be invoked as a justification for torture (sexual violence amounts to torture, as detailed in Section 2(a) of this checklist). <p>Other:</p> <ul style="list-style-type: none"> • UN, Code of Conduct for Law Enforcement Officials, 1979, Article 5. The defence of superior order cannot be invoked to justify torture or cruel, inhuman or degrading treatment or punishment (sexual violence amounts to torture, as detailed in Section 2(a) of this checklist). • UN, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, 1990, para. 26. The defence of superior order will be inadmissible where the order was manifestly unlawful and the subordinate had a reasonable opportunity to refuse to follow it. • UN, Transitional Administration in East Timor, On the Establishment of Panels with Exclusive Jurisdiction Over Serious Criminal Offences, UNTAET/REG/2000/15, 2000, Section 21. The defence of superior order is inadmissible. 	<p>Australia, War Crimes Act, 1945, amendments of 2001, Section 16. This law excludes the defence of superior order for war crimes, but allows this circumstance to be considered in determining the proper sentence.</p> <p>Russian Federation, Criminal Code, 1996, Article 42. Criminal liability is excluded for persons who do not comply with a deliberately unlawful order.</p> <p>Burundi, Penal Code, amendments of 2009, Article 31. The defence of superior order cannot be availed of for war-crime charges.</p>

G. CAN DOMESTIC COURTS APPLY RELEVANT INTERNATIONAL CUSTOMARY LAW THAT WAS APPLICABLE AT THE TIME AND IN THE PLACE WHERE THE CONDUCT OCCURRED?

'No one may be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time it was committed; nor may a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed' ([CIHL Study, Rule 101](#)). As such, domestic courts should have the means to apply international as well as domestic law. However, some constitutions require that domestic prosecutions of international crimes are conditional on their domestic criminalization (Australia, for example: [Polyukhovich v. Commonwealth \(1991\) 172 CLR 501, 563, Brennan J](#)). Therefore, states parties to the GCs and APs should make all necessary efforts to incorporate the penal provisions into their domestic legislation, to ensure that they can investigate, prosecute and address future violations of IHL ([ICRC International Review, XIVth International Congress on Penal Law, 'International Crimes and Domestic Criminal Law', 1989](#), p. 61).

LEGAL BASIS, ADDITIONAL STANDARDS AND OTHER GUIDANCE:	STATE PRACTICE:
<p>IHL:</p> <ul style="list-style-type: none"> • GCIV, Article 67; APII, Article 6(2)(c); CIHL Study, Rule 101. No one may be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time it was committed; nor may a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed. <p>ICL:</p> <ul style="list-style-type: none"> • ICC Statute, Article 22(1). A person can only be held responsible for an act that constituted a criminal offence at the time that it took place. <p>IHRL:</p> <ul style="list-style-type: none"> • ECHR, Article 7(1); ICCPR, Article 15(1); ACHR, Article 9; AfCHPR, Article 7(2). IHRL requires that a person may only be held criminally responsible for an act which constituted a criminal offence under national or international law at the time of its commission. <p>Other:</p> <ul style="list-style-type: none"> • UDHR, Article 11(2). • Report of the UN Secretary-General pursuant to para. 2 of UNSC Resolution 808, 1993, paras. 34–36. A Court may apply CIHL that was applicable at the time of the relevant conduct. 	<p>Quebec, Court of Appeals, <i>Désiré Munyaneza</i>, 2014, paras. 20–55. The Court confirmed the Canadian Court's jurisdiction over acts that constituted crimes under international law at the time and in the place of their commission.</p> <p>South Africa, Implementation of the Geneva Conventions Act, 2012, Article 7(4). 'Nothing in this Act must be construed as precluding the prosecution of any person accused of having committed a breach under CIHL before this Act took effect'.</p> <p>Colombia, Legislative Act amending Articles 116, 152 and 221 of the Constitution, 2012. The investigating and prosecuting authorities shall exclusively apply IHL. The Act foresees a statutory law that would harmonize the Colombian penal law with IHL and interpret the latter.</p> <p>Court of Bosnia and Herzegovina, <i>Nedo Samardzic</i>, 2006. The Court justified a prosecution for sexual slavery on the basis that the country's Criminal Code had codified crimes already recognized under CIHL at the time relevant to the case. The Court explained that trying the accused under the provisions of the domestic Criminal Code did not breach the principle of legality.</p> <p>Cameroon, Constitution, 1996 (amendment), Article 45. International treaties and international agreements that have been ratified shall take precedence over national laws.</p>

10. ABBREVIATIONS

ACHR	American Convention on Human Rights
AfCHPR	African Charter on Human and People's Rights
AP	Protocols I and II of 8 June 1977 additional to the Geneva Conventions
CA3	Article 3 common to the Geneva Conventions
CEDAW	Convention on the Elimination of Discrimination Against Women
CIHL	Customary international humanitarian law
CIHL database	ICRC customary international humanitarian law Study
CRC	Convention on the Rights of the Child
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
GCs	The Geneva Conventions of 12 August 1949
IAC	International armed conflict
IAComHR	Inter-American Commission on Human Rights
IACTHR	Inter-American Court of Human Rights
ICC Statute	Rome Statute of the International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICL	International criminal law
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International humanitarian law
IHRL	International human rights law
IRL	International refugee law
LOAC	Law of armed conflict
Maputo Protocol	Protocol to the AfCHPR on the Rights of Women in Africa
NIAC	Non-international armed conflict
SAARC	South Asian Association for Regional Cooperation
UDHR	Universal Declaration of Human Rights
UNCAT	United Nations Convention Against Torture

The ICRC helps people around the world affected by armed conflict and other violence, doing everything it can to protect their lives and dignity and to relieve their suffering, often with its Red Cross and Red Crescent partners. The organization also seeks to prevent hardship by promoting and strengthening humanitarian law and championing universal humanitarian principles.