

BIS Manual - *The Gambia*



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Foreword

Global Rights Compliance is an international humanitarian law and human rights advisory service committed to supporting states and civil society to achieve accountability for gross violations of human rights. In 2019, we launched the Basic Investigative Standards for International Crimes ('BIS') as an App aimed at providing professional and non-professional practitioners across the globe with access to the best practices and basic minimum standards in the investigation and prosecution of humanitarian and human rights violations.

Accordingly, we are proud to have designed the 'BIS Manual – The Gambia' to support the Gambian Justice Ministry prosecutors in their determined efforts to hold accountable those responsible for human rights violations. Accountability for those crimes is crucial for building respect for the rule of law and to deter future abuses.

Along with a contextualised BIS App and a bespoke training programme, it is our hope that GRC's 'BIS Manual – The Gambia', will provide the Gambian Justice Ministry with practical information and know-how to help confront the injustices of the Jammeh era and to meet the challenges presented by the country's transitional justice process.

Yours sincerely,



Wayne Jordash

Founding Partner Global Rights Compliance LLP

Who we are

Global Rights Compliance ('GRC') specialises in legal services associated with bringing accountability for atrocity crimes and other violations of international law. Drawing on decades of experience in conflict affected areas and transitional justice environments, our 'root and branch' philosophy combines innovative full spectrum accountability strategies, building the capacity of states to implement international humanitarian and human rights standards, bespoke expertise in evidence gathering in conflict settings, and assisting communities to seek remedies for violations.

Wayne Jordash QC

Wayne Jordash QC is the Founding Partner of GRC and an international humanitarian law and international criminal law expert with experience across the globe, regularly advising governments on human rights and international humanitarian law compliance, including the Bangladeshi, Libyan, Serbian, Ukrainian and Vietnamese governments. Wayne has served as an advocate in international proceedings before the International Criminal Court, International Court of Justice, International Criminal Tribunal for Rwanda, Special Court for Sierra Leone, and the Extraordinary Chambers in the Courts of Cambodia and is currently appointed as lead counsel at the United Nations Mechanism for International Criminal Tribunals.

Carolyn Edgerton

Carolyn Edgerton is a Canadian criminal lawyer with almost 30 years of experience in the investigation and prosecution of international crimes, the greatest part as a Legal Officer and Trial Attorney in the service of the United Nations at the International Criminal Tribunal for the former Yugoslavia ('ICTY'). Over the years Carolyn has contributed to the investigation, pre-trial and trial phases of some of the ICTY's most complex cases against members of the political and military leadership in the former Yugoslavia, serving, among other things, as component team leader managing all aspects of the prosecution of Radovan Karadžić for crimes related to the siege of Sarajevo. Retired from the United Nations, Carolyn has focussed her practice on justice and building complementarity, and is presently engaged in projects in Europe, Eurasia and West Africa. Carolyn is the GRC project leader for The Gambia.

Ruby Axelson

Ruby Axelson joined GRC in 2015. Her role focuses on international litigation and project implementation in the fields of international criminal law, international humanitarian law, and gender justice. She is engaged in the design and delivery of specialised aspects of GRC's advisory and capacity building work, with a focus on sexual violence. Ruby was a lead drafter of the BIS and is involved in the creation and implementation of training curriculums for civil society organisations relating to the documentation and investigation of international crimes.

Other acknowledgments

This project was supported through a grant under the Knowledge Management Fund, an initiative of the Knowledge Platform Security & Rule of Law established by the Dutch Ministry of Foreign Affairs. GRC is grateful for their generous contribution which enabled the creation of this Manual.

A special thank you also to all those who supported GRC with their work on this Manual, including Guernica 37 International Justice Chambers, who provided crucial drafting and research assistance; Jack Sproson, who was the principal contributor to this work and without whose dedicated effort the Manual would not have been realised; GRC Legal Consultant Uzay Ayzev, who was instrumental throughout the drafting process; and GRC Pro Bono Legal Consultants and Interns from common and civil law jurisdictions across the globe, including England, India, France, Romania, Finland, Greece, Canada and the United States.

Introduction

This Manual is prepared with a view to familiarising Prosecutors of the Gambian Ministry of Justice with international standards relating to the investigation and prosecution of serious violations of human rights and international criminal law. These standards will be relevant in dealing with the challenges of those violations that might ultimately be recommended for prosecution when the Truth, Reconciliation and Reparations Commission makes its final report.

In order to provide practitioners with a comprehensive understanding of the steps necessary to prosecute these crimes, the eight chapters of this manual are structured holistically, and fall into three broad categories: (i) introducing human rights and international criminal law; (ii) substantive considerations in prosecuting international crimes; and (iii) victim centred practices when investigating international crimes.

Introducing international human rights and international criminal law

Chapter one begins by introducing international human rights law ('IHRL'), outlining particularly central and / or relevant treaties and highlighting a selection of rights potentially violated by the crimes under consideration. It also identifies and examines international and regional accountability mechanisms that could be used to pursue accountability for these violations.

Chapter two then introduces international criminal law ('ICL'), explaining how international crimes (i.e., crimes against humanity; war crimes; genocide; and the crime of aggression) differ from domestic criminal offences, before going on to define and give a brief overview of each crime.

Prosecuting international crimes: substantive considerations

Following this introduction, the Manual then moves on to discuss the substantive considerations associated with prosecutions brought under these operative legal regimes. Given that, on the available evidence, crimes against humanity appear to be the sole international crime applicable in the Gambian context, chapter three focuses on the contextual and material elements that must be established in order to establish these crimes.¹

Chapter four compliments this analysis by addressing how perpetrators can be held responsible for crimes under both domestic and international 'modes of liability'. Crucially, this chapter encourages prosecutors to be aware of different levels of perpetration, and to consider how senior individuals might incur liability for criminal acts that they ordered or directed, notwithstanding their physical or organisational remoteness from those acts.

¹ Throughout this and the following two chapters, the Manual provides 'investigative cues' to guide practitioners in applying the analysis to particular fact patterns.

Chapter five examines sexual violence. It begins by assessing how prosecutors can identify, recognise, and classify acts of sexual violence, before dealing with other practical considerations, including the importance of recognising the impact of sexual violence upon survivors, and how to appropriately work with these survivors when investigating allegations of sexual violence.

Chapter six assesses the potential defences that prosecutors may have to overcome in order to successfully prosecute the crimes considered in this Manual. As in chapter four, both domestic and international defences are considered.

Drawing together the analysis in the previous four chapters, chapter seven moves on to assess how prosecutors might build a case in relation to international crimes, which can present very different challenges than their domestic counterparts, especially with regard to the type and scope of evidence and information that is required to prove the various elements of the crimes.² Accordingly, this chapter reviews the types of evidence that might be used to both establish the crime itself (referred to hereafter as the ‘crime base’), and to potentially link more senior perpetrators to that crime. It also discusses how prosecutors might go about choosing the most appropriate charge against an accused, when numerous different charges are available.

Investigating and prosecuting international crimes: victim centred practices

Finally, chapter eight moves on to discuss ‘survivor centred principles in dealing with victims and witnesses’, which are foundationally important considerations that have an overarching relevance to most, if not all of the preceding analyses contained in this Manual. In doing so, it highlights the general principle of ‘Do no harm’ and the associated principles of ‘informed consent’, ‘information sharing’, ‘confidentiality’, and survivor centred access to justice. Having done so, the second half of the chapter goes on to deal with survivor centred principles during the interviewing process, addressing the PEACE interview model (an internationally recognised best practice interview model), alongside other best practices for sexual violence and pre-trial interviews, respectively.

² OHCHR, ‘Who’s responsible: Attributing Individual Responsibility For Violations of International Human Rights And Humanitarian Law in United Nations Commissions Of Inquiry, Fact-Finding Missions And Other Investigations’ (2018) (OHCHR, ‘[Who’s responsible?](#)’), p. 33.

Chapter One: International Human Rights Law

1. Introduction

Human rights are granted to all individuals for the simple fact that they are human.³ At their core, human rights are designed to safeguard the dignity of people and their fundamental freedoms, such as the right to life, freedom from torture, the right to liberty and security of person, the right to freedom of speech, the right to a fair trial, and the right to non-discrimination (equality).

In essence, human rights protect the individual from the power of the state. For the most part, states derive their obligations to respect the human rights of individuals within their jurisdiction when they ratify international human rights treaties and integrate them into their domestic legislation.⁴ The norms that arise from such treaties are collectively referred to as IHRL. IHRL allows the individual to seek redress when a state fails to uphold their rights. It provides an avenue for victims toward justice and accountability, allowing them to no longer just be rights holders, but empowered individuals.

1.1. The difference between IHRL and ICL

IHRL and ICL are two substantively different legal frameworks. IHRL focuses upon the responsibility of states (rather than individuals) for actions amounting to violations of human rights. The protections ensured by IHRL apply at all times, including during peacetime,⁵ social disturbances, sporadic violence, internal strife,⁶ and even situations of armed conflict.⁷

ICL, on the other hand, focuses upon the ‘individual criminal responsibility’ of persons who perpetrate certain criminal acts (i.e., genocide, war crimes, crimes against humanity, and the crime of aggression). Unlike IHRL, ICL only applies in specific contexts, which vary between the four substantive crimes. As will be seen below, for example, war crimes can only be

³ Organisation of African Unity (‘OAU’), African Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 ([‘ACHPR’](#)), preamble: “Recognizing on the one hand, that fundamental human rights stem from the attitudes of human beings, which justifies their international protection and on the other hand that the reality and respect of peoples’ rights should necessarily guarantee human rights”.

⁴ Human rights obligations may also be derived from ‘customary international law’, which is not examined in this Chapter, as the vast majority of human rights obligations can be derived from well-ratified treaty provisions. Customary rules will arise when a very wide range of states abide by a rule out of a belief that they are obliged to do so, notwithstanding other international obligations which they may have agreed to in a treaty, for example. When a rule of customary law arises, it will generally bind all states, regardless of whether or not they have ratified a particular treaty, *see North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark); (Federal Republic of Germany v. Netherlands)* (Judgment) (1969) ICJ Reports 3, para. 77; *Continental Shelf (Libya v. Malta)* (Judgment) (1985) ICJ Reports 13, para. 207; *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)* (Judgment) (1986) ICJ Reports 14, para. 183.

⁵ OHCHR, ‘Manual on Human Rights Monitoring’ (2011) HR/P/PT/7/Rev1 ([‘OHCHR Manual on Human Rights Monitoring’](#)), p. 3.

⁶ OHCHR, [Manual on Human Rights Monitoring](#), p. 3.

⁷ OHCHR, [Manual on Human Rights Monitoring](#), p. 3.

committed in the context of an ongoing armed conflict,⁸ whilst crimes against humanity can only be committed as part of a ‘widespread or systematic attack against a civilian population.’⁹ It is these contextual elements that ‘trigger’ ICL, and transform what might otherwise be a domestic criminal offence (e.g., murder) into an international crime (e.g., a crime against humanity).¹⁰

That said, it should be stressed that although ICL will apply in certain contexts as a special rule, it does not displace IHRL, which remains applicable as a general, constantly applicable rule.¹¹ Naturally, this gives rise to the possibility of overlap and interplay between these regimes, both of which must therefore be interpreted harmoniously and concurrently so as to ensure legal certainty and fill any gaps in the legal protection afforded to victims.¹² In cases of conflict between these regimes, special rules will usually apply instead of general ones, albeit only as far as is necessary in order to remedy any inconsistency between them.¹³

1.2. Understanding the framework of IHRL: core human rights treaties

1.2.1. Core international human rights treaties

Many of the values protected by human rights, such as justice, fairness, and humanity, have been observed in societies across the globe for centuries. However, substantive ‘human rights’, understood as claims held and enforceable by every person against the state, have been progressively developed and defined since 1945.¹⁴ Its ‘founding documents’ are generally seen as the Charter of the United Nations (‘UN’) (1945) and the Universal Declaration of Human Rights (‘UDHR’) (1948).¹⁵ Whilst the UN Charter broadly encourages respect for human rights

⁸ Another war crimes chapeau is that the crime had a ‘nexus’ to the conflict, meaning that it ‘took place in the context of and was associated with’ an armed conflict. See Rome Statute of the International Criminal Court (17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (‘[Rome Statute](#)’), article 8.

⁹ [Rome Statute](#), article 7.

¹⁰ UN Human Rights Committee (‘HRC’) ‘General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’ (26 May 2004) CCPR/C/21/Rev.1/Add.13 (‘[HRC General Comment No. 31](#)’), para. 18

¹¹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* (Advisory Opinion) (2004) ICJ Reports 136 (‘[The Wall Advisory Opinion](#)’), para. 106; HRC ‘General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights on the Right to Life’ (30 October 2018) CCPR/C/GC/36 (‘[HRC General Comment No. 36](#)’), para. 70. See also [OHCHR Manual on Human Rights Monitoring](#), Chapter 5.

¹² *Hassan v. The United Kingdom*, Application No. 29750/09 (Grand Chamber ECtHR, 16 September 2014), paras 35-37, 77, 101.

¹³ These considerations also apply to inter-compatibility of IHRL and international humanitarian law (or the law of armed conflict). See M Milanović ‘[The Soleimani Case and the Last Nail in the Lex Specialis Coffin](#)’ (*Opinio Juris*, 13 January 2020); M Milanović ‘The Lost Origins of Lex Specialis: Rethinking the Relationship between Human Rights and International Humanitarian Law’ in J D Ohlin (ed.) *Theoretical Boundaries of Armed Conflict and Human Rights* (CUP 2016), pp. 78-117; M Milanović ‘[The Interplay Between Human Rights and Humanitarian Law](#)’ (*Opinio Juris*, 10 October 2007).

¹⁴ OHCHR, *The Core International Human Rights Treaties* (2014), ST/HR/3/Rev.1, p. 6 (‘OHCHR, [The Core International Human Rights Treaties](#)’); J Donnelly ‘[The Relative Universality of Human Rights](#)’ (May 2007) 29 *Human Rights Quarterly* 282, p. 284.

¹⁵ [OHCHR Manual on Human Rights Monitoring](#), p. 5.

and fundamental freedoms for all without distinction as to race, sex, language or religion,¹⁶ the UDHR represents the first elaboration of specific human rights within one broadly accepted international document. For this reason, although not legally binding, the UDHR's adoption in 1945 had immense symbolic value, and it remains an authoritative document outlining the most fundamental human rights today.

Over time, the human rights defined in the UDHR have been further developed and codified in nine 'core' international human rights treaties and their optional/additional protocols.¹⁷ These instruments are voluntarily signed/ratified by states¹⁸ who, in doing so, undertake legal obligations to implement the provisions of those instruments, and to report periodically to the respective treaty bodies mandated to monitor state compliance with these obligations (*see* section 1.5).¹⁹

The core IHRL treaties and the accession status of The Gambia are listed in Table 1, below.

Treaty	Treaty Date	Accession/Ratification of The Gambia
International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)	21 December 1965	Yes – 29 December 1978
International Covenant on Economic, Social and Cultural Rights (ICESCR)	16 December 1966	Yes – 29 December 1978
Optional Protocol to ICESCR	10 December 2008	No
International Covenant on Civil and Political Rights (ICCPR)	16 December 1966	Yes – 11 March 1979
Optional Protocol to the ICCPR	16 December 1966	No

¹⁶ Charter of the United Nations (adopted 26 June 1945, entered into force October 24 October 1945) 1 UNTS XVI ('UN Charter'), article 1(3); [HRC General Comment No. 31](#), para. 2.

¹⁷ OHCHR, [The Core International Human Rights Treaties](#), p. 6; OHCHR, 'The Core International Human Rights Instruments and their Monitoring Bodies' (OHCHR, [The Core International Human Rights Instruments and their Monitoring Bodies](#)). Additional protocols often broaden or reinforce the obligations contained within a treaty. They are not standalone agreements, and work in conjunction with the treaty to which they are appended.

¹⁸ OHCHR, [The Core International Human Rights Instruments and their Monitoring Bodies](#).

¹⁹ All treaties except Optional Protocol to CAT ('OPCAT') require periodic reporting. *See* OHCHR, [The Core International Human Rights Treaties](#).

Second Optional Protocol to the ICCPR Aiming at the Abolition of the Death Penalty	15 December 1989	Yes – 28 September 2018
Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)	18 December 1979	Yes - 16 April 1993
Optional Protocol to CEDAW	6 October 1999	No
Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT)	10 December 1984	Yes - 8 September 2018
Optional Protocol to CAT	18 December 2002	No
Convention on the Rights of the Child (CRC)	20 November 1989	Yes - 8 August 1990
Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography	25 May 2000	No
Optional Protocol to the CRC on the Involvement of Children in Armed Conflict	25 May 2000	No
Optional Protocol to the CRC on a Communications Procedure	19 December 2011	No
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	18 December 1990	Yes - 28 September 2018
Convention on the Rights of Persons with Disabilities (CRPD)	13 December 2006	Yes - 6 July 2015
Optional Protocol to the CRPD	30 March 2007	No

International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED)	20 December 2006	No
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Table 1: Core IHRL treaties

1.2.2. Core regional human rights treaties

In addition to the core international treaties, there are also a number of important regional human rights treaties (and additional protocols), which include:

- (i) The African Charter on Human and People's Rights ('ACHPR') and its additional protocols;
- (ii) The European Convention on Human Rights ('ECHR') and its additional protocols; and
- (iii) The Inter-American Convention on Human Rights ('IACHR') and its additional protocols.

However, whilst their jurisprudence can prove useful for comparative study, these regional agreements only apply to states within their respective global region. As such, only the ACHPR and its additional protocols are relevant for The Gambia. These are detailed in Table 2, below.

Treaty	Date of Treaty	Accession/Ratification of The Gambia
African Charter on Human and People's Rights	1 June 1981	Yes - 13 June 1983
Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights	10 June 1998	Yes - 30 June 1999
Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa	1 July 2003	Yes - 25 May 2005
Protocol to the African Charter on Human and People's Rights on the Rights of Persons with Disabilities in Africa	29 January 2018	No

Table 2: The ACHPR and its additional protocols

1.3. When do obligations arise under IHRL?

1.3.1. Jurisdiction

Generally, a state's obligations under IHRL will be 'triggered' where it has 'jurisdiction'. States will have jurisdiction where they exercise effective 'authority and control' over an individual (e.g., by placing them in detention)²⁰ or a territory²¹ (i.e., within their own borders and, where applicable, areas where they exercise effective control outside of these borders, for example, as an occupying power).

The specific obligations owed in a particular circumstance will vary according to the conduct in question, and according to the treaty provision that is relevant on the facts. Generally, however, where states exercise jurisdiction, they will be expected to:

- (i) 'respect' rights by ensuring that they do not consciously violate them;
- (ii) 'protect' rights by taking positive action to prevent foreseeable harm at the hands of third parties;²² and
- (iii) 'fulfil' rights by ensuring that they are given substantive, meaningful content (i.e., by ensuring that they can be effectively enforced in a court of law).²³

The duties to 'protect' and 'fulfil' are known as 'positive duties' as they require a state to actively do something or prevent something from happening. They differ from 'negative duties', which obligate states to refrain from doing something, and may be breached when the state knew or ought to have known of the existence of a risk, yet did not adequately respond to it by deterring, preventing, or effectively investigating harms inflicted by third parties.²⁴

²⁰ *López Burgos v. Uruguay*, Communication No. R.12/52 (29 July 1981) CCPR/C/13/D/52/1979, Supp. No. 40 A/36/40 176, paras 12.2-12.3; *Coard et al. v. United States* (Case 10.951) Inter American Court of Human Rights Report No. 101/99 (29 September 1999), para. 37; *Mohamed Abdullah Saleh Al-Asad v. the Republic of Djibuti* (Communication No. 383/10), African Commission on Human and Peoples' Rights, 55th Ordinary Session for the African Commission (12 May 2014), para. 134; *Jaloud v. The Netherlands*, Application No. 47708/08 (ECtHR, 20 November 2014), para. 154; *Öcalan v. Turkey*, Application No. 46221/99 (ECtHR, 12 May 2005), para. 91; *Issa and Ors v. Turkey*, Application No. 31821/96 (ECtHR, 16 November 2004), para. 71; HRC 'General Comment No. 35 (Article 9): Liberty and Security of Person' (16 December 2014) CCPR/C/G/35 ('[HRC General Comment No. 35](#)')

²¹ *Loizidou v. Turkey* (Preliminary Objections), Application No. 15318/89 (Grand Chamber ECtHR, 23 March 1995), para. 62; *Loizidou v. Turkey* (Judgment), Application No. 15318/89 (Grand Chamber ECtHR, 18 December 1996), paras 52-57; *Cyprus v. Turkey* (Judgment), Application No. 25781/94 (ECtHR, 10 May 2001), para. 77; *Medvedev and Others v. France* (Judgment), Application No. 3394/03 (Grand Chamber, ECtHR, 29 March 2010), para. 67; *Al-Saadoon and Mufdhi v. The United Kingdom*, Application No. 61498/08 (ECtHR, 2 March 2010), para. 128; *The Wall Advisory Opinion*, para. 112.

²² HRC, 'General Comment No.32 (article 14): The Right to Equality before Courts and Tribunals and to Fair Trial' (23 August 2007) CCPR/C/GC/32 ('[HRC General Comment No.32](#)'); para. 1; A Eide, 'The Right to Adequate Food and to be Free from Hunger' (13 May 1983) E/CN.4/Sub.2/1983/25 ('[HRC The Right to Adequate Food](#)'), para. 14.

²³ [HRC General Comment No.32](#), para. 25; [HRC The Right to Adequate Food](#), para. 52.

²⁴ *Osman v. The United Kingdom* (Judgment), Application No. 23452/94 (Grand Chamber, ECtHR, 28 October 1998) para. 115; *SERAC and CESR v. Nigeria* (Communication No. 155/96), African Commission on Human and Peoples' Rights, 30th Ordinary Session (27 October 2001) ('*SERAC v. Nigeria*'), para. 44; *Velásquez Rodríguez v.*

1.3.2. Derogation and limitation

Sometimes, there will be circumstances in which, despite exercising jurisdiction, states are unable to meet their obligations under IHRL. In these situations, it is possible that states may justifiably ‘limit’ or, very exceptionally, ‘derogate from’, these obligations. Derogation and limitation do not affect the issue of jurisdiction but can modify the extent to which a state is held responsible for conduct that would otherwise amount to a human rights violation.

Limitation

Limitation refers to limited restrictions on an individual’s human rights that are rendered lawful because they are necessary to achieve legitimate public aims, such as those relating to morality, public order, or public safety, for example.²⁵ Unlike derogation, limitation does not require any contextual or situational threshold. Rather, the issue of whether or not a particular limitation was lawful will depend upon whether it satisfies the criteria contained within the ‘limitation clause’ of the human rights instrument in question. Generally, the limitation clause will require states to prove that their restriction of an individual’s rights was rendered lawful because it was: (i) prescribed by law; (ii) implemented in pursuance of a clear and legitimate aim; and (iii) a necessary and proportionate means to achieve that aim.²⁶

Derogation

During exceptional situations of very serious public emergencies, such as natural disasters or periods of armed conflict, states may derogate from (i.e., suspend) their IHRL obligations under certain treaty provisions.²⁷ Generally, in order to derogate from their obligations in this manner, states must prove that an (actual or imminent) state of emergency²⁸ exists that threatens the life of the nation, and that the suspension of rights is limited to the extent strictly required by the exigencies of that situation.²⁹

Honduras (Judgment) (Petition No.7920), Inter-American Court of Human Rights, Series C No. 4 (29 July 1986) para. 172.

²⁵ UN General Assembly, International Covenant on Civil and Political Rights, adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 171 (*ICCPR*), article 12(3), 22.

²⁶ *ICCPR*, article 19(3); *HRC General Comment No. 31*, para. 6; UN General Assembly, ‘*Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*’, (7 September 2012) A/67/357, para. 41.

²⁷ *ICCPR*, article 4; The Constitution of The Republic of The Gambia 1997 (*Gambian Constitution*), article 35(1): mentions derogations from fundamental rights during an emergency.

²⁸ *A. and others v. The United Kingdom* (Judgment), Application No. 3455/05, (Grand Chamber ECtHR, 19 February 2009), paras 174-177.

²⁹ HRC, ‘*CCPR General Comment No. 29, Article 4: Derogations During a State of Emergency*’ (31 August 2001) CCPR/C/21/Rev.1/Add.11 (*HRC General Comment No. 29*), para. 4.

Derogation does not extend to all human rights, such as the right to life (which are referred to as ‘non-derogable rights’),³⁰ nor does it remove the obligation upon states to act within the bounds of the rule of law,³¹ and to respect the principles of necessity and proportionality.³² In addition, situations of derogation must be non-discriminatory (i.e., made without distinction as to race, colour, sex, language, religion, or social origin) and should always be notified to the other state parties to the instrument concerned at the time of derogating.³³ This requirement of contemporaneous notification usually means that, even if not expressly prohibited, it is very unlikely that states can retrospectively derogate from their obligations under IHRL (i.e., by claiming that their obligations were suspended after the fact, without having done so during the period of public emergency).³⁴

1.4. Fundamental protections under IHRL

Certain fundamental human rights protections are common to international and regional human rights treaties and are also guaranteed under the constitution of The Gambia. These rights (which are listed in Table 3, below) will constitute the focus of this section.

Core Right	International Human Rights Conventions	African Charter of Human and Peoples’ Rights	The Constitution of the Gambia (1997)
Right to life	Article 6 ICCPR	Article 4 ACHPR	Article 18 of the Gambian Constitution
Right to freedom from torture	Article 7 ICCPR; article 2 CAT	Article 5 ACHPR	Article 21 of the Gambian Constitution
Right to equality	Article 26 ICCPR; Article 2 ICERD; Article 2 CEDAW	Article 19 ACHPR	Article 33 of the Gambian Constitution
Right to liberty and security of person	Article 9 ICCPR	Article 6 ACHPR	Article 19 of the Gambian Constitution

³⁰ [ICCPR](#), article 4; Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 04 November 1950, entered into force 03 September 1953) 213 UNTS 221 (‘[ECHR](#)’), article 15; Organisation of American States, American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978), 1144 UNTS 123 (‘[ACHR](#)’), article 57; [HRC General Comment No. 29](#), para. 15.

³¹ [HRC General Comment No. 29](#), para. 2.

³² [ICCPR](#), article 4(1). *See also* [HRC General Comment No. 29](#), para. 4.

³³ [ICCPR](#), article 4(1).

³⁴ [ICCPR](#), article 4(3). *See also* [HRC General Comment No. 29](#), para. 17.

Right to freedom of expression	Article 19 ICCPR	Article 9 ACHPR	Article 25 of the Gambian Constitution
Right to a fair trial	Article 14 ICCPR	Article 7 ACHPR	Article 24 of the Gambian Constitution

Table 3: Common fundamental rights protections

1.4.1. The right to life

The right to life³⁵ is an absolute right that has attained ‘peremptory status’ in international law.³⁶ This means that it has been accepted and recognised by the international community as a norm from which no derogation is permitted.³⁷

The right to life involves both negative and positive obligations. On one hand, it places a negative obligation upon states to refrain from taking the lives of individuals within its jurisdiction; state agents may only use lethal force in the exceptionally limited range of circumstances where doing so is the *only* necessary and proportionate means by which to protect themselves or others from imminent death or injury.³⁸ As is the case with all substantive rights under IHRL, this obligation applies regardless of circumstance, and may still be applicable, for example, during periods of armed conflict (*see* section 1.3.2).

On the other hand, the right to life also includes positive obligations for states to take adequate measures to protect the lives of individuals under their jurisdiction.³⁹ Although this does not require states to prevent every killing within their jurisdiction (which would be a grossly disproportionate burden),⁴⁰ it does require that they use their best endeavours to prevent such violence, and, when killing has occurred, take positive action by effectively investigating and prosecuting those responsible.⁴¹ This is reflected in the ACHPR, under which the right to life has been interpreted as requiring state parties to:

“take steps both to prevent arbitrary deprivations of life and to conduct prompt, impartial, thorough and transparent investigations into any such deprivations that may have occurred, holding those

³⁵ UN General Assembly, Universal Declaration of Human Rights (10 December 1948) A/Res/217(III) (‘UDHR’), article 3; [Gambian Constitution](#), article 18; [ICCPR](#), article 6.

³⁶ [HRC General Comment No. 36](#), para. 2; HRC ‘[General Comment No. 6: Article 6 \(Right to Life\)](#)’ (30 April 1982) HRI/GEN/1/Rev.9, para. 1.

³⁷ United Nations, [Vienna Convention on the Law of Treaties](#) (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, article 53.

³⁸ [McCann and Others v. The United Kingdom](#) (Judgment), Application no. 18984/91 (ECtHR, 27 September 1995), para. 192.

³⁹ [ICCPR](#), article 6; [HRC General Comment No. 36](#), paras 21, 22.

⁴⁰ [HRC General Comment No. 36](#), para. 2; [Sawhoyamaya Indigenous Community v. Paraguay](#) (Judgment), Inter-American Court of Human Rights, Series C. No. 146 (29 March 2006), para. 155.

⁴¹ [Armani Da Silva v. The United Kingdom](#) (Judgment), Application No. 5878/08 (ECtHR, 30 March 2016), paras 229-233.

responsible to account and providing for an effective remedy and reparation for the victim or victims, including where appropriate, their immediate family and dependents.”⁴²

Given its importance, and in light of the limitations on the state’s ability to use lethal force that flow from it, it is apparent that there is some tension between the right to life and the imposition of the death penalty. The death penalty has become progressively less acceptable within IHRL in recent years,⁴³ under which states have progressively recognised its incompatibility with the right to life. However, this form of punishment has not yet been fully outlawed and may still be used as a last resort if certain procedural safeguards, such as the right to a fair trial (*see* section 1.4.6), are respected. Indeed, as per article 6(2) of the ICCPR: “in countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes ... this penalty can only be carried out pursuant to a final judgment rendered by a competent court.” This is echoed in article 18 of the 1997 Gambian Constitution, which notes that the right to life is not breached in execution of a death sentence by a court of competent jurisdiction.

There are numerous instances in the Gambian context which might be treated as a violation of the right to life. For example, during the night of 23 August 2012, nine detainees on death row were taken from Mile II prison without notice and brutally murdered by members of the Junglers.⁴⁴ On the evidence, it appears that at least four of these killings violated the right to life, given that the victims had not exhausted their rights of appeal.⁴⁵ Depending upon the circumstances (i.e., whether or not there were other violations of due process), the other five executions may also constitute further violations of the right to life.

1.4.2. The right to be free from torture and cruel, inhuman, or degrading treatment or punishment

The prohibition against torture is an absolute right⁴⁶ that, like the right to life, has attained peremptory status in international law.⁴⁷ Torture is defined differently in IHRL and ICL (*see*

⁴² ACmHPR, ‘[General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life \(Article 4\)](#)’ (November 2015), 57th Ordinary Session of the African Commission on Human and Peoples’ Rights, para. 7.

⁴³ Council of Europe, Protocol 6 to the ECHR concerning the Abolition of Death Penalty, 28 April 1983, ETS 114 (‘[Protocol 6 to the ECHR](#)’).

⁴⁴ A Hirsch, ‘[President Jammeh's Threat to Kill All of the Country's Remaining 38 Death Row Inmates Isolates Tiny West African Nation](#)’ (*The Guardian*, 1 September 2012); S Steffen & E Segueda, ‘[Death Penalty in Gambia](#)’ (*Deutsche Welle*, 10 October 2012).

⁴⁵ Amnesty International, ‘[Gambia’s President Suspends Executions Amid Outcry](#)’ (*Amnesty International*, 17 September 2012); L Sherman-Nikolaus, ‘[A Year on from the Gambia’s Return to Executions](#)’ (*Amnesty International*, 23 August 2013); Amnesty International, ‘[The Gambia: Conditional Moratorium on Executions is Not Enough](#)’ (*Amnesty International*, 17 September 2012).

⁴⁶ UDHR, article 5; ICCPR, article 7; ACHPR, article 5.

⁴⁷ Torture has been described as a *jus cogens* (meaning that it is a norm from which no derogation is permitted in any circumstance, and which all states are obliged to take steps to uphold). *See Questions Relating to the Obligations to Prosecute or Extradite (Belgium v. Senegal)* (Advisory Opinion) (2012) ICJ Reports 422, para. 99; *Al-Adsamo v. United Kingdom*, Application No.35763/97 (ECtHR, 21 November 2002), para. 61; *Caesar v. Trinidad and Tobago* (Petition No.12.147), IACHR, Series C No.123 (11 March 2005); [HRC General Comment No.](#)

section 3.4.4). For the purposes of IHRL, torture is most authoritatively defined in article 1 of the Convention against Torture ('CAT'), under which 'torture' includes any act by which severe mental/physical pain or suffering is intentionally inflicted on a person for one of the following purposes:

- (i) obtaining from him or a third person information or a confession;
- (ii) punishing him for an act he or a third person has committed or is suspected of having committed;
- (iii) intimidating or coercing him or a third person; or
- (iv) for any reason based on discrimination of any kind.

The threshold for harm to constitute torture is high. Not only must the pain or suffering have been sufficiently 'severe' in order to constitute torture, it must also have been inflicted or carried out with the consent or acquiescence of a public official or other person acting in an official state capacity.⁴⁸ In addition, any pain or suffering arising from, inherent in, or incidental to lawful sanctions does not constitute torture.⁴⁹

That said, acts that are not severe enough to amount to torture, but which nevertheless cause a relatively lower level of mental or physical pain and suffering on the victims could qualify as cruel, inhuman or degrading treatment ('CIDT').⁵⁰ CIDT encompasses acts inflicting severe pain and suffering, or which constitute a serious attack on human dignity that inflicts serious physical or mental impact, for a purpose, on the authorisation of an officer or state official,⁵¹ but which do not reach the particular threshold or severity to be characterised as torture.⁵² Albeit dealt with under separate articles under the CAT,⁵³ like torture, the prohibition against CIDT is considered to be non-derogable in any circumstance.⁵⁴

29, para. 3; UN Committee Against Torture, '[General Comment No. 2: Implementation of Article 2 by States Parties](#)' (2008) HRI/Rev.9 (Vol I) 376, para. 1; International Law Commission, '[Draft Articles on State Responsibility](#)' (2001) A/56/10, Chapter IV.E.2; *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No 3) (1999) UKHL 17, p. 175.

⁴⁸ UN General Assembly, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 ('CAT'), article 1. This is a specific element not required in the definition of torture in ICL and IHL – see ICC, Elements of Crimes ('[ICC Elements of Crimes](#)'), articles 7(1)(f) and 8(2)(a)(ii-1) .

⁴⁹ CAT, article 1.

⁵⁰ CAT, article 16.

⁵¹ CAT, article 1(1).

⁵² *Husayn (Abu Zubaydah) v. Poland* (Judgment), Application No.7511/13 (ECtHR, 24 July 2014), para. 500.

⁵³ Under CAT, article 4 obligations refer to torture, while articles 10, 11, 12 and 13 obligations would apply to CIDT.

⁵⁴ UDHR, article 5; ICCPR, article 7; ECHR, article 4; ACHPR, article 5; CAT, article 1, para.1: E de Wet, '[The Prohibition of Torture as an International Norm of Jus Cogens and its implications for National and Customary Law](#)' (2004) 15 *European Journal of International Law*, p. 97.

Whilst the definition of ‘torture’ under the CAT specifies a threshold for an act to qualify as torture,⁵⁵ it does not lay down a particular test to distinguish torture from CIDT. That said, IHRL jurisprudence has previously identified factors which, depending on upon the facts of the case,⁵⁶ can distinguish torture amounting to CIDT. These include, non-exhaustively:

- (i) the nature of the treatment;
- (ii) the duration of the treatment;
- (iii) the impact of the treatment on the victim; and
- (iv) the vulnerability of the victim (for example age, gender, or status).⁵⁷

Like the right to life, the prohibition against torture under IHRL imposes both positive and negative obligations upon states. As such, in addition to refraining from committing torture or other forms of ill-treatment, IHRL requires states to take effective legislative, administrative, judicial or other measures (including investigation and prosecution of the perpetrators) to prevent and criminalise acts of torture in any territory under its jurisdiction.⁵⁸ They are also prohibited from expelling, returning or extraditing a person to any other state where they would be in danger of being subjected to torture.⁵⁹

TRRC testimonies have revealed a number of possible cases of torture by agents of the National Intelligence Agency (‘NIA’) during the Jammeh regime. One such account came from witness Batch Samba Jallow, a primary school headmaster, who was arrested at his home at 4AM one morning in October 1995 by NIA agents.⁶⁰ Jallow spoke about his interrogation and the torture at NIA headquarters which followed. He was made to remove his clothes, tied to a wooden chair, and told he was going to stay there until they got what they wanted to know from him.⁶¹ He was then tortured and interrogated, which included the use of electrocution on various parts of his body including his nose, ears, lips, toes, and genitals, and slashing his legs with knives.⁶² Jallow was then moved to the cell called Babandinka for two to five days, where he was beaten every day. Following this, he was taken in a dump truck to Kotu Police station for further interrogation,⁶³ where he stayed for three to four days, before being transferred by NIA agents to Fajara Barracks, where he remained for the next 14 months without trial, on charges of treason.⁶⁴

⁵⁵ CAT, article 1(1).

⁵⁶ *Selmouni v. France* (Judgment), Application No. 25803/94 (Grand Chamber, ECtHR, 28 July 1999), para. 100.

⁵⁷ *Ireland v. United Kingdom* (Judgment), Application No.5320/71 (ECtHR, 18 January 1978), para. 162.

⁵⁸ CAT, articles 2, 4.

⁵⁹ CAT, article 3 (otherwise known as the principle of ‘non-refoulement’).

⁶⁰ Aneked, ‘Truth, Reconciliation & Reparations Commission (TRRC) Digest Edition (‘[Aneked TRRC Digest 1](#)’), p. 26; T Cruvellier & M K Darboe, ‘Will Fatou Bensouda Face The Truth Commission in Gambia?’ (*JusticeInfo.Net*, 11 July 2019) (*JusticeInfo.Net*, ‘[Will Fatou Bensouda Face The Truth Commission in Gambia?](#)’).

⁶¹ QTV Gambia, ‘[TRRC Day 13 Pt1 28.01.2019](#)’ at 44 min 23secs.

⁶² *JusticeInfo.Net*, ‘[Will Fatou Bensouda Face The Truth Commission in Gambia?](#)’.

⁶³ *Aneked TRRC Digest 1*, p. 27; *JusticeInfo.Net*, ‘[Will Fatou Bensouda Face The Truth Commission in Gambia?](#)’.

⁶⁴ *JusticeInfo.Net*, ‘[Will Fatou Bensouda Face The Truth Commission in Gambia?](#)’.

This treatment is evidently a circumstance that should be considered for prosecution as an act of torture. Firstly, the fact that Mr Jallow's torturers were NIA agents satisfies the requisite link to a state agent. Secondly, given its gravity and length, it would be very likely that the treatment would meet the necessary severity threshold. Additionally, the fact that Mr Jallow was kept by NIA agents 'until they got what they wanted to know' appears to support the requirement that the torture be inflicted to gain information of a confession. Fourthly, his detention for over 14 weeks on charges of treason appears to evidence that the torture was used to punish him for an act he committed or was suspected to have committed. Finally, the severity and regularity of the punishment might support the element that the torture was used to intimidate him.

1.4.3. The right to equality and non-discrimination

The right to equality and non-discrimination is of central importance within IHRL and is best expressed in Article 1 of the Universal Declaration of Human Rights, which states that: "all human beings are born free and equal in dignity and rights."⁶⁵ This right is enshrined in most major IHRL treaties, and guarantees that human rights are enjoyed by all without discrimination of any kind.⁶⁶ This includes both 'direct' and 'indirect' discrimination. 'Direct discrimination' occurs when the state consciously discriminates against a group or individual on the basis of a prohibited ground (e.g., by excluding a certain race or gender from a public place). 'Indirect discrimination', on the other hand, involves unconscious or inadvertent discrimination perpetrated by rules or practices which, despite applying neutrally on their face, nonetheless inflict a disproportionate impact upon a particular group (e.g., by requiring all workers to work a certain number of Fridays in a month, despite the fact that Friday represents an acknowledged holy day for some workers).

Although the right to equality and non-discrimination arises in numerous international instruments, three are particularly notable for their protection of this right, or for their relevance to The Gambia.

Firstly, the ICCPR is of note, not just because of its very wide ratification, but also because it contains a general non-discrimination clause, which, in contrast to a number of other international instruments, can be invoked independently of any other substantive guarantee in the convention.⁶⁷ Under this general clause, states have both positive and negative obligations to:

⁶⁵ [UDHR](#), article 1.

⁶⁶ [ICCPR](#), article 2; UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195 ('[ICERD](#)'), articles 1-2; UN General Assembly, International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 ('[ICESCR](#)'), article 2; UN General Assembly, Convention on the Rights of Persons with Disabilities, (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 ('[CRPD](#)'), article 3; UN General Assembly, Convention on the Rights of Child, (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 ('[CRC](#)'), article 2. *See also* United Nations and the Rule of Law, '[Equality and Non-discrimination](#)'.

⁶⁷ [ICCPR](#), article 26.

- (i) guarantee equality before the law (i.e., by ensuring that enforcement authorities treat all persons equally before courts and tribunals);
- (ii) guarantee the equal protection of the law (i.e., by ensuring that law making authorities do not draft laws that unfairly discriminate);
- (i) prohibit discrimination (i.e., by taking positive steps to draft, prohibit and effectively punish discrimination); and
- (ii) guarantee to all persons equal and effective protection against discrimination (i.e., by taking positive steps to combat structural causes of discrimination, for example by taking affirmative action to help economically and societally disadvantaged groups).

Secondly, given its focus and near universal ratification, the International Convention on the Elimination of All Forms of all Forms of Racial Discrimination is also particularly relevant. Although states parties to ICERD undertake to condemn and eliminate *racial* discrimination in particular, the Convention in fact protects *all people's* right to equality by prohibiting any distinction, exclusion, restriction or preference that negatively impacts upon the equal enjoyment of human rights and fundamental freedoms in a person's political, economic, social and cultural life due to their:

- (i) race, colour, descent, national, social or ethnic origin;
- (ii) sex, sexual orientation and gender identity;
- (iii) language, religion, political or other opinion;
- (iv) property; or
- (v) other status such as disability, age, marital and family status, health, place of residence, economic or social situation.⁶⁸

Like the ICCPR, state parties to ICERD undertake to perform a range of both positive and negative obligations to combat discrimination on these grounds. This includes the obligation to refrain from engaging in or sponsoring direct or indirect discrimination, and also to undertake to perform positive steps to eradicate discrimination, including by condemning and prohibiting discriminatory practices or propaganda⁶⁹ (including, where necessary, through legislation), encouraging integration, and ensuring the equal and effective enjoyment of fundamental rights for all persons.

⁶⁸ [ICERD](#), article 1; Convention on the Elimination of All Forms of Discrimination Against Women, (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 ('CEDAW'), article 1; World Health Organisation, '[Gender, equity and human rights](#)', citing Committee on Economic, Social and Cultural Rights, '[General Comment No. 20: Non-discrimination in Economic, Social and Cultural Rights](#)' (2009) E/C.12/GC/20, para. 2.

⁶⁹ [ICERD](#), article 4.

Finally, given the prevalence of sexual violence under Jammeh’s regime, it is also important to stress that the additional protections of the right to equality and non-discrimination found in the CEDAW, are of relevance in the Gambian context. CEDAW includes a number of substantive protections for women, and specifically safeguards the rights of all women to equality and non-discrimination⁷⁰ in areas relating to employment and employment opportunities (including the right to protection of health and to safety in working conditions,⁷¹ and the right to enjoy adequate living conditions).⁷² These protections reflect the fact that discrimination and sexual and gender-based violence (‘SGBV’) against women continues to be prevalent across the globe. SGBV in particular ‘disproportionately affects women, as it seriously inhibits women’s ability to enjoy and exercise their human rights and fundamental freedoms on the basis of equality with men.’⁷³ Discrimination against women is also worsened by intersecting vulnerabilities linked to numerous different factors including, for example, age, ethnic background, economic or social status, and migration status. It is for this reason that CEDAW requires its state parties to recognise such intersecting forms of discrimination and their compounded negative impact on women,⁷⁴ and to adopt and pursue policies and programmes designed to eliminate them.⁷⁵

During consultations in remote areas of The Gambia conducted by the International Center for Transitional Justice (‘ICTJ’), women revealed they had been forced to carry out hard labour in appalling conditions on Jammeh’s farms, where they were unpaid, poorly fed, exposed to disease, and lost income from being unable to work their own farms.⁷⁶ If they did not go, they would be considered part of the opposition and arrested.⁷⁷ Their work was monitored by soldiers who would sneak into their rooms and rape them.⁷⁸ The women had no privacy, sharing bathrooms and bathing facilities with men, and were exposed to sexual abuse.⁷⁹

Taking into account the protections in CEDAW specifically, forced labour and or deprivation of income could amount to a violation of the right to free choice of profession or employment under article 11(c), whilst the denial of healthcare and deprivation of sanitary working conditions could violate the right to health, and to health and safety in working conditions under articles 14 and

⁷⁰ [CEDAW](#), article 1.

⁷¹ [CEDAW](#), article 11.

⁷² [CEDAW](#), article 14.

⁷³ UN Committee on the Elimination of Discrimination Against Women, ‘General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women’ (2010) CEDAW/C/GC/28 ([‘CEDAW General Recommendation No. 28’](#)), para. 19

⁷⁴ [CEDAW, General Recommendation No. 28](#), para. 18.

⁷⁵ [CEDAW](#), article 4(1).

⁷⁶ D Gbery, [‘Violations Against Gambian Women Must Be Acknowledged’](#) (*International Center for Transitional Justice* (‘ICTJ’), 10 November 2019); ICTJ, [‘Women’s Experiences of Dictatorship in The Gambia’](#) (*International Center for Transitional Justice*, 16 December 2019) ([‘ICTJ ‘Women’s Experiences of Dictatorship in The Gambia’](#)), p. 8.

⁷⁷ [ICTJ ‘Women’s Experiences of Dictatorship in The Gambia’](#), pp. 8, 12.

⁷⁸ [ICTJ ‘Women’s Experiences of Dictatorship in The Gambia’](#), pp. 8, 13.

⁷⁹ [ICTJ ‘Women’s Experiences of Dictatorship in The Gambia’](#), p. 9.

11(f), respectively. Albeit not under CEDAW, SGBV, particularly rape, is also evidently capable of constituting a human rights violation (*see* chapter 5).⁸⁰

1.4.4. Right to liberty and security of person

The right to liberty and security of person protects individuals from arbitrary deprivations of their physical freedom and interference with their bodily or mental integrity.⁸¹ Unlike the right to life and the prohibition of torture, this is *not* an absolute right, meaning that it can be derogated from by states in certain circumstances.⁸²

Deprivations of liberty will be considered arbitrary unless they are imposed by the state and carried out pursuant to criminal charges, in line with the rule of law.⁸³ Arrests and detentions should only be carried out if they are necessary and proportionate to the charges against the person concerned and in accordance with the fundamental principle of due process.⁸⁴ Furthermore, a detained individual must be informed of the reasons for their arrest and the charges against them, and must be brought before a judge within a reasonable time.⁸⁵

Violations of the right to liberty and security of person often manifest in connection with other serious human rights violations, such as torture and inhuman treatment in detention centres⁸⁶ or enforced disappearance,⁸⁷ both of which are generally used in contexts such as conflicts, to suppress political dissent.⁸⁸

There were numerous examples of conduct potentially amounting to a violation of the right to liberty and security during the Jammeh regime. In June 2006, for example, Chief Ebrimah Manneh, a journalist with the Daily Observer, based in Banjul, was arrested by two NIA officials acting without warrant.⁸⁹ He was not charged with any criminal offence,⁹⁰ nor arraigned before a court of competent jurisdiction.⁹¹ On 05 June 2008, the Economic Community of West African

⁸⁰ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 21 July 2003, entered into force 25 November 2005) 2nd Ordinary Session of the Assembly of the Union ('[Maputo Protocol](#)'), article 14(2)(c).

⁸¹ [UDHR](#), article 3; [ACHPR](#), article 6; [Gambian Constitution](#), article 19.

⁸² [ICCPR](#), article 9.

⁸³ [ICCPR](#), article 1.

⁸⁴ [ACHPR](#), article 6; [Gambian Constitution](#), article 19.

⁸⁵ [ICCPR](#), article 9.

⁸⁶ [HRC General Comment No. 35](#), paras 34, 56.

⁸⁷ Enforced disappearance is defined as "the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorisation, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which places such a person outside the protection of the law." *See* International Convention for the Protection of All Persons from Enforced Disappearance' (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3 ('[CED](#)'), article 2.

⁸⁸ UN Commission on Human Rights, '[Declaration on the Protection of All Persons from Enforced Disappearance](#)' (28 February 1992) E/CN.4/RES/1992/29, article 1.

⁸⁹ *Manneh v. Gambia* (Judgment) (ECOWAS, 5 June 2008) ECW/CCJ/APP/04/07 ('[Manneh v. Gambia](#)'), para. 27.

⁹⁰ *Manneh v. Gambia*, para. 27.

⁹¹ *Manneh v. Gambia*, para. 27.

States (‘ECOWAS’) Court held The Gambia responsible for disappearing Manneh and found his arrest and detention to be illegal. The Court ordered his immediate release and damages to be paid to Manneh or, in his absence, to his family.⁹² However, the Court’s decision was never implemented and in 2017, the Committee to Protect Journalists reported that the Gambian police had advised Manneh’s family that he had been killed and thrown into a well around Kanilialai.⁹³ No remains have ever been recovered.

1.4.5. The right to freedom of expression and opinion

Freedom of expression is defined as the right to hold opinions without interference and seek, receive, and share information and ideas through any media,⁹⁴ including those that are not generally accepted.⁹⁵ All forms of expression,⁹⁶ including political discourse,⁹⁷ and on public affairs⁹⁸ are protected through any form of media, including spoken and written language, art, or images.⁹⁹ Indeed, to be protected under this right, opinions do need not even be true.¹⁰⁰

Freedom of expression is vital for the development and the functioning of a democracy¹⁰¹ as it allows citizens to freely engage in political discourse by seeking and receiving all types of information. As such, individuals’ right to expression, information¹⁰² and political participation,¹⁰³ should not be policed or censored. That said, it should be stressed that this is not absolute, and as such may be derogated from in certain circumstances.¹⁰⁴ Additionally, it may also be subject to lawful limitation or restriction such as, for example, where speech amounts to libel, defamation, or hate speech.¹⁰⁵ Article 19(3) ICCPR, for instance, provides for the lawful restriction of this right where the limitation:

- (i) is provided by law¹⁰⁶ (i.e., any law formulated must clearly and precisely enable individuals to know the limits of their freedom of speech and act in line with the law);¹⁰⁷

⁹² [‘The Gambia Must Implement ECOWAS Court Judgment on Ebrima Manneh’](#) (Media Foundation for West Africa, 4 June 2015).

⁹³ Committee to Protect Journalists, [‘Chief Ebrima Manneh’](#).

⁹⁴ UDHR, article 19; ICCPR, article 19.

⁹⁵ *Hertel v. Switzerland* (Judgment), Application No.25181/94 (ECtHR, 25 August 1998), para. 50.

⁹⁶ HRC [‘General Comment No. 34: Article 19 \(Freedoms of opinion and expression\)’](#) (12 September 2011) CCPR/C/GC/34, para. 12.

⁹⁷ *Essono Mika Miha v. Equatorial Guinea*, Communication No.414/1990 (8 July 1994) CCPR/C/51/D/414/1990, para. 2.3.

⁹⁸ *Coleman v. Australia*, Communication No. 1157/2003 (10 August 2006) CCPR/C/87/1157/2003, paras 7.1-7.3.

⁹⁹ ICCPR, article 19(2).

¹⁰⁰ T McGonagle, *‘Fake News’* (2017) 35 *Netherlands Quarterly of Human Rights* 203, p. 208.

¹⁰¹ K Boyle and S Shah, ‘Thought, Expression, Association, and Assembly’ in D Moeckli and Ors. (eds.) *International Human Rights Law* (OUP 2014) (‘Moeckli (2014)’), p. 225.

¹⁰² ICCPR, article 19(2).

¹⁰³ UDHR, article 25; ICCPR, article 25.

¹⁰⁴ HRC, [‘General Comment No. 34 \(Article 19\): Freedoms of Opinion and Expression’](#) (12 September 2011) CCPR/C/CG/34, para. 21.

¹⁰⁵ See [‘Germany: Responding to ‘Hate Speech – 2018 Country Report’](#) (Article 19, 2018), p. 14.

¹⁰⁶ ICCPR, article 19(3).

- (ii) pursues a legitimate aim¹⁰⁸ (e.g., the protection of the rights or reputations of others, national security, public order,¹⁰⁹ or public health or morals);¹¹⁰ and
- (iii) is a necessary and proportionate means to achieve that aim¹¹¹ (i.e., it goes no further than necessary in order addresses a pressing social need¹¹² rather than simply being useful, reasonable or desirable).¹¹³

There were numerous examples of violations of the right to freedom of expression in The Gambia during the Jammeh regime. Between 2007-2013, for instance, four Gambian journalists were arrested and detained by local authorities at various times for their publications, which were alleged to constitute offences under vague and broad ranging criminal offences of sedition, false news and criminal defamation. In a case brought by the four whilst in exile, the ECOWAS Court found the arrests to constitute a violation of the right to freedom of expression. It held that the ability to freely express opinion was one of the most fundamental human rights and stressed that, given the risk of discouraging the legitimate exercise of human rights, any limitations on speech must be “narrowly drawn”.¹¹⁴ It therefore ordered that the legislation on sedition, criminal libel, false news and criminal defamation be decriminalised in line with international human rights standards contained in articles 9 of the ACHPR and 19 of both the ICCPR and UDHR.¹¹⁵

1.4.6. Right to a fair trial

The right to a fair trial is fundamental to the rule of law and democracy,¹¹⁶ and many of the best practices and principles set out in this Manual are rooted in the protection of this right. Everyone has the right to a fair trial and public hearing in both civil and criminal cases.¹¹⁷ In criminal cases, the right to be presumed innocent is a core component of the right to a fair trial.¹¹⁸ The

¹⁰⁷ Article 19 and Electronic Frontier Foundation, ‘Necessary and Proportionate, International Principle on the Application of International Human Rights Law to Communications Surveillance’ (Article 19, May 2014) ([‘Article 19, Necessary and Proportionate’](#)), pp. 14-15.

¹⁰⁸ [ICCPR](#), article 19.

¹⁰⁹ [Article 19, Necessary and Proportionate](#), p. 18.

¹¹⁰ HRC ‘[General Comment No. 22 \(Article 18\): Freedom of Thought, Conscience or Religion](#)’ (30 July 1993) CCPR/C/21/Rev.1/Add.4, para. 8.

¹¹¹ [ICCPR](#), article 19(3).

¹¹² [Lingens v. Austria](#) (Judgment), Application No. 9815/82 (Plenary, ECtHR, 08 July 1986), para. 25.

¹¹³ [The Sunday Times v. The United Kingdom](#) (Judgment) Application No. 6538/74 (ECtHR, 26 April 1979), para. 59; HRC ‘[General Comment No. 27 \(Article 12\): Freedom of Movement](#)’ (2 November 1999) CCPR/C/21/rev.1/add.9, para. 14.

¹¹⁴ [Federation of African Journalists v. The Republic of the Gambia](#), Judgment No. ECW/CCJ/JUD/04/18 (ECOWAS, 13 February 2018) ([‘Federation of African Journalists’](#)), pp. 38, 43.

¹¹⁵ [Federation of African Journalists](#), p. 45.

¹¹⁶ Equality and Human Rights Commission, [‘Article 6: Right to a Fair Trial’](#).

¹¹⁷ African Union, ‘Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa’ (2003) DOC/OS(XXX)247 ([‘Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa’](#)), article A.1.

¹¹⁸ [ICCPR](#), article 14.2; ACHPR, article. 7(1)(b).

presumption of innocence was incorporated in the statutes of both the ICTY¹¹⁹ and ICTR,¹²⁰ and is found in article 66(1) of the Rome Statute. This principle extends through all stages of the investigation and trial proceedings. The key components of the right to a fair trial are that trials must be fair and public. What this means in practice is summarised in Table 4, below.

Elements of the right to a fair trial¹²¹	
1.	Equality of arms between the parties to a proceeding.
2.	Equality of all persons without distinction as to race, colour, ethnic origin, sex, gender, age, religion, creed, language, political or other convictions, national or social origin, means, disability, birth, status or other circumstances.
3.	Equality of access by both men and women to judicial bodies.
4.	Respect for the inherent dignity of the human person, especially of women who participate in legal proceedings as complainants, witnesses, victims or accused.
5.	Adequate opportunity to prepare a case, present arguments and evidence and to challenge or respond to opposing arguments or evidence.
6.	An entitlement to legal consultation and representation.
7.	An entitlement to the assistance of an interpreter.
8.	An entitlement to have a party's rights and obligations affected only by a decision based solely on evidence presented to the judicial body.
9.	An entitlement to a determination of their rights and obligations without undue delay and with adequate notice of and reasons for the decisions.
10.	An entitlement to an appeal to a higher judicial body.
11.	That the public and the media may not be excluded from hearings before judicial bodies unless it is: <ul style="list-style-type: none"> • In the interest of justice for the protection of children, witnesses or the identity of victims of sexual violence; or

¹¹⁹ UN Security Council, Resolution 827: Statute of the International Criminal Tribunal for the Former Yugoslavia (25 May 1993 last amended 9 July 2009) S/RES/827 ('[ICTY Statute](#)'), article 21(3).

¹²⁰ UN Security Council, Resolution 955: Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 (8 November 1994 last amended 14 August 2002) S/RES/955 ('[ICTR Statute](#)'), article 20(3).

¹²¹ [Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa](#), articles A.2, A.3(f-h).

	<ul style="list-style-type: none"> For reasons of public order or national security in an open and democratic society that respects human rights and the rule of law.
12.	Judicial bodies may take steps or order measures to be taken to protect the identity and dignity of victims of sexual violence, and the identity of witnesses and complainants who may be put at risk by reason of their participation in judicial proceedings.
13.	Judicial bodies may take steps to protect the identity of accused persons, witnesses or complainants where it is in the best interest of a child.

Table 4: Elements of the right to a fair trial

1.5. Engaging with UN human rights bodies

Having examined some of the substantive human rights protections that may be engaged in the Gambian context, this section explores the various UN human rights mechanisms that practitioners may use on behalf of victims or whilst advocating for legal and policy changes, including Charter-based bodies, treaty-based bodies, and other special procedures. This section gives an overview of:

- (i) the UN Human Rights Council ('HRC') Procedures (including the HRC Complaint Procedure;¹²² Universal Periodic Review ('UPR');¹²³ and The Special Procedures¹²⁴); and
- (ii) the UN treaty-based bodies that accept individual complaints or communications relating to human rights violations.

1.5.1. The UN Human Rights Council procedures

The HRC, established by the UN General Assembly in 2006, is composed of 47 elected UN Member States.¹²⁵ It aims to prevent human rights abuses, inequity and discrimination, protect the most vulnerable, and expose perpetrators.¹²⁶ It does so through its Complaints Procedure, UPR, and Special Procedures.

The HRC complaints procedure

Individuals or groups that claim to be victims of human rights violations or that have direct, reliable knowledge of such violations may submit complaints against a state to the HRC, regardless of whether that state has ratified any human rights treaties or conventions.¹²⁷ NGOs

¹²² OHCHR, '[Welcome to the Human Rights Council](#)'.

¹²³ UPR Info, '[What is the UPR?](#)'.

¹²⁴ OHCHR, 'Special Procedures of the Human Rights Council' ('OHCHR, '[Special Procedures of the Human Rights Council](#)').

¹²⁵ OHCHR, '[Promotion and Protection of Human Rights around the Globe](#)'.

¹²⁶ OHCHR, '[Human Rights Bodies](#)'.

¹²⁷ HRC, 'Institution-building of the United Nations Human Rights Council' (18 June 2007) A/HRC/RES/5/1 ('HRC '[Institution-building of the United Nations Human Rights Council](#)'), para. 85; OHCHR, '[Human Rights Council Complaint Procedure](#)'.

may also submit complaints on behalf of victims or based on facts surrounding human rights violations, so long as they have direct knowledge and clear evidence of such violations. These submissions and proceedings are kept strictly confidential, unless the Council decides otherwise.¹²⁸

In order to submit a complaint to the HRC, complainants must have exhausted all domestic remedies for seeking redress for the human rights violation in question, unless it appears that such remedies would be ineffective or unreasonably prolonged. Complaints presented to the HRC must provide details on the facts related to the violation of the UN Charter, UDHR or any other applicable IHRL instruments and must not be:

- (i) submitted anonymously;
- (ii) manifestly politically motivated;
- (iii) written with an abusive language;
- (iv) exclusively based on mass media reports; or
- (v) in relation to a case that is already being dealt with by a special procedure, a treaty body or other UN mechanisms on human rights.¹²⁹

It should be underlined that the complaints procedure is not mandated to seek remedies in individual cases or provide compensation to alleged victims. Instead, after receiving the complaint and assessing its merits, the HRC may:

- (i) request the state concerned to provide additional information;
- (ii) appoint an expert to monitor the situation; or
- (iii) recommend the OHCHR to provide technical cooperation, capacity building or advisory service to the state to improve its human rights standards.

Universal Periodic Review

The UPR is a process through which the HRC reviews the human rights record of each UN member state every four-and-half years.¹³⁰ During their review, each state has the opportunity to declare what actions they have taken to improve the human rights situation in their countries and to fulfil their human rights obligations.¹³¹ The review is conducted on the basis of the information provided by:

- (i) the State under review;

¹²⁸ HRC ‘[Institution-building of the United Nations Human Rights Council](#)’, para. 104.

¹²⁹ OHCHR, ‘[Human Rights Council Complaint Procedure](#)’.

¹³⁰ HRC ‘[Institution-building of the United Nations Human Rights Council](#)’, para. 14; [OHCHR Manual on Human Rights Monitoring](#), p. 32.

¹³¹ HRC, ‘[Basic Facts About the UPR](#)’, (‘[HRC, ‘Basic Facts About the UPR](#)’); [OHCHR Manual on Human Rights Monitoring](#)’, p. 32.

- (ii) independent human rights experts and groups (i.e., UN Special Procedures, treaty bodies and other UN entities); and
- (iii) other stakeholders, such as civil society organisations.¹³²

Following the review, an outcome report is prepared that summarises the discussions, questions, comments and recommendations made by states to the country under review as well as the responses of the reviewed state. In the next UPR, the reviewed state is expected to provide information on the progress made in implementing these recommendations.¹³³

The Gambia has gone through three cycles of UPR in the last 10 years,¹³⁴ with the next one expected to take place in 2024.

Special procedures

HRC Special Procedures are composed of individuals (i.e., Special Rapporteurs or Independent Experts) or Working Groups made up of human rights experts mandated to address either specific country situations (Sudan or Somalia, for example) or thematic issues (such as torture, or extra-judicial killings).¹³⁵ They examine, monitor, advise and publicly report on human rights situations in line with their mandate.¹³⁶ Special Procedures may also intervene directly with states on the allegations made against them in relation to past, ongoing or potential violations of human rights.¹³⁷ The work of HRC Special Procedures covers virtually all human rights.¹³⁸

Victims may provide the HRC Special Procedures mandate-holders with information on human rights violations regardless of whether or not they have exhausted domestic remedies and notwithstanding the accused State's ratification of any international or regional human rights instruments. Other individuals/groups may also provide the Special Procedures with information on general patterns and trends of human rights violations (such as those affecting a particular group or community), or even information relating to existing legislation, policy or practice in a given state that is considered incompatible with international human rights standards.

A complaint to the UN Special Procedures must include information on:

- (i) the identity of the alleged victim(s) as well as the person(s)/organisations(s) submitting the communication. This information may be kept confidential if requested by the submitter;

¹³² OHCHR, [Basic Facts About the UPR](#).

¹³³ OHCHR, [Basic Facts About the UPR](#).

¹³⁴ OHCHR, [Universal Periodic Review – Gambia](#).

¹³⁵ [OHCHR Manual on Human Rights Monitoring](#), p. 30; OHCHR, '[Special Procedures of the Human Rights Council](#)'.

¹³⁶ [OHCHR Manual on Human Rights Monitoring](#), p. 30.

¹³⁷ OHCHR, '[Communications](#)' ('[OHCHR 'Communications'](#)').

¹³⁸ HRC, '[Promotion and Protection of Human Rights around the Globe](#)'.

- (ii) the date, place and detailed description of the circumstances of the violations which already occurred, that are ongoing or about to occur; and
- (iii) the alleged perpetrators of the violation (if known).¹³⁹

Other details pertaining to the specific alleged violation may be required depending on the mandate(s) to which the submission is addressed or relevant. Communications that are solely based on media reports, contain abusive language, or are obviously politically motivated are not taken into consideration.¹⁴⁰

Each Special Procedure mandate-holder will evaluate the complaint and decide whether to take action. If the information provided is found credible, Special Procedure mandate-holders can send communications to states concerned to request clarification, information and comments on the allegations made against them. They can also carry out country visits¹⁴¹ and submit public reports to the HRC.¹⁴² A Special Rapporteur may make an ‘Urgent Appeal’ to the accused state in cases where the alleged violations are time-sensitive in terms of involving loss of life, life-threatening situations or either imminent or ongoing damage of a very grave nature to victims that cannot be addressed in a timely manner by the procedure of allegation letters.

1.5.2. UN treaty bodies

The human rights treaty bodies are committees composed of independent experts that monitor states’ implementation and realisation of their obligations under the core IHRL treaties and their optional protocols by parties.¹⁴³ There are 10 treaty bodies established by the specific treaties which they monitor.¹⁴⁴ These committees can issue ‘general comments’ capable of providing authoritative interpretations of the specific provisions of the treaties they are overseeing.¹⁴⁵

Treaty bodies receive information on alleged violations of their respective treaty frameworks in two ways.¹⁴⁶ Firstly, they receive periodic reports from state parties regarding their compliance with their human rights obligations under a particular treaty. In considering these reports, they also receive information from other sources such as civil society organisations, UN entities and other international organisations. These reports are then examined in light of all the information

¹³⁹ OHCHR ‘Communications’.

¹⁴⁰ OHCHR ‘Communications’.

¹⁴¹ OHCHR *Manual on Human Rights Monitoring*, p. 30; OHCHR, ‘*Special Procedures of the Human Rights Council*’.

¹⁴² OHCHR, *Manual on Human Rights Monitoring*, p. 30; OHCHR, ‘*Documents on Gambia*’.

¹⁴³ OHCHR, *Manual on Human Rights Monitoring*, p. 28; OHCHR, ‘*The Core International Human Rights Instruments and their Monitoring Bodies*’; OHCHR, ‘*The Core International Human Rights Treaties*’.

¹⁴⁴ OHCHR, *Manual on Human Rights Monitoring*, p. 28; OHCHR, ‘*The Core International Human Rights Instruments and their Monitoring Bodies*’; OHCHR, ‘*The Core International Human Rights Treaties*’.

¹⁴⁵ *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* (Judgment) (2010) ICJ Reports 639, para. 66; J Connors & M Schmidt, ‘United Nations’ in Moeckli (2014), p. 376.

¹⁴⁶ See OHCHR, ‘*OHCHR Training Package on Reporting to United Nations Human Rights Treaty Bodies*’ (UN, 2017).

available and in the presence of the submitting state, and the treaty body will publish its concerns and recommendations to the state concerned in the form of concluding observations.¹⁴⁷

Secondly, treaty bodies also receive *ad hoc* complaints on alleged violations of human rights perpetrated by states.¹⁴⁸ There are three main procedures for bringing alleged violations of human rights treaties before the Treaty Committees, which include:

- (i) individual communications;
- (ii) state-to-state complaints¹⁴⁹; and
- (iii) inquiries.¹⁵⁰

Individual communications are the most frequently used complaint procedure. Accordingly, it has the greatest relevance to The Gambia, and will constitute the sole focus of this section.

Individual communications

Complaints can be made by individuals against a state to the relevant treaty body if the relevant state:

- (i) is a party to the treaty in question;¹⁵¹ and
- (ii) has ratified the individual complaint procedure under the corresponding treaty. These procedures are usually found within the provisions of the treaty or an optional protocol to the treaty.¹⁵²

Currently, eight out of ten treaty bodies accept individual complaints, also known as ‘communications’, or ‘petitions’ (see Table 4, below). Among those highlighted in Table 4, The Gambia has only ratified the individual complaints mechanisms under the ICCPR and the

¹⁴⁷OHCHR, ‘[Monitoring the core international human rights treaties](#)’.

¹⁴⁸ OHCHR, ‘[The Core International Human Rights Treaties](#)’; OHCHR, [Manual on Human Rights Monitoring](#), p. 28.

¹⁴⁹ ICCPR, article 41; UN General Assembly, [Optional Protocol to the International Covenant on Economic, Social and Cultural Rights](#) (5 March 2009) A/RES/63/117, article 10; CAT, article 21; ICERD, articles 12-13, CPPED, article 32; Human Rights Council, [Optional Protocol to the Convention on the Rights of the Child on a Communications Procedures](#) (14 July 2011) A/HRC/RES/17/18, article 12. There has yet to be an inter-state complaint brought to a committee.

¹⁵⁰ Not all Committees are able to initiate inquiries; the UN Committee against Torture, the Committee on the Elimination of Discrimination against Woman, the Committee on Economic, Social and Cultural Rights, the Committee on the Rights of Persons with Disabilities, and the Committee on the Rights of the Child may initiate inquiries upon receipt of reliable, well-founded indications of serious, grave or systematic, violations of the respective conventions by a state party. See J Connors & M Schmidt ‘United Nations’ in Moeckli (2014), p. 380.

¹⁵¹ States can also accept the competence of the court by making a declaration under a specific article of a convention, declarations are needed for Committee on the Elimination of Racial Discrimination (‘CERD’), Committee Against Torture (‘CAT’), Committee on Enforced Disappearances (‘CED’), Committee on Migrant Workers (‘CMW’). See OHCHR, ‘[Human Rights Bodies – Complaint Procedures](#)’.

¹⁵² OHCHR, ‘[Human Rights Treaty Bodies - Individual Communications](#)’; [OHCHR Manual on Human Rights Monitoring](#), p. 29.

CRPD.¹⁵³ Accordingly, individuals may only submit complaints against The Gambia before the HRC and the Committee on the Rights of Persons with Disabilities for alleged violations of rights guaranteed under those treaties.

Treaty Name	Treaty-based Body	Source of Communication Procedure
International Covenant on Civil and Political Rights	Human Rights Committee (CCPR) ¹⁵⁴	First Optional Protocol to the International Covenant on Civil and Political Rights
Convention on the Elimination of All Forms of Discrimination against Women	Committee on the Elimination of Discrimination against Women (CEDAW) ¹⁵⁵	Optional Protocol to the Convention on the Elimination of Discrimination against Women
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	Committee Against Torture ('CAT') ¹⁵⁶	Article 22 of the Convention
Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment	Subcommittee on Prevention of Torture ¹⁵⁷	N/A
International Convention on the Elimination of All Forms of Racial Discrimination	Committee on the Elimination of Racial Discrimination ('CERD')	Article 14 of the Convention
Convention on the Rights of Persons with Disabilities	Committee on the Rights of Persons with Disabilities ('CRPD')	Optional Protocol to the Convention
Convention for the Protection of All Persons from Enforced	Committee on Enforced	Article 31 of Convention

¹⁵³ OHCHR, '[UN Treaty Body Database](#)'.

¹⁵⁴ OHCHR, '[Human Rights Committee](#)'.

¹⁵⁵ OHCHR, '[Committee on the Elimination of Discrimination Against Women](#)'.

¹⁵⁶ OHCHR, '[Committee Against Torture](#)'.

¹⁵⁷ OHCHR, '[Optional Protocol to the Convention Against Torture \(OPCAT\) Subcommittee on Prevention of Torture](#)'.

Disappearances	Disappearances ('CED')	
International Covenant on Economic, Social and Cultural Rights	Committee on Economic, Social and Cultural Rights ('CESCR') ¹⁵⁸	Optional Protocol to the International Covenant on Economic, Social, and Cultural Rights
Convention on the Rights of the Child	Committee on the Rights of the Child ('CRC') ¹⁵⁹	Optional Protocol to the Convention on the Rights of the Child on a Communication Procedure
International Convention on the Protection of the Rights Migrant Workers and Their Families	Committee on Migrant Workers ('CMW')	Article 77 of the Convention (Has not yet entered into force) ¹⁶⁰

Table 5: Treaty based complaint mechanisms

Bringing an individual communication

Typically, individuals complaining before the treaty bodies must exhaust the domestic remedies available to them. The person submitting the complaint must show that they are personally and directly affected by the law, policy, practice, act or omission of the State party that constitutes the object of the complaint.¹⁶¹ A claim, however, can be brought on behalf of someone else if their written consent is obtained. In cases where it is not possible to obtain written consent (e.g., where the victim is in prison or has been subjected to enforced disappearance), this requirement can be ignored if the reasons for the absence of written consent is substantiated. Additionally, in order to be successfully brought, the complaint must:

- (i) identify the alleged victims;
- (ii) relate to a right that relates to the mandate of the treaty body;
- (iii) include a factual description of the violation;
- (iv) contain credible and detailed information;
- (v) not be solely based on media reports. It can, however, include information on the general patterns of violations without mentioning individual cases;
- (vi) relate to events that occurred after the date that the complaint procedure came into force in the accused state; and

¹⁵⁸ OHCHR, '[Committee on Economic, Social and Cultural Rights](#)'.

¹⁵⁹ OHCHR, '[Committee on the Rights of the Child](#)'.

¹⁶⁰ This individual complaint mechanism will become operative when 10 states parties have made the necessary declaration under article 77.

¹⁶¹ OHCHR, '[Human Rights Treaty Bodies - Individual Communications](#)'.

- (vii) not have been submitted to another international body.

1.5.3. Non-treaty instruments (soft law)

Treaties are considered ‘hard law’ since their provisions are legally binding upon their state parties. However, there are also non-treaty (or ‘soft law’) instruments that are not legally binding, but may nonetheless be able to influence the actions of states.¹⁶² Soft-law instruments are usually declarations, principles, or reports from UN bodies on a specific topic that give guidance on the international standards related to various human rights issues and expand on human rights obligations of states.¹⁶³

Some prominent non-treaty instruments of importance to international human rights, include:

- (i) Standard Minimum Rules for the Treatment of Prisoners;¹⁶⁴
- (ii) Code of Conduct for Law Enforcement Officials;¹⁶⁵
- (iii) Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power;¹⁶⁶
- (iv) Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment;¹⁶⁷
- (v) Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions;¹⁶⁸
- (vi) Declaration of the Protection of all Persons from Enforced Disappearance;¹⁶⁹
- (vii) Declaration on the Elimination of Violence Against Women.¹⁷⁰

1.6. The African human rights law system

The African human rights system was developed through the African Union (‘AU’), which created the ACHPR (also known as ‘The Banjul Charter’) that was signed in Banjul in 1981 and

¹⁶² D Shelton, ‘Normative Hierarchy in International Law’ (2006) 100 *American Journal of International Law* 291, p. 319; B Choudhury, ‘Balancing Soft and Hard Law for Human Rights’ (2018) 67 *International and Comparative Law Quarterly* 961, p. 964.

¹⁶³ [OHCHR Manual on Human Rights Monitoring](#), p. 9.

¹⁶⁴ UN General Assembly, ‘[United Nations Standard Minimum Rules for the Treatment of Prisoners](#)’ (13 May 1977) A/RES/70/175.

¹⁶⁵ UN General Assembly, ‘[Code of Conduct for Law Enforcement Officials](#)’ (5 February 1980) A/RES/34/169.

¹⁶⁶ UN General Assembly, ‘[Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power](#)’ (29 November 1985) A/RES/40/34.

¹⁶⁷ UN General Assembly, ‘[Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment](#)’ (9 December 1988) A/RES/43/173.

¹⁶⁸ ECOSOC, ‘[Resolution 1989/65: Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions](#)’ (24 May 1989).

¹⁶⁹ UN General Assembly, ‘[Declaration on the Protection of all Persons from Enforced Disappearances](#)’ (18 December 1992) A/RES/47/133.

¹⁷⁰ UN General Assembly, ‘[Declaration on the Elimination of Violence Against Women](#)’ (20 December 1993) A/RES/48/104.

ratified by all AU member nations.¹⁷¹ The AU also adopted an additional protocol to the ACHPR to strengthen the protection of women's rights in 2003¹⁷² and an additional treaty on children's rights in 1990.¹⁷³

The ACHPR has certain unique characteristics. It not only recognises the rights of the *individual* but also the economic, social, and cultural rights of *peoples* more generally. Accordingly, the Banjul Charter goes beyond the fundamental human rights contained in other IHRL instruments by protecting families, communities, and societies, focusing on their collective rights and duties and recognising people's right to existence and self-determination.¹⁷⁴

1.6.1. The African Commission on Human and Peoples' Rights

The Banjul Charter established the African Commission on Human Peoples' Rights,¹⁷⁵ whose main objective is to promote and ensure the protection of human and people's rights in Africa.¹⁷⁶ In discharging this mandate, the Commission:

- (i) considers complaints made against states parties by individual or other states parties;
- (ii) assesses state party reports on the implementation of the Charter;
- (iii) conducts on-site visits;
- (iv) adopts human rights resolutions and general comments on the provisions of the Charter;¹⁷⁷ and
- (v) appoints special rapporteurs and working groups.¹⁷⁸

The Commission's complaint procedure allows it to receive complaints on the violations of the Charter. The Commission can consider two types of complaints:

- (i) *inter-state communications*: Where one state party alleges that another state party has violated its human rights obligations under the Charter;¹⁷⁹ and
- (ii) *other communications*: Submitted by individuals or organisations, who allege that a state party has violated their Charter rights.¹⁸⁰ Anyone, not only the victim or their family, can

¹⁷¹ OHCHR, [Manual on Human Rights Monitoring](#), p. 54.

¹⁷² See [Maputo Protocol](#).

¹⁷³ See [African Charter on the Rights and Welfare of the Child](#) (adopted 1 July 1990, entered into force 29 November 1999), 26th Ordinary Session of the Assembly of Heads of State and Government of the OAU.

¹⁷⁴ [ACHPR](#), Chapter II, articles 27-29.

¹⁷⁵ [ACHPR](#), article 30.

¹⁷⁶ African Commission on Human and Peoples' Rights, '[Mandate of the Commission](#)'.

¹⁷⁷ See Camphor, '[General Comment No. 4: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment \(Article 5\)](#)' (23 February – 4 March 2017), 21st Extra-Ordinary Session of the African Commission on Human And Peoples' Rights; Camphor, '[The Guidelines on Combating Sexual Violence and its Consequences in Africa](#)' (22 May, 2017), 60th Ordinary Session, p. 12.

¹⁷⁸ [ACHPR](#), article 46-59.

¹⁷⁹ [ACHPR](#), articles 48-49.

¹⁸⁰ [ACHPR](#), articles 55-58.

bring a complaint to the Commission alleging that a State party has violated a right guaranteed under the Charter.¹⁸¹

For communications submitted by individuals or organisations to be accepted by the Commission, the communication must:

- (i) include the identities of its authors. The authors can, however, request their identities to remain anonymous;
- (ii) not be written in disparaging or insulting language directed against the State concerned and its institutions or to the Organization of African Unity ('OAU');
- (iii) not be based exclusively on news disseminated through the mass media;
- (iv) be sent after the exhaustion of the local remedies, preferably within six-months.¹⁸² This requirement does not apply if the exhaustion of domestic remedies would be unduly prolonged;¹⁸³
- (v) not relate to cases which have been settled by these States involved in accordance with the principles of the UN Charter, or the Charter of the OAU or the provisions of the Banjul Charter.¹⁸⁴

The African Commission has heard only a handful of cases relating to The Gambia. Within those, only two proceeded past the admissibility stage and were subject, ultimately, to decisions.¹⁸⁵ However, neither of these cases related to situations which might amount to international crimes. Accordingly, they will not be discussed further.

1.6.2. African Court of Human and Peoples' Rights

The African Commission of Human and Peoples' Rights was the only monitoring body of the Banjul Charter until the establishment of the African Court on Human and Peoples' Rights in 2004.¹⁸⁶ The Court was established through The Protocol on the Establishment of an African

¹⁸¹ African Commission on Human and People's Rights, '[Communications Procedure](#)'.

¹⁸² *Michael Majuru v. Zimbabwe* (Decision) Communication No. 308/2005 (ACmHPR, 10 November 2005), paras 108, 109.

¹⁸³ *Purohit and Another v. The Gambia* (Merits), 33rd Ordinary Session (African Commission on Human and Peoples' Rights, 29 May 2003), para. 24.

¹⁸⁴ [ACHPR](#), article 56. See for more information, International Federation for Human Rights, '[Admissibility of Complaints before the African Court: A Practical Guide](#)' (June 2016).

¹⁸⁵ See e.g., *Sir Dawda K. Jawara v. The Gambia* (Decision), Communication No. 147/95-149/96 (ACmHPR, 11 May 2000).

¹⁸⁶ African Commission on Human and Peoples' Rights, '[Establishment of the Court](#)'.

Court on Human and People's Rights on 08 June 1998¹⁸⁷ with a mandate to complement and reinforce the functions of the Commission.¹⁸⁸

The functions of the Court include:

- (i) considering cases and disputes submitted to it concerning the interpretation and application of the Banjul Charter and any other relevant human rights instruments ratified by the States concerned;
- (ii) issuing advisory opinions at the request of the AU or its members.¹⁸⁹

A number of interested actors may institute cases before the court, including: States that are party to the Court's Protocol, the African Commission, and NGOs that have an observer status before the Court and African Intergovernmental Organisations.¹⁹⁰ Individuals and those who act on their behalf will be able to take cases directly to the African Court only against those states that have made a declaration accepting the Court's jurisdiction in relation to the individual complaints to be made against them.¹⁹¹ If the Court finds that the state in question violated the rights of the complainant, it may order remedies such as compensation or other forms of reparations to be made.¹⁹²

During a meeting in Equatorial Guinea in 2014, the AU and its member states adopted the Protocol on Amendments to the Protocol of the ACHPR Statute, otherwise known as the Malabo Protocol. When ratified by fifteen member states, the Malabo Protocol will merge the ACHPR with the African Court of Justice to create an 'African Court of Justice and Human Rights' that will have jurisdiction over human rights violations as well as international crimes.¹⁹³ However, as of July 2020, the Malabo Protocol has not been ratified by any AU state.¹⁹⁴

1.6.3. ECOWAS Community Court of Justice

The ECOWAS Community Court of Justice (CCJ) was established in 1991 through the Revised Treaty of the Economic Community of West African States.¹⁹⁵ The jurisdiction of the Court includes:

- (i) examining cases of failure by members states to honour their obligations under the Community law;

¹⁸⁷ OAU, 'Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights' (adopted 10 June 1998, entered into force 25 January 2004) ('[Optional Protocol on ACHPR](#)').

¹⁸⁸ African Commission on Human and Peoples, '[Rights, Mandate, Vision, Mission, and Values](#)'.

¹⁸⁹ [ACHPR](#), article 4(1).

¹⁹⁰ See [Optional Protocol on ACHPR](#), article 5.

¹⁹¹ C Heyns and M Killander, 'Africa' in Moeckli (2014), p. 453.

¹⁹² [Optional Protocol on ACHPR](#), article 27(1).

¹⁹³ E Matiyas, '[What Prospects for an African Court Under the Malabo Protocol?](#)' (*JusticeInfo.Net*, 31 May 2018).

¹⁹⁴ African Union, '[Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights](#)' (adopted 27 June 2014).

¹⁹⁵ ECOWAS, '[Revised Treaty of the Economic Community of West African States](#)' (24 July 1993).

- (ii) adjudicating on any dispute relating to the interpretation and application of the of the Community law; and
- (iii) determining cases of violation of human rights that occur in any Member State.¹⁹⁶

One specific characteristic of the ECOWAS Court is that there is no requirement to exhaust local remedies for a case to be brought before the court.¹⁹⁷ Victims of human rights violations may, therefore, initiate a case before the Court even while their case is pending before national authorities.¹⁹⁸ However, applications cannot be anonymous and must not be made whilst the same matter has been instituted before another international court for adjudication.¹⁹⁹

Although the ECOWAS instruments do not specify the remedies that the Court can provide, as noted above, in past cases, the Court has both awarded damages and issued other, more specific orders. These have included, for example, orders mandating the immediate release of an illegally detained journalist,²⁰⁰ and the establishment of an independent panel to look into an applicant's detention and torture at the NIA headquarters in Banjul by state agents, in violation of article 5 ACHPR.²⁰¹ In the latter case, the Court mandated the panel of inquiry to 'determine the persons responsible for the arrest, detention, torture and other forms of ill- treatment of the Applicants be made to give account of their actions by putting in place effective measures to discipline and prosecute the police officers involved.'²⁰²

1.7. The national human rights system of The Gambia

The Gambian National Human Rights Commission ('NHRC') was established through the National Human Rights Commission Act 2017, with the mandate to monitor, receive and investigate human rights violations committed by Gambian state and non-State actors after December 2017.²⁰³ If the NHRC finds a violation, it prepares a detailed report on the matter and issues recommendations to the relevant institutions and communities for implementation.²⁰⁴

¹⁹⁶ ECOWAS, '[Revised Treaty of the Economic Community of West African States](#)' (24 July 1993), article 7. See ECOWAS Court of Justice, '[Supplementary Protocol A/SP.1/01/05 Amending the Preamble and Articles 1, 2, 9 and 30 of Protocol A/P.1/7/91 Relating to the Community Court of Justice and Article 4 Paragraph 1 of the English Version of Said Protocol](#)' (19 January 2005) ('ECOWAS Court of Justice, '[Supplemental Protocol A/SP.1/01/05](#)'), article 3. See also ECOWAS Community Court of Justice, '[Mandate And Jurisdiction](#)'.

¹⁹⁷ Claiming Human Rights, 'The ECOWAS Court of Justice' (10 January 2010) ('Claiming Human Rights, '[The ECOWAS Court of Justice](#)'); 'Fact Sheet: ECOWAS Community Court of Justice' (*The Open Society Justice Initiative*, June 2013) ('The Open Society Justice Initiative, '[Fact Sheet: ECOWAS Community Court of Justice](#)').

¹⁹⁸ Claiming Human Rights, '[The ECOWAS Court of Justice](#)'.

¹⁹⁹ See ECOWAS Court of Justice, '[Supplementary Protocol A/SP.1/01/05](#), article 4(d).

²⁰⁰ The Open Society Justice Initiative, '[Fact Sheet: ECOWAS Community Court of Justice](#), para. 5.

²⁰¹ *Darboe & Ors v. The Republic of the Gambia* (Decision), Communication No. 1ECW/CCJ/JUD/01/20, ECOWAS Court of Justice, 20 January 2020 ('[Darboe & Ors v. The Republic of the Gambia](#)'), p. 38.

²⁰² *Darboe & Ors v. The Republic of the Gambia*, p. 38.

²⁰³ F Salvioli, '[Preliminary Observations from the Official Visit to The Gambia by the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence](#)' (*OHCHR*, 27 November 2019), p. 2.

²⁰⁴ National Human Rights Commission The Gambia, '[Annual Report 2019](#)', p. 70.

The NHRC can also receive complaints from any person or organisation, under paragraph 13 of the National Human Rights Commission Act 2017.²⁰⁵ A complaint of human rights may be submitted to the NHRC through:

- (i) the head office of the NHRC in Kotu or any other place the NHRC may determine;
- (ii) the NHRC's website; or
- (iii) letters or emails addressed to any of the Commissioners, Executive Secretary or staff members of the Legal Department of the Commission.²⁰⁶

Recent work by NHRC includes:

- (i) monitoring and visiting three detention facilities (namely, Mile II, Jeshwang and Janjanburreh Prisons) and five police stations in 2019 in order to identify their shortcomings;²⁰⁷
- (ii) successfully negotiating with The Gambia government to agree to lift the suspension on Home Digital FM and King FM radios stations and allowing them to resume their operations. The government also dropped all criminal charges against the leadership of the said radio stations;²⁰⁸ and
- (iii) persuading the Gambian Police Force to drop all the charges against Mr. Madi Jobarteh, a human rights defender who was charged with false publication and broadcasting contrary to section 181A (1) of the Criminal Code of The Gambia.²⁰⁹

²⁰⁵ Gambian National Assembly, '[National Human Rights Commission Act](#)' (2017), Part 3, para.13.

²⁰⁶ National Human Rights Commission The Gambia, '[Who Can Make a Complaint?](#)'.

²⁰⁷ National Human Rights Commission The Gambia, '[Annual Report 2019](#)', pp. 68-69.

²⁰⁸ National Human Rights Commission The Gambia, '[Media Advisory NHRC 25022020](#)' (20 February 2020).

²⁰⁹ National Human Rights Commission The Gambia, '[Press Release: NHRC/PR/13012020/001 \(05\) – Charges against Mr.Madi Jobartheh Dropped by the Inspector General of Police with Immediate Effect](#)' (10 July 2020), p. 1.

Chapter Two: International Criminal Law

2. Introduction - what are international crimes?

International Criminal Law ('ICL') is the branch of law that deals with the prosecution of international crimes, which are generally taken to encompass the four 'core' crimes recognised under the Rome Statute of the International Criminal Court ('ICC'). These include:

- (i) war crimes;
- (ii) crimes against humanity;
- (iii) genocide; and
- (iv) aggression.²¹⁰

This chapter will explore each of these crimes, and detail how various concepts in international criminal law differ from those of domestic criminal law.

2.1. What is the difference between international and domestic crimes?

Many of the individual acts criminalised under these four international crimes involve acts that may also be criminalised under a state's domestic criminal law²¹¹ such as murder, rape, arbitrary imprisonment or torture.²¹² However, despite this commonality, international crimes differ from domestic criminal offences for three primary reasons:

- (i) the contextual element(s) of international crimes;
- (ii) the 'international character' of international crimes; and
- (iii) the inapplicability of certain procedural limitations when prosecuting international crimes.

2.1.1. The contextual element(s) of international crimes

The main distinguishing factor between international and domestic crimes is the context that must exist in order for ICL to apply. As noted above (*see* section 1.1), war crimes, for example,

²¹⁰ Historically, numerous crimes, such as terrorism or piracy, were generally characterised as 'international crimes' given their actual or potential transboundary effects. However, since its entry into force, the Rome Statute is seen as the authoritative determination of what constitutes an international crime, and those crimes involving transboundary effects are now more properly referred to as 'transnational crimes'. *See* R Cryer *et al.* (eds), *An Introduction to International Criminal Law and Procedure* (3rd ed CUP 2015), p. 5 ('Cryer *et al.* (2015)'). *See also*, UN General Assembly, Rome Statute of the International Criminal Court (17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 ('[Rome Statute](#)'), articles 6 (Genocide), 7 (Crimes against humanity), 8 (War crimes) and 8 *bis* (Crime of aggression).

²¹¹ E Durkheim *The Division of Labor in Society* (1893) (New York: The Free Press 1997), p. 60, *cited in* C Stahn *Critical Introduction to International Criminal Law* (CUP 2020) p. 17 ('Stahn (2020)'); Cryer *et al.* (2015) p. 227.

²¹² *See e.g.*, [Rome Statute](#), articles 6-8*bis*; Stahn (2020) p. 17; Cryer *et al.* (2015) p. 79.

can only be committed in the context of an ongoing armed conflict,²¹³ whilst crimes against humanity can only be committed as part of a ‘widespread or systematic attack against a civilian population.’²¹⁴ It is these ‘contextual elements’ that ‘trigger’ ICL, and transform what might otherwise be a domestic criminal offence (e.g., murder) into an international crime (e.g., a crime against humanity).²¹⁵

Context is fundamentally important when prosecuting international crimes, not only because it gives rise to ICL in the first instance, but also because it demands an analysis of the context, scale, and patterns of violence that make up organised criminality. This, in turn, can form the starting point for assessing responsibility in chains of command to include higher level perpetrators capable of incurring responsibility for coordinating or facilitating international crimes, notwithstanding their physical or organisational remoteness from the physical perpetration of those crimes (*see* chapters 4 and 7). For this reason, understanding and establishing context should be the starting point of any international criminal investigation.²¹⁶

2.1.2. The international character of the crime

In further contrast to domestic criminal offences, international crimes are comprised of those crimes that, because of their nature or gravity, are of concern to the international community as whole, and which all states therefore have an interest in prohibiting.²¹⁷ Generally, this is achieved through the lens of international law. Outside of the Rome Statute, for instance, war crimes are prohibited under international humanitarian law (‘IHL’) in treaties such as the 1949 Geneva Conventions I-IV and their additional protocols.²¹⁸ Similarly, genocide is prohibited by

²¹³ Another war crimes chapeau is that the crime had a ‘nexus’ to the conflict, meaning that it ‘took place in the context of and was associated with’ an armed conflict. *See* International Criminal Court (‘ICC’), Elements of Crimes (2 November 2000 (as amended)) PCNICC/2000/1/Add.2 (‘[ICC Elements of Crimes](#)’), article 8.

²¹⁴ [Rome Statute](#), article 7.

²¹⁵ [Rome Statute](#), article 7; Human Rights Committee (‘HRC’) ‘General Comment No. 31’ (26 May 2004) CCPR/C/21/Rev.1/Add.13, para.18.

²¹⁶ ‘[Fact Sheet: International Crimes](#)’ (*Open Society Foundations*, 2016).

²¹⁷ T Taylor ‘Large Questions in Eichmann Case’ (1961) *New York Times* 6, p.22, as cited in H Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Viking Press 1963), p. 260.

²¹⁸ International Committee of the Red Cross (‘ICRC’), Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (12 August 1949) 75 UNTS 31 (‘[Geneva Convention I](#)’); ICRC, Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (12 August 1949) 75 UNTS 85 (‘[Geneva Convention II](#)’); ICRC, Geneva Convention (III) Relative to the Treatment of Prisoners of War (12 August 1949) 75 UNTS 135 (‘[Geneva Convention III](#)’); ICRC, Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (12 August 1949) 75 UNTS 287 (‘[Geneva Convention IV](#)’); ICRC, [Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts](#) (8 June 1977) 1125 UNTS 3; ICRC, [Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts](#) (8 June 1977) 1125 UNTS 609 (‘[Additional Protocol II](#)’); ICRC, [Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Adoption of an Additional Distinctive Emblem](#) (8 December 2005) (Not yet entered into force).

the 1948 Genocide Convention,²¹⁹ whilst the crime of aggression is circumscribed by the United Nations ('UN') Charter.²²⁰ Although there is no universal treaty which codifies the prohibition as yet, crimes against humanity are also considered to be prohibited under customary international law.²²¹

2.1.3. Inapplicability of certain procedural/jurisdictional limitations

Finally, given its focus on systemic, organised criminality, ICL has also developed a range of legal and procedural mechanisms that differ from domestic criminal law, and which make it easier to hold high-level perpetrators to account. These include:

- (i) *Overcoming immunity*: state officials who may enjoy immunity from criminal prosecution before the domestic authorities of other states (e.g., because of their current or previous rank within the political structure of a state²²²) do not enjoy such immunity before international tribunals when they are prosecuted for international crimes.²²³
- (ii) *Limitation*: before international tribunals and in most states, statutory limitations that ordinarily limit the timeframe within which domestic crimes may be prosecuted do not apply to international crimes.²²⁴ This enables the effective prosecution of crimes committed in the past,²²⁵ which is extremely important given that international criminal prosecutions are often unfeasible in the immediate term, either because it is impossible to

²¹⁹ United Nations ('UN') General Assembly, 'Convention on the Prevention and Punishment of the Crime of Genocide' (9 December 1948) UNGA/Res/3/260 ('[Genocide Convention](#)').

²²⁰ Charter of the United Nations (24 October 1945) 892 UNTS 119 ('[UN Charter](#)'), article 2(4).

²²¹ '[Definitions](#)' (United Nations Office on Genocide Prevention and the Responsibility to Protect).

²²² UN Conference on Diplomatic Intercourse and Immunities, [Vienna Convention on Diplomatic Relations](#) (18 April 1961) 500 UNTS 95.

²²³ *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)* (Judgment), 14 February 2002, ICJ Reports 2002 ('[Arrest Warrant Case](#)'), para. 61; *Prosecutor v. Al-Bashir*, ICC-02/05-01/09 OA2, [Judgment in the Jordan Referral re Al-Bashir Appeal](#), 6 May 2019, paras 1-11. See also section 6.1.1.

²²⁴ Both the UN and the Council of Europe have adopted conventions that render statutory limitations inapplicable to genocide, crimes against humanity and war crimes. See R Kok, 'Statutory Limitations in International Criminal Law' (2008) 6(4) *Journal of International Criminal Justice* ('*JICJ*') 823, as cited in Stahn (2020), p. 18. The Rome Statute, for instance, provides that the crimes within the jurisdiction of the ICC shall not be subject to any statute of limitations and therefore can be tried even several years after of the actual commission of crimes. See [Rome Statute](#), article 29. Similar provisions exist in the International Crimes Act (Kenya) 2008 and International Criminal Court Act (Uganda), 2010. See [International Crimes Act](#), Act No.16 of 2008 L.N. 66/2008 (Kenya), article 7(1)(g); [International Criminal Court Act](#), The Uganda Gazette No.39 Volume CIII, 25 June 2010, article 19(1)(a)(vii).

²²⁵ It is important to remember that the principle of non-retroactivity under international law requires that the conduct in question be criminalised by *some* source of law that was previously applicable to the individual and was sufficiently foreseeable to them at the time the alleged offence was committed. Therefore, there is no violation of 'non-retroactivity' if the individual was bound by some prior source of law, such as customary international law; general principles of law; an applicable treaty, or even domestic law, that criminalised the same conduct and applied the same or a less severe punishment. See V Spiga, 'Non-Retroactivity of Criminal Law: A New Chapter in the Hissene Habre Saga' (2011) 9(1) *JICJ* 5, p. 16; B van Schaack, '[Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals](#)' (2008) 97 *Georgetown Law Journal* 119, pp. 158-172; T de Souza Diaz, 'The Retroactive Application of the Rome Statute in Cases of Security Council Referrals and Ad Hoc Declarations' (2018) 16 *JICJ* 65, pp. 66-67. See also B Juratowitch, '[Retroactive Criminal Liability and International Human Rights Law](#)' (2005) 75 *British Yearbook of International Law* 337, pp. 340-341.

apprehend the perpetrators,²²⁶ or because the existence or extent of the crimes is covered up and/or not discovered until some time later.²²⁷

2.2. Investigating and prosecuting international crimes

Historically, outside of the ICC, a number of courts and tribunals, both national and international, have conducted prominent prosecutions for international crimes. Internationally, these institutions have taken various forms, including as purely international, *ad hoc* tribunals,²²⁸ and also as internationalised (or ‘hybrid’) tribunals, whereby international organisations, such as the UN, help (e.g., through judicial composition) prosecute perpetrators of crimes within a national jurisdiction, often following ‘periods of intense unrest involving widespread human rights abuses’.²²⁹ Although these tribunals have made crucial contributions toward the evolution and advancement of ICL, most of the *ad hoc* tribunals have now either completed, or are completing, their mandates. Accordingly, although the jurisprudence of these tribunals continues to provide valuable guidance on the application of international criminal law, the ICC is increasingly taking center stage as the primary forum for international prosecutions of international crimes. This is reflected in the approach and focus of this Manual.

2.2.1. Complementarity

Although ICL is generally known for its prosecution of high-level perpetrators, such as presidents or military commanders, within international courts and tribunals,²³⁰ international crimes are primarily intended to be prosecuted at the domestic level.²³¹ In the Rome Statute, this is reflected in the principle of ‘complementarity’, under which the Court is expressly intended to be ‘complementary’ to national criminal jurisdictions,²³² acting only as ‘a court of last resort’

²²⁶ Radovan Karadzic, for example, was indicted on 25 July 1995, yet successfully evaded arrest until 21 July 2008. See [Case Information Sheet: Radovan Karadžić \(ICTY\)](#). Similarly, Félicien Kabuga was indicted on 14 April 2011, yet not arrested until 9 years later on 16 May 2020. See [Case Information Sheet: Félicien Kabuga \(IRMCT\)](#).

²²⁷ There are countless examples of perpetrators attempting (often successfully) to cover up the true extent of their crimes. Amongst the most infamous, however, was the efforts to disguise the extent of the killing in Srebrenica by initially dumping bodies in mass graves, and later moving these bodies through multiple ‘secondary’ grave sites in order to prevent identification and further cloud the ability of the investigative authorities to establish the extent of the crimes. See [Facts about Srebrenica \(ICTY\)](#).

²²⁸ For purely international tribunals see: UN Security Council, Resolution 827: Statute of the International Criminal Tribunal for the Former Yugoslavia (25 May 1993 last amended 9 July 2009) S/RES/827 (‘[ICTY Statute](#)’); UN Security Council, Resolution 955: Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 (8 November 1994 last amended 14 August 2002) S/RES/955 (‘[ICTR Statute](#)’).

²²⁹ For hybrid tribunals, see UN Security Council, Resolution 1757: Annex: [Statute of the Special Tribunal for Lebanon](#) (30 May 2007) S/RES/1757; UN Security Council, Resolution 1315: [Statute of the Special Court for Sierra Leone](#) (16 January 2000) S/RES/1315.

²³⁰ Cryer *et al.* (2015), p. 4.

²³¹ Cryer *et al.* (2015), pp. 70, 79-82.

²³² [Rome Statute](#), preamble paras 4 and 6, article 1.

where states parties are unable or unwilling to investigate and prosecute perpetrators of international crimes over which they have jurisdiction.²³³ The complementarity principle is foundationally important within the Rome Statute for a number of reasons, including the need to prevent the ICC becoming overwhelmed by an unmanageable case load, and to support ownership of crimes for stakeholders within transitional justice processes.²³⁴ Successfully embracing the complementarity principle has led to many African states (including Burkina Faso; Burundi; The Democratic Republic of The Congo; Kenya; Senegal; South Africa; and Uganda) to incorporate international crimes within their domestic systems.²³⁵

2.2.2. Investigating and prosecuting international crimes

Regardless of whether they are investigated and prosecuted domestically or internationally, establishing individual responsibility for international crimes requires prosecutors to prove various elements beyond reasonable doubt. The core, internationally accepted elements of international crimes are found in the ICC Elements of Crimes,²³⁶ and include:

- (i) *the contextual elements of international crimes*: Elements which relate to the circumstance in which the crime must be committed within, or as part of (*see* sections 2.1.1 and 3.2);
- (ii) *the physical elements (actus reus) of the crime*: Elements relating to the conduct of the perpetrator, the consequences of such conduct, and the circumstances in which they occurred (*see* sections 3.3.1.1, 3.3.1.2, and 3.3.2); and

²³³ ‘[About the ICC](#)’ (ICC). *See also*, Vanderbilt Law School, [International Criminal Court serves as a ‘court of last resort’](#) (6 April 2010) where Christian Wenaweser, President of the Assembly of States Parties to the ICC stated that the ICC was created to serve as an ‘institution of last resort’. For a discussion on the complementarity principle *see also*, Cryer *et al.* (2015), pp. 154-156; C Stahn ‘Chapter 9 - Taking Complementarity Seriously’ in C Stahn, M El Zeidy (eds.), *The International Criminal Court and Complementarity: From theory to practice* (1st ed CUP 2011), pp.233-282; V Tsilonis, *The Jurisdiction of the International Criminal Court* (Springer 2019) pp. 216–217.

²³⁴ *See e.g.*, [Informal Expert Paper: The Principle of Complementarity in Practice](#) (ICC-OTP, 2003), paras 1-3.

²³⁵ *See e.g.*, [Loi N°025-2018/AN portant Code Pénal](#) (Burkina Faso) (updated in 2018), Decree n°96-451/PRES, Journal Officiel du Faso, 13 December 1996, articles 4, 313–31; [Law No. 052-2009/AN of 16 June 2009 to Determine the Competence and the Procedures for the Application of the Rome Statute Regarding the International Criminal Court by Burkinabè Jurisdictions](#) (Burkina Faso), Décret N°2009-894/PRES, Journal Officiel du Faso, 03 December 2009; [Law No. 1/05 of 22 April 2009 Revising the Penal Code](#) (Burundi), 22 April 2009, articles 10 & 195–203; [Law 9/98 of 31 October 1998 to Define and Suppress Genocide, War Crimes, and Crimes Against Humanity](#) (Republic of the Congo), 31 October 1998. *See also* [International Crimes Act](#), Act No.16 of 2008 L.N. 66/2008 (Kenya), paras 6 & 8; [Law No. 2007-05 of 12 February 2007 Amending the Code of Criminal Procedure Regarding the Implementation of the Treaty of Rome Establishing the International Criminal Court](#) (Senegal) Journal Officiel de la République Sénégalaise du 10 mars 2007 p.2384, 12 February 2007, article 2; Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, Government Gazette of the Republic of South Africa, 18 July 2002, para 4; [International Criminal Court Act](#), The Uganda Gazette No.39 Volume CIII, 25 June 2010, para. 18.

²³⁶ [ICC Elements of Crimes](#).

- (iii) *the mental elements (mens rea) of the crime*: Elements which relate to the mindset/intention of a perpetrator in committing a crime (see section 3.3).²³⁷

In assessing an individual's criminal responsibility for the commission of an international crime, prosecutors must also consider the following:

- (i) *modes of liability*: Principles which relate to the means by which a perpetrator is linked to, and held responsible for, criminal conduct (*see* chapter 4);²³⁸ and
- (ii) *defences and immunities*:²³⁹ Principles capable of absolving (or, in the case of immunities, preventing the imposition of) individual of criminal responsibility (*see* chapter 7).²⁴⁰

2.3. International crimes under the Rome Statute

As noted above, the four core international crimes contained within the Rome Statute include: genocide, crimes against humanity, war crimes and the crime of aggression, each of which will be introduced and defined in this section.

2.3.1. Genocide

Genocide is a crime by which a perpetrator intentionally seeks to eradicate an entire group of human beings (e.g., a particular ethnic or religious group) by taking steps to eliminate members of that group. The seriousness of this intention sets genocide apart as the most serious of international crimes and for this reason, it is referred to as the 'crime of crimes'.²⁴¹ It is prohibited under both the Genocide Convention of 1948²⁴² and under customary international law as a prohibition from which no member of the international community may derogate ('*jus cogens*'), and which all states must take steps to uphold ('*erga omnes*').²⁴³

Article 6 of the Rome Statute,²⁴⁴ incorporates, verbatim, article II of the Genocide Convention, and therefore defines the crime of genocide as:

'...any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

²³⁷ See [Rome Statute](#), article 6.

²³⁸ [Rome Statute](#), article 25, 28; Cryer *et al.* (2015), p. 353.

²³⁹ For the concepts of defences and immunities within the ICC structure, see [Rome Statute](#), articles 27 and 31.

²⁴⁰ [Rome Statute](#), article 31.

²⁴¹ P Sands, *East West Street: On the Origins of Genocide and Crimes Against Humanity* (London, Weidenfeld & Nicolson 2016), p. 380; R Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (1st ed Carnegie Endowment for International Peace 1944), p. 79.

²⁴² [Genocide Convention](#), article 1.

²⁴³ [Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide](#) (Advisory Opinion) (1951) ICJ Reports 15, para. 23; [Case Concerning Armed Activities on the Territory of the Congo \(Democratic Republic of the Congo v. Rwanda\)](#) (Judgment) (2006) ICJ Reports 6, para. 64.

²⁴⁴ See also [ICTY Statute](#), article 4; [ICTR Statute](#), article 2.

- (b) Causing serious bodily or mental harm to members of the group;*
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;*
- (d) Imposing measures intended to prevent births within the group;*
- (e) Forcibly transferring children of the group to another group.*²⁴⁵

As will be seen, many of the acts that might constitute genocide are also capable of falling within the definition of crimes against humanity. However, in contrast to crimes against humanity, which prohibits conduct directed against individual victims in a specific context, genocide is distinguished by its focus upon conduct intended to eradicate a particular group. This is reflected in the fact that, in order to constitute genocide, the physical elements of the crime must have been committed with the intent to destroy a protected group,²⁴⁶ in whole or in part. For this reason, genocide is referred to as a ‘specific intent crime’.²⁴⁷

Given its seriousness, the threshold for proving a charge of genocide intent is very high and, on the evidence, is not satisfied in the Gambian context. Consequently, the crime of genocide will not be discussed further in this Manual.

2.3.2. Crimes against humanity

Unlike genocide and war crimes, crimes against humanity have not historically benefitted from one single definition codified within a particular treaty. That said, over the course of the last three decades, the jurisprudence of various international tribunals, alongside the passing of the Rome Statute, have, collectively, provided some much-needed clarity on the contours of this crime.

Under the Rome Statute, which now contains the most widely ratified treaty-based definition of the offence, crimes against humanity are defined as any of the following acts when committed as part (or in the context) of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (i) murder;
- (ii) extermination;
- (iii) enslavement;
- (iv) deportation or forcible transfer of population;
- (v) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

²⁴⁵ [Genocide Convention](#), article II.

²⁴⁶ Protected groups include national, ethnical, racial or religious groups, *see* [Rome Statute](#), article 6.

²⁴⁷ [ICC Elements of Crimes](#), article 6; *see also* R Cryer, ‘Chapter 24 – International Criminal Law’ in M Evans (ed), *International Law* (5th ed OUP 2018), pp. 746-747 (‘Cryer in Evans (2018)’).

- (vi) torture;
- (vii) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity;
- (viii) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (ix) enforced disappearance of persons;
- (x) the crime of apartheid; and
- (xi) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.²⁴⁸

On the evidence, it appears that many of the crimes committed under the Jammeh regime in The Gambia are potentially capable of being classified as crimes against humanity. Accordingly, they will constitute the focus of many of the substantive crimes discussed in this Manual (*see in particular*, chapters 3, 4, and 7).

2.3.3. War crimes

War crimes are serious violations of the laws and customs applicable in an armed conflict,²⁴⁹ also known as IHL, which gives rise to individual criminal responsibility under ICL.²⁵⁰ The fundamental purpose of IHL is to minimise human suffering and the violence inherent to warfare. This is achieved by protecting persons who are not or are no longer participating in the conflict and restricting the means and methods of warfare against those who are doing so.²⁵¹

In order to prosecute an act as a war crime, it must be shown that it was committed in the context of an armed conflict. An armed conflict exists where there is use of armed force by states or non-state armed groups ('NSAGs'). There are two types of armed conflicts:

- (i) *international armed conflicts* ('IACs'): Where two or more states fight against each other; or
- (ii) *non-international armed conflicts* ('NIACs'): Where a state is fighting against one or more NSAGs, or NSAGs are fighting against one another within a state's territory.²⁵²

²⁴⁸ [Rome Statute](#), article 7.

²⁴⁹ [Rome Statute](#), article 8(2)(a).

²⁵⁰ [Rome Statute](#), article 8; Cryer *et al.* (2015) p. 264.

²⁵¹ OHCHR, 'Manual on Human Rights Monitoring' (2011) HR/P/PT/7/Rev1 ('[OHCHR Manual on Human Rights Monitoring](#)'), p. 55; UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (OUP, 2005), para. 1.8.

²⁵² *Prosecutor v. Tadić*, IT-94-1, [Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction](#), 2 October 1995, para. 70.

Even a single act can constitute a war crime if committed in the context of an IAC²⁵³ or a NIAC.²⁵⁴

International armed conflicts

In an IAC, some violations of IHL, known as ‘grave breaches’ of the Geneva Conventions, are more serious than others, and give rise to obligations upon states parties to search for, arrest, extradite (if necessary), and prosecute the perpetrators of such acts.²⁵⁵ Grave breaches are criminalised under article 8(2)(a) of the Rome Statute, which provides as follows:

‘(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

- (i) Wilful killing;*
- (ii) Torture or inhuman treatment, including biological experiments;*
- (iii) Wilfully causing great suffering, or serious injury to body or health;*
- (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;*
- (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile power;*
- (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;*
- (vii) Unlawful deportation or transfer or unlawful confinement;*
- (viii) Taking of hostages.’*²⁵⁶

In addition, article 8(2)(b) sets out a closed list of twenty-six other serious violations of IHL which might be committed during an IAC, including, among others, a limited number of weapons offences,²⁵⁷ declaring no quarter,²⁵⁸ sexual offences,²⁵⁹ attacking civilians,²⁶⁰ using human shields,²⁶¹ and launching an attack which will cause disproportionate collateral damage.²⁶²

²⁵³ [Rome Statute](#), article 8(2)(b).

²⁵⁴ [Rome Statute](#), article 8(2)(c); *Prosecutor v. Kunarac et al.*, IT-96-23/1-3-A, [Judgment](#), 12 June 2002, para.58.

²⁵⁵ [Geneva Convention I](#), articles 49, 50; [Geneva Convention II](#), articles 50, 51; [Geneva Convention III](#), articles 129, 130; [Geneva Convention IV](#), articles 146, 147.

²⁵⁶ [Rome Statute](#), article 8(2)(a).

²⁵⁷ [Rome Statute](#), article 8(2)(b)(xviii).

²⁵⁸ [Rome Statute](#), article 8(2)(b) (xii).

²⁵⁹ [Rome Statute](#), article 8(2)(b)(xxii).

²⁶⁰ [Rome Statute](#), article 8(2)(b)(i).

²⁶¹ [Rome Statute](#), article 8(2)(b)(xxiii).

²⁶² [Rome Statute](#), article 8(2)(b)(iv).

Non-international armed conflicts

For a situation to qualify as a NIAC, the NSAG's involved in the conflict must be sufficiently organised²⁶³ and the intensity of the conflict must reach a certain level.²⁶⁴ These requirements reflect the distinction between NIACs and other forms of internal disturbances such as protests, riots, banditry, terrorist activities, unorganised and short-lived insurrections, or other isolated and sporadic acts of violence.²⁶⁵

There are fewer legal standards applicable to NIACs than IACs. Nonetheless, article 8(2)(c) of the Rome Statute enumerates the following acts as being capable of prosecution as war crimes when committed in a NIAC:

'(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

²⁶³ For a situation of internal conflict to be classified as a NIAC, it must involve NSAGs that have the minimum level of organisation to be able to conduct military operations. This requirement distinguishes NIACs from other types of internal disturbances where the groups involved lack similar levels of organisation. In assessing whether an armed group is sufficiently organised, the following factors should be taken into consideration: (i) the existence of a responsible command structure, disciplinary rules and mechanisms within the group, (ii) the existence of a headquarters owned by the group; (iii) the fact that the group controls a certain territory; (iv) the group's access to weaponry, other military equipment, recruits and military training; (v) the group's ability to define a unified military strategy and use military tactics, (vi) the group's ability to plan, coordinate and carry out military operations, including troop movements and logistics; and (vii) the group's ability to speak with one voice, negotiate and conclude agreements such as cease-fire or peace accords. See *Prosecutor v. Limaj et al.*, IT-03-66-T, [Judgment](#), 30 November 2005, para. 90; *Prosecutor v. Haradinaj et al.*, IT-04-84-T, [Judgment](#), 3 April 2008 ('*Haradinaj et al. Trial Judgment*'), para. 60; *Prosecutor v. Lubanga*, ICC-01/04-01/06, [Judgment Pursuant to Article 74 of the Statute](#), 14 March 2012 ('*Lubanga Trial Judgment*'), para. 537; *Prosecutor v. Katanga*, ICC-01/04-01/07, [Judgment Pursuant to Article 74 of the Statute](#), 7 March 2014 ('*Katanga Trial Judgment*'), para. 1186; *Prosecutor v. Bemba*, ICC-01/05-01/08, [Judgment Pursuant to Article 74 of the Statute](#), 21 March 2016 ('*Bemba Trial Judgment*'), paras 134-135.

²⁶⁴ In assessing whether this is the case, the following factors can be taken into consideration: (i) the prevalence, duration, geographical scope and intensity of the armed confrontations; (ii) the type of weapons and other military equipment used; (iii) the amount and calibre of munitions used during the conflict; (iv) the fact that the violence cannot be addressed through routine peacetime policing but rather requires the intervention of armed forces; (v) the number of persons and type of forces taking part in the fighting; (vi) the number of casualties and the level of material destruction occurred during the conflict; (vii) the number of civilians fleeing combat zones; and (viii) the fact that the conflict drew the attention of the UN Security Council. See *Haradinaj et al. Trial Judgment*, para. 47; *Lubanga Trial Judgment*, para. 538; *Katanga Trial Judgment*, para. 1187; *Bemba Trial Judgment*, para. 137; *Prosecutor v. Mrkšić et al.*, IT-95-13/1-T, [Judgment](#), 27 September 2007, para. 407.

²⁶⁵ [Rome Statute](#), articles 8(2)(d) and (f); [Additional Protocol II](#), article 1(2); *Lubanga Trial Judgment*, para. 538; *Prosecutor v. Bemba*, ICC-01/05-01/08, [Decision Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo](#), 15 June 2009, para. 231; *Prosecutor v. Lubanga*, ICC-01/04-01/06, [Decision on the Confirmation of Charges](#), 29 January 2007, para. 173; *Prosecutor v. Dordević*, Case No.IT-05-87/1-T, [Judgment](#), 23 February 2011, para. 1522; *Prosecutor v. Boškoski & Tarčulovski*, IT-04-82-T, [Judgment](#), 10 July 2008, para. 185. See also N Melzer [International Humanitarian Law: A Comprehensive Introduction](#) (ICRC, 2016), p. 70.

- (i) *Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;*
- (ii) *Committing outrages upon personal dignity, in particular humiliating and degrading treatment;*
- (iii) *Taking of hostages;*
- (iv) *The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognised as indispensable.*²⁶⁶

Article 8(2)(e) of the Rome Statute criminalises 15 further violations of IHL when committed during NIACs. Albeit more limited in number and lesser in scope, these crimes are largely identical in formulation to those set out under article 8(2)(b).

On the evidence, there is nothing to suggest that an IAC or NIAC existed in The Gambia for any protracted period during the course of Jammeh’s regime. Accordingly, there are no contextual elements capable of supporting a charge of war crimes, which will not be discussed further in this Manual.

2.3.4. The crime of aggression

The crime of aggression was criminalised as a ‘crime against peace’ before the Nuremberg International Military Tribunal (‘IMT’) and the Tokyo IMT, which prosecuted crimes committed by the Nazi and Japanese regimes in the aftermath of World War II, respectively. That said, neither the Nuremberg IMT Charter nor Tokyo IMT clearly defined the crime.²⁶⁷

The subsequent lack of consensus regarding the definition of this crime initially stalled the project for a permanent international criminal court in the 1950s, and even during the negotiations of the Rome Statute, the matter remained extremely controversial.²⁶⁸ As a result, although the crime of aggression was added to the jurisdiction of the ICC under article 5(1)-5(2) of the Rome Statute, several state parties maintained that it shall not be prosecuted unless and until a definition was included by an amendment to the Statute.²⁶⁹ The 2010 Kampala agreement successfully agreed upon such a definition, thereby adopting an amendment defining the crime as:

*“[T]he planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the UN.”*²⁷⁰

²⁶⁶ [Rome Statute](#), article 8(2)(c).

²⁶⁷ Cryer *in* Evans (2018), p. 754.

²⁶⁸ Cryer *et al.* (2015), pp. 310-311.

²⁶⁹ [Rome Statute](#), article 5.

²⁷⁰ [Rome Statute](#), article 8bis.

In its 16th session, the Assembly of State Parties (the ICC's governing body) adopted a resolution resulting in the activation of the jurisdiction of the Court over the crime of aggression from December 2017.²⁷¹ This definition is supplemented by a set of acts of aggression in the ICC Elements of Crimes, which include, for example: the invasion, attack or bombardment by armed forces; the blockade of ports or coasts; or sending of armed bands, groups, irregulars or mercenaries to carry out acts of armed force by one state against another.²⁷²

This crime differs from other crimes in the Rome Statute, in the sense that the ICC may only exercise jurisdiction over it when both the victim's state and alleged aggressor state have ratified the Kampala amendments on aggression and accepted the Court's jurisdiction in relation to it.²⁷³

Nonetheless, again, there is no evidence to suggest that there was an inter-state use of force during Jammeh's regime. Accordingly, the crime of aggression will not be discussed further in this Manual.

²⁷¹ Assembly of State Parties, '[Press Release - Assembly activates Court's jurisdiction over crime of aggression](#)' (ICC, 15 December 2017).

²⁷² See [ICC Elements of Crimes](#), article 8bis(2).

²⁷³ Assembly of State Parties, '[Draft Resolution proposed by the Vice-President of the Assembly - Activation of the jurisdiction of the Court over the crime of aggression](#)' (14 December 2017) ICC-ASP/16/L.10. The Resolution was adopted by consensus on 14 December 2017, with 35 parties to the amendment up until that date. See Cryer *in* Evans (2018) p. 755.

Chapter 3: Crimes Against Humanity – Elements of Crimes

3. Introduction

As noted previously, on the available evidence, of the four ‘core’ international crimes, only crimes against humanity seem relevant for the purposes of this manual. Accordingly, these crimes will constitute the sole focus of this chapter.

3.1. Crimes against humanity - elements of crimes

During the course of the Truth, Reconciliation and Reparations Commission (‘TRRC’) testimonies, there have been numerous allegations relating to conduct that may qualify as crimes against humanity under article 7 of the Rome Statute.²⁷⁴ As with all crimes under the Rome Statute, in order to prove that an accused committed a crime against humanity, prosecutors must establish three essential components beyond a reasonable doubt. These include:

- (i) the contextual elements of the crime;
- (ii) the individual criminal acts that make up the material (physical) element(s) of the crime (*actus reus*); and
- (iii) the required mental elements (*mens rea*), which describe the state of mind of the person who engaged in the acts that constitute the physical and contextual elements of the crime.

Given that it is common to all crimes against humanity under article 7, this chapter will address the contextual element of these offences first, before moving on to describe the operation of mental elements under article 30 of the Rome Statute. As will be seen, these elements are also common to every crime against humanity under article 7, although they operate differently depending upon the crime under consideration. Having done so, the discussion will analyse, in turn, some of the crimes against humanity that are potentially relevant in the Gambian context based upon the evidence arising from TRRC testimonies.

3.2. Proving the contextual element of crimes against humanity under the Rome Statute

The requirement that crimes against humanity must be committed as part of a widespread or systematic attack directed against a civilian population²⁷⁵ can be broken down into two parts, namely that:

- (i) the conduct was committed as part of a widespread or systematic attack directed against a civilian population; and

²⁷⁴ UN General Assembly, Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (‘[Rome Statute](#)’), article 7.

²⁷⁵ International Criminal Court (‘ICC’), Elements of Crimes (2 November 2000 (as amended)) PCNICC/2000/1/Add.2 (‘[ICC Elements of Crimes](#)’), article 7.

- (ii) the accused knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.

3.2.1.Contextual Element One: The conduct was committed as part of a widespread or systematic attack directed against a civilian population

To prove the first contextual element of crimes against humanity, prosecutors must establish that: there was an attack directed against a civilian population; that this attack was widespread or systematic; and that the attack was committed pursuant to or in furtherance of a State or organisational policy to commit such an attack.

There was an attack directed against a civilian population

First, the evidence must therefore demonstrate that there was an attack directed against a civilian population and that the perpetrator's conduct formed a part of this attack.²⁷⁶ To satisfy this element, the attack should involve a course of conduct comprising the multiple commission of acts referred to in article 7(1) of the Rome Statute, against a civilian population.²⁷⁷ It need not be military in nature and may involve any violence carried out in the form of a campaign/operation against a civilian population.²⁷⁸ Civilians must be the primary target of the attack,²⁷⁹ as opposed to members of armed forces or other combatants.²⁸⁰ The presence of non-civilians within a population that is composed primarily of civilians does not alter its civilian status.²⁸¹

The attack was widespread or systematic

Second, the evidence must demonstrate that the attack was either widespread or systematic.²⁸² Whether an attack was widespread will depend upon its large-scale nature and the number of

²⁷⁶ *Prosecutor v. Katanga*, ICC-01/04-01/07, Judgment Pursuant to Article 74 of the Statute, 7 March 2014 ('*Katanga Trial Judgment*'), para. 1124; *Prosecutor v. Bemba*, ICC-01/05-01/08, Judgment Pursuant to Article 74 of the Statute, 21 March 2016 ('*Bemba Trial Judgment*'), para. 165.

²⁷⁷ *Rome Statute*, article 7(2)(a); *Katanga Trial Judgment*, para. 1101; *Prosecutor v. Gbagbo*, ICC-02/11-01/11, Decision on the Confirmation of Charges Against Laurent Gbagbo, 12 June 2014 ('*Gbagbo Decision on Confirmation of Charges*'), para. 209.

²⁷⁸ *Katanga Trial Judgment*, para. 1101; *Gbagbo Decision on Confirmation of Charges*, para. 209; *Prosecutor v. Bemba*, ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009 ('*Bemba Decision on Confirmation of Charges*'), para. 75; *ICC Elements of Crimes* article 7, Introduction, para. 3.

²⁷⁹ *Bemba Decision on Confirmation of Charges*, para. 76; *Prosecutor v. Kunarac et al.*, IT-96-23 & IT-96-23/1-A, Judgment, 12 June 2002 ('*Kunarac et al. Appeal Judgment*'), paras 91-92; *Katanga Trial Judgment*, para. 1104.

²⁸⁰ *Katanga Trial Judgment*, paras 1102-1105.

²⁸¹ *Katanga Trial Judgment*, para. 1105; *Prosecutor v. Jelisić*, IT-95-10-T, Judgment, 14 December 1999 ('*Jelisić Trial Judgment*'), para. 54; *Prosecutor v. Tadić*, IT-94-1T, Judgment, 7 May 1997 ('*Tadić Trial Judgment*'), paras 638-639; *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, 2 September 1998 ('*Akayesu Trial Judgment*'), para. 582; *Prosecutor v. Kayishema et al.*, ICTR-95-1-T, Judgment, 21 May 1999 ('*Kayishema et al. Trial Judgment*'), para. 128.

²⁸² *Situation in the Republic of Kenya*, ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya, 31 March 2010 ('*Situation in the Republic of Kenya Investigation Authorisation Decision*'), para. 94; *Akayesu Trial Judgment*, para. 579; *Prosecutor*

targeted persons.²⁸³ Although there is no fixed minimum threshold in this regard, the International Criminal Court ('ICC') Prosecutor has previously considered that low intensity sporadic attacks, that were limited in geographical scope and that resulted in fewer than 100 deaths and 500 assaults, might not be considered as widespread.²⁸⁴ On the other hand, an attack that resulted in the deaths of around 1,200 civilians over a large geographic area would easily constitute a widespread attack.²⁸⁵ In assessing the widespread nature of an attack, prosecutors might consider the following factors:

- (i) the number of criminal acts committed during the attack;
- (ii) the logistics and resources involved in the attack;
- (iii) the number of victims;
- (iv) the temporal and geographic scope of the attack;
- (v) the alteration of ethnic, religious, racial or political composition of the overall population;
or
- (vi) the cumulative effect of the attack on the population.²⁸⁶

Whether an attack was systematic will depend upon whether it consisted of organised acts of violence, rather than spontaneous or random criminal acts.²⁸⁷ For instance, an attack that involves the targeting of a particular ethnic group with an established methodology (e.g., building roadblocks, laying landmines and conducting coordinated assaults) would point to the

v. *Alfred Musema*, ICTR-96-13-A, [Judgment and Sentence](#), 27 January 2000, para. 203; *Bemba* [Decision on Confirmation of Charges](#), para. 82.

²⁸³ See e.g., *Bemba* [Trial Judgment](#), para. 163; *Katanga* [Trial Judgment](#), para. 1123; *Gbagbo* [Decision on Confirmation of Charges](#), para. 222; *Prosecutor v. Harun & Ali Kushayb*, ICC-02/05-01/07, [Decision on the Prosecution Application under 58\(7\) of the Statute](#), 27 April 2007, para. 62; *Prosecutor v. Kordić & Čerkez*, IT-95-14/2-A, Judgment, 17 December 2004 ('*Kordić & Čerkez* [Appeal Judgment](#)'), para. 94; *Prosecutor v. Blagojević & Jokić*, IT-02-60-T, Trial Judgment, 17 January 2005 ('*Blagojević & Jokić* [Trial Judgment](#)'), paras 545-546.

²⁸⁴ ICC Office of the Prosecutor, '[Report on Preliminary Examination Activities \(2015\)](#)' (12 November 2015), paras 96-100, 301, 307.

²⁸⁵ *Prosecutor v. Katanga & Ngudjolo Chui*, ICC-01/04-01/07, Decision on the Confirmation of Charges, 30 September 2008 ('*Katanga & Chui* [Decision on the Confirmation of Charges](#)'), paras 410-412.

²⁸⁶ *Situation in the Republic of Kenya* [Investigation Authorisation Decision](#), para. 224; *Prosecutor v. Al Bashir*, ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest Against Omar Al Bashir, 4 March 2009 ('*Al Bashir* [Decision on the Prosecution's Application for a Warrant of Arrest](#)'), para. 81.

²⁸⁷ *Katanga* [Trial Judgment](#), para. 1123; *Kordić & Čerkez* [Appeal Judgment](#), para. 94; *Blagojević & Jokić* [Trial Judgment](#), paras 545-546. See also, *Prosecutor v. Blaškić*, IT-95-14-T, Judgment, 3 March 2000 ('*Blaškić*, [Trial Judgment](#)'), para. 658; *Prosecutor v. Brdanin*, IT-99-36-T, Judgment, 1 September 2004 ('*Brdanin* [Trial Judgment](#)'), para. 135; *Prosecutor v. Kunarac et al.*, IT-96-23-T & IT-96-23/1-T, Judgment, 22 February 2001 ('*Kunarac et al.* [Trial Judgment](#)'), para. 429; *Kunarac et al.* [Appeal Judgment](#), para. 94; *Prosecutor v. Blaškić*, IT-95-14-A, Judgment, 29 July 2004 ('*Blaškić* [Appeal Judgment](#)'), para. 101.

systematic nature of that attack.²⁸⁸ Factors to consider in determining whether an attack was systematic include:

- (i) the existence of a pattern of criminal conduct;
- (ii) temporally and geographically repeated and coordinated attacks;
- (iii) the involvement of political or military authorities in the attack;
- (iv) the existence of a plan or policy targeting a civilian population;
- (v) the adoption and institutionalisation of discriminatory procedures against a civilian population; and
- (vi) the means and methods used during the attack.²⁸⁹

The attack was committed pursuant to or in furtherance of a State or organisational policy to commit such attack

Third, prosecutors must establish that the attack was committed pursuant to, or in furtherance of, a state or organisational policy to commit such an attack. In order to do so, the evidence should establish that the attack was deliberately committed by a state or organisation in pursuance or furtherance of a policy, as opposed to being spontaneous, random, or isolated in character.²⁹⁰ An organisation is a group that governs a specific territory or has a sufficient level of organisation and capabilities (i.e., a structure, hierarchy and material capacity) to coordinate a widespread or systematic attack against a civilian population.²⁹¹ A policy means that a State or organisation intended to carry out an attack against a civilian population, whether through its actions or deliberate omissions.²⁹² An attack that was planned, directed, organised, promoted, or actively encouraged by a state or organisation would satisfy this criterion, even if a policy was not formally adopted.²⁹³

Factors that might demonstrate the existence of a state or organisational policy to commit an attack may include:

²⁸⁸ *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, 9 June 2014 (*'Ntaganda Decision on Confirmation of Charges'*), para. 24.

²⁸⁹ *Gbagbo Decision on the Confirmation of Charges*, paras 223-224; *Al Bashir Decision on the Prosecution's Application for a Warrant of Arrest*, paras 79-85; *Semanza v. Prosecutor*, ICTR-97-20-A, *Judgment*, 20 May 2005, paras 268-269; *Kunarac et al. Appeal Judgment*, para. 98; *Prosecutor v. Ruto et al.*, ICC-01/09-01/11, Decision on the Confirmation of Charges Pursuant to Article 61 (7)(a) and (b) of the Rome Statute, 23 January 2012 (*'Ruto et al. Decision on the Confirmation of Charges'*), paras 1699, 181-182; *Akayesu Trial Judgment*, para. 173.

²⁹⁰ *Gbagbo Decision on Confirmation of Charges*, para. 215; *Bemba Decision on Confirmation of Charges*, para. 81; *Katanga Trial Judgment*, para. 1113; *Bemba Trial Judgment*, para. 161.

²⁹¹ *Katanga Trial Judgment*, para. 1119; *Gbagbo Decision on Confirmation of Charges*, para. 217; *Bemba Decision on Confirmation of Charges*, para. 81; *Ruto et al. Decision on the Confirmation of Charges*, para. 185.

²⁹² *Katanga Trial Judgment*, para. 1108.

²⁹³ *Ruto et al. Decision on the Confirmation of Charges*, para. 210; *Gbagbo Decision on Confirmation of Charges*, para. 214.

- (i) the identification and designation of victims by the accused prior to the attack;
- (ii) the preparation or mobilisation of accused prior to the attack;
- (iii) the allocation of substantial resources in preparation for the attack;
- (iv) public statements made prior to the attack;
- (v) meetings among high-ranking officials of a State or organisation prior to the attack where discussions of military nature (e.g., logistics and strategy) took place;
- (vi) the appointment of commanders responsible for the attack; and
- (vii) the recurrence of similar attacks.²⁹⁴

3.2.2. Contextual Element Two: The accused knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population

To prove the second contextual element of crimes against humanity, prosecutors should establish: that the individual conduct was committed as part of the attack, and that the accused was aware that a widespread or systematic attack directed against a civilian population took place and that their action was part of the attack.

The individual conduct was committed as part of the attack

First, in order to establish that the individual criminal act (i.e., murder or torture) was committed within the context of (or as part of) the attack, prosecutors will need to focus on information that shows that the specific act was similar in nature, aim, and consequence to other acts committed during the relevant attack on a civilian population.²⁹⁵

The accused was aware that a widespread or systematic attack directed against a civilian population took place and that their action was part of the attack

Second, to establish that the accused was aware that there was a widespread or systematic attack directed against a civilian population and that their action was part of the attack,²⁹⁶ there must be proof that the accused knowingly participated in the attack.²⁹⁷ That said, the evidence need not establish that the accused had knowledge of all of the characteristics of the attack, nor the precise details of the plan or policy of the state or organisation. Moreover, motive is irrelevant; prosecutors are not required to show that the accused subscribed to the state or organisation's criminal designs or intended their act to form a part of the attack. It is sufficient that the accused

²⁹⁴ *Ruto et al. Decision on Confirmation of Charges*, para. 219; *Katanga Trial Judgment*, para. 1199; *Ntaganda Decision on Confirmation of Charges*, paras 19-20.

²⁹⁵ *Katanga Trial Judgment*, para. 1124; *Bemba Trial Judgment*, para. 165.

²⁹⁶ *Bemba Trial Judgment*, para. 167; *Katanga Trial Judgment*, para. 1123; *Bemba Decision on Confirmation of Charges*, para. 88; *Kunarac et al. Appeal Judgment*, para. 102.

²⁹⁷ *Katanga Trial Judgment*, para. 1125.

knowingly participated in the attack, i.e., that they knew that their actions were part of an attack on a civilian population.²⁹⁸

3.2.3. Proving contextual elements: cues for prosecutors

In seeking to establish whether an accused's conduct fulfilled the required contextual elements, prosecutors may consider the following cues:

Element	Cues
Was there an attack directed against a civilian population?	<ul style="list-style-type: none"> • Was there an attack involving the multiple acts mentioned commission of in article 7? • Did the attack involve any form of violence? • Were civilians the primary target of the attack?
Was the attack widespread?	<ul style="list-style-type: none"> • How many criminal acts were committed during the attack? • What was the geographical / temporal scope of the attack? • How many victims were there and what cumulative effect did the attack have on them?
Was the attack systematic?	<ul style="list-style-type: none"> • Did the acts of violence share a similar pattern? • Were the attacks otherwise organized and coordinated? • Do the means and methods used support show that the attack was organized or coordinated?
Was the attack committed pursuant to or in furtherance of a State or organizational policy to commit such an attack?	<ul style="list-style-type: none"> • Were any military or political authority authorities involved in the attack, including in its ordering? • Were the accused state officials or members of an organisation? • Did the accused identify victims of the attack before it was carried out? • Were the attacks preceded by prior public statements of state authorities?
Did the accused know or intend the conduct to be part of a widespread or	<ul style="list-style-type: none"> • What evidence is there to indicate that accused was

²⁹⁸ *Katanga Trial Judgment*, para. 1125; *Bemba Trial Judgment*, para. 167.

<p>systematic attack directed against a civilian population?</p>	<p>aware of the attack?</p> <ul style="list-style-type: none"> • Is there evidence to show that the accused intended to contribute to the attack (e.g., through statements or comments prior to the attack)? • Was the accused involved in the planning or execution of the attack?
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Table 6: Proving contextual elements: cues for prosecutors

3.3. Proving mental elements under article 30 of the Rome Statute

Article 30 of the Rome Statute sets out the default mental elements that must be established in relation to each physical element of crimes under article 7, and which will apply unless the elements of the crime under consideration require more specific mental elements to be met. It will therefore have relevance for most of the crimes considered below.

Under article 30(1), a person shall be criminally responsible and liable for punishment for a crime only if each material element is committed with intent and knowledge. Under article 30(2), a person has intent where: (a) in relation to conduct, that person means to engage in the conduct; or (b) in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events. Under article 30(3) ‘knowledge’ means awareness that a circumstance exists, or a consequence will occur in the ordinary course of events. ‘Know’ and ‘knowingly’ are construed accordingly.

3.3.1. Article 30(2): *An accused intended to engage in the conduct or bring about a consequence (intent)*

To prove intent, prosecutors must establish that an accused either: (a) meant to engage in *conduct*; or (b) meant to cause a *consequence* or were aware that it would occur in the ordinary course of events. Whether or not an accused is required to have intent in relation to conduct or a consequence will depend upon the elements of the crime in question. For example, the physical element of the crime of murder is that an accused *killed* or *caused the death of a victim*. ‘Killing’ refers to conduct, whilst ‘causing death’ refers to a consequence. The mental elements of murder can therefore be proven in relation to both conduct and/or a consequence.²⁹⁹

Conduct

‘Conduct’ is an act or omission that the accused must do (or not do) to be responsible for a crime.³⁰⁰ Pursuant to article 30(2)(a), where the material (physical) elements of a crime amount

²⁹⁹ Katanga [Trial Judgment](#), para. 781.

³⁰⁰ E Gadirov & R Clark, ‘Article 9: Elements of a Crime’ in O Triffterer *et al.* (eds), *The Rome Statute of the International Court: A Commentary* (Beck/Hart 2016), p. 629; D Pigaroff & D Robinson, ‘Article 30: Mental

to ‘conduct’, the evidence must establish that the accused meant to engage in that conduct (i.e., that they did so voluntarily).³⁰¹ Consequently, it must be ascertained whether the accused acted or deliberately failed to act without regard to the expected result of the action taken.³⁰²

Consequence

The ‘consequence’ of a crime refers to either a completed result, or the creation of a state of harm or risk of harm as required by a physical element of the crime.³⁰³ Where the physical elements of a crime constitute a consequence, the evidence must demonstrate that the accused intended to bring about that consequence, either because they:

- (i) meant to cause that consequence (Rome Statute, article 30(2(b)); or
- (ii) were aware that it would occur in the ordinary course of events (Rome Statute, articles 30(2)(b) and 30(3)).

To establish that the accused meant to cause a consequence, prosecutors must prove that they voluntarily acted to achieve the desired result.³⁰⁴ This requires the accused to have acted deliberately or failed to act in order to cause the consequence.³⁰⁵

Alternatively, if the evidence does not establish that the accused meant to cause the consequence in question, intent can nonetheless be shown if the accused was aware that the consequence would occur in the ordinary course of events.³⁰⁶ The practitioner need only consider this route to establishing intent where there is doubt that the accused meant to cause the consequence. To establish that the accused was aware that the consequence would occur in the ordinary course of events, the evidence must demonstrate that:

- (i) it was foreseeable that the accused’s conduct would cause the consequence of the crime in the ordinary course of events (i.e., unless an unforeseen or unexpected intervention prevented its occurrence).³⁰⁷ Whilst this does not require the consequence to have been an ‘absolute certainty’, following the accused’s conduct, the evidence should demonstrate a

Elements’ in O Triffterer *et al.* (eds), *The Rome Statute of the International Court: A Commentary* (Beck/Hart 2016) (‘Pigaroff & Robinson (2016)’), pp. 1120-1121.

³⁰¹ *Prosecutor v. Lubanga*, ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute, 14 March 2012 (‘*Lubanga Trial Judgment*’), para. 1009; *Prosecutor v. Lubanga*, ICC-01/04-01/06, Decision on the Confirmation of Charges, 29 January 2007 (‘*Lubanga Decision on the Confirmation of Charges*’), paras 351-352; *Katanga Trial Judgment*, para. 774.

³⁰² *Katanga Trial Judgment*, para. 774.

³⁰³ Pigaroff & Robinson (2016), pp. 1121-1122, fn. 74.

³⁰⁴ *Lubanga Trial Judgment*, para. 1009; *Lubanga Decision on the Confirmation of Charges*, paras 351-352; *Katanga Trial Judgment*, para. 774.

³⁰⁵ *Katanga Trial Judgment*, para. 781.

³⁰⁶ *Rome Statute*, article 30(2)(b).

³⁰⁷ *Katanga Trial Judgment*, para. 777; *Bemba Decision on Confirmation of Charges*, para. 362.

‘very high probability’ (or ‘virtual certainty’) that the consequence in question would occur following this conduct;³⁰⁸ and

- (ii) the accused, based on their knowledge of how the events ordinarily develop, was consciously aware of such a high probability (or virtual certainty) and anticipated the occurrence of the consequence in the future.³⁰⁹

3.3.2. Article 30(3): An accused knew that a circumstance existed or that a consequence would occur in the ordinary course of events (knowledge)

Some crimes against humanity require that a certain *circumstance* exists (in addition to the background contextual requirement of a widespread and systematic attack directed against a civilian population). For example, in order to establish the crime against humanity of deportation or forcible transfer, prosecutors must establish that the persons deported or transferred were ‘lawfully present in the area from which they were so deported or transferred’.³¹⁰

Where this is the case, the evidence must demonstrate that the accused was aware that the specific circumstance existed.³¹¹ Awareness requires knowledge on behalf of the accused.³¹² Where a circumstance involves a legal conclusion or value judgment (e.g., the crime against humanity of other inhumane acts requires that the conduct ‘was of a character similar’ to other acts listed as crimes against humanity),³¹³ it is not required that the accused completed a legal evaluation, but simply that they were aware of the relevant facts that established it as such.³¹⁴

3.3.3. Proving mental elements: cues for prosecutors

In seeking to establish whether an accused demonstrated the required mental elements, prosecutors may consider the following cues:

Element	Cues
Do the elements of the crime require more specific mental elements than those contained within article 30?	
Do the elements of the crime require that the accused intentionally	<ul style="list-style-type: none">• Did the accused engage in the prohibited conduct voluntarily?

³⁰⁸ *Prosecutor v. Lubanga*, ICC-01/04-01/06, [Appeal Judgment](#), 1 December 2014, paras 447-450; *Katanga Trial Judgment*, para. 776; *Bemba Decision on Confirmation of Charges*, paras 352-369.

³⁰⁹ *Lubanga Trial Judgment*, para. 1012.

³¹⁰ *ICC Elements of Crimes*, article 7(1)(d).

³¹¹ *Lubanga Trial Judgment*, para. 1274; *Katanga Trial Judgment*, para. 778.

³¹² *Rome Statute*, article 30(3).

³¹³ *ICC Elements of Crimes*, article 7(1)(k).

³¹⁴ *ICC Elements of Crimes*, General Introduction, para. 4.

engaged in conduct?	<ul style="list-style-type: none"> • Did the accused act or fail to act? • Does the evidence indicate that this conduct was deliberate?
Do the elements of the crime require that the accused intentionally caused, or was aware that a consequence would occur in the ordinary course of events?	<ul style="list-style-type: none"> • Did the accused act or fail to act with the purpose of causing the consequence? • If not, was the accused aware of a virtual certainty that the consequence would occur as a result of their action/inaction?
Do the elements of the crime require the accused to have been aware of a specific circumstance?	<ul style="list-style-type: none"> • What are the relevant circumstances that must exist in order to establish the elements of the crime in question? • What does the overall evidence show about the existence of that circumstance? • What evidence was available to the accused to make them aware of that circumstance at the time of their acts (e.g., were they specifically informed of its existence)?

Table 7: Proving mental elements: cues for prosecutors

3.4. Specific elements of crimes against humanity under article 7 of the Rome Statute

The analysis will now turn to those crimes against humanity under article 7 of the Rome Statute that are potentially supported on the evidence arising from TRRC testimonies. These include murder; extermination; enslavement; imprisonment; torture; rape; sexual slavery; enforced prostitution; sexual violence; enforced disappearance; persecution; and other inhumane acts.

3.4.1. Article 7(1)(a): Murder

Article 7(1)(a) of the Rome Statute prohibits murder as a crime against humanity,³¹⁵ which will occur when a person kills or causes the death of another person. Broadly, this correlates with

³¹⁵ [Rome Statute](#), article 7(1)(a). The crime against humanity of murder is also prohibited by: UK, USA, France and USSR, [Charter of the International Military Tribunal](#) – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (8 August 1945) 280 UNTS 1951, article 6 (c); UN, [Charter on the International Military Tribunal for the Far East](#) – Special proclamation by the Supreme Commander for the Allied Powers (19 January 1946), Treaties and Other International Act Series 1589, article 5(c); UN Security Council, Resolution 827: Statute of the International Criminal Tribunal for the Former Yugoslavia (25 May 1993 last amended 9 July 2009) S/RES/827 ('[ICTY Statute](#)'), article 5 (a); UN Security Council, Resolution 955: Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 (8 November 1994 last amended 14 August 2002) S/RES/955 ('[ICTR Statute](#)'), article 3(a); ; UN Security Council, Resolution 1315: Statute of the Special Court for Sierra Leone (16

section 187 of the Gambian Criminal Code, under which murder occurs when a person of malice aforethought unlawfully causes the death of another person.³¹⁶

To prove that an accused committed the crime against humanity of murder, prosecutors must establish that:

- (i) the accused killed (or caused the death) of one or more persons;
- (ii) the conduct was committed as part of a widespread or systematic attack directed against a civilian population; and
- (iii) the accused knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.³¹⁷

The accused killed or caused the death of one or more persons

Firstly, prosecutors must establish that the accused *killed or caused the death* of one or more persons. In order to do so, they must demonstrate that: (i) a victim is dead and; (ii) that there is a causal link between the accused's unlawful act and that death.³¹⁸ To establish that a victim is dead, prosecutors do not have to recover the victim's body.³¹⁹ Where they rely on circumstantial evidence to establish that a killing has taken place, they also do not have to identify the exact number, nor precise identity of the alleged victims,³²⁰ as long as their death is the only reasonable conclusion that can be drawn from the evidence.³²¹ However, to the extent possible they will be expected to identify:

- (i) the location of the alleged murder;
- (ii) its approximate date;
- (iii) the means by which the act was committed;
- (iv) the circumstances of the incident; and

January 2000) S/RES/1315 ('[Statute of the Special Court for Sierra Leone](#)'), article 2(a); UN & Royal Government of Cambodia, Law on the Establishment of the Extraordinary Chambers in the courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, (27 October 2004) NS/RKM/1004/006 ('[Law on the Establishment of ECCC](#)'), article 5.

³¹⁶ Gambian Criminal Code, section 190; The Gambian Criminal Code recognises malice aforethought in four circumstances (see section 190).

³¹⁷ [ICC Elements of Crimes](#), article 7(1)(a); [Akayesu Trial Judgment](#), para. 589; [Jelisić Trial Judgment](#), para. 35.

³¹⁸ [Bemba Decision on Confirmation of Charges](#), para. 132; [Akayesu Trial Judgment](#), para. 189; [Blaškić Trial Judgment](#), paras 216-217.

³¹⁹ [Bemba Trial Judgment](#), para. 88.

³²⁰ [Katanga & Chui Decision on the Confirmation of Charges](#), para. 422.

³²¹ [Katanga Trial Judgment](#), para. 768; [Bemba Decision on Confirmation of Charges](#), para. 132; *Prosecutor v. Krnojelac*, IT-97-25-T, Judgment, 15 March 2002 ('[Krnojelac Trial Judgment](#)'), para. 326; [Brdanin Trial Judgment](#), para. 385; *Prosecutor v. Popović et al.*, IT-05-88-T, Judgment, 10 June 2010 ('[Popović et al. Trial Judgment](#)'), para. 789.

(v) the causal link between the accused's act or omission and the crimes.³²²

To establish this causal link, prosecutors must prove that the relevant action or omission was a substantial (but not necessarily the sole) cause of that death.³²³ Just as in section 187 of the Gambian Criminal Code, this link can be established through the unlawful action *or omission* of the accused.³²⁴

General contextual and mental elements

Finally, prosecutors will also have to satisfy the general contextual element common to all crimes against humanity (i.e., that the crime was committed as part of a widespread and systematic attack directed against a civilian population, and that the accused knew or intended the conduct to be part of this attack). Additionally, they must satisfy the mental elements that accompany the physical elements of the crime (i.e., that the accused killed or caused the death of one or more persons). These elements are discussed in detail above (*see* sections 3.2.3 and 3.3.3).

Proving murder: cues for prosecutors

In seeking to establish whether an accused could be liable for murder as a crime against humanity, prosecutors may consider the following cues:

Element	Cues
Does the direct or circumstantial evidence show that a victim is dead?	<ul style="list-style-type: none">• Is there direct evidence that the accused killed the victim (e.g., by an act of violence)?• Is there circumstantial evidence showing that the only reasonable conclusion is that the accused killed the victim and/or other unidentified persons?• What was the location, date, and circumstances of the murder?
Does the evidence show a causal link between the accused's actions and the victim's death?	<ul style="list-style-type: none">• Did the accused kill or cause the death the victim through an act or omission?• What were the means by which the conduct was committed?• Were the accused's conduct a substantial cause of the death?

Table 8: Proving murder: cues for prosecutors

³²² *Bemba Decision on Confirmation of Charges*, para. 133; *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgment, 16 November 1998 ('*Delalić et al. Trial Judgment*'), para. 424.

³²³ *Katanga & Chui Decision on the Confirmation of Charges*, para. 296; *Krnojelac Trial Judgment*, paras 328-329, 342; *Delalić et al. Trial Judgment*, para. 424. *See also* Gambian Criminal Code, section 193.

³²⁴ *Katanga & Chui Decision on the Confirmation of Charges*, para. 287; *Bemba Decision on Confirmation of Charges*, para. 132; *Popović et al. Trial Judgment*, para. 788; *Akayesu Trial Judgment*, para. 589.

3.4.2. Article 7(1)(b): Extermination

Article 7(1)(b) of the Rome Statute prohibits extermination as a crime against humanity, which will occur when:

- (i) the accused killed one or more persons, including by inflicting conditions of life calculated to bring about the destruction of part of a population;
- (ii) the conduct constituted, or took place as part of, a mass killing of members of a civilian population;
- (iii) the conduct was committed as part of a widespread or systematic attack directed against a civilian population; and
- (iv) the accused knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.³²⁵

The accused killed or caused the death of one or more persons

Firstly, prosecutors must prove that an accused killed one or more persons. This element is identical to the first element of murder and as such, the factors discussed above to prove killing or causing death (i.e., that a victim is dead and that there is a causal link between the accused's acts and that death) are also relevant here. Extermination also expressly encompasses killings inflicted through indirect means of causing death, such as 'by inflicting conditions of life calculated to bring about the destruction of part of a population.'³²⁶

The conduct constituted, or took place as part of, a mass killing of civilians

The second element of extermination specifies that the killing must have itself constituted, or taken place as part of, a mass killing of the civilian population.³²⁷ This specific contextual element (which operates in addition to, and does not displace, the general contextual element common to all crimes against humanity) is crucial: whilst a single killing may suffice, it must nonetheless have been inflicted with at least an awareness of the necessary context of mass killing in order to be considered as extermination.³²⁸ The term 'mass killing' generally refers a significant number of killings with close proximity in time and space.³²⁹ This element does not require a specific or minimum number deaths, which should be determined on a case-by-case basis.³³⁰ That said, in previous cases, the killing of over 1000 civilians during an attack on a town

³²⁵ [ICC Elements of Crimes](#), article 7(1)(b).

³²⁶ [ICC Elements of Crimes](#), article 7(1)(b).

³²⁷ [ICC Elements of Crimes](#), article 7(1)(b); *Kayishema et al. Trial Judgment*, para. 147.

³²⁸ *Prosecutor v. Vasiljević*, IT-98-32-T, Judgment, 29 November 2002 ('*Vasiljević Trial Judgment*'), para. 228.

³²⁹ *Kayishema et al. Trial Judgment*, para. 147.

³³⁰ *Kayishema et al. Trial Judgment*, para. 145.

has led to charges of extermination being successfully obtained,³³¹ whilst in later cases the killings of groups of up to 32 have been charged as murder.³³²

General contextual and mental elements

Finally, in addition to this specific contextual requirement, prosecutors will also have to satisfy the general contextual element common to all crimes against humanity (i.e., that the crime was committed as part of a widespread and systematic attack directed against a civilian population, and that the accused knew or intended the conduct to be part of this attack). Additionally, they must also satisfy the mental elements that accompany the physical elements of the crime (i.e., that the accused killed or caused the death of one or more persons). These elements are discussed in detail above (*see* sections 3.2.3 and 3.3.3).

Proving extermination: cues for prosecutors

In seeking to establish whether an accused could be liable for extermination as a crime against humanity, prosecutors may consider the following cues:

Element	Cues
Did the accused kill the victim?	<ul style="list-style-type: none"> • Is there direct evidence that the accused killed the victim (e.g., by an act of violence)? • Is there circumstantial evidence showing that the only reasonable conclusion is that the accused killed the victim and/or other unidentified persons? • What was the location and date of the murder? • What were the means and by which the act was committed?
If not, did the accused cause the death of the victim?	<ul style="list-style-type: none"> • Did the accused ‘inflict conditions of life calculated to bring about the destruction of part of a population’?³³³ • Was the accused’s conduct comparable in nature or severity to: deliberately depriving a population ‘of access to food and medicine’;³³⁴ denying detainees access to necessities for life (e.g., water or sanitation); or ‘introducing a deadly virus into a

³³¹ *Al Bashir* [Decision on the Prosecution’s Application for a Warrant of Arrest](#), para. 97.

³³² *Prosecutor v. Muhammad Hussein*, ICC-02/05-01/12, [Public Redacted version of Decision on the Prosecutor’s Application under Article 58 Relating to Abdel Raheem Muhammad Hussein](#), 1 March 2012, para. 11.

³³³ [ICC Elements of Crimes](#), article 7(1)(b).

³³⁴ [ICC Elements of Crimes](#), article 7(1)(b). *See also*, *Prosecutor v. Bagilishema*, ICTR-95-1A-T, Judgment, 7 June 2001 (‘*Bagilishema Trial Judgment*’), para. 90; *Kayishema et al. Trial Judgment*, para. 146.

	population and preventing medical care which results in mass death’? ³³⁵
Is there causal link between the accused’s acts and the victim’s death?	<ul style="list-style-type: none"> • Did the accused kill or cause the death the victim through an act or omission? • What were the means by which the act or omission was committed? • Were the accused’s actions a substantial cause of the death?
Is the specific contextual element satisfied?	<ul style="list-style-type: none"> • Did the killing/circumstances causing death take place in the context of a ‘mass killing’ event? • How many killings were there? • Did these killings have close proximity in time and space?

Table 9: Proving extermination: cues for prosecutors

3.4.3. Article 7(1)(c): Enslavement

Article 7(1)(c) of the Rome Statute prohibits enslavement as a crime against humanity, which will occur when:

- (i) the accused exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty;
- (ii) the conduct was committed as part of a widespread or systematic attack directed against a civilian population;
- (iii) the accused knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.³³⁶

An accused exercised rights or powers of ownership over one or more persons

In order to establish that an accused committed the crime of enslavement, prosecutors must first establish that they exercised any or all of the powers attaching to the right of ownership over one or more persons.

In light of the reference to purchasing, selling, lending or bartering, it is evident that the first element of enslavement encompasses ‘chattel’ or ‘transactional’ slavery.³³⁷ This refers to forms of slavery in which slaves are treated as property capable of being traded or inherited, a

³³⁵ Kayishema et al. [Trial Judgment](#), para. 146. See also, Bagilishema [Trial Judgment](#), para. 450.

³³⁶ [ICC Elements of Crimes](#), article 7(1)(d).

³³⁷ R Cryer et al. (eds), *An Introduction to International Criminal Law and Procedure* (3rd ed CUP 2015) (‘Cryer et al. (2015)’), p. 473.

circumstance prohibited by section 20 of the 1997 Gambian Constitution and sections 240-241 of the Gambian Criminal Code, which criminalise the purchase or disposal of,³³⁸ or habitual dealing in,³³⁹ persons as slaves, respectively.

Additionally, article 7(1)(c) of the Rome Statute contemplates similar circumstances in which, despite not being exposed to more extreme ‘chattel slavery’, victims are nonetheless placed into a ‘situation of dependence which entails his or her deprivation of any form of autonomy.’³⁴⁰ Consistent with the various forms of slave dealing criminalised in section 230A of the Gambian Criminal Code, this may include trafficking in persons (particularly women and children)³⁴¹ or otherwise reducing a person to servile status, including through debt bondage, serfdom, forced marriage, child exploitation, or forced labour.³⁴² Whether or not contemporary notions of slavery satisfy the definition of enslavement can often be a matter of degree.³⁴³ Consequently, whilst equally severe, they are often less easily identifiable than traditional examples of ‘chattel slavery’. Importantly, however, in these circumstances, prosecutors should be aware that despite being a potentially helpful evidentiary factor in determining whether an accused’s actions fall within article 7(1)(c), the (non-) consent of the victim is not an element of enslavement, which is instead exclusively concerned with exercise of rights of ownership of another person.³⁴⁴ Indeed:

*“slaves may be well fed, well clothed, and comfortably housed, but they are still slaves if without lawful process they are deprived of their freedom by forceful restraint [...] involuntary servitude, even if tempered by humane treatment, is still slavery.”*³⁴⁵

³³⁸ This includes the import, export, removal, purchase, disposal of another person as a slave, or the acceptance or receipt or detention against their will a person as a slave.

³³⁹ Habitual dealing in slaves includes the habitual import, export, removal, purchase, sale, or trafficking of another person as a slave.

³⁴⁰ *Katanga Trial Judgment*, para. 975.

³⁴¹ Trafficking is also criminalised in The Gambia via section 28 of the Trafficking in Persons Act 2007.

³⁴² The ICC Elements of Crimes state that: ‘[i]t is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956.’ See *ICC Elements of Crimes*, fn. 11. See also, *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Judgment, 8 July 2019 (*‘Ntaganda Trial Judgment’*), para. 952; *Kunarac et al. Appeal Judgment*, paras 119, 121; *Katanga Trial Judgment*, para. 976; *Prosecutor v. Sesay et al.*, SCSL-04-15-T, Judgment, 2 March 2009 (*‘Sesay et al. Trial Judgment’*), para. 160; *Prosecutor v. Taylor*, SCSL-03-01-T, Judgment, 18 May 2012 (*‘Taylor Trial Judgment’*), para. 420.

³⁴³ In *Katanga*, the Court made it clear that the chamber would ‘undertake a case-by-case analysis’ in order to prove the exertion of powers which might be associated with the right of ownership. See *Katanga Trial Judgment*, para. 976.

³⁴⁴ *Kunarac et al. Appeal Judgment*, paras 120-121; OHCHR, *Update to the Final Report of the UN Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-like Practices During Armed Conflict* (6 June 2000) E/CN.4/Sub.2/2000/21, para. 51.

³⁴⁵ *US v. Oswald Pohl & Others* (Opinion and Judgment), Case No. 4 (US Military Tribunals sitting in the Palace of Justice in Nuremberg, 3 November 1947) reprinted in *Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council No. 10, Vol 5*, (1997), pp. 958, 970, as quoted in *Kunarac et al. Appeal Judgment*, para. 123.

General mental and contextual elements

Finally, prosecutors will also have to satisfy the general contextual element common to all crimes against humanity (i.e., that the crime was committed as part of a widespread and systematic attack directed against a civilian population, and that the accused knew or intended the conduct to be part of a widespread or systematic attack against a civilian population). They will also have to satisfy the mental elements that accompany the physical elements of the crime (i.e., that the accused exercised any or all of the powers attaching to the right of ownership over one or more persons, which amounts to conduct under article 30). These elements are discussed in detail above (*see* sections 3.2.3 and 3.3.3).

Proving enslavement: cues for prosecutors

In seeking to establish whether an accused could be liable for enslavement as a crime against humanity, prosecutors may consider the following cues:

Element	Cues
Did the accused exercise any or all of the powers attaching to the right of ownership over one or more persons?	<ul style="list-style-type: none">• Did the accused's actions amount to chattel slavery?• If not, did the accused's actions nonetheless deprive the victim of their liberty, including through exercising physical or psychological control over them by preventing or deterring their escape through force, threat of force, coercion, cruel treatment, abuse, or control of sexuality?³⁴⁶• If the actions involved the victim's labour, were the circumstances such that they amounted to forced labour under the relevant international instruments,³⁴⁷ or because the conditions of labour were so bad that it was impossible for detainees to consent to work? Relevant considerations in this regard will include situations in which labour is characterised by severely overcrowded

³⁴⁶ *Kunarac et al. Appeal Judgment*, para. 119; *Katanga Trial Judgment*, para. 976, in particular fn. 2299 and references cited therein; *Prosecutor v. Ongwen*, ICC-02/04-01/15, Decision on the Confirmation of Charges against Dominic Ongwen, 23 March 2016 ('*Ongwen Decision on the Confirmation of Charges*'), paras 136-139.

³⁴⁷ Geneva Convention (III) Relative to the Treatment of Prisoners of War' (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 ('*Geneva Convention III*'), articles 49-57; *Geneva Convention Relative to the Protection of Civilian Persons in Times of War* (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287, article 40; UN General Assembly, International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 ('*ICCPR*'), article 8(3)(c); *Convention Concerning Forced or Compulsory Labour* (ILO No. 29) (adopted 10 June 1930, entered into force May 1, 1932) 39 UNTS 55.

	conditions, a lack of food or sanitation, or other deplorable living conditions. ³⁴⁸
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Table 10: Proving enslavement: cues for prosecutors

3.4.4. Article 7(1)(e): Imprisonment

Article 7(1)(e) of the Rome Statute prohibits the crime against humanity of imprisonment or other severe deprivation of physical liberty in a manner that violates fundamental rules of international law.³⁴⁹ The elements of the offence are as follows:

- (i) the accused imprisoned one or more persons or otherwise severely deprived one or more persons of physical liberty;
- (ii) the gravity of the conduct was such that it was in violation of fundamental rules of international law;
- (iii) the accused was aware of the factual circumstances that established the gravity of the conduct;
- (iv) the conduct was committed as part of a widespread or systematic attack directed against a civilian population; and
- (v) the accused knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.³⁵⁰

The accused imprisoned/severely deprived one or more persons of physical liberty

To satisfy the first element of imprisonment, prosecutors must prove that the accused imprisoned or otherwise severely deprived one or more persons of physical liberty. Deprivations of physical liberty may include, for example, house arrest, restriction to a closed city, or similarly severe restrictions, including internment in concentration or detention camps or other forms of long-term detention.³⁵¹

To establish that a deprivation of liberty was sufficiently severe as to fall within the ambit of article 7(1)(e), prosecutors may consider a number of indicative factors, such as:

- (i) whether the detainee was subjected to torture or other cruel, inhuman or degrading treatment, including crimes of sexual violence, or other intimidation;

³⁴⁸ *Krnojelac Trial Judgment*, paras 359-360. See also, *Prosecutor v. Naletilić et al.*, IT-98-34-T, *Judgment*, 31 March 2003, para. 259.

³⁴⁹ The crime against humanity of imprisonment is also prohibited by: *ICTY Statute*, article 5(e); *ICTR Statute*, article 5(e); *Statute of the SCSL*, article 2(e). The prohibition on the arbitrary deprivation of liberty is a norm of customary international law applicable in both international and non-international armed conflicts.

³⁵⁰ *ICC Elements of Crimes*, article 7(1)(e).

³⁵¹ *Prosecutor v. Kordić & Čerkez*, IT-95-14/2-T, *Judgment*, 26 February 2001 ('*Kordić & Čerkez Trial Judgment*'), para. 299.

- (ii) whether the detention was secret;
- (iii) whether the detainee was cut off from the outside world; and/or
- (iv) whether the detention was part of a series of repeated detentions.³⁵²

The gravity of the conduct was such that it violated fundamental rules of international law

Second, prosecutors must establish that this detention or deprivation of liberty was arbitrary³⁵³ and that this arbitrary detention was sufficiently grave as to violate fundamental rules of international law. Under international law, detention will be arbitrary when:

- (i) there is no legal basis for the deprivation of liberty;
- (ii) the deprivation of liberty results from the exercise of specified rights and freedoms (such as the rights to freedom of speech, conscience, assembly, association, and movement);³⁵⁴ or
- (iii) the total or partial non-observance of international human rights norms relating to the right to a fair trial is of such gravity as to give the deprivation of liberty or imprisonment an arbitrary character.³⁵⁵

Arbitrary detention will be sufficiently grave when it violates fundamental rules of international law. This entails more than minor procedural errors in legal due processes and requires, at a minimum, that the detention resulted in a violation of internationally recognised human rights, including, non-exhaustively:³⁵⁶

- (i) the guarantees of the right to a fair trial, such as the rights to prompt access to families, counsel, independent medical attention and a judge;³⁵⁷

³⁵² C K Hall *et al.*, 'Article 7: General Introduction' in Triffterer *et al.* (eds), *The Rome Statute of the International Court: A Commentary* (Beck/Hart 2016) ('Hall *et al.* (2016)'), p. 202.

³⁵³ Kordić & Čerkez [Trial Judgment](#), paras 299, 302; Krnojelac [Trial Judgment](#), para. 113. See also, Hall *et al.* (2016), p. 201. For this reason, arbitrary imprisonment will not include lawful deprivations of liberty, including 'lawful arrest, conviction following trial, lawful deportation or extradition procedures, quarantine, and, during armed conflict, assigned residence, internment on security grounds and internment of prisoners-of-war': Cryer *et al.* (2015), p. 475.

³⁵⁴ See [Gambian Constitution](#), article 25.

³⁵⁵ Report of UN Working Group on Arbitrary Detention, 'Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment - Report of the Working Group on Arbitrary Detention, Annex I: Revised Methods of Work' (19 December 1997) E/CN.4/1998/44, para. 8. Many of these situations correspond to protections afforded by the [Gambian Constitution](#). See *e.g.*, sections 19, 25, and 26.

³⁵⁶ Hall *et al.* (2016), p. 202.

³⁵⁷ See UN General Assembly, 'United Nations Standard Minimum Rules for the Treatment of Prisoners' (13 May 1977) A/RES/70/175, rules 27, 58; Council of Europe, 'European Prison Rules' (Council of Europe Publishing, June 2006), paras 23.1, 24.1 & 41.1; UN General Assembly, Resolution 43 /173: UNGA, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (9 December 1988) A/RES/43/173 ('[Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment of 1988](#)'), principle 15; [ICCPR](#), article 9(3). See generally, [Gambian Constitution](#), article 24 ('Provision to Secure Protection of the Law and Fair Play').

- (ii) the right to have the lawfulness of one's detention promptly determined by a court and to be released if the detention was unlawful;³⁵⁸
- (iii) the right to an independent, impartial and competent court;³⁵⁹
- (iv) the right to representation by counsel;³⁶⁰ and
- (v) the right to an appeal.³⁶¹

TRRC testimonies have revealed a number of allegations of conduct that may amount to severe deprivations of liberty in this manner. Witness Batch Samba Jallow, for example, recounted being arrested and dragged from his home at 4AM on 12 October 1995 by National Intelligence Agency ('NIA') officials, following which he was taken to NIA headquarters, where he was beaten, interrogated and brutally tortured during the next five or six days.³⁶² From there, he was then transferred to the Kotu police station for further interrogations and beatings.³⁶³ After three or four days,³⁶⁴ NIA agents³⁶⁵ transferred the witness³⁶⁶ to Fajara Barracks,³⁶⁷ where he was detained for the next 14 months.³⁶⁸ During this time, he had no access to any of the fair trial guarantees discussed in this section. His family also did not know of his whereabouts.³⁶⁹

The accused was aware of the factual circumstances establishing the gravity of the conduct

In order to satisfy the third element of the crime against humanity of imprisonment or other severe deprivation of physical liberty, prosecutors must establish that the accused was aware of the factual circumstances that established the gravity of the conduct. This element amounts to a requirement that the accused have knowledge of a specific circumstance under article 30 (*see* sections 3.3 and 3.3.2). Accordingly, it requires the accused to have had knowledge of the factual circumstances that established the gravity of the conduct. However, it is not required that the

³⁶² [Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment of 1988](#), Principles 9-13; [ICCPR](#), article 9(3). *See also*, [Gambian Constitution](#), article 24(1).

³⁵⁹ UN General Assembly, Universal Declaration of Human Rights (10 December 1948) A/Res/217(III) ('[UDHR](#)'), articles 3, 10; UN General Assembly, Resolutions 40/32 & 40/146: Basic Principles on the Independence of the Judiciary (29 November to 13 December 1985) A/RES/40/32 & 40/146 ('[Basic Principles on the Role of Lawyers](#)'). *See also*, [Gambian Constitution](#), article 24(1).

³⁶⁰ [Basic Principles on the Role of Lawyers](#), para.1. *See also* [Gambian Constitution](#), article 24(3)(d).

³⁶¹ [European Prison Rules](#), para. 61.

³⁶² QTV Gambia '[TRRC DAY 13 Pt1 28.01.2019](#)' (28 January 2019) 17:30 – 25:05.

³⁶³ QTV Gambia '[TRRC DAY 13 Pt2 28.01.2019](#)' (28 January 2019) 26:10.

³⁶⁴ QTV Gambia '[TRRC DAY 13 Pt2 28.01.2019](#)' (28 January 2019) 35:37.

³⁶⁵ QTV Gambia '[TRRC DAY 13 Pt2 28.01.2019](#)' (28 January 2019) 38:20.

³⁶⁶ QTV Gambia '[TRRC DAY 13 Pt2 28.01.2019](#)' (28 January 2019) 37:48.

³⁶⁷ QTV Gambia '[TRRC DAY 13 Pt2 28.01.2019](#)' (28 January 2019) 38:00.

³⁶⁸ Aneked, 'Truth, Reconciliation & Reparations Commission (TRRC) Digest Edition 1' ('[Aneked TRRC Digest 1](#)'), p. 27.

³⁶⁹ QTV Gambia '[TRRC DAY 13 Pt2 28.01.2019](#)' (28 January 2019) 33:40.

accused completed any legal evaluation as to whether their actions were in violation of fundamental rules of international law.³⁷⁰

General mental and contextual elements

Finally, in addition to this specific knowledge requirement, prosecutors will also have to satisfy the general contextual element common to all crimes against humanity (i.e., that the crime was committed as part of a widespread and systematic attack directed against a civilian population, and that the accused knew or intended the conduct to be part of this attack). Additionally, they must satisfy the mental elements that accompany the physical elements of the crime (i.e., that the accused imprisoned or otherwise severely deprived a victim of their liberty), which amounts to conduct under article 30. These elements are discussed in detail above (*see* sections 3.2.3 and 3.3.3).

Proving imprisonment: cues for prosecutors

In seeking to establish whether an accused could be liable for the crime against humanity of imprisonment or other severe deprivation of physical liberty, prosecutors may consider the following cues:

Element	Cues
Was the deprivation of liberty arbitrary?	<ul style="list-style-type: none"> • Was there a legal basis for the detention? • Did the detention result from the victim's exercise of specified rights and freedoms? • Did the detention recognise the accused's right to fair trial?
Was the arbitrary detention of such a gravity that it violated fundamental rules of international law?	<ul style="list-style-type: none"> • Were the factors that characterised the detention as arbitrary more than minor procedural errors? • Could the accused contact the outside world, in particular their family, to inform them of their well-being, location, and the charges against them? • Did the victim have the ability to access a competent court / counsel? • Did the victim have access to independent medical attention?

³⁷⁰ J Nilsson, 'Article 7(1)(e)' in M Klamberg (ed), *Commentary on the Law of the International Criminal Court* (1st ed Torkel Opsahl Academic Publisher 2017), pp. 47-48.

	<ul style="list-style-type: none"> • Did the victim have the right to an appeal?
Was the accused aware of the factual circumstances that established the gravity of the conduct?	<ul style="list-style-type: none"> • Did the accused knowingly commit the conduct that rendered the victim's detention arbitrary?

Table 11: Proving imprisonment: cues for prosecutors

3.4.5. Article 7(1)(f): Torture

Article 7(1)(f) of the Rome Statute prohibits the crime against humanity of torture. Under article 7(2)(e), 'torture' is defined as 'the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.'³⁷¹ The elements of the offence are as follows:

- (i) the accused inflicted severe physical or mental pain or suffering upon one or more persons;
- (ii) such person or persons were in the custody or under the control of the accused;
- (iii) such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions;
- (iv) the conduct was committed as part of a widespread or systematic attack directed against a civilian population; and
- (v) the accused knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.³⁷²

The accused inflicted severe harm upon the victim

To satisfy the first element of the offence of torture, prosecutors must establish that the accused inflicted severe harm upon the victim. Severity in this case serves to differentiate harm amounting to torture (and therefore capable of being classified as a crime against humanity), from other cruel, inhuman and degrading treatment.³⁷³ This contrasts with the approach taken

³⁷¹ The prohibition on torture is well recognised as being part of customary international law norm and is also as a *jus cogens* norm, from which no derogation is permitted. See *Delalić et al. Trial Judgment*, para. 454; *Kunarac et al. Appeal Judgment*, paras 146-147; *Prosecutor v. Brdanin*, IT-99-36-A, Judgment, 3 April 2007 ('*Brdanin Appeal Judgment*'), para. 246, citing to *Kunarac et al. Appeal Judgment*, para. 146; *Prosecutor v. Furundžija*, IT-95-17/1-A, Judgment, 21 July 2000 ('*Furundžija Appeal Judgment*'), para. 111; *Prosecutor v. Karadžić*, IT-95-5/18-T, Judgment, 24 March 2016, para. 505; *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (Judgment) (2012) ICJ Reports 422, para. 55.

³⁷² *ICC Elements of Crimes*, article 7(1)(f).

³⁷³ This is the approach followed by a number of regional human rights bodies, including the European Court of Human Rights. See *Ireland v. UK*, Application No. 5310/71 (ECHR, 18 January 1978), para. 162.

under the Convention against Torture ('CAT') and within the jurisprudence of the *ad hoc* tribunals, where torture is distinguished from other cruel, inhuman and degrading treatment on the basis that the harm must have been inflicted for a prohibited purpose, which is not a requirement for torture under the Rome Statute³⁷⁴ (*see* section 1.4.2).

There is no "precise threshold for determining what degree of suffering is sufficient to meet the definition of torture."³⁷⁵ Consequently, 'severity' will be determined on a case-by-case basis, and will depend upon two factors:

- (i) the objective severity of the harm; and
- (ii) the subjective severity of the harm.³⁷⁶

The objective severity of harm refers to the type of harm and number of stressors inflicted on the victim. In some cases, the objective severity of acts (e.g., the mutilation of body parts), will be so great that it is sufficient to satisfy the definition of torture *per se*, without recourse to subjective factors. In others, however, the severity of the harm will be dependent upon subjective factors arising in the circumstances. Subjective severity refers to the physical and mental effects of harm upon a particular victim, which can vary with age, sex, or underlying health conditions,³⁷⁷ or because of other factors relating to the detention, such as the length and cumulative effects of detention and mistreatment.³⁷⁸ Also relevant in this regard will be the general atmosphere and conditions of detention; the absence of medical care after abuse; the repetitive or systematic character of any mistreatment; and the nature, purpose, and consistency of abuse.³⁷⁹ It should be stressed that rape has been recognised as falling within the crime against humanity of torture by the *ad hoc* tribunals,³⁸⁰ although it has yet to be brought as such in front of the ICC.³⁸¹

³⁷⁴ Namely to obtain information, or a confession, or to punish, intimidate, humiliate or coerce the victim or a third person, or to discriminate, on any ground, against the victim or a third person. *See* UN General Assembly, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 ('CAT'), article 1; *Akayesu Trial Judgment*, para. 594 (adopting the prohibited purposes contained in the convention); *Delalić et al. Trial Judgment*, paras 470-472, 494, 941, 963; *Prosecutor v. Furundžija*, IT-95-17/1-T, Judgment, 10 December 1998 ('*Furundžija Trial Judgment*'), para. 162; *Furundžija Appeal Judgment*, para. 111(iii); *Kunarac et al. Trial Judgment*, para. 485.

³⁷⁵ *Prosecutor v. Kvočka et al.*, IT-98-30/1-T, Judgment, 2 November 2001 ('*Kvočka et al. Trial Judgment*'), para. 143.

³⁷⁶ *Kvočka et al. Trial Judgment*, para. 143.

³⁷⁷ *Kvočka et al. Trial Judgment*, paras 142-143, 148; *Brđanin Trial Judgment*, paras 482-484. *See also*, *Prosecutor v. Naletelić & Martinović*, IT-98-34-A, Judgment, 3 May 2006, para. 300; *Krnojelac Trial Judgment*, para. 182; *Kunarac et al. Trial Judgment*, para. 182; *Prosecutor v. Martić*, IT-95-11-T, Trial Judgment, 12 June 2007 ('*Martić Trial Judgment*'), para. 75 (duration of the suffering inflicted, nature of the crimes, physical or mental condition of the victim, the victim's age, and the victim's position of inferiority to the perpetrator).

³⁷⁸ *Krnojelac Trial Judgment*, para. 182. It should be stressed that when considering the mental elements associated with severity, it is not necessary to prove that the accused knew that the harm they inflicted was of sufficient severity to constitute torture; it is sufficient that they intended the conduct and that the victim endure severe pain or suffering: *Bemba Decision on Confirmation of Charges*, para. 194.

³⁷⁹ *Kvočka et al. Trial Judgment*, para. 151.

³⁸⁰ *Kunarac et al. Appeal Judgment*, para. 151 ('severe pain or suffering, as required by the definition of the crime of torture, can thus be said to be established once rape has been proved, since the act of rape necessarily implies such

The accused inflicted the harm whilst the victim was in their custody

To satisfy the second element of torture, prosecutors must establish that the accused inflicted harm whilst the victim was under their custody or under their control. This will rarely be a difficult threshold to surpass, given that some form of detention or control will usually be necessary for the infliction of torturous acts.³⁸² This is particularly so given that, in further contradiction to the CAT,³⁸³ the Rome Statute does not require the accused to have held an official position, nor to have acted in an official capacity at the time that the conduct took place. As such, the custody requirement does not limit torture to harm inflicted upon victims in the detention of state forces, such as the military or the police.

The harm was not inherent in / incidental to lawful sanctions

The third element of torture as a crime against humanity stresses that torture will not arise where the harm is inherent in, or incidental to, detention arising from lawful sanctions. However, this is contingent upon those sanctions being consistent with international law.³⁸⁴ As such, harm inflicted as a result of domestic punishments that were arbitrary and/or clearly cruel or inhuman, would still be capable of being classed as torture for the purposes of the Rome Statute.

General contextual and mental elements

Finally, prosecutors must also satisfy the general contextual element common to all crimes against humanity (i.e., that the crime was committed as part of a widespread and systematic attack directed against a civilian population, and that the accused knew or intended the conduct to be part of this attack). Additionally, they must also satisfy the mental elements that accompany the physical elements of the crime (i.e., that the accused inflicted severe harm upon a person within their custody or control, which amounts to conduct under article 30). These elements are discussed in detail above (*see* sections 3.2.3 and 3.3.3).

Proving torture: cues for prosecutors

In seeking to establish whether an accused could be liable for torture as a crime against humanity, prosecutors may consider the following cues:

pain or suffering’); *Delalić et al. Trial Judgment*, paras 495-496; *Brdanin Trial Judgment*, para. 485 (describing rape as one of the acts that appeared by its very definition to meet the severity threshold for torture); *Akayesu Trial Judgment*, para. 597; *Martić Trial Judgment*, para. 76.

³⁸¹ *Bemba Decision on Confirmation of Charges*, para. 209.

³⁸² Cryer *et al.* (2015), p. 478.

³⁸³ CAT, article 1.

³⁸⁴ Economic and Social Council, ‘*Report of the UN Special Rapporteur on Torture: Question of the Human Rights of All Persons-Subjected to any Form of Detention or Imprisonment*’ (12 January 1988) E/CN.4/1988/17, para. 42.

Element	Cues
Was the harm objectively severe?	<ul style="list-style-type: none"> Was the harm comparable in severity to acts involving extremely serious harm, such as the mutilation of body parts?
Was the harm subjectively severe?	<ul style="list-style-type: none"> If the harm was physical, is it comparable in severity to combinations of acts involving serious physical harm, including beating; sexual violence; prolonged denial of sleep, food, hygiene and medical assistance;³⁸⁵ electroshocks or burns; mock executions or simulated amputations; extended hanging from hand and/or leg chains; standing for great periods of time;³⁸⁶ kneeling on sharp instruments; flogging; or water treatment?³⁸⁷ If the harm was mental, is it comparable in severity to combinations of acts involving serious mental harm, including threats to torture, rape, or kill relatives;³⁸⁸ forced observance of severe mistreatment, including sexual attacks (which amounts to torture for the forced observer); or the presence of onlookers, ‘particularly family members’ during sexual attacks, including rape (which amounts to torture for the victim being raped)?³⁸⁹
Was the harm inflicted whilst the victim was under the accused’s custody and control?	<ul style="list-style-type: none"> What were the methods by which the accused kept the victim under their custody and control? How long was the victim in the accused’s custody and control? Is this time period conducive to the length / nature of the alleged mistreatment?
Was the harm inflicted as a result of lawful sanctions?	<ul style="list-style-type: none"> If so, was the detention itself lawful (i.e., not arbitrary)? If so, was the nature / severity of the harm nonetheless such that it could never be reasonably seen as arising from lawful sanction?

Table 12: Proving torture: cues for prosecutors

³⁸⁵ *Kvočka et al. Trial Judgment*, paras 144, 147.

³⁸⁶ *Kvočka et al. Trial Judgment*, para. 146, referring to the findings of the UN Human Rights Committee in relation to the situation in Zaire.

³⁸⁷ *Kvočka et al. Trial Judgment*, para. 147.

³⁸⁸ *Kvočka et al. Trial Judgment*, para. 144.

³⁸⁹ *Kvočka et al. Trial Judgment*, para. 149.

3.4.6. Article 7(1)(g)-1: Rape

Article 7(1)(g)-1 of the Rome Statute prohibits the crime against humanity of rape.³⁹⁰ Broadly, this correlates with section 3 of the Gambian Sexual Offences Act 2013, under which rape occurs when a person intentionally, under coercive circumstances, either engages in a sexual act with another person or causes another person to engage in a sexual act with the accused or a third person.³⁹¹

The elements of this offence require the prosecution to prove that:

- (i) the accused invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the accused with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body;
- (ii) the invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent;
- (iii) the conduct was committed as part of a widespread or systematic attack directed against a civilian population; and
- (iv) the accused knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.³⁹²

The accused invaded the body of person through penetration

The first element of the crime against humanity of rape involves invasion of the body of a person through penetration. This is gender-neutral and accordingly includes same-sex penetration and both male and/or female accused and victims.³⁹³ The crime of rape under the Gambian Sexual Offence Act 2013 is similarly broad.³⁹⁴

Any form of penetration, however slight, is sufficient to complete the crime.³⁹⁵ In the case of vaginal rape, penetration of the labia majora would be sufficient.³⁹⁶ There are two forms of penetration covered by this element:

³⁹⁰ The crime against humanity of rape is also prohibited under the [ICTY Statute](#), article 5 (g); [ICTR Statute](#), article 3(g); [SCSL Statute](#), article 2(g); and the [Law on the Establishment of ECCC](#), article 5. Rape as a war crime is prohibited by the [Rome Statute](#), articles 8(2)(b)(xxii) and 8(2)(c)(vi).

³⁹¹ Gambian Sexual Offences Act 2013, section 3(1).

³⁹² [ICC Elements of Crimes](#), article 7(1)(g)-1.

³⁹³ *Ntaganda Trial Judgment*, para. 993; *Bemba Trial Judgment*, para. 100; *Ntaganda Decision on the Confirmation of Charges*, para. 52; *Sesay et al. Trial Judgment*, para. 146.

³⁹⁴ Gambian Sexual Offences Act, section 3(1).

³⁹⁵ See Gambian Sexual Offences Act, section 2: ‘to even the slightest degree’; [ICC Elements of Crimes](#), article 7(1)(g)-1; *Kunarac et al. Appeal Judgment*, para. 127.

- (i) penetration of any part of the body with a *sexual organ*.³⁹⁷ This is a broad definition which not only covers the penetration of the vagina or anus, but also covers oral penetration (i.e., penetration of the mouth).³⁹⁸ In addition, the penetration may be of any part of the body of the *victim or the perpetrator*.³⁹⁹ Consequently, a rape may occur where any part of the perpetrator's body has been penetrated by a sexual organ.
- (ii) penetration of the *anal or genital opening of the victim* with *any object or any other part of the body*.⁴⁰⁰ This covers penetration with something other than a sexual organ which could include penetration with either other body parts, for example a hand, or any other object.⁴⁰¹

The invasion was committed by force, threat of force or coercion, or against a person incapable of giving genuine consent

The second element details the circumstances and conditions which give the invasion a criminal character.⁴⁰² For the invasion of the body to constitute rape, it has to be committed under one or more of the following circumstances:

- (i) by force;
- (ii) by threat or force or coercion, such as that caused by fear, violence, duress, detention psychological oppression or abuse of power, against such person or another person;
- (iii) by taking advantage of a coercive environment; or
- (iv) against another person incapable of giving genuine consent if affected by natural, induced or age-related incapacity.⁴⁰³

The coercive behaviour or environment may be directed towards the victim or a third person.⁴⁰⁴ The Gambian Sexual Offences Act 2013 defines rape as occurring 'under coercive

³⁹⁶ Gambian Sexual Offences Act, section 2: 'Vagina' includes any part of the female genital organ.'

³⁹⁷ See Gambian Sexual Offences Act, section 2: "Sexual Act" means- (a) the insertion (to even the slightest degree) of the penis of a person into the vagina or anus of another person, except where the insertion is consistent with sound medical practices, carried out for proper medical purposes [...]. See also, [ICC Elements of Crimes](#), article 7(1)(g)-1; [Bemba Trial Judgment](#), para. 101; [Furundžija Trial Judgment](#), paras 183-185; [Delalić et al. Trial Judgment](#), para. 1066.

³⁹⁸ [Bemba Trial Judgment](#), para. 101; [Sesay et al. Trial Judgment](#), para. 146; [Furundžija Trial Judgment](#), paras 183-185; [Delalić et al. Trial Judgment](#), para. 1066.

³⁹⁹ [ICC Elements of Crimes](#), article 7(1)(g)-1; Gambian Sexual Offences Act 2013, section 2.

⁴⁰⁰ Gambian Sexual Offences Act, section 2. See also, [ICC Elements of Crimes](#), article 7(1)(g)-1.

⁴⁰¹ [Akayesu Trial Judgment](#), para. 596; [Sesay et al. Trial Judgment](#), para. 146.

⁴⁰² [Bemba Trial Judgment](#), para. 102; [Katanga Trial Judgment](#), para. 964.

⁴⁰³ [ICC Elements of Crimes](#), article 7(1)(g)-1; [Ntaganda Trial Judgment](#), para. 934; [Bemba Trial Judgment](#), para. 102.

⁴⁰⁴ Women's Initiative for Gender Justice, 'The Hague Principles on Sexual Violence' (2019) ('[The Hague Principles on Sexual Violence](#)'), p. 47; [ICC Elements of Crimes](#), articles 7(1)(g)-1, 8(2)(b)(xxii)-1, and 8(2)(e)(vi)-

circumstances’.⁴⁰⁵ The wording of this section is broad enough to be interpreted in line with international standards.

Use of physical force is not necessary for a finding of rape.⁴⁰⁶ The victim’s lack of consent is not an element, and does not need to be established under either the Rome Statute or the Gambian Sexual Offences Act.⁴⁰⁷ Instead, the focus is on the presence of the coercive circumstances and conditions described above which, if established, will be sufficient for the penetration to amount to rape.⁴⁰⁸ To the extent that consent may play a role as a defence,⁴⁰⁹ consent cannot be inferred by reason of any words or conduct of a victim where one of these coercive conditions exists.⁴¹⁰

1, element two. *See also*, *Ntaganda Trial Judgment*, para. 944; *Kunarac et al. Appeal Judgment*, para. 130; *Kunarac et al. Trial Judgment*, para. 711.

⁴⁰⁵ According to section 3(2) of the Gambian Sexual Offences Act 2013, ‘coercive circumstances’ includes: the application of physical force to the complainant or to a person other than the complainant; threats (whether verbally or through conduct); of the application of physical force to the complainant or to a person other than the complainant; threats (whether verbally or through conduct) to cause harm (other than bodily harm) to the complainant or to a person other than the complainant, under circumstances where it is not reasonable for the complainant to disregard the threats; circumstances where the complainant is under the age of 16 years; circumstances where the complainant is unlawfully detained; circumstances where the complainant is affected by – (i) physical disability or helplessness, mental incapacity or other inability (whether permanent or temporary); (ii) intoxicating liquor or any drug or other substance which mentally incapacitates the complainant; (iii) sleep, to such an extent that the complainant is rendered incapable of understanding the nature of the sexual act or is deprived of the opportunity to communicate unwillingness to submit to or to commit the sexual act; circumstances where the complainant submits to or commits the sexual act by reason of having been induced (whether verbally or through conduct) by the perpetrator, or by some other person to the knowledge of the perpetrator, to believe that the perpetrator or the person with whom the sexual act is being committed, is some other person; circumstances where as a result of the fraudulent misrepresentation of some fact by, or any fraudulent conduct on the part of, the perpetrator, or by or on the part of some other person to the knowledge of the perpetrator, the complainant is unaware that a sexual act is being committed with him or her; circumstances where the presence of more than one person is used to intimidate the complainant.

⁴⁰⁶ *ICC Elements of Crimes*, article 7(1)(g)-1; *Ntaganda Trial Judgment*, para. 934; *Bemba Trial Judgment*, para. 103; *Akayesu Trial Judgment*, para. 688; *Delalić et al. Trial Judgment*, para. 937; *Kunarac et al. Appeal Judgment*, para. 129; *Taylor Trial Judgment*, para. 416; *Prosecutor v. Prlić et al.*, IT-04-74-T, *Judgment*, 29 May 2013, para. 70; *Furundžija Trial Judgment*, para. 82; *Prosecutor v. Muhimana*, ICTR-95-1B-T, *Judgment*, 28 April 2005, para. 297. *See also*, Council of Europe (‘CoE’) Convention on preventing and combating violence against women and domestic violence (adopted 11 May 2011, entered into force 01 August 2014) CETS No.210 (‘*Istanbul Convention*’), article 36; CoE Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence (11 May 2011) CETS No. 210 (‘*Istanbul Convention Explanatory Report*’), article 36, para. 192; *M.C. v. Bulgaria*, Application No. 39272/98 (ECtHR, 4 March 2004) (‘*M.C. v. Bulgaria*’), paras 161, 163; Committee on the Elimination of Discrimination Against Women, ‘General Recommendation No 35 on gender-based violence against women, updating general recommendation No. 19’ (14 July 2017) *CEDAW/C/GC/35*, para. 33.

⁴⁰⁷ *ICC Elements of Crimes*, article 7(1)(g)-1; Gambian Sexual Offences Act, section 3.

⁴⁰⁸ *Katanga Trial Judgment*, para. 965; *Bemba Trial Judgment*, paras 105-106; *Ntaganda Trial Judgment*, para. 934.

⁴⁰⁹ *The Hague Principles on Sexual Violence*, p. 44.

⁴¹⁰ International Criminal Court, Rules of Procedure and Evidence, reproduced from the Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York (3-10 September 2002) ICC-ASP/1/3 and Corr.1, part II.A (‘*ICC Rules of Procedure and Evidence*’), rule 70. *See also*, *Istanbul Convention Explanatory Report*, para. 191; *M.C. v. Bulgaria*, para. 165; *E.B. v. Romania*, Application No. 49089/10 (ECtHR, 19 March 2019), para. 56 (‘*E.B. v. Romania*’); *Karen Tayag Vertido v. the Philippines*,

As such, it is not necessary to show that the victim explicitly said no or resisted.⁴¹¹ The coercive circumstances and conditions are further examined in section 5.3. below.

TRRC testimonies have brought to light a number of circumstances which may satisfy this requirement. In particular, Binta Manneh testified before the TRRC that she was raped in 2000 during an inter-school sports competition. At the competition, two men wearing uniforms took her to the back of the stadium. One of the men held onto her hand tightly, unzipped his trousers and pushed her onto her belly. When she was laying on the floor, the man had pulled up her skirt, cut off her underwear, and pressed his elbow against her chest. During the TRRC session, Binta Manneh recounted that the man ‘assaulted’ her and when asked what she meant she responded that he imposed himself on her forcefully. She was told by the police that those on duty around the area of the incident were paramilitary.⁴¹²

Fatou Jallow (known as Toufah) testified to suffering similar harm. Following her victory at the 22nd July Pageantry on the 21 or 22 November 2014, she recounted that she received a call from ‘Aunty Aisha’ from the Ministry of Education requesting her attendance at an event where the President would be receiving an award for food sustainability. After some pressure she attended. Toufah later attended other events with the President, including private meetings at State House and received various gifts. On one occasion, the President asked her whether she would want to marry him. After this she noticed interferences with her phone and a car following her. On one occasion Yahya Jammeh held her face, pushed it down, pulled his pants down and rubbed his genitals in her face. He then pulled up her dress, injected her on her arm with a needle and penetrated her.⁴¹³

General mental and contextual elements

Finally, prosecutors must also satisfy the general contextual element common to all crimes against humanity, (i.e., that the crime was committed as part of a widespread and systematic attack directed against a civilian population, and that the accused knew or intended the conduct to be part of this attack). Additionally, they must also satisfy the mental elements that accompany the physical elements of the crime, (i.e., that an accused invaded a victim’s body

Communication No. 18/2008 (22 September 2009) CEDAW/C/46/D/18/2008, paras 8.7, 8.9.b.(b)(ii) (*‘Karen Tayag Vertido v. the Philippines’*); *R. P. B. v. the Philippines*, Communication No. 34/2011 (12 March 2014) CEDAW/C/57/D/34/2011 (*‘R.P.B. v. the Philippines’*), para. 8.10.

⁴¹¹ *ICC Rules of Procedure and Evidence*, rule 70; *Istanbul Convention*, article 36; *Istanbul Convention Explanatory Report*, para. 191; *M.C. v. Bulgaria*, para. 164; *E.B. v. Romania*, para. 56; *Karen Tayag Vertido v. the Philippines*, paras 8.7, 8.9.b.(b)(ii); *R. P. B. v. the Philippines*, para. 8.1. See also, *Prosecutor v. Gacumbitsi*, ICTR-2001-64-A, *Judgment*, 17 June 2004, para. 155; *Kunarac et al. Trial Judgment*, paras 644-646.

⁴¹² Aneked, ‘Truth, Reconciliation & Reparations Commission (TRRC) Digest Edition 7’ (*‘Aneked TRRC Digest 7’*), Bunta Manneh, p. 79.

⁴¹³ Aneked, ‘Truth, Reconciliation & Reparations Commission (TRRC) Digest Edition 9’ (*‘Aneked TRRC Digest 9’*), Toufah Jammeh, pp. 133- 150

with a sexual organ by force or coercion, which amounts to conduct for the purposes of article 30).

Proving rape: cues for prosecutors

In seeking to establish whether an accused could be liable for the crime against humanity of rape, prosecutors may consider the following cues:

Element	Cues
Did the accused cause the	<ul style="list-style-type: none"> • Penetration of any part of the body of the victim or perpetrator with a sexual organ? • Penetration of the anal or genital opening of the victim with any object or any other part of the body?
Did the accused do so	<ul style="list-style-type: none"> • by force; • by threat or force or coercion (e.g., fear, violence, duress, detention psychological oppression or abuse of power, against such person or another person); • by taking advantage of a coercive environment; or • against another person incapable of giving genuine consent if affected by natural, induced or age-related incapacity.⁴¹⁴

Table 13: Proving rape: cues for prosecutors

3.4.7. Article 7(a)(g)-2: Sexual slavery

Article 7(1)(g)-2 of the Rome Statute prohibits the crime against humanity of sexual slavery,⁴¹⁵ which is a particular form of enslavement⁴¹⁶ that, as mentioned, is prohibited in The Gambia pursuant to the both Constitution and Criminal Code.⁴¹⁷ The elements of the crime are as follows:

- (i) the accused exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty;
- (ii) the accused caused such person or persons to engage in one or more acts of a sexual nature;

⁴¹⁴ [ICC Elements of Crimes](#), article 7(1)(g)-1; *Ntaganda Trial Judgment*, para. 934; *Bemba Trial Judgment*, para. 102.

⁴¹⁵ [Rome Statute](#), article 7(1)(g); [SCSL Statute](#), article 2(g).

⁴¹⁶ Hall *et al.* (2016), p. 212.

⁴¹⁷ [Gambian Constitution](#), section 20; Gambian Criminal Code, sections 230a, 240, 241.

- (iii) the conduct was committed as part of a widespread or systematic attack directed against a civilian population; and
- (iv) the accused knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.⁴¹⁸

The accused exercised any or all of the powers attaching to the right of ownership over one or more persons

The first element of the crime against humanity of sexual slavery requires prosecutors to establish that the accused exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty. This element is a replication of the crime against humanity of enslavement (see above). There is no exhaustive list of situations or circumstances which reflect the exercise of a power of ownership⁴¹⁹ and it need not entail a commercial transaction.⁴²⁰ In making this determination, the prosecutor should take into account various factors including:

- (i) control of the victim's movement;
- (ii) the nature of the physical environment;
- (iii) psychological control;
- (iv) measures taken to prevent or deter escape;
- (v) the use or threat of force or other forms of physical or mental coercion;
- (vi) duration;
- (vii) assertion of exclusivity;
- (viii) subjection to cruel treatment and abuse;
- (ix) control of sexuality;
- (x) forced labour; and
- (xi) the victim's vulnerability.⁴²¹

⁴¹⁸ [ICC Elements of Crimes](#), article 7(1)(g)-2.

⁴¹⁹ [Ntaganda Trial Judgment](#), para. 952; [Katanga Trial Judgment](#), para. 975; [Sesay et al. Trial Judgment](#), para. 160.

⁴²⁰ [Ntaganda Trial Judgment](#), para. 952; [Katanga Trial Judgment](#), para. 75; [Taylor Trial Judgment](#), para. 420; *Prosecutor v. Brima et al.*, SCSL-04-16-T, Judgment, 20 June 2007 ('[Brima et al. Trial Judgment](#)'), para. 709; See also, UNCHR, [Systematic Rape, sexual slavery and slave-like practices during armed conflict](#) (6 June 2000) E/CN.4/Sub.2/2000/21, para. 50.

⁴²¹ [Ntaganda Trial Judgment](#), para. 952; [Kunarac et al. Appeal Judgment](#), paras 119, 121; [Katanga Trial Judgment](#), para. 976; [Sesay et al. Trial Judgment](#), para. 160; [Taylor Trial Judgment](#), para. 420.

Trafficking in persons, in particular woman and children, would amount to a deprivation of liberty reflecting the powers attaching to the right of ownership.⁴²² Trafficking is criminalised in The Gambia under section 28 of the Trafficking in Persons Act 2007.⁴²³

Examples of circumstances involving any or all of the powers attaching to the rights of ownership over another person include, non-exhaustively, scenarios where women and girls are forced into ‘marriage’,⁴²⁴ domestic servitude or other forced labour that also includes forced sexual activity,⁴²⁵ detention in ‘rape camps’ or ‘comfort stations’,⁴²⁶ forced prostitution,⁴²⁷ and other practices involving the treatment of women as chattel (i.e., goods).⁴²⁸

The accused caused a person or persons to engage in one or more acts of a sexual nature

Second, the accused must have caused a person or persons to engage in one or more acts of a sexual nature. This concerns the victim’s ability to decide the conditions in which they engage in sexual activity.⁴²⁹ This may include rape (see above),⁴³⁰ as well as other physical and non-physical acts of a sexual nature.⁴³¹

⁴²² ICC Elements of Crimes, article 7(1)(g)-2, fn. 18. “‘Trafficking in persons’ refers to the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation’: UN General Assembly, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime (15 November 2000) A/RES/55/25, article 3 (a).

⁴²³ Gambia Trafficking in Persons Act 2007, section 28(2) defines trafficking as ‘(a) the recruitment of, provision of, transportation of, transfer of, harbouring of, receipts of, or trading in, persons; (b) the use of threat, force or other forms of coercion, abduction, kidnapping, fraud, deception, the abuse of power, or a position of vulnerability; or (c) the giving or receipt of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation within or across national borders.’ Section 28(3) provides that: ‘Trafficking in persons also includes – (a) placement for sale, bonded placement, temporary placement, placement for service, where exploitation by another person is the motivating factor; and (b) transportation of another person within and across an international border for the purpose of exploiting that person’s prostitution’.

⁴²⁴ See e.g., Katanga Trial Judgment, paras 1000-1001.

⁴²⁵ See e.g., Ntaganda Trial Judgment, paras 959-961; UNHCR, Sub Commission on Prevention of Discrimination and Protection of Minorities, Contemporary forms of slavery, systematic rape, sexual slavery and slavery like practices during armed conflict: Final Report submitted by Ms. Gay J. McDougall, Special Rapporteur, 22 June 1998 E/CN.4/Sub.2/1998/13(‘UNCHR Contemporary forms of slavery, systematic rape, sexual slavery and slavery like practices during armed conflict: Final Report’), para. 30.

⁴²⁶ UNCHR Contemporary forms of slavery, systematic rape, sexual slavery and slavery like practices during armed conflict: Final Report, para. 30; Prosecutor v. Gagović et al., IT-26-93, Indictment, paras 1.5, 4.8.

⁴²⁷ UNCHR Contemporary forms of slavery, systematic rape, sexual slavery and slavery like practices during armed conflict: Final Report, para. 31.

⁴²⁸ UNCHR Contemporary forms of slavery, systematic rape, sexual slavery and slavery like practices during armed conflict: Final Report, para. 8. See also, ECOSOC, Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (7 September 1956, entry into force 30 April 1957) ECOSOC/RES/608(XXI), article 1.

⁴²⁹ Katanga Trial Judgment, para. 978.

⁴³⁰ Ntaganda Trial Judgment, para. 955.

⁴³¹ Akeyesu Trial Judgment, para. 688; Furundžija Trial Judgment, para. 186; Brima et al. Trial Judgment, para. 720; Prosecutor v. Milutinović et al., IT-05-87-T, Judgment, 26 February 2009 (‘Milutinovic et al. Trial Judgment’),

General contextual and mental elements

Finally, prosecutors must also satisfy the general contextual element common to all crimes against humanity (i.e., that the crime was committed as part of a widespread and systematic attack directed against a civilian population, and that the accused knew or intended the conduct to be part of this attack). Additionally, they must also satisfy the mental elements that accompany the physical elements of the crime, (i.e., that that the accused exercised any or all of the powers attaching to the right of ownership over one or more persons, and that they caused a person or persons to engage in one or more acts of a sexual nature, both of which amount to conduct for the purposes of article 30).

Proving sexual slavery: cues for prosecutors

In seeking to establish whether an accused could be liable for the crime against humanity of sexual slavery, prosecutors may consider the following cues:

Element	Cues
Did an accused exercise any or all of the powers attaching to the rights of ownership over one or more persons?	<ul style="list-style-type: none">• Did the accused purchase, sell, lend or barter the victim(s), or impose on them a similar deprivation of liberty?• Did the accused's actions nonetheless deprive the victim of their liberty, including through exercising physical or psychological control over them by preventing or deterring their escape through force, threat of force, coercion, cruel treatment, abuse, or control of sexuality?⁴³²
Did an accused cause a person to engage in one or more acts of a sexual nature?	<ul style="list-style-type: none">• Did the accused cause the rape of the victim by the perpetrator or another person (see above)?• Did the accused cause the victim(s) to engage with any other physical or non-physical act of a sexual nature with the perpetrator or another person?

Table 14: Proving sexual slavery: cues for prosecutors

paras 194-195, 199; *Prosecutor v. Rukundo*, ICTR-2001-70-T, Judgment, 27 February 2009 ('*Rukundo Trial Judgment*'), para. 380. *See also*, ICC Office of the Prosecutor, 'Policy Paper on Sexual and Gender-Based Crimes' (June 2014) ('*Policy Paper on Sexual and Gender-Based Crimes 2014*'), p. 3; *UNCHR Contemporary forms of slavery, systematic rape, sexual slavery and slavery like practices during armed conflict: Final Report*, paras 21-22.

⁴³² *Kunarac et al. Appeal Judgment*, para. 119; *Katanga Trial Judgment*, para. 976, in particular fn. 2299 and references cited therein; *Ongwen Decision on the Confirmation of Charges*, paras 136-139.

3.4.8. Article 7(1)(g)-3: Enforced prostitution

Article 7(1)(g)-3 of the Rome Statute prohibits the crime against humanity of enforced prostitution.⁴³³ While enforced prostitution is not specifically criminalised as a separate offence, the Gambian Criminal Code criminalises prostitution and associated activities including procuration of women or girls into prostitution;⁴³⁴ procuring defilement of women by threats or fraud or administering drugs;⁴³⁵ detention of a woman in any brothel;⁴³⁶ living on earnings of prostitution;⁴³⁷ and keeping a place (brothel) for purposes of prostitution.⁴³⁸

The elements of the crime against humanity of enforced prostitution require prosecutors to prove that:

- (i) the accused caused one or more persons to engage in one or more acts 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;
- (ii) the accused or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature;
- (iii) the conduct was committed as part of a widespread or systematic attack directed against a civilian population; and
- (iv) the accused knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.⁴³⁹

⁴³³ [Rome Statute](#), article 7(1)(g); [SCSL Statute](#), article 2(g). *See also*, UN General Assembly, [Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others](#) (2 December 1949 entry into force 25 July 1951) A/RES/317(IV), article 1; [Protocol on Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime](#), article 1; OHCHR, [Recommended Principles and Guidelines on Human Rights and Human Trafficking](#), (20 May 2002) E/2002/68/Add.1; ECOWAS, [Declaration on the Fight against Trafficking in Persons](#), 21 December 2001, para. 1714.

⁴³⁴ Gambian Criminal Code, section 129.

⁴³⁵ Gambian Criminal Code, section 130: 'Any person who – (1) by threats or intimidation procures or attempts to procure any woman or girl to have any unlawful carnal connection, either in The Gambia or elsewhere; or (2) by false pretences or false representations procures any woman or girl to have any unlawful carnal connection, either in The Gambia or elsewhere; or (3) applies, administers to, or causes to be taken by any woman or girl any drug, matter or thing, with intent to stupefy or overpower to as thereby to have unlawful carnal connection with such women or girl, is guilty of a misdemeanour.'

⁴³⁶ Gambian Criminal Code, section 132.

⁴³⁷ Gambian Criminal Code, section 135 (males living on earnings of prostitution or persistently soliciting), section 136 (females living on earning of prostitution or aiding, etc., for gain prostitution of another woman).

⁴³⁸ Gambian Criminal Code, section 137.

⁴³⁹ [ICC Elements of Crimes](#), article 7(10)(g)-3.

The accused caused one or more persons to engage in one or more acts of a sexual nature

Firstly, the prosecutor must show that the accused caused one or more persons to engage in one or more acts of a sexual nature.⁴⁴⁰ This element does not require the accused to have been involved in the sexual act themselves, but does require them to have caused the act of a sexual nature to occur. This may include rape (see above), as well as other physical and non-physical acts of a sexual nature (see below). The accused must commit the act of a sexual nature by force, or by threat of force or coercion, 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.⁴⁴¹ These conditions and circumstances are the same as required for rape (see section 1.4.5) and are discussed in more detail below (see section 5.3).

The accused or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature

Second, it must be shown that a monetary or other form of payment or advantage was obtained or expected in exchange for or in connection with the acts of a sexual nature. The obtainment or expectation of pecuniary or other advantage must be on the part of the accused or another person (i.e., the client).⁴⁴² This is partially comparable to, and may be dealt with under, sections 135-136 of the Gambian Criminal Code which criminalise persons who live wholly or partly on the earnings of prostitution, or who have, for the purposes of gain, exercised control, direction or influence over the movements of a prostitute in such a manner as to show that they are aiding, abetting or compelling her prostitution with any person, or generally.⁴⁴³ It is likely that most, if not all, forms of 'forced prostitution' would be covered by the crime against humanity of sexual slavery (see above).⁴⁴⁴ That said, the crime of enforced prostitution might also cover situations that do not amount to sexual slavery or enslavement, but in which a person is compelled to perform sexual acts in order to obtain something necessary for survival or to avoid further harm.⁴⁴⁵

General contextual and mental elements

Finally, prosecutors must also satisfy the general contextual element common to all crimes against humanity, (i.e., that the crime was committed as part of a widespread and systematic

⁴⁴⁰ *Akeyesu Trial Judgment*, para. 688; *Furundžija Trial Judgment*, para. 186; *Brima et al. Trial Judgment*, para. 720; *Mutinovic Trial Judgment*, paras 194-195, 199; *Rukundo Trial Judgment*, para. 380. See also, *Policy Paper on Sexual and Gender-Based Crimes 2014*, p.3; *UNCHR Contemporary forms of slavery, systematic rape, sexual slavery and slavery like practices during armed conflict: Final Report*, paras 21-22.

⁴⁴¹ *ICC Elements of Crimes*, articles 7(1)(g)-6; Gambian Sexual Offences Act, section 3(1)-(2).

⁴⁴² Hall *et al.* (2016), p. 215; M Cottier & S Mzee 'Paragraph 2(b)(xxii): Rape and other Forms of sexual violence' in Triffterer *et al. The Rome Statute of the International Court: A Commentary* (Beck/Hart 2016), p. 497.

⁴⁴³ *ICC Elements of Crimes*, article 7(1)(g)(3); Case No. 76, *Trial of Washio Awochi, Netherlands Temporary Court-Martial at Batavia* (25 October 1946), p. 123.

⁴⁴⁴ Hall *et al.* (2016), p. 214; *UNCHR Contemporary forms of slavery, systematic rape, sexual slavery and slavery like practices during armed conflict: Final Report*, para. 31.

⁴⁴⁵ Hall *et al.* (2016), p. 215.

attack directed against a civilian population, and that the accused knew or intended the conduct to be part of this attack). Additionally, they must also satisfy the mental elements that accompany the physical elements of the crime, (i.e., that the accused caused one or more persons to engage in one or more acts of a sexual nature, and that a monetary or other form of payment or advantage was obtained or expected in exchange for or in connection with those acts, both of which amount to conduct for the purposes of article 30). These elements are discussed in detail above (*see* sections 3.2.3 and 3.3.3).

Proving enforced prostitution: cues for prosecutors

In seeking to establish whether an accused could be liable for the crime against humanity of enforced prostitution, prosecutors may consider the following cues:

Element	Cues
Did the accused cause one or more persons to engage in one or more acts of a sexual nature?	<ul style="list-style-type: none"> • Did the accused cause the rape of the victim by the perpetrator or another person (see above)? • Did the accused cause the victim(s) to engage with any other physical or non-physical act of a sexual nature with the perpetrator or another person?
Did the accused do so:	<ul style="list-style-type: none"> • by force; • by threat or force or coercion (e.g., fear, violence, duress, detention psychological oppression or abuse of power, against such person or another person); • by taking advantage of a coercive environment; or • against another person incapable of giving genuine consent if affected by natural, induced or age-related incapacity?⁴⁴⁶
Was a monetary or other form of payment or advantage obtained or expected in exchange for or in connection with those acts?	<ul style="list-style-type: none"> • Did the accused or another person benefit (or expect to benefit) financially in exchange for or in connection with the acts of a sexual nature? • Did the accused or another person benefit (or expect to benefit) materially or obtain another advantage in exchange for or in connection with the acts of a sexual nature?

Table 15: Proving enforced prostitution: cues for prosecutors

⁴⁴⁶ [ICC Elements of Crimes](#), article 7(1)(g)-3; *Ntaganda Trial Judgment*, para. 934; *Bemba Trial Judgment*, para. 102.

3.4.9. Article 7(1)(g)-6: Sexual violence

Article 7(1)(g)-6 of the Rome Statute prohibits the crime against humanity of ‘any of other form of sexual violence of comparable gravity’.⁴⁴⁷ This is a residual crime designed to criminalise conduct not captured by the specific sexual violence crimes contained in the Rome Statute, namely the crimes against humanity of rape, sexual slavery, enforced prostitution, forced pregnancy, and enforced sterilization.⁴⁴⁸ Conduct that amounts to sexual violence is covered by section 3 of the Gambian Sexual Offences Act 2013⁴⁴⁹ and section 126 of the Gambian Criminal Code.⁴⁵⁰

The elements of this offence require prosecutors to prove that:

- (i) the accused 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;⁴⁵¹
- (ii) such conduct was of a gravity comparable to the other offences in article 7(1)(g) of the Statute;⁴⁵²
- (iii) the accused was aware of the factual circumstances that established the gravity of the conduct;
- (iv) the conduct was committed as part of a widespread or systematic attack directed against a civilian population;
- (v) the accused knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

The accused committed an act of a sexual nature

To satisfy the first element, prosecutors must establish that the accused committed an ‘act of a sexual nature’. In addition to penetration, the Gambian Sexual Offences Act defines ‘sexual acts’ as including ‘cunnilingus or any form of genital stimulation’.⁴⁵³ In addition, section 126 criminalises indecent assault on females⁴⁵⁴ and indecently insulting or annoying females.⁴⁵⁵

⁴⁴⁷ [Rome Statute](#), article 7(1)(g).

⁴⁴⁸ [Rome Statute](#), article 7(1)(g).

⁴⁴⁹ Gambian Sexual Offences Act 2013, sections 2, 3.

⁴⁵⁰ Gambian Criminal Code, section 126.

⁴⁵¹ [ICC Elements of Crimes](#), articles 7(1)(g)-6, 8(2)(b)(xxii)-6, article 8(2)(e)(vi)-6, element one.

⁴⁵² [ICC Elements of Crimes](#), article 7(1)(g)-6.

⁴⁵³ Gambian Sexual Offences Act 2013, section 2.

⁴⁵⁴ Gambian Criminal Code, section 126(1): ‘Any person who unlawfully and indecently assaults any woman or girl [...]’

Under international law, ‘acts of a sexual nature’ are defined broadly to include both physical and non-physical acts.⁴⁵⁶ Acts such as forced nudity may amount to sexual violence, even in the absence of physical contact.⁴⁵⁷ The Hague Principles on Sexual Violence provide useful guidance on what, in context, makes violence ‘sexual’, especially from the viewpoint of survivors.

Acts of a sexual nature can be committed by and against any person regardless of age, sex or gender. This includes same-sex acts.⁴⁵⁸ The accused may commit the act of a sexual nature against one or more persons *or* cause the person to engage in an act of a sexual nature against themselves or a third party (including another person or an animal), or on a dead body.⁴⁵⁹

In addition, the accused must commit the act of a sexual nature by force, or by threat of force or coercion, 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.⁴⁶⁰ These conditions and circumstances are the same as required for rape (*see* section 1.4.5).

TRRC testimonies have highlighted multiple acts committed under the Jammeh regime that may satisfy this requirement. Witness Sainabou Camara Lowe, for example, testified that on 10 April 2000, during student demonstrations, she was captured and detained by paramilitaries. The paramilitaries beat her until she lost consciousness. She was injured around her genitals. A pipe

⁴⁵⁵ Gambian Criminal Code, section 126(3): ‘Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman [...].’

⁴⁵⁶ *Akayesu Trial Judgment*, para. 688; *Furundžija Trial Judgment*, para. 186; *Brima et al. Trial Judgment*, para. 720; *Milutinovic et al. Trial Judgment*, paras 194-195, 199; *Rukundo Trial Judgment*, para. 380. *See also*, *Policy Paper on Sexual and Gender-Based Crimes 2014*, p.3; *UNCHR Contemporary forms of slavery, systematic rape, sexual slavery and slavery like practices during armed conflict: Final Report*, paras 21-22.

⁴⁵⁷ *Akayesu Trial Judgment*, para. 688; *Kunarac et al. Trial Judgment*, paras 769, 772; *Kvočka et al. Trial Judgment*, para. 170; *Brdanin Trial Judgment*, para. 1013; *Prosecutor v. Brima et al.*, SCSL-2004-16-A, Judgment, 22 February 2008 (*Brima et al. Appeal Judgment*), para. 184. *See also*, *UNCHR Contemporary forms of slavery, systematic rape, sexual slavery and slavery like practices during armed conflict: Final Report*, para. 21: Sexual violence includes acts such as ‘forcing a person to strip naked in public’; ICC Office of the Prosecutor, *Report on Preliminary Examination Activities 2016* (14 November 2016), para. 94: ‘In addition, detainees were forcibly maintained in a state of forced nudity, compelled to perform physical exercises naked [...]’; *Policy Paper on Sexual and Gender-Based Crimes 2014*, p. 3: ‘An act of a sexual nature is not limited to physical violence, and may not involve any physical contact – for example, forced nudity’. Before, the ICC, the *Bemba* Arrest Warrant decision did not dispute the fact that forced nudity constitutes sexual violence; rather, the decision indicated that the alleged acts of forced nudity were not of sufficient gravity to prosecute: *Prosecutor v. Bemba*, ICC-01/05-01/08, Warrant of Arrest for Jean-Pierre Bemba Gombo, 23 May 2008 (*Bemba Arrest Warrant Decision*), paras 39-40; *The Hague Principles on Sexual Violence*, pp. 13-14.

⁴⁵⁸ *Bemba Trial Judgment*, para. 100; *Ntaganda Trial Judgment*, para. 933. *See also*, *Policy Paper on Sexual and Gender-Based Crimes 2014*, fn. 6.

⁴⁵⁹ *The Hague Principles on Sexual Violence* (2019), p. 8. *ICC Elements of Crimes*, articles 7(1)(g)-6, 8(2)(b)(xxii)-6, and 8(2)(e)(vi)-6, element one. *See e.g.*, *Delalić et al. Trial Judgment*, para. 1065; *Prosecutor v. Todorović*, IT-95-9/1-S, *Sentencing Judgment*, 31 July 2001, paras 38-40.

⁴⁶⁰ *ICC Elements of Crimes*, articles 7(1)(g)-6; Gambian Sexual Offences Act, section 3(1)-(2).

was inserted so she could urinate through it.⁴⁶¹ Similarly, Witness Binta Jamba described how, after the death of her husband, Ousman Sonko had visited her house. He took off her veil and put his hands in her garment. He touched her breasts and put his hands inside her pants. On another occasion he kissed her and told her to sit on his lap.⁴⁶² Finally, witness Sanna B Sabally also described how, having been sentenced to nine years in prison on 22 December 1995, during which he was tortured (often involving acts of sexual violence) on more than 20 occasions.⁴⁶³ He testified that Alhagie Martin and Lamin Senhore electrocuted his tongue and penis. They took a long metal pin that looked like the spokes of a bicycle and drove it inside his penis. Alhagie Martin, Lamin Senhore, Malafi Corr and Ndure made them wear G-strings underwear, pose as prostitutes and engage in sexual acts with one another. Upon refusing, they were beaten.⁴⁶⁴ On one occasion, the perpetrators asked the witness and Sadibou Hydera to have sex with each other. When they both refused, they castrated them.⁴⁶⁵

The conduct was of a gravity comparable to other offences in article 7

Next, the conduct must be of a gravity comparable to other offences in article 7(1)(g) of the Statute (i.e., rape, sex sexual slavery, enforced prostitution, forced pregnancy, and enforced sterilization). However, the gravity criterion should not be understood to exclude acts that do not involve penetration or physical contact.⁴⁶⁶

General contextual and mental elements

Finally, prosecutors must also satisfy the general contextual elements common to all crimes against humanity (i.e., that the crime was committed as part of a widespread and systematic attack directed against a civilian population, and that the accused knew or intended the conduct to be part of this attack). Additionally, they must also satisfy the mental elements that accompany the physical elements of the crime, (i.e., that the accused committed an act of a sexual nature or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, which amounts to conduct for the purposes of article 30). These elements are discussed in detail above (*see* sections 3.2.3 and 3.3.3).

⁴⁶¹ [Aneked TRRC Digest 9](#), Sainabou Camra Lowe, p. 14.

⁴⁶² [Aneked TRRC Digest 9](#), Binta Jamba, p. 125-127.

⁴⁶³ Aneked, ‘Truth, Reconciliation & Reparations Commission (TRRC) Digest Edition 4’ ([‘Aneked TRRC Digest 4’](#)), Sanna B. Sabally, p. 72.

⁴⁶⁴ [Aneked TRRC Digest 4](#), Sanna B. Sabally, p. 73.

⁴⁶⁵ [Aneked TRRC Digest 4](#), Sanna B. Sabally, p. 73.

⁴⁶⁶ Hall *et al.* (2016), p. 216. To date, the only jurisprudence related to the ‘comparable gravity’ criterion emanates from the *Bemba* Warrant of Arrest Decision, where the Pre-Trial Chamber found that forcible undressing was not of comparable gravity to the other crimes in Article 7(1)(g): *Bemba*, [Arrest Warrant Decision](#), para. 40. However, there is a line of jurisprudence from the *ad hoc* tribunals that confirms that forced nudity is to be considered as an act of sexual violence: *Akayesu* [Trial Judgment](#), para. 688; *Kunarac et al.* [Trial Judgment](#), paras 769, 772; *Kvočka et al.* [Trial Judgment](#), para. 170; *Brđanin* [Trial Judgment](#), para. 1013; *Brima et al.* [Appeal Judgment](#), para. 184. *See also*, [UNCHR Contemporary forms of slavery, systematic rape, sexual slavery and slavery like practices during armed conflict: Final Report](#), para. 21; [Report on Preliminary Examination Activities 2016](#), para. 94; [Policy Paper on Sexual and Gender-Based Crimes 2014](#), p. 3.

Proving sexual violence: cues for prosecutors

In seeking to establish whether an accused could be liable for the crime against humanity of sexual violence, prosecutors may consider the following cues:

Element	Cues
Did the accused commit 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?	<ul style="list-style-type: none">• Did the accused cause the victim(s) to engage with any physical or non-physical act of a sexual nature with the perpetrator, themselves or another person, including indecent assault, cunnilingus, or any form of genital stimulation?
Did the accused do so:	<ul style="list-style-type: none">• by force;• by threat or force or coercion (e.g., fear, violence, duress, detention psychological oppression or abuse of power, against such person or another person);• by taking advantage of a coercive environment; or• against another person incapable of giving genuine consent if affected by natural, induced or age-related incapacity?⁴⁶⁷
Was the conduct of a gravity comparable to the other offences in article 7 (1) (g) of the Statute?	<ul style="list-style-type: none">• Which crime under article 7 is of comparable gravity?• What are the circumstances establishing this gravity?

Table 16: Proving sexual violence: cues for prosecutors

3.4.10. Article 7(1)(h): Persecution

Article 7(1)(h) of the Rome Statute prohibits persecution, which involves the intentional and severe deprivation of fundamental rights against an identifiable group, on discriminatory grounds. The elements of the crime are that:

- (i) the accused severely deprived, contrary to international law, one or more persons of fundamental rights;
- (ii) the accused targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such;

⁴⁶⁷ [ICC Elements of Crimes](#), article 7(1)(g)-3; *Ntaganda Trial Judgment*, para. 934; *Bemba Trial Judgment*, para. 102.

- (iii) such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7 (3) of the Statute, or other grounds that are universally recognised as impermissible under international law;
- (iv) the conduct was committed in connection with any act referred to in article 7(1) of the Statute or any crime within the jurisdiction of the Court;
- (v) the conduct was committed as part of a widespread or systematic attack directed against a civilian population; and
- (vi) the accused knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.⁴⁶⁸

An accused severely deprived the victim of their rights

Firstly, prosecutors must establish that the accused severely deprived the victim of their rights in a manner that was ‘contrary to international law’. At a minimum, this can be taken as a reference to internationally recognised human rights within the Universal Declaration on Human Rights (‘UDHR’), the International Covenant on Civil and Political Rights (‘ICCPR’), and the International Covenant on Economic, Social and Cultural Rights (‘ICESCR’),⁴⁶⁹ many of which correspond with those recognised in sections 17 to 37 of the Gambian Constitution.⁴⁷⁰

There is no comprehensive list of acts that may constitute persecution. In principle, the first element of article 7(1)(h) therefore potentially encompasses a very wide range of human rights violations, as long as those violations are severe. Persecutory acts may include both actions and omissions.⁴⁷¹ Severity depends upon the nature or extent of the conduct in question.⁴⁷² Previously, for example, the ICC Pre-Trial Chamber has confirmed that killings, displacement, rape, and serious physical injuries that took place as part of an extensive attack against a civilian community, were severe enough to amount to persecution for the purposes of article 7(1)(h).⁴⁷³ On the other hand, other crimes involving less grave rights violations, such as the destruction of homes / property, will not ordinarily be persecutory unless they were so severe that they resulted

⁴⁶⁸ [ICC Elements of Crimes](#), article 7(1)(h).

⁴⁶⁹ [Ntaganda Decision on Confirmation of Charges](#), para. 58; W A Schabas (ed) *The International Criminal Court: A Commentary on the Rome Statute* (2nd ed OUP 2016), pp. 196-7 (‘Schabas (2016)’).

⁴⁷⁰ [Gambian Constitution](#), Chapter IV ‘Protection of Fundamental Rights and Freedoms’.

⁴⁷¹ *Nahimana et al.*, Judgment, para. 985.

⁴⁷² *Kordić & Čerkez Appeal Judgment*, para. 108; *Prosecutor v. Blaškić*, IT-95-14-A, Judgment, 29 July 2004 (‘*Blaškić Appeal Judgment*’), para. 149.

⁴⁷³ *Prosecutor v. Muthaura et al.*, ICC-01/09-02/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012 (‘*Muthaura et al. Decision on Confirmation of Charges*’), para.283. When dealing with potential persecutory acts, international jurisprudence usually refers to the underlying criminal acts that violate rights, rather than framing the issue in strict human rights terms: *see* Schabas (2016), p. 196.

in the destruction of an ‘indispensable and vital asset to the owner’⁴⁷⁴ or amounted to ‘a destruction of the livelihood of a certain population.’⁴⁷⁵

The accused targeted the person because of their membership of a group or collectivity

The second and third elements of persecution work together and require the accused to have intentionally targeted a group or collectivity on political, racial, national, ethnic, cultural, religious, or gender grounds or other grounds rendered universally impermissible under international law.⁴⁷⁶ This threshold of universal impermissibility is high, and there is some uncertainty regarding which discriminatory bases may fall within its ambit. Nonetheless, it is anticipated that it may encompass discrimination on the grounds of sexual orientation,⁴⁷⁷ age, or disability.⁴⁷⁸

To establish that an accused intended to discriminate against one of these groups, prosecutors must demonstrate that the discrimination was a significant (albeit not necessarily the primary) motive for the persecutory act.⁴⁷⁹ This specific intent requirement operates in addition to the ordinary mental elements that must accompany the physical elements of the crime under article 30.⁴⁸⁰ Although this intent may be inferred where it is proven that the accused knowingly participated in a discriminatory regime / enterprise,⁴⁸¹ it must nonetheless be established with respect to the specific persecutory act charged, rather than for the attack that provides the general context for that act.⁴⁸² Discriminatory intent can be manifested by targeting those belonging to a particular ethnic group, or, equally, those *not* belonging to that group.⁴⁸³

It should also be stressed that for the second element of persecution to be satisfied, a victim must have actually been persecuted as a result of the accused’s intentional actions.⁴⁸⁴

⁴⁷⁴ *Prosecutor v. Kupreskić et al.*, IT-95-16-T, Judgment, 14 January 2000 (*‘Kupreskić et al. Trial Judgment’*), para. 631.

⁴⁷⁵ *Kupreskić et al. Trial Judgment*, para. 631; *Blaškić Appeal Judgment*, para. 146.

⁴⁷⁶ See e.g., *Ntaganda Decision on Confirmation of Charges*, para. 58.

⁴⁷⁷ Whilst this has not been considered by an international court or tribunal, it is widely understood that sexual orientation and gender identity would be covered by this provision. See e.g., Grey *et al.* ‘Gender-based Persecution as a Crime against Humanity: The Road Ahead’ (2019) 17 *Journal of International Criminal Justice* 957; R Axelson, *State-Sponsored Hatred and Persecution on the Grounds of Sexual Orientation: The Role of International Criminal Law*. See also, *ICC Policy Paper on Sexual and Gender Based Violence*, June 2014, pp. 3, 16.

⁴⁷⁸ C Stahn, *A Critical Introduction to International Criminal Law* (CUP, 2019) (*‘Stahn (2019)’*), pp. 72-73; Schabas (2016), p. 198.

⁴⁷⁹ *Krnojelac Trial Judgment*, para. 435.

⁴⁸⁰ *ICC Elements of Crimes*, article 7(1)(h), Elements 3; *Kordić & Čerkez Trial Judgment*, para. 212; *Cryer et al.* (2015), p. 258.

⁴⁸¹ *Vasiljević Trial Judgment*, para. 248.

⁴⁸² *Krnojelac Trial Judgment*, para. 436.

⁴⁸³ *Ntaganda Trial Judgment*, para. 1009.

⁴⁸⁴ *Vasiljević Trial Judgment*, para. 245.

The conduct was carried out in connection with another crime under article 7

To meet the fourth element of persecution, prosecutors must demonstrate that the impugned conduct was carried out in connection with another crime under the jurisdiction of the ICC or listed within article 7(1) of the Rome Statute (i.e., another crime against humanity). This requirement is unique to the Rome Statute and not necessarily indicative of the customary international law standard used in the jurisprudence of the *ad hoc* tribunals, which used the (roughly similar) requirement that the conduct be of ‘a gravity equal’ to other acts punishable as crimes against humanity.⁴⁸⁵

General contextual and mental elements

Finally, prosecutors must also satisfy the general contextual element common to all crimes against humanity (i.e., that the crime was committed as part of a widespread and systematic attack directed against a civilian population, and that the accused knew or intended the conduct to be part of this attack). Additionally, they must satisfy the mental elements that accompany the physical elements of the crime (i.e., that the accused severely deprived the victim of their rights in a manner that was ‘contrary to international law’, which amounts to conduct under article 30). These elements are discussed in detail above (*see* sections 3.2.3 and 3.3.3).

Proving persecution: cues for prosecutors

In seeking to establish whether an accused could be liable for the crime against humanity of persecution, prosecutors may consider the following cues:

Element	Cues
Did the accused inflict a severe deprivation of human rights, contrary to international law, upon the victim?	<ul style="list-style-type: none">• Was the deprivation of rights severe because the nature of the violation is severe <i>per se</i>?• If not, was the deprivation of rights rendered severe because of the extent of the crimes?• Did the conduct include overt acts of violence, such as the burning of homes or other terrorisation;⁴⁸⁶ murder, extermination, imprisonment, deportation, torture, enslavement, or other inhumane acts?⁴⁸⁷• Did the conduct include other violations of civil and political rights, such as the passing of discriminatory laws, restriction of movement and seclusion in ghettos, or the exclusion of members from aspects of society,

⁴⁸⁵ *Nahimana et al. v. Prosecutor*, ICTR-99-52-A, [Judgment](#), 28 November 2007, para. 985.

⁴⁸⁶ *Prosecutor v. Krstic*, IT-98-33-T, [Judgment](#), 2 August 2001, para. 537.

⁴⁸⁷ *Tadić Trial Judgment*, paras 704-710.

	including from professions, businesses, educational institutions, public service, and inter-marriage? ⁴⁸⁸
Did the accused have discriminatory intent?	<ul style="list-style-type: none"> • Did the accused target other members of the group to which the victim belonged? • Does the location or circumstance of the crime show the accused's intention to target members of the specified group? • Do the method(s) of the crime show that accused's intent to target the specified group?
Was the conduct carried out in conjunction with another crime under article 7(1) of the Rome Statute?	

Table 17: Proving persecution: cues for prosecutors

3.4.11. Article 7(1)(i): Enforced disappearance

Article 7(1)(i) of the Rome Statute prohibits the crime against humanity of enforced disappearance, which is defined as ‘the arrest, detention or abduction of persons by, or with the authorisation, support or acquiescence of, a State or a political organisation, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.’ The elements of the offence are complex, and include the following:

- (i) The perpetrator:
 - (a) arrested, detained, or abducted one or more persons; or
 - (b) refused to acknowledge the arrest, detention or abduction, or to give information on the fate or whereabouts of such person or persons.
- (ii) (a) Such arrest, detention or abduction was followed or accompanied by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons; or
 - (b) Such refusal was preceded or accompanied by that deprivation of freedom.
- (iii) The accused was aware that:

⁴⁸⁸ Kupreskić *et al.* [Trial Judgment](#), paras 608-615; Cryer *et al.* (2015), p. 258.

- (a) Such arrest, detention or abduction would be followed in the ordinary course of events by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons; or
- (b) Such refusal was preceded or accompanied by that deprivation of freedom.
- (iv) Such arrest, detention or abduction was carried out by, or with the authorisation, support or acquiescence of, a State or a political organisation.
- (v) Such refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons was carried out by, or with the authorization or support of, such State or political organisation.
- (vi) The accused intended to remove such person or persons from the protection of the law for a prolonged period of time.
- (vii) The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
- (viii) The accused knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.⁴⁸⁹

The elements of enforced disappearance envisage two situations in which an accused disappears a victim, including: where an accused is responsible for the initial arrest or detention; or where an accused is not responsible for the arrest or detention, but intentionally fails to provide accurate information regarding the fate or whereabouts of a disappeared person. The first three elements of the offence reflect this. Accordingly, depending upon the facts, prosecutors will **either** apply the elements listed above as: (i)(a), (ii)(a), and (iii)(a); **or** (i)(b), (ii)(b), and (iii)(b). This is explained in further detail below.

Applying the first three elements of enforced disappearance where the accused was responsible for the arrest or detention of the victim

The first situation envisaged by the crime of enforced disappearance is where the accused was involved in the arrest or detention of the disappeared individual. In these situations, the first three elements of the offence require prosecutors to prove: that the perpetrator deprived one or more persons of their liberty; that this arrest, detention or abduction was followed or accompanied by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons; and that the perpetrator was aware that these circumstances would follow in the ordinary course of events.

The phrasing of the Rome Statue anticipates that the deprivation of liberty will be conducted through ‘arrest, detention or abduction’. That said, it may also encompass ‘any form of

⁴⁸⁹ [ICC Elements of Crimes](#), article 7(1)(i).

deprivation of liberty of a person against his or her will.’⁴⁹⁰ This includes situations in which the individual was initially arrested or detained lawfully, but later disappeared in custody.⁴⁹¹

Secondly, this deprivation of liberty must also have been accompanied by a refusal to acknowledge or to give information on the whereabouts of an individual. A ‘refusal to acknowledge or provide information’ will include outright denials that an arrest, detention, or abduction has taken place, and situations in which misleading or obfuscatory information regarding the fate or whereabouts of an individual is provided.⁴⁹²

Thirdly, the accused must have been aware that the arrest and detention would be followed in the ordinary course of events by a refusal to acknowledge the deprivation of freedom or to give information on the fate or whereabouts of such person or persons. This specific mental requirement takes the place of the ordinary knowledge requirement under article 30.

Applying the first three elements of enforced disappearance where the accused was responsible for refusing to provide accurate information on the fate or whereabouts of the victim.

If the first circumstance is not applicable on the facts, an accused may be held responsible for enforced disappearance where they were not directly responsible for the arrest or detention itself, but nonetheless knowingly covered up or refused to provide information on its commission.

In these circumstances, the first three elements of the offence will require prosecutors to establish that: the accused refused to acknowledge the arrest, detention or abduction, or to give information on the fate or whereabouts of such person or persons; such refusal was preceded or accompanied by that deprivation of freedom; and that the accused was aware that their refusal was preceded or accompanied by this deprivation of freedom. As above, this final element is a specific mental requirement takes the place of the ordinary knowledge requirement under article 30.

The analysis in the section immediately above will be equally relevant in applying these elements. The crucial point to stress here, however, is that there is no requirement that the accused be directly involved in the arrest or detention itself: the elements relevant to the second range of circumstances can be satisfied from the intentional failure to provide accurate information regarding this arrest.

Particularly emblematic situations in this regard may include, for example, the intentional failure of the Ministry of the Interior to give accurate information on the fate of nine prisoners who were allegedly taken from the Mile II prison and extrajudicially executed on the 23 August by

⁴⁹⁰ *Situation in the Republic of Burundi*, ICC-01/17-X-9-US-Exp, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation in the Republic of Burundi, 25 October 2015 ([‘Burundi Decision’](#)), para. 118. See also *Situation in Côte d’Ivoire*, ICC/02/11, Corrigendum to Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire, 15 November 2011 ([‘Côte d’Ivoire Decision’](#)) paras 77-82.

⁴⁹¹ [ICC Elements of Crimes](#), fn. 26; [Burundi Decision](#), para. 118.

⁴⁹² [Burundi Decision](#), para. 118.

members of Junglers squads.⁴⁹³ In that case, the Ministry claimed that the convicts were executed by firing squad on Sunday 26th August, 2012, following the exhaustion of their appeals.⁴⁹⁴ This statement, however, is believed to be false, as evidence has been heard that the prisoners were in fact suffocated by members of Junglers squads on the night of the 23 August.⁴⁹⁵ The bodies of the those killed have never been returned to their families and the burial site of the victims has not been made known.⁴⁹⁶

It should be stressed that where disappearances have occurred, the state has an obligation to investigate and provide information as soon as possible, regardless of whether the family has lodged a complaint.⁴⁹⁷ Until this occurs, and the fate or whereabouts of the individual is clarified, enforced disappearance will be considered as a continuous (or ongoing) crime.⁴⁹⁸

The disappearance was perpetrated by, or with the support or authorisation of, a state or political organisation

The remaining elements must all also be satisfied regardless of which circumstance is pursued in the first three elements of the crime of enforced disappearance. Accordingly, the fourth uniform element of article 7(1)(i) requires disappearances to have perpetrated by, or with the support or authorisation of, a state or political organisation.⁴⁹⁹ Enforced disappearance is typically a ‘state crime’ associated with the actions of the police or armed forces, or a state’s security service.⁵⁰⁰ However, it should be noted that, contrary to the approach taken in other relevant international instruments,⁵⁰¹ under the Rome Statute, the term ‘political organisations’ includes other non-state

⁴⁹³ A Hirsch, ‘[The Gambia Faces Growing Diplomatic Pressure to Halt Execution of Prisoners](#)’ (*The Guardian*, 1 September 2012).

⁴⁹⁴ MiNews 26, ‘[Gambia shoots nine death row inmates in mass execution](#)’ (BNO News, 28 August 2012).

⁴⁹⁵ See e.g., [Aneked TRRC Digest 6](#), p. 132; TRRC, [Testimony of Amadou Badjie](#), Part 3, (25 July 2019) (28:46-31:49).

⁴⁹⁶ [Amnesty International](#), ‘[A Year on from the Gambia’s Return to Executions](#)’.

⁴⁹⁷ [Burundi Decision](#), para. 118, fn. 303 and references cited therein.

⁴⁹⁸ [Burundi Decision](#), para. 121; [Quinteros v. Uruguay](#), Communication No.107/1981 (21 July 1983) A/38/40, para. 14; [Velásquez-Rodríguez v. Honduras \(Judgment\)](#), Petition No.7920, (IACtHR, 29 July 1988) IACtHR Series C No. 4, paras 155 and 181 (‘[Velásquez-Rodríguez v. Honduras](#)’); [Goiburú et al. v. Peru \(Judgment\)](#), Petitions No.11,560; 11,665 and 11,667 (IACtHR, 22 September 2006), IACtHR Series C No. 153, para. 81; [Heliodoro Portugal v. Panama \(Judgment\)](#), Petition No.12,408 (IACtHR, 12 August 2008), IACtHR Series C No. 186, paras 34-35, 106-107 (‘[Heliodoro Portugal v. Panama](#)’); [El-Masri v. The Former Yugoslav Republic of Macedonia](#), App No. 39630/09, (ECtHR, 13 December 2012), para. 240 (‘[El-Masri v. The Former Yugoslav Republic of Macedonia](#)’); [Varnava and Others v. Turkey](#) App Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16070/90, 16071/90, 16072/90 and 16073/90, (ECtHR, 18 September 2009), para.148.

⁴⁹⁹ [Burundi Decision](#), para. 119. See also Schabas (2016), p. 205, fn. 466 and references cited therein.

⁵⁰⁰ When establishing a state/organisational nexus, it should be stressed that internal political instability or any other public emergency *may not* be invoked to justify the conduct of State agents: [Burundi Decision](#), para. 119.

⁵⁰¹ See UN General Assembly, [International Convention for the Protection of All Persons from Enforced Disappearance](#) (20 December 2006 entry into force 23 December 2010) A/RES/61/177, article 2; UN General Assembly, [Declaration on the Protection of All Persons from Enforced Disappearance](#) (28 February 1992) E/CN.4/RES/1992/29, preamble. In broadening the definition in this way, the Rome Statute nonetheless achieves a balance between preserving the state-based or organisational character of the crime and the underlying rationale of

actors. Although the precise meaning of the phrase ‘political organisation’ remains somewhat unclear, it has been convincingly argued that it should be taken to mean (at least) ‘politically motivated organisations whose purpose is the commission of attacks constituting crimes against humanity.’⁵⁰²

The victim was removed from the protection of the law for a prolonged period of time

The fifth element of enforced disappearance requires prosecutors to establish that the accused removed the victim from the protection of the law for a ‘prolonged period of time’. Removal from the protection of the law includes situations in which a victim is prevented from accessing judicial assistance or oversight.⁵⁰³ Although the precise period that will satisfy this requirement has not been authoritatively clarified by the ICC, it has held that several months or years would definitely fulfil this element.⁵⁰⁴ That said, it should be noted that this runs contrary to the majority of international human rights jurisprudence, under which *any* detention involving an individuals’ removal from the protection of the law, even in the short-term, will be sufficient to satisfy the definition of enforced disappearance.⁵⁰⁵ In practice, therefore, it is likely that the ‘prolonged period’ requirement would have to be interpreted in light of the risk to the individual placed outside of legal protection by the accused’s actions.⁵⁰⁶ Consequently, even a period of days could be sufficient in this regard, particularly where the purpose of the detention was, for example, to effectuate that individual’s execution.

The accused intentionally deprived the victim of their liberty

To satisfy the sixth element of the crime against humanity of enforced disappearance, prosecutors must establish that the accused intentionally deprived the victim of their liberty *in order to remove that individual from the protection of the law*. This specific mental requirement takes the place of the ordinary intent requirement under article 30 and can often be established by considering the means by which the individual is deprived of their liberty. Abduction in unmarked cars with tinted windows;⁵⁰⁷ capture or detention in desolate areas⁵⁰⁸ or unofficial

international criminal law as a body of rules concerned with the personal responsibility of individuals, rather than just the interaction of the individual and the state, as in human rights law.

⁵⁰² Stahn (2019), p. 67.

⁵⁰³ [Burundi Decision](#), para. 120, fn. 305 and references cited therein.

⁵⁰⁴ [Burundi Decision](#), para.120.

⁵⁰⁵ UNCHR, Working Group on Enforced or Involuntary Disappearances [Crimes Against Humanity: Information Provided to the International Law Commission](#) (2019), 71st Session of the International Law Commission.

⁵⁰⁶ P Pillai ‘[Enforced Disappearances: A Global Scourge, Increasingly Under the Radar](#)’ (Opinio Juris, 31 May 2019).

⁵⁰⁷ [Velásquez-Rodríguez v. Honduras](#), paras 99-100; [Godínez-Cruz v. Honduras](#) (Judgment), Petition No. 8097 (IACtHR, 20 January 1989), IACtHR Series C No. 8 (‘[Godínez-Cruz v. Honduras](#)’), paras 106, 110.

⁵⁰⁸ [Godínez-Cruz v. Honduras](#), para. 154(b)(iii).

prisons;⁵⁰⁹ or failing to register detainees' names, for example, may all be relevant considerations in this regard.⁵¹⁰

General contextual elements

Finally, prosecutors must also satisfy the general contextual element common to all crimes against humanity, i.e., that the crime was committed as part of a widespread and systematic attack directed against a civilian population, and that the accused knew or intended the conduct to be part of this attack (*see* sections 3.2.3 and 3.3.3).

Proving enforced disappearance: cues for prosecutors

In seeking to establish whether an accused could be liable for the crime against humanity of enforced disappearance, prosecutors may consider the following cues:

Element	Cues
Was a deprivation of liberty followed by a refusal to give accurate information?	<ul style="list-style-type: none"> • Was there an arrest / deprivation of liberty? • Was there any information given / available about the detention? • Was there a request for information? • Was there an attempt to deny that the individual had been arrested, or to conceal their fate, for example by hiding their body? • Has the fate of the victim been resolved, or is the crime ongoing?
Did the enforced disappearance involve a state or political organisation?	<ul style="list-style-type: none"> • Was the accused a member of a state or political organisation? • Was the arrest undertaken on the orders of a state or political organisation? • Was the victim detained at a state facility, such as a prison, police station, or security service HQ?
Did the accused detain the victim for the purpose of disappearing them?	<ul style="list-style-type: none"> • Did the circumstances of the arrest/detention indicate that the accused intended to remove the victim from the protection of the law? • What were the circumstances of the victim's detention?

⁵⁰⁹ *Godínez-Cruz v. Honduras*, para.153(d)(iii).

⁵¹⁰ *Burundi Decision*, para.120.

	<ul style="list-style-type: none"> • Were records kept of the victim’s arrest and/or detention?
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Table 18: Proving enforced disappearance: cues for prosecutors

3.4.12. Article 7(1)(k): Other inhumane acts

Article 7(1)(k) of the Rome Statute contains a general residual clause prohibiting other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health. The elements of the crime are as follows:

- (i) the accused inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act;
- (ii) such act was of a character similar to any other act referred to in article 7 (1) of the Statute;
- (iii) the accused was aware of the factual circumstances that established the character of the act;
- (iv) the conduct was committed as part of a widespread or systematic attack directed against a civilian population; and
- (v) the accused knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.⁵¹¹

The accused’s conduct caused serious physical or mental injury

Firstly, to establish that an accused’s conduct amounted to an inhumane act, prosecutors must prove that those actions caused serious mental or physical injury. This requires proof that the victim suffered severe mental or physical harm and that this suffering was the result of an act or omission of the accused. There is no objective threshold of severity, which should instead be assessed on a case-by-case basis.⁵¹²

The act was of comparable gravity to other crimes under article 7

Secondly, whilst conduct charged under another heading of article 7 may not be *simultaneously* charged under article 7(1)(k),⁵¹³ in order to constitute an ‘inhumane act’ the conduct must be comparable in ‘character’ (or gravity)⁵¹⁴ to other crimes against humanity under article 7. Ordinarily, this will require the conduct to represent a serious violation of customary international law or elementary norms of international human rights law.⁵¹⁵ The types of conduct that might amount to an inhumane act have not been exhaustively enumerated. This is because article 7(1)(k) is intended to be a residual category within the Rome Statute.⁵¹⁶ As such, any

⁵¹¹ [ICC Elements of Crimes](#), article 7(1)(k).

⁵¹² Cryer *et al.* (2015), p. 261.

⁵¹³ *Katanga & Chui Decision on the Confirmation of Charges*, para. 450; *Muthaura et al. Decision on Confirmation of Charges*, para. 269.

⁵¹⁴ [ICC Elements of Crimes](#), article 7(1)(k) fn. 30.

⁵¹⁵ *Katanga & Chui Decision on the Confirmation of Charges*, para. 448.

⁵¹⁶ *Muthaura et al. Decision on Confirmation of Charges*, para. 269.

exhaustive enumeration of the acts within its ambit would only serve to create opportunities for ‘the imagination of future torturers’⁵¹⁷ to exceed the capacity to punish these acts.⁵¹⁸ Nonetheless, there is a significant body of case-law giving useful examples of potential inhumane acts, which may include serious physical or mental injury falling short of the crime of murder⁵¹⁹ such as mutilation,⁵²⁰ beatings or killings, forced disappearances;⁵²¹ sniping at civilians;⁵²² or forced marriage.⁵²³

It should be stressed that the scope of this category does have limits and despite recognising its residual and non-exhaustive nature, the ICC has made it clear that the conditions of article 7(1)(k) ‘must be interpreted conservatively and must not be used to expand uncritically the scope of crimes against humanity.’⁵²⁴ As a result, charges brought under this article may ‘compel a narrower or more restrictive interpretation than that adopted by other international jurisdictions’⁵²⁵ such as the International Criminal Tribunal for the Former Yugoslavia (‘ICTY’) or the International Criminal Tribunal for Rwanda (‘ICTR’), where the Chambers had a greater discretion to identify actions that may fall under the umbrella term ‘inhumane acts’.⁵²⁶

The accused knowingly and intentionally inflicted harm on the victim

Thirdly, it must be shown that the accused knowingly and intentionally inflicted severe harm upon the victim at the time of the offence, which is a specific mental requirement that replaces the default mental elements under article 30. Intention relates to the physical elements, whilst knowledge relates to the factual circumstances of the crime (*see* section 3.3.3). Knowledge in this regard is not a high threshold and merely requires prosecutors to establish that the accused was aware of the factual, rather than legal, circumstances establishing the severity of their actions.

General contextual and mental elements

Finally, prosecutors must also satisfy the general contextual element common to all crimes against humanity, i.e., that the crime was committed as part of a widespread and systematic attack directed against a civilian population, and that the accused knew or intended the conduct to be part of this attack. These elements are discussed in detail above (*see* sections 3.2.3 and 3.3.3).

⁵¹⁷ *Blaškić Trial Judgment*, para. 237.

⁵¹⁸ *Kupreskić et al. Trial Judgment*, para. 263.

⁵¹⁹ *Blaškić Trial Judgment*, para. 239.

⁵²⁰ *Muthaura et al. Decision on Confirmation of Charges*, paras 270-3.

⁵²¹ *Kvočka et al. Trial Judgment*, para. 208.

⁵²² *Prosecutor v. Galić*, IT-98-29-A, *Judgment*, 30 November 2006, para. 158.

⁵²³ *Ongwen Decision on Confirmation of Charges*, para. 87; *Brima et al. Appeal Judgment*, para. 201; *Taylor Trial Judgment*, paras 424-8.

⁵²⁴ *Muthaura et al. Decision on Confirmation of Charges*, para. 269.

⁵²⁵ Schabas (2016), p. 207.

⁵²⁶ Schabas (2016), p. 207.

Proving other inhumane acts: cues for prosecutors

In seeking to establish whether an accused could be liable for the crime against humanity of other inhumane acts, prosecutors may consider the following cues:

Element	Cues
Did the accused inflict serious mental or physical harm?	<ul style="list-style-type: none">• Was the harm objectively severe?• Was the harm rendered severe by the method or circumstances of its infliction?• Was the harm of comparable gravity to acts causing serious physical harm, such as mutilation, severe bodily harm, or serious beatings?• Was the harm of comparable gravity to other acts involving control over a victim, including forced marriage, abuse in detention camps, forced nudity, or enforced disappearance?
Was the harm comparable in nature and gravity to other acts under article 7?	<ul style="list-style-type: none">• Which crime under article 7 is of comparable gravity?• What are the circumstances establishing this gravity?• Could the crime be successfully charged as another crime under article 7?
Did the accused knowingly and intentionally inflict the severe harm upon the victim?	<ul style="list-style-type: none">• Does the evidence suggest that the accused intentionally inflicted harm upon the victim??• Was the accused aware of the factual (rather than legal) circumstances establishing the gravity of this crime?

Table 19: Proving other inhuman acts cues

Chapter 4: Modes of Liability

4. Introduction

This section describes the ways in which perpetrators can be held responsible for their participation in crimes recognised under Gambian criminal law and falling within the jurisdiction of the International Criminal Court ('ICC').

The circumstances in which an individual will be held criminally responsible for committing a crime are governed by principles known as 'modes of liability'. Modes of liability are common to both domestic and international criminal law ('ICL'), and many of those recognised under the Gambian Criminal Code are also covered by the Rome Statute. In a number of respects, however, the scope of the modes of liability under the Rome Statute greatly exceeds that of those recognised in Gambian law, as they better envisage the responsibility of those operating within the upper hierarchies of criminal collectives. In prosecuting those responsible for criminal acts committed under the Jammeh regime, prosecutors will therefore need to select the best mix of local and international modes that allows them to establish criminal liability at multiple different levels of perpetration; from those who physically commit the crime, to those who ordered them to do so.

This section will first set out the modes of liability recognised in Gambian criminal law, before providing an overview of those under the Rome Statute. It will then discuss general considerations that prosecutors should keep in mind when applying modes of liability and move on to assess each mode recognised under the Rome Statute. Finally, it will provide a self-assessment tool for prosecutors seeking to select the most appropriate mode of liability.

4.1. Principles of liability in Gambian criminal law

The Gambian Criminal Code recognises two forms of criminal liability: 'principal offenders' and 'accessories'.⁵²⁷ Under section 23, 'principal offenders' include those who physically (or directly) commit a criminal act or omission with the required mental element(s), or who otherwise enable; aid or abet; counsel; or procure another person to commit an offence.⁵²⁸ 'Aiding' means providing assistance to a principal, whilst 'abetting' requires incitement to commit a criminal act by providing aid or encouragement to a principal.⁵²⁹ 'Counselling' involves advising or urging another person to commit an offence,⁵³⁰ and to 'procure' means to

⁵²⁷ Gambian Criminal Code 1933, chapter V. *See also* Gambian Criminal Offences Bill 2020, part VI.

⁵²⁸ Gambian Criminal Code, sections 23(1)-(4).

⁵²⁹ J Herring, *Criminal Law* (9th ed Palgrave Law Masters 2015), p. 324.

⁵³⁰ *See for interpretation*, Gambian Criminal Code, section 25(1): 'When a person counsels another to commit an offence, and an offence is actually committed after such counsel by the person to whom it is given, it is immaterial whether the offence actually committed is the same as that counselled or a different one, or whether the offence is committed in the way counselled or in a different way, provided in either case that the facts constituting the offence actually committed are a probable consequence of carrying out the counsel. In either case the person who gave the counsel is deemed to have counselled the other person to commit the offence actually committed by him.'

‘produce’ by endeavour (i.e., setting out to see that a criminal act occurs and taking steps to ensure that it does).⁵³¹

Under section 24, principal liability is extended to include ‘joint principal offenders in prosecution of a common purpose’.⁵³² This section will apply where there is a common intention to prosecute an unlawful purpose in conjunction with another, and in executing that purpose an offence is committed that is found to be a probable consequence of the unlawful acts. To establish common intention, prosecutors must prove that:

- (i) the accused intended to commit an offence jointly with others;
- (ii) even though the criminal act was outside of the common design, it was a nonetheless a natural and foreseeable consequence of effecting that common purpose; and
- (iii) the parties were aware of that fact when they agreed to participate in the criminal act.

Finally, under section 26(1), accessories after the fact will include situations in which a person assists another who is, to his knowledge, guilty of an offence, to escape punishment.

4.2. Modes of liability under ICL

To establish individual criminal responsibility at the ICC, prosecutors must demonstrate that the accused acted in a specific way and that those actions contributed to the crimes in one or more of the ways described in article 25 (individual criminal responsibility) or article 28 (the responsibility of commanders and other superiors) of the Rome Statute. The elements of each of these modes of liability must be established **in addition** to the physical, mental, and contextual elements of the particular substantive crimes being charged, and must be proven beyond a reasonable doubt.

As such, under the Rome Statute, an individual will incur criminal liability where it is proven beyond all reasonable doubt that they:

- (i) committed the crime (Rome Statute, article 25(3)(a)). This includes:
 - commission of the crime as an individual (*direct perpetration*);
 - commission of the crime jointly with another (*co-perpetration*);
 - commission of the crime through another person, regardless of whether that other person is criminally responsible (*indirect perpetration*); or
 - commission through other persons, together with co-perpetrators (*indirect co-perpetration*).
- (ii) ordered, solicited or induced the crime (Rome Statute, article 25(3)(b));

⁵³¹ Procurement need not be the sole or decisive reason for the commission of the offence, but causation must always be established. See e.g., *Attorney General's Reference (No. 1 of 1975)* (1975) EWCA Crim 1 (1975) 2 All ER 684.

⁵³² Gambian Criminal Code, section 24.

- (iii) aided, abetted or otherwise assisted the crime (Rome Statute, article 25(3)(c));
- (iv) contributed to the commission (or attempted commission) of a crime by a group of persons acting with a common purpose (*complicity to commit a crime*) (Rome Statute, article 25(3)(d));
- (v) failed to prevent, repress or punish the crime (*command or superior responsibility*) (Rome Statute, article 28(a) and (b)).

Despite some differences in their respective elements, these modes cover a number of those recognised in sections 23-26 of the Gambian Criminal Code. For example, ‘direct perpetration’ and ‘co-perpetration’ under the Rome Statute are analogous to ‘direct commission’ and ‘joint principal offending in prosecution of a common purpose’ under sections 23-24 of the Gambian Criminal Code. ‘Aiding and abetting’ is also broadly comparable in both legal regimes, whilst ‘soliciting’ and ‘inducing’ under the Rome Statute correspond to ‘counselling’ or ‘procuring’ in Gambian domestic law.

As discussed above, however, the modes of liability recognised under the Rome Statute greatly exceed those in the Gambian Criminal Code in a number of important respects. Specifically, ‘indirect perpetration’; ‘indirect co-perpetration’; ‘ordering’; ‘complicity’; and ‘command / superior responsibility’ all provide means to establish the liability of perpetrators who caused, contributed toward, or otherwise facilitated the commission of atrocity crimes, despite not having been involved in their direct (or physical) perpetration. These modes will therefore represent a crucial tool in enabling prosecutions against more senior individuals with indirect responsibility for crimes committed under the Jammeh regime, potentially up to and including Jammeh himself. For this reason, they will be explored and applied in detail below.

4.3. Modes of liability: key issues to consider

Given the complexity of international crimes, the appropriate mode of liability to establish an accused’s criminal responsibility will be highly contingent upon the facts of a case. That said, given their importance, prosecutors should keep in mind the following general considerations when seeking to establish modes of liability against an accused:

- (i) Have prosecutors considered that multiple different levels of perpetration may arise in relation to a particular crime?**

International crimes are committed against a backdrop of widespread, organised criminality that is often characterised by numerous different and overlapping types/levels of criminal responsibility. Whilst the liability of those that physically commit crimes will often be readily apparent, within organised criminal collectives there will be a range of other mid- and high-level perpetrators that contributed to the crime through multiple layers of decision-making. Given their role in causing or controlling events, these perpetrators (e.g., senior politicians, or high ranking military or security personnel) are often considered to be the ‘most’ responsible for the commission of atrocity crimes, notwithstanding the fact

that they did not physically commit those crimes themselves.⁵³³ In as far as possible, when considering evidence relating to international crimes, prosecutors should therefore remain aware of the need to identify any information that will allow them to discover the contribution of those who were more remote from the actual physical perpetration, but were nonetheless instrumental or influential in the commission of those crimes.

(ii) Where there are numerous potentially applicable modes of liability, have prosecutors identified those best supported by the available evidence?

Prosecutors should pursue the mode(s) of liability that are best supported on the available evidence in order to increase the strength of their own case and avoid the risk of overloading or confusing the indictment with unsupported or frivolous claims.⁵³⁴ Naturally, this will depend upon the evidence that prosecutors possess in relation to a set of alleged facts, and on the rules regarding what evidence might be admissible in court. This includes, for example, those relating to the inadmissibility of hearsay evidence under section 20 of the Gambian Evidence Act, under which statements made by individuals not called as witnesses or who are not a party to the case are generally inadmissible in court.⁵³⁵

(iii) Is it possible to bring / maintain alternative modes of liability?

Prosecutors should always seek to identify the most promising mode of liability. Nonetheless, where, on the available evidence, they represent genuine alternatives to the primary mode pursued, alternative modes of liability (brought in addition to the principal allegations) can afford prosecutors the flexibility to respond to any uncertainty regarding the sufficiency of evidence. In other words, to ensure that any contribution to a crime that might have been made is adequately captured by the modes of liability, prosecutors should plead those modes that provide both a primary mode but also those that represent viable alternatives. It is a natural part of the process for viable modes to be more easily identified as the investigation and prosecution progresses.⁵³⁶

(iv) When considering which modes to charge, have prosecutors ensured respect for the rights of the accused?

⁵³³ M Osiel *Making Sense of Mass Atrocity* (CUP 2009), p. 247; J Stewart 'The End of Modes of Liability for International Crimes' (2012) 25 *Leiden Journal of International Law* 165, pp. 165-167.

⁵³⁴ W Jordash & J Coughlan, 'The Right to be Informed of the Nature and Cause of the Charges: A Potentially Formidable Jurisprudential Legacy' in S Darcy & J Powderly (eds), *Judicial Creativity at the International Criminal Tribunals* (OUP 2010) ('Jordash & Coughlan (2010)'), p. 309.

⁵³⁵ Statements can only be repeated in court as evidence that they were made in the first instance. They cannot, however, be repeated in an attempt to establish the truth of their content. See Gambian Evidence Act 1994, sections 19-21.

⁵³⁶ *Prosecutor v. Ruto et al.*, ICC-01/09-01/11, [Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang](#), 8 March 2011, para. 36; *Prosecutor v. Bemba*, ICC-01/05-01/08, Decision Giving Notice to the Parties and Participants that the Legal Characterisation of the Facts May be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court, 21 September 2012 ('*Bemba Decision Giving Notice Under Regulation 55*'), paras 3-4.

When establishing criminal liability, prosecutors must recognise the central importance of the accused's fair trial rights. Whilst the modes of liability under the Rome Statute allow prosecutors to recognise the indirect criminal liability of individuals with remote connections to the physical perpetration of crimes, any charges brought against an accused must be supported by evidence and must eventually be capable of being proven beyond a reasonable doubt. This is also true for modes of liability, which must be proven beyond a reasonable doubt.⁵³⁷

A fundamental aspect of a fair trial involves prosecutors respecting the accused's right to be promptly informed of the charges brought against them (*see* section 1.4.6). This includes being informed of the modes of liability in a manner that is clear and precise,⁵³⁸ and avoiding unsupported allegations regarding the relevant mode of liability that could overload or confuse the indictment. They must also keep the accused apprised of any material modifications to the charges brought against them, including to the legal characterisation of their alleged conduct, in a manner which gives them adequate time to prepare an effective defence.⁵³⁹

4.4. Modes of Liability under the Rome Statute

The Rome Statute also distinguishes between those responsible for committing a crime (article 25(3)(a)), known as principals, and those responsible for commanding (article 28) or otherwise assisting in the commission of a crime (article 25(3)(b)-(d)), known as accessories.⁵⁴⁰ That said, there is no automatic correlation between these different modes of liability and the penalty given to the perpetrator. As such, an accomplice may incur a similar or even identical penalty to that of the perpetrator of the same crime.⁵⁴¹

4.4.1. Article 25(3)(a): Perpetration

Under article 25(3)(a) of the Rome Statute, an individual can be held responsible for committing (or perpetrating) a crime in four ways:

- (i) **direct perpetration:** where the accused physically (or directly) commits a crime themselves;

⁵³⁷ *Prosecutor v. Katanga*, ICC-01/04-01/07, Judgment Pursuant to Article 74 of the Statute, 7 March 2014 ('*Katanga Trial Judgment*'), para. 69.

⁵³⁸ *The Prosecutor v. Munyakazi*, ICTR-97-36A-A, Judgment, 28 September 2011 ('*Munyakazi Appeal Judgment*'), para. 36; *Prosecutor v. Gacumbitsi*, ICTR-2001-8-A, Judgment, 7 July 2006 ('*Gacumbitsi Appeal Judgment*'), para. 49; *Prosecutor v. Ntakirutimana & Ntakirutimana*, ICTR-96-10-A & ICTR-96-17-A, *Judgment*, para. 32.

⁵³⁹ *See* Jordash & Coughlan (2010), p. 288.

⁵⁴⁰ *Prosecutor v. Lubanga*, ICC-01/04-01/06, Decision on the Confirmation of Charges, 29 January 2007 ('*Lubanga Decision on the Confirmation of Charges*'), para. 320.

⁵⁴¹ *Katanga Trial Judgment*, para. 1386; W Jordash & N Bracq, 'Modes of Liability and Individual Criminal Responsibility' in C Jalloh, K Clarke, and V Nheimelle (eds), *The African Court of Justice and Human and Peoples Rights in Context* (CUP 2019), p. 757.

- (ii) **co-perpetration**: where the accused has liability for a crime committed as part of a common plan undertaken with others;
- (iii) **indirect perpetration**: where the accused uses another individual to commit the objective elements of a crime by controlling their will; and
- (iv) **indirect co-perpetration**: where an accused occupying a leadership position in an organisation is held accountable for crimes committed by agents under the control of another leader in that organisation, despite the fact that the accused lacks direct control over those agents.

4.4.1.1. Direct perpetration

Direct perpetration, under article 25(3)(a) of the Rome Statute, is analogous to section 23(a) of the Gambian Criminal Code. In both cases, the mode is established by proof that the accused physically committed the crime⁵⁴² and intended to commit the crime.⁵⁴³

Proving direct perpetration: cues for prosecutors

In seeking to establish whether an accused could be liable as a direct perpetrator, prosecutors may consider the following cues:

Element	Cues
Is there sufficient evidence to prove direct perpetration beyond a reasonable doubt?	<ul style="list-style-type: none"> • By what means did the perpetrator commit the crime?⁵⁴⁴ • Did the accused cause the crime by their actions (e.g., pulling the trigger)? • If not, did the accused cause the crime by their omissions? • Is there evidence establishing causation between the crime and the accused's conduct? • Are there contradictions between testimonies? • At what time and place did the events take place? • Is there evidence of the identities of the victims?

⁵⁴² *Lubanga Decision on the Confirmation of Charges*, para. 332(i); *Prosecutor v. Katanga & Chui*, ICC-01/04-01/07, Decision on the Confirmation of Charges, 30 September 2008 ('*Katanga & Chui Decision on the Confirmation of Charges*'), para. 488; *Prosecutor v. Lukić & Lukić*, IT-98-32/1-T, *Judgment*, 20 July 2009, para. 897; *Prosecutor v. Limaj et al.*, IT-03-66-T, *Judgment*, 30 November 2005, para. 509; *Prosecutor v. Kunarac et al.*, IT-96-23-T & IT-96-23/1-T, *Judgment*, 22 February 2001, para. 390.

⁵⁴³ *Rome Statute*, article 25(3)(a).

⁵⁴⁴ *Munyakazi Appeal Judgment*, para. 36; *Gacumbitsi Appeal Judgment*, para. 46.

<p>Did the accused commit the crime intentionally?</p>	<ul style="list-style-type: none"> • Did the accused engage in the prohibited conduct voluntarily? • Did the accused act or fail to act? • Does the evidence indicate that this conduct was deliberate?
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Table 20: Proving direct perpetration cues

4.4.1.2. Co-perpetration

Co-perpetration involves situations in which an accused commits a criminal act jointly with others in pursuance of a common plan. It is therefore broadly analogous to joint principal offending in prosecution of a common purpose under section 24 of the Gambian Criminal Code.

In order to establish that an accused is liable for a crime through co-perpetration, prosecutors must prove that:

- (i) there was an agreement or common plan between the accused and at least one other co-perpetrator that, once implemented, would result in the commission of the relevant crime in the ordinary course of events;⁵⁴⁵
- (ii) the accused provided an essential contribution to the common plan that resulted in the commission of the relevant crime;
- (iii) the accused meant to commit the relevant crime, or he was aware that by implementing the common plan these consequences would ‘occur in the ordinary course of events’; and
- (iv) the accused was aware that he provided an essential contribution to the implementation of the common plan.⁵⁴⁶

There was an agreement or common plan

Firstly, prosecutors must establish that there was a common plan between the accused and at least one other perpetrator. It does not need to be proven that this plan was express⁵⁴⁷ and its existence can be inferred from both direct and circumstantial evidence,⁵⁴⁸ including the

⁵⁴⁵ *Prosecutor v. Lubanga*, ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute, 14 March 2012 (*‘Lubanga Trial Judgment’*), paras 980-981; *Prosecutor v. Lubanga*, ICC-01/04-01/06 A 5, Judgment on the Appeal of Mr Thomas Lubanga Dyilo Against His Conviction, 1 December 2014 (*‘Lubanga Appeal Judgment’*), para. 445.

⁵⁴⁶ *Rome Statute*, article 25(3)(a); *Prosecutor v. Ntaganda*, ICC-01/04-02/06, *Prosecution Request for Notice to be Given of a Possible Recharacterisation Pursuant to Regulation 55(2)*, 9 March 2015, para. 16.

⁵⁴⁷ *Prosecutor v. Kilolo et al.*, ICC-01/05-01/13, Judgment pursuant to Article 74 of the Statute, 19 October 2016 (*‘Kilolo et al. Trial Judgment’*), para. 66; *Lubanga Trial Judgment*, para. 988.

⁵⁴⁸ *Kilolo et al. Trial Judgment*, para. 66; *Lubanga Trial Judgment*, para. 988.

subsequent conduct of the accused.⁵⁴⁹ This evidence must also show that the plan had an element of criminality⁵⁵⁰ in that, if implemented, it would have led to the commission of a crime ‘in the ordinary course of events.’⁵⁵¹ However, it need not be proven that this plan was specifically directed at the commission of a crime.⁵⁵² Consequently, the requirement of a common plan will be satisfied even where:

- (i) the co-perpetrators agreed, together, to implement a common plan to achieve a non-criminal goal, and to commit a crime if certain conditions were met in the implementation of that plan; or
- (ii) the co-perpetrators were aware that their implementation of a common plan, albeit directed at the achievement of a non-criminal goal, gave rise to the risk that it would result in the commission of the crime, and accepted such an outcome.⁵⁵³

The accused provided an essential contribution to the commission of a crime

Secondly, the co-perpetrator must have provided an ‘essential’ (or ‘substantial’)⁵⁵⁴ contribution to the commission of the crime.⁵⁵⁵ This contribution does not have to be the sole or main cause of the crime, as the responsibility of co-perpetrators arises from their collective contribution to, and control over, the common plan.⁵⁵⁶ Consequently, there is also no requirement for prosecutors to prove that the accused was directly or physically linked to the crime,⁵⁵⁷ for example by proving that they were present at the location and time that the acts were committed.⁵⁵⁸ Ultimately, whether a particular contribution was ‘essential’ will depend upon the nature and centrality of the role of, and the functions assigned to, an accused. Assessments in this regard will therefore need to be conducted on a case-by-case basis, taking into account the role of the accused in relation to the overall circumstances of the case.⁵⁵⁹

⁵⁴⁹ *Kilolo et al. Trial Judgment*, para. 66; *Katanga & Chui Decision on the Confirmation of Charges*, para. 301; *Prosecutor v. Kenyatta et al.*, ICC-01/09-02/11, *Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute*, 23 January 2012, para. 400.

⁵⁵⁰ *Kilolo et al. Trial Judgment*, para. 67.

⁵⁵¹ *Lubanga Trial Judgment*, para. 981.

⁵⁵² *Kilolo et al. Trial Judgment*, para. 67; *Lubanga Appeal Judgment*, para. 447.

⁵⁵³ *Lubanga Decision on the Confirmation of Charges*, para. 344.

⁵⁵⁴ *Lubanga Trial Judgment*, para. 997.

⁵⁵⁵ The requirement that the accused’s contribution be ‘essential’ is necessary to distinguish between those who commit crimes as principal perpetrators and those who are merely held to be accessories to those crimes. See *Lubanga Trial Judgment*, paras 998-999.

⁵⁵⁶ *Lubanga Trial Judgment*, para. 994.

⁵⁵⁷ *Lubanga Trial Judgment*, para. 1004.

⁵⁵⁸ *Lubanga Appeal Judgment*, paras 469, 473; *Katanga & Chui Decision on the Confirmation of Charges*, para. 526; *Prosecutor v. Ruto et al.*, ICC-01/09-01/11, *Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute*, 23 January 2012 (*‘Ruto et al. Decision on the Confirmation of Charges’*), para. 306; *Lubanga Trial Judgment*, paras 1004-1005.

⁵⁵⁹ *Lubanga Trial Judgment*, paras 1000-1001.

The accused must have also been aware that they provided an essential contribution to the implementation of the common plan. This requires prosecutors to establish that they were aware of the factual circumstances enabling them to jointly control the crime, which can be achieved by demonstrating their awareness that: (i) their role was essential to the implementation of the common plan; and (ii) that consequently, they could have prevented (or mitigated the effects of) the commission of the crime by refusing to take part.⁵⁶⁰ This amounts to knowledge for the purposes of article 30 of the Rome Statute.

The accused intended to commit the physical elements of the crime

As to the requisite mental elements, an accused may be held liable for co-perpetration where they and at least one other perpetrator intended to commit the physical elements of a crime; or they were aware that in implementing their common plan this consequence ‘[would] occur in the ordinary course of events.’⁵⁶¹ This requires prosecutors to establish that at the time they committed the material elements of the crime, the accused knew *with some certainty* what kind of prohibited consequences would arise from the implementation of their common plan, based on their knowledge of events and their acceptance of the terms of the plan. A ‘low’ or ‘contingent’ level of risk will therefore be insufficient in this regard.⁵⁶²

Proving co-perpetration: cues for prosecutors

To establish an accused’s liability as a co-perpetrator, prosecutors may consider the following cues:

Element	Cues
Does the evidence explicitly demonstrate that a common plan existed between the accused and another co-perpetrator?	<ul style="list-style-type: none"> Is there direct or physical evidence showing that a plan existed (e.g., physical or digital records)?
Can a common plan be implied from the circumstantial evidence?	<ul style="list-style-type: none"> Did the accused coordinate with others regarding the means necessary to achieve an objective (e.g., retaining political power)? Did the accused make public statements indicating an intention to achieve an objective (e.g., to hold on to power)

⁵⁶⁰ *Lubanga Appeal Judgment*, para. 473; *Lubanga Decision on the Confirmation of Charges*, paras 366-367; *Prosecutor v. Bemba*, ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009 (*‘Bemba Decision on the Confirmation of Charges’*), paras 370-371; *Ruto et al. Decision on the Confirmation of Charges*, para. 309.

⁵⁶¹ *Kilolo et al. Trial Judgment*, para. 70; *Katanga & Chui Decision on the Confirmation of Charges*, para. 533; *Lubanga Decision on the Confirmation of Charges*, paras 363-364.

⁵⁶² *Lubanga Trial Judgment*, para. 1012.

	<p>at any cost)?</p> <ul style="list-style-type: none"> • Did the accused mobilise others in order to commit acts pursuant to this common objective? • Did the accused undertake other preparatory activities (e.g., stockpiling weapons?) • What was the nature and content of interactions between the accused, other co-perpetrators, and forces under their control? • Were the co-perpetrators reacting to crisis (e.g., political protest) that guided their actions?⁵⁶³
Was the accused's contribution to the common plan 'essential'?	<ul style="list-style-type: none"> • Did the accused assist in the formulation, organisation, or coordination of the relevant strategy or plan?⁵⁶⁴ • Did the accused direct or control other participants?⁵⁶⁵ • Did the accused determine the roles of those involved in the offence?⁵⁶⁶ • Did the accused supervise and/or finance resource acquisition (e.g., weapons) to commit the offence?⁵⁶⁷ • Did the accused fund the execution of the crimes? • Did the accused encourage the crimes through mobilising supporters to carry out crimes against political opponents, or by rewarding physical perpetrators of crimes?
Did the accused know that their contribution to the common plan was essential?	<ul style="list-style-type: none"> • Was the accused's contribution such that they could have frustrated the commission of the crime by not taking part? • Would the crime have been prevented but for their contribution? • Would the crimes have been materially changed but for the contribution?
Does the evidence show that accused intended that the common	<ul style="list-style-type: none"> • Did the common plan have a criminal objective (e.g., to eradicate political opposition)?

⁵⁶³ *Prosecutor v. Blé Goudé*, ICC-02/11-02/11, [Decision on the Confirmation of Charges Against Charles Blé Goudé](#), 11 December 2014, paras 231-232.

⁵⁶⁴ *Lubanga Trial Judgment*, para. 1004.

⁵⁶⁵ *Lubanga Trial Judgment*, para. 1004.

⁵⁶⁶ *Lubanga Trial Judgment*, para. 1004.

⁵⁶⁷ *Katanga & Chui Decision on the Confirmation of Charges*, para. 526.

<p>plan would entail crimes, or that they knew that implementing the plan would lead to the commission of crimes in the ordinary course of events?</p>	<ul style="list-style-type: none"> • Did the common plan have a non-criminal objective (e.g., building an effective army) that entailed criminal acts (e.g., recruiting child soldiers) in order to achieve it?⁵⁶⁸ • Given the circumstances (e.g., the nature of the objective and the available resources), was the accused aware or must they have been aware, that the implementation of their plan would lead to the commission of a crime in the ordinary course of events?
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Table 21: Proving co-perpetration cues

4.4.1.3. Indirect perpetration

Indirect perpetration occurs where an accused uses another individual to commit a crime by controlling the will of that individual to such a degree that the criminal act must be attributed to the accused as if it were their own. It has no direct comparison in Gambian law.

In order to prove indirect perpetration, prosecutors must establish that the accused:

- (i) exerted control over the crime whose material elements were brought about by one or more persons;
- (ii) meets the mental elements prescribed by article 30 of the Rome Statute and the mental elements specific to the crime at issue; and
- (iii) was aware of the factual circumstances allowing them to exert control over the crime.⁵⁶⁹

The accused exerted control over the crime

An accused may exert control over a crime in two circumstances. The first is where they exercise control over the will of those who bear no criminal culpability for their actions,⁵⁷⁰ because, for example, they were a minor below the age of criminal responsibility; suffered from mental deficiency or impairment; were involuntarily intoxicated; or committed the act as “an inadvertent participant...acting under duress or mistake.”⁵⁷¹ In these situations, those physically committing the criminal act only do so as an ‘instrument’ of the accused, who therefore retains criminal liability for those acts.

The second such situation of control is where the accused has “functional domination”⁵⁷² over an organisational structure, within which they can mobilise their “authority and power [...] to

⁵⁶⁸ *Lubanga Trial Judgment*, para. 1136.

⁵⁶⁹ *Rome Statute*, article 25(3)(a); *Katanga Trial Judgment*, para. 1399.

⁵⁷⁰ *Lubanga Decision on the Confirmation of Charges*, para. 332; *Katanga & Chui Decision on the Confirmation of Charges*, para. 488.

⁵⁷¹ R Cryer *et al.* (eds), *An Introduction to International Criminal Law and Procedure* (3rd ed CUP 2015) (‘Cryer *et al.* (2015)’), p. 367.

⁵⁷² Cryer *et al.* (2015), p. 368.

secure compliance with [their] orders.”⁵⁷³ In order to establish that such control was present, the evidence should show: (i) a clear organisational hierarchy, within which compliance with orders was rendered nearly automatic; and (ii) that, within this hierarchy, the accused genuinely exerted control over the course of events occasioning the crime by conceiving the crime, overseeing its preparation at different hierarchical levels, and/or controlling its performance and execution through the organisational apparatus.⁵⁷⁴

Mental elements

As to the requisite mental elements, prosecutors must also establish that the accused meets the requirements under article 30 of the Rome Statute, and that they have the requisite intent to commit the alleged crime. Furthermore, they must also prove that the accused was aware of the factual circumstances enabling them to exercise control over the crime.⁵⁷⁵ At a minimum, this requires the accused to have an awareness of the organisational structure that enabled them to use another person to realise the material elements of the offence.⁵⁷⁶

Proving indirect perpetration: cues for prosecutors

In seeking to establish whether an accused could be liable as an indirect perpetrator, prosecutors may consider the following cues:

Element	Cues
Did the accused exert control over an individual?	<ul style="list-style-type: none"> • Did the accused control another person to commit a crime? • Was the direct perpetrator a minor below the age of criminal responsibility? • Did the direct perpetrator suffer from mental deficiency or impairment? • Was the direct perpetrator involuntarily intoxicated? • Did the direct perpetrator commit the crime as an inadvertent participant...acting under duress or mistake?
Did the accused exert control over an organisation?	<ul style="list-style-type: none"> • Was there an organised, hierarchical apparatus of power, such as a political or military structure?

⁵⁷³ *Katanga & Chui Decision on the Confirmation of Charges*, para. 514. In these situations, although it is likely that those directly committing the crime will bear criminal culpability, it is possible that certain direct perpetrators could be absolved of criminal responsibility. See *Katanga Trial Judgment*, para. 1404.

⁵⁷⁴ *Katanga Trial Judgment*, para. 1412.

⁵⁷⁵ *Katanga Trial Judgment*, para. 1414.

⁵⁷⁶ *Katanga Trial Judgment*, para. 1415.

	<ul style="list-style-type: none"> • Was this hierarchy such that the accused could expect automatic execution of their orders, for example because even if an order was disobeyed, another subordinate would obey almost automatically?⁵⁷⁷ • Did the organisation use intensive, strict, and violent training regimes, or other disciplinary punishments?⁵⁷⁸ • Could the accused hire or impose discipline on subordinates? • Did the accused have a rank/position that allowed them to give orders to subordinates? • Was the accused involved in training subordinates? • Was the accused involved in providing resources (including funds and weaponry)?⁵⁷⁹
<p>What evidence is there that the accused was aware of the factual circumstances enabling them to exercise control over the crime?</p>	<ul style="list-style-type: none"> • Was the accused aware of the ingredients fundamental to [their] exertion of control over the crime?⁵⁸⁰ • Did the accused conceive the crime? • Did the accused oversee the crime's preparation at different hierarchical levels? • Did the accused oversee the performance or execution of the crime?⁵⁸¹

Table 22: Proving indirect perpetration cues

4.4.1.4. Indirect co-perpetration

Indirect co-perpetration occurs when an organisational leader is held liable for crimes committed by those for whom another horizontal co-perpetrator is vertically responsible. Put differently, it allows 'leader X [to be] held accountable for crimes committed by agents under the control of leader Y, although leader X lacks such control.'⁵⁸² This is represented graphically in *Figure 1*.

⁵⁷⁷ *Katanga Trial Judgment*, para. 1408.

⁵⁷⁸ *Katanga & Chui Decision on the Confirmation of Charges*, para. 518.

⁵⁷⁹ *Katanga & Chui Decision on the Confirmation of Charges*, para. 513; *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, 9 June 2014 ('*Ntaganda Decision on the Confirmation of Charges*'), para. 120.

⁵⁸⁰ *Katanga Trial Judgment*, para. 1415.

⁵⁸¹ *Katanga Trial Judgment*, para. 1412.

⁵⁸² C Stahn, *A Critical Introduction to International Criminal Law* (1st ed CUP 2019), p. 138.

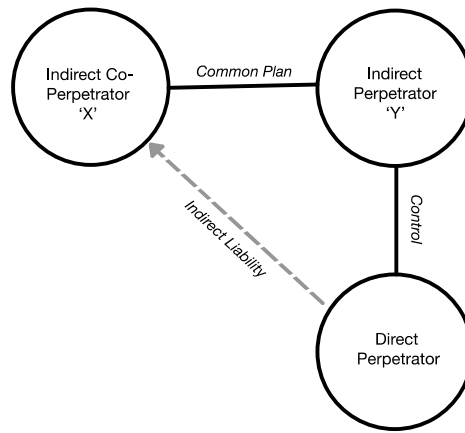


Figure 1: Indirect Co-perpetration

The scope of liability recognised by indirect co-perpetration is wide ranging. However, it arises from a recognition that leaders within organised criminal collectives may still bear responsibility as the architects of criminal acts ultimately committed by their subordinates, notwithstanding their physical and (formal) organisational detachment from those crimes.

In order to prove indirect co-perpetration, prosecutors must establish that:

- (i) the accused was part of a common plan or agreement with one or more persons;
- (ii) the accused and other co-perpetrators carried out essential contributions to that plan in a coordinated manner that resulted in the fulfilment of the material elements of a crime;
- (iii) the accused had control over the organisation;
- (iv) the organisation consisted of an organised and hierarchical apparatus of power;
- (v) the execution of the crimes was secured by almost automatic compliance with the orders of the accused;
- (vi) the accused satisfied the mental elements of the crime in question;
- (vii) the accused and other co-perpetrators were mutually aware and accepted that the implementation of the common plan would result in the fulfilment of the material elements of the crimes; and
- (viii) the accused was aware of the factual circumstances enabling him to exercise joint control over the commission of the crime through another person.⁵⁸³

Because indirect co-perpetration is an amalgamation of indirect and co-perpetration,⁵⁸⁴ its requisite elements have been explained in detail above. Elements (i) and (ii) are dealt with above in co-perpetration, whilst requirements (iii) – (v) are dealt with in indirect perpetration. As to the

⁵⁸³ [Rome Statute](#), article 25(3)(a); [Ntaganda Decision on the Confirmation of Charges](#), para. 104; [Prosecutor v. Muthaura et al.](#), ICC-01/09-02/11, [Decision on the Confirmation of Charges Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute](#), 23 January 2012, para. 297.

⁵⁸⁴ [Prosecutor v. Ongwen](#), ICC-02/04-01/15, [Decision on the Confirmation of Charges Against Dominic Ongwen](#), 23 March 2016 ('[Ongwen Decision on the Confirmation of the Charges](#)'), para. 39.

mental elements, requirement (vii) is dealt with in co-perpetration and the remaining elements are common to both crimes.

4.4.2. Article 25(3)(b): Ordering

International crimes are often committed by direct perpetrators on the orders of a superior.⁵⁸⁵ To account for this, the Rome Statute envisages a form of criminal liability arising from ordering, which refers to situations in which an accused in a position of authority gives an order to a subordinate to commit crimes, and that subordinate goes on to do so.⁵⁸⁶ Ordering in this sense leads to criminal liability as an accomplice to the eventual crime.

To establish an accused's liability for ordering an offence, prosecutors must prove that:

- (i) the accused was in a position of authority;
- (ii) the accused instructed another person in any form to commit a crime or to perform an act or omission in the execution of which a crime was carried out;
- (iii) the order had a direct effect on the commission or attempted commission of the crime; and
- (iv) the accused was at least aware that the crime would be committed in the ordinary course of events as a consequence of the execution or implementation of the order.

The accused was in a position of authority

To establish that the accused was in a position of authority, prosecutors must demonstrate that there was a superior-subordinate relationship that gave the accused some level of control over the direct perpetrator at the time they issued an order.⁵⁸⁷ It does not need to be proven that this position was legal, formal, or permanent,⁵⁸⁸ and it is sufficient that the position occupied by the accused factually allowed them to 'compel another person to commit a crime in following the [...] order.'⁵⁸⁹

The accused instructed another person

Next, it must be proven that the accused either instructed a person to commit a crime which was in fact committed, or to perform an act or omission, in the course of which a crime was carried

⁵⁸⁵ Cryer *et al.* (2015), p. 359.

⁵⁸⁶ *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, 2 September 1998 ('*Akayesu Trial Judgment*'), para. 483; *Prosecutor v. Blaškić*, IT-95-14-T, Judgment, 03 March 2000 ('*Blaškić Trial Judgment*'), para. 278.

⁵⁸⁷ *Akayesu Trial Judgment*, para. 483; *Blaškić Trial Judgment*, para. 278. See e.g., *Ntaganda Decision on the Confirmation of Charges*, para. 120.

⁵⁸⁸ *Prosecutor v. Karadžić*, IT-95-5/18-T, Judgment Volume 1 of 4, 24 March 2016 ('*Karadžić Trial Judgment*'), para. 573.

⁵⁸⁹ *Ntaganda Decision on the Confirmation of Charges*, fn. 598.

out.⁵⁹⁰ This instruction need not be written or given in any particular form, and may be passed down the chain of command, rather than given directly to the direct perpetrator(s).⁵⁹¹

The order substantially affected the commission of the crime

In order to satisfy the third element of ordering, the order must be shown to have directly and substantially affected the commission or attempted commission of the crime. This does not require prosecutors to establish that the order was the sole cause of the crime, but it must nonetheless have been a substantial contributing factor in bringing about the eventual commission of that act.⁵⁹²

Mental elements

Finally, it must also be proven that the accused intended to instruct the direct perpetrator to carry out the crime that they went on to commit. Essentially, this requires prosecutors to demonstrate that the accused meant that their order would lead to the criminal act being committed or were at least aware that the crime would be committed in the ordinary course of events, following the execution or implementation of the order (*see* sections 3.3.1 and 3.3.2).⁵⁹³

It should be stressed that in satisfying these subjective elements, it is the mental state of the superior who gives the order, rather than the subordinate who carries out that order, that is important. It is therefore irrelevant whether the subordinate realised that their actions were criminal in nature.⁵⁹⁴

Proving ordering: cues for prosecutors

In seeking to establish whether an accused could be liable for contributing to a crime through ordering, prosecutors may consider the following cues:

Element	Cues
Was the accused in a position to instruct the direct perpetrator to commit the	<ul style="list-style-type: none">• Does the evidence suggest that the accused was acting at the direction of a superior?

⁵⁹⁰ *Prosecutor v. Mudacumura*, ICC-01/04-01/12, Decision on the Prosecutor's Application Under Article 58, 13 July 2012 ('*Mudacumara Decision on the Prosecutor's Application under Article 58*'), para. 63; *Ntaganda Decision on the Confirmation of Charges*, para. 145; *Karadžić Trial Judgment*, para. 573; *Prosecutor v. Galić*, IT-98-29-A, *Judgment*, 30 November 2006, para. 176.

⁵⁹¹ *Karadžić Trial Judgment*, para. 573; *Mudacumara Decision on the Prosecutor's Application under Article 58*, para. 63.

⁵⁹² *Prosecutor v. Milutinović et al.*, IT-05-87-T, *Judgment Volume 1 of 4*, 26 February 2009 para. 88; *Prosecutor v. Strugar*, IT-01-42-T, *Judgment*, 31 January 2005, para. 332; *Ntaganda Decision on the Confirmation of Charges*, para. 145.

⁵⁹³ *Mudacumara Decision on the Prosecutor's Application under Article 58*, para. 63; *Ntaganda Decision on the Confirmation of Charges*, para. 145; *Prosecutor v. Blaškić*, IT-95-14-A, *Judgment*, 29 July 2004, para. 42.

⁵⁹⁴ *Blaškić Trial Judgment*, para. 282.

crime?	<ul style="list-style-type: none"> • Was there a chain of command or reporting, even if informal? • Was it normal for individuals within the chain of command to act outside of that chain?
What evidence is there that an order was given?	<ul style="list-style-type: none"> • Is there direct evidence of orders being given (e.g., physical or digital copies)? • Can the existence of an order be inferred from circumstantial evidence (e.g., because there was a large number of similar actions carried out over a defined area)?⁵⁹⁵
Did the order substantially affect the commission of a crime?	<ul style="list-style-type: none"> • What was the nature of the order that was given (i.e., did it involve criminal acts)? • What was the nature of the crime that allegedly followed the commission of the order? • Was the crime that was committed a foreseeable consequence of that order?
Did the accused assume, anticipate or intend that their order would lead to the commission of a crime?	<ul style="list-style-type: none"> • What was the nature of the order (i.e., did it involve criminal acts?) • Did the accused make any prior statements showing that the objective of their order was the commission of crimes?⁵⁹⁶ • What were the overall circumstances of the crime?

Table 23: Proving ordering cues

4.4.3. Article 25(3)(b): Soliciting or inducing

Soliciting or inducing refers to a form of accomplice liability that occurs when an accused influences or prompts another person to commit a crime.⁵⁹⁷ More specifically, ‘soliciting’ refers to situations in which an accused asks or urges a direct perpetrator to commit a criminal act.⁵⁹⁸ In this sense, it covers largely the same conduct as ‘counselling’ under section 25 of the Gambian

⁵⁹⁵ *Blaškić Trial Judgment*, para. 281; *Prosecutor v. Hategemimana*, ICTR-00-55B-A, *Judgment*, 08 May 2012, para. 67.

⁵⁹⁶ *Ntaganda Decision on the Confirmation of Charges*, para. 150.

⁵⁹⁷ The equivalent mode of liability in the Tribunals is ‘instigation’ under: UN Security Council, Resolution 955: Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 (8 November 1994 last amended 14 August 2002) S/RES/955 (‘*ICTR Statute*’), article 6(1); UN Security Council, Resolution 827: Statute of the International Criminal Tribunal for the Former Yugoslavia (25 May 1993 last amended 9 July 2009) S/RES/827 (‘*ICTY Statute*’), article 7(1).

⁵⁹⁸ *Kilolo et al. Trial Judgment*, para. 75.

Criminal Code. ‘Inducing’, on the other hand, is a stronger method of instigation than ‘soliciting’, and encompasses situations in which an accused succeeds in influencing another individual to commit a crime, either by strong reasoning, persuasion, or conduct prompting of the commission of the offence.⁵⁹⁹ Therefore, it is almost identical to ‘procuring’ under section 25 of the Gambian Criminal Code.⁶⁰⁰

To establish an accused’s liability for soliciting or inducing, prosecutors must prove that:

- (i) the accused influenced another person to either commit a crime which occurred or was attempted, or to perform an act or omission as a result of which a crime was carried out;
- (ii) the solicitation/inducement had a direct effect on the commission or attempted commission of the crime; and
- (iii) the accused was at least aware that the crimes would be committed in the ordinary course of events following the realisation of the act or omission.⁶⁰¹

The accused exerted influence over another person

Firstly, it must be demonstrated that the accused exerted influence over another to commit a crime or perform an act or omission that resulted in the commission of a crime. Evidently, this requires prosecutors to establish that the crime was actually committed or attempted by the direct perpetrator following the accused’s orders.⁶⁰² However, whilst it must be shown that an accused influenced the actions or omissions of the direct perpetrator, in order to be classed as ‘soliciting / inducing’, it must be established that the direct perpetrator had some degree of freedom to decide whether or not to commit the crime.⁶⁰³ If this were not the case then the accused would have had complete control over the direct perpetrator’s actions, and the appropriate mode of liability would be that of indirect perpetration under article 25(3)(a) of the Rome Statute.

The inducement does not have to be direct or public, and can be communicated through an intermediary.⁶⁰⁴ It is also unnecessary to demonstrate that the accused was present when the direct perpetrator committed the crime.⁶⁰⁵ Any inducement by the accused to commit a crime may be either express or implied⁶⁰⁶ and can consist of either an act or omission⁶⁰⁷ and unlike

⁵⁹⁹ *Kilolo et al. Trial Judgment*, para. 76.

⁶⁰⁰ The major difference between soliciting or inducing under the Rome Statute and counselling or procuring under the Gambian Criminal Code is that the former is a form of accomplice liability under the Rome Statute, whilst the latter leads to principal liability under the Gambian Criminal Code.

⁶⁰¹ *Rome Statute*, article 25(3)(b); *Ntaganda Decision on the Confirmation of Charges*, para. 153.

⁶⁰² *Prosecutor v. Šešelj*, MICT-16-99-A, Judgment, 11 April 2008 (‘*Šešelj Appeal Judgment*’), para. 124.

⁶⁰³ *Šešelj Appeal Judgment*, para. 124.

⁶⁰⁴ *Prosecutor v. Kilolo et al.*, ICC-01/05-01/13, Judgment on the Appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido Against the Decision of Trial Chamber VII Entitled “Judgment pursuant to Article 74 of the Statute”, 8 March 2018 (‘*Kilolo et al. Appeal Judgment*’), para. 848.

⁶⁰⁵ *Prosecutor v. Nyiramasuhuko et al.*, ICTR-92-48-A, *Judgment*, 14 December 2015, para. 3327.

⁶⁰⁶ *Kilolo et al. Trial Judgment*, para. 78.

ordering, no superior-subordinate relationship between the accused and the direct perpetrator is required.⁶⁰⁸

The solicitation or inducement had a direct effect on the commission of a crime

Secondly, it must be proven that the solicitation / inducement had a direct effect upon the commission of a crime. Like ordering, this requires prosecutors to establish that the solicitation / inducement was a substantial contributing factor in bringing about the eventual criminal act or omission.⁶⁰⁹ This will be the case, for example, where an accused convinces another individual, who was previously undecided as to whether they would do so, to commit a criminal act, thereby bringing about a crime that might not have happened without their intervention.⁶¹⁰

Mental elements

Finally, prosecutors must establish that the accused intended to solicit or induce the direct perpetrator to carry out the crime that they went on to commit (*see* section 3.3.1), or that they were aware that this crime would occur in the ordinary course of events as a consequence of their act.⁶¹¹

Proving soliciting or inducing: cues for prosecutors

In seeking to establish whether an accused could be liable for soliciting or inducing, prosecutors may consider the following cues:

Element	Cues
Is there evidence that the accused influenced the direct perpetrator in committing a crime?	<ul style="list-style-type: none"> • Was the influence psychological in nature (e.g., by persuasion, enticement or promises)? • Was the influence physical (e.g., through coercion or threats)? • What was the relationship between the accused and the direct perpetrator?
Did the accused's inducement have a direct effect upon the commission of the	<ul style="list-style-type: none"> • What was the nature of the accused's inducement (i.e., did it involve criminal acts)? • What was the nature of the crime that allegedly followed the

⁶⁰⁷ *Ntaganda* [Decision on the Confirmation of Charges](#), fn. 629; *Karadžić* [Trial Judgment](#), para. 572.

⁶⁰⁸ *Kilolo et al.* [Trial Judgment](#), para. 77.

⁶⁰⁹ *Karadžić* [Trial Judgment](#), para. 572; *Prosecutor v. Kordić & Čerkez*, IT-95-14/2-A, Judgment, 17 December 2004 ('*Kordić & Čerkez* [Appeal Judgment](#)'), para. 27.

⁶¹⁰ *Prosecutor v. Orić*, IT-03-68-T, Judgment, 30 June 2006 ('*Orić* [Trial Judgment](#)'), para. 271.

⁶¹¹ *Kordić & Čerkez* [Appeal Judgment](#), para. 32.

criminal act or omission?	commission of the inducement? <ul style="list-style-type: none"> Was the crime that was committed a foreseeable consequence of that inducement?
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Table 24: Proving soliciting or inducement cues

4.4.4. Article 25(3)(c) Aiding, abetting or otherwise assisting in the commission of a crime

Article 25(3)(c) of the Rome Statute criminalises aiding and abetting or otherwise assisting in the commission or attempted commission of a crime, including by providing the means for its commission. Aiding and abetting is a common mode of liability in both international and domestic criminal law and is similar to that recognised in sections 23(b)-(c) of the Gambian Criminal Code.

In order to establish an accused's liability for aiding, abetting, or otherwise assisting in the commission of a crime, prosecutors must demonstrate that:

- (i) an international crime was committed or attempted;
- (ii) the accused aided, abetted or otherwise assisted in the commission of the crime or its attempted commission, including by providing the means for its commission; and
- (iii) the accused provided assistance for the purpose of facilitating the commission of the crime.⁶¹²

An international crime was committed or attempted

Firstly, it must be shown that a crime within the jurisdiction of the ICC has been committed or attempted. This requires prosecutors to demonstrate the factual aspects of the crime in question but does not require the direct perpetrator to be identified, charged, or convicted.⁶¹³

The accused aided or abetted another in the commission of the criminal act

Secondly, it must be shown that the accused aided, abetted, or otherwise assisted in the commission or attempted commission of the criminal act. The terms 'aiding', 'abetting' or 'otherwise assisting' all signify the same type of conduct,⁶¹⁴ that is, the provision of aid that assists the commission of the crime.⁶¹⁵ Assistance may be given before, during, or after the offence has been perpetrated⁶¹⁶ and may take the form of practical (or material) aid,⁶¹⁷ or

⁶¹² Rome Statute, article 25(3)(c); *Kilolo et al. Trial Judgment*, paras 83-84; *Prosecutor v. Al Mahdi*, ICC-01/12-01/15, *Decision on the Confirmation of Charges Against Ahmad Al Fagi Al Mahdi*, 24 March 2016, para. 26; *Ongwen Decision on the Confirmation of the Charges*, para. 43.

⁶¹³ *Kilolo et al. Trial Judgment*, para. 84.

⁶¹⁴ *Kilolo et al. Appeal Judgment*, para. 1325.

⁶¹⁵ *Kilolo et al. Trial Judgment*, para. 84; *Ongwen Decision on the Confirmation of the Charges*, para. 43.

⁶¹⁶ *Kilolo et al. Trial Judgment*, para. 96.

encouraging or expressing sympathy for the commission of a crime.⁶¹⁸ Encouragement need not be explicit, and will include situations in which the accused is present at the scene of the crime as a ‘silent spectator’ capable of providing tacit encouragement merely ‘by [their] mere presence and authority.’⁶¹⁹ Like ordering, soliciting and inducing, it is not essential that the accused was personally present during the commission of the offence, or that they offered their support or assistance directly to the direct perpetrator in order to establish liability under article 25(3)(c). Consequently, an accused may still be held liable for aiding and abetting where they provided their support indirectly through an intermediary, for example when operating in a chain of command.⁶²⁰

There is no minimum threshold of assistance that needs to be met in order to establish an accused’s liability for aiding and abetting, nor are there any strict requirements regarding the effect of the assistance upon the commission of the crime. Ultimately, whether or not an accused’s conduct amounts to ‘assistance’ will depend upon the facts of each case, including the role of the accused in relation to that of the direct perpetrator(s).⁶²¹

Mental elements

Finally, it must also be established that the accused’s assistance was provided ‘*for the purpose of facilitating the commission of the crime*’, meaning that the accused must have been aware that their conduct would assist in the commission of a crime, even if they did not share the intention of the direct perpetrator (*see* section 3.3.1).⁶²²

Proving aiding and abetting: cues for prosecutors

In seeking to establish whether an accused could be liable for aiding, abetting, or otherwise assisting the commission of a crime, prosecutors may consider the following cues:

⁶¹⁷ *Kilolo et al. Trial Judgment*, para. 88. *See also*, *Prosecutor v. Kvočka et al.*, IT-98-30/1-T, Judgment, 02 November 2001 (*‘Kvočka et al. Trial Judgment’*), para. 253; *Prosecutor v. Mrkšić et al.*, IT-95-13/1-T, Judgment, 27 September 2007 (*‘Mrkšić et al. Trial Judgment’*), para. 551; *Prosecutor v. Sesay et al.*, SCSL-04-15-T, Judgment, 2 March 2009 (*‘Sesay et al. Trial Judgment’*), para. 276; *Prosecutor v. Taylor*, SCSL-03-01-T, Judgment, 18 May 2012 (*‘Taylor Trial Judgment’*), fn. 1136.

⁶¹⁸ *Kilolo et al. Trial Judgment*, para. 89. *See also*, *Mrkšić et al. Trial Judgment*, para. 551; *Kvočka et al. Trial Judgment*, para. 254; *Prosecutor v. Furundžija*, IT-95-17/1-T, Judgment, 10 December 1998 (*‘Furundžija Trial Judgment’*), para. 231; *Akayesu Trial Judgment*, para. 484; *Sesay et al. Trial Judgment*, paras 276-277; *Taylor Trial Judgment*, fn. 1136.

⁶¹⁹ *Kilolo et al. Trial Judgment*, para. 89; *Prosecutor v. Ngirabatware*, MICT-12-29-A, Judgment, 18 December 2014 (*‘Ngirabatware Appeal Judgment’*), para. 150.

⁶²⁰ *Kilolo et al. Appeal Judgment*, para. 1330; *Kilolo et al. Trial Judgment*, para. 96.

⁶²¹ *Kilolo et al. Appeal Judgment*, para. 1327; *Kilolo et al. Trial Judgment*, para. 93; *Ongwen Decision on the Confirmation of the Charges*, para. 43.

⁶²² *Kilolo et al. Trial Judgment*, para. 97.

Element	Cues
Was a crime under the Rome Statute committed?	<ul style="list-style-type: none"> • Which crime was committed? • By what means did the direct perpetrator commit the crime? • At what time and place did the events take place? • Is there evidence of the identities of the victims?
Did the accused aid, abet, or otherwise assist in the commission or attempted commission of the criminal act?	<ul style="list-style-type: none"> • Was the assistance given by an accused's conduct? • Was the assistance given by tacit encouragement where, 'by [their] mere presence and authority,'⁶²³ the accused implicitly approved the act by failing to take steps to prevent its commission? • Was the assistance committed through 'omission proper' (i.e., did the accused have a duty to act and the means to fulfil this duty, but choose not to do so)?⁶²⁴

Table 25: Proving aiding and abetting cues

4.4.5. Article 25(3)(d): Other contributions to crimes

Under article 25(3)(d) of the Rome Statute, an accused may be held liable for other contributions to crimes where they intentionally contribute to the commission or attempted commission of a crime in conjunction with another group of persons acting with a common purpose.

In order to establish an accused's liability for other contributions to crimes, prosecutors must demonstrate that:

- (i) an international crime was committed or attempted by another person;
- (ii) the direct perpetrators of the crime belong to a group acting with a common purpose;
- (iii) the accused contributed to the crime in any other way other than those identified in article 25(b)-(c);
- (iv) the contribution was intentional; and
- (v) the accused's contribution was made in the knowledge that the group intended to commit the crime.⁶²⁵

⁶²³ *Kilolo et al. Trial Judgment*, para. 89; *Ngirabatware Appeal Judgment*, para. 150.

⁶²⁴ *Karadžić Trial Judgment*, para. 575.

⁶²⁵ *Rome Statute*, article 25(3)(d); *Katanga Trial Judgment*, para. 1620.

An international crime was committed or attempted

Firstly, in order to establish an accused's liability for other contributions to crimes, it must be shown that the crime in question has occurred or been attempted by the direct perpetrators.

The accused belonged to a group acting with a common purpose

Secondly, it must be shown that those direct perpetrators belonged to a group acting with a common purpose.⁶²⁶ This group need not be organised in a military, political or administrative structure,⁶²⁷ and there is no requirement to prove that the accused was a member of this group.⁶²⁸ The common purpose of the group must involve an element of criminality, meaning that the purpose itself must have been to commit a crime, or must have at least involved the commission of a crime in the ordinary course of events.⁶²⁹

The accused contributed to the crime in question in a way other than those identified under article 25(b)-(c) of the Rome Statute

Next, the evidence must demonstrate that the accused contributed to the crime in any way other than through perpetrating, ordering, soliciting, inducing, or aiding and abetting. This requires prosecutors to prove the specific contribution made in relation to each crime that the accused is allegedly complicit in,⁶³⁰ and to demonstrate that this contribution had a material effect on the commission of the crime.⁶³¹ As such, although it need not be the sole determining factor in the commission of that crime,⁶³² contributions cannot be general, inconsequential, or trivial in nature.⁶³³

Mental elements

Finally, as to the mental elements of other contributions to crimes, it must also be proven that the accused's contribution was intentional,⁶³⁴ and that it was made with the aim of furthering the criminal activity or purpose of the group, or in the knowledge of that group's intention to commit the crime.⁶³⁵ This intent or knowledge must be established in relation to each specific crime. General criminal intention on the part of the group will therefore not suffice,⁶³⁶ although there is no need to prove that the accused shared the exact intent and knowledge of the direct perpetrators

⁶²⁶ Katanga [Trial Judgment](#), para. 1624.

⁶²⁷ Katanga [Trial Judgment](#), para. 1626.

⁶²⁸ Katanga [Trial Judgment](#), para. 1631.

⁶²⁹ Katanga [Trial Judgment](#), paras 1626-1627, 1630.

⁶³⁰ Katanga [Trial Judgment](#), para. 1632.

⁶³¹ Katanga [Trial Judgment](#), paras 1632-1633.

⁶³² Katanga [Trial Judgment](#), paras 1633-1634.

⁶³³ Katanga [Trial Judgment](#), para. 1632.

⁶³⁴ Katanga [Trial Judgment](#), para. 1637.

⁶³⁵ Katanga [Trial Judgment](#), paras 1639-1642.

⁶³⁶ Katanga [Trial Judgment](#), para. 1642.

committing the crime.⁶³⁷ The perpetrator's knowledge may be inferred from the relevant facts and circumstances and may be connected to the group's intention to commit specific crimes.⁶³⁸

Proving other contributions to crimes: cues for prosecutors

In seeking to establish whether an accused could be liable for other contributions to crimes, prosecutors may consider the following cues:

Element	Cues
Was a crime under the Rome Statute committed?	<ul style="list-style-type: none"> • Which crime was committed? • By what means did the direct perpetrator commit the crime? • At what time and place did the events take place?
Is there evidence that the group of direct perpetrators acted with a common purpose?	<ul style="list-style-type: none"> • Is there evidence of a pre-arranged plan? • If not, can the existence of a plan be inferred from the group's actions or omissions? • What was the geographical and temporal scope of the alleged plan? • Were there any similarities between the type, origins, or characteristics of the victims pursued? • What were the identities of the victims (e.g., common profession, religion, political views etc.)?
Is there evidence that the accused intentionally made a material contribution to the crime?	<ul style="list-style-type: none"> • What role did the accused play in relation the seriousness and scope of the crimes committed? • Did the accused sustain their contribution after acquiring knowledge of the criminality of the group's purpose? • Were any efforts made to prevent criminal activity or to impede the efficient functioning of the group's crimes? • Did the accused create or merely execute the criminal plan? • What was the accused position in the group?⁶³⁹

⁶³⁷ Katanga [Trial Judgment](#), para. 1638.

⁶³⁸ Katanga [Trial Judgment](#), para. 1642.

⁶³⁹ *Prosecutor v. Mbarishimana*, ICC-01/04-01/10, [Decision on the Confirmation of Charges](#), 16 December 2011, para. 284.

<p>Was the accused contribution made with the intent of furthering the commission of a crime?</p>	<ul style="list-style-type: none"> • Which crimes were committed? • Did the accused intend to further each of these crimes? • What were the circumstances of these crimes?
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Table 26: Proving other contributions to crimes cues

4.4.6. Article 28(a): Command responsibility

Command/superior responsibility allows superiors to be held liable for failing to prevent, repress, or punish crimes committed by their subordinates.⁶⁴⁰ Command responsibility refers to the responsibility of military commanders for crimes committed by forces acting under their command, authority and control, which occurred because of their failure to exercise proper control over those forces.

To establish command responsibility under article 28(a) of the Rome Statute, prosecutors must demonstrate that:

- (i) an international crime was committed by forces;
- (ii) the accused was a military commander or person acting effectively as a military commander;
- (iii) the accused had effective command and control, or effective authority and control, over the forces who committed the crime(s) in question;
- (iv) the accused either knew or owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes;
- (v) the accused failed to take the necessary and reasonable measures within their power to prevent or repress the commission of such crimes or failed to submit the matter to the competent authorities for investigation and prosecution; and
- (vi) the crimes committed by the forces resulted from the failure of the accused to exercise proper control over them.⁶⁴¹

An international crime was committed

Firstly, the relevant forces (i.e., the armed group or military) must have committed an international crime.⁶⁴² ‘Commission’ by subordinate forces incorporates modes of liability

⁶⁴⁰ Cryer *et al.* (2015), p. 368.

⁶⁴¹ [Rome Statute](#), article 28(a); [Bemba Decision on the Confirmation of Charges](#), para. 407.

beyond perpetration and consequently, commanders may also incur liability where their forces plan, instigate, or aid and abet in the commission of a crime by another person.⁶⁴³

The accused was acting as a military commander or person acting as military commander

Secondly, the accused must have been a military commander or a person acting as a military commander. A military commander is someone who is formally or legally appointed to carry out a particular command function.⁶⁴⁴ This includes those appointed in line with the domestic procedures or practices of the regular armed forces of a state,⁶⁴⁵ and those individually appointed under the practices or regulations (whether written or unwritten) of irregular non-governmental forces.⁶⁴⁶ A person acting as a military commander includes those not formally or legally appointed as military commanders, but who effectively have command over the forces that committed the crimes,⁶⁴⁷ even if they do not perform exclusively military functions.⁶⁴⁸

The accused had effective command and control

Thirdly, the accused must have had effective command and control, or effective authority and control, over the forces who committed the crime(s) in question.⁶⁴⁹ Effective command and authority have similar meanings, as both refer to the power or right to give orders and enforce obedience.⁶⁵⁰ However, whilst effective *command* refers to the existence of these rights because of an accused's position within a chain of command, effective *authority* encompasses different means and methods by which military commanders might have the right to exercise power or influence.⁶⁵¹ Effective *control* is common to both of these elements, and relates to the material ability to exercise this power or influence by preventing, repressing, or punishing crimes committed by subordinates, or to submit the matter to competent authorities for investigation or prosecution.⁶⁵² Such control is generally a manifestation of a (formal or informal) superior-

⁶⁴² *Bemba Trial Judgment*, para. 175.

⁶⁴³ *Prosecutor v. Kordić & Čerkez*, IT-95-14/2-T, Judgment, 26 February 2001 ('*Kordić and Čerkez Trial Judgment*'), paras 370-371.

⁶⁴⁴ *Bemba Trial Judgment*, para. 176; *Bemba Decision on the Confirmation of Charges*, para. 408.

⁶⁴⁵ *Bemba Trial Judgment*, para. 176.

⁶⁴⁶ *Bemba Trial Judgment*, para. 176.

⁶⁴⁷ *Bemba Trial Judgment*, para. 177; *Gacumbitsi Appeal Judgment*, para. 143.

⁶⁴⁸ *Bemba Trial Judgment*, para. 177; *Bemba Decision on the Confirmation of Charges*, fn. 522; *Gacumbitsi Appeal Judgment*, para. 143.

⁶⁴⁹ *Bemba Trial Judgment*, paras 170, 180-181; *Bemba Decision on the Confirmation of Charges*, para. 407. To demonstrate effective control, it must be shown that the superior was at least in control of the forces at the time that the crimes were committed, if not for some period beforehand. See *Bemba Decision on the Confirmation of Charges*, paras 418-419.

⁶⁵⁰ *Bemba Trial Judgment*, para. 180; *Bemba Decision on the Confirmation of Charges*, para. 413.

⁶⁵¹ *Bemba Decision on the Confirmation of Charges*, paras 412-416.

⁶⁵² *Bemba Trial Judgment*, para. 183; *Bemba Decision on the Confirmation of Charges*, para. 415; *Prosecutor v. Delalić et al.*, IT-96-21-A, Judgment, 20 February 2001 ('*Delalić et al. Appeal Judgment*'), paras 190-198.

subordinate relationship between the accused and their forces and will invariably not arise unless this relationship existed.⁶⁵³

Put differently, effective command and authority require the accused to have occupied a position that gave them the *right* to control their subordinates, whilst effective control requires them to have been *materially able* to do so in practice.

The accused knew or should have known that their forces were committing/about to commit crimes

The fourth element of command responsibility requires prosecutors to establish that the accused either **knew** or **should have known** that their forces were committing or about to commit crimes:

- (i) to establish that an accused **knew** that their forces had committed or were about to commit crimes, the evidence must show that they had actual knowledge or awareness regarding the crimes of their subordinates.⁶⁵⁴ This cannot be presumed and must instead be established by direct or circumstantial evidence.⁶⁵⁵ If the evidence is circumstantial, it must demonstrate an inference that is the only reasonable conclusion. It should be noted, however, that in any case it does not have to be shown that the commander knew the specific identities of the direct perpetrator(s), nor that they mastered the precise details of the crimes to be committed;⁶⁵⁶ and
- (ii) where the evidence does not show that the accused knew that crimes were committed or about to be committed by their subordinates, prosecutors may establish that they **should have known** this to be the case.⁶⁵⁷ In situations where information is not immediately available, military commanders have an active duty to take the necessary measures to acquire knowledge regarding the conduct of their troops, particularly where that conduct entailed the commission of a crime. The accused will be taken to have knowledge of the crimes if they had general information to put them on notice of possible crimes committed by subordinates, and such information was sufficient to justify further inquiry or investigation.⁶⁵⁸

The accused failed to take necessary and reasonable measures within the power to prevent, repress, or punish the commission of crimes

The fifth element of command responsibility requires prosecutors to establish that although the accused knew, or should have known, that the forces were committing or about to commit

⁶⁵³ *Prosecutor v. Halilović*, IT-01-48-A, [Judgment](#), 16 October 2007, para. 59.

⁶⁵⁴ *Bemba Trial Judgment*, para. 170; *Bemba Decision on the Confirmation of Charges*, para. 407.

⁶⁵⁵ *Bemba Trial Judgment*, para. 191; *Bemba Decision on the Confirmation of Charges*, para.430; *Blaskić Trial Judgment*, para. 307.

⁶⁵⁶ *Bemba Trial Judgment*, para. 194.

⁶⁵⁷ *Bemba Trial Judgment*, para. 170; *Bemba Decision on the Confirmation of Charges*, paras 407, 428.

⁶⁵⁸ *Bemba Decision on the Confirmation of Charges*, para. 434.

crimes, they subsequently failed to take necessary and reasonable measures within their power to:

- (i) **prevent** the commission of crimes before they were committed, for example by: (a) ensuring that relevant practices operated in accordance with the relevant rules of law; (b) taking disciplinary measures to prevent the commission of atrocities, including by suspending, excluding or redeploying violent subordinates; (c) protesting against criminal conduct and / or insisting before a superior authority that immediate action be taken; and (d) postponing military operations and / or conducting those operations in such a way as to lower / remove the risk of specific crimes being committed;⁶⁵⁹
- (ii) **repress** (or subdue) the commission of crimes, for example by: (a) taking measures to prevent criminal acts that are in progress; (b) conducting investigations regarding previous crimes; (c) exercising disciplinary power; or (d) proposing a sanction to a superior / remitting the case to a judicial authority where the accused has no such power;⁶⁶⁰ or
- (iii) **punish** crimes that have been committed by submitting the matter to a functioning authority competent to investigate and prosecute the acts, for example where commanders lack the disciplinary authority to adequately redress the crime in question.⁶⁶¹

Necessary measures in discharging these obligations are those that are appropriate and sufficient for the commander to genuinely discharge their duty to prevent, repress, or punish.⁶⁶² Generally, this will depend upon the type, severity, and imminence of the crimes in question.⁶⁶³

Reasonable measures are those that reasonably fall within the commander's material power⁶⁶⁴ to prevent, repress, or punish the impugned conduct. This will depend upon the extent of a commander's material ability to prevent or repress the commission of crimes, or to submit the matter to competent authorities for investigation.⁶⁶⁵ Put differently, commanders cannot be held responsible for something they had no power to do.⁶⁶⁶ Consequently, when seeking to establish whether an accused fulfilled the 'necessary and reasonable measures' obligation, prosecutors must consider what measures they had at their disposal in the circumstances.⁶⁶⁷ If it is established that the commander has taken all necessary and reasonable measures within their power, they

⁶⁵⁹ Where a commander has a duty to prevent crimes but fails to do so, punishment after the fact will not remedy the breach of this obligation: *Orić Trial Judgment*, para. 326.

⁶⁶⁰ *Bemba Trial Judgment*, paras 205-207.

⁶⁶¹ *Bemba Trial Judgment*, para. 208.

⁶⁶² *Bemba Trial Judgment*, para. 198.

⁶⁶³ *Taylor Trial Judgment*, para. 501.

⁶⁶⁴ *Bemba Trial Judgment*, para. 198.

⁶⁶⁵ *Karadžić Trial Judgment*, para. 588; *Bemba Decision on the Confirmation of Charges*, para. 443.

⁶⁶⁶ *Bemba Appeal Judgment*, para. 167.

⁶⁶⁷ *Bemba Appeal Judgment*, paras 168-170.

cannot be held responsible for the crimes, even if they were committed and the perpetrators went unpunished.⁶⁶⁸

The harm resulted from the accused's command and control

Finally, the evidence must establish that the crimes committed by the subordinates resulted from the accused's failure to exercise proper control over them. This requirement will be satisfied if it can be shown that the crimes would not have been committed in the manner that they were, had the commander properly exercised control.⁶⁶⁹ That said, it is often impractical to assess what exactly would have happened if the commander had not failed in their duties. Consequently, it will be sufficient if the evidence establishes that the failure increased the risk of the commission of the crimes.⁶⁷⁰

Proving command responsibility: cues for prosecutors

In seeking to establish whether an accused could be liable under command responsibility, prosecutors may consider the following cues:

Element	Cues
Was the accused a military commander or person acting effectively as a military commander?	<ul style="list-style-type: none">• Did the accused have an official position within a military chain of command?• Did the accused have an unofficial superior position within a chain of command?• Was the group in which the accused had a rank state- or non-state in nature?
Did the accused have effective command and control, or effective authority and control, over the forces who committed the crime(s) in question?	<ul style="list-style-type: none">• What was the official position of the commander within the military structure?• What were the actual tasks they carried out?• Did they have a power to issue orders and to ensure compliance with orders?• Did they have the capacity to re-subordinate units or make changes to internal structures, including by promoting, replacing, disciplining, or investigating members of the forces?⁶⁷¹

⁶⁶⁸ *Bemba Trial Judgment*, para. 200.

⁶⁶⁹ *Bemba Trial Judgment*, para. 213.

⁶⁷⁰ *Bemba Decision on the Confirmation of Charges*, para. 425.

⁶⁷¹ *Bemba Trial Judgment*, para. 188.

	<ul style="list-style-type: none"> Did the accused represent the ideology of a movement (e.g., a political party) to which the subordinates adhere?⁶⁷²
<p>Does the evidence show that the accused knew that the forces were committing or about to commit crimes?⁶⁷³</p>	<ul style="list-style-type: none"> Is there evidence of orders to commit crimes? Is there evidence that the military commander was personally informed that their forces were involved in criminal activity? What was the type, number, scope, location, and timing of the illegal acts? What was the means of available communication between the accused and their subordinates? What was the scope and nature of the commander's position and responsibility in the hierarchical structure? What was the location of the command at the time (i.e., was it geographically removed from the acts)? What was the notoriety of the illegal acts (e.g., were they reported in media coverage of which the military commander was aware)?⁶⁷⁴
<p>If the evidence does not show that the accused knew that the forces were committing or about to commit crimes, does it indicate that they should have known that this was the case?</p>	<ul style="list-style-type: none"> Did the past behaviour, character traits, or habits of subordinates indicate a preponderance for crime (e.g., violence)?⁶⁷⁵ What was the level of training of the subordinates? Were there any reports addressed to the accused, or press releases of international organisations and NGOs regarding the crimes? Did other personnel around the accused know of the crime? What was the extent of communication between the alleged military commander and the subordinates?⁶⁷⁶
<p>Did the accused fail to prevent, repress, or punish crimes?</p>	<ul style="list-style-type: none"> Based upon the nature and circumstances of the crimes, what was necessary at the time to prevent, repress or punish the crimes?

⁶⁷² *Bemba Trial Judgment*, para. 188.

⁶⁷³ *Bemba Trial Judgment*, para. 191.

⁶⁷⁴ *Bemba Trial Judgment*, para. 193; *Bemba Decision on the Confirmation of Charges*, para. 431.

⁶⁷⁵ *Delalić Appeal Judgment*, para. 238; *Prosecutor v. Bagilishema*, ICTR-95-1A-A, Judgment, 3 July 2002 ('*Bagilishema Appeal Judgment*'), para. 42(3).

⁶⁷⁶ See e.g., *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Trial Judgment, 18 December 2008 ('*Bagosora et al. Trial Judgment*'), paras 2065-2066.

	<ul style="list-style-type: none"> • Based upon the resources and knowledge available to the commander, what was reasonable at the time to prevent, repress or punish the crimes? • Did the accused fail to prevent, repress, or punish the crimes when they could have taken necessary and reasonable measures to do so? • Did the accused fail to submit the crimes to a competent tribunal when they could have taken necessary and reasonable measures to do so?
Were the crimes related to the accused's effective authority and control?	<ul style="list-style-type: none"> • Would the crimes have been prevented had the accused exercised their effective control correctly? • Would the crimes have been frustrated and/or materially changed had the accused exercised their effective control correctly?

Table 27: Proving command responsibility cues

4.4.7. Article 28(b) Superior responsibility

Article 28(b) of the Rome Statute provides for the responsibility of a civilian superior (who is not a military commander or a person who acts as such) for crimes committed by subordinates under their effective authority and control, as a result of their failure to exercise proper control over such forces.

The elements that must be demonstrated to establish superior responsibility are as follows:

- (i) an international crime was committed by the subordinates of the civilian superior;
- (ii) the perpetrator was a civilian superior who was not a military commander or a person effectively acting as such;
- (iii) the civilian superior had effective authority and control over their subordinates who committed the crime(s) in question;
- (iv) the crimes committed by the subordinates concerned activities that were within the effective responsibility and control of the civilian superior;
- (v) the civilian superior either knew or consciously disregarded information which indicated that their subordinates were committing or about to commit such crimes;
- (vi) the civilian superior failed to take the necessary and reasonable measures within their power to prevent or repress the commission of such crimes, or failed to submit the matter to the competent authorities for investigation and prosecution; and

(vii) the crimes committed by subordinates resulted from the civilian superior's failure to exercise control properly over them.⁶⁷⁷

An international crime was committed

In order to satisfy the first element of superior responsibility, the evidence must show that the subordinates of the accused committed the crime in question, including by planning, instigating, or aiding and abetting in the commission of a crime by another person.⁶⁷⁸

The civilian superior had a superior subordinate relationship that was not a military commander or commander like relationship

Secondly the civilian superior must have a superior-subordinate relationship with the direct perpetrators other than those defined in article 28(a) (i.e., one that is not a commander or commander-like relationship). In contrast to command responsibility, which refers to the accused's command over military or quasi-military forces, superior responsibility relates to civilians who exercise similar hierarchical authority over individuals where a military or military-like structure cannot be established.⁶⁷⁹ Accordingly, non-military members of governments, members of political parties, or officials of business companies may incur liability under superior responsibility concerning the criminal conduct of their civilian subordinates.⁶⁸⁰

The accused had effective control over their subordinates that committed the crime

The third element of superior responsibility requires the civilian superior to have effective authority and control over their subordinates that committed the crime in question. Again, in contrast to command responsibility, superior responsibility only requires effective *authority* and control, and cannot be established though effective *command* and control (discussed above). Consequently, whilst the requisite degree of effective control is similar to that of a military commander, the means by which that control is exercised need not be directly comparable to military chains of command.⁶⁸¹ This element would therefore be made out, for example, if the civilian superior had a more general position of authority and influence within the relevant organisation that enabled them to issue orders or instructions.⁶⁸²

⁶⁷⁷ [Rome Statute](#), article 28(b).

⁶⁷⁸ [Bemba Trial Judgment](#), fn. 89.

⁶⁷⁹ O Triffterer & R Arnold, 'Article 28: Responsibility of Commanders and their Superiors' in O Triffterer *et al.* (eds), *The Rome Statute of the International Court: A Commentary* (Beck/Hart 2016) ('Triffterer & Arnold (2016)'), p. 1101.

⁶⁸⁰ Triffterer & Arnold (2016), p. 1102.

⁶⁸¹ [Bagilishema Appeal Judgment](#), para. 55.

⁶⁸² See e.g., *Prosecutor v. Musema*, ICTR-96-13-A, [Judgment and Sentence](#), 27 January 2000 ('[Musema Judgment and Sentence](#)'), paras 880-883.

The crimes were related to the accused's effective authority and control

The fourth element of superior responsibility requires the crimes committed by the subordinates to have been related to the accused's effective authority and control. This requires a link between the crimes and the role performed by the accused to be shown. For instance, a civilian superior would not be held liable for misconduct of subordinates that occurred outside of working hours or which was not related to their work activities.⁶⁸³ That said, if the crimes occurred within the premises of the work place or whilst the employees were engaged in their professional duties outside of the work premises and within the context of the superior-subordinate relationship between the direct perpetrators and the accused, this element would be satisfied.⁶⁸⁴

The accused knew or consciously disregarded information that indicated their subordinates were committing / about to commit crimes

Next, the evidence must establish that the civilian superior either **knew** that their subordinates were committing or about to commit crimes, or that they **consciously disregarded** information that indicated that their subordinates were committing or about to commit such crimes:

- (i) as with command responsibility, to establish that an accused **knew** that their forces had committed or were about to commit crimes, the evidence must show that they had actual knowledge or awareness regarding their subordinates' actions.⁶⁸⁵ This cannot be presumed and must instead be established by direct or circumstantial evidence;⁶⁸⁶ and
- (ii) if it is not possible to establish the actual knowledge of the perpetrator, the civilian superior may be shown to be responsible if it can be established that they **consciously disregarded information** that indicated that their subordinates were committing or about to commit crimes. To satisfy this standard, it must be shown that the civilian superior had information available to them that indicated a significant risk regarding the commission of crimes by their subordinates⁶⁸⁷ and that they consciously (i.e., knowingly) disregarded this information.⁶⁸⁸

The accused failed to take necessary and reasonable measures within the power to prevent, repress, or punish the commission of crimes

As with command responsibility, the sixth element of superior responsibility requires the accused to have failed to take necessary and reasonable measures within their power to prevent or repress the commission of the crimes, or to have failed to submit the matter to the competent authorities for investigation or prosecution. The standard required by necessary and reasonable

⁶⁸³ Triffterer & Arnold (2016), pp. 110

⁶⁸⁴ *Musema Judgment and Sentence*, para. 880.

⁶⁸⁵ *Bemba Trial Judgment*, para. 191.

⁶⁸⁶ *Bemba Trial Judgment*, para. 191; *Bemba Decision on the Confirmation of Charges*, para. 430.

⁶⁸⁷ Triffterer & Arnold (3. 2016), pp. 1102-1103.

⁶⁸⁸ Triffterer & Arnold (2016), pp. 1102-1103.

measures, and the substantive elements of the duty to prevent, repress, or punish, are the same as those required under command responsibility, and have been discussed above.

The crimes were related to the accused's effective control

Finally, prosecutors must also establish that the crimes committed by the subordinates resulted from the superior's failure to exercise proper control over them. This requirement would be satisfied if it can be shown that the crimes would not have been committed in the circumstances in which they were, had the commander properly exercised control.⁶⁸⁹ That said, it is often impractical to assess what exactly would have happened if the commander had not failed in their duties. Consequently, it will be sufficient if the evidence establishes that the failure increased the risk of the commission of the crimes.⁶⁹⁰

Proving command responsibility: cues for prosecutors

Many of the elements for superior responsibility are similar to those considered in command responsibility, above. That said, in seeking to establish whether an accused could be liable under superior responsibility, prosecutors may consider the following specific cues:

Element	Cues
Did the accused have a non-military superior-subordinate relationship with the direct perpetrator?	<ul style="list-style-type: none"> • What was organisational structure in which this superior-subordinate relationship existed? • What was the accused's position within this structure? • What was the subordinate's position within this structure?
Did the accused have effective authority and control?	<ul style="list-style-type: none"> • Did they have the authority to control subordinates and to ensure compliance with instructions? • Did they have the material ability to enforce this authority against subordinates (e.g., by enforcing disciplinary procedures against them)?
Did the accused know, or consciously disregard information showing that that their forces had committed or were about to commit crimes?	<ul style="list-style-type: none"> • Has the accused previously admitted knowledge of the crimes? • Has the accused previously made other statement which point to their knowledge of the crimes?⁶⁹¹ • Where circumstantial evidence is relied upon, is the accused's knowledge the only reasonable conclusion that can be drawn?⁶⁹²

Table 28: Proving superior responsibility cues

⁶⁸⁹ *Bemba Trial Judgment*, para. 213.

⁶⁹⁰ *Bemba Trial Judgment*, para. 213; *Bemba Decision on the Confirmation of Charges*, para. 425.

⁶⁹¹ *Bemba Trial Judgment*, para. 191.

⁶⁹² *Bemba Trial Judgment*, para. 192.

4.5. Finding the appropriate mode of liability - a self-assessment tool for prosecutors

Have prosecutors considered all potentially relevant levels of perpetratorship?		
1.	Is there evidence linking direct perpetrators to the crime? (i.e., members of the military, paramilitary or security forces, or members of civilian authorities, such as the police).	
	1(a).	Can these perpetrators be linked to the crime through direct perpetratorship or other accessorial modes of liability?
2.	Is there evidence linking mid-level perpetrators to the crime? (i.e., those responsible for performing reporting obligations and carrying out / transmitting orders within chains of command).	
	2(a).	Can these perpetrators be linked to the crime through co-perpetratorship or other accessorial modes of liability?
3.	Is there evidence linking high-level perpetrators to the crime? (i.e., senior individuals responsible for giving order within chains of command, such as heads of state, governmental ministers, judges, parliamentary deputies, governors, or mayors).	
	3(a).	Can these perpetrators be linked to the crime through indirect perpetration, indirect co-perpetration, or other accessorial modes of liability?
4.	Can evidence of direct (or physical) perpetration be used as a basis to link more senior mid- or high-level perpetrators to the crime?	
Is the alleged mode well supported on the available evidence?		
5.	Is there a strong likelihood that the available evidence will be found to prove the accused's liability beyond all reasonable doubt?	
6.	Have prosecutors considered whether evidence relied upon is likely to face admissibility issues?	
7.	Have prosecutors considered whether there is any other direct or circumstantial evidence relating to the alleged facts that would strengthen the linkage between the accused and the crime?	
8.	Have prosecutors supported their charges with material facts, including evidence pertaining to what the accused is alleged to have done or failed to have done, alongside the location, date and duration of the action or omission?	
9.	Where they allege that an accused personally committed a crime, have prosecutors identified, at a minimum, the victim(s), the time and place of events, and the means by	

	which the act was allegedly perpetrated?	
10.	Where they allege that an accused was liable for a criminal act through ordering, soliciting, inducing, aiding or abetting, or complicity, have prosecutors identified, at a minimum, the particular acts course of conduct that gives rise to the charges?	
11.	When alleging an accused's liability for crimes through command or superior responsibility, have prosecutors identified, at a minimum, the accused's conduct as a superior, and the conduct of those for whom they are alleged to be responsible?	
Have prosecutors considered bringing alternative modes of liability?		
12.	Have prosecutors considered the evidence from multiple different standpoints, so as to assess whether alternative modes of liability might also be reasonably supported?	
13.	Would alternative modes of liability offer a tactical advantage for prosecutors, for example by offering a lower threshold that is more easily met on the available evidence?	
14.	Have prosecutors ensured that any alternative modes of liability are not frivolous or unsupported, and that they are genuinely sustained on the evidence?	
Do the allegations respect the rights of the accused?		
15.	Have prosecutors specified the alleged conduct with sufficient precision so as to allow the accused to easily identify the means by which they are alleged to have been linked to the crime?	
16.	Have the prosecutors informed the accused of any alternative modes of liability being brought, or any changes to those initially brought?	
17.	If alternative modes of liability are brought, have prosecutors ensured that they do not overload or confuse the indictment, so that the accused can easily identify the means by which they are alleged to have been linked to the crime?	

Chapter 5: Investigating and Prosecuting Sexual Violence Crimes

5. Introduction

Sexual violence is a form of gender-based violence; it is discriminatory and is a serious violation of human rights law.⁶⁹³ The voices of women coming forward to speak about their experiences, including before the Truth, Reconciliation and Reparations Commission ('TRRC'),⁶⁹⁴ have revealed the prevalence of sexual violence at all levels of Gambian society during the Jammeh era and beyond.⁶⁹⁵ Despite this, due to a number of factors including the normalisation of violence against women, stigmatisation of victims, and patriarchal attitudes that exclude women from the public sphere,⁶⁹⁶ sexual violence remains underreported in The Gambia, particularly in cases where the perpetrator is a prominent or wealthy figure.⁶⁹⁷

Addressing sexual violence is a crucial component of achieving accountability and sustainable peace for states transitioning out of conflict or repressive rule.⁶⁹⁸ Without this, the rights of

⁶⁹³ [Gambian Women's Act 2010](#), section 6: '(1) Every woman shall be protected against any form of physical, sexual, psychological or economic harm, suffering or violence whether occurring in public or private life; (2) Any form or violence against women is hereby prohibited [...].'. See also Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 21 July 2003, entered into force 25 November 2005) 2nd Ordinary Session of the Assembly of the Union ('[Maputo Protocol](#)'), article 1; UN General Assembly, '[Declaration on the Elimination of Violence Against Women](#)' (20 December 1993) A/RES/48/104; UNGA Declaration on the Elimination of Violence against Women (20 December 1993) A/Res/48/104 ('[Declaration on the Elimination of Violence against Women](#)'), article 1; Committee on the Elimination of Discrimination Against Women ('CEDAW'), 'General Recommendation No. 19: Violence against Women' (1992) A/47/38 ('[CEDAW General Recommendation 19](#)'), para. 1; CEDAW 'General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19' (14 July 2017) CEDAW/C/GC/35 ('[CEDAW General Recommendation 35](#)'), paras 1, 14; Egyptian Initiative for Personal Rights v. Egypt, Decision, Comm. No. 323/2006 (ACmHPR, Dec. 2011) ('[Egyptian Initiative for Personal Rights v. Egypt](#)'); *Njemanze et al. v. Federal Republic of the Nigeria*, ECW/CCJ/JUD/08/17, Judgment, 12 October 2017, p. 40.

⁶⁹⁴ International Center for Transitional Justice ('ICTJ'), 'Women's Experiences of Dictatorship in the Gambia: A Submission by Women from Sintet, Janjanbureh, and Basse to the Truth, Reconciliation and Reparations Commission' (December 2019) ('[ICTJ Women's Experiences of the Dictatorship in the Gambia](#)'), p. 6; CEDAW 'Consideration of reports submitted by States parties under article 18 of the Convention Fourth and fifth periodic reports of States parties due in 2010: Gambia' (13 December 2013) [CEDAW/C/GMB/CO/4-5](#), paras 34-35; The Gambia Bureau of Statistics, 'The Gambia: Demographic and Health Survey 2013' (September 2014) ('[Gambia Demographic and Health Survey](#)'), p. 229. See also, Aneked, 'Truth, Reconciliation & Reparations Commission (TRRC) Digest Edition 9' ('[Aneked TRRC Digest 9](#)').

⁶⁹⁵ [ICTJ Women's Experiences of the Dictatorship in the Gambia](#), pp. 5-6; L Hunt, 'The Gambia's 'MeToo' year breaks silence on rape' (*The New Humanitarian*, 5 February 2020).

⁶⁹⁶ [ICTJ Women's Experiences of the Dictatorship in the Gambia](#), pp. 1, 6; I Touray, 'Sexuality and Women's Sexual Rights in the Gambia' (October 2006) 36(5) *IDS Bulletin* ('[Touray, Sexuality and Women's Sexual Rights in the Gambia](#)'), p. 81. See also, African Commission on Human and Peoples' Rights ('ACHPR'), 'General Comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5)' (adopted at the 21st Extra-Ordinary Session of the ACHPR held from 23 February to 4 March 2017) ('[ACHPR General Comment No. 4 on the African Charter on Human and People's Rights](#)'), para. 60.

⁶⁹⁷ [Aneked TRRC Digest 9](#), p. 32.

⁶⁹⁸ HRC, Analytical study focusing on gender-based and sexual violence in relation to transitional justice: Report of the Office of the United Nations High Commission for Human Rights (30 June 2014) A/HRC/27/21 ('[HRC Study on gender-based violence in relation to transitional justice](#)'), para. 7.

survivors of sexual violence to receive adequate redress for violations and to participate in transitional justice processes cannot be safeguarded, and the discriminatory structures and attitudes within the society that enabled sexual violence remain unchanged.⁶⁹⁹

Sexual violence is a crime against a person's right to personal security and their physical, sexual and psychological integrity and autonomy.⁷⁰⁰ In addition to being criminalised domestically,⁷⁰¹ various forms of sexual violence are criminalised internationally, including: rape; sexual slavery; enforced prostitution; forced pregnancy; enforced sterilisation; and any other form of sexual violence of comparable gravity (*see* sections 2.3.3, 3.4.5-3.4.8).⁷⁰² Sexual violence may also be relevant to a range of other domestic crimes,⁷⁰³ as well as other international crimes such as torture or inhumane treatment.⁷⁰⁴

This section promotes a victim-centred approach to investigating and prosecuting sexual violence crimes. A victim-centred approach requires placing the needs and priorities of victims at the forefront of any response to sexual violence.⁷⁰⁵ With a view to assisting prosecutors in handling sexual violence cases, this section will address a number of themes, which include:

- (i) **understanding and identifying sexual violence crimes** (i.e., how to recognise, identify and charge international and domestic sexual violence offences, alongside the steps necessary to conduct comprehensive, flexible, rights-based investigations/prosecutions);
- (ii) **obtaining and corroborating evidence of sexual violence** (i.e., understanding the issue of corroborating evidence for sexual violence offences and considering linkage evidence to connect perpetrators to the crimes);
- (iii) **victims and impact of sexual violence** (i.e., the varying intersectional factors that can affect an individual's experience of sexual violence and the potential impacts on the victim and the wider community); and

⁶⁹⁹ [HRC Study on gender-based violence in relation to transitional justice](#), paras 7, 15.

⁷⁰⁰ [CEDAW General Recommendation 35](#), para. 33; *Karen Tayag Vertido v. the Philippines*, Communication No. 18/2008 (22 September 2009) CEDAW/C/46/D/18/2008 (*'Karen Tayag Vertido v. the Philippines'*), para. 8.7; *R. P. B. v. the Philippines*, Communication No. 34/2011 (12 March 2014) CEDAW/C/57/D/34/2011, (*'R.P.B. v. the Philippines'*), para. 8.10.

⁷⁰¹ *See e.g.*, Gambian Sexual Offences Act 2013, section 3; Gambian Criminal Code, section 126.

⁷⁰² UN General Assembly, Rome Statute of the International Criminal Court (17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (*'Rome Statute'*), articles 7(1)(g), 8(2)(b)(xxii) and 8(2)(e)(vi); [Maputo Protocol](#), article 11(3); [CEDAW General Recommendation 35](#), para. 16; ACHPR, 'The Guidelines on Combatting Sexual Violence and its Consequences in Africa' (African Union ('AU') 2017) (*'ACHPR Guidelines on Combating Sexual Violence'*), para. 3.1(c).

⁷⁰³ *See e.g.*, Gambian Criminal Code, section 186 (manslaughter); section 187 (murder); section 208 (disabling in order to commit felony or misdemeanour); section 212 (acts intended to cause grievous harm); section 214 (grievous harm); section 227 (common assault); section 228 (assaults causing actual bodily harm).

⁷⁰⁴ [CEDAW General Recommendation 35](#), paras 16, 33; [ACHPR Guidelines on Combating Sexual Violence](#), para. 3.1(e); [ACHPR General Comment No. 4 on the African Charter on Human and People's Rights](#), para. 57; Women's Initiative for Gender Justice, 'The Hague Principles on Sexual Violence' (2019) (*'The Hague Principles on Sexual Violence'*), p. 38.

⁷⁰⁵ ['Victim/Survivor Centred Approach'](#) (UN Women: Virtual Knowledge Centre to End Violence against Women and Girls, 14 January 2019).

- (iv) **best practice approaches to investigating and prosecuting sexual violence** (i.e., ending myths and stereotypes that surround sexual violence and how to collect evidence using a rights-based, best practice approach).⁷⁰⁶

5.1. Understanding and identifying sexual violence crimes

Acts of sexual violence are intentional, non-consensual,⁷⁰⁷ acts of a sexual nature.⁷⁰⁸ Sexual violence can be committed at any time and in any environment, including marital, familial, or intimate relationships.⁷⁰⁹ These acts can be ‘single, multiple, continuous, or intermittent’.⁷¹⁰

An act of sexual violence may be committed against one or more persons, or by causing a person to engage in an act of a sexual nature (e.g., on the perpetrator, themselves or a third party).⁷¹¹ They can be committed by or against any person, regardless of age, sex, or gender.⁷¹²

The following sections provide a context-based examination of what conduct amounts to sexual violence crimes. They provide guidance on how to:

- (i) recognise and identify acts of a sexual nature, including the different charging options available in Gambian law;
- (ii) recognise and investigate coercive environments; and
- (iii) investigate perpetrators of sexual violence.

⁷⁰⁶ These principles are also discussed in detail in section 8, which should be read in close conjunction with this section.

⁷⁰⁷ The term ‘non-consensual’ is used to describe an act that was committed with force, under coercive conditions or environments or against a person incapable of giving genuine consent.

⁷⁰⁸ [ACHPR Guidelines on Combating Sexual Violence](#), para. 3.1(a); [CEDAW General Recommendation 35](#), para. 33; [Karen Tayag Vertido v. the Philippines](#), para. 8.7; [R.P.B. v. the Philippines](#), para. 8.10. *See also*, Council of Europe (‘CoE’) Convention on preventing and combating violence against women and domestic violence (adopted 11 May 2011, entered into force 01 August 2014) CETS No.210 (‘[Istanbul Convention](#)’), article 36; CoE Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence (11 May 2011) CETS No. 210 (‘[Istanbul Convention Explanatory Report](#)’), paras 189-190.

⁷⁰⁹ [The Hague Principles on Sexual Violence](#), pp. 6, 13; [CEDAW General Recommendation 35](#), para. 20; ACHPR, ‘Prevention and Eradication of Violence against Women and Children (Addendum to the SADC Declaration on Gender and Development)’ (14 September 1998) (‘[African Commission Prevention and Eradication of Violence Against Women and Children](#)’), para. 5; [Istanbul Convention](#), article 36(3); [Istanbul Convention Explanatory Report](#), para. 194.

⁷¹⁰ [The Hague Principles on Sexual Violence](#), p. 6.

⁷¹¹ Gambian Sexual Offenses Act, paras 2-3; International Criminal Court (‘ICC’), Elements of Crimes (2 November 2000 (as amended)) PCNICC/2000/1/Add.2 (‘[ICC Elements of Crimes](#)’), articles 7(1)(g)-6, 8(2)(b)(xxii)-6, 8(2)(e)(vi)-6. *See also*, [ACHPR Guidelines on Combating Sexual Violence](#), para. 3.1; [Istanbul Convention](#), article 36(1); [Istanbul Convention Explanatory Report](#), para. 190; [The Hague Principles on Sexual Violence](#), pp. 39-40. *See also*, e.g., *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgment, 16 November 1998 (‘*Delalić et al.*, [Trial Judgment](#)’), para. 1065; *Prosecutor v. Todorović*, IT-95-9/1-S, Sentencing Judgment, 31 July 2001 (‘*Todorović* [Sentencing Judgment](#)’), paras 38-40.

⁷¹² *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Judgment, 8 July 2019 (‘*Ntaganda* [Trial Judgment](#)’), para. 933; *Prosecutor v. Bemba*, ICC-01/05-01/08, Judgment pursuant to article 74 of the Statute, 21 March 2016 (‘*Bemba* [Trial Judgment](#)’), para. 100. *See also*, ICC Office of the Prosecutor, ‘Policy Paper on Sexual and Gender-Based Crimes’ (June 2014) (‘[Policy Paper on Sexual and Gender-Based Crimes 2014](#)’), p. 9, fn. 6; [ACHPR Guidelines on Combating Sexual Violence](#), para. 3.2(a-d); [The Hague Principles on Sexual Violence](#), pp. 6, 13, 39.

5.1.1. Recognising and classifying acts of a sexual nature

The first step to proving the commission of sexual violence is to establish that a sexual act took place.⁷¹³ Whether an act is *sexual* in nature is rooted in the perceptions of the victim, the perpetrator, and/or their respective communities.⁷¹⁴ An act may be sexual in nature regardless of whether it produced, or was intended to produce, sexual gratification for the perpetrator.⁷¹⁵ As such, there is a broad spectrum of acts, both physical and non-physical, which may be deemed to be sexual in nature.⁷¹⁶ Sexual violence does not necessarily have to cause physical injury,⁷¹⁷ or even involve physical contact.⁷¹⁸

The Hague Principles on Sexual Violence provides useful guidance on what, in context, makes violence ‘sexual’, especially from the viewpoint of survivors.⁷¹⁹ Understanding what may amount to an act of a sexual nature will be important for prosecutors to fully appreciate the broad range of conduct that may be charged as sexual violence in The Gambia.

The following non-exhaustive list specifies examples of conduct that may amount to acts of a sexual nature, as identified in both TRRC proceedings and international best practice.⁷²⁰

- (i) castration,⁷²¹ mutilation of sexual organs, forced circumcision and female genital mutilation (‘FGM’);⁷²²

⁷¹³ See e.g., Gambian Sexual Offences Act 2013, section 3(1); Gambian Criminal Code, section 126(1)-(3). See also, [ICC Elements of Crimes](#), articles 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi).

⁷¹⁴ [The Hague Principles on Sexual Violence](#), pp. 5, 22.

⁷¹⁵ [The Hague Principles on Sexual Violence](#), pp. 6, 14; [African Commission Guidelines on Combatting Sexual Violence](#), 3.1(b). See also, for e.g., *Prosecutor v. Milutinović et al.*, IT-05-87-T, Judgment, 26 February 2009, (‘*Milutinović et al. Trial Judgment*’), para. 199.

⁷¹⁶ [African Commission Guidelines on Combatting Sexual Violence](#), para. 3.1.b; [ACHRP General Comment No. 4 on the African Charter on Human and People’s Rights](#), para. 58; *Prosecutor v. Akeyesu*, ICTR-96-4-T, Judgment, 2 September 1998 (‘*Akeyesu Trial Judgment*’), para. 688; *Prosecutor v. Furundžija*, IT-95-17/1-T, Judgment, 10 December 1998 (‘*Furundžija Trial Judgment*’), para. 186; *Brima et al.*, SCSL-04-16-T, Judgment, 20 June 2007 (‘*Brima et al. Trial Judgment*’), para. 720; *Milutinović et al. Trial Judgment*, paras 194-195, 199; *Prosecutor v. Rukundo*, ICTR-2001-70-T, Judgment, 27 February 2009 (‘*Rukundo Trial Judgment*’), para. 379. See also, [Policy Paper on Sexual and Gender-Based Crimes 2014](#), p.3; UNHCR, Sub Commission on Prevention of Discrimination and Protection of Minorities, *Contemporary forms of slavery, systematic rape, sexual slavery and slavery like practices during armed conflict: Final Report submitted by Ms. Gay J. McDougall, Special Rapporteur* (22 June 1998) E/CN.4/Sub.2/1998/13 (‘*UNHCR Contemporary forms of slavery, systematic rape, sexual slavery and slavery like practices during armed conflict: Final Report*’), paras 21-22.

⁷¹⁷ [The Hague Principles on Sexual Violence](#), p. 13. See e.g., *Akeyesu Trial Judgment*, para. 10A.

⁷¹⁸ [ACHPR Guidelines on Combating Sexual Violence](#), 3.1(b); [The Hague Principles on Sexual Violence](#), p. 6.

⁷¹⁹ [The Hague Principles on Sexual Violence](#).

⁷²⁰ This list is presented alphabetically to avoid a perception of hierarchy among them.

⁷²¹ Aneked, ‘Truth, Reconciliation & Reparations Commission (TRRC) Digest, Edition 4’ (‘*Aneked TRRC Digest 4*’), Sanna B. Sabally, p. 73.

⁷²² [ACHPR Guidelines on Combating Sexual Violence](#), para. 3.1.b; [The Hague Principles on Sexual Violence](#), p. 10; ACHPR, General Comment 4: Right to redress for victims of torture and other punishments or cruel, inhuman or degrading treatment (23 February – 4 March 2017) (‘*ACHPR General Comment 4*’), para. 58; ACHPR, Resolution on the Situation of Women and Children in Armed Conflict (2014) ACHPR/Res.283(LV)2014 (‘*Resolution 283 on the situation of women and children in armed conflict (2014)*’).

- (ii) enforced prostitution (*see* section 3.4.7.);⁷²³
- (iii) forced masturbation and any other forced touching that the victim is compelled to perform on himself/ herself or a third person;⁷²⁴
- (iv) having someone undress completely or partially (i.e., forced nudity),⁷²⁵ for example taking of the victim's veil;⁷²⁶
- (v) having someone wear clothing with a sexual association,⁷²⁷ for example making the victims wear G-string underwear and pose as prostitutes;⁷²⁸
- (vi) human trafficking for sexual exploitation and slavery;⁷²⁹
- (vii) inspecting someone's genitals, anus, breasts, or hymen without medical or similar necessity;⁷³⁰
- (viii) kissing⁷³¹ or licking a person, especially a sexual body part;⁷³²
- (ix) punishing someone for refusing to engage in sexual activity;⁷³³
- (x) rape (including gang rape, marital rape or 'corrective' rape), which includes penetration of the vagina, anus or mouth by any part of the body or object,⁷³⁴ for example penetration by bananas and sticks;⁷³⁵

⁷²³ [Rome Statute](#), articles 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi); [African Union Strategy for Gender Equality & Women's Empowerment 2018 – 2028](#), p. 62; [African Union Policy on Prevention and Response to Sexual Exploitation and Abuse for Peace Support Operations](#), para. 22; [ACHPR Guidelines on Combating Sexual Violence](#), para. 3.1.b; [ACHPR General Comment 4](#), para. 58.

⁷²⁴ [ACHPR Guidelines on Combating Sexual Violence](#), para. 3.1.b. *See e.g.*, [Aneked TRRC Digest 4](#), Sanna B. Sabally, p. 73: the victims were forced to engage in sexual acts with one another.

⁷²⁵ [The Hague Principles on Sexual Violence](#), p. 10; [ACHPR Guidelines on Combating Sexual Violence](#), para. 3.1.b; [ACHPR General Comment 4](#), para. 58; [Akayesu Trial Judgment](#), para. 688.

⁷²⁶ *See e.g.*, [Aneked TRRC Digest 9](#), Binta Jamba, p. 125: the perpetrator took of the victim's veil and put his hands inside her garment.

⁷²⁷ [The Hague Principles on Sexual Violence](#), p. 9.

⁷²⁸ *See e.g.*, [Aneked TRRC Digest 4](#), Sanna B. Sabally, p. 73.

⁷²⁹ [ACHPR Guidelines on Combating Sexual Violence](#), para. 3.1.b; [ACHPR General Comment 4](#), para. 58.

⁷³⁰ [African Commission Guidelines on Combatting Sexual Violence](#), para. 3.1.b; [The Hague Principles on Sexual Violence](#), p. 10.

⁷³¹ *See e.g.*, [Aneked TRRC Digest 9](#), Binta Jamba, p. 126: the perpetrator kissed the victim and told her to sit on his lap.

⁷³² [The Hague Principles on Sexual Violence](#), p. 10.

⁷³³ [The Hague Principles on Sexual Violence](#), p. 8; [Aneked TRRC Digest 4](#), Sanna B. Sabally, p. 73: the victim was castrated after refusing to engage in sexual acts with another man.

⁷³⁴ [Rome Statute](#), article 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi); [ACHPR Guidelines on Combating Sexual Violence](#), para. 3.1.b; [The Hague Principles on Sexual Violence](#), p. 12. *See e.g.*, [Aneked TRRC Digest 9](#), Bintou Nyabally, pp. 20-22; Aneked, 'Truth, Reconciliation & Reparations Commission (TRRC) Digest Edition 7' ('[Aneked TRRC Digest 7](#)'), Sainey Senghore, p. 81; Abdoukarim Jammeh, p. 88; Njie Manneh, p. 100; Musa Kanaji, p. 103; [Aneked TRRC Digest 9](#), Toufah Jalloh, pp. 133- 150.

⁷³⁵ [Aneked TRRC Digest 4](#), Sanna B. Sabally, p. 74.

- (xi) sexually harassing someone by engaging in (repeated) unwelcome sexual conduct which can be interpreted as offensive, humiliating, or intimidating under the circumstances;⁷³⁶
- (xii) threats of sexual violence or intimidation or causing someone to form reasonable apprehension, or fear, of acts of sexual violence;⁷³⁷
- (xiii) touching a person in a sexual manner, for example by giving or receiving massages;⁷³⁸
- (xiv) touching a person's sexual body parts,⁷³⁹ for example touching their breasts or putting their hands inside the victim's underwear or garment;⁷⁴⁰ or
- (xv) violent acts to the genitalia (such as beating, burning, electrical shocks or blows),⁷⁴¹ for example electrocuting and driving objects into a person's penis.⁷⁴²

Having identified that an act of a sexual nature took place, prosecutors will need to consider how to classify and charge the conduct as either a domestic or international crime. Whilst sections 3.4.5- 3.4.8 outline the international crimes potentially relevant to sexual violence in The Gambia, domestic offences are outlined below.

5.2. Classifying and charging domestic sexual violence offences in The Gambia

5.2.1. Rape

Section 3 of the Gambian Sexual Offences Act 2013 provides that rape occurs when a person intentionally and under coercive circumstances:

- (i) engages in a sexual act with another person; or
- (ii) causes another person to engage in a sexual act with the perpetrator or with a third person.

This definition is gender-neutral and therefore encompasses both male and/or female perpetrators and victims and includes same-sex acts.⁷⁴³ Diverging from international standards,⁷⁴⁴ however,

⁷³⁶ Gambian Criminal Code, section 126(3). See also, [The Hague Principles on Sexual Violence](#), p. 9; [ACHPR Guidelines on Combating Sexual Violence](#), para. 3.1.b; [ACHPR General Comment 4](#), para. 58.

⁷³⁷ [ACHPR Guidelines on Combating Sexual Violence](#), para. 3.1.b; [The Hague Principles on Sexual Violence](#), p. 8; [ACHPR General Comment 4](#), para. 58.

⁷³⁸ [The Hague Principles on Sexual Violence](#), p. 10.

⁷³⁹ [The Hague Principles on Sexual Violence](#), p. 10; [ACHPR Guidelines on Combating Sexual Violence](#), para. 3.1.b.

⁷⁴⁰ See e.g., [Aneked TRRC Digest 9](#), Binta Jamba, p. 125.

⁷⁴¹ [ACHPR Guidelines on Combating Sexual Violence](#), para. 3.1.b; [The Hague Principles on Sexual Violence](#), p. 10; [Delalić et al. Trial Judgment](#), paras 1019, 1035, 1038-1040; [Todorović Sentencing Judgment](#), para. 38; [Prosecutor v. Simić](#), IT-95-9/2-S, [Sentencing Judgment](#), 17 October 2002, para. 63; [Prosecutor v. Naletilić et al.](#), IT-98-34-T, [Judgment](#), 31 March 2003, para. 450; [Prosecutor v. Brdanin](#), IT-99-36-T, [Judgment](#), 1 September 2004, para. 498.

⁷⁴² [Aneked TRRC Digest 4](#), Sanna B. Sabally, p. 73.

⁷⁴³ Gambian Sexual Offences Act 2013, sections 2, 3. See e.g., [Ntaganda Trial Judgment](#), para. 933; [Bemba Trial Judgment](#), para. 100.

⁷⁴⁴ For international best practice, see e.g., CEDAW, 'Concluding observations on the combined fourth and fifth periodic reports of the Gambia' (28 July 2015) CEDAW/C/GMB/CO/4-5 ('[Concluding Observations of The Gambia](#)'), paras 8, 22-23; [The Hague Principles on Sexual Violence](#), pp. 6, 13; [CEDAW General Recommendation 35](#), para. 20; [African Commission Prevention and Eradication of Violence Against Women and Children](#), para. 5;

marital rape (i.e., rape that occurs between husbands and wives) is not criminalised under Gambian criminal law pursuant to section 3(3) of the Sexual Offences Act.⁷⁴⁵

What constitutes a sexual act?

Under section 2 of the Gambian Sexual Offences Act 2013, conduct amounting to a ‘sexual act’ includes:

- (i) a person inserting his penis into the vagina, anus or mouth of another person;
- (ii) a person inserting a part of the body of an animal or any object into the vagina or anus of another person; or
- (iii) cunnilingus or any form of genital stimulation.⁷⁴⁶

In order to prove rape, prosecutors do not have to establish how deeply a victim was penetrated, as penetration ‘even to the slightest degree’ is sufficient to complete this crime.⁷⁴⁷ Consequently, in the case of vaginal rape, for example, penetration of the labia majora would be sufficient.⁷⁴⁸

In line with international standards, the Gambian definition of rape includes oral penetration,⁷⁴⁹ as well as penetration with objects.⁷⁵⁰ Sections 2(a)-(b) of the Sexual Offences Act do not, however, include reference to penetration by other parts of the body of the victim or perpetrator, such as a hand or a finger, as recognised in international definitions of rape.⁷⁵¹ In order that this conduct does not fall outside the law, prosecutors in The Gambia can therefore consider charging penetration by other parts of the body as ‘any form of genital stimulation’ under section 2(c).⁷⁵²

Importantly, a plain reading of section 2(c) (‘any form of genital stimulation’) is broad enough to encompass sexual acts that do not include penetration, such as touching, kissing or licking a person’s genitals or forcing the victim to masturbate themselves or another person. Adopting this

[Istanbul Convention](#), article 36(3); [Istanbul Convention Explanatory Report](#), para. 194. *For regional best practice, see e.g.,* Namibian Combatting of Rape Act No. 8 of 2000 (‘[Namibian Combatting of Rape Act](#)’), para. 2(3); [Kenyan Protection against Domestic Violence Act 2015](#), section 3(a)(vi); [South African Prevention of Family Violence Act](#), article 5.

⁷⁴⁵ Gambian Sexual Offences Act 2013, section 3(3): ‘For the purposes of this section, rape shall not apply to married couples.’

⁷⁴⁶ Gambian Sexual Offences Act 2013, section 2.

⁷⁴⁷ See e.g., [Rome Statute](#), articles 7(1)(g)(1), 8(2)(b)(xxii), 8(2)(e)(vi); [Ntaganda Trial Judgment](#), paras 931, 932; [Bemba Trial Judgment](#), para. 99; *Prosecutor v. Kunarac et al.*, IT-96-23 & IT-96-23/1-A, Judgment, 12 June 2002 (‘[Kunarac et al. Appeal Judgment](#)’), para. 127.

⁷⁴⁸ Gambian Sexual Offences Act 2013, section 2: “‘Vagina’” includes any part of the female genital organ.’

⁷⁴⁹ Gambian Sexual Offences Act 2013, section 2(a); [Bemba Trial Judgment](#), para. 101; [Furundžija Trial Judgment](#), paras 183-185; [Delalić et al. Trial Judgment](#), para. 1066; [Sesay et al. Trial Judgment](#), para. 146. See also, [Istanbul Convention](#), article 36; [Istanbul Convention Explanatory Report](#), para. 190.

⁷⁵⁰ Gambian Sexual Offences Act 2013, section 2(b); [Akayesu Trial Judgment](#), para. 596; [Sesay et al. Trial Judgment](#), para. 146.

⁷⁵¹ [ICC Elements of Crimes](#), articles 7(1)(g)-1, 8(2)(b)(xxii)-1, 8(2)(e)(vi)-1.

⁷⁵² Gambian Sexual Offences Act 2013, section 2.

interpretation would enhance protection from sexual violence crimes and afford prosecutors the opportunity to:

- (i) seek sentences more commensurate with the gravity of the crime as compared to indecent assault which has a maximum penalty of two years (*see* section 5.2.3); and
- (ii) prosecute certain non-penetrative acts committed against men, which would not otherwise be criminalised, since the Gambian Criminal Code does not include the charge of indecent assault against males above the age of 14 (*see* section 5.5.1).

Coercive circumstances

The second element of rape requires prosecutors to establish that the sexual acts were committed under coercive circumstances,⁷⁵³ examples of which are provided by section 3(2) of the Gambian Sexual Offences Act 2013.⁷⁵⁴ Understanding and investigating coercive circumstances in line with international standards is considered in detail below.

Sentencing and aggravating factors

Sentences for sexual violence offences should be commensurate with the gravity of the crime, and should be effective, proportionate and dissuasive.⁷⁵⁵ Sentences should be applied consistently and should not be influenced by discriminatory attitudes regarding women or victims of sexual violence.⁷⁵⁶

In The Gambia, the penalty for rape ranges from imprisonment for ten years up to mandatory life imprisonment.⁷⁵⁷ In line with international standards, section 4 of the Gambian Sexual Offences Act 2013 provides a number of aggravating factors to take into account.⁷⁵⁸ For instance, where the rape was committed through actual or threatened physical force, or where the victim was unlawfully detained, the minimum sentence is imprisonment for fifteen years.⁷⁵⁹ Section 4(1)(a)(iii) also outlines further aggravating circumstances which result in mandatory life imprisonment.⁷⁶⁰ However, it should be stressed that to protect the rights of the accused, the

⁷⁵³ Gambian Sexual Offences Act 2013, section 3(1).

⁷⁵⁴ Gambian Sexual Offences Act 2013, section 3(2).

⁷⁵⁵ UN Women, 'Handbook for Legislation on Violence Against Women' (2012) ('[UN Handbook for Legislation on Violence Against Women](#)'), p. 49; [CEDAW General Recommendation 35](#), para. 44; [ACHPR Guidelines on Combating Sexual Violence](#), p. 36; [Istanbul Convention](#), article 45(1); [Istanbul Convention Explanatory Report](#), para. 232.

⁷⁵⁶ [UN Handbook for Legislation on Violence Against Women](#), p. 49.

⁷⁵⁷ Gambian Sexual Offences Act 2013, section 4(1)(a)(i).

⁷⁵⁸ Gambian Sexual Offences Act 2013, section 4. *See also*, J Thompson & F Nkewto Simmonds, 'Rape Sentencing Study: Statutory Sentencing Provisions for Rape, Defilement, and Sexual Assault in East, Central and Southern Africa' (*Population Council*, 2012) ('[Rape Sentencing Study](#)'), pp. 15-17.

⁷⁵⁹ Gambian Sexual Offences Act 2013, section 4(1)(a)(ii).

⁷⁶⁰ Gambian Sexual Offences Act 2013, section 4(1)(a)(iii): Where – (aa) the complainant has suffered grievous bodily or mental harm as a result of the rape, (bb) the complainant is under the age of thirteen years or is by reason of age exceptionally vulnerable, (cc) the complainant is under the age of eighteen years and the perpetrator is the complainant's parent, guardian or caretaker or is otherwise in a position of trust or authority over the complainant,

imposition of life imprisonment should only be sought when it can be justified by the extreme gravity of the crime and the individual circumstances of the convicted person (for example, their culpability, and their age, education, social and economic condition).⁷⁶¹

To aid the prosecutor's interpretation of these domestic aggravating factors, international best practice, including the ACHPR Guidelines on Combatting Sexual Violence and its Consequences in Africa, suggests the following, non-exhaustive list of aggravating factors may also be relevant:⁷⁶²

- (i) whether the offence was committed against a child or against another person who was vulnerable because of their age;
- (ii) the vulnerability of the victim (including due to age, disability, status as a displaced person or refugee, socio-economic status, physical or psychological violence that preceded the act of sexual violence or occurred concurrently, or the kidnapping of the victim);
- (iii) the actual or threatened use of physical force or a weapon;
- (iv) the relationship between the victim and the attacker (e.g., the existence of a family relationship, status as a former or current partner, abuse of authority);
- (v) the knowledge of the attacker that they were infected with HIV, or other sexually transmitted disease;
- (vi) whether the perpetrator has previously been convicted of similar offences; and
- (vii) the seriousness of the physical or psychological damage caused by the attack.

A comprehensive, context-based investigation may reveal evidence of aggravating factors from the very beginning of the investigation and throughout, including during the first response to a reported incident. The presence of these factors may also be relevant to establishing coercive circumstances (*see* sections 5.3.2-5.3.6) and will be relevant to any risk assessments of the victim's safety and security (*see* section 8.1.3).

(dd) the convicted person is infected with any serious sexually transmitted disease and at the time of the commission of the rape knows that he or she is so infected, (ee) the convicted person uses a firearm or any other weapon for the purpose of or in connection with the commission of the rape, to mandatory life imprisonment.

⁷⁶¹ [Rome Statute](#), article 77(1)(b); International Criminal Court, Rules of Procedure and Evidence, reproduced from the Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York (3-10 September 2002) ICC-ASP/1/3 and Corr.1, part II.A ('ICC Rules of Procedure and Evidence'), rule 145; *Prosecutor v. Lubanga*, ICC-01/04-01/06, [Decision on Sentence pursuant to Article 76 of the Statute](#), 10 July 2012, paras 21, 36, 54; *Prosecutor v. Bemba*, ICC-01/05-01/08, [Decision on Sentence pursuant to Article 76 of the Statute](#), 21 June 2016, paras 15, 68.

⁷⁶² [ACHPR Guidelines on Combating Sexual Violence](#), p. 36; [UN Handbook for Legislation on Violence Against Women](#), p. 24; [Istanbul Convention](#), article 46; [Istanbul Convention Explanatory Report](#), paras 236-244.

Mitigating circumstances

Section 4(2) of the Gambian Sexual Offences Act 2013 allows a court to impose a lesser sentence than the minimum sentence in rape cases where there are ‘substantial and compelling circumstances’ to do so.⁷⁶³ A best practice approach would be that reduced penalties should not be imposed for reasons grounded in gender-stereotypes and bias (*see* section 5.7.2). For example, reduced sentences are not justified in cases of ‘honour’ crimes; where there is reconciliation between the victim and the perpetrator, for example through marriage; based on the behaviour of the victim before or after the sexual violence (i.e., their previous relationship with the perpetrator, or factors such as what they were wearing or location); or because of the characteristics or status of the victim, for example as a sex-worker or non-virgin.⁷⁶⁴

5.2.2. Defilement of girls between 16 and 18

Section 5(1) of the Gambian Sexual Offences Act 2013 criminalises ‘any person who unlawfully has carnal knowledge of a girl between the ages of sixteen and eighteen’. The maximum term of conviction for defilement is seven years.⁷⁶⁵

There is no requirement that this crime be committed under ‘coercive circumstances. To establish this crime, it is sufficient to prove that the perpetrator had sexual intercourse with a girl between the ages of sixteen and eighteen.⁷⁶⁶ Often, proving that the complainant was under the age of eighteen represents a significant barrier to prosecutions (for example, where the complainant does not have a valid birth certificate or in the absence of medical evidence).⁷⁶⁷ If the accused can prove that they had reasonable cause to believe and did in fact believe the girl was above the age of eighteen, they may be found not guilty.⁷⁶⁸

In situations where the defendant and complainant are of a similar age and understanding, and the sex is consensual and nonexploitative, the application of the crime of defilement can be

⁷⁶³ Gambian Sexual Offences Act 2013, section 4(2).

⁷⁶⁴ [UN Handbook for Legislation on Violence Against Women](#), p. 49; [ACHPR Guidelines on Combating Sexual Violence](#), p. 36.

⁷⁶⁵ Gambian Sexual Offences Act 2013, section 5(1)

⁷⁶⁶ Gambian Sexual Offences Act 2013, section 5. *For regional jurisprudence, see e.g., Uganda Prosecution v. Kusemererwa Julius*, Case No HCT-01-CR-SC-0015-2014, The Republic of Uganda in the High Court of Uganda at Fort Portal, (25 November 2015) (*‘Uganda v. Kusemererwa’*); *S.C. v. Republic of Kenya*, Criminal Appeal No. 19 of 2009 at the High Court of Kenya at Malindi, (29 July 2010) (*‘S.C. v. Republic of Kenya’*), p. 3-4; *Waweru Wambui v. Republic of Kenya*, Criminal Appeal No. 102 of 2016 at the Court of Appeal at Nairobi, (22 March 2019) (*‘Wambui v. Kenya’*); *Hadson Ali Mwachongo v. Republic of Kenya*, Criminal Appeal No. 65 of 2015 in the Court of Appeal at Mombasa, (27 May 2016); *CKW v. The Attorney General & Another*, Petition No. 6 of 2013 at the High Court of Kenya at Eldoret, (25 July 2014). *See also*, Winifred Kamau, ‘Legal Treatment of Consent in Sexual Offences in Kenya’ (Equality Effect, February 2013) (*‘Kamau (2013)’*), p. 19.

⁷⁶⁷ [Kamau \(2013\)](#), p. 20. *See e.g., S.C. v. Republic of Kenya*. Apart from medical evidence, age may also be proved by birth certificate, the victim’s parents or guardian and by observation and common sense. *See e.g., Commonwealth Secretariat, ‘Case Law Handbook on Violence Against Women and Girls in Commonwealth East Africa: Kenya, Rwanda, Tanzania and Uganda’*, (2 September 2019) (*‘Case Law Handbook on Violence Against Women and Girls in Commonwealth East Africa’*), p. 30.

⁷⁶⁸ Gambian Sexual Offences Act 2013, section 5(2).

problematic, not least because the defendant is liable to a prison term of up to seven years.⁷⁶⁹ While the provision may aim to protect vulnerable young women, prosecutors should use their discretion when charging this crime and consider the context and circumstances of the individual case to weigh whether prosecution is necessary to protect the rights of the individual in question.⁷⁷⁰

If there is evidence of the existence of any coercive circumstances or aggravating circumstances (see section 5.2.1), it will be more appropriate to charge the crime as rape under section 3 of the Sexual Offences Act. In such instances, charging the crime as rape will better reflect the unlawful conduct (i.e., sexual acts under coercive circumstances) and enable sentencing that more appropriately reflects the seriousness of the violation.⁷⁷¹

5.2.3. Indecent assault or indecently annoying females

Section 126 of the Gambian Criminal Code provides for two separate offences that can be used to prosecute certain types of sexual violence, namely:

- (i) indecent assault on females; and
- (ii) indecently insulting or annoying females.

What constitutes an indecent act?

Indecent assault on females, proscribed by section 126(1) of the Gambian Criminal Code, involves unlawful and indecent assault on any woman or girl.⁷⁷² Assault involves the physical

⁷⁶⁹ UN Committee on the Rights of the Child ('CRC') 'General comment No. 20 (2016) on the implementation of the rights of the child during adolescence' (6 December 2016), [CRC/C/GC/20](#), para. 40: 'States should avoid criminalising adolescents of similar ages for factually consensual nonexploitative sexual activity'; [Teddy Bear Clinic for Abused Children & another v. Minister of Justice and Constitutional Development & another](#), CCT 12/13 (2013) ZACC 35, Constitutional Court of South Africa; [S v. Masuku](#), CRB No. B467/14 ZWHHC 106, (4 February 2015); [Eliud Waweru Wambui v. Republic of Kenya](#), Criminal Appeal No. 302 of 2011 at the High Court of Kenya At Nairobi, (25 June 2014) ('[Wambui v. Kenya](#)') p. 7-8: 'Many other jurisdictions criminalise only sexual conduct with children of a younger age than 16 years. We think it is rather unrealistic to assume that teenager and maturing adults [...] do not engage in, and often seek sexual activity with their eyes fully open. They may not have attained the age of maturity but they may well have reached the age of discretion and are able to make intelligent and informed decisions about their lives and their bodies'; [P.O.O \(A Minor\) v. Director of Public Prosecutions & another](#), Constitutional Petition No. 1 of 2017, The Republic of Kenya in the High Court of Homa Bay, (17 August 2017); [The State v. CF \(A Juvenile\)](#), HH 143-11, CRB 5,320/10, High Court of Zimbabwe, (6 July 2011). See also, G Dalitso Kangaude & A Skelton, '(De)Criminalizing Adolescent Sex: A Rights-Based Assessment of Age of Consent Laws in Eastern and Southern Africa', (SAGE Open, October-December 2018); Case Law Handbook on Violence Against Women and Girls in Commonwealth East Africa, p. 19.

⁷⁷⁰ See e.g., Crown Prosecution Service, [The Code for Crown Prosecutors, Rape and Sexual Offences - Chapter 2: Sexual Offences Act 2003 - Principal Offences, and Sexual Offences Act 1956 - Most commonly charged offences](#): 'It is not in the public interest to prosecute children who are of the same or similar age and understanding that engage in sexual activity, where the activity is truly consensual for both parties and there are no aggravating features, such as coercion or corruption.'

⁷⁷¹ Gambian Sexual Offences Act 2013, section 4.

⁷⁷² Gambian Criminal Code, section 126(1).

touching of any part of another person's body, with anything and through anything, including through the victim's clothing.⁷⁷³ This can include touching the clothing itself.⁷⁷⁴

Indecently insulting or annoying females is criminalised under section 126(3) of the Gambian Criminal Code. The offence involves uttering any word, making any sound or gesture, or exhibiting any object to a woman or intruding upon their privacy. To establish this offence, it must be proven that the perpetrator intended to insult the modesty of any woman and intended the word or sound be heard, or the gesture or object be seen by the woman.⁷⁷⁵

Gambian law does not define what constitutes indecent assault or indecently insulting or annoying females. While the wording of 'indecent' signifies conduct against a woman's morality or honour,⁷⁷⁶ a best practice approach would suggest a broad interpretation of these crimes to include the wide range of physical and non-physical sexual acts that violate the victim's bodily integrity and autonomy, but fall short of rape.⁷⁷⁷ For example, indecent assault may cover non-consensual sexual acts that do not involve penetration, such as touching a woman's breasts or bottom, kissing or licking a person, stripping someone naked, or putting hands inside a person's clothing. Indecently insulting or annoying a person, on the other hand, may cover acts such as sexual harassment (including making noises, statements or gestures with a sexual overtone or sending sexually explicit messages), exposing a person to nudity, or humiliating or mocking someone based on sexual reputation, sexual activity or sexual body parts.⁷⁷⁸

Coercive circumstances

Indecent assault and indecently insulting or annoying females are inherently non-consensual crimes.⁷⁷⁹ Since the Gambian Criminal Code provides no definition of consent in relation to these crimes, when issues of consent arise, prosecutors may look to a broad interpretation of

⁷⁷³ See e.g., [UK Sexual Offences Act 2003](#), section 3(1); [Kenyan Sexual Offences Act 2003](#), pp. 4-5; [John Njuguna Gitau v. Republic of Kenya](#), Criminal Appeal No. 140 of 1982 in the Court of Appeal at Nakuru (Kenya), (23 March 1983); [Wambui v. Kenya](#); [R. v. Ewanchuk](#), (1999) 1 S.C.R. 330, Supreme Court of Canada.

⁷⁷⁴ See e.g., [R v. H \(Karl Anthony\)](#) (2005) EWCA Crim 732, 1 WLR 2005, Court of Appeal Criminal Division, UK.

⁷⁷⁵ Gambian Criminal Code, section 126(3).

⁷⁷⁶ [Resolution 283 on the situation of women and children in armed conflict \(2014\)](#): 'Concerned that crimes of sexual violence are often defined as "crimes against morality or honour", rather than against the victim's bodily integrity and that perpetrators may receive more lenient penalties if they are perceived to act to protect "honour", and sometimes go unpunished.'

⁷⁷⁷ [UN Handbook for Legislation on Violence Against Women](#), p. 24; [The Hague Principles on Sexual Violence](#), pp. 5-6, 40-42. See also, [Akayesu Trial Judgment](#), para. 688; [Furundžija Trial Judgment](#), para. 186; [Brima et al. Trial Judgment](#), para. 720; [Milutinović et al. Trial Judgment](#), para. 195; [Rukundo Trial Judgment](#), para. 381; [Policy Paper on Sexual and Gender-Based Crimes 2014](#), p. 3; [UNHCR Contemporary forms of slavery, systematic rape, sexual slavery and slavery like practices during armed conflict: Final Report](#), paras 21-22.

⁷⁷⁸ [The Hague Principles on Sexual Violence](#), pp. 8-11.

⁷⁷⁹ Gambian Criminal Code, section 126(1): specifically proscribes a person who 'unlawfully' commits the indecent assault, while section 126(2) provides that consent shall be no defence to a charge for indecent assault on a girl under the age of sixteen.

coercive circumstances under the Sexual Offences Act, in line with international standards (*see* section 5.3.2).⁷⁸⁰

Sentencing

Indecently insulting or annoying females and indecent assault are misdemeanour offences punishable by a term of one or two years imprisonment, respectively.⁷⁸¹ These sentences are significantly lower than the minimum sentences for the crime of rape,⁷⁸² and in certain contexts and circumstances, may not adequately reflect the gravity of the crimes committed.⁷⁸³ Indeed, non-penetrative acts of sexual violence are not inherently less serious than penetrative acts and may be equally harmful to the victim.⁷⁸⁴ Nevertheless, aggravating factors (such as the age of the victim, the use of physical force, grievous bodily or mental harm, etc.) cannot be taken into account in the current sentencing regime of these crimes.

To overcome this limitation, where the non-penetrative act involves ‘cunnilingus or any other form of genital stimulation’ the prosecutor can consider the charge of rape based on the definition of sexual acts under section 2(c) of the Gambian Sexual Offences Act 2013.⁷⁸⁵ This would enable sentencing which more appropriately reflects the gravity of these crimes.

5.2.4. Female circumcision/female genital mutilation

FGM is a form of violence against women,⁷⁸⁶ and a discriminatory practice prohibited by international human rights law.⁷⁸⁷ FGM may, in certain circumstances and contexts, amount to the international crime of sexual violence,⁷⁸⁸ as well as torture or other inhumane acts.⁷⁸⁹ FGM is

⁷⁸⁰ Gambian Criminal Code, sections 126(1) and 126(3). It should be noted that indecent assault on a girl under the age of sixteen is a strict liability defence, to which consent is not a defence: section 126(2).

⁷⁸¹ Gambian Criminal Code, section 126(1)-(3).

⁷⁸² Gambian Sexual Offences Act 2013, section 4.

⁷⁸³ [ACHPR Guidelines on Combating Sexual Violence](#), section 43.1(a); [UN Handbook for Legislation on Violence Against Women](#), p. 49.

⁷⁸⁴ [The Hague Principles on Sexual Violence](#), pp. 11, 30.

⁷⁸⁵ Gambian Sexual Offences Act 2013, section 2(c).

⁷⁸⁶ UN Economic and Social Council, [Ninth report and final report on the situation regarding the elimination of traditional practices affecting the health of women and the girl child, prepared by Ms. Halima Embarek Warzazi](#), (11 July 2005) E/CN.4/Sub.2/2005/36, para. 35.

⁷⁸⁷ [Declaration on the Elimination of Violence against Women](#), article 5; [Convention on the Rights of the Child](#) (adopted 20 November 1989, entered into force 2 September 1990 in accordance with article 49(1)) 1577 UNTS, article 24(3); [Maputo Protocol](#), article 5; [African Charter on the Rights and Welfare of the Child](#), article 21.1; [Istanbul Convention](#), article 38; [Istanbul Convention Explanatory Report](#), paras 198-202; [WHO World Health Assembly Resolution 61.16](#); UNGA, ‘Intensifying global efforts for the elimination of Female Genital mutilation’ (20 December 2012) [Resolution A/RES/67/146](#); CEDAW-CRC, ‘Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child on harmful practices’, (14 November 2014) [CEDAW/C/GC/31-CRC/C/GC/18](#); CEDAW, ‘General Recommendation No. 24: article 12 of the Convention (women and health)’ (1999) A/5438/Rev.1 (‘[General Recommendation No. 24](#)’), paras 12, 15.

⁷⁸⁸ [The Hague Principles on Sexual Violence](#), p. 28.

⁷⁸⁹ *See e.g.*, UN Committee Against Torture, [General Comment No. 2](#), (24 January 2008) CAT/C/GC/2, para. 18; UN Committee Against Torture, [F.B. v. The Netherlands](#), (12 January 2016) CAT/C/56/D/613/2014.

prohibited by numerous legal instruments in The Gambia, including the Women's (Amendment) Act 2015,⁷⁹⁰ the Children's Act 2005⁷⁹¹ and the Criminal Code.⁷⁹²

Which acts might constitute FGM?

The first step to prove the commission of this offence is to establish that an act of female circumcision, as defined by section 32A(3) of the Women's (Amendment) Act 2015, took place.⁷⁹³ The definition of female circumcision under Gambian law is broad enough to cover all types of female genital mutilation as defined by the World Health Organisation, including the partial or total removal of the external female genitalia and 'all harmful procedures to the female genitalia for non-medical purposes, e.g., pricking, piercing, incising, scraping and cauterizing.'⁷⁹⁴ This can be established by witness evidence, medical and/or other expert evidence, and a range of other corroborating or circumstantial evidence (such as evidence of the victim's location, pattern evidence of the perpetrators previous involvement in FGM, etc) (*see* section 5.4.1).⁷⁹⁵

FGM is inherently coercive. Accordingly, the consent of the victim cannot be a defence to the crime of FGM and prosecutors need not collect evidence of whether the victim consented or whether the FGM was committed under coercive circumstances.⁷⁹⁶ That said, evidence on the existence of coercive circumstances may be relevant to sentencing and/or to show victim impact.

Who can be prosecuted for FGM?

As the second step, the prosecutor must establish that the suspect is responsible for the commission of the crime. Anyone who directly performs the FGM,⁷⁹⁷ or requests, incites or

⁷⁹⁰ Gambian Women's (Amendment) Act 2015, sections 32A and 32B.

⁷⁹¹ Gambian Children's Act 2005 (as amended), section 12(3).

⁷⁹² Gambian Criminal Code, sections 210 and 212.

⁷⁹³ Gambian Women's (Amendment) Act 2015, section 32A(3) defines female circumcision as: '(a) the excision of the prepuce with partial or total excision of the clitoris (clitoridectomy); (b) the partial or total excision of the labia minora; (c) the partial or total excision of the external genitalia (of the labia minora and the labia majora), including stitching; (d) the stitching with thorns, straw, thread or by other means in order to connect the excision of the labia and the cutting of the vagina and the introduction of corrosive substances or herbs into the vagina for the purpose of narrowing it; (e) symbolic practices that involve the nicking and pricking of the clitoris to release drops of blood; or (f) engaging in any form of female genital mutilation or cutting'.

⁷⁹⁴ WHO, '[Female genital mutilation](#)' (3 February 2020). *See also*, UN Division for the Advancement of Women, United Nations Economic Commission for Africa 'Good Practices in Legislation on 'Harmful Practices' Against Women, Report of the expert group meeting', 26-29 May 2009 ('[Good Practices in Legislation on 'Harmful Practices' against Women](#)'), p. 16: 'Legislation should: define female genital mutilation as any procedure involving partial or total removal of the external female genitalia or other injury to the female genital organs for non-medical reasons, whether committed within or outside of a medical institution.'

⁷⁹⁵ [CPS Female Genital Mutilation Prosecution Guidance](#).

⁷⁹⁶ The Gambian Women's (Amendment) Act 2015 does not recognise consent as a defence, in line with international best practice: UN, [Good Practices in Legislation on 'Harmful Practices' against Women](#), p. 16.

⁷⁹⁷ Gambian Women's (Amendment) Act 2015, section 32A (2). While FGM is traditionally carried out by older community women, trends towards the medicalisation of the practice have recently been reported. Although not specifically criminalised in the Gambian Women's (Amendment) Act 2015, the provision is broad enough to apply universally to anyone carrying out female circumcision including 'traditional circumcisers' and medical

promotes it,⁷⁹⁸ can be prosecuted under the laws of The Gambia. In line with international best practice,⁷⁹⁹ those who fail to report to the proper authorities when FGM is about to take place or has taken place may also be prosecuted.⁸⁰⁰ Accordingly, prosecutors may pursue those who enable and promote the practice, including: parents who request their female children to be circumcised, community leaders who organise FGM, and teachers or medical professionals who fail to report female circumcision which is about to, or already has, been committed. That being said, in cases involving children, any decision to prosecute must be weighed against the best interests of the child.⁸⁰¹ Since prosecuting their family members may result in additional hardship for the child victims of FGM, preventative and protective measures should be prioritised with prosecution considered as a last resort.⁸⁰²

Sentencing

Persons convicted of committing, requesting, inciting or promoting FGM face three years of imprisonment and/or a fine of fifty thousand Dalasis.⁸⁰³ Those convicted of failing to inform the authorities are liable to a fine of ten thousand Dalasis.⁸⁰⁴ If the FGM causes death, then the direct perpetrator may face life imprisonment.⁸⁰⁵ In line with the international standards, the Women's (Amendment) Act does not distinguish between the different types of female genital mutilation for the purposes of punishment.⁸⁰⁶

Preventing FGM in The Gambia

Despite its criminalisation, FGM remains common in The Gambia,⁸⁰⁷ given the limited implementation and enforcement of the laws prohibiting the practice.⁸⁰⁸ This perpetuates the

professionals. *See also*, [The Gambia: The Law and FGM](#), p. 4; [Good Practices in Legislation on 'Harmful Practices' against Women](#), p. 16.

⁷⁹⁸ Gambian Women's (Amendment) Act 2015, section 32B (1).

⁷⁹⁹ [Good Practices in Legislation on 'Harmful Practices' against Women](#), p. 17; [CPS Female Genital Mutilation Prosecution Guidance](#); UNICEF, [Legislative Reform to Support the Abandonment of Female Genital Mutilation/Cutting](#) (August 2010), p. 28.

⁸⁰⁰ Gambian Women's (Amendment) Act 2015, section 32B (2).

⁸⁰¹ [Convention on the Rights of the Child](#), article 3; [African Charter on the Rights and Welfare of the Child](#), article 4; [Legislative Reform to Support the Abandonment of Female Genital Mutilation/Cutting](#), pp. 18, 28.

⁸⁰² [Legislative Reform to Support the Abandonment of Female Genital Mutilation/Cutting](#), p. 29.

⁸⁰³ Gambian Women's (Amendment) Act 2015, sections 32A(2)(a) and 32B (1).

⁸⁰⁴ Gambian Women's (Amendment) Act 2015, section 32B (2).

⁸⁰⁵ Gambian Women's (Amendment) Act 2015, section 32A (2).

⁸⁰⁶ [Good Practices in Legislation on 'Harmful Practices' against Women](#), p. 16.

⁸⁰⁷ Approximately 75% of women between the ages of 15 and 49 have experienced FGM. This figure goes as high as 96.7% in the rural regions of the country. *See* Thomson Reuters Foundation, 28 Too Many, 'The Gambia: The Law and FGM', (September 2018) ('[The Gambia: The Law and FGM](#)'), p. 1. *See also*, UN Population Fund, '[Female Genital Mutilation Dashboard \(FGM\) – Gambia](#)'; Canada: Immigration and Refugee Board of Canada 'The Gambia: The practice of female genital mutilation (FGM); treatment of people and NGOs who oppose the practice; state protection provided to victims and to people who oppose the practice (2016-May 2018)', GMB106103.FE (18 May 2018) ('[The Gambia: The Practice of female genital mutilation \(FGM\)](#)'); A Kaplan Marcusán *et al.*, 'Manual for the

culture of silence (i.e., under-reporting), harmful societal attitudes and continuing uncertainty about criminalisation which surround the practice.⁸⁰⁹

Prosecutors can take some practical steps to resolve this issue. In particular, the application of child-sensitive and victim-centred approaches to confidentiality, informed consent, protection and support (*see* sections 5.5.1, 5.7, 8.1.1-8.1.3, 8.5, 8.6, 8.6.1) as well as close co-ordination with community groups and local CSOs, who can act as important intermediaries, could go some way to overcoming the culture of silence by providing victims the confidence to come forward.⁸¹⁰ Since FGM is often carried out by family or community members, the victim may require ongoing support throughout the criminal justice process and after the case has concluded.⁸¹¹

5.3. Lack of consent and coercive circumstances

The above sections provide an overview of the main crimes of sexual violence criminalised domestically in The Gambia. According to international standards and Gambian domestic law, sexual violence takes place under a broad range coercive circumstances.⁸¹² Focusing on coercive circumstances, rather than proving the non-consent of the victim, removes the focus from the acts and conduct of the victim to focus on the actions of the perpetrator and assessments of whether the surrounding circumstances were coercive.⁸¹³

Based on international standards, this section examines the coercive behaviours and circumstances that may be relevant when considering charges of international or domestic crimes of sexual violence.

Management and Prevention of Female Genital Mutilation/Cutting for Health Professional, The Gambia' (2010) (['Manual for Management and Prevention of FGM'](#)), p. 11.

⁸⁰⁸ *See* the findings of the HRC, ['Concluding observations on the Gambia in the absence of its second periodic report'](#), 30 August 2018, CCPR/C/GMB/CO/2, para. 13; [Concluding Observations of The Gambia](#), para. 20. *See also*, [The Gambia: The Law and FGM](#), p. 5; [The Gambia: The Practice of female genital mutilation \(FGM\)](#).

⁸⁰⁹ [The Gambia: The Law and FGM](#), p. 7; [Legislative Reform to Support the Abandonment of Female Genital Mutilation/Cutting](#), p. 30.

⁸¹⁰ *See e.g.*, [The Gambia: The Law and FGM](#), p. 7; [CPS Female Genital Mutilation Prosecution Guidance: Legislative Reform to Support the Abandonment of Female Genital Mutilation/Cutting](#), pp. 30-31.

⁸¹¹ [CPS Female Genital Mutilation Prosecution Guidance](#).

⁸¹² [CEDAW General Recommendation 35](#), para. 33; [ACHPR Guidelines on Combating Sexual Violence](#), p. 14; [Istanbul Convention](#), article 36; [Istanbul Convention Explanatory Report](#), articles 189, 191-194; [Karen Tayag Vertido v. the Philippines](#), paras 8.7, 8.9.b(ii)(b.); [R.P.B. v. the Philippines](#), para. 8.10; [M.C. v. Bulgaria](#), Application No. 39272/98 (ECtHR, 4 March 2004), paras 163, 165, 181; [E.B. v. Romania](#), Application No. 49089/10 (ECtHR 19 March 2019), (['E.B. v. Romania'](#)), paras 56, 60; [ICC Elements of Crimes](#), articles 7(1)(g)-6, 8(2)(b)(xxii)-6 and 8(2)(e)(vi)-6.

⁸¹³ *See e.g.*, [ICC Elements of Crimes](#), articles 7(1)(g), 8(2)(b)(xxii) and 8(2)(e)(vi); [ACHPR Guidelines on Combating Sexual Violence](#), para. 3.1.a; [Kenyan Sexual Offences Act](#), section 43(1); [Botswana Penal Code](#), section 141; [Namibian Combatting of Rape Act](#), section 2(2).

5.3.1. Definition of ‘Coercive Circumstances’ under the Gambian Sexual Offences Act 2013

The Gambian Sexual Offences Act 2013 defines rape as occurring when a ‘sexual act’ is committed ‘under coercive circumstances’.⁸¹⁴ This definition of rape therefore presumes consent to be lacking where there is evidence of coercive circumstances, and proving the lack of consent of the victim is not a material element of the crime.

Section 3(2) of the Sexual Offences Act sets out a list of coercive circumstances which, on a plain reading, is non-exhaustive. This enables prosecutors to take a flexible, best practice approach in dealing with rape cases, and to consider the full range of behaviours and environments that, on a case-by-case basis, may provide evidence of ‘coercive circumstances’ in accordance with international standards. Doing so offers an opportunity for prosecutors to take account of contexts of power and culture specific to The Gambia, as well as the inherent inequality in male-female dynamics that exist in patriarchal societies which affect a person’s ability to express or otherwise assert their consent to sexual acts.⁸¹⁵ Adopting a broad interpretation of coercive circumstances would bring The Gambia into compliance with its international commitments and obligations by fully capturing the spectrum of harm suffered by victims of sexual violence; enable it to build better cases; and help to promote and protect the rights of women in The Gambia to live free from violence.⁸¹⁶

5.3.2. Understanding ‘coercive circumstances’ in line with international standards

International criminal, customary and human rights law state that free, voluntary and genuine consent cannot be given to a sexual act imposed by actual or threatened force; coercion (such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power); by taking advantage of a coercive environment; or when committed against a person incapable of giving genuine consent.⁸¹⁷

The presence of at least one of these coercive circumstances is sufficient to establish the non-consensual nature of the sexual act.⁸¹⁸ Consequently, proving a lack of consent or demonstrating

⁸¹⁴ Gambian Sexual Offences Act 2013, section 3(1). Since indecent assault/indecently annoying or insulting are also non-consensual crimes (section 126 of the Gambian Criminal Code) a best practice and rights-based approach would suggest that, in the absence of a definition of consent or coercive circumstances contained in the Gambian Criminal Code, prosecutors utilise the broad interpretation of coercive circumstances under the Gambian Sexual Offences Act 2013, in line with international standards.

⁸¹⁵ K Seelinger *et al.* ‘Investigation and Prosecution of Sexual Violence’ (UC Berkeley, 2011), p. 44.

⁸¹⁶ See *e.g.*, [Istanbul Convention](#), article 4; [M.C. v. Bulgaria](#), para. 166.

⁸¹⁷ [ICC Elements of Crimes](#), articles 7(2)(g), 8(2)(b)(xxii) and 8(2)(e)(iv); [Ntaganda Trial Judgment](#), para. 934; [Bemba Trial Judgment](#), paras 105-106; [Katanga Trial Judgment](#), para. 965; [Prosecutor v. Katanga & Chui](#), ICC-01/04-01/07, Decision on the confirmation of charges, 30 September 2008 ([‘Katanga & Chui Decision on the Confirmation of Charges’](#)), para. 440. See also, [M.C. v. Bulgaria](#), para. 181; [ICC Rules of Procedure and Evidence](#), rule 70.

⁸¹⁸ [ICC Elements of Crimes](#), articles 7(1)(g), 8(2)(b)(xxii) and 8(2)(e)(iv); [Ntaganda Trial Judgment](#), para. 934; [Bemba Trial Judgment](#), paras 102, 105-106; [Katanga Trial Judgment](#), para. 965; [ICC Rules of Procedure and](#)

the non-consent of the victim (i.e., by their words or deeds) is not required.⁸¹⁹ A victim is **not** required to physically resist or fight back to demonstrate lack of consent or the presence of coercive circumstances (*see* section 5.7.2).⁸²⁰ In fact, it is common for there to be no physical resistance because of a variety of psychological factors (see below) or because they fear further violence on the part of the perpetrator.⁸²¹ Generally speaking, it is common that a number of intersecting behaviours or circumstances will be in play at the same time or across a period of time which will amount to an environment in which consent is not possible. For example, in a domestic violence situation a number of coercive factors including physical force, bullying, psychological oppression, and threats may occur over a prolonged period of time.

The following sections outline the different coercive behaviours and environments recognised in international law. As discussed above, the conditions and circumstances described in this section can be used to assist prosecutor's in their interpretation of 'coercive circumstances' under section 3(2) of the Gambian Sexual Offences Act 2013, as well as for other domestic and international sexual crimes.

5.3.3. Physical force

Use of physical force is clear evidence of non-consent, although it is not an element of sexual violence *per se* and therefore not necessary to establish coercive circumstances.⁸²² The application of physical force to the complainant or to a person other than the complainant is recognised under section 3(2)(a) of the Gambian Sexual Offences Act 2013.⁸²³ Where physical

Evidence, rule 70. *See also*, [Istanbul Convention Explanatory Report](#), para. 191; [M.C. v. Bulgaria](#), para. 106; [E.B. v. Romania](#), para. 56; [Karen Tayag Vertido v. the Philippines](#), para. 8.9.b(ii)(b); [R.P.B. v. the Philippines](#), para. 8.10.

⁸¹⁹ [Ntaganda Trial Judgment](#), para. 934; [Bemba Trial Judgment](#), para. 106; [ICC Rules of Procedure and Evidence](#), rule 70.

⁸²⁰ [ICC Rules of Procedure and Evidence](#), rule 70; [Prosecutor v. Gacumbitsi](#), ICTR-2001-64-A, Judgment, 17 June 2004 ('[Gacumbitsi Trial Judgment](#)'), para. 325; [Prosecutor v. Kunarac et al.](#), IT-96-23-T& IT-96-23/1-T, Judgment, 22 February 2001 ('[Kunarac et al. Trial Judgment](#)'), paras 644-646. *See also*, [Karen Tayag Vertido v. the Philippines](#), paras 8.7, 8.9.b(ii)(b); [R.P.B. v. the Philippines](#), para. 8.10; [Istanbul Convention](#), article 36; [Istanbul Convention Explanatory Report](#), para. 191; [M.C. v. Bulgaria](#), para. 165; [E.B. v. Romania](#), para. 56.

⁸²¹ [M.C. v. Bulgaria](#), para. 164.

⁸²² [ICC Elements of Crimes](#), articles 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi); [Ntaganda Trial Judgment](#), para 934; [Bemba Trial Judgment](#), para. 103; [Akayesu Trial Judgment](#), para. 688; [Kunarac et al. Appeal Judgment](#), para. 129; [Prosecutor v. Taylor](#), SCSL-03-01-T, Judgment, 18 May 2012 ('[Taylor Trial Judgment](#)'), para. 416; [Furundžija Trial Judgment](#), para. 82; [Prosecutor v. Muhimana](#), ICTR-95-1B-T, Judgment and Sentence, 28 April 2005 ('[Muhimana Trial Judgment](#)'), para. 297; [Katanga & Chui Decision on the Confirmation of the Charges](#), para. 440. *See also*, [Istanbul Convention](#), article 36; [Istanbul Convention Explanatory Report](#), para. 192; [M.C. v. Bulgaria](#), paras 161, 163; [General Recommendation No. 35](#), para. 33.

⁸²³ Gambian Sexual Offences Act 2013, section 3(2)(a): 'the application of physical force to the complainant or to a person other the complainant'.

force does occur, it does not need to reach a significant level, such a ‘excessive’ or ‘life-threatening physical force’.⁸²⁴

The following non-exhaustive list of examples of physical force may be indicators of coercive circumstances, as well as aggravating factors relevant to sentencing:⁸²⁵

- (i) acts of violence directed towards the victim, such as hitting or slapping the victim including with an object (i.e., a gun);⁸²⁶
- (ii) physically restraining the victim, such as pinning them down or grabbing their hands;⁸²⁷
- (iii) pushing the victim to the ground or dragging the victim;⁸²⁸
- (iv) acts of violence directed towards another person;⁸²⁹
- (v) using a knife to tear off the victim’s clothes;⁸³⁰ or
- (vi) pointing a weapon at the victim.⁸³¹

During the TRRC proceedings, multiple witnesses have described sexual violence occurring following physical violence. For example, evidence has been provided that:

- (i) President Jammeh held Toufah Jallow’s face and forced it down, before rubbing his genitals on her;⁸³²
- (ii) witness Bintou Nyabally was attacked, forcefully undressed and raped. She suffered pain under her groin and several injuries such as bruises on her arms and legs from trying to fight off the perpetrators;⁸³³
- (iii) Binta Manneh came across two men wearing uniforms and one of them grabbed her hand. The man held onto her hand tightly, unzipped his trousers and pushed her to the ground on

⁸²⁴ Amnesty International, ‘Rape and Sexual Violence: Human Rights Law and Standards in the International Criminal Court’ (2011) ([‘Rape and Sexual Violence Amnesty’](#)), p. 18.

⁸²⁵ Use of physical force, as well as the resulting bodily/mental harm suffered by the victim, can also be important evidence establishing aggravating circumstances: Gambian Sexual Offences Act 2013, section 4(1)(a)(ii): where the application of physical force to the complainant or to a person other than the complainant is used, a person convicted of rape is liable to imprisonment for not less than fifteen years; section 4(1)(a)(iii)(aa): where the complainant has suffered grievous bodily or mental harm as a result of the rape, a person convicted of rape may be subject to liable to mandatory life imprisonment. *See also*, [Istanbul Convention](#), article 46(f); [Istanbul Convention Explanatory Report](#), para. 241.

⁸²⁶ *Delalić et al. Trial Judgment*, para. 937; *Gacumbtsi Trial Judgment*, para. 208; *Prosecutor v. Musema*, ICTR-96-13-A, Judgment and Sentence, 27 January 2000 ([‘Musema Judgment and Sentence’](#)), para. 833.

⁸²⁷ *Karen Tayag Vertido v. the Philippines*, para. 2.2; *M.C. v. Bulgaria*, para. 19.

⁸²⁸ *Akayesu Trial Judgment*, paras 424, 427; *Gacumbtsi Trial Judgment*, para. 208. *See also* *Karen Tayag Vertido v. the Philippines*, para. 2.2; *M.C. v. Bulgaria*, para. 30; *E.B. v. Romania*, para. 10.

⁸²⁹ *Ntaganda Trial Judgment*, para. 944.

⁸³⁰ *Muhimana Trial Judgment*, para. 297.

⁸³¹ *Delalić et al. Trial Judgment*, para. 958.

⁸³² [Aneked TRRC Digest 9](#), p. 143.

⁸³³ [Aneked TRRC Digest 9](#), p. 21.

her belly. When she was laying on the floor, the man pulled up her skirt, cut off her underwear, and ‘assaulted’ her.⁸³⁴

It should be noted, however, that most incidents of sexual violence do not involve physical force and, as such, do not necessarily result in physical injury or leave any visible traces on the body of a victim.⁸³⁵ Moreover, evidence of physical injuries may no longer exist in those cases where reporting of the crime was delayed or where medical evidence is unavailable. Accordingly, prosecutors should draw no adverse conclusions regarding the credibility of the victim in cases where there is no evidence of physical injuries. The victim should not be expected to explain why they bear no marks of physical violence.

5.3.4. Threats of force

Threats of force against the victim can also constitute coercive circumstances,⁸³⁶ as recognised by sections 3(2)(b)-(c) of the Gambian Sexual Offences Act 2013.⁸³⁷ The harm threatened may be of physical force, but can also include threats of other harm (e.g., a threat to reveal the sexual encounter, or to stop or postpone education, care, or financial support). There is no need for physical force to actually occur.⁸³⁸ It is not necessary for the perpetrator to actually carry out the threat or even intend to do so. The threat itself is sufficient as long as it creates a reasonable fear in the victim that they or a third person will be harmed.⁸³⁹

The threat may have been directed towards the victim, or a third person such as the victim’s children or family⁸⁴⁰ and may be expressed in words or actions, or as a combination of both. Further, the threat of force does not have to be immediate and may relate to a future occurrence.

The following is a non-exhaustive list of examples of threats of force:

- (i) threats or intimidation using a weapon;⁸⁴¹
- (ii) threats to kill or injure;⁸⁴²

⁸³⁴ [Aneked TRRC Digest 7](#), Sainey Senghore, p. 79; Abdoukarim Jammeh, p. 88; Njie Manneh, p. 99; Musa Kanaji p. 103.

⁸³⁵ [WHO Guidelines for medico-legal care for victims of sexual violence](#), pp. 11, 49.

⁸³⁶ [ICC Elements of Crimes](#), article 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(iv).

⁸³⁷ Gambian Sexual Offences Act 2013, section 3(2)(b): threats (whether verbally or through conduct) of the application of physical force to the complainant or to a person other than the complainant; section 3(2)(c): ‘threats (whether verbally or through conduct) to cause harm (other than bodily harm) to the complainant or to a person other than the complainant, under circumstance where it is not reasonable for the complainant to disregard the threats.’

⁸³⁸ [Ntaganda Trial Judgment](#), para. 935; [Bemba Trial Judgment](#), para. 103. See also, [Katanga & Chui Decision on the Confirmation of the Charges](#), para. 440; [Akayesu Trial Judgment](#), para. 688; [Taylor Trial Judgment](#), para. 416.

⁸³⁹ [Furundžija Trial Judgment](#), para. 174.

⁸⁴⁰ [Ntaganda Trial Judgment](#), para. 943. See also, [Akayesu Trial Judgment](#), paras 424, 437; [Delalić et al. Trial Judgment](#), para. 937; [Furundžija Trial Judgment](#), para. 82; [Kunarac et al. Appeal Judgment](#), para. 301; [Muhimana Trial Judgment](#), para. 297.

⁸⁴¹ [Ntaganda Trial Judgment](#), para. 944; [Delalić et al. Trial Judgment](#), para. 958; [Kunarac et al. Trial Judgment](#), para. 667.

- (iii) threats to harm sexual body parts;⁸⁴³
- (iv) threats to harm a person's health;⁸⁴⁴ and/or
- (v) threats of being subjected to sexual violence.⁸⁴⁵

Similar acts have been presented in the TRRC as evidence of coercive circumstances. For example, Binta Jamba testified that she was raped by Ousman Sonko, former Inspector General of Police and Minister of Interior (2000-2016) after he had threatened her while carrying a gun, which he placed on her bed while he was undressing.⁸⁴⁶

5.3.5. Coercion

Perpetrators of sexual violence will often employ more subtle behaviours, such as inducements or bullying (e.g., verbal or psychological abuse or controlling behaviour) to create or exploit vulnerabilities in victims and make them dependant on, or subordinate to, their abuser.⁸⁴⁷ This is known as coercion, or 'coercive' behaviour. Section 3(2) of the Gambian Sexual Offence Act 2013 explicitly recognises forms of coercion such as detention, deception and other fraudulent misrepresentation as coercive environments.⁸⁴⁸

In line with the international standards, prosecutors should adopt a flexible and context-based approach in dealing with such cases and consider evidence of the full range of coercive behaviours and circumstances that may give rise to sexual violence. The following is a non-exhaustive list of examples of coercion:

- (i) fear of violence, duress, detention, psychological oppression or abuse of power;⁸⁴⁹
- (ii) intimidation, extortion, and other forms of duress that prey on fear or desperation;⁸⁵⁰
- (iii) detention (whether legal or illegal);⁸⁵¹

⁸⁴² *Ntaganda Trial Judgment*, paras 944, 977. See also, *Katanga & Chui Decision on the Confirmation of the Charges*, para. 440, fn. 592; *Kunarac et al. Trial Judgment*, paras 68, 711; *Musema Judgment and Sentence*, para. 833.

⁸⁴³ *Furundžija Trial Judgment*, para. 82.

⁸⁴⁴ *V. C. v. Slovakia*, Application No. 18968/07 (ECtHR, 8 November 2011), para. 15.

⁸⁴⁵ *Prosecutor v. Kvočka et al.*, IT-98-30/1-T, Judgment, 2 November 2001 ('*Kvočka et al. Trial Judgment*'), para. 561.

⁸⁴⁶ *Aneked TRRC Digest 9*, Binta Jamba, p. 127.

⁸⁴⁷ *M.C. v. Bulgaria*, para. 146.

⁸⁴⁸ Gambian Sexual Offences Act 2013, section 3(2)(b), (c), (e), (g), and (h).

⁸⁴⁹ *ICC Elements of Crimes*, articles 7(1)(g)-6, 8(2)(b)(xxii), and 8(2)(e)(vi)-6, element 1; *Katanga Trial Judgment*, para. 965; *Bemba Trial Judgment*, paras 105-106; *Ntaganda Trial Judgment*, para. 934; *ACHPR Guidelines on Combatting Sexual Violence*, p. 14.

⁸⁵⁰ *Aneked TRRC Digest 9*, p. 52; *Ntaganda Trial Judgment*, para. 935; *Akayesu Trial Judgment*, para. 688; *Kunarac et al. Trial Judgment*, para. 747.

⁸⁵¹ *Ntaganda Trial Judgment*, paras 934, 976, 978; *Katanga & Chui Decision on the Confirmation of the Charges*, paras 353, 434. See also, *Kvočka et al. Trial Judgment*, paras 98, 555; *Kunarac et al. Appeal Judgment*, para. 132;

- (iv) regular violence committed against detainees (including sexual violence);⁸⁵²
- (v) capture and restraint of victims;⁸⁵³
- (vi) psychological violence; and
- (vii) promises made to the victim, including promises relating to education or employment or promises to spare or benefit family members.⁸⁵⁴

The following sub-sections will expand on this list and explain the types of coercion which may be particularly relevant for The Gambia.

Detention

Detention reflects unequal power structures and is always coercive.⁸⁵⁵ According to international standards, sexual violence in any form of detention or captivity, legal or illegal, vitiates consent.⁸⁵⁶ Detention need not be formal and could, for example, include detention in privately owned properties.

Contrary to these standards, section 3(2)(e) of the Gambian Sexual Offences Act 2013 deems only ‘unlawful detention’ as a coercive circumstance.⁸⁵⁷ Consequently, rape and other forms of sexual abuse that occur during lawful detention following an arrest by the police force in a state-run facility, or confinement in some other state-run facility, would fall outside the scope of this provision. Prosecutors may consider adopting a broader interpretation of ‘coercive circumstances’ to include any form of detention in line with international standards to ensure that all victims have access to justice.

TRRC testimonies revealed a number of cases where sexual violence occurred during detention, for example:

Kunarac et al. Trial Judgment, paras 464, 542, 574; *Furundžija Trial Judgment*, para. 271; *Menesheva v. Russia*, Application No. 59261/00, (ECtHR, 9 March 2006).

⁸⁵² *Kunarac et al. Trial Judgment*, para. 574; *Kvočka et al. Trial Judgment*, para. 561; *Salmanoğlu & Polattaş v. Turkey*, Application No. 15828/03, (ECtHR, 17 March 2009).

⁸⁵³ *Ntaganda Trial Judgment*, para. 943.

⁸⁵⁴ *Kvočka et al. Trial Judgment*, para. 551.

⁸⁵⁵ International Committee for the Red Cross (‘ICRC’), ‘Sexual Violence in Detention’ (February 2017) (‘[ICRC Sexual Violence in Detention Report](#)’), p. 2.

⁸⁵⁶ *Ntaganda Trial Judgment*, paras 934, 976, 978; *Katanga & Chui Decision on the Confirmation of the Charges*, paras 353, 434; *Furundžija Trial Judgment*, para. 271; *Kvočka et al. Trial Judgment*, paras 98, 555; *Delalić et al. Trial Judgment*, para. 495; *Kunarac et al. Appeal Judgment*, para. 132; *Kunarac et al. Trial Judgment*, paras 464, 542, 574.

⁸⁵⁷ Gambian Sexual Offences Act 2013, section 3(2)(e).

- (i) Sainabou Camara Lowe testified that during student demonstrations on 10 April 2000, she was captured and detained by paramilitaries who beat her until she lost consciousness and injured her around her genitals;⁸⁵⁸ and
- (ii) Bintou Nyabally testified that on 17 May 1996, along with other UDP members, she was arrested by ‘paras’ and taken to the Police Intervention Unit (PIU). Two men wearing the paramilitary uniform entered the cell she was in, one named ‘Sanneh’, and pulled Bintou Nyabally’s legs, so she fell down. Sanneh and the other man then raped her.⁸⁵⁹

Psychological violence and abuse of unequal power relations

The factors or conduct that amount to coercion go beyond threats of physical violence and include other forms of psychological violence, oppression and the instilment of fear.⁸⁶⁰ This may occur in a broad array of contexts and is particularly likely where there is an unequal power relationship between the perpetrator and the victim.

The following non-exhaustive factors may be indicative of unequal power relations:

- (i) unequal relations in familial or intimate relationships (e.g., where there is domestic violence or where the perpetrator is the head of the household);⁸⁶¹
- (ii) the perpetrator has an official or unofficial position of authority (e.g., soldiers, detention guards, police officers, guardians or care givers, doctors, teachers, community or tribal leaders etc.);⁸⁶²
- (iii) the affected person has any type of dependency (including financial, legal, professional, familial, and/or personal) on the perpetrator;⁸⁶³
- (iv) the affected person is open to exploitation due to certain vulnerabilities or personal characteristics;⁸⁶⁴ and
- (v) the affected person is aware that the perpetrator has previously used violence against them, or a third party.⁸⁶⁵

⁸⁵⁸ [Aneked TRRC Digest 9](#), Sainabou Camra Lowe, p. 14: the victim was beaten by paramilitaries, causing injury to her genitals.

⁸⁵⁹ [Aneked TRRC Digest 9](#), Bintou Nyabally, pp. 20-22.

⁸⁶⁰ [Ntaganda Trial Judgment](#), para. 934; [Kunarac et al. Trial Judgment](#), para. 747; [Gambian Women’s Act 2010](#), section 2. To understand and recognise evidence of what might constitute psychological violence/oppression, prosecutors can be guided by the definition of ‘abuse’ contained within the [Gambian Women’s Act 2010](#), which includes ‘physical, psychological, sexual, verbal, economic, social, cultural or similar mistreatment or mishandling which interferes with the integrity of the woman.’

⁸⁶¹ [Istanbul Convention Explanatory Report](#), para. 181.

⁸⁶² See e.g., [Ntaganda Trial Judgment](#), para. 943. See also, [Delalić et al. Trial Judgment](#), para. 495; [Kunarac et al. Trial Judgment](#), paras 542, 576, 780; [Kvočka et al. Trial Judgment](#), paras 548, 561.

⁸⁶³ [Istanbul Convention Explanatory Report](#), para. 181; Crown Prosecution Service, ‘What is Consent?’ (undated) (‘CPS What is Consent?’), p. 1; [Aneked TRRC Digest 9](#), Haddy Mboge Barrow, p. 29.

⁸⁶⁴ [The Hague Principles on Sexual Violence](#), p. 11: for e.g., sex, sexual orientation, gender identity, age, disability, poverty, class, social status, caste, ethnicity, indigeneity, race, religion, illiteracy, or other grounds.

Unequal power relations between men and women can also contribute to coercive circumstances.⁸⁶⁶ This often exists in patriarchal and religious societies (such as The Gambia) where men hold more power compared to women both at the household and institutional level.⁸⁶⁷ Under these circumstances, coercion can be manifested in a number of ways, including where women:

- (i) feel a duty or pressure to submit to their husband, particularly where refusing sex can have severe consequences (such as violence, divorce, or the husband taking another wife);⁸⁶⁸
- (ii) believe they cannot say no or do not understand that they can refuse due to social or religious norms;⁸⁶⁹
- (iii) feel they are to blame for encouraging the man (e.g., by wearing suggestive clothing or being alone with a man); or
- (iv) feel that they will suffer reputational damage due to stereotypes about divorced or unmarried women.⁸⁷⁰

This is particularly so in marriages involving young women, who are unable to make decisions about or negotiate sex.⁸⁷¹

Considering psychological violence and abuse of unequal power relations requires the prosecutor to examine the context and circumstances surrounding the sexual violence. There are many examples of acts or circumstances which may, individually or collectively, indicate psychological violence or abuse of power which the prosecutor should investigate, including:

- (i) social isolation of the victim from others, including their friends, families, colleagues or support services (including medical);
- (ii) making the victim feel obligated, or guilty for refusing, to have sex by threatening to end the relationship or telling them they are a bad wife/mother if they don't have sex;
- (iii) using intimidating and aggressive language or gestures (such as yelling, destruction of objects, or other aggressive behaviour);
- (iv) insulting, ridiculing or belittling the victim (whether publicly or privately);

⁸⁶⁵ [The Hague Principles on Sexual Violence](#), p. 11.

⁸⁶⁶ [Aneked TRRC Digest 9](#), Haddy Mboge Barrow, p. 29.

⁸⁶⁷ [Aneked TRRC Digest 9](#), Haddy Mboge Barrow, p. 29; [Concluding observations on the Gambia in the absence of its second periodic report](#), para. 13.

⁸⁶⁸ [Touray, Sexuality and Women's Sexual Rights in the Gambia](#), p. 82.

⁸⁶⁹ [Aneked TRRC Digest 9](#), Haddy Mboge Barrow, p. 29.

⁸⁷⁰ WHO and Pan American Health Organization, 'Understanding and Addressing Violence Against Women: Intimate Partner Violence' (2012) (['WHO Understanding and Addressing Violence Against Women: Intimate Partner Violence'](#)), p. 4.

⁸⁷¹ [Touray, Sexuality and Women's Sexual Rights in the Gambia](#), p. 79.

- (v) stalking (including cyber-stalking);
- (vi) controlling or monitoring the behaviour/activities of the victim (e.g., whether they leave the house, where they go and what they do, what they wear, who they speak to, their finances, education or job etc);
- (vii) making promises to the victim that they or another person will be rewarded (either with money or gifts), receive an education, or maintain/gain a job;
- (viii) devising/enforcing rules or activities that humiliate, degrade or dehumanise the victim;
- (ix) threats to reveal private information about the victim to their family/friends or to the public, or on social media, such as their sexual orientation, HIV or immigration status, or private photographs; and
- (x) threats or accusations relating to family or religious dishonour.⁸⁷²

In assessing whether a particular conduct amounts to sexual violence, prosecutors should consider the abovementioned and other similar factors in their totality. In many cases, the perpetrator's actions may seem unproblematic if considered in isolation. The victim may not even be aware or acknowledge that they are being subjected to abusive behaviour.⁸⁷³ Cumulatively, however, the existence of these factors may reveal a pattern of controlling and abusive conduct by the perpetrator against the victim.⁸⁷⁴

The TRRC has heard evidence from a number of witness that Jammeh used his position of power and authority to take sexual advantage of vulnerable women and minors through force, threats, harassment and a pattern of coercive and manipulative behaviour that included a range of inducements.⁸⁷⁵ Indicative of the psychological oppression and abuse of power used by Jammeh is the evidence given about his abuse of 'Protocol Girls'. An unidentified witness described how during her first one-on-one meeting with Jammeh, he offered her a job as a protocol officer at the Office of the President.⁸⁷⁶ In addition to their salary as Protocol Officers, they received a number of privileges which came from Jammeh: including a car, telephones, laptops and promises of education.⁸⁷⁷ The unidentified witness stated in her opinion Yahya Jammeh took advantage of how vulnerable the women were, adding that he had money, power and a position of authority

⁸⁷² European Institute for Gender Equality, '[Psychological Violence](#)' (undated); Crown Prosecution Service, 'Controlling or Coercive Behavior in an Intimate of Family Relationship' (30 June 2017) ('[CPS Controlling or Coercive Behavior in an Intimate of Family Relationship](#)').

⁸⁷³ [CPS Controlling or Coercive Behavior in an Intimate of Family Relationship](#).

⁸⁷⁴ [CPS Controlling or Coercive Behavior in an Intimate of Family Relationship](#).

⁸⁷⁵ [Aneked TRRC Digest 9](#), p. 88; Unidentified Witness Testimony, referring to the persons' list, Person 38 was below 18 years old; [Aneked TRRC Digest 9](#), p. 115; Jatta Jarju recalled that one day one of her colleagues told her "do you know that so and so is at State House working as a protocol officer?" The witness said she knew of two and was provided a paper to write down the names of the girls she was informed about. She explained that one of them was 17 (underage) when she started working at State House but she could not remember the age of the other protocol girl. She also highlighted that the underage girl travelled with Yahya Jammeh.

⁸⁷⁶ [Aneked TRRC Digest 9](#), p. 83.

⁸⁷⁷ [Aneked TRRC Digest 9](#), p. 84.

and that he took that to his advantage to abuse women.⁸⁷⁸ She explained that she continued working at the Protocol Office, despite Jammeh's sexual abuse, because her entire family was depending on her.⁸⁷⁹

Taking advantage of inherently coercive environments

Sexual violence can also be committed by taking advantage of an inherently coercive environment,⁸⁸⁰ where the perpetrator does not directly coerce the victim but takes advantage of a coercive environment that exists independently.⁸⁸¹ Inherently coercive environments may exist where, for instance, there is a military/security presence in the area,⁸⁸² or in circumstances where there are other ongoing war crimes or crimes against humanity being committed,⁸⁸³ such as during repressive rule by authoritarian leaders.

In such situations, while the perpetrator may not have done anything explicitly to coerce the victim (such as by using force or by threatening the victim), or be responsible for creating the coercive environment themselves, they nonetheless take advantage of a situation that is inherently coercive (i.e., due to the pervasive potential for violence) to sexually abuse the victim.⁸⁸⁴

Several factors may contribute to creating a coercive environment, including the number of people involved in the commission of the crime, whether the sexual violence was committed during or immediately following a combat situation, and whether the sexual violence was committed together with other crimes.⁸⁸⁵ For example, in the Ntaganda case before the International Criminal Court the soldiers engaged in the sexual violence in the immediate aftermath of the armed group's takeover of the villages and the rapes coincided with the commission of other crimes by the soldiers against the inhabitants of the villages.⁸⁸⁶

It is common that other coercive circumstances (as described above) will be present in addition to the inherently coercive environment, which converge to create a situation where the victim

⁸⁷⁸ [Aneked TRRC Digest 9](#), p. 85.

⁸⁷⁹ [Aneked TRRC Digest 9](#), p. 87.

⁸⁸⁰ [ICC Elements of Crimes](#), articles 7(1)(g), 8(2)(b)(xxii) and 8(2)(e)(vi); [CEDAW General Recommendation 35](#), para. 33; [Istanbul Convention](#), article 36; [Istanbul Convention Explanatory Report](#), paras 189, 191-194; [Karen Tayag Vertido v. the Philippines](#), paras 8.7, 8.9.b(ii)(b); [R.P.B. v. the Philippines](#), para. 8.10; [M.C v. Bulgaria](#), paras 163, 165, 181; [E.B. v. Romania](#), paras 56, 60.

⁸⁸¹ [Amnesty, Rape and Sexual Violence](#), p. 26; [ICRC Sexual Violence in Detention Report](#), p. 2; [Ntaganda Trial Judgment](#), para. 935; [Bemba Trial Judgment](#), para. 104.

⁸⁸² [Akayesu Trial Judgment](#), para. 688; [Bemba Trial Judgment](#), paras 103-104. *See also*, [UNHCR Contemporary forms of slavery, systematic rape, sexual slavery and slavery like practices during armed conflict: Final Report](#), para. 25.

⁸⁸³ [Ntaganda Trial Judgment](#), paras 935, 945; [Bemba Trial Judgment](#), para. 104; [Kunarac et al. Appeal Judgment](#), para. 130.

⁸⁸⁴ [Amnesty, Rape and Sexual Violence](#), p. 26.

⁸⁸⁵ [Ntaganda Trial Judgment](#), paras 935, 945; [Bemba Trial Judgment](#), para 104.

⁸⁸⁶ [Ntaganda Trial Judgment](#), para. 945.

was unable to provide genuine consent. Accordingly, prosecutors must consider these factors in their totality.

Evidence of the 2009 witch-hunts suggests that the sexual violence occurred during an inherently coercive environment, which the perpetrators were able to take advantage of. In particular, evidence points to sexual violence that occurred during the operations to cleanse villages of alleged witches, and together with various other crimes.⁸⁸⁷ The operations to cleanse villages and settlements of witches followed a pattern. Perpetrator groups, including the marabout, soldiers and ‘Green Boys’ groups roamed communities going house to house,⁸⁸⁸ entering often without warning,⁸⁸⁹ and forcibly removing people who they targeted as witches from their homes.⁸⁹⁰ Victims were bussed to either Baba Jobe’s compound (in Kololi), and the others, around Foni, or Jammeh’s compound in Kanilai.⁸⁹¹ The compounds were heavily guarded. At these compounds, various other abuses were committed, for example multiple witnesses described being humiliated by being forced to undress to be bathed in an unknown liquid,⁸⁹² to drink a hallucinogenic concoction,⁸⁹³ as well as seeing beatings and interrogations.⁸⁹⁴ Under these conditions, incidents of sexual violence that occurred during the witch-hunts and at the compulsory work farms in Kanilai (including forced nudity, rape and other forms of sexual violence⁸⁹⁵), is likely to have been committed in an inherently coercive environment. It is possible that this inherently coercive environment coincided with other coercive circumstances or behaviours, such as force, threats, detention or abuse of power.

5.3.6. Incapacity

International standards, and the Gambian Sexual Offences Act 2013,⁸⁹⁶ also recognise certain situations in which a person is incapable of giving free, voluntary and genuine consent. This may be due to induced, natural or age-related causes.⁸⁹⁷

⁸⁸⁷ See e.g., M K Darboe, ‘[Gambia: On the Trail of Deadly Witch Doctors in Jammeh’s Region](#)’ (*Justiceinfo.net*, 10 December 2019); S Hayden, ‘Gambia’s Dictator ordered a witch hunt. This village is still haunted by it.’ (*The Washington Post*, 28 May 2018) (‘[Hayden, Gambia’s Dictator ordered a witch hunt](#)’); *ICTJ Women’s Experiences of the Dictatorship in the Gambia*.

⁸⁸⁸ *Aneked TRRC Digest 10*, pp. 66, 74-75, 131.

⁸⁸⁹ *Aneked TRRC Digest 10*, pp. 66.

⁸⁹⁰ *Aneked TRRC Digest 10*, pp. 74-75, 197.

⁸⁹¹ *Aneked TRRC Digest 10*, pp. 32, 59, 74-75, 79, 83, 119, 132, 170, 178, 185, 188, 193-194, 197, 202, 207-208, 209; [Hayden, Gambia’s Dictator ordered a witch hunt](#).

⁸⁹² See e.g., *Aneked TRRC Digest 10*, pp. 66-67, 75, 120, 132.

⁸⁹³ *Aneked TRRC Digest 10*, pp. 67, 75, 84, 132, 189, 216.

⁸⁹⁴ *Aneked TRRC Digest 10*, pp. 32, 60, 85, 96, 197.

⁸⁹⁵ *ICTJ Women’s Experiences of the Dictatorship in the Gambia*, pp. 7-8.

⁸⁹⁶ Gambian Sexual Offences Act 2013, section 3(2): “coercive circumstances” includes – “(d) circumstances where the complainant is under the age of sixteen year”; “(f) circumstances where the complainant is affected by – (i) Physical disability or helplessness, mental incapacity or other inability (where permanent or temporary); (ii) Intoxicating liquor or any drug or other substance which mentally incapacitates the complainant, or (iii) Sleep, to such an extent that the complainant is rendered incapable of understanding the nature of the sexual act or is deprived of the opportunity to communicate willingness to submit to or to commit the sexual act.”

Intoxication with alcohol or drugs, whether self-administered or administered by the perpetrator, may render a person incapable of giving genuine consent.⁸⁹⁸ Whether the victim's capacity to provide genuine consent was impaired will need to be assessed on a case-by-case basis in light of the circumstances of the individual case. For example, this would be the case if the substance caused the victim to be unconscious, unaware of what was happening, or otherwise unable to refuse the sexual conduct.

A person may also be affected by a temporary or permanent physical or mental condition that renders them incapable of giving genuine consent.⁸⁹⁹ This includes if they were asleep, unconscious or have certain disabilities or conditions affecting their ability to consent or communicate consent. However, a person with physical or mental disabilities or conditions should not be presumed to be incapable of comprehending the nature of the sexual acts or of giving consent.⁹⁰⁰ Accordingly, the capacity of the victim to consent should be assessed on a case-by-case basis, without any automatic assumptions that they are helpless and their evidence unreliable.

Age, including old age,⁹⁰¹ can affect a person's ability to give genuine consent;⁹⁰² it can be an aggravating factor,⁹⁰³ and also needs to be taken into consideration for the safety and protection of the victim during the criminal justice process.

Evidence that could indicate an incapacity to genuinely consent has been heard before the TRRC, for example:

- (i) Haddy Mboge Barrow described occasions where perpetrators used their positions of authority to deceive and sexually abuse children and young women;⁹⁰⁴
- (ii) Mustapha Ceesay testified that his aunt had been "raped by the 'Green Boys' while she was intoxicated and that they kept raping her even when she was conscious",⁹⁰⁵ and

⁸⁹⁷ [ICC Elements of Crimes](#), fns 16, 51, 64; [Bemba Trial Judgment](#), para 107; [Ntaganda Trial Judgment](#), para 981; [Sesay et al. Trial Judgment](#), para 148; [M.C. v. Bulgaria](#), para. 79. See also, S F Ribeiro & D van der Straten Ponthoz, 'International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: Best Practice on the Documentation of Sexual Violence as a Crime or Violation of International Law' (2nd ed UK Foreign & Commonwealth Office 2017) ('[International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#)'), p. 59; '[Sexual violence: prevalence, dynamics and consequences](#)' (Who.int, 2020) ('[WHO Sexual violence: prevalence, dynamics and consequences](#)'), p. 8; CPS What is Consent?

⁸⁹⁸ [Sesay et al. Trial Judgment](#), para. 148; [WHO Sexual violence: prevalence, dynamics and consequences](#), pp. 7-8.

⁸⁹⁹ Gambian Sexual Offences Act 2013, section 3(2)(f)(i).

⁹⁰⁰ See e.g., UNGA '[United Nations Convention on the Rights of the Persons with Disabilities](#)' (24 January 2007) A/RES/61/106.

⁹⁰¹ [M.C. v. Bulgaria](#), para. 79.

⁹⁰² Gambian Sexual Offences Act 2013, section 2; [ICC Elements of Crimes](#), fn. 16, 51 and 64; [Bemba Trial Judgment](#), para 107; [Ntaganda Trial Judgment](#), para 981; [Sesay et al. Trial Judgment](#), para. 148.

⁹⁰³ Gambian Sexual Offences Act 2013, section 4(1)(a) (iii) (bb)-(cc).

⁹⁰⁴ [Aneked TRRC Digest 9](#), Haddy Mboge Barrow, p. 29.

- (iii) Fatou Jallow testified that Yayha Jammeh injected a substance into her arm with a needle prior to raping her. She said she does not know how long she laid there or what happened, but eventually she woke up feeling very disorientated.⁹⁰⁶

5.4. Obtaining and corroborating evidence of sexual violence

5.4.1. Corroborating evidence of sexual violence

In order to prove that an act of sexual violence has occurred, prosecutors will need to obtain evidence of that act. Although evidence is dealt with more broadly in sections 7.3.1 to 7.3.3, given its importance, the issue of corroborative evidence in sexual violence investigations is dealt with here.

Corroborating evidence is evidence that strengthens, adds to, or authenticates already existing evidence.⁹⁰⁷ While corroborating evidence can be useful, it is often difficult to obtain for sexual violence cases. Sexual violence typically happens in isolated locations and situations where the perpetrator is in a position of authority over the victim and she is unable to seek help.⁹⁰⁸ In settings where sexual violence is prevalent, including within familial or intimate relationships, during detention, or under repressive regimes, the task of establishing and finding eyewitnesses maybe onerous and supporting medical documentation may be difficult or even impossible to obtain.⁹⁰⁹

It is a settled principle of both international and Gambian criminal law that judges may rely on the evidence of a single witness to enter a conviction without the need for corroboration.⁹¹⁰

This principle has been codified in rule 63(4) of the Rules of Evidence and Procedure of the ICC, which prohibits Chambers from legally requiring corroboration in order to prove any crime

⁹⁰⁵ Aneked, '[Truth, Reconciliation & Reparations Commission \(TRRC\) Digest Edition 10](#)' (November 2019), Mustapha Ceesay, p. 31.

⁹⁰⁶ [Aneked TRRC Digest 9](#), Toufah Jalloh, pp. 133-150.

⁹⁰⁷ Gambian Evidence Act, section 179: 'Corroboration consists of independent evidence from which a reasonable inference can be drawn which confirms and supports in some material way the evidence to be corroborated and connects the relevant person with the offence, claim or defence.'

⁹⁰⁸ A Leotta, '[I was a Sex-Crimes Prosecutor. Here's Why 'He Said, She Said' Is a Myth](#)' (*TIME*, 3 October 2018); [The Hague Principles on Sexual Violence](#), pp. 11, 30, 46.

⁹⁰⁹ [Trial, Rape Myths](#), p. 56.

⁹¹⁰ See e.g., [Ntaganda Trial Judgment](#), paras 75-76; *Prosecutor v. Haradinaj*, IT-04-84-A, Appeal Judgment, 19 July 2010 ('[Haradinaj Appeal Judgment](#)'), paras 145, 219; *Prosecutor v. Tadić*, IT-94-1-A, Appeal Judgment, 15 July 1999 ('[Tadić Appeal Judgment](#)'), para. 65; *Prosecutor v. Bagilishema*, ICTR-95-1A-A, Appeal Judgment, 3 July 2002 ('[Bagilishema Appeal Judgment](#)'), para. 79; *Prosecutor v. Dragomir Milošević*, IT-98-29/1-A, Appeal Judgment, 12 November 2009 ('[Dragomir Milošević Appeal Judgment](#)'), para. 215; *Prosecutor v. Kupreškić*, IT-95-16-A, Appeal Judgment, 23 October 2001, para. 220; *Prosecutor v. Lukić & Lukić*, IT-98-32/1-A, Appeal Judgment, 4 December 2012 ('[Lukić & Lukić Appeal Judgment](#)'), para. 375; H Jallow, *The Law of Evidence*, Revised Second Edition (Topkin Publication, 2016) ('Jallow Law of Evidence 2016'), pp. 211-213.

within the jurisdiction of the court, and in particular crimes of sexual violence.⁹¹¹ The principle has also been accepted and applied in domestic sexual violence prosecutions⁹¹² and has been referred to in African courts.⁹¹³

International legal and human rights best practice suggest that the continued requirement for corroborative evidence in sexual violence cases discriminates against women,⁹¹⁴ and their right to equal access to justice.⁹¹⁵ In 2013, the United Nations Human Rights Council urged states to repeal discriminatory provisions that require corroboration of testimony in sexual violence cases.⁹¹⁶

Section 7 of the Gambian Sexual Offences Act 2013 explicitly abolishes what it refers to as ‘the cautionary rule’,⁹¹⁷ meaning that section 180 of the Evidence Act is no longer applicable to offences of a sexual or indecent nature. Section 7 of the Sexual Offences Act therefore brings Gambian law in line with international best practice by removing the necessity to corroborate a witnesses’ account of sexual violence. Nonetheless, in practice, the requirement for corroboration is still seen within the Gambian courts, posing a significant challenge for prosecutors, as cases based on two conflicting accounts of the sexual violence from the victim and the perpetrator are less likely to succeed in court.

⁹¹¹ [ICC Rules of Procedure and Evidence](#), rule 63(4); [Ntaganda Trial Judgment](#), para. 75. See also, [Policy Paper on Sexual and Gender-Based Crimes 2014](#), para. 93.

⁹¹² See e.g., [R v. Green](#), 1996 CanLII 6613 (NL SC): ‘A trier of fact may convict on the unsupported testimony of a single witness’; [R v. Mehrpouya](#), 2015 ONSC 2456 (CanLII), para. 25: ‘This is not to say that an accused cannot be convicted, in an appropriate case, solely on the basis of the evidence of a single complainant. Any such suggestion would fall prey to the false myths regarding sexual offence complainants as inherently suspect or untrustworthy’; [R. v. T.S.](#), 2012 ONSC 6070 (CanLII), para. 81: ‘Finally, I note that the complainant’s testimony as to the alleged sexual assault is not corroborated or confirmed by any other evidence. That is not to say that an accused charged with an alleged sexual assault cannot, in an appropriate case, be found guilty solely on the basis of the evidence of a single complainant. To make such a suggestion would be to fall prey to the false myths regarding sexual offence complainants as inherently suspect or untrustworthy.’

⁹¹³ C Rickard, ‘“Cautionary Rule” Victory for Sexual Assault Victims’ (Africa Lii, 12 March 2018) ([‘Rickard Cautionary Rule Victory for Sexual Assault Victims’](#)).

⁹¹⁴ In 2010, the United Nations General Assembly urged member states to ‘review, evaluate and update’ their criminal procedure to, among other things, ‘ensure that evidentiary rules are non-discriminatory’: UNGA, [‘Model Strategies and Practical Measures on the Elimination of Violence Against Women in the Field of Crime Prevention and Criminal Justice’](#) (21 December 2010) A/RES/65/228, para. 15(d). See also, UNODC Handbook on Effective Prosecution Responses to Violence Against Women and Girls, Criminal Justice Handbook Series, 2014, p. 111; [UN Handbook for Legislation on Violence Against Women](#), p. 41; International Commission of Jurists (‘ICJ’), ‘Women’s Access to Justice for Gender-Based Violence: A Practitioner’s Guide (ICJ 2016) ([‘ICJ Women’s Access to Justice for Gender-Based Violence: A Practitioner’s Guide’](#)), pp. 237-238.

⁹¹⁵ [CEDAW General Recommendation No. 33](#), para. 25(a)(iii); [ICJ Women’s Access to Justice for Gender-Based Violence: A Practitioner’s Guide](#), p. 237.

⁹¹⁶ UN HRC [‘Accelerating efforts to eliminate all forms of violence against women: preventing and responding to rape and other forms of sexual violence’](#) (25 June 2013) A/HRC/RES/23/25, para. 8.

⁹¹⁷ Gambian Sexual Offence Act 2013, section 7: ‘A court shall not treat the evidence of any complainant in criminal proceedings at which an accused is charged with an offence of a sexual or indecent nature with special caution before the accused is charged with any such offence.’

Importantly, however, prosecutors should not drop cases simply because of the absence of corroboration. International best practice, as well as Gambian law, suggests that a victim's credible, reliable testimony can form the basis for a conviction, including that the act took place, the identification of the alleged perpetrator, and the circumstances surrounding the act and the existence of coercive circumstances.⁹¹⁸

In addition, it should be stressed that, whilst it should not be an evidential requirement, corroborative evidence remains valuable in any criminal prosecution and will almost always come to light in a comprehensive investigation.⁹¹⁹ Prosecutors should therefore be alert to the different types of corroborating evidence throughout their sexual violence investigations. These are discussed in detail in section 7.3.1.

5.4.2. Linking perpetrators to acts of sexual violence

When they have established the material elements of the offence, prosecutors will also need to provide linkage evidence to prove that the accused perpetrated the sexual violence offence. Acts of sexual violence can be orchestrated or facilitated by individuals, groups, political or state entities, or organisations.⁹²⁰ As such, potential perpetrators can include everyone from the victim's intimate partner to members of the armed forces or state security acting at the direction of high-ranking superiors. Perpetrators of sexual violence can also be male or female.⁹²¹

Acts of sexual violence can be committed by direct or remote methods of perpetration. Perpetrators may therefore include those who physically commit the crime themselves, and those who do so indirectly through others, without ever meeting the victim or visiting the scene of the crime. Consequently, prosecutors should consider the full range of modes of liability when examining potential perpetrators (*see* chapter 4).

5.5. Victims and impact of sexual violence

Having discussed the principles associated with understanding and identifying sexual violence, this section now turns to provide guidance on victims of sexual violence and the intersecting factors that affect an individual's experience of sexual violence and coercive circumstances, as well as an overview of the impact of sexual violence with a focus on the stigma and shame surrounding such violations.

⁹¹⁸ Jallow *Law of Evidence* 2016, p. 211; [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), pp. 148. *See e.g., Prosecutor v. Habré*, Extraordinary African Chambers in the Courts of Senegal, paras 719-736, 1577-1582, as reported by [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 61.

⁹¹⁹ [Istanbul Convention](#), article 55; [Istanbul Convention Explanatory Report](#), para. 280; Crown Prosecution Service, 'Domestic Abuse Guidelines for Prosecutors' (28 April 2020).

⁹²⁰ [The Hague Principles on Sexual Violence](#), p. 8; [ICC Elements of Crimes](#), articles 7(1)(g)-6, 8(2)(b)(xxii)-6, and 8(2)(e)(vi)-6. *See e.g., Delalić et al. Trial Judgment*, para. 1065; *Todorović Sentencing Judgment*, paras 38-40.

⁹²¹ [The Hague Principles on Sexual Violence](#), pp. 6, 13; *Ntaganda Trial Judgment*, para. 933; *Bemba Trial Judgment*, para. 100.

5.5.1. Victims of sexual violence

Anyone can be a victim of sexual violence.⁹²² Prosecutors should consider all reported incidents of sexual violence without bias, regardless of who the victim is. Each case should be assessed on a case-by-case basis and should take into account the individual circumstances and needs of the victim based on their personal characteristics.

Sexual violence against men and boys

Whilst sexual violence disproportionately affects women and girls, it also affects men and boys, as well as transgender and intersex persons.⁹²³ At the TRRC, Sanna B Sabally provided evidence of sexual violence committed against men. In particular, in the context of multiple occasions of torture, he testified that a long metal pin was driven inside his penis and it was electrocuted. He and other victims were made to wear G-string underwear, pose as prostitutes and engage in sexual acts with one another. On one occasion, the perpetrators asked the witness and Sadibou Hydara to have sex with each other. When they both refused, they were castrated.⁹²⁴

It is important to note at the outset that male survivors of sexual violence are victims. As such, since they did not consent to the sexual acts committed by the perpetrator, it would be *inappropriate* to prosecute them for homosexuality, which is criminalised under the Gambian Criminal Code.⁹²⁵

As discussed above, the definition of rape under the Gambian Sexual Offences Act is gender-neutral and is therefore broad enough to cover penetration and any form of genital stimulation, perpetrated against men and boys, or by causing men and boys to engage in those sexual acts against another person.⁹²⁶ Equally, however, the Gambian Criminal Code only criminalises indecent assault against males if the victim is under 14 years of age.⁹²⁷ As such, Gambian law does not criminalise sexual violence not amounting to rape when committed against males above the age of 14. As an alternative, therefore, prosecutors can consider charging sexual violence

⁹²² [ACHRP General Comment No. 4 on the African Charter on Human and People's Rights](#), para. 59; [The Hague Principles on Sexual Violence](#), p. 5.

⁹²³ [ACHRP General Comment No. 4 on the African Charter on Human and People's Rights](#), para. 59; [Ntaganda Trial Judgment](#), para. 942; [Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar](#), ICC-01/19, [Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar](#), 14 November 2019, para. 86. See also, [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), pp. 265-277; Institute for International Criminal Investigations, 'Guidelines For Investigating Conflict-Related Sexual And Gender-based Violence Against Men And Boys' (29 February 2019) ([IICI Guidelines For Investigating Conflict-Related Sexual And Gender-based Violence Against Men And Boys](#)); [The Hague Principles on Sexual Violence](#), pp. 5, 6.

⁹²⁴ [Aneked TRRC Digest 4](#), Sanna B. Sabally, p. 74.

⁹²⁵ Gambian Criminal Code, sections 144, 145, 147; Gambian Criminal Code (Amendment) Act 2014, section 4.

⁹²⁶ Gambian Sexual Offences Act 2013, sections 2, 3.

⁹²⁷ Gambian Criminal Code, section 146: 'Any person who unlawfully and indecently assaults a boy under the age of fourteen years is guilty of a felony, and is liable to imprisonment for seven years.'

against men and boys as grievous harm,⁹²⁸ common assault,⁹²⁹ or common assault causing actual bodily harm,⁹³⁰ if the elements of these crimes are otherwise established.

As a consequence of the lack of legal provisions, social stigma and gender norms, it is common for sexual violence against men and boys to be discussed in coded language or reported or characterised as other crimes that do not reflect the sexual nature of the conduct.⁹³¹ It is therefore important that descriptions of sexual violence do not get lost or ignored during investigations and prosecutions.

Where it is possible to do so in a culturally sensitive manner and without doing harm (*see* sections 8.1.1, 8.1.3, 8.2.1, 8.6.3, 8.7) prosecutors should aim to explore the full scope of crimes committed, avoid mischaracterising the crime, and capture the sexual nature of the harm done. While sexual violence can be classified as other crimes, such as torture or inhumane treatment, where this is the case it is beneficial if the acts underlying the charges are representative and reflective of the sexual nature of the conduct and harm. In the case of Sanna B Sabally, for example, this might involve charging the crime as rape (where evidence points to penetration or genital stimulation), or by ensuring that charges such as the crime against humanity of torture or the domestic crime of grievous harm cover the acts of sexual violence and recognise the sexual nature of the harm.

Vulnerable categories and intersectional discrimination

How an individual experiences, and is affected by sexual violence will be very specific to the victim themselves, their gender and personal circumstances, the context in which the violation was committed, and the relationship and power dynamics between the victim and the perpetrator.

Prosecutors should adopt an intersectional approach to understand how various forms of inequality and discrimination (such as ethnicity, social-economic status, and gender) interact and operate together to create different experiences of sexual violence.⁹³² These intersecting factors can impact upon how an individual experiences coercion and have an aggregating negative impact on victims of sexual violence. Understanding this intersectionality will allow the prosecutor to be able to deal with violations in a more victim-centred way.⁹³³ In particular, taking

⁹²⁸ Gambian Criminal Code, section 214: ‘Any person who lawfully does grievous harm to another is guilty of a felony, and is liable to imprisonment for seven years’; ‘*grievous harm* means any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, member or sense.’

⁹²⁹ Gambian Criminal Code, section 227: ‘Any person who unlawfully assaults another is guilty of a misdemeanour, and, if the assault is not committed in circumstances for which a greater punishment is provided in this Code, is liable to imprisonment for one year.’

⁹³⁰ Gambian Criminal Code, section 228: ‘Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour, and is liable to imprisonment for five years’.

⁹³¹ [IICI Guidelines For Investigating Conflict-Related Sexual And Gender-based Violence Against Men And Boys](#), p. 7; [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 267.

⁹³² ‘[Intersectional Feminism: what it means and why it matters right now](#)’ (UN Women, 1 July 2020).

⁹³³ *See e.g.*, [Istanbul Convention Explanatory Report](#), para. 53; [CEDAW General Recommendation 35](#), para. 12.

an intersectional approach will enable the prosecutor to better understand the potential coercive circumstances affecting the victim's ability to consent, and will enable the prosecutor to assess the potential harms faced by the victim and implement the most appropriate practices to protect the victim from additional harm caused during the investigation (*see* section 8).

The intersecting identities and factors include, amongst others: ethnicity/race, indigenous or minority status, colour, social economic status, language, religion or belief, culture, political opinion, national origin, marital and/or maternal status, age, urban/rural location, health status, mental or physical disability, property ownership, sexual orientation and gender identity, illiteracy, armed conflict, seeking asylum, being a refugee, internal displacement, statelessness, migration, heading households, widowhood, living with HIV/AIDS, deprivation of liberty, being in sex work, being sex trafficked, substance abuse, homelessness, geographical remoteness and stigmatisation of minorities fighting for their rights, including human rights defenders.⁹³⁴

These factors invariably result in each victim experiencing coercion differently. This will be especially relevant in assessing unequal power relations between the perpetrator and victim which may, in the circumstances, amount to coercion. Prosecutors should therefore take these factors into account in assessing whether the victim was coerced.

The following is a non-exhaustive list of vulnerable populations that can experience intersectional discrimination within The Gambia:

- (i) **sex workers:** Sexual violence against sex workers is prevalent in The Gambia.⁹³⁵ They face abuse from their clients, pimps, and the police.⁹³⁶ Sex work is highly stigmatised in The Gambia, and sex workers are therefore often seen as immoral, untrustworthy and not deserving of protection.

⁹³⁴ See e.g., [CEDAW General Recommendation 35](#), para. 12, citing: CEDAW, 'General recommendation on women's access to justice' (23 July 2015) CEDAW/C/GC/33 ('[General recommendation No. 33](#)'), paras 8 and 9. The Committee has also addressed intersectional discrimination in its views in [Isatou Jallow v. Bulgaria](#), Communication No. 32/2011, (28 August 2012) CEDAW/C/52/D/32/2011; [S.V.P. v. Bulgaria](#), Communication No. 31/2011, (24 November 2012) CEDAW/C/53/D/31/2011; [Cecilia Kell v. Canada](#), Communication No. 19/2008, (27 April 2012) CEDAW/C/51/D/19/2008; [A.S. v. Hungary](#), Communication No. 4/2004, (29 August 2006) CEDAW/C/36/D/4/2004; [R.P.B. v. the Philippines](#); [M.W. v. Denmark](#), Communication No. 46/2012, (21 August 2012) CEDAW/C/63/D/46/2012; [HRC, Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo](#), (2 May 2011) A/HRC/17/26, paras 21-23; [Istanbul Convention](#), articles 4, 36(2); [Istanbul Convention Explanatory Report](#), paras 52, 53, 192; [E.B. v. Romania](#), para. 60; CEDAW, 'General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women,' (16 December 2010) CEDAW/C/2010/; [UN HRC Study on gender-based violence in relation to transitional justice](#), para. 5.

⁹³⁵ BMC Public Health Sexual Violence Against Female Sex Workers in The Gambia found that approximately 30% of sex workers surveyed in The Gambia had been forced to have sex with a client. J A Sherwood *et al.*, 'Sexual violence against female sex workers in The Gambia: a cross-sectional examination of the associations between victimization and reproductive, sexual and mental health' (*BMC Public Health*, 2015), article 270 ('[BMC Public Health Sexual Violence Against Female Sex Workers in the Gambia](#)').

⁹³⁶ [BMC Public Health Sexual Violence Against Female Sex Workers in the Gambia](#).

Sex workers may be subject to numerous intersecting vulnerabilities. For instance, a female sex worker may also be a victim of domestic violence; a migrant; homeless; HIV positive;⁹³⁷ or a substance-abuser, etc. As a result, their individual experiences of what constitutes coercive circumstances, as well as how they respond to such circumstances, will differ from one another. They may, for example, avoid reporting incidents of sexual violence to the authorities since that may put them at risk of prosecution for a misdemeanour offence;⁹³⁸ being subjected to inappropriate/degrading treatment by the police; or further harm from their pimp or intimate partner. Accordingly, prosecutors should take such factors into consideration and assess the potential risks to the victim's safety and security in pursuing sexual violence cases that involve sex workers.

- (ii) **witchcraft:** During Jammeh's rule, persons accused of witchcraft were specifically targeted and subjected to sexual violence including forced nudity, sexual assault, and rape during the witch hunts. Some victims endured extreme humiliation (e.g., elderly women were stripped naked in front of their own children) and as a result did not report or speak about the abuses. In addition, the impact of the witch hunts has been multi-generational, as the children of the women accused of witchcraft have been ostracised both at school and within the community.⁹³⁹
- (iii) **HIV positive status:** HIV positive individuals may be vulnerable to sexual violence (e.g., they may be exploited by an abuser who uses this vulnerability to take advantage of the victim) or they may face specific threats (such as social ostracisation or stigmatisation in their community) when reporting sexual violence that need to be taken into account during risk assessments (*see* section 8.1.3). They may also require specific medical treatment (including post-exposure prophylaxis) or have specific protection concerns which will need to be considered by the prosecutor.
- (iv) **sexual orientation and gender identity:**⁹⁴⁰ Globally, but also in The Gambia, lesbian, gay, bi-sexual, transgender, queer and intersex ('LGBTQI') individuals face discrimination, hate crimes and violence, including acts of sexual violence, due to their actual or perceived sexual orientation and gender identity.⁹⁴¹ Sexual violence may be

⁹³⁷ 'Female sex workers are among the most vulnerable populations for the acquisition and transmission of both HIV and STIs': [BMC Public Health Sexual Violence Against Female Sex Workers in the Gambia](#).

⁹³⁸ Gambian Criminal Code, section 136: 'A woman who knowingly lives wholly or in part on the earnings of prostitution, [...] commits a misdemeanour.'

⁹³⁹ [ICTJ Women's Experiences of the Dictatorship in the Gambia](#), pp. 7-8.

⁹⁴⁰ Gender identity encompasses categories of individuals such as non-binary, transgender or transsexual persons, crossdressers, transvestites and other groups of persons that do not correspond to what society has established as belonging to 'male' or 'female' categories. *See e.g., Istanbul Convention Explanatory Report*, para. 53; [UN HRC Study on gender-based violence in relation to transitional justice](#), para. 4.

⁹⁴¹ *See e.g., HRC, Concluding observations on the Gambia in the absence of its second periodic report* (30 August 2018) CCPR/c/GMB/CO/2, paras 11-12. *See also, International Protocol on the Documentation and Investigation of Sexual Violence in Conflict*, p. 22; *Toonen v. Australia*, Communication No. 488/1992 (4 April 1994) CCPR/C/50/D/488/1992, para. 8.6; HRC, *Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on their Sexual Orientation and Gender Identity: Report of the United Nations Commissioner for Human Rights* (17 November 2001) A/HRC/19/41, para. 7; *Young v. Australia*, Communication No. 941/2000, (18

committed against these individuals in order to punish, terrorise, or ‘correct’ their sexual orientation or gender identity in line with social norms. Sexual violence against individuals due to their sexual orientation or gender identity is extremely under-documented, and a lack of appropriate services and healthcare mean that they face significant barriers in accessing appropriate support services.⁹⁴²

Due to the criminalisation of homosexuality in The Gambia and the social stigma surrounding it,⁹⁴³ victims of sexual violence who have marginalised sexual orientations or gender identities are less likely to come forward for fear of prosecution. One expert testifying before the TRRC stated that sexual violence amongst LGBTQI individuals is underreported because “virtually there is no room for them and for them to openly come out.”⁹⁴⁴ LGBTQI victims of sexual violence should be treated as victims. They are victims of sexual violence regardless of their sexual orientation or gender identity: as such, they should not be exposed to prosecution pursuant to the provisions criminalising homosexuality in the Gambian Criminal Code.⁹⁴⁵

In addition, LGBTQI individuals have the same rights to privacy, protection and confidentiality as other victims. However, because of widespread homophobia, the disclosure of case-related sensitive information may put LGBTQI persons at particular risk of physical or other harm. Their status will therefore be relevant to their very specific protection needs and should be taken into consideration in any risk assessment (*see* sections 8.1.3, 8.2, 8.3, 8.4, 8.7)

5.6. Impact of sexual violence

The long and short-term impact of sexual violence can be severe and sometimes life-threatening. Injuries from rape and other acts of sexual violence may be less visible than those caused by other kinds of violence, yet a victim may still suffer long-term physical and psychological consequences.⁹⁴⁶ It has been recognised that the psychological harm suffered by victims of sexual violence “may often be more pervasive and permanent in its effect than any physical harm.”⁹⁴⁷

September 2003) CCPR/C/78/D/941/2000, para. 6.1; *X v. Columbia*, Communication No. 1361/2005, (14 May 2007) CCPR/C/89/D/1361/2005, para. 7.2; *Salgueiro da Silva Mouta v. Portugal*, Application No. 33290/96 (ECtHR, 21 March 2000), para. 28; ICJ, ‘*Sexual Orientation, Gender Identity and International Human Rights Law: Practitioners Guide No.4*’ (2009) p. 33; African Commission on Human and Peoples’ Rights, ‘*275 Resolution on the Protection against Violence and Violations against Persons on the basis of their real or imputed Sexual orientation or Gender Identity*’ (28 April to 12 May 2014) ACHPR/Res.275(LV)2014.

⁹⁴² *Istanbul Convention Explanatory Report*, para. 53.

⁹⁴³ Gambian Criminal Code, section 144 (2)(c).

⁹⁴⁴ *Aneked TRRC Digest 9*, Babanding Daffeh, p. 44.

⁹⁴⁵ Gambian Criminal Code, sections 144, 145, 147.

⁹⁴⁶ *ACHRP General Comment No. 4 on the African Charter on Human and People’s Rights*, para. 60.

⁹⁴⁷ *R. v. McCraw*, (1991), 3 SCR 72 (Canada).

The impacts of sexual violence can be physical; psychological; social or socioeconomic; and legal. These impacts are not limited to the victim, and can harm families, family communities, and communal structures.⁹⁴⁸ They may also be intergenerational (e.g., where victims of harm pass on feelings of shame or stigma to their children as a result of trauma inflicted by their experiences of sexual violence).⁹⁴⁹ In this way, sexual violence can damage or even destroy communities, inflicting lasting effects upon all members.⁹⁵⁰ This is particularly so in The Gambia, where the ‘tight-knit’ nature of communities means that the impact of sexual violence can reverberate through them. Understanding the broader impact of sexual violence within these communities will therefore be an important factor in ensuring that transitional justice processes address systematic human violations, by finding appropriate and effective remedies for past harms in order to break the cycle of violence.⁹⁵¹

Prosecutors should seek to gather impact evidence throughout their investigation. Evidence of impact may be an indicator and provide corroborating evidence (*see* sections 5.4, 5.4.1, 7.3.1) that sexual violence has occurred and warrant further investigation. Impact evidence is important during any risk assessments (*see* section 8.1.3), as well as during trial and in sentencing. In particular, section 4 of the Gambian Sexual Offences Act 2013 provides that where a complainant has suffered grievous bodily or mental harm the perpetrator is liable to mandatory life imprisonment.

Impact evidence can be a crucial factor in proving that the harm inflicted was sufficiently severe as to satisfy the elements of crime. If sexual violence is charged as torture, for example, it is necessary to demonstrate the infliction of severe pain and physical or mental suffering (*see* sections 1.4.2, 3.4.4).⁹⁵²

5.7. Best practice approaches to investigating and prosecuting sexual violence

Society’s understanding of sexual violence, and consequently how sexual violence cases are handled during investigations and prosecutions, is influenced by misconceptions and false beliefs. This, in turn, perpetuates a culture in which sexual violence can continue unabated. Separating these falsehoods from the facts is crucial to stopping pervasive sexual violence in The Gambia and ensuring victims of sexual violence are able to access meaningful justice.

Accordingly, a victim-centred approach to investigations and prosecutions means that prosecutors should ensure that no aspect of their investigation or assessment of evidence is affected by their personal views about sexual violence, gender or other stereotyping against

⁹⁴⁸ [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 25.

⁹⁴⁹ [ICTJ Women’s Experiences of the Dictatorship in the Gambia](#), pp. 16-18.

⁹⁵⁰ [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 25.

⁹⁵¹ [ICTJ Women’s Experiences of the Dictatorship in the Gambia](#), p. 16.

⁹⁵² [ICC Elements of Crimes](#), article 7(1)(f).

women, or any other intersectional factors (*see* section 8.1.3).⁹⁵³ The following sub-sections delineate practical instructions to ensure survivor-centred practices and procedures throughout the criminal justice process by:

- (i) understanding stigma and shame; and
- (ii) ending common myths, assumptions and stereotypes.

These sections should be read alongside those set out in section 8.

5.7.1. Understanding stigma and shame

A common impact of sexual violence crimes is stigma and shame felt by the victim. Stigma entails negative, gender-based stereotypes that result in the victim's marginalisation, shifting blame from the perpetrator to the victim.⁹⁵⁴ The stigma and shame surrounding sexual violence is highly context specific,⁹⁵⁵ and may arise on personal, interpersonal, community or structural levels.⁹⁵⁶ This means that victims of sexual violence may internalise stigma and shame themselves,⁹⁵⁷ or may suffer these impacts as a result of the actions of their families, wider communities, or the authorities investigating and prosecuting crimes.⁹⁵⁸

As noted at the outset of this section, stigma and shame are significant barriers to justice for victims of sexual violence in The Gambia.⁹⁵⁹ Addressing and combatting stigma requires a victim-centred approach (*see* chapter 8), which places the victim's confidentiality, safety and dignity at the forefront of the criminal justice process.⁹⁶⁰ A prosecutor's reaction to reports of sexual violence should not reinforce stigma or shame, or reflect gender bias or stereotypes. The

⁹⁵³ [Preventing and Combating Domestic Violence against Women, A learning resource for training law enforcement and justice officers](#), p. 43; [Principles for Global Actions: Preventing and Addressing Stigma Associated with Conflict-Related Sexual Violence](#), p. 26; Crown Prosecution Service, 'Rape and Sexual Offences - Chapter 21: Societal Myths' (CPS, January 2011) ('[Rape and Sexual Offences - Chapter 21: Societal Myths](#)'); [Istanbul Convention Explanatory Report](#), para. 192; [Karen Tayang Vertido v. Philippines](#), paras 8.5-8.6, 8.8; [R.P.B. v. the Philippines](#), paras 8.11, 9(iv); [Handbook on Effective Prosecution Responses to Violence Against Women and Girls](#), p. 31.

⁹⁵⁴ Trial International, 'Rape Myths in Wartime Sexual Violence Trials: Transferring the Burden from Survivor to Perpetrator' (2018) ('[Trial, Rape Myths](#)'), p. 22.

⁹⁵⁵ UK Foreign & Commonwealth Office, Preventing Sexual Violence in Conflict Initiative, and the Foreign, Commonwealth, and Development Office, 'Principles for Global Actions: Preventing and Addressing Stigma Associated with Conflict-Related Sexual Violence' (19 September 2017) ('[Principles for Global Actions: Preventing and Addressing Stigma Associated with Conflict-Related Sexual Violence](#)'), p. 18; UNODC, 'Handbook on Effective Prosecution Responses to Violence Against Women and Girls' (2014) ('[Handbook on Effective Prosecution Responses to Violence Against Women and Girls](#)'), p. 45.

⁹⁵⁶ [Principles for Global Actions: Preventing and Addressing Stigma Associated with Conflict-Related Sexual Violence](#), p. 18; [Handbook on Effective Prosecution Responses to Violence Against Women and Girls](#), p. 45.

⁹⁵⁷ [Principles for Global Actions: Preventing and Addressing Stigma Associated with Conflict-Related Sexual Violence](#), p. 18. *See also* [Handbook on Effective Prosecution Responses to Violence Against Women and Girls](#), p. 46.

⁹⁵⁸ [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), pp. 20, 115, 222; [OHCHR Protection of victims of sexual violence: Lessons learned](#), p. 19; [Trial, Rape Myths](#), p. 22.

⁹⁵⁹ [Aneked TRRC Digest 9](#), Haddy Mboge Barrow, p. 32.

⁹⁶⁰ [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 14.

prosecutor's reaction is critical to ensure the victim has confidence in how they will be treated throughout the investigative process, and whether they are believed or thought to be responsible.⁹⁶¹ This means that practitioners should remain objective and non-judgemental at all times and accept the victim's evidence at face value.⁹⁶²

There are a number of ethical and practical principles that are particularly important in the investigation of sexual violence crimes, which investigators should keep in mind, many of which will be explored below and in the sections that follow.

5.7.2. Ending myths, assumptions and stereotypes

Promiscuity and virginity: irrelevance of prior sexual conduct

Consent can only be considered genuine if it is given voluntarily, consciously and freely in relation to a specific sexual act.⁹⁶³ It will not suffice if the person has consented to similar conduct; if they consented to the relevant activity(ies) on a previous occasion; if they initially consented but later withdrew that consent; or if the nature of the sexual activity changed without their consent.⁹⁶⁴

Accordingly, questions about a victim's prior sexual conduct are irrelevant to assessing whether they consented to the specific sexual act in question.⁹⁶⁵ In addition, no assumptions should be inferred about the victim or witness' credibility, character or predisposition to sexual availability from their prior sexual conduct.⁹⁶⁶ Prosecutors should therefore focus on establishing that the act of a sexual nature occurred (e.g., "what happened?", "where did he touch you?", "what did they ask you to do?"), and that it occurred under coercive circumstances.⁹⁶⁷ Questions about sexual history, prior partners and relationships (e.g., "were you a virgin?", "have you had sex with the perpetrator before?", "how many people have you had sex with?", "do you usually have sex with men or women?"),⁹⁶⁸ are irrelevant to proving the crime. This encompasses questions relating to

⁹⁶¹ [Principles for Global Actions: Preventing and Addressing Stigma Associated with Conflict-Related Sexual Violence](#), p. 19; [Handbook on Effective Prosecution Responses to Violence Against Women and Girls](#), p. 41.

⁹⁶² Council of Europe and Norwegian National Police Directorate, 'Preventing and Combating Domestic Violence against Women, A learning resource for training law enforcement and justice officers' (January 2016) ('[Preventing and Combating Domestic Violence against Women, A learning resource for training law enforcement and justice officers](#)'), p. 43; [GBV Pocket Guide](#), p. 18.

⁹⁶³ [The Hague Principles on Sexual Violence](#), p. 11.

⁹⁶⁴ [The Hague Principles on Sexual Violence](#), p. 6, fn. 4.

⁹⁶⁵ Gambian Sexual Offences Act 2013, section 18(1); [UN Handbook for Legislation on Violence Against Women](#), p. 42; [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 62; [The Hague Principles on Sexual Violence](#), p. 44; [Istanbul Convention Explanatory Report](#), para. 278.

⁹⁶⁶ [ICC Rules of Procedure and Evidence](#), rule 70; [Istanbul Convention Explanatory Report](#), paras 277-278; [The Hague Principles on Sexual Violence](#), p. 45, para. 13; UNGA, Strengthening crime prevention and criminal justice responses to violence against women (31 March 2011) [A/RES/65/228](#), para. 15; [UN Women Handbook for Legislation on Violence against Women](#), p. 42.

⁹⁶⁷ See e.g., [Rome Statute](#), articles 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi); Gambian Sexual Offences Act 2013, section 3; Gambia Criminal Code, section 126.

⁹⁶⁸ [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 62

the victim's previous sexual conduct with the perpetrator, including situations within intimate or familial relationships.⁹⁶⁹

Such questions are often used to undermine a victims' credibility and are rooted in gender bias and stereotyping that reflect an unfounded assumption that victims of sexual violence are more likely to have consented if they have had prior consensual sexual conduct, either with the perpetrator or others. This is humiliating and risks re-traumatising the victim,⁹⁷⁰ and attributes blame to the victim's supposed immorality, rather than the perpetrator's depravity.⁹⁷¹ Certain marginalised groups are more likely to face this form of stereotyping (e.g., sex workers, HIV positive persons, LGBTQI individuals). These stereotypes are unfounded.

In The Gambia, section 18 of the Gambian Sexual Offences Act 2013 recognises that evidence of the previous sexual conduct or experience of the complainant cannot be adduced and this line of questioning cannot be put to the complainant.⁹⁷² Evidence of the sexual reputation of the complainant is also barred.⁹⁷³ This aligns with international best practice, which usually provides for 'rape shield' laws that limit the possibility to introduce evidence of the victim's prior sexual conduct.⁹⁷⁴

Section 18(2) of the Sexual Offences Act provides for limited circumstances in which the court may, on application, grant leave to the Defence to adduce evidence or question the complainant regarding previous sexual conduct or experience.⁹⁷⁵ Other jurisdictions contain similar provisions.⁹⁷⁶ Admission of such evidence or questioning can only come after a specific application, and the court's reasoning should be recorded and form part of the record of the

⁹⁶⁹ See e.g., *R. v. Goldfinch* (2019) SCC 38 R (Canada).

⁹⁷⁰ See e.g., *Istanbul Convention*, article 54; *Istanbul Convention Explanatory Report*, paras 277-278.

⁹⁷¹ *Trial, Rape Myths*, p. 25; *Handbook on Effective Prosecution Responses to Violence Against Women and Girls*, p. 33.

⁹⁷² Gambian Sexual Offences Act 2013, section 18(1).

⁹⁷³ Gambian Sexual Offences Act 2013, section 18(3).

⁹⁷⁴ See e.g., *ICC Rules of Procedure and Evidence*, rule 71; International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, IT/32/Rev.7 13 May 2015 (as amended), ('*ICTY Rules of Procedure and Evidence*'), rule 96(iv); *Istanbul Convention*, article 54. See also, *US Federal Rule of Evidence 412*, as amended by the Violence against Women Act (1994); Indian Evidence (Amendment) Act (2003); *New Zealand Evidence Act* (2006), section 44 and 44A; *South African Criminal Procedure Act 51 of 1977*, amended by the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, section 227; *Kenyan Sexual Offences Act* (No 3 of 2006), section 34(1).

⁹⁷⁵ Gambian Sexual Offences Act 2013, section 18(2): 'Notwithstanding sub-section (1), the court may on application made to it, grant leave to adduce such evidence or to put such question if the court is satisfied that such evidence or question; (a) tends to rebut evidence that was previously adduced by the prosecution; (b) tends to explain the presence of semen or the source of pregnancy or disease or any injury to the complainant, where it is relevant to a fact in issue; or (c) is so fundamental to the defence of the accused that to exclude it would violate the constitutional rights of the accused; and (d) has significant probative value that is not substantially out-weighed by its potential prejudice to the complainant's personal dignity and right of privacy.'

⁹⁷⁶ See e.g., *Criminal Code of Canada*, section 276(2)-(3).

proceedings.⁹⁷⁷ The court can direct that the complainant does not need to be present at the hearing of such application.⁹⁷⁸

International best practice suggests that the limited circumstances referred to in section 18(2) should not be interpreted to include any evidence that is adduced to infer consent or to attack the victim's credibility.⁹⁷⁹ Even evidence that appears benign (e.g., evidence about the past relationship between the victim and perpetrator), should be scrutinised and handled with care, and should not be adduced unless the party can pinpoint the specific purpose for which it is adduced and under which limited circumstance it falls.⁹⁸⁰

Irrelevance of victim's conduct or behaviour

The behaviour or character of the victim (e.g., what they were wearing; whether they had make up on; their sexuality; whether they had been drinking/taking drugs; their previous sexual conduct; or their engagement in sex work) is irrelevant to any assessment of consent.⁹⁸¹ Similarly, the location of the alleged incident is irrelevant to the issue of consent (although it may be indicative of coercive circumstances). The fact that a victim voluntarily frequented 'dark', 'isolated' or 'dangerous' places,⁹⁸² or entered a perpetrator's room, residence or house, is not indicative of consent or 'risky' behaviour.⁹⁸³

Testifying before the TRRC, witness Haddy Mboge Barrow explained that victim blaming in sexual violence cases arises in various forms in The Gambia, and it is especially commonplace for females to be blamed for failing to dress 'modestly' or going to particular places.⁹⁸⁴ Focus should remain on the behaviour of the perpetrator and questioning should take care to avoid unfairly blaming the victim for the perpetrator's actions. Any questions from the prosecutors such as "what were you wearing", "were your clothes appropriate", "why did you go back to his house if you didn't want to have sex" during interviews will reinforce these negative stereotypes and contribute to the continued wall of silence surrounding sexual violence cases in The Gambia.⁹⁸⁵

⁹⁷⁷ Gambian Sexual Offences Act 2013, section 18(2).

⁹⁷⁸ Gambian Sexual Offences Act 2013, section 18(4).

⁹⁷⁹ See e.g., [Criminal Code of Canada](#), section 276(1); [ICC Rules of Procedure and Evidence](#), rules 70(d), 71; [R. v. Goldfinch](#) (2019) SCC 38 R (Canada); [R. v. Darrach](#) (2000) SCC 46 (Canada); [R v. Seaboyer, R. v. Gayme](#) (1991) 2 SCR 577 (Canada).

⁹⁸⁰ [R. v. Goldfinch](#) (2019) SCC 38 R (Canada), para. 46.

⁹⁸¹ [Trial, Rape Myths](#), p. 25; [Handbook on Effective Prosecution Responses to Violence Against Women and Girls](#), p. 33; [The Hague Principles on Sexual Violence](#), p. 45.

⁹⁸² [Handbook on Effective Prosecution Responses to Violence Against Women and Girls](#), p. 33.

⁹⁸³ Georgetown Law, 'Myths and Facts About Sexual Violence' (undated) ('[Georgetown Law Myths and Facts About Sexual Violence](#)').

⁹⁸⁴ [Aneked TRRC Digest 9](#), Haddy Mboge Barrow, p. 30.

⁹⁸⁵ [Aneked TRRC Digest 9](#), Haddy Mboge Barrow, pp. 30-32.

Hymen examination

Hymen examination (or virginity testing) is the practice of assessing one's 'virginity' based on the state of their hymen.⁹⁸⁶ International standards make it clear that virginity testing should not be undertaken to establish whether a victim has been raped or sexually abused.⁹⁸⁷

When conducting an investigation into sexual violence, the state of one's hymen cannot reliably or scientifically establish whether a woman has been raped, has had sexual intercourse or is sexually active.⁹⁸⁸ The hymen may not break or incur noticeable damage as a result of sexual intercourse or forced sexual penetration.⁹⁸⁹ On the other hand, the hymen can be broken for reasons outside of sexual intercourse or sexual violence, such as exercise or other physical activity. When used as a test for sexual violence, it is invasive, unscientific, degrading, and inherently discriminatory.⁹⁹⁰ Forcing a girl or woman to have a virginity test as a requirement of the criminal justice system is a serious human rights violation⁹⁹¹ and, when committed forcibly, may amount to rape.⁹⁹²

That said, as discussed below, medical examinations to examine female genitalia for signs of sexual assault may be useful corroborating evidence where the purpose of that examination is to evaluate for and treat injuries, and not to assess 'virginity' (*see* section 7.3.1).⁹⁹³

Flight, fright or freeze: irrelevance of behaviour during and after sexual violence

There is no correct way for a victim to behave during or after sexual violence and there is a broad spectrum of responses that will be influenced by a multitude of factors. There is no

⁹⁸⁶ Physicians for Human Rights, 'Virginity and Hymen Testing: No Factual, Scientific, or Medical Basis' (undated) ('[PHR Virginity and Hymen Testing](#)'), p. 1.

⁹⁸⁷ *See e.g.*, [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 62; World Health Organisation, UN Women, and UNOHCHR, 'Eliminating Virginity Testing: An Interagency Statement' (2018) WHO/RHR/18.15, ('[WHO Eliminating Virginity Testing](#)').

⁹⁸⁸ [PHR Virginity and Hymen Testing](#), p. 1; [WHO Eliminating Virginity Testing](#), p. 4.

⁹⁸⁹ [PHR Virginity and Hymen Testing](#), p. 1; [WHO Eliminating Virginity Testing](#), pp. 5, 10.

⁹⁹⁰ Independent Forensic Expert Group, 'Statement on Virginity Testing' (TORTURE, 2005) Vol. 25, No.1, pp. 62-68 ('[IFEG Statement on Virginity Testing](#)'), p. 67; [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 62; [CEDAW General Recommendation 35](#), para. 31(b); HRC, 'Report of the Special Rapporteur on Violence against Women, its Causes and Consequences on her mission to South Africa 2016,' Dubravka Šimonović (14 June 2016) A/HRC/32/42/Add.2; [CEDAW Joint General Recommendation No. 31](#); [WHO Eliminating Virginity Testing](#), p. 10.

⁹⁹¹ Virginity tests violate her right to privacy and physical integrity, the rights of the child, the right to be protected from discrimination on the basis of sex, the right to life, the right to be free from torture or cruel, inhumane or degrading treatment, and the right to the highest attainable standard of health. [WHO Eliminating Virginity Testing](#), p. 8. *See also*, [PHR Virginity and Hymen Testing](#); [ICJ Women's Access to Justice for Gender-Based Violence: A Practitioner's Guide](#), pp. 239-240.

⁹⁹² [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 62; [WHO Eliminating Virginity Testing](#), p. 7; [PHR Virginity and Hymen Testing](#).

⁹⁹³ [WHO Eliminating Virginity Testing](#), p. 10.

requirement for the victim to clearly say no or to physically resist.⁹⁹⁴ Passivity (e.g., where a victim freezes and/or does not call for help) is not a sign of voluntary participation in an act of sexual violence,⁹⁹⁵ especially given that the victim may not have said “no” because they felt it was not safe to resist.

If there is evidence that a coercive behaviour or environment existed, consent cannot be inferred by reason of any words or conduct of the victim.⁹⁹⁶ Practitioners should not, therefore, base their assessment of the victim’s credibility and/or reliability on their own assumptions of typical behaviour in such situations.⁹⁹⁷ Instead, they should undertake a context-based investigation, considering the coercive circumstances surrounding the sexual violence.⁹⁹⁸

Victims may submit to sexual conduct for reasons associated with the unique, coercive environment surrounding the violence. They may have been wholly overpowered by the physical strength of their abuser. They may have been abducted for marriage or detained in an isolated location. They may submit based on a genuine fear rooted in the perpetrator’s previous violent behaviour, because the perpetrator was in a position of authority or power, or because of ingrained socio-religious beliefs that it is a woman’s duty to submit. They may be afraid of escalating the situation, or believe that actively resisting might provoke even more violent, abusive behaviour. A victim may be unable to fight back because they are paralysed with fear,⁹⁹⁹ or choose to not resist as a coping mechanism for dealing with the trauma of being sexually assaulted.¹⁰⁰⁰

⁹⁹⁴ [Trial, Rape Myths](#), pp. 34-35; [Handbook on Effective Prosecution Responses to Violence Against Women and Girls](#), p. 32; [E.B. v. Romania](#), para. 56; [M.C. v. Bulgaria](#), paras 143, 156, 166; [ICC Rules of Procedure and Evidence](#), rule 70(a).

⁹⁹⁵ [E.B. v. Romania](#), para. 56; [ICC Rules of Procedure and Evidence](#), rule 70(a); Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) ‘[GREVIO Baseline Evaluation Report Sweden](#)’ (21 January 2019) GREVIO/Inf(2018)15, p. 45; [Handbook on Effective Prosecution Responses to Violence Against Women and Girls](#), p. 32.

⁹⁹⁶ See e.g., [ICC Rules of Procedure and Evidence](#), rule 70; [Istanbul Convention Explanatory Report](#), paras 191-192. See also, [R.v. Barton \(2019\)](#) SCC 33 (Canada).

⁹⁹⁷ [Istanbul Convention](#), article 36; [Istanbul Convention Explanatory Report](#), para. 192; Amnesty International, ‘Case Closed: Rape and Human Rights in the Nordic Countries’ (Amnesty International, March 2010) (‘[Case Closed: Rape and Human Rights in the Nordic Countries](#)’) p. 50; [Karen Tayag Vertido v. The Philippines](#), para. 8.5; [CEDAW General Recommendation 35](#), para. 26(c).

⁹⁹⁸ [The Hague Principles on Sexual Violence](#), p. 6; [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 44.

⁹⁹⁹ Government of Ontario, ‘[Dispelling the myths about sexual assault](#)’ (Ontario.ca, 8 April 2019); [Handbook on Effective Prosecution Responses to Violence Against Women and Girls](#), p. 32.

¹⁰⁰⁰ [M.C. v. Bulgaria](#), para. 166; [Kunarac et al. Trial Judgment](#), para. 646; [Karen Tayag Vertido v. the Philippines](#), para. 8.5; [Georgetown Law Myths and Facts About Sexual Violence](#).

Active participation and physiological responses

A victim's active participation in the sexual act or any physiological reaction (such as an orgasm, involuntary erection or ejaculation) does not indicate consent.¹⁰⁰¹ Having a physiological reaction cannot be controlled and is not an indicator that the victim enjoyed it or consented. Therefore, questions, such as: "Did you enjoy it," "Did you have an erection", "Did you have an orgasm" are biased, unfair, and rooted in gender stereotypes that reveal the person who poses them is not impartial. Attempts to adduce such evidence should be challenged during trial proceedings.

Subsequent behaviour

References to the victim's behaviour after an act of sexual violence are unrelated to the incident.¹⁰⁰² The victim's subsequent sexual conduct with the perpetrator and/or others is equally irrelevant.¹⁰⁰³ A victim might remain with their abuser in cases of domestic sexual violence, marry a perpetrator, and/or give birth to a child conceived during a rape. In The Gambia, it is common for a woman made pregnant from rape to negotiate marriage with the perpetrator.¹⁰⁰⁴

No adverse inference from delayed reporting

Failure or delay in reporting acts of sexual violence, including not revealing all the facts immediately or leaving out or minimising certain acts, does not imply that a victim is lying or lacks credibility.¹⁰⁰⁵ Prosecutors should therefore draw no adverse inferences or make assumptions as to the credibility of victims who have delayed reporting their case. In line with international best practice,¹⁰⁰⁶ the Gambian Sexual Offences Act 2013 does not allow for this type of evidence to be presented.¹⁰⁰⁷

Reporting of sexual violence crimes is likely to be delayed for many reasons, including a lack of understanding about what sexual violence is and if it has occurred; the influence of trauma upon a victim; fear of retaliation; fear of not being believed or being blamed, stigmatised and re-victimised; shame; shock;¹⁰⁰⁸ the length of criminal proceedings; the economic cost of having to

¹⁰⁰¹ [The Hague Principles on Sexual Violence](#), pp. 45, 56; *Kunarac et al. Trial Judgment*, paras 644-647; [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), pp. 272, 280. See e.g., *R.v. Ewanchuk (1999)* 1 SCR 330 (Canada).

¹⁰⁰² [ICC Rules of Procedure and Evidence](#), rule 71.

¹⁰⁰³ [ICC Rules of Procedure and Evidence](#), rule 70(d).

¹⁰⁰⁴ [Aneked TRRC Digest 9](#), Haddy Mboge Barrow, p. 32.

¹⁰⁰⁵ [Directive 2012/29/EU](#), Preamble, para. 25. See also, 'Crown Prosecution Service interim guidelines on prosecuting cases of child sexual abuse – England and Wales' in [Handbook on Effective Prosecution Responses to Violence Against Women and Girls](#), p. 46.

¹⁰⁰⁶ [Directive 2012/29/EU](#), para. 25; See also, 'Crown Prosecution Service interim guidelines on prosecuting cases of child sexual abuse (summary – England and Wales)' in [Handbook on Effective Prosecution Responses to Violence Against Women and Girls](#), p. 46.

¹⁰⁰⁷ Gambian Sexual Offences Act 2013, section 9.

¹⁰⁰⁸ [Georgetown Law Myths and Facts About Sexual Violence](#).

pay for transport related to the investigation and prosecution;¹⁰⁰⁹ or criminal justice systems that discourage reporting or prosecution, for example by failing to adopt gender-sensitive practices in police stations.¹⁰¹⁰

Victims of sexual violence from certain vulnerable categories may have additional and intersecting reasons why they may choose not to report an incident of sexual violence (*see* section 5.5.1). For example, a sex-worker who has become a victim of sexual violence may delay reporting, or choose not to report, through fear of their status as a sex-worker being revealed to the authorities or the community. For the same reasons, victims may not reveal everything or even leave out the worst acts during interviews.

¹⁰⁰⁹ [Aneked TRRC Digest 9](#), Haddy Mboge Barrow, p. 34.

¹⁰¹⁰ [Aneked TRRC Digest 9](#), Haddy Mboge Barrow, p. 34.

Chapter 6: Potential Defences

6. Introduction

Defences are legal principles that allow an accused to deny liability for the commission of a criminal act, even where the prosecution have proven (and linked the accused to) the mental, physical and, where appropriate, contextual elements of the offence in question. As part of their efforts to build a working case theory (*see* section 7.3), prosecutors must be aware of the defences that may be argued, and should be prepared to challenge those defences in advance of trial by seeking evidence that would disprove the element(s) of the defence being raised. Each case where a defence is raised must be considered on its merits, in the context of the individual circumstances of that case.

This chapter will highlight the defences available to an accused in both international and Gambian domestic law and highlight relevant issues that such defences may pose to any potential prosecutions arising from the Truth, Reconciliation and Reparations Commission ('TRRC') recommendations. Specifically, it will address:

- (i) Gambian Constitutional defences;
- (ii) defences under the Gambian Criminal Code; and
- (iii) defences under the Rome Statute.

6.1. Constitutional defences in The Gambia

In The Gambia, there are two specific instances where statutory indemnity raises very significant challenges for those seeking to hold members of the Jammeh regime to account. These include:

- (i) *the 1997 Constitution*, which provides that it is unlawful to institute any criminal proceedings against members of the Armed Forces Provisional Ruling Counsel ('AFPRC');¹⁰¹¹ and
- (ii) *the Indemnity (Amendment) Act 2001*, which provides the President with the power to indemnify any person against prosecution for any act committed to quell an unlawful assembly or other emergency situation.¹⁰¹²

6.1.1. The 1997 Constitution

In its preamble, the 1997 Constitution affirms the central importance of the rule of law and the separation of powers.¹⁰¹³ Additionally, section 33 protects, more specifically, the right to equality before the law.¹⁰¹⁴ On a plain reading, it is therefore apparent that under the 1997 Constitution,

¹⁰¹¹ Constitution of The Republic of The Gambia, 1997 ('[Gambian Constitution](#)'), section 13, schedule II.

¹⁰¹² *For discussion see*, '[20 Years of Fear in Gambia: Time for Justice!](#)' (Article 19, Amnesty International & RADDHO, 2015) pp. 4, 18.

¹⁰¹³ [Gambian Constitution](#), preamble, paras 3-5.

¹⁰¹⁴ [Gambian Constitution](#), section 33(1).

all citizens, regardless of rank or status, have the right to the equal protection of, and are equally subject to, the law.¹⁰¹⁵

However, despite the alleged centrality of these provisions, under section 69(3)(b), former President Jammeh enjoys immunity against all criminal proceedings. In addition, under paragraph 13 of schedule II of the 1997 Constitution, members of the AFPRC (which was dissolved in 1996 to form a civilian government) also enjoy immunity for any act committed during its two-year life span. This constitutional contradiction represents a serious barrier to any intended prosecutions against members of the Jammeh regime, up to and including former President Jammeh himself.

The effect on Jammeh as President

Section 69(3)(b) of the 1997 Constitution provides immunity before criminal proceedings for a President that has vacated office.¹⁰¹⁶ The only exception to this is where proceedings are permitted against a former President for crimes committed whilst in office¹⁰¹⁷ by no less than two-thirds of all members of the National Assembly, through a motion affirming that such proceedings are justified in the public interest.¹⁰¹⁸ However, no such motion has been passed. Consequently, under the current constitutional provisions, Jammeh, as the former President, cannot be prosecuted in The Gambia for any act or omission committed during his period in office.

Additionally, paragraph 13 of schedule II of the Constitution provides that members of the AFPRC (or any person appointed by or, in the name of, the AFPRC, except judges of the Supreme Court or the Court of Appeals)¹⁰¹⁹, also enjoy immunity for any act or omission in the performance of their official duties.¹⁰²⁰ What is more, under paragraph 17 of schedule II,¹⁰²¹ it is unconstitutional for the National Assembly to repeal or amend paragraph 13.¹⁰²² As the former chairman of the AFPRC, this provision therefore not only reinforces Jammeh's immunity before domestic courts, but also potentially extends this immunity to other mid- and high-level perpetrators who operated as part of the organisation during its two year life span.¹⁰²³

¹⁰¹⁵ N Laver, 'The Rule of Law in the UK' (*In Brief*).

¹⁰¹⁶ [Gambian Constitution](#), section 69(3).

¹⁰¹⁷ [Gambian Constitution](#), section 69(3).

¹⁰¹⁸ [Gambian Constitution](#), section 69(3).

¹⁰¹⁹ [Gambian Constitution](#), para. 13(3), schedule II.

¹⁰²⁰ [Gambian Constitution](#), para. 13(1), schedule II.

¹⁰²¹ [Gambian Constitution](#), para. 17, schedule II: 'The National Assembly shall have no power to pass a bill to amend or repeal this paragraph or paragraph 11, 12, 13, or 14 of this schedule'.

¹⁰²² [Jammeh v. Attorney General](#) (2002) AHRLR 72, Gambia Supreme Court, (29 November 2001), paras 13, 16, 17, 31.

¹⁰²³ Indeed, former AFPRC members Sanna Sabally and Yankuba Touray have already attempted to refuse to testify before the Truth, Reconciliation and Reparations Commission ('TRRC') on this basis. See Yankuba Jallow, '[TRRC's Lead Counsel Argues Constitutional Immunity for AFPRC Members is Discriminatory](#)' (Foroyaa, 27 June

Steps to be taken

Prosecuting Jammeh and other members of the AFPRC for their alleged commission of international crimes will therefore be dependent upon the repeal of the 1997 Constitution, and upon the adoption of a newly drafted version that rejects any attempt to protect those responsible for such crimes.¹⁰²⁴ Unfortunately, at the time of writing, this appears unlikely, following the failure, on 22 September 2020, to gain parliamentary approval to further progress a broad constitutional and legislative reform process that sought to repeal the 1997 Constitution, thereby paving the pathway to accountability for violations committed during the Jammeh regime.

Admittedly, The Gambia's draft International Crimes legislation rejects any principle of immunity from prosecution on the basis of an individual's status as a state official.¹⁰²⁵ However, this means little without the repeal or amendment of the current Constitution, which is the supreme law applicable in The Gambia,¹⁰²⁶ and which would therefore likely overrule any attempt to amend, repeal, or circumvent existing immunity provisions. The position at this stage therefore remains unaltered: without the passing of a new Constitution, the immunity provisions within the 1997 Constitution will prevent the prosecution of AFPRC members, up to and including Jammeh, in Gambian courts.¹⁰²⁷

6.1.2. The Indemnity Act

The 2001 Indemnity Act was a reaction by the Jammeh Government to the murder of 14 students, a journalist, and a Red Cross volunteer¹⁰²⁸ at a student protest following the alleged rape of a 13-year old girl by police officers. The legislation, however, goes further than this one incident, in as far as it affords the President the ongoing discretion to indemnify all security officers who claim that their actions were taken to 'public safety, public health, public morality or otherwise in the public interest'.¹⁰²⁹ Albeit a discretionary (rather than automatic) protection, this provision undermines the rule of law, and has the potential to unjustly empower members of

2019); K Fatou, '[Understanding the constitutional immunity for AFPRC members: Lessons for TRRC](#)' (Kerr-Fatou, 2020).

¹⁰²⁴ Draft Constitution, Constitutional Review Commission (Gambia), 30 March 2020 ('[Draft Constitution](#)').

¹⁰²⁵ Draft International Crimes Act (Gambia), article 14.

¹⁰²⁶ [Gambian Constitution](#), section 4.

¹⁰²⁷ See e.g., Immunity of State Officials from Foreign Criminal Jurisdiction, [Fifth Report of the Special Rapporteur](#), Ms. Concepción Escobar Hernández (68th session of the International Law Commission ('ILC'), A/CN.4/701, chapter XI (2016), arguing that as such offences violate peremptory norms, and/or undermine the values of the international community as a whole, given that the crimes themselves cannot be regarded as acts that have been performed in an official capacity as such actions go beyond, or are not in accordance with the ordinary functions of state.

¹⁰²⁸ See AFP, '[Gambia's 'broken' justice system struggles with victims' ire](#)' (Justiceinfo.net, 12 May 2017): Yusupha Mbye was shot in the spine during the student march that was put down by Jammeh's forces. See also, P Róin & M Danielsen, '[How to topple a dictator: The rebel plot that freed the Gambia](#)' (The Guardian, 22 May 2018).

¹⁰²⁹ The Indemnity (amendment) Act, Gambian National Assembly, April 2001, section 2(1)(a) and (b).

the security services to act in any manner they deem appropriate without fear of reprisal. Such a provision therefore ought not to be used, and, like the Constitution, should be the subject of reform and repeal.

6.2. Gambian Criminal Code defences

6.2.1. Section 14: Compulsion

Under section 14 of the Gambian Criminal Code, a person will not be liable for a criminal act where:

- (i) an offence is committed by two or more offenders; and
- (ii) the act is done or omitted only because, during the whole of the time in which it is being done or omitted, the person is compelled to do or omit to do that act by threats on the part of the other offender(s) to instantly kill him or do him grievous bodily harm if he refuses.¹⁰³⁰

In order to rely upon the defence of compulsion, an accused must meet a high threshold: not only must they establish that they were compelled by an immediate threat¹⁰³¹ made by another person who was present during the whole time in which the criminal act took place, but they must also establish that the threats that compelled them to commit those acts amounted to threats to kill or cause grievous bodily harm. That said, although the wording found in the Gambian Criminal Code assumes that this threat must be real, cases of alleged compulsion will attract the provision on ‘mistake of fact’ found under section 8 of the Gambian Criminal Code. Accordingly, the immediacy and existence of threat can be assessed from the genuine belief of the defendant seeking to rely upon the defence.¹⁰³²

Particular care must be taken by prosecutors to be prepared for this defence being raised by individuals claiming that they were merely ‘following orders’. It is commonly accepted that acting on the orders of a superior does not free an accused from responsibility for a criminal offence, as the duty to obey is strictly limited to orders that are lawful in the first instance.¹⁰³³

6.2.2. Section 15: Necessity

Under section 15 of the Gambian Criminal Code, a person will not be responsible for a criminal act or omission where:

- (i) that act or omission was done or omitted to be done only in order to avoid consequences which could not otherwise be avoided;

¹⁰³⁰ See Gambian Criminal Code, section 14.

¹⁰³¹ Threats of future injury do not suffice: S Yeo, ‘Compulsion and Necessity in African Criminal Law’ (2009) 53 *Journal of African Law* 90 (‘Yeo (2009)’), p. 99.

¹⁰³² Yeo (2009), p. 96.

¹⁰³³ See [Rome Statute](#), article 33.

- (ii) those consequences, if followed, would have inflicted upon him or upon others whom he was bound to protect inevitable and irreparable evil; and
- (iii) no more was done that was reasonably necessary for that purpose, and that the evil inflicted by it was not disproportionate to the evil avoided.¹⁰³⁴

In Gambian law, necessity is therefore intended to discharge criminal liability for otherwise criminal acts taken to avoid the infliction of ‘inevitable and irreparable evil’. Like duress, this defence poses a high threshold for defendants to meet.

Firstly, in order to rely upon the defence, it must be established that the conduct was done *only* to avoid consequences which could not have otherwise been avoided. In other words, the conduct must have been necessary in order to avoid the infliction of an avoidable harm: if there was another means by which to avoid the consequence, the defence will fail. Importantly, however, unlike the provisions of compulsion in the Gambian Criminal Code, or duress at the International Criminal Court (‘ICC’), there is no requirement that this harm be immediate, and future threats (e.g., a threat to kill a family member in a week should the defendant fail to engage in the conduct)¹⁰³⁵ would likely fall within harms covered by the defence of necessity in The Gambia.¹⁰³⁶

Secondly, that consequence must have amounted to an ‘inevitable and irreparable evil’ under Gambian law. Given that the harms that may amount to ‘inevitable and irreparable evil’ are not enumerated (unlike compulsion), a potentially broad range of severe harms may therefore fall within the defence of necessity.¹⁰³⁷ This is particularly so given that (as with compulsion), the severity of the threat can be assessed from the genuine belief of the defendant seeking to rely upon the defence.¹⁰³⁸

Finally, it must be shown that the response itself was a proportionate reaction to that threat, meaning that, in addition to being necessary to avoid a threat, the action must have been no more than reasonably required in order to do so. In this sense, it is safe to say, for example, that if an individual (‘A’) threatened to kill another person (‘B’), but A was not present and therefore posed no direct and immediate threat, it would be wholly disproportionate for B to travel to A’s location and shoot him dead. However, if A had an automatic rifle and was pointing it at a group of children and was taking steps to fire the weapon into those children, in B’s presence, then it may be proportional for B to shoot him dead on the basis it was necessary to save the lives of others.

¹⁰³⁴ Gambian Criminal Code, section 14.

¹⁰³⁵ Unlike compulsion, necessity imposes no requirement on who the threat was directed against. As such, the threat can be directed against the defendant or another person.

¹⁰³⁶ Yeo ‘[Compulsion and Necessity in African Criminal Law](#)’, p. 99.

¹⁰³⁷ Yeo ‘[Compulsion and Necessity in African Criminal Law](#)’, p. 98.

¹⁰³⁸ Yeo ‘[Compulsion and Necessity in African Criminal Law](#)’, p. 96.

The defence of necessity is therefore based on ‘necessity’, ‘reasonability’, and ‘proportionality’. In this way, it does not give an individual or group of individuals ‘free-reign’ to ignore humanitarian considerations and act as they please. It should also be stressed, again, that any defences brought under this defence relating to ‘superior orders’ must not succeed (*see* section 6.2.1).

6.3. Rome Statute defences¹⁰³⁹

6.3.1. Article 31(1)(a): Mental incapacity

As per article 31(1)(a) of the Rome Statute, a person shall not be criminally responsible if, at the time of the criminal conduct:

- (i) they suffer a mental disease or defect;
- (ii) that destroys that person’s capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law.¹⁰⁴⁰

The mental defect or disease must be one that negates the mental element of crime. As such, whilst depression or similar illnesses would not necessarily amount to mental incapacity, schizophrenia may do so, given its capacity to substantially impair an accused’s ability to understand their conduct, form a rational judgment, or exercise self-control.¹⁰⁴¹

6.3.2. Article 31(1)(b): Intoxication

As per article 31(1)(b) a person shall not be criminally responsible if, at the time of that person’s conduct, they were:

- (i) in a state of intoxication;
- (ii) that destroyed their person’s capacity to appreciate the unlawfulness or nature of their conduct, or capacity to control his or her conduct to conform to the requirements of law;
- (iii) unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court.

An individual cannot have the benefit of the defence if they state that they were drunk, or under the influence of narcotics that they willingly and knowingly administered to themselves.¹⁰⁴²

¹⁰³⁹ [Rome Statute](#), article 31.

¹⁰⁴⁰ [Rome Statute](#), article 31(1)(a).

¹⁰⁴¹ *See Prosecutor v. Delalić et al.*, IT-96-21-T, Judgment, 16 November 1998 (*‘Delalić Trial Judgment’*) in which the Trial Chamber defined ‘diminished responsibility’, a concept borrowed from the criminal law of England and Wales. *See also, Prosecutor v. Vasiljević*, IT-98-32-T, Judgment, 29 November 2002 (*‘Vasiljević Trial Judgment’*) where the defendant argued he had psycho-neurosis caused by chronic alcoholism and fatigue.

¹⁰⁴² *See Prosecutor v. Kvočka et al.*, IT-98-30/1, Judgment, 2 November 2001 (*‘Kvočka et al. Trial Judgment’*), para. 707.

6.3.3. Article 31(1)(c): Self-defence¹⁰⁴³

As per article 31(1)(c) a person shall not be criminally responsible if, at the time of that person's conduct, the person was:

- (i) acting reasonably to defend themselves or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission;
- (ii) against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected.¹⁰⁴⁴

Accordingly, self-defence operates not only on an individual and personal basis, but also extends to the defence of 'another'.¹⁰⁴⁵ As with the defence of 'necessity', the protected value (i.e., the individual) can be reasonably defended against an imminent and unlawful use of force, but that defence must be in a manner that is proportionate to the degree of danger facing the individual or other person that is being protected (see necessity, above).¹⁰⁴⁶

There are two further points that prosecutors should consider where such a defence is raised:

- (i) the fact that an individual was involved in a legitimate defensive operation conducted by military forces does not of itself constitute grounds for the exclusion of criminal liability on the basis of self-defence; and
- (ii) it is for the Court to consider, in the context of the allegation and the circumstances of the evidence heard, whether conduct complained of is reasonable and proportionate.¹⁰⁴⁷ This will require a case by case analysis: the fact that an action was deemed reasonable in one set of circumstances does not necessarily mean that it will be deemed so in another.

6.3.4. Article 31(1)(d): Duress

Under article 31(1)(d) a person shall not be criminally responsible where:

¹⁰⁴³ See also *Prosecutor v. Kordić & Čerkez*, IT-95-14/2, Judgment, 26 February 2001 ('*Kordić & Čerkez Trial Judgment*'), para. 449: where the Chamber stated that although its statute does not contain any provision on self-defence, such defence form part of the general principles of criminal law which the International tribunal must take into account when dealing with case before it, and further, that the principles of self-defence as per article 31 of the Rome Statute, reflected provisions found in most national criminal codes and may be regarded as constituting a rule of customary international law.

¹⁰⁴⁴ The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph.

¹⁰⁴⁵ Re-affirming the caveat that self-defence of property only applies to war crimes.

¹⁰⁴⁶ *Kordić & Čerkez Trial Judgment*, para. 449; M Klamberg, 'Article 31(1)(c)' in M Klamberg (ed), *Commentary of the Rome Statute* (FICHL Publication Series No.29, TOAEP 2017) p. 324; R Cryer et al., *International Criminal Law* (4th ed CUP 2019) pp. 387-388.

¹⁰⁴⁷ *Kordić & Čerkez Trial Judgment*, para. 452.

- (i) the alleged criminal conduct has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person; and
- (ii) the person acts necessarily and reasonably to avoid this threat;
- (iii) provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be made by other persons; or constituted by other circumstances beyond that person's control.

Although the defence of duress has historically been the source of significant argument between practitioners and scholars,¹⁰⁴⁸ recent years have brought some clarity to this area. Accordingly, it is now apparent that duress is capable of acting as a full defence,¹⁰⁴⁹ and that it is available for both soldiers and civilians alike.¹⁰⁵⁰

In determining whether the defence is satisfied, a number of points need to be considered:

- (i) a defendant must be able to demonstrate an imminent threat to life, limb or freedom to themselves, a relative, or an individual close to them;
- (ii) as opposed to the defence of necessity, that threat must emanate from an individual that threat must emanate from an individual, a person;
- (iii) the threat must be imminent in that the fear must be operating on the defendant at the time of the alleged criminal act; and
- (iv) the defendant must have no way to avoid the impending harm.¹⁰⁵¹

This defence considers the way in which the ‘reasonable person’ would react in the face of an imminent and serious threat. It does not, therefore, presuppose that an individual is a ‘reasonable hero’. Consequently, there is no requirement for individuals to engage in acts of heroism, or demonstrate self-sacrifice.¹⁰⁵² As such, faced, for example, with the choice of killing another person or suffering the infliction of egregious harm or even death, an individual could not be said to be guilty of a murder if they chose the former course of action. To hold otherwise would be to

¹⁰⁴⁸ See e.g., M Joyce, ‘Duress: From Nuremberg to the International Criminal Court, Finding the Balance Between Justification and Excuse’ (2015) 28:03 *LJIL*, pp. 623-642; P Rowe, ‘Duress as a Defence to War Crimes after Erdemović: A Laboratory for a Permanent Court?’ (1998) 1 *YIHL*, pp. 210-228.

¹⁰⁴⁹ [Rome Statute](#), article 31(1)(d).

¹⁰⁵⁰ *Prosecutor v. Ongwen*, ICC-02/04-01/15, Decision on the confirmation of charges against Dominic Ongwen, 23 March 2016 (*Ongwen Decision on the Confirmation of Charges*), paras 151-156, which makes no mention of a difference of standard between civilians and soldiers and recognises duress as a potential defence even for soldiers.

¹⁰⁵¹ J Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits* (1989) 62 *South California Law Review* 1331, p. 1340.

¹⁰⁵² *Prosecutor v. Drazen Erdemović*, Case No. IT-96-22-A, ‘Separate and Dissenting Opinion of Judge Cassese’, 7 October 1997 (*Erdemović Separate and Dissenting Opinion of Judge Cassese*), para. 48; R Cryer, ‘16. Defences/Grounds for Excluding Criminal Responsibility’ in R Cryer et al., *International Criminal Law* (4th Ed, CUP, 2019) p. 390.

require an ‘extraordinary’ and indeed, ‘perhaps impossible’ standard of courage.¹⁰⁵³ This needs to be contrasted, however, with an individual who may have assumed a special (but voluntary) duty to others (e.g., as a military commander), in which case it might be necessary that the individual may be assumed to possess the capacity for a greater level of resistance when faced with threats of such harm.¹⁰⁵⁴

6.3.5. Article 31(3): Other defences

Under article 31(3), the Rome Statute also recognises a range of other defences that are found in the applicable law under article 21, and which are not explicitly recognised anywhere else in the Statute, as long as those provisions are not inconsistent with internationally recognised human rights, and do not result in any adverse discriminatory distinction. Relevant defences in this regard include those found in:

- (i) applicable treaties and rules of international law, including the established principles of the international law of armed conflict;
- (ii) general principles of law derived by the Court from the national laws of domestic legal systems of the world including, where appropriate and compatible with the other provisions of the Rome Statute, the national laws of States that would normally exercise jurisdiction over the crime;
- (iii) principles and rules of law as interpreted in the Court’s previous decisions.

6.3.6. Article 32(1): Mistake of fact or law

As per article 32(1) of the Rome Statute, a mistake of fact or law¹⁰⁵⁵ shall be a ground for excluding criminal responsibility where it negates the mental element required by the crime.

Therefore, if the definition of a particular crime requires specific mental elements with regard to certain conduct or circumstances, an honestly held mistake of fact would negate the mental element, even if that proved to be unreasonable. By way of example, consider the case of *McCann v. United Kingdom*,¹⁰⁵⁶ where British Special Air Service Forces soldiers killed several Irish Republican Army terrorists in Gibraltar. The forces had been told by their superiors that the terrorists posed an imminent threat to the lives of others as they could remotely detonate a car bomb. However, it transpired that there was no such bomb. In that case, albeit mistaken, it was held that the soldiers’ genuinely held belief that their actions were absolutely necessary in order to safeguard innocent lives was capable of justifying a use of force which could otherwise amount to a violation of the right to life, as to hold otherwise would be to ‘impose an unrealistic

¹⁰⁵³ *Erdomović Separate and Dissenting Opinion of Judge Cassese*, para. 47.

¹⁰⁵⁴ *See Erdomović Appeal Judgment*; *Ongwen Decision on the Confirmation of Charges*, para. 152.

¹⁰⁵⁵ That said, a mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility – *see Rome Statute*, article 32(2).

¹⁰⁵⁶ *McCann and Others v. The United Kingdom*, Application No.18984/91 (ECtHR, 27 September 1995).

burden on the State and its law-enforcement personnel in the execution of their duty, perhaps to the detriment of their lives and those of others.’¹⁰⁵⁷

6.3.7. Article 33: Superior orders

Under article 33 of the Rome Statute, a person will not escape criminal liability for conduct committed on the order of a superior unless:

- (i) the person was under a legal obligation to obey orders of the Government or the superior in question;
- (ii) the person did not know that the order was unlawful; and
- (iii) the order was not manifestly unlawful.¹⁰⁵⁸

There are three main approaches to the defence, the first being that the superior is accountable for the commission of the crime, as the subordinate has a general duty to obey the orders of the superior. The second approach however, or the absolute liability doctrine, is that superior orders are no defence, and are an issue for mitigation only. The rationale for this is that the obligation to obey superior orders is generally limited to lawful orders only. The third approach, or that of conditional liability, is that superior orders do not relieve the subordinate of criminal responsibility unless such an individual did not know and could not possibly have been expected to know that the order was unlawful.

The defence in article 33 is based upon the doctrine of conditional liability. As such, superior orders do not relieve the subordinate of criminal responsibility unless they did not know and could not possibly have been expected to know that the order was unlawful. However, practitioners must note that the defence is not available to those alleged to have committed genocide, or crimes against humanity, as in such circumstances the doctrine of absolute liability applies.¹⁰⁵⁹ In the Gambian context, it is therefore exceptionally unlikely that a defence of superior orders could be brought in relation to any crime committed under the Jammeh regime.

¹⁰⁵⁷ There is no requirement of reasonableness for the purposes of a war crime, however for a simple violation of international humanitarian law (‘IHL’), an honest but unreasonable mistake of fact would still potentially violate specific rules of IHL.

¹⁰⁵⁸ [Rome Statute](#), article 33(2) notes however, that orders to commit genocide or crimes against humanity are manifestly unlawful.

¹⁰⁵⁹ See [Rome Statute](#), article 33; an individual may not be able to raise a defence under article 33, however, this does not preclude any other relevant defence from being raised, and therefore the circumstances surrounding the allegation, and the reasoning behind why an individual acted in the manner they did, may give rise to a credible alternative defence.

Chapter 7: Case Building

7. Introduction

Building an international crimes case refers to a process of identifying, investigating, organising and analysing evidence to establish the elements of relevant crimes, so as to present viable cases for prosecutions against identified perpetrators. It involves four main stages, which provide the structure for this Chapter, and include:

- (i) establishing the crime base (collecting evidence to prove that the crimes were actually committed);
- (ii) establishing linkage between the persons responsible for the crimes committed; and
- (iii) establishing a case theory (a theory of what the evidence reveals to have happened).¹⁰⁶⁰ This requires an analysis of the evidence to determine whether the contextual elements, elements of crimes and modes of liability have been sufficiently established; and
- (iv) having built a case theory, selecting those cases that prosecutors will take forward to trial.

In The Gambia, this process will involve a review of the totality of the statements, exhibits and other evidence collected by the Truth, Reconciliation and Reparations Commission ('TRRC')¹⁰⁶¹ and a detailed consideration of the relevance, probative value, and the best approach to be taken when using that evidence in court.¹⁰⁶² Consideration should also be given to other exhibits, documents and statements (among others) that may already have been collected or recorded by civil society organisations, non-governmental organisations (NGOs) and international non-governmental organisations (e.g., those collated by Trial International and Human Rights Watch).¹⁰⁶³

7.1. Establishing the crime base

This first step of case building requires prosecutors to analyse and collate the available evidence so as to demonstrate that international crimes were actually committed. The sheer number of statements recorded by the TRRC,¹⁰⁶⁴ alongside the evidence of those who testified,¹⁰⁶⁵ calls for

¹⁰⁶⁰ D Groome *Handbook of Human Rights Investigation* (2nd ed Createspace 2011) ('Groome (2011)') pp. 251-252.

¹⁰⁶¹ TRRC, '[Interim Report](#)' (2018-2019), para. 82.

¹⁰⁶² This may include people who have provided statements and/or oral evidence, but those individuals cannot now be located. Consideration must therefore be given to existing provisions under Gambian law and in international practice in terms of the admission of hearsay evidence.

¹⁰⁶³ Enquiries ought to be made with relevant parties within these organisations so as to determine whether access will be given, and under what circumstances.

¹⁰⁶⁴ TRRC, '[Interim Report](#)' (2018-2019), para. 82.

¹⁰⁶⁵ Aneked, 'Truth, Reconciliation & Reparations Commission (TRRC) Digest, Edition 12' [Aneked TRRC Digest 12](#). 'As at the time of the TRRC's second suspension of public hearings on August 4, 2020 the Commission had heard testimonies from 261 witnesses during 15 three-week sessions' as shared by the [Truth, Reconciliation and Reparations Commission](#) – TRRC (Facebook, 20 September 2020).

a mapping exercise to allow for those incidents of most significant criminality to be highlighted and targeted as appropriate by using a clear and defensible methodology.

7.1.1. Mapping the crimes

At the outset of the mapping process, prosecutors should maintain a broad focus, ideally without focusing on a single incident or allegation (e.g., a massacre) as doing so may cause a premature narrowing of the scope of the investigation, or lead prosecutors to ignore valuable evidence or allegations that may be vital to the prosecution at hand or other potential cases.

In order to do so, it may be helpful to adopt a thematic approach. Indeed, having considered the publicly available evidence of violations committed under the Jammeh regime arising from TRRC hearings, it is possible to define such several thematic areas, and/or elements of offending, which, given the gravity and/or scale of offences, could be justifiably prioritised in an initial mapping process from which to build cases for prosecution. These include:

- (i) violence, including sexual violence, against women;
- (ii) torture;
- (iii) killing and enforced disappearance; and
- (iv) inhumane treatment of scores of victims during the witch-hunts of 2009.¹⁰⁶⁶

It is through this mapping that prosecutors can develop an approximate pattern of the commission of offences and begin to gauge their frequency and gravity. This initial mapping process will lay the foundation for prosecutors to begin to collate ‘crime base’ evidence relating to the circumstances and facts that pertain directly to the commission of the crimes,¹⁰⁶⁷ including the individual events (i.e., the specific crimes that occurred and their surrounding circumstances), and the actors participating or present at or near the scene of those crimes.¹⁰⁶⁸ With analysis, this evidence will ultimately be crucial in identifying and successfully prosecuting specific perpetrators.¹⁰⁶⁹

¹⁰⁶⁶ These are only examples and therefore suggestive. Further thematic issue can be added if deemed appropriate.

¹⁰⁶⁷ M Nystedt *et al*, ‘A Handbook on Assisting International Criminal Investigations’ (Folke Bernadotte Academy and Swedish National Defence College 2011) ([‘Nystedt *et al.* \(2011\)’](#)), p. 42.

¹⁰⁶⁸ [Nystedt *et al.* \(2011\)](#), p. 42.

¹⁰⁶⁹ Patterns of crime can assist in establishing linkage evidence given the common themes within the ‘pattern’. Further, the pattern does not necessarily need to be something overly complex, it can be something so simple as a particularly uniform denoting a specific group of the military were responsible for crimes. *See* S F Ribeiro & D van der Straten Ponthoz, ‘International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: Best Practice on the Documentation of Sexual Violence as a Crime or Violation of International Law’ (2nd ed UK Foreign & Commonwealth Office 2017) ([‘International Protocol on the Documentation and Investigation of Sexual Violence in Conflict’](#)), p. 226.

7.2. Establishing linkage

Establishing linkage evidence is the second stage of building an international crimes case and follows naturally from the initial mapping stage. ‘Linkage evidence’ is the term used to describe the evidence that helps connect alleged perpetrators to the violations in question (*see* sections 4.5, 5.4.2).¹⁰⁷⁰ Collecting linkage evidence for international crimes generally requires a ‘bottom-up’ approach, whereby each ‘link’ in the chain of responsibility is mapped, from the direct perpetrator of the crime upwards to include those who, despite being physically or organisationally removed from its physical commission, nonetheless contribute to the crime through chains of command and layers of decision-making.¹⁰⁷¹ This may include, for example, senior politicians, military or security personnel, many of whom are often considered to be ‘most responsible’¹⁰⁷² for international crimes, given their overarching responsibility in commissioning or otherwise facilitating their commission.

Linking these individuals to international crimes will usually require evidence that demonstrates the existence of hierarchies, and which identifies those yielding effective control within those hierarchies. Understanding how to demonstrate these links is especially helpful when confronted with complex command structures (whether military, superior or both). This is particularly so because in the prosecution of senior leadership cases, the existence of the basic crime base evidence may not be significantly challenged by the defence, who will likely focus on (rebutting the existence of) chains of responsibility between crimes and the accused.¹⁰⁷³

Given their organisational and physical remoteness from the crimes in question, linkage evidence demonstrating the criminal responsibility of those at the higher echelons of the power structure might not be immediately available. That said, it is entirely likely that such evidence will present itself once the crime base is identified and analysed and others (such as accomplices and co-perpetrators) at the lower ends of the command structure begin to be targeted for investigation or are dealt with by the courts.¹⁰⁷⁴ They may seek to co-operate with investigators and prosecutors with a view to such cooperation being viewed positively by the court when passing sentence.

Of course, investigations cannot always be so linear and so a combination of a ‘top-down’ and ‘bottom-up’ approach may be necessary.¹⁰⁷⁵ This is of particular relevance when considering former President Jammeh and his ‘circle of power’, where authority was not only exercised

¹⁰⁷⁰ OHCHR, ‘Who’s responsible? Attributing Individual Responsibility For Violations of International Human Rights And Humanitarian Law in United Nations Commissions Of Inquiry, Fact-Finding Missions And Other Investigations’ (2018) (‘OHCHR, [Who’s Responsible?](#)’) p. 17.

¹⁰⁷¹ OHCHR, [Who’s Responsible?](#), p. 40.

¹⁰⁷² International Criminal Court, Office of the Prosecutor, Strategic Plan (2016-2018), 16 November 2015 (‘[ICC OTP Strategic Plan 2016-2018](#)’) paras 35-36.

¹⁰⁷³ International Criminal Tribunal for the Former Yugoslavia (‘ICTY’), ‘ICTY Manual on Developed Practices’ (International Criminal Tribunal for the former Yugoslavia (UNICRI Publisher 2009) (‘[ICTY Manual on Developed Practices](#)’), p. 122.

¹⁰⁷⁴ *See e.g.*, [ICC OTP Strategic Plan 2016-2018](#), para. 35.

¹⁰⁷⁵ [ICTY Manual on Developed Practices](#), p. 15.

through an official command structure, but also more informally, through communications, patronage, and other personal relationships. Some of those witnesses who were members of his circle of power, such as Sanna Sabally, have already testified before the TRRC.¹⁰⁷⁶

In The Gambia, prosecutors will face a particular case-building challenge in their intention to prosecute Jammeh for his role in orchestrating the crimes considered in this Manual, given his (superficial) physical and organisation removal from those who physically committed these crimes. Although the ‘theory’ is that Jammeh is at the apex of control and therefore responsible, there is extremely limited direct evidence (e.g., documentary evidence of direct orders) to demonstrate his responsibility in this regard, and at the time of writing the greater body of linkage evidence against him consists of multiple pieces of circumstantial evidence (*see* section 7.3.1).

7.2.1. Perpetrator levels

The number of levels linking a suspect to the crime will depend on how far the suspect is removed from the physical perpetration of the crime, as well as the complexity of the structures and institutions employed by a perpetrator.¹⁰⁷⁷

Establishing a link between those ‘most responsible’ and the crimes committed will usually involve, at a minimum, the following levels:

- (i) the identification of **direct perpetrators** and the organisations of which they are members;
- (ii) investigation of the organisational structures and **mid-level perpetrators**; and
- (iii) investigation of **high-level perpetrators**.

Level one: direct perpetrators and the organisations they were members of

The first linkage level involves the establishment of the identity and specific conduct of the direct perpetrators, meaning those who have physically committed the crime (e.g., in terms of a murder by shooting, the individual(s) who pulled the trigger).¹⁰⁷⁸

Witness testimony is likely to be the primary source of crime base evidence as it can establish what happened, when and where the crime occurred, who was involved, and its impact.¹⁰⁷⁹ For example, given the close community ties in the Gambian context, it is likely that witnesses may have known the perpetrator or their family or would be able to provide a description of the

¹⁰⁷⁶ Aneked, ‘Truth, Reconciliation & Reparations Commission (TRRC) Digest, Edition 3’ ([‘Aneked TRRC Digest 3’](#)).

¹⁰⁷⁷ Institute for International Criminal Investigations (‘IICI’), ‘Investigators Manual’ (2014) (‘IICI Investigators Manual’), p. 96.

¹⁰⁷⁸ IICI Investigators Manual, p. 105

¹⁰⁷⁹ Aneked, ‘Truth, Reconciliation & Reparations Commission (TRRC) Digest, Edition 10’ ([‘Aneked TRRC Digest 10’](#)), p. 110.

suspect.¹⁰⁸⁰ Even if such witnesses and victims cannot positively identify the perpetrators, the information gathered may provide significant leads that can assist the investigation,¹⁰⁸¹ including information identifying the perpetrators as belonging to a particular group, such as clothing, vehicles, dialect or weaponry.¹⁰⁸²

Physical evidence is also commonly linked to this first perpetrator level. It includes the type of evidence one would find at the scene of a crime, for example, a murder weapon, bullet casings, blood stains, or fingerprints. It may be equally useful for establishing the perpetrators or victims of a crime, such as those exhumed from a mass grave.¹⁰⁸³

Video or photographic evidence, if authenticated, can also be highly probative and reliable information about how the crime occurred. It may, for example, include images of injuries or damage suffered as a result of a violation.¹⁰⁸⁴ In the context of an international crimes case, this evidence may provide key information about the identity of the direct perpetrators, who may have been caught on camera by witnesses or may have even filmed themselves committing crimes.¹⁰⁸⁵

Expert evidence can also be important in establishing this first level of perpetratorship. For example, in sexual violence cases, a medical examination may reveal injuries that can establish the offence,¹⁰⁸⁶ or may provide evidence of aggravating circumstances (e.g., that the sexual violence resulted in grievous bodily harm).¹⁰⁸⁷

Regardless of the seniority of the final target of the investigation, this first level is essential: without this information it will be difficult to establish any link between the crimes and those at the leadership level who controlled or facilitated their criminal acts. Thereafter, prosecutors can look to establish the organisations to which these perpetrators belonged, or were working with to commit the specific crime being investigated.¹⁰⁸⁸ This will naturally enable prosecutors to then

¹⁰⁸⁰ Groome (2011), pp. 208-209.

¹⁰⁸¹ IICI Investigators Manual, p. 105.

¹⁰⁸² IICI Investigators Manual, p. 105. *See e.g.*, witnesses before the TRRC identified the marabout (a perpetrator group involved in the witch hunts) as being from Guinea: [Aneked TRRC Digest 10](#), pp. 22, 37, 59, 74, 131, 168. Witnesses also identified groups of men and women dressed in green, referred to by many as ‘Green Boys’: [Aneked TRRC Digest 10](#), pp. 59, 74, 206-207, 215.

¹⁰⁸³ *Prosecutor v. Krstić*, ICTY-IT-98-33-T, Judgment, 2 August 2001 (*‘Krstić Trial Judgment’*), para. 71.

¹⁰⁸⁴ *Prosecutor v. Karadžić*, ICTY-IT-95-5/18-T, Judgment, 24 March 2016, (*‘Karadžić Trial Judgment’*), p. 236.

¹⁰⁸⁵ IICI Investigators Manual, p. 107; *Prosecutor v. Ladjedvardi*, 5-3StE 2/16-4-1/16, [Judgment](#), 12 July 2016. In the *al Mahdi* case before the ICC, for example, the accused was recorded in several videos and photographs explaining how the attack should unfold, offering prayer dedicated to the attack and also as being present at the sites of attack: *see Prosecutor v. Al Mahdi*, ICC-01/12-01/15, Judgment and Sentence, 27 September 2016 (*‘Al Mahdi Judgment and Sentence’*) paras 35, 37 and 38.

¹⁰⁸⁶ [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 157; Crown Prosecution Service, ‘Rape and Sexual Offences – Chapter 9: Forensic, Scientific, and Medical Evidence’ (undated) (*‘CPS Rape and Sexual Offences – Chapter 9: Forensic, Scientific, and Medical Evidence’*).

¹⁰⁸⁷ *See e.g.*, Gambian Sexual Offences Act 2013, section (4)(a)(iii)(aa).

¹⁰⁸⁸ M Bergsmo and W H Wiley, ‘Manual on Human Rights Monitoring: An Introduction for Human Rights Officers’ (University of Oslo, Norwegian Centre for Human Rights 2008) (*‘Bergsmo & Wiley (2011)’*), p. 8.

develop an understanding of who, at the higher level of command or influence, might be responsible for the direct perpetrator's actions.

Level two: organisational structures and mid-level perpetrators

Level two seeks a clear understanding of the organisation and hierarchical structure of the group identified as being involved in the perpetration of the crime,¹⁰⁸⁹ and the identification of any mid-level perpetrators responsible for its commission. This can involve mapping:

- (i) the structures within the organisation;
- (ii) the people with authority and the scope of their authority;¹⁰⁹⁰
- (iii) how such persons communicated with each other (particularly how orders and directions are passed and complied with and reports issued);
- (iv) what laws and regulations define the relationships between persons, and the de facto channels of authority.¹⁰⁹¹

In reality, the number of layers that need to be investigated at this stage “will vary on a case-by-case basis, depending on a variety of factors including the institutional structure of the organisation itself, the crimes it was deployed to commit, and the means by which the crimes were committed.”¹⁰⁹²

That said, regardless of the number of layers investigated at this stage, the process of doing so will usually reveal a number of mid-level perpetrators, which includes those persons superior to the direct perpetrators of the crime who are answerable to the highest levels in the organisations.¹⁰⁹³ Such persons may become the subject of the investigation themselves, or may lead the investigation upwards towards the high-level perpetrators.

Level three: high-level perpetrators

The final level relates to investigations of high-level perpetrators such as senior politicians, military or police officials, or commanders of non-state groups¹⁰⁹⁴ who organise, rather than participate in, the direct perpetration of a crime.¹⁰⁹⁵

¹⁰⁸⁹ IICI Investigators Manual, p. 108.

¹⁰⁹⁰ IICI Investigators Manual, p. 108.

¹⁰⁹¹ IICI Investigators Manual, p. 108.

¹⁰⁹² IICI Investigators Manual, p. 107.

¹⁰⁹³ In the Gambian context, this may include, for example, General Saul Badjie for his role and rank in the Junglers; Solo Bojang for his alleged involvement in leading numerous operations, including the witch hunts and the Mile II killings, and Omar Jawo, the former police chief in Barra, who was allegedly involved in the witch hunts. *See e.g.*, TRRC [Day 72 Part 1](#) Amadou Badjie (25 July 2019), 1:18:49-1:19:29; TRRC [Day 77](#) Alieu Jeng Pt 4 (19 August 2019) 29:53-30:59; ANEKED [TRRC Digest 10](#), pp. 226, 230.

¹⁰⁹⁴ Institute for International Criminal Investigations, ‘Investigation Manual for War Crimes, Crimes against Humanity and Genocide in Bosnia and Herzegovina’ (2013), p. 31.

¹⁰⁹⁵ [Nystedt et al. \(2011\)](#), p. 43.

The investigation into high-level perpetrators is often complex and requires a comprehensive understanding of the (legal and factual) links and relationships between the senior official being investigated and the intermediary units and direct perpetrators operating under their authority.¹⁰⁹⁶ This may be difficult to achieve, as the further an investigation goes, particularly through the higher echelons of power and responsibility, the less likely it is that there will be independent evidence that will implicate senior officials, given that they are unlikely to be directly responsible for that which may have occurred.

That said, there is a range of evidence that may be helpful in this regard. In developing an understanding of the legal and factual authority of the senior official, prosecutors may review a range of documentary evidence¹⁰⁹⁷ and may employ the skills of specialised military or political analysts. Similarly, insider witnesses and accomplices will likely provide *essential* evidence relating to factual chains of authority that circumvent legal relationships.¹⁰⁹⁸ Investigators and prosecutors should, however, be cognisant of the significant challenges and risks associated with obtaining reliable linkage information from insider witnesses and accomplices. In particular, they may:

- (i) be implicated in crimes and be another person of interest to the investigation;
- (ii) show hostility towards the investigation;¹⁰⁹⁹
- (iii) blame others to shield themselves or someone else from investigation;
- (iv) see it as an opportunity to further their own agenda; or, equally
- (v) be at risk of intimidation or reprisals for providing such information.¹¹⁰⁰

Additionally, in the Gambian context, open source evidence (*see* section 7.3.2) of Jammeh's statements will be an important source of linkage to the crimes which took place during his regime. For example, on 19 August 2012, in a television address to mark the Muslim feast of Eid-al-Fitr, Jammeh announced to the Gambian nation that by the middle of September all existing death sentences would be 'carried out to the letter'.¹¹⁰¹ Before the end of that same month, late one night, nine death row inmates, some of whom had not exhausted their rights of

¹⁰⁹⁶ IICI Investigators Manual, p. 109.

¹⁰⁹⁷ Analysis of the State's laws and regulations, for example may demonstrate the official had authority over and responsibility for the direct or mid-level perpetrators. *See e.g.*, Constitution of The Republic of The Gambia, 1997 ('[Gambian Constitution](#)'), section 188(1) and (2) for the President's control over the military; section 191(1) for the President's control over the National Intelligence Agency. Other documents, such as internal correspondence, or diaries of persons within the organisation may provide critical information relating to the factual authority of individuals and/or the flow of information around an organisation.

¹⁰⁹⁸ IICI Investigators Manual, p. 109.

¹⁰⁹⁹ OHCHR, 'Manual on Human Rights Monitoring' (2011) UN HR/P/PT/7/Rev1 ('[OHCHR Manual on Human Rights Monitoring](#)'), p. 25.

¹¹⁰⁰ [ICTY Manual on Developed Practices](#), p. 20: care should be taken to ensure the safety and security of insider witnesses for this reason.

¹¹⁰¹ '[Executions in The Gambia: A Giant Leap Backwards](#)' (Amnesty International, 24 August 2012); 'Nine Executed in The Gambia, says Amnesty International' (*BBC News*, 24 August 2012).

appeal, were taken from Mile II prison by members of the Junglers, suffocated, and their bodies dumped in unmarked locations. This television address may possibly be used as evidence of his intent to carry out the murders.

7.3. Establishing a case theory and analysing the evidence

Analysis of the evidence should be ongoing throughout a criminal investigation. Investigators and prosecutors should be constantly mapping the evidence to ascertain whether it is sufficient to establish contextual elements, the specific elements for identified individual criminal acts and possible modes of liability for any suspects. This is called establishing a ‘case theory’, i.e., a theory of what the evidence reveals to have happened.¹¹⁰²

This may reveal gaps in the case which require further investigation, additional supporting evidence (see sections 5.4 and 7.3.1)¹¹⁰³ or result in an adjustment of the case theory.

7.3.1. Analysing the evidence: categories of evidence

Although all evidence must be reliable, credible, and accurate, evidence can come from many sources or formats, and different pieces of evidence may provide different levels or types of support for a specific allegation, or even the case as a whole. Evidence may also have different functions, depending on what it seeks to establish.

This sub-section presents an overview of the discrete categories of evidence that have been admitted by international criminal tribunals and courts, which include: direct evidence, indirect evidence (circumstantial and hearsay evidence), corroborative evidence, and exculpatory evidence.

Direct evidence

Direct evidence, if believed, proves a fact in issue without the need for additional inferences.¹¹⁰⁴ The most common example of direct testimonial evidence is that which concerns what a witness personally saw, smelled, felt or heard.¹¹⁰⁵ One example might be that of a woman who sees the rain fall on the footpath outside her house. Her observation is considered direct evidence of the

¹¹⁰² Groome (2011), p. 251-2.

¹¹⁰³ [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 226.

¹¹⁰⁴ D Watt, *Watt’s Manual of Criminal Evidence*, (Thomson Carswell, Toronto, 2006) (‘Watt (2006)’), p. 41; *R. v. Violette* (2008) BCSC 422 (CanLII); *R. v. Arcuri* (2001) SCC 54 (CanLII), (2001) 2 SCR 828, para. 22.

¹¹⁰⁵ H Jallow, *The Law of Evidence*, Revised Second Edition (Topkin Publication, 2016) (‘Jallow (2016)’), pp. 26, 98-99; *Prosecutor v. Gbagbo & Blé Goudé*, ICC-02/11-01/15, Public redacted version of the “Response to Defence Submissions on the Specific Factual Issues for which the Evidence Presented could be Insufficient to Reasonably Support a Conviction, 10 September 2018 (‘*Gbagbo & Blé Goudé Response to Defence Submissions on the Specific Factual Issues*’), para. 108.

fact that it rained.¹¹⁰⁶ The only inference that may be involved is that the testimony is true and credible.¹¹⁰⁷

In The Gambia, oral evidence must be direct.¹¹⁰⁸ Direct evidence is not, however, limited to oral evidence. It may, sufficiently authenticated, be a document which directly establishes a fact;¹¹⁰⁹ a fingerprint; a photograph, or a film clip, among a wide range of others. In the Gambian context, direct evidence would therefore definitely include, for example, Toufah Jalloh's testimony before the TRRC that 'Yahya Jammeh decided to penetrate [her], but before he did, he took out a needle from his pocket and he injected [her] on [her] arm.'¹¹¹⁰

Indirect evidence

Indirect evidence is generally understood to encompass circumstantial and hearsay evidence.¹¹¹¹

Circumstantial evidence is evidence of relevant facts other than the fact in issue, which, either by themselves or in connection with other facts make the existence or non-existence of any fact in issue or relevant fact more or less probable.¹¹¹² It is not the same as direct evidence, but may, especially when linked with other pieces of circumstantial evidence and placed in support of direct evidence, be influential in helping a court reach a decision.¹¹¹³

In international jurisprudence, direct and circumstantial evidence have the same intrinsic value. The category of evidence is irrelevant. What matters is that the evidence used supports the elements of crimes and mode of commission alleged against a perpetrator.¹¹¹⁴ As such, it is possible to reach a finding based solely on circumstantial evidence.¹¹¹⁵ However the requisite

¹¹⁰⁶ Groome, (2011) p.41.

¹¹⁰⁷ Watt (2006), p. 41; *R. v. Violette* (2008) BCSC 422 (CanLII); *R. v. Arcuri* (2001) SCC 54 (CanLII), (2001) 2 SCR 828, para. 22.

¹¹⁰⁸ Gambian Evidence Act, section 80.

¹¹⁰⁹ S N Lederman, A W Bryant & M K Fuerst, *The Law of Evidence in Canada* (4th edn LexisNexis 2014), p. 69.

¹¹¹⁰ Aneked, 'Truth, Reconciliation & Reparations Commission (TRRC) Digest, Edition 6 ('*Aneked TRRC Digest*'), p. 45

¹¹¹¹ Jallow (2016), p. 26.

¹¹¹² Gambian Evidence Act, section 11(b); Jallow (2016), p. 99; M Klamberg, *Evidence in International Criminal Trials: Confronting Legal Gaps and the Reconstruction of Disputed Events* (Brill | Nijhoff 2013), p. 408. *See also*, *Prosecutor v. Delalić et al.*, ICTY- IT-96-21-A, Judgment, 20 February 2001 ('*Delalić et al.*, *Appeal Judgment*'), para. 458; *Prosecutor v. Ayyash et al.*, STL-11-01, *Official Transcript*, 16 January 2014, p. 19; Groome (2011), p. 41.

¹¹¹³ M Klamberg, 'Epistemological Controversies and Evaluation of Evidence in International Criminal Trials' in K Jon Heller *et al.* (eds.) *Oxford Handbook of International Criminal Law* (OUP 2020) p. 462.

¹¹¹⁴ *See e.g.*, *Prosecutor v. Brdjanin*, IT-99-36-T, Judgment, 1 September 2004 ('*Brdjanin Trial Judgment*'), para. 35; *Gbago & Blé Goudé Response to Defence Submissions on the Specific Factual Issues*, para. 56; *Prosecutor v. Lubanga*, ICC-01/04-01/06, *Judgment pursuant to Article 74 of the Statute*, 14 March 2012, paras 111, 988; *Prosecutor v. Katanga*, ICC-01/04-01/07, *Order for Reparations pursuant to Article 25 of the Statute*, 24 March 2017, paras 58, 61-62; *Prosecutor v. Katanga*, ICC-01/04-01/07 A3 A4 A5, *Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled "Order for Reparations pursuant to Article 75 of the Statute"*, 8 March 2018, para. 57.

¹¹¹⁵ *Prosecutor v. Stakić*, IT-97-24-A, Judgment, 22 March 2006 ('*Stakić Appeal Judgment*'), para. 219; *Prosecutor v. Lukić & Lukić*, IT-98-32/1-A, *Judgment*, 4 December 2012, paras 149, 208, 316. *See also*, *Prosecutor v. Ayyash et*

condition is that the conclusion at which the court arrives must be the only reasonable conclusion given the compilation (or even piece) of circumstantial evidence (i.e., the evidence must be established beyond reasonable doubt).¹¹¹⁶

Hearsay evidence is evidence of a statement made out of court and offered in court to prove the truth of the matter asserted in the statement.¹¹¹⁷ It can take the form of oral evidence or be documentary in nature (*see below*).¹¹¹⁸ Hearsay can be first hand, such as when a witness gives an account of information provided to him by another person; second hand; or more remote, such as when an account of information has passed between two or more persons before being conveyed to the witness who appears in court.¹¹¹⁹

In many common law jurisdictions, such as that of The Gambia's, hearsay evidence is generally inadmissible in criminal cases.¹¹²⁰ In Gambian domestic legislation, this exclusion has a threefold rationale, as follows:

- (i) the accuracy of the statement cannot be tested through cross examination;
- (ii) statements can be embellished with repetition; and
- (iii) admitting hearsay evidence creates an opportunity for the unchecked fabrication of evidence.¹¹²¹

In practice, common law and international jurisprudence on hearsay evidence has evolved such that the range of exceptions have practically nullified the exclusionary rule itself.¹¹²² Existing rationales for the exclusionary rule in The Gambia do not take into account the fact that hearsay is subject to the same (if not more stringent) evaluation as other testimonial or documentary evidence, ensuring an accurate reflection of its reliability and appropriate probative value. Witnesses, even those that come from oral cultures, have also been found to be more than

al., STL-11-01/T/TC, [Redacted Corrected Version of the Prosecution Final Trial Brief](#), 7 August 2018, paras 29, 32.

¹¹¹⁶ *Delalić et al.*, [Appeal Judgment](#), para. 458; *Stakić Appeal Judgment*, para. 219.

¹¹¹⁷ Gambian Evidence Act, section 19; [ICTY Manual on Developed Practices](#), pp. 106-107; Crown Prosecution Service, [Code for Crown Prosecutors](#).

¹¹¹⁸ [ICTY Manual on Developed Practices](#), p. 107; *Prosecutor v. Ruto & Sang*, ICC-01/09-01/11, Redacted Version of the Common Legal Representative for Victims' Joint Reply to the "Ruto Defence Request for Judgment of Acquittal" and to the "Sang Defence 'No Case to Answer Motion'", 29 January 2016, (*'Ruto & Sang Common LRV Joint Reply'*), paras. 44, 46.

¹¹¹⁹ [ICTY Manual on Developed Practices](#), p. 107.

¹¹²⁰ Gambian Evidence Act, section 20; Jallow (2016), pp. 142, 144.

¹¹²¹ Jallow (2016), p. 144.

¹¹²² *See e.g.*, A Goldman, 'Legal Evidence' in M Golding & W Edmundson (eds) *Blackwell Philosophy Guide to the Philosophy of Law and Legal Theory* (Blackwell Publishing Ltd 2005), p. 174.

capable of distinguishing what they personally witnessed and what they were told, if asked to make the distinction.¹¹²³

The importance of hearsay evidence is reflected in international practice. Given the general complexities of the investigation and prosecution of international crimes in diverse contexts, hearsay is not considered to be *per se* devoid of probative value or *per se* unreliable.¹¹²⁴

Trial Chambers of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda had the discretion to, and in practice invariably did, admit and rely on hearsay evidence, so long as it was relevant and probative to the case,¹¹²⁵ as did the Extraordinary Chambers of the Special Courts of Cambodia.¹¹²⁶ Rule 89(c) of the Special Court for Sierra Leone gave the Trial Chamber a broad discretion to admit evidence they considered relevant (they do not insist on probative value).¹¹²⁷ Similarly, the International Criminal Court ('ICC') Rules of Procedure and Evidence allow Chambers the authority to 'assess freely' all evidence submitted in order to determine its relevance or admissibility.¹¹²⁸

The admission of hearsay evidence does not indicate a finding as to its probative value,¹¹²⁹ and its weight is assessed in light of the totality of the evidence at the end of the trial.¹¹³⁰ That said,

¹¹²³ N Amoury Combs, *Fact-Finding Without Facts—The Uncertain Evidentiary Foundations of International Criminal Convictions* (CUP 2010), p. 94.

¹¹²⁴ *Prosecutor v. Katanga & Ngudjolo Chui*, ICC-01/04-01/07, [Prosecution's Submissions on Admissibility of Hearsay Evidence](#), 9 July 2010, para. 6.

¹¹²⁵ UN General Assembly, Rome Statute of the International Criminal Court (17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 ('[Rome Statute](#)'), articles 69 (3) and(4); ICTY, Rules of Procedure and Evidence, IT/32/Rev.7 13 May 2015 (as amended) ('[ICTY Rules of Procedure and Evidence](#)'), rule 89(c); ICTR, [Rules of Procedure and Evidence](#), IT/3/Rev.8 26 June 2000 (as amended), rule 89(c); Residual Special Court for Sierra Leone, [Rules of Procedure and Evidence](#), 4 December 2013 (as amended) ('[RSCSL Rules of Procedure and Evidence](#)'), rule 89 (c); Special Tribunal for Lebanon, [Rules of Procedure and Evidence](#), 20 March 2009 (as amended), rule 149(c); Extraordinary Chambers in the Courts of Cambodia, Internal Rules, Rev.8, 3 August 2011 ('[ECCC Internal Rules](#)'), rule 87 (1). *See also, from the ICTY: Prosecutor v. Aleksovski*, IT-95-14/1, Decision on Prosecution's Appeal on Admission of Evidence, 16 February 1999 ('[Aleksovski Decision on Prosecutor's Appeal on Admissibility of Evidence](#)'), para. 15; *Prosecutor v. Galić*, IT-98-29-AR73.2, [Decision on interlocutory appeal concerning Rule 92bis \(C\)](#), 7 June 2002, para. 27; *Prosecutor v. Gotovina et al.*, IT-06-90-T, Judgment, 15 April 2011 ('[Gotovina et al. Trial Judgment](#)'), para. 43; *Prosecutor v. Popović et al.*, IT-05-88-A, Judgment, 30 January 2015 ('[Popović et al. Appeal Judgment](#)'), para. 1307. *From the ICTR: Prosecutor v. Akayesu*, ICTR-96-4-A, Judgment, 1 June 2001 ('[Akayesu Appeal Judgment](#)'), paras 286; *Prosecutor v. Rutaganda*, ICTR-96-3-A, [Judgment](#), 26 May 2003, para. 34; *Prosecutor v. Kajelijeli*, ICTR-98-44A-T, Judgment and Sentence, 1 December 2003, ('[Kajelijeli Judgment and Sentence](#)'), para. 45. *From the SCSL: Prosecutor v. Brima et al.*, SCSL-04-16-PT, Decision on Joint Defence Motion to Exclude All Evidence from Witness TFI-277 pursuant to Rule 89(C) and/or Rule 95', 24 May 2005 ('[Brima et al. Decision on Joint Defence Motion](#)') paras. 12-13; *Prosecutor v. Brima et al.*, SCSL-04-16-T, [Judgment](#), 20 June 2007, para. 100. *From the ICC: Ruto & Sang Common LRV Joint Reply*, paras 37-41, 43-44, 46.

¹¹²⁶ [ECCC Internal Rules](#), rule 87(1); *Co-Prosecutors v. Kaing Guek Eav*, 001/18-07-2007/ECCC/TC, [Judgment](#), 26 July 2010, para. 43.

¹¹²⁷ [RSCSL Rules of Procedure and Evidence](#), rule 89 (c).

¹¹²⁸ ICC, Rules of Procedure and Evidence, reproduced from the *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002* (ICC-ASP/1/3 and Corr.1), part II.A ('[ICC Rules of Procedure and Evidence](#)'), rule 63(3).

¹¹²⁹ *Brima et al. Decision on Joint Defence Motion*, paras 12-13

courts must be satisfied of its reliability.¹¹³¹ International courts have considered the following as factors of reliability:

- (i) its voluntariness;
- (ii) whether it was first-hand or further removed;
- (iii) the absence of an opportunity to cross-examine the maker of the statement;
- (iv) the circumstances within which it arose;
- (v) truthfulness; and
- (vi) the trustworthiness of the evidence.¹¹³²

Exculpatory evidence

Not all evidence is necessarily evidence of guilt. Exculpatory evidence is evidence that may point to the innocence of the accused or disprove evidence of the prosecution.¹¹³³ In building an international crimes case, impartiality and objectivity are paramount. Prosecutors should be confident that every effort has been made to explore any exculpatory evidence.¹¹³⁴ No evidence should be ignored or disregarded because it does not support a case theory. If exculpatory evidence is found, prosecutors may need to revisit and reconsider their case theories. They also have a 'duty of disclosure', meaning that any exculpatory evidence must be made available to the defence in order to allow an accused the opportunity to draft the best defence possible.¹¹³⁵

Corroborative evidence

Corroborative evidence is evidence from which a reasonable inference can be drawn that confirms and supports other categories of evidence or in some material way can connect the

¹¹³⁰ See e.g., *Prosecutor v. Delalić*, IT-96-21-T, [Decision on the Motion of the Prosecution for the Admissibility of Evidence](#), 19 January 1998, para. 31: 'It should be emphasized that a decision by the Trial Chamber to admit evidence does not in any way constitute a binding determination as to the authenticity or trustworthiness of the documents sought to be admitted. These are matters to be assessed by the Trial Chamber at a later stage in the course of determining the weight to be attached to the evidence in question.'

¹¹³¹ *Gotovina et al.* [Trial Judgment](#), para. 43; *Ruto & Sang* [Common LRV Joint Reply](#), paras 44, 46; *Akayesu* [Appeal Judgment](#), para. 286.

¹¹³² *Aleksovski* [Decision on Prosecutor's Appeal on Admissibility of Evidence](#), para. 15; *Gotovina et al.* [Trial Judgment](#), para. 43; *Kajelijeli Judgment and Sentence*, para. 45; *Prosecutor v. Sesay et al.*, SCSL-04-15-T, [Judgment](#), 2 March 2009, para. 495; *Prosecutor v. Taylor*, SCSL-03-01-T, [Judgment](#), 18 May 2012 ('*Taylor Trial Judgment*'), paras 168–169.

¹¹³³ [Rome Statute](#), article 67(2).

¹¹³⁴ Groome (2011), p. 254.

¹¹³⁵ Under the Rome Statute, prosecutors at the ICC are obliged to identify, and disclose to the defence, all potentially exculpatory evidence: [Rome Statute](#), article 67(2). See also, [ICTY Manual on Developed Practices](#), pp. 61-63; ADC-ICTY, [Manual on International Criminal Defence: ADC-ICT Developed Practices within the framework of the War Crimes Justice Project](#) (UNICRI, ADC-ICTY & OHCHR 2020) ('[ADC-ICTY Manual on International Criminal Defence](#)'), pp. 64, 82-83.

relevant person with the offence.¹¹³⁶ Corroborative evidence strengthens or confirms what other evidence shows. It may provide explanations relating to other existing evidence in the case, and thereby strengthen its credibility and probative value.¹¹³⁷ Corroboration is one of the many potential factors relevant to the assessment of the appropriate credibility and weight to be accorded to the testimony of a witness.¹¹³⁸

The potential range of types and sources of corroborative evidence is vast and will depend upon the context in which the incident in question takes place. For example, in addition to evidence of a direct victim of a crime, corroborative evidence may come from the person(s) who reported the crime (if someone other than the victim); persons(s) who reported the incident; person(s) who saw the incident, heard it or heard about it; witnesses who had contact with the victim in the period leading up to the crime; witnesses who spoke with the victim after the crime, and from people including a victim's neighbours, colleagues, teachers, medical caregivers, emergency response personnel, co-detainees, etc.

In the Gambian context, for example, an article of the newspaper *The Point* (dated August 2012) contains the Government's statement regarding the execution of the above referred to nine prisoners by a firing squad, without due process considerations.¹¹³⁹ The information contained in the article, and the article itself could be relevant and add probative value to different aspects of the case, such as the murder and enforced disappearances of these victims (not all of whom had exhausted their right to appeal) and thus, be admissible in evidence.

Expert Evidence

Experts are persons with specialised skills and knowledge, acquired through training, who may be called to assist the court by dealing with issues that are beyond the understanding and experience of the average judge, such as specific issues of a technical nature, or requiring knowledge in a specific field.¹¹⁴⁰ Experts must be impartial¹¹⁴¹ to the case, and testify with

¹¹³⁶ Gambian Evidence Act, section 179.

¹¹³⁷ [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 226.

¹¹³⁸ *Prosecutor v. Dragomir Milošević*, IT-98-29/1-A, [Judgment](#), 12 November 2009, para. 215.

¹¹³⁹ See [Nine death row prisoners executed – Govt](#) (*The Point*, 28 August 2012).

¹¹⁴⁰ *Prosecutor v. Akayesu*, ICTR-96-4-T, Decision on a Defence Motion for the Appearance of an Accused as an Expert Witness, 9 March 1998 ('Akayesu [Decision on Defence Motion](#)'), p. 2; *Prosecutor v. Semanza*, ICTR-97-20-A, [Judgment](#), 20 May 2005, para. 303; *Prosecutor v. Simba*, ICTR-01-76-A, Judgment 27 November 2007 ('Simba [Appeal Judgment](#)') para. 74; *Prosecutor v. Nahimana et al.*, ICTR-99-52-A, Judgment, 28 November 2007 ('Nahimana et al. [Appeal Judgment](#)'), para. 198; *Prosecutor v. Brđanin*, IT-99-36-T, 3 June 2003 ('Brđanin [Decision on Prosecution's Submission of Statement of Expert Witness Ewan Brown](#)'); *Prosecutor v. Jokić*, IT-05-88-R77.1-A, [Appeal Judgment on Allegations of Contempt](#), 25 June 2009, para. 18; *Popović et al. Appeal Judgment*, para. 375; *Prosecutor v. Ntaganda*, ICC-01/04-02/06-1046-Red, Public redacted version of "Reply on behalf of Mr Ntaganda to 'Prosecution's response to 'Supplementary submissions on behalf of Mr. Ntaganda in relation to proposed Expert witnesses'", 23 February 2016, ('Ntaganda [Reply to Prosecution's Response to Submissions in relation to proposed Expert Witnesses](#)') para. 8, 11; *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Decision on Defence Preliminary challenges to Prosecution's expert witnesses, 9 February 2016 ('Ntaganda [Decision on Defence Preliminary Challenges](#)'), para. 7; *Prosecutor v. Ruto & Sang*, ICC-01/09-01/11, [Decision on Sang Defence Application to exclude expert Report of Mr. Hervé Maupeu](#), 7 August 2013, para. 11. See also, [ICTY](#)

‘utmost neutrality’ and scientific objectivity.¹¹⁴² Their opinions may help to contextualise and understand some of the available evidence and represent the situation in a more scientific and logical way,

There is no higher threshold for admissibility into evidence of an expert report than the standard admissibility requirements discussed earlier in this chapter.¹¹⁴³ It will be admitted into evidence on the basis of its relevance, determining its probative value and weighing this probative value against its potentially prejudicial effect”.¹¹⁴⁴

The Gambian Evidence Act also provides for the use of experts in cases in so long as their opinion is relevant and the grounds on which the opinion is based are also relevant.¹¹⁴⁵ This includes **but is not limited to**, experts in matters relating to:

- (i) foreign law;
- (ii) customs;
- (iii) arts;
- (iv) sciences;
- (v) identity of handwriting; and
- (vi) identity of fingerprints.

In international practice, experts have given evidence on a broad range of areas and issues, including, for example, ballistics, history, constitutional law, international relations, forensic medicine, and military command structures.¹¹⁴⁶

[Manual on Developed Practices](#), p. 25; S Choudhry [Women’s Access to Justice: A Guide for Legal Practitioners](#) (Council of Europe, October 2018) p. 20; UNODC, [Handbook On Effective Prosecution Responses To Violence Against Women And Girls](#) ([‘Criminal Justice Handbook Series 2014’](#)), pp. 42, 111.

¹¹⁴¹ [Ntaganda Reply to Prosecution’s Response to Submissions in relation to proposed Expert Witnesses](#), paras 8, 11, 14; [Ntaganda Decision on Defence Preliminary Challenges](#), para. 9; [ICTY Manual on Developed Practices](#), p. 25.

¹¹⁴² [Akayesu Decision on Defence Motion](#), p. 2; [Prosecutor v. Gacumbitsi](#), ICTR-2001-64-T, [Decision on expert Witnesses for the Defence Rules 54, 74, 89 and 94bis of the RPE](#), 11 November 2003; [Ntaganda Reply to Prosecution’s Response to Submissions in relation to proposed Expert Witnesses](#), para. 9; [Nahimana et al. Appeal Judgment](#), para. 198.

¹¹⁴³ See e.g., [Prosecutor v. Ruto & Sang](#), ICC-01/09-01/11, [Decision on Sang Defence Application to exclude expert Report of Mr. Hervé Maupéu](#), 7 August 2013 ([‘Ruto & Sang Decision on Sang Defence Application’](#)), para. 14. See also, [Brdanin Decision on Prosecution’s Submission of Statement of Expert Witness Ewan Brown](#).

¹¹⁴⁴ [Ruto & Sang Decision on Sang Defence Application](#), para. 14

¹¹⁴⁵ Gambian Evidence Act, section 65. See also, [Simba Appeal Judgment](#), para. 74.

¹¹⁴⁶ See e.g., [Prosecutor v. Galić](#), IT-98-29-T, [Decision on the Expert Witness Statements Submitted by the Defence](#), 27 January 2003.

7.3.2. Analysing the evidence: types of evidence

Evidence can come in many forms and has been broadly categorised as testimonial; documentary; physical;¹¹⁴⁷ and, in more recent years; audio-visual digital.¹¹⁴⁸ Many of these categories overlap but also complement and reinforce one another.¹¹⁴⁹ This section deals with some of these categories, and introduces open source evidence as a category discrete from digital evidence. Open source evidence transcends these different categories of evidence, as it refers to the medium by which evidence is discovered rather than the type itself. Table 28 presents the different types of evidence:

Type of Evidence	Description	Additional Information
Testimonial Evidence	Testimonial evidence may be defined as the evidence or statement(s) that a witness gives under oath whether written ¹¹⁵⁰ (in the form of a written declaration), oral, or through a recorded deposition. ¹¹⁵¹	As noted in section 7.3.1. under corroborating evidence, testimonial evidence may include not only the evidence of a victim, but a wide range of corroborative witnesses related to an incident under investigation. Experts will testify orally, to discuss and elaborate on the results of their analytical reports in court. Victims of crimes may deliver testimonial evidence on sentencing as victim impact statements.
Documentary Evidence	Documentary evidence is any evidence that can be introduced at a trial in the form of documents, as distinguished from oral testimony.	‘Documents’, as described by section 2 of the Gambian Evidence Act includes, but is not limited to: books; maps; plans; drawings; photographs; and anything that has recording capabilities or from which audio files and sounds may be stored. ¹¹⁵² The nature of ‘documents’ dealt with in international practice includes: laws; regulations; transcripts; newspapers; medical records; ¹¹⁵³ prison records; ¹¹⁵⁴ court records; ¹¹⁵⁵ public statements or announcements;

¹¹⁴⁷ Nystedt et al. (2011), p. 55; [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 143.

¹¹⁴⁸ See e.g., [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 143.

¹¹⁴⁹ [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 143.

¹¹⁵⁰ [ICTY Manual on Developed Practices](#), pp. 79-81.

¹¹⁵¹ See e.g., ICTY, [Information Booklet for ICTY Witnesses](#) (Victims and Witnesses Section 2007).

¹¹⁵² Gambian Evidence Act, section 2.

¹¹⁵³ Nystedt et al. (2011), p. 62

¹¹⁵⁴ Nystedt et al. (2011), p. 62

¹¹⁵⁵ Nystedt et al. (2011), p. 62

		<p>diaries;¹¹⁵⁶ orders; reports; minutes; decrees; and official logbooks from a wide range of sources and dealing with a wide range of information (such as vehicle usage, guard shift changes, and visitor logs, for example),¹¹⁵⁷ among others.</p> <p>Documents may be primary or secondary evidence,¹¹⁵⁸ with primary evidence referring to the document(s) produced for the court,¹¹⁵⁹ while secondary evidence referring to reproductions of primary evidence, as well as oral accounts of the document given by someone who has seen the document themselves.¹¹⁶⁰</p>
Physical Evidence	Physical evidence refers to objects, including materials detected through scientific means, that can be produced before a court. ¹¹⁶¹	Physical evidence can also refer to: documents; videos; photographs; tape-recordings; ¹¹⁶² and a range of other artefacts. ¹¹⁶³
Open Source	Open source information is	As a concept, open source information is ‘not defined by its specific source’. ¹¹⁶⁵ However, it can broadly be

¹¹⁵⁶ For instance, in the *Bagilishema* case, the defence tendered a letter written by the accused, contemporaneous to the time of the alleged offences, into evidence. One of the judges wrote in a separate opinion that ‘the accused certainly could not have envisaged facing a trial of this nature at the time he wrote the letter. Hence it enhances the credibility of the matters urged therein’: *Prosecutor v. Bagilishema*, ICTR-95-1A-T, Separate Opinion of Judge Asoka de Z. Gunawardana, 7 June 2001 (*‘Bagilishema Separate Opinion of Judge Asoka de A. Gunawardana’*), para. 19; *Nystedt et al. (2011)*, p. 63.

¹¹⁵⁷ *Nystedt et al. (2011)*, p. 62.

¹¹⁵⁸ Gambian Evidence Act, section 97.

¹¹⁵⁹ Gambian Evidence Act, section 98.

¹¹⁶⁰ Gambian Evidence Act, section 99.

¹¹⁶¹ F D’Alessandra *et al.*, ‘Handbook on Civil Society Documentation of Serious Human Rights Violations: Principles & Best Practice (Public International Law & Policy Group (‘PILPG’) 2016) (‘*PILPG Handbook*’), pp. 89-96. The ICC explicitly provides for the admissibility of video evidence as prior recorded testimony through *Rome Statute*, article 69(2) and *ICC Rules of Procedure and Evidence*, rule 68. *See also*, *Katanga Decision on the Prosecutor’s Bar Table Motions*, para 24(d). *See e.g.*, Gambian Evidence Act, sections 42-45, 113; *Nystedt et al. (2011)*, pp. 62-63; *Bagilishema Separate Opinion of Judge Asoka de A. Gunawardana*, para. 19; *Prosecutor v. Kordić & Čerkez*, IT-95-14/2-T, *Decision on Prosecutor’s Submissions concerning ‘Zagreb Exhibits’ and Presidential Transcripts*, 1 December 2000, para. 44.

¹¹⁶² The ICC explicitly provides for the admissibility of video evidence as prior recorded testimony through *Rome Statute*, article 69(2) and *ICC Rules of Procedure and Evidence*, rule 68. *See also*, *Prosecutor v. Katanga & Ngudjolo Chui*, ICC-01/04-01/07-2635, *Decision on the Prosecutor’s Bar Table Motions*, 17 December 2010 (*‘Katanga & Chui Decision on the Prosecutor’s Bar Table Motions’*), para 24(d): showing that outside of testimony, video evidence may be admissible ‘as evidence that speaks for itself’ if originality and integrity is established.

¹¹⁶³ *PILPG Handbook*, p. 90.

Evidence	information that is publicly available, including through request or purchase. ¹¹⁶⁴	split into online and documentary open source information. These categories are in turn further discussed below.
Documentary Open Source Evidence	Open source documentary information refers to documentary evidence accessible through public means, such as in print or online.	Documentary open source information can be very useful in establishing the background to a conflict as well as the extent to which certain information is known. Such as newspapers, microfiche materials, magazines, articles, reports; publicly made statements, testimonies, and press releases; public administration records, library holdings; books.
Online Open Source Evidence	Online open source information refers to information publicly available on the internet.	The reliability and authenticity of a given piece of online open source evidence could be demonstrated through its verification ¹¹⁶⁶ and authentication. ¹¹⁶⁷ Some examples are: online news articles, expert and NGO reports; images/videos posted on social media websites (Twitter, Facebook, YouTube, Instagram, LinkedIn, etc.); ¹¹⁶⁸ geospatial and satellite imagery, mapping data; leaked confidential documents; information available on websites, online forums, public WhatsApp Groups.
Digital and Audio-Visual Evidence	For the purposes of avoiding a lacuna, digital evidence can	Among other things, digital evidence may help establish the perpetrator's intent; their whereabouts at the time of a crime; relationship with other suspects;

¹¹⁶⁵ A Koenig, [The New Forensics: Using Open Source Information to Investigate Grave Crimes](#) (Human Rights Center, UC Berkeley School of Law 2017), p. 7.

¹¹⁶⁴ N Mehandru & A Koenig, [Open Source Evidence and the International Criminal Court](#) (Harvard Human Rights Journal, 15 April 2019).

¹¹⁶⁶ 'Verification is a term used within open source investigations. It refers to establishing that the content is what it alleges to be, and, if an image or video, that it was taken at a specified location, date and time': [Video as Evidence Field Guide](#) (WITNESS 2016) pp. 52.

¹¹⁶⁷ In the context of online open source evidence, authentication means ensuring that the online content has not been doctored or manipulated in one form or another. In order to achieve a higher degree of authenticity, it is always better to get the original piece of content from the poster.

¹¹⁶⁸ See 'Box 6: Peer experience—example of social media use' [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 152.

	be described as <i>any privately owned</i> digital or audio-visual content that would not otherwise be classified as open source information.	the existence of a common plan; or their pattern of movement. ¹¹⁶⁹ Photos or videos of the perpetrator can also help corroborate the victim testimony. ¹¹⁷⁰ Electronic health records; CCTV footage; privately held videos or photographs; evidence generated by private computers and/or cell phones, such as app data or emails; or internet search history are all examples of such evidence.
Telecommunications Evidence	Telecommunications evidence falls under the umbrella of audio-visual and digital evidence, but also covers a wide range of potential forms of information relating to telecommunications.	Telecommunications evidence can be helpful for corroboration and may provide indications of networks, such as familial ties or chains of command. Examples include: handset details (including applications and audio-visual files); communications service providers' records, such as: subscriber records; cell site information; billing information and payments; network reports; and financial history of the company; call data records, which may include metadata of the call but not content, among others. ¹¹⁷¹

Table 29: Types of evidence

7.3.3. Analysing the evidence: principles of admissibility

After considering the types of evidence and the categories it may fall into, it is also important to be familiar with the way evidence is treated during trial and the weight it can have, in order to ensure that it is used and presented in the most efficient, effective way. The rules that govern the entry of evidence at trial are known as 'principles of admissibility' and serve to determine whether or not particular items of evidence may be received by the court in support of a particular fact in issue.¹¹⁷²

Although it can be defined in a wide sense, the rules of admissibility vary depending on the judicial system. Common law systems, such as The Gambia, tend to be more strict, seeking to exclude, through predetermined 'exclusionary rules' (such as those relating to hearsay), that which is either irrelevant or potentially unreliable.¹¹⁷³ In contrast, civil law systems generally

¹¹⁶⁹ [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), pp. 152-153.

¹¹⁷⁰ [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 153.

¹¹⁷¹ All these types of telecommunications data were used in *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC. See Special Tribunal for Lebanon, [Primer on Telecommunications Evidence: Guide to Understanding the Testimony of Ayyash et al.](#)

¹¹⁷² *Admissibility*, Oxford Dictionary of Law (5th Ed OUP 2006), p. 13.

¹¹⁷³ See e.g., *Prosecutor v. Gbagbo & Blé Goudé*, ICC-02/11-01/15, [Decision on the submission and admission of evidence](#), 29 January 2016, para. 12

make determinations of relevance and probative value freely together with the weight considerations of the evidence submitted.¹¹⁷⁴ They have fewer technical rules of evidence.

International criminal rules of evidence are born of the combination of these two systems. For example, in the Rome Statute, the Court does not use the technical rules of the common law system, preferring instead the evidentiary flexibility of the civil law. That said, it still preserves the judge's authority to rule on the relevance and probative value as weighed against any prejudicial effect on trial fairness, should they choose to.¹¹⁷⁵ Reflective of its civil law influence, the threshold for relevance and probity in the ICC is rather low, as shall be demonstrated below.

In both international and domestic law, the admissibility of evidence is a matter of law for the judge. However, given the lack of juries in international criminal law, judges are both the gatekeepers of evidence and the decision makers.¹¹⁷⁶ This makes setting aside certain inadmissible pieces of evidence difficult but extremely important.

Admissibility in the ICC

Article 69 of the Rome Statute deals with evidence. Article 69(3) mandates parties to submit evidence relevant to the case,¹¹⁷⁷ whereas 69(4) speaks of probative value and the function of that as against subsequent prejudice caused by the evidence in consideration.¹¹⁷⁸

In *Lubanga*, a cumulative 3-step test was put forth for the admission of evidence, which is to be applied on a case-by-case basis:

- (i) Is the evidence prima facie relevant?
- (ii) Is the evidence of prima facie probative value?
- (iii) Does the probative value outweigh its potentially prejudicial effect?¹¹⁷⁹

Although the ICC has these cumulative parameters, it is flexible in its approach to admissibility. Apart from its mandatory exclusion of evidence that is 'obtained by means of a violation of this Statute or internationally recognised human rights' when 'the violation casts substantial doubt on the reliability of the evidence,' or if the 'admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings',¹¹⁸⁰ as well as the exception of prior or subsequent sexual conduct of a victim or witness,¹¹⁸¹ there are no automatic inclusion or

¹¹⁷⁴ D K Piragoff, 'Evidence', in R S Lee (ed.) *The International Criminal Court—Elements of Crimes and Rules of Procedure and Evidence* (Ardsley, NY: Transnational Publishers 2001) ('Piragoff (2001)'), pp. 351-4.

¹¹⁷⁵ [Rome Statute](#), article 69(3), (4), (7); [ICTY Rules of Procedure and Evidence](#), rule 89(D).

¹¹⁷⁶ A Wistrich & J Rachlinski, 'Implicit Bias in Judicial Decision Making How It Affects Judgment and What Judges Can Do About It' (Cornell Legal Studies Research Paper, 2017), p. 94.

¹¹⁷⁷ [Rome Statute](#), article 69(3).

¹¹⁷⁸ [Rome Statute](#), article 69(4).

¹¹⁷⁹ *Prosecutor v. Lubanga*, ICC-01/04-01/06-1399, Decision on the admissibility of four documents, 13 June 2008 ('[Lubanga Decision on the admissibility of four documents](#)'), paras 25–32.

¹¹⁸⁰ [Rome Statute](#), article 69(7).

¹¹⁸¹ [ICC Rules of Procedure and Evidence](#), rule 71.

exclusion criteria. The Rules of Procedure and Evidence also authorise the Court to ‘assess freely all evidence submitted in order to determine its relevance or admissibility.’¹¹⁸²

The court can choose between admitting the evidence or having the parties submit the evidence and leaving evaluations for a later stage. The factors for both of these assessments are the same.¹¹⁸³ They are identified and discussed below.

Concepts of admissibility: relevance

As noted above, relevant evidence is that which supports or disproves a ‘material issue’ in the case.¹¹⁸⁴ When relevance is assessed at trial, ‘material issues’ are those found in the indictment.¹¹⁸⁵ Relevance is a threshold requirement that must be met even before the court considers the value of the evidence proving or disproving a fact in issue.¹¹⁸⁶ Relevance is not a solitary concept and is **always** relative to the fact in issue. For this purpose, evidence, especially if indirect, must be contextualised to demonstrate its relevance.

Concepts of admissibility: probative value

Relevant evidence is that which makes a fact in question more or less likely. The concept of relevance contains an implicit requirement of probative value. Probative value (or ‘probative force’) is the degree to which the evidence makes an assertion more or less probable; in other words, it is the degree to which a piece of evidence can ‘prove or disprove a point in issue.’¹¹⁸⁷

In this sense, it involves a qualitative assessment of the cogency or convincingness of that evidence, taking account of its reliability, credibility, authenticity and other indicators on the evidence's overall believability. For example, a photo with a timestamp of someone at a place where a crime has taken place, and a video of the person committing the crime both support the fact that a crime may have been committed by the person. However, the video does so in a stronger way, as it can provide more and higher quality information about, and support for, the fact in issue.

¹¹⁸² [ICC Rules of Procedure and Evidence](#), rule 63(2).

¹¹⁸³ Piragoff (2001), pp. 351-4.

¹¹⁸⁴ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.13, Decision on Jadranko Prlić’s Consolidated Interlocutory Appeal Against the Trial Chamber’s Orders of 6 and 9 October on Admission of Evidence, 12 January 2009 (‘Prlić, [Decision on Admission of Evidence](#)’), para. 17; [US Federal Rules of Evidence](#), rule 401: Test for Relevant Evidence; [The Legal Concept of Evidence](#) (The Stanford Encyclopaedia of Philosophy, 13 November 2015); T Anderson, W Twining & D Schum *Analysis of Evidence* (2 ed CUP 2009) (‘Anderson *et al.* (2009)’), p. 385. A Digest of the Law of Evidence, A Digest of the Law of Evidence, (5th Ed, William Clowes & Sons, 1886) p. 2

¹¹⁸⁵ Prlić, [Decision on Admission of Evidence](#), para. 17.

¹¹⁸⁶ [Evidence Law: The Rule of Relevance and Admissibility of Character Evidence](#) (The Lawshelf.com).

¹¹⁸⁷ Anderson *et al.* (2009), p. 384.

When offering a document for admission, the moving party must show *prima facie* that the document is both relevant and has probative value.¹¹⁸⁸ Leading from that, evidence which is both relevant and probative must also enjoy some component of reliability.¹¹⁸⁹ Consequently, the two parameters determining probative value are reliability of the evidence and the amount it can influence determination of a matter at hand.¹¹⁹⁰

Concepts of admissibility: reliability

Reliability has been described as the 'invisible golden thread' running through all elements of admissibility.¹¹⁹¹ Yet, with no clear definition, the threshold for admissibility can vary from demonstrable apparent reliability,¹¹⁹² to strict inadmissibility due to lack of authenticity.¹¹⁹³ The reliability of a statement is relevant to its weight, but also factors into determinations of admissibility.¹¹⁹⁴

Reliability can be broken down into 'voluntariness, truthfulness and trustworthiness.'¹¹⁹⁵ Reliability is therefore not only about the evidence itself, but it is also dependent on the way it has been obtained. Article 69(7) of the Rome Statute precludes admission of evidence obtained by violations of human rights, if it causes substantial doubt on the reliability of the evidence or if it would be antithetical to the integrity of the proceedings.¹¹⁹⁶ While collecting evidence, this must be borne in mind. Additionally, if obtained in violation of a serious human right, for example torture, the reliability of confession or other testimonial evidence, would be seriously impacted.¹¹⁹⁷

¹¹⁸⁸ *Prosecutor v. Popović et al.*, IT-05-88-AR73.2, [Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness](#), 30 January 2008, para. 22; *Prosecutor v. Prlić et al.*, IT-04-74-AR73.16, [Decision on Jadranko Prlić's Interlocutory Appeal against the Decision on Prlić Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence](#), 3 November 2009, para. 33; *Prosecutor v. Bagosora et. al.*, ICTR-98-41-I, [Decision on Request to admit United Nations Documents into Evidence under Rule 89\(C\)](#), 25 May 2006, para. 2.

¹¹⁸⁹ *Prosecutor v. Tadić*, IT-94-1-T, [Decision on Defence Motion on Hearsay](#), 5 August 1996, paras 7, 15–16, 19.

¹¹⁹⁰ *Katanga & Chui* [Decision on the Prosecutor's Bar Table Motions](#).

¹¹⁹¹ *Prosecutor v. Delalić et al.*, IT-96-21-T, [Decision on Prosecution's Oral Requests for the Admission of Exhibit 155 into Evidence and for an Order To compel the Accused, Zdravko Mucić, to Provide a Handwriting Sample](#), 19 January 1998, para 32.

¹¹⁹² *Lubanga* [Decision on the admissibility of four documents](#), para. 30.

¹¹⁹³ *Katanga & Chui* [Decision on the Prosecutor's Bar Table Motions](#), para. 13.

¹¹⁹⁴ *Prosecutor v. Kordić & Čerkez*, IT-95-14/2-AR73.5, [Decision on Appeal regarding Statement of Deceased Person](#), 21 July 2000, para. 24.

¹¹⁹⁵ *Aleksovski* [Decision on Prosecutor's Appeal on Admissibility of Evidence](#), para 15.

¹¹⁹⁶ [Rome Statute](#), article 69(7).

¹¹⁹⁷ S O'Mara, 'The Captive Brain: Torture and the Neuroscience of Interrogation' (2018) 111 QJM: An International Journal of Medicine 73, pp. 73–78.

Once a piece of evidence is found to be reliable, the Court must also determine the significance of the evidence or the extent to which it will advance the Chamber's inquiries.¹¹⁹⁸ The Court in *Katanga* identified two ways in which evidence could be deemed significant:

- (i) by considerably helping the Chamber reach 'a conclusion about the existence or non-existence of a material fact' or;
- (ii) by helping the Chamber assess 'the reliability of other evidence in the case.'¹¹⁹⁹ A piece of evidence may be relevant but have little to no impact on the issues before the court and thus be deemed insignificant.¹²⁰⁰

Reliability is a broad concept. Accordingly, it embraces credibility as well as other issues, including observational accuracy and authenticity.¹²⁰¹

Credibility can be defined as the extent to which the source of the item of evidence can be trusted. The implicit requirement that a piece of evidence be prima facie credible 'is a factor in the assessment of its relevance and probative value'.¹²⁰² Accuracy is an important aspect of credibility. In the case of a document, evidence of credibility can refer to evidence of dates, names of recipients, signatures and seals.¹²⁰³ Additional factors for determining credibility include but are not limited to the role in the events, plausibility and clarity, inconsistencies with other evidence and probability of previous falsity.¹²⁰⁴ Although it does not have to be exhaustively considered, the court emphasises as a general rule that the more that is known about the evidence, the more probative force it possesses.

It is important to note that a piece of evidence can be credible even if inconsistent. For example, witness testimonies with inconsistencies or discrepancies have been accepted by international courts because the evidence, when taken as a whole, was considered to be reliable and credible.¹²⁰⁵

¹¹⁹⁸ C Giffard, [The Torture Reporting Handbook](#) (The Human Rights Centre, University of Essex 2000) ('Giffard (2000)'), paras 34-35.

¹¹⁹⁹ Giffard (2000), para. 34.

¹²⁰⁰ Giffard (2000), para. 35.

¹²⁰¹ Anderson *et al.* (2009), p. 385.

¹²⁰² *Prosecution v. Naletilić & Martinović*, IT-98-34-A, [Appeals Judgment](#), 3 May 2006, para. 402. *See further*, *Delalić et al.*, [Appeal Judgment](#), para. 20; *Prosecutor v. Popović et al.*, IT-05-88-T, Decision on Admissibility of Intercepted Communications, 7 December 2007 ('*Popović et al. Decision on Admissibility of Intercepted Communications*'), paras 33-34; *Prosecutor v. Karemera et al.*, ICTR-98-44-AR73.17, [Decision on Joseph Nzirorera's Appeal of Decision on Admission of Evidence Rebutting Adjudicated Facts](#), 29 May 2009, para. 15, fn. 38.

¹²⁰³ *Prosecutor v. Gotovina & Markac*, IT -06-90-A, [Public Redacted Version of the 21 June 2012 Decision on Ante Gotovina's and Mladen Markac's Motions for the Admission of Additional Evidence on Appeal](#), 2 October 2012, para. 26.

¹²⁰⁴ *Nahimana et al.* [Appeal Judgment](#), para. 194.

¹²⁰⁵ *Prosecutor v. Popović et al.*, IT-05-08-T, Judgment, 10 June 2010 ('*Popović et al.*, [Trial Judgment](#)'), para. 506; *Kunarac et al.* [Appeal Judgment](#), para. 309.

In *Ruto and Sang*, the Court stated that reliability involved factors of authenticity, deemed to be sufficient on the basis of the circumstances.¹²⁰⁶ Authenticity relates to whether a document is what it professes to be in terms of origin and/or source. This, along with proof of authorship, greatly influences the assessment of its weight.¹²⁰⁷

Authenticity also requires internal and external indicators confirming authenticity as well as a chain of custody, which is an important process that records the change in possession and control of a piece of evidence. However, history of origin is not a compulsory requirement if the evidence, on whole, demonstrates that it is authentic.¹²⁰⁸ This is ensured by a process of ‘authentication’ - the process by which documentary evidence is proven to be genuine and not forged.¹²⁰⁹ For the ICC, there are no provisions regulating authenticity, but while considering evidence, the more detail there is in terms of a **chain of custody**, the better it is to explain its authenticity and justify any gaps.

Concepts of admissibility: chain of custody

Chain of custody (also referred to as ‘provenance’ or ‘authorship’), is an important indicator of authenticity, and hence reliability, for courts in determining the admissibility of evidence.¹²¹⁰ It is

¹²⁰⁶ *Prosecutor v. Ruto & Sang*, ICC-01/09-01/11-1353, [Decision on the Prosecution’s Request for Admission of Documentary Evidence](#), 10 June 2014, para. 15.

¹²⁰⁷ *Prosecutor v. Martić*, IT-95-11-T, [Decision Adopting Guidelines on the Standards Governing the Admission of Evidence](#), 19 January 2006, para. 5.

¹²⁰⁸ *Prosecutor v. Orić*, IT-03-68-T, Judgment, 30 June 2006 (‘*Orić Trial Judgment*’), paras 27–28.

¹²⁰⁹ Anderson *et al.* (2009), p. 380; S Dubberley, A Koenig & D Murray, ‘Introduction: The Emergence of Digital Witnesses’ in S Dubberley, A Koenig & D Murray, *Digital Witness* (OUP, 2020), p. 10.

¹²¹⁰ *Prosecutor v. Bagosora et. al.*, ICTR-98-41-T, [Decision on admissibility of proposed testimony of witness DBY](#), 18 September 2003, para 21: ‘[...] the Chamber is making no assessment here of the reliability or credibility of the evidence. The standard for admissibility, however, is simply that the evidence is relevant and has the prospect of probative value. This evidence satisfies both of these conditions and does not improperly prejudice the Accused.’ However, see *Prosecutor v. Bagosora*, ICTR-98-41-A, [Judgment](#), 14 December 2011, para. 545: ‘Gatsinzi’s testimony contained a number of inconsistencies, speculations, and hearsay evidence, thereby lacking credibility and reliability, a point on which Bagosora also agrees.’ Therefore, an unbroken chain of custody is a significant factor of reliability for an international court. See also, *Prosecutor v. Blé Goudé*, ICC-02/11-02/11, [Decision on the confirmation of charges against Charles Blé Goudé](#), 11 December 2014, paras 14-15: ‘The Chamber has assessed the probative value of the relevant evidence, bearing in mind that due to the limited scope and purpose of the confirmation of charges proceedings, such assessment is limited and that, as recognised by the Appeals Chamber, the evaluation of the credibility of witnesses is “necessarily presumptive”. Indeed, the Chamber is mindful of the guidance of the Appeals Chamber that while a Pre-Trial Chamber may evaluate the credibility of witnesses, “it should take great care in finding that a witness is or is not credible”, as it considers that the credibility of witnesses can only be properly addressed at trial. The conclusions of the Chamber are based on the totality of the available evidence, considered in a system as a whole, regardless of which party originally tendered the evidence in the record of the case. Consistent with the established practice of Pre-Trial Chambers, the items of evidence referred to in the present decision are included for the sole purpose of providing the reasoning that underpins its determination. This is without prejudice to the relevance of other items of evidence than those referred to, which the Chamber has in any case considered thoroughly. More specifically, a lack of explicit reference to an item of evidence may signify that the finding to which it relates is already sufficiently supported by other pieces of evidence, or, conversely, that a certain finding, satisfactorily established in light of the evidence taken as a whole, is not negated by one or more other discrete items of evidence’.

predicated on providing a history of possession and control, and aids the court in assessing authenticity of the evidence.¹²¹¹ Chain of custody also requires evidence of secure, continuous possession from each individual who held custody of the evidence in question.¹²¹² Ideally, the 'chain' should not be broken.¹²¹³ Chain of custody commences at the moment of collection and extends past the time the evidence is used in court.¹²¹⁴ It records:

- (i) location and movement of that evidence (for example, detailing how the evidence was collected, stored or transported); and
- (ii) the history of those persons who had the evidence in their custody.¹²¹⁵

While chain of custody may be broken for varying reasons, these deficiencies can be remedied by corroboration. International courts have consistently stated that chain of custody is not necessarily an indispensable requirement for admissibility.¹²¹⁶ If the body of evidence as a whole demonstrates that the piece of evidence is authentic, an absence of a complete chain of custody is not fatal to that evidence's probative value.¹²¹⁷

As a consequence of this case-by-case analysis, cases from the *ad hoc* tribunals offer different answers to the question of chain of custody: some have allowed for evidence to be submitted without author testimony, while others have refused to admit even corroborating witness testimony without testimony from the author.¹²¹⁸ Although, due to the dissonance in admission

¹²¹¹ [Human Rights Electronic Evidence Study](#) (Center for Research Libraries: Global Network Resources, 2012), p. 51.

¹²¹² M H Graham, *Federal Rules of Evidence in a Nutshell* (3rd edn West Academic Publishing 1992) p. 402; [ICTY Manual on Developed Practices](#), p. 28.

¹²¹³ [ICTY Manual on Developed Practices](#), p. 28.

¹²¹⁴ [ICTY Manual on Developed Practices](#), p. 28. See Jallow (2016), p. 161 where the author explains that 'Real evidence can be objects and things which are physical in nature and are relevant to the act in case. One type of real evidence is, e.g., documentary evidence which comprises facts derived from or contained in documents, proved usually by the production of the document'.

¹²¹⁵ Black's Law Dictionary (9th edn Thomson Reuters Legal 2009), p. 260.

¹²¹⁶ Orić [Trial Judgment](#), para. 27.

¹²¹⁷ See e.g., Popović *et al.* [Decision on Admissibility of Intercepted Communications](#), paras 52, 69, 70, where the defendants claimed that it was possible that intercepts used as evidence were modified, tampered with, or simply produced after the war. However, particularly in light of the extensive cross referencing of the intercepts over a number of years, the Chamber was satisfied that the assertion that they were a massive fraud (on the part of BiH) was unsustainable. In para. 65 of their judgment (see *Prosecutor v. Popovic et al.*, Case No. IT-05-88-T, [Judgment](#) (volume 1) 10 June 2010) the Chamber found the intercepts to be *overall* probative and reliable. See further e.g., *Prosecutor v. Lubanga*, ICC-01/04-01/06-803, Decision on the Confirmation of Charges, 29 January 2007 ('*Lubanga Decision on the Confirmation of Charges*'), paras 96-98; Orić [Trial Judgment](#), para. 27; Popović *et al.*, [Trial Judgment](#), paras 64-66; *Brdjanin Trial Judgment*, paras 13, 34; *Prosecutor v. Tolimir*, IT-05-88/2-T, [Judgment](#), 12 December 2012, paras 67-70; *Taylor Trial Judgment*, para. 205.

¹²¹⁸ *Prosecutor v. Brdjanin & Talic*, IT-99-36-T, [Order on the Standards Governing the Admission of Evidence](#), 15 February 2002, para. 20. But see, *Prosecutor v. Renzaho*, ICTR-97-31-T, [Judgment and Sentence](#), 14 July 2009, para. 841: 'The Defence applied on 2 March 2007 to exclude the testimony of Prosecution Witness Kagame [...] submitting that it covered new material facts not included in the Amended Indictment. After hearing arguments from the parties, the Chamber denied the motion, stating that it also would render a written decision in light of the importance of the issue. [...] It rendered a written decision on 20 March 2007, denying a Defence motion to exclude Witness Kagame's testimony and granting the Prosecution request to admit as an exhibit the audio recording and its

criteria, there are no universal standards with regard to establishing provenance of evidence, in line with best practice it is nevertheless advisable to establish procedures to ensure an unbroken record detailing the handling of evidence prosecutors may intend using in court.¹²¹⁹

7.4. The process after case-building: selecting and prioritising international crimes cases

Having established a crime base and, using reliable, credible, and probative evidence, identified possible perpetrators, prosecutors will next need to take steps to choose which cases they will prosecute.

Dealing with violations involving multiple perpetrators in cases spanning lengthy time periods with large numbers of victims can be costly, time-consuming and resource-intensive.¹²²⁰ This can have an impact on domestic justice systems,¹²²¹ particularly those which, in transitional environments, may face legal, logistical, political and economic challenges in their functioning, and may be limited in the number of cases they can investigate and prosecute at any one time.¹²²²

These constraints may allow for an exercise of prosecutorial discretion in determining which cases to select and prioritise for investigation and prosecution. In The Gambia, this discretion lies with the Minister of Justice¹²²³ and should be guided by consistent, objective criteria. As the approach adopted for case selection and prioritisation can substantially affect the way justice will

transcription, along with translations thereof. They were found to have sufficient probative value. [...] The tape had been adequately authenticated and the manner in which it had been obtained was not problematic.’ The ICC has stated that the authenticity of a document is not a strict requirement for the evidence to be admissible before the Court: *Prosecutor v. Bemba*, ICC-01/05-01/08, [Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64\(9\) of the Rome Statute](#) of 6 September 2012, 8 October 2012, para 9: ‘The Chamber stresses that there is no strict requirement that every document be authenticated officially or by a witness in court. In the view of the Chamber, items can also be (i) self-authenticating, if they are official documents publicly available from official sources; (ii) agreed upon by the parties as authentic; (iii) prima facie reliable if they bear sufficient indicia of reliability such as a logo, letter head, signature, date or stamp, and appear to have been produced in the ordinary course of the activities of the persons or organisations who created them; or (iv) in case the item itself does not bear sufficient indicia of reliability, shown to be authentic and reliable by the tendering party through provision of sufficient information to enable the Chamber to verify that the documents are what they purport to be.’

¹²¹⁹ [ICTY Manual on Developed Practices](#), p. 28; ICC, Regulations of the Office of the Prosecutor, ICC-BD/05-01/09, 23 April 2009 (‘[ICC Regulations of the Office of the Prosecutor](#)’), regulation 22: Chain of Custody.

¹²²⁰ The Belfast Guidelines on Amnesty and Accountability (Transitional Justice Institute, University of Ulster 2013) (‘[The Belfast Guidelines on Amnesty and Accountability](#)’), p. 6.

¹²²¹ K Ainley & M Kersten, *Dakar Guidelines on the Establishment of Hybrid Courts* (2019) (‘[Dakar Guidelines](#)’), p. 58.

¹²²² [The Belfast Guidelines on Amnesty and Accountability](#), p. 8; ICC OTP, Policy Paper on Case Selection and Prioritisation (15 September 2016), (‘[ICC OTP Policy Paper on Case Selection and Prioritisation](#)’), paras 11-12.

¹²²³ Gambian Criminal Procedure Code, section 65(2): Public Prosecutors in The Gambia are subject to the direction of the Attorney General.

be received by victims and influence the perceived legitimacy of the process,¹²²⁴ setting out these criteria in a publicly available policy may ultimately avoid criticisms of bias or partiality.¹²²⁵

7.4.1. Prosecutorial discretion

At the ICC, The Office of the Prosecutor (‘OTP’) is obliged to exercise its prosecutorial discretion according to sound, fair and transparent principles and criteria,¹²²⁶ which include independence,¹²²⁷ impartiality,¹²²⁸ and objectivity:¹²²⁹

- (i) **Independence:** the independence, integrity and credibility of prosecutors is paramount in ensuring the legitimacy of prosecutions.¹²³⁰ However, the authority is expected to act independently and in the interests of justice.¹²³¹ Independence goes beyond not seeking or acting on instructions, and requires that prosecutorial decisions are not influenced or altered by the presumed or known wishes of any external actor(s),¹²³² which may undermine the independence of the prosecuting authority.¹²³³ In The Gambia, this may affect the weight prosecutors will ultimately place on TRRC recommendations in making their case-related strategic decisions.
- (ii) **Impartiality:** refers to the application of consistent processes, methods and criteria.¹²³⁴ Impartiality does not refer to equivalence of blame¹²³⁵ and may lead to different outcomes for different groups¹²³⁶ or individuals.
- (iii) **Objectivity:** Case selection should be an information and **evidence-driven** process, where the strength of a case is balanced against its weaknesses.¹²³⁷ This will include consideration of potentially exonerating circumstances.¹²³⁸

To be effective, any prosecutorial strategy for case selection must be shaped with practical realities in mind. This will mean assessing the types of cases, the available evidence and

¹²²⁴ M Bergsmo (ed), *Criteria for Prioritizing and Selecting Core International Crimes Cases* (FICHLR 2010) (*‘Bergsmo (2010)’*), p. 9.

¹²²⁵ *Dakar Guidelines*, p. 50.

¹²²⁶ *ICC OTP Policy Paper on Case Selection and Prioritisation*, para. 5.

¹²²⁷ *ICC OTP Policy Paper on Case Selection and Prioritisation*, para. 16.

¹²²⁸ *ICC OTP Policy Paper on Case Selection and Prioritisation*, para. 16; *Dakar Guidelines*, p. 29.

¹²²⁹ *ICC OTP Policy Paper on Case Selection and Prioritisation*, para. 16.

¹²³⁰ *Dakar Guidelines*, p. 29.

¹²³¹ *ICC OTP Policy Paper on Case Selection and Prioritisation*, para. 33; ICC OTP, *Policy Paper on the Interests of Justice* (September 2007), (*‘ICC OTP Policy Paper on the Interests of Justice’*), pp. 5-6. *See also*, ICC OTP, *Draft OTP Strategic Plan 2019-2021* (17 July 2019), paras 35-36.

¹²³² *ICC OTP Policy Paper on Case Selection and Prioritisation*, para. 17.

¹²³³ Judge J Korner, ‘Processing of War Crimes at the State Level in Bosnia and Herzegovina’ (OSCE, 16 June 2016), para. 65.

¹²³⁴ *ICC OTP Policy Paper on Case Selection and Prioritisation*, paras 19-20.

¹²³⁵ *ICC OTP Policy Paper on Case Selection and Prioritisation*, para. 20.

¹²³⁶ *ICC OTP Policy Paper on Case Selection and Prioritisation*, para. 20.

¹²³⁷ *ICC OTP Policy Paper on Case Selection and Prioritisation*, paras 21-22.

¹²³⁸ *ICC OTP Policy Paper on Case Selection and Prioritisation*, para 22.

resources (including staff), the capacity of the court, the amount of space available on the docket, and most importantly the need to exclude any political interference affecting the prosecutorial decisions.¹²³⁹ The exercise of prosecutorial discretion will also include considerations of the interests of justice.¹²⁴⁰ While the definition of interests of justice is **context based**, the ICC OTP has noted¹²⁴¹ it includes consideration of:

- (i) whether the case is of sufficient gravity¹²⁴² (according to the factors set out below);
- (ii) the interests of the victims in seeing justice done, as well as the protection of their safety, physical and psychological well-being, dignity and privacy.¹²⁴³ This may require a dialogue with the victims themselves, their representatives or other stakeholders in order to understand their interests and concerns.¹²⁴⁴ A gendered perspective to the overall strategy is essential for the protection of physical and psychological well-being, dignity and privacy of all victims;¹²⁴⁵
- (iii) the particular circumstances of the accused (including age or infirmity);¹²⁴⁶ and
- (iv) other justice mechanisms, such as institutional reform, domestic prosecutions or traditional justice.¹²⁴⁷

7.4.2. Case selection criteria

Generally, no single criterion will determine the selection or prioritisation of a case, instead in most circumstances, a combination of several factors will influence the decision.

7.4.3. Gravity

While gravity at the ICC refers to ‘most serious crimes within a given situation’ ‘of concern to the international community as a whole,’¹²⁴⁸ gravity is a **context based** analysis which includes qualitative and quantitative considerations¹²⁴⁹ involving the scale, nature, manner and impact of the crimes,¹²⁵⁰ as described below:

¹²³⁹ E Naughton ‘[Committing to Justice for Serious Human Rights Violations: Lessons for Hybrid Tribunals](#)’ (ICTJ 2018), p. 30.

¹²⁴⁰ [ICC OTP Policy Paper on Case Selection and Prioritisation](#), para. 33.

¹²⁴¹ In the framework of the term ‘interests of justice’ as used in articles 53(1)(c) and 53(2)(c) of the Rome Statute, dealing with, respectively, initiation of an investigation and initiation of a prosecution.

¹²⁴² [ICC OTP Policy Paper on the Interests of Justice](#), p. 5.

¹²⁴³ [ICC OTP Policy Paper on the Interests of Justice](#), p. 5.

¹²⁴⁴ [ICC OTP Policy Paper on the Interests of Justice](#), p. 6. *See also*, ICC OTP, [Draft OTP Strategic Plan 2019-2021](#) (17 July 2019), paras 35-36.

¹²⁴⁵ [ICC OTP Policy Paper on the Interests of Justice](#), p. 5.

¹²⁴⁶ [ICC OTP Policy Paper on the Interests of Justice](#), p. 7; [Bergsmo \(2010\)](#), p. 176.

¹²⁴⁷ [ICC OTP Policy Paper on the Interests of Justice](#), p. 7.

¹²⁴⁸ [ICC OTP Policy Paper on Case Selection and Prioritisation](#), para. 35.

¹²⁴⁹ [Dakar Guidelines](#), p. 21.

¹²⁵⁰ [ICC OTP Policy Paper on the Interests of Justice](#), para. 37.

Scale

Scale of the crime refers to factors such as number of victims, extent of harm caused, geographical reach and duration of the crimes.

Scale may refer to the number of direct and indirect victims, the extent of harm caused by the crimes, referring not only to the physical, but also the psychological harm caused to the victims or their families as well as their wider communities.¹²⁵¹ It can also refer to the geographic or temporal spread of the crimes (e.g., whether the crimes occurred intensely, over a short period of time, or whether they occurred more infrequently, but over a longer period of time).¹²⁵² Absolute numerical minimums are ill-advised and scale should be assessed on a case-by-case basis.¹²⁵³

Nature

This refers to the specific factual elements of each offence such as killing, rapes, other sexual and gender-based crimes.¹²⁵⁴ The nature of the crime may act as a guide for case-selection where it reveals particularly heinous acts or types of offending, such as sexual and gender-based crimes and crimes against children, that prosecutors wish to pay special attention to, for example because of their prominence in a particular context.¹²⁵⁵

*Manner of Commission*¹²⁵⁶

This requires a consideration of the context within which the crime occurred, and includes, among others,

- (i) the means employed to commit the crimes;
- (ii) the extent to which the crimes were systematic or result of an organised policy or plan. Among others, this will involve a consideration of patterns in the commission of the crimes, which may demonstrate their systematic or organised nature, and the state or organisational plans or policies aimed at the commission of crimes;
- (iii) the extent to which they resulted from an abuse of power or official capacity;
- (iv) whether the victims were particularly vulnerable (such as women, children, elderly or disabled);

¹²⁵¹ [ICC OTP Policy Paper on the Interests of Justice](#), para. 38; *Prosecutor v. Abu Garda*, ICC-02/05-02/09, Decision on the Confirmation of Charges, 8 February 2010 (*‘Abu Garda Decision on the Confirmation of Charges’*), para. 30.

¹²⁵² [ICC OTP Policy Paper on Case Selection and Prioritisation](#), para. 38; [ICTY Manual on Developed Practices](#), p. 15, para. 18.

¹²⁵³ [Dakar Guidelines](#), p. 21

¹²⁵⁴ [ICC OTP Policy Paper on Case Selection and Prioritisation](#), para. 39; p. 15, [ICTY Manual on Developed Practices](#), p. 15.

¹²⁵⁵ ICC OTP, Policy Paper on Sexual and Gender-Based Crimes (June 2014) (*‘ICC OTP Policy on Sexual and Gender-Based Crimes’*), para. 37.

¹²⁵⁶ *Abu Garda Decision on the Confirmation of Charges*, para. 30.

- (v) the existence of elements of particular cruelty;
- (vi) the existence of any discriminatory motives; and
- (vii) the use of rape or other forms of sexual violence.¹²⁵⁷

Impact

A finding of gravity may also be supported by an analysis of the broader social, economic, political impact and consequences of crimes on the affected communities.¹²⁵⁸ This will require a context-based analysis of the effect that crimes have had on the victims and society. Prosecutors should recall that these criteria should be considered as a whole to determine the gravity of an offence. Prosecutors may consider:

- (i) whether the crimes increased the vulnerability of their victims;
- (ii) whether the crimes instilled terror in their victims; and
- (iii) what level of social, economic or other damage was inflicted on the affected communities.¹²⁵⁹

Often the impact will depend on the society's perception of the crime, and may be understood by considering physical, but also the psychological harm caused to the victims or their families as well as their wider communities.¹²⁶⁰ In The Gambia for instance, the impact of the 'witch hunt' orchestrated by the Jammeh regime may be understood in the light of its effect on the wider community within The Gambia, as to its adverse effect on the victims' families, and their social standing within their respective communities.¹²⁶¹

7.4.4. Ordinary crime v. international crime

In the Gambian context, determination of gravity also requires a determination as to whether the case in question involves an ordinary crime or an international crime, as this may (among other things) impact the ultimate choice of forum within which the case might be heard. As discussed in detail in section 2.1 this will require an assessment of the contextual evidence.

The classification of a case as an ordinary crime does not mean it is de-prioritised. It may, for instance aid the investigation and analysis of domestic criminal and human rights violations, by providing the necessary contextual and/or linkage evidence for crimes against humanity cases to be prosecuted elsewhere. For discussion on the differences between categories of crimes, see section 2.1 above.

¹²⁵⁷ [ICC OTP Policy Paper on Case Selection and Prioritisation](#), para. 40; [Abu Garda Decision on the Confirmation of Charges](#), para. 30.

¹²⁵⁸ [ICC OTP Policy Paper on Case Selection and Prioritisation](#), para. 41; [Dakar Guidelines](#), p. 21.

¹²⁵⁹ [ICTY Manual on developed practices](#), p. 15.

¹²⁶⁰ [Abu Garda Decision on the Confirmation of Charges](#), para. 30.

¹²⁶¹ Aneked, 'Truth, Reconciliation & Reparations Commission (TRRC) Digest, Edition 10' ([Aneked TRRC Digest 10](#)), p. 33.

7.4.5. Degree of responsibility of the alleged perpetrator

As noted in section 7.2.1 international and internationalised courts and tribunals have generally focused on prosecutions for those ‘most responsible’ for international crimes.¹²⁶² Generally, this has meant high-level perpetrators responsible for ordering or otherwise facilitating the commission of international crimes.

However, whilst case selection should consider the position of the suspect in any leadership hierarchy and their role and level of involvement in the commission of those crimes,¹²⁶³ it should be stressed that the notion of who is ‘most responsible’ for an international crime, particularly in domestic proceedings, *does not* always equate with an individual’s rank. As such, decisions as to which perpetrators should be prioritised for prosecution should be taken on a case-by-case basis, depending on the available evidence.¹²⁶⁴ This may include whether or not an accused’s conduct was particularly grave or notorious,¹²⁶⁵ or whether a prosecution against them would ultimately help in building the evidentiary foundations for cases against higher-level perpetrators.¹²⁶⁶ Other criteria which may be considered in this regard include:

- (i) **group identity of the perpetrator:** targeting those belonging to a particular criminal collective or group (e.g., the Junglers) may be important in helping prosecutors address the broader criminal behaviour of that group as whole.
- (ii) **notoriousness/responsibility for particularly heinous acts:** prosecutors may wish to target individuals who have allegedly committed particularly heinous crimes and have reached a level of notoriety that contributes to the victimisation and terrorisation of the local population to a large extent. This will include both lower-ranking perpetrators and direct perpetrators who have acted with particular cruelty. Further indicators may include the seriousness of the offence, the nature and method of the acts, and the consequences of the offence(s).
- (iii) **role and culpability of accused:** this seeks to address the potential modes of criminal responsibility of an alleged perpetrator. For example, prosecutors may wish to ensure that those who committed crimes jointly with another accused are indicted for those crimes, or

¹²⁶² [ICC Regulations of the Office of the Prosecutor](#), regulation 34(1); [Statement By The Prosecutor Following The Withdrawal Of The Charges Against 14 Accused](#), ICTY Press Release CC/PIO/314-E (ICTY 8 May 1998); [SCSL Statute](#), article 15; Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, 27 October 2004, article 2 (limiting jurisdiction to ‘senior leaders of Democratic Kampuchea and those who were most responsible’ for crimes committed between 1975 and 1979).

¹²⁶³ [Case Mapping, Selection and Prioritisation of Conflict and Atrocity-Related Crimes](#), p. 13.

¹²⁶⁴ [ICC OTP Policy Paper on Case Selection and Prioritisation](#), para. 43.

¹²⁶⁵ [ICC OTP Policy Paper on Case Selection and Prioritisation](#), para. 42; [Draft OTP Strategic Plan 2019-2021](#), para. 27.

¹²⁶⁶ [ICC OTP Policy Paper on Case Selection and Prioritisation](#), para. 45; [ICTY Manual on Developed Practices](#), p. 14, para. 6

to use prosecutions against mid-level perpetrators to build cases against high-level perpetrators.¹²⁶⁷

7.4.6. Cases and charges representative of victimisation

The ICC OTP chooses cases and charges that constitute a representative sample of the main types of victimisation and of the communities which have been affected by the crimes.¹²⁶⁸ This context-based determination may serve as guidance to Gambian prosecutors in their consideration of the potential cases. In the Gambian context, prosecutors may therefore consider:

- (i) whether they wish to select cases representative of all victims,¹²⁶⁹ or to focus on certain types of crimes;¹²⁷⁰
- (ii) whether the offences in question were features of the previous regime;¹²⁷¹
- (iii) the emphasis a certain vulnerable group will be given in their case selection;¹²⁷²
- (iv) the emphasis on new areas of criminal law, and the resultant expansion of international criminal jurisprudence, such as dealing with the prosecution of the crime of enforced disappearance;¹²⁷³
- (v) whether the crimes in question have been traditionally under-prosecuted, such as sexual and gender-based crimes;¹²⁷⁴ and
- (vi) whether the crimes in question involve sexual or gender-based violence, which should be prioritised in order to highlight ‘the gravity of these crimes, thereby helping to end impunity for, and contributing to the prevention of, such crimes.’¹²⁷⁵

7.4.7. Other practical considerations

Additional case prioritisation criteria will include an assessment of certain practical considerations:

¹²⁶⁷ [Case Mapping, Selection and Prioritisation of Conflict and Atrocity-Related Crimes](#) (Case Matrix Network, June 2018), pp. 13-14.

¹²⁶⁸ [ICC Regulations of the Office of the Prosecutor](#), regulation 34(2) referred to in [ICC OTP Policy Paper on Case Selection and Prioritisation](#), para. 45.

¹²⁶⁹ [Case Mapping, Selection and Prioritisation of Conflict and Atrocity-Related Crimes](#) (Case Matrix Network, June 2018), p. 15.

¹²⁷⁰ [Dakar Guidelines](#), p. 58.

¹²⁷¹ [Dakar Guidelines](#), p. 58.

¹²⁷² [Dakar Guidelines](#), p. 58.

¹²⁷³ [Dakar Guidelines](#), p. 58.

¹²⁷⁴ [ICC OTP, Policy Paper on Case Selection and Prioritisation](#), para. 46; [ICC OTP Policy on Sexual and Gender-Based Crimes](#), para. 37.

¹²⁷⁵ [ICC OTP, Policy Paper on Case Selection and Prioritisation](#), para. 46.

- (i) whether the case is made out on the evidence and there is a reasonable prospect of conviction, and that the indictment is not merely issued because of public pressure;
- (ii) whether there is any investigative or prosecutorial value to higher-level perpetrator cases;
- (iii) the location and availability of additional evidence and any risks to its degradation;
- (iv) international cooperation and judicial assistance to support the Office's activities, particularly where witnesses and perpetrators are located in other countries;
- (v) the Office's capacity to effectively conduct the necessary investigations within a reasonable period of time;
- (vi) whether the costs of further investigations and prosecutions might be disproportionate to the possible outcome;
- (vii) the impact of investigations and prosecutions on the victims;
- (viii) the Court's ability to protect persons from risks that might arise from their interaction with the Office; and
- (ix) the potential to secure the appearance of suspects before the Court.¹²⁷⁶

The above considerations are in no hierarchical order to each other. The specific weight to be given to each individual criterion will depend on the circumstances of each case.¹²⁷⁷

¹²⁷⁶ [ICC OTP Policy Paper on Case Selection and Prioritisation](#), para. 51; [Bergsmo \(2010\)](#), pp. 9, 36, 176.

¹²⁷⁷ [ICC OTP Policy Paper on Case Selection and Prioritisation](#), para. 52; [Bergsmo \(2010\)](#), pp. 9, 52-53.

Chapter 8: Survivor-Centred Principles in Dealing with Victims and Witnesses

8. Introduction

This chapter highlights a number of best practice principles for dealing with victims of crime. Section 8.1. deals with the overarching general principle of ‘Do no harm’, whilst sections 8.2. - 8.5. examine the associated principles of ‘informed consent’, ‘information sharing’, ‘confidentiality’, and survivor centred access to justice. Having done so, Sections 8.6. – 8.8. go on to deal with survivor centred principles during the interviewing process, addressing the PEACE interview model and best practices for sexual violence and pre-trial interviews, respectively.

8.1 ‘Do no harm’

8.1.1 What does ‘Do no harm’ mean?

‘Do no harm’ is a basic principle of human rights monitoring¹²⁷⁸ in broad use within the fields of humanitarian and human rights law,¹²⁷⁹ and, more recently, in the international criminal justice sector.¹²⁸⁰ ‘Do no harm’ requires criminal justice actors to recognise the potential harmful impact of their interventions (from initial approaches right through to the trial itself) with victims and witnesses, and take steps to:

- (i) avoid exposing them to risk through their actions;¹²⁸¹ and
- (ii) mitigate their possible negative effects.¹²⁸²
- (iii) Implementing the principle of ‘Do no harm’ requires practitioners to have an understanding of the context they are working in.¹²⁸³ It means working to a victim-centred

¹²⁷⁸ OHCHR, ‘[Manual on Human Rights Monitoring](#)’ (2011) HR/P/PT/7/Rev1 (‘[OHCHR Manual on Human Rights Monitoring](#)’), p. 626.

¹²⁷⁹ See e.g., ‘Humanitarian Charter and Minimum Standards in Humanitarian Response’, Protection Principle 1: ‘Enhance People’s Safety, Dignity and Rights and Avoid Exposing Them to Further Harm.’ (‘[Protection Principles](#)’).

¹²⁸⁰ *Prosecutor v. Bemba*, ICC-01/05-01/08, [Observations relevant to Reparations](#), 31 October 2016, para. 22; [ICTY Manual on Developed Practices](#), p. 34.

¹²⁸¹ ‘Prosecuting International Crimes Series: Investigation Policy and Principles of Cooperation and Collaboration’ (Philippe Kirsch Institute June 7 2018) (‘[Investigation Policy and Principles](#)’); F D Alessandra *et al.*, ‘Handbook on Civil Society Documentation of Serious Human Rights Violations: Principles & Best Practice (Public International Law & Policy Group (‘PILPG’) 2016) (‘[PILPG Handbook](#)’), pp. 8, 21.

¹²⁸² S F Ribeiro & D van der Straten Ponthoz, ‘International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: Best Practice on the Documentation of Sexual Violence as a Crime or Violation of International Law’ (2nd ed UK Foreign & Commonwealth Office 2017) (‘[International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#)’), p. 85; Council of Europe Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence (11 May 2011) CETS No. 210 (‘[Istanbul Convention Explanatory Report](#)’), paras 116, 255; United Nations Office on Drugs and Crime (‘UNODC’) ‘Handbook on Effective Prosecution Responses to Violence Against Women and Girls’ (UN 2014) (‘[UNODC Handbook for Violence against Women and Girls](#)’), p. 25; [PILPG Handbook](#), pp. 8, 21; African Commission on Humans and Peoples’ Rights (‘ACHPR’), ‘The Guidelines on Combatting Sexual Violence and its Consequences in Africa’ (African Union (‘AU’) 2017) (‘[ACHPR Guidelines](#)’), p. 18.

approach,¹²⁸⁴ not exhibiting judgmental behaviour,¹²⁸⁵ never blaming a victim,¹²⁸⁶ and always prioritising the safety of the victims and witnesses over the evidence.¹²⁸⁷ ‘Do no harm’ and its related principles are core to the victim-centred interview techniques discussed in the later sections of this Chapter.

As part of a victim-centred approach, criminal justice actors should tailor their interventions with victims and witnesses to their rights, needs, wishes and risks, recognising their diverse abilities, challenges and vulnerabilities based on who they are and the context they are in.¹²⁸⁸ Measures designed to mitigate possible negative effects of these interventions should be based on an individualized assessment of the potential risks to the victim/witnesses, taking into account the specific nature of the crime, vulnerabilities of their situation, and identity.¹²⁸⁹ This is done through ‘risk assessments’, which are discussed in more detail in section 8.1.3. Crucially, in doing so, ‘Do no harm’ requires the practitioner to listen to the views of the victim or witness.

Particular attention should be paid to traumatized victims, and victims of sexual and gender-based violence and torture who, initially harmed by their perpetrators, can be further harmed by the criminal justice process,¹²⁹⁰ during which they may be subjected to unresponsive, insensitive, inadequate and poorly prepared interventions by police, prosecutors and judges.¹²⁹¹ ‘Do no harm’ requires criminal justice actors to recognise these negative behaviours and address them to reduce their negative effects.

¹²⁸³ OHCHR [Training Manual](#), p. 15; OHCHR, ‘Integrating a Gender Perspective into Human Rights Investigations: Guidance and Practice’ (UN 2018) ([‘OHCHR Guidance on Integrating Gender Perspective in Investigations’](#)) p. 25; International Criminal Tribunal for the Former Yugoslavia (‘ICTY’), ‘ICTY Manual on Developed Practices’ (International Criminal Tribunal for the former Yugoslavia (UNICRI Publisher 2009) ([‘ICTY Manual on Developed Practices’](#)), p. 34.

¹²⁸⁴ GBV Guidelines, ‘How to support survivors of gender-based violence when a GBV actor is not available in your area,’ (Humanitarian Response 2015) ([‘GBV Pocket Guide’](#)), pp. 2-3; United Nations Population Fund (‘UNFPA’), ‘9 Ethical Principles: Reporting Ethically on Gender-Based Violence in the Syria Crisis,’ (UN 2015), ([‘UNFPA 9 Ethical Principles’](#)); OHCHR, ‘Protection of victims of sexual violence: Lessons learned’ (UN 2019), ([‘OHCHR Lessons learned’](#)) pp. 5-6, 8-10, 13-15; ‘Draft Global Code of Conduct for Investigating and Documenting Conflict-Related Sexual Violence’ (2020), principle 1.3, ([‘Draft Murad Code’](#)).

¹²⁸⁵ [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 182; [GBV Pocket Guide](#), pp. 7, 16.

¹²⁸⁶ [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 172; S Paine MBE, ‘Rape: The Victim Experience Review’ (US Home Office 2009) ([‘Rape: The Victim Experience Review’](#)), p. 11.

¹²⁸⁷ [Investigation Policy and Principles; ICTY Manual on Developed Practices](#), p. 34.

¹²⁸⁸ [Draft Murad Code](#), principle 1.1.

¹²⁸⁹ [Investigation Policy and Principles](#).

¹²⁹⁰ OHCHR, ‘Latin America Model Protocol for the Investigation of Gender-Related Killings of Women (femicide/feminicide)’, (UN 2014) ([‘OHCHR Latin America Protocol’](#)), para. 61.

¹²⁹¹ US Department of Justice, National Hate Crimes Training Curricula- Student Manual ([‘Hate Crimes Training Curricula’](#)), pp. 50, 54, 60.

8.1.2. Who should observe the ‘Do no harm’ principle, and when?

‘Do no harm’ is based on the safety and dignity of victims of crime.¹²⁹² It engages investigators, police, prosecutors and judges and also applies to any person involved in the investigation of international crimes. This includes defence counsel, intermediaries, local communities, unofficial investigators and CSOs.¹²⁹³

‘Do no harm’ is an ongoing principle¹²⁹⁴ that underpins all stages of the criminal justice process and has been translated into concrete measures in dealing with victims/witnesses of crime, many of which are recommended as international best practice throughout this Manual. Properly implemented, “Do no harm” can enable victims of crime to have ownership of their story and experience¹²⁹⁵ in any accountability measures.

8.1.3. Risk assessment

What is a risk assessment?

‘Do no harm’ requires police, prosecutors, judges and other criminal justice actors to share responsibility for the protection of victims through all stages of the criminal justice process.¹²⁹⁶ This is done through a risk assessment. A risk assessment is one of the first¹²⁹⁷ and most important steps prosecutors should take in the dealing with victims. It is ongoing and should be repeated throughout the criminal justice process.¹²⁹⁸

A risk assessment is an individualised measure that should be completed on a case by case basis,¹²⁹⁹ and will deal with multiple levels and types of risks.¹³⁰⁰ The assessment should take

¹²⁹² [Investigation Policy and Principles](#).

¹²⁹³ [Investigation Policy and Principles](#); [OHCHR Training Manual](#), p. 15; [PILPG Handbook](#), p. 21.

¹²⁹⁴ [PILPG Handbook](#), p. 20.

¹²⁹⁵ [Draft Murad Code](#), principle 1.9.

¹²⁹⁶ Council of Europe (‘CoE’) Convention on preventing and combating violence against women and domestic violence (adopted 11 May 2011, entered into force 01 August 2014) CETS No.210 (‘[Istanbul Convention](#)’), article 56; [Istanbul Convention Explanatory Report](#), para. 260; CEDAW ‘General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19’ (14 July 2017) CEDAW/C/GC/35 (‘[CEDAW General Recommendation 35](#)’), para. 40(b).

¹²⁹⁷ [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 92; Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (b) (‘[Directive 2012/29/EU](#)’), article 22.1; Committee on the Elimination of Discrimination against Women (‘CEDAW’), ‘General Recommendation No. 35 on Gender-Based Violence Against Women, Updating General Recommendation No. 19, CEDAW/C/GC/35 (UN 2017) (‘[CEDAW General Recommendation No. 19](#)’), para. 40(b), [PILPG Handbook](#), p. 22.

¹²⁹⁸ [PILPG Handbook](#), p. 45; [Istanbul Convention](#), article 51; [Istanbul Convention Explanatory Report](#), para. 260; [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 92; Crown Prosecution Service, ‘Domestic Abuse Guidelines for Prosecutors’ (2020) (‘[Domestic Abuse Guidelines for Prosecutors](#)’).

¹²⁹⁹ [Directive 2012/29/EU](#), para. 22; European Institute for Gender Equality, ‘Principle 4: Adopting an intersectional approach’ (‘[Risk Assessment and management Principle 4: Adopting an intersectional approach](#)’) para. 260.

¹³⁰⁰ European Institute for Gender Equality, ‘Step 1: Define the purpose and objectives of police risk assessment’ (‘[Risk Assessment and Management Step 1: Define the purpose and objectives](#)’).

into account the individual characteristics of the victim (i.e., their gender, age and other intersectional factors), the nature of the crime, the circumstances of the crime and the context in which it took place, as well as their relationship to the perpetrator.¹³⁰¹ The weight that these characteristics carry within the risk assessment will vary depending on the context of the individual situation. The risk assessment should also include the victim's own assessment of risk.¹³⁰²

Recognising that continued contact with a victim/witness could increase their risks,¹³⁰³ prosecutors and police should ensure that each successive intervention includes an assessment of anything that might have changed as a result of the previous interactions. Among others, prosecutors should consider the following possibilities when conducting risk assessments:

- (i) retaliation, intimidation or threats by alleged perpetrators, their families and supporters against victims, witnesses and their families;¹³⁰⁴
- (ii) punishment, including physical violence, by members of the victim/witness' immediate community, family or caregiver;¹³⁰⁵
- (iii) re-traumatization;¹³⁰⁶
- (iv) particular risks of reporting an act of sexual violence, including those faced by vulnerable groups and those with intersectional factors¹³⁰⁷ such as lack of social support, isolation, gender identity or sexual orientation, ethnic background, age or immigration status (among others).¹³⁰⁸ Women may be subjected to coercive pressure to force victims/witnesses to reconcile with perpetrators.¹³⁰⁹ In addition, in cases alleging domestic violence, evidence of coercive or controlling behaviour, environments, or escalating violence should factor into the risk assessment.¹³¹⁰ For example, many victims of domestic sexual violence have been subjected to repeated assaults;¹³¹¹

¹³⁰¹ [Directive 2012/29/EU](#), paras 22.2, 22.3; [UNODC Handbook for Violence against Women and Girls](#), p. 54.

¹³⁰² European Institute for Gender Equality, 'Step 2: Identify the most appropriate approach to police risk assessment', (['Risk Assessment and Management Step 2: Identify the most appropriate approach'](#)); [OHCHR Lessons learned](#), p. 12.

¹³⁰³ [ICTY Manual on Developed Practices](#), para. 48.

¹³⁰⁴ [PILPG Handbook](#), p. 39.

¹³⁰⁵ [PILPG Handbook](#), p. 39.

¹³⁰⁶ [PILPG Handbook](#), p. 39.

¹³⁰⁷ [Istanbul Convention](#), article 46(c); [Istanbul Convention Explanatory Report](#), paras 87, 238; European Institute for Gender Equality, 'Step 3: Identify the most relevant risk factors for police risk assessment' (['Risk Assessment and Management Step 3: Identify the most relevant risk factors'](#)).

¹³⁰⁸ [Istanbul Convention](#), article 46(c); [Istanbul Convention Explanatory Report](#), paras 87, 238; [Risk Assessment and Management Step 3: Identify the most relevant risk factors](#).

¹³⁰⁹ [PILPG Handbook](#), p. 39.

¹³¹⁰ [Istanbul Convention Explanatory Report](#), para. 260; [Risk Assessment and Management Step 3: Identify the most relevant risk factors](#); [OHCHR Lessons learned](#), p. 55, Table 5.

¹³¹¹ [Istanbul Convention Explanatory Report](#), para. 260.

- (v) victims or witnesses may be rejected by family members or the community, resulting, for instance, in isolation, or, as occurs often in the case of sexual and gender-based violence, abandonment of children.¹³¹² They may be stigmatised or isolated.¹³¹³ Understanding the social attitudes and gender-dynamics within the context will enable practitioners to accurately assess risks; and
- (vi) arrest and punishment, (e.g., when certain acts are criminalized);¹³¹⁴

How and when should risk assessments be completed?

Because ‘Do no harm’ is an ongoing principle, and given the risks inherent in the Gambian context, the obligation to monitor and assess risks arises prior to, and extends beyond, a specific intervention or interaction with a victim or witness.

Risk assessments are conducted in three steps.¹³¹⁵ Step 1 is identification. To the extent possible, prosecutors should identify all potential threats which could arise from their intervention that are capable of causing harm to the victim or witness, as well as their families and the broader community.¹³¹⁶ In doing so, they should identify the nature and source of the threat;¹³¹⁷

Step 2 is assessment, and involves calculating the likelihood of threats becoming a reality, and the severity of the impact of the threats posed to individuals, infrastructure and information.¹³¹⁸ At this stage, it is necessary to take into account the specific needs of vulnerable individuals (*see* section 5.5.1) who are less likely to defend themselves.¹³¹⁹ Assessments of risk should be based on objective and reliable information concerning potential threats.¹³²⁰ In particular, prosecutors should consider the likelihood of repeated violence, including deadly violence, and adequately address the seriousness of the situation, especially if such threats have been made to victims or their families;¹³²¹

¹³¹² [PILPG Handbook](#), p. 39.

¹³¹³ ‘Principles for Global Actions: Preventing and Addressing Stigma Associated with Conflict-Related Sexual Violence’ (UK Foreign and Commonwealth Office 2017) ([‘Principles for Global Actions: Preventing and Addressing Stigma Associated with Conflict-Related Sexual Violence’](#)), pp. 7, 57; [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 26.

¹³¹⁴ [PILPG Handbook](#), p. 39; [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 127.

¹³¹⁵ [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 93.

¹³¹⁶ [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 85; [Istanbul Convention Explanatory Report](#), para. 255.

¹³¹⁷ [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), pp. 93, 127.

¹³¹⁸ [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 93.

¹³¹⁹ [Istanbul Convention](#), article 46(c); [Istanbul Convention Explanatory Report](#), paras 87, 238.

¹³²⁰ IICI, ‘Victims and Witnesses: Support, Protection, Compensation and Participation’ (2018) ([‘IICI Victims and Witnesses Support’](#)), pp. 10-11. *See also*, *Prosecutor v. Katanga*, ICC-01-04- 01-07-475-ENG, 13 May 2008, [First Decision on the Prosecution Request for Authorisation to Redact Witness Statements](#), paras 44, 54-55.

¹³²¹ [Istanbul Convention Explanatory Report](#), 260; *Opuz v. Turkey*, App. No. 33401/02, (ECtHR, 9 June 2009) para. 96.

Step 3 is mitigation. Here, prosecutors should assess the measures that can be put in place to reduce or counter the identified risks and implementation of such measures. Measures should be proportionate and different levels of protection may be made available for different levels of risk,¹³²² which will vary according to the context and available infrastructure of the justice process. In the context of prosecutions arising from the Truth, Reconciliation and Reparations Commission (‘TRRC’) testimonies, for example, it may be appropriate to create a victims/witness unit dedicated to the protection and support of prosecution and defence victims and witnesses.¹³²³

Risk mitigation may also require designing a coordinated safety plan for victims, particularly of those vulnerable and high risk,¹³²⁴ which may involve the local judiciary ordering protective measures such as (where possible and practicable): voice distortion; face distortion; pseudonyms; video testimony; and the relocation of proceedings to another site to hear witnesses, if doing so is necessary for their safety.¹³²⁵

8.2. Informed consent

8.2.1. What is informed consent?

Linked to ‘Do no harm’, ‘prior informed consent’ is an ethical principle grounded in the right to self-determination and respect for personal autonomy.¹³²⁶ In the context of the investigation and prosecution of international crimes, informed consent involves criminal justice actors:

- (i) proactively and carefully explaining the different stages of the criminal justice process to a victim or witness in a culturally appropriate and context-specific way;
- (ii) making clear how their information will be used at each stage of the process, including the consequent risks to their safety and security; and, having done so
- (iii) asking if they still agree to participate.¹³²⁷

This means presenting the information in a manner and form that the victim or witness will understand. In practice, for example, this might mean that victims or witnesses who speak

¹³²² ICTY Manual on Developed Practices, para. 53.

¹³²³ Dakar Guidelines p. 33.

¹³²⁴ International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 93; Istanbul Convention Explanatory Report, paras 64, 261.

¹³²⁵ Dakar Guidelines p. 34. See also, section 177, Gambian Criminal Offences Bill, 2020; ACHPR, ‘Principles and Guidelines on the Rights to Legal Assistance and Fair Trial in Africa’, (AU 2003) (‘ACHPR Principles and Guidelines on the Rights to Legal Assistance and Fair Trial in Africa’), sections 2-3.

¹³²⁶ PILPG Handbook, p. 24; Ontario Association of Chiefs of Police, Canadian Framework for Collaborative Police Response on Sexual Violence (OACP 2019) (‘Canadian Framework for Collaborative Police Response on Sexual Violence’) p. 15; International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 89; GBV-Sub Cluster (Turkey Hub-Syria), ‘Standard Operating Procedures for Gender-Based Violence Prevention and Response’ (November 2018) (‘Standard Operating Procedures for Gender-Based Violence Prevention and Response’), p. 35.

¹³²⁷ International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 10.

different languages may require translators or forms of non-verbal expression to ensure the meaning of informed consent is fully understood. It also means that all explanations should be appropriate to the level of education, knowledge and understanding of the victim/witness, taking into account any customs and traditions, such as collective identities, which may impact on the way victims or witnesses understand and agree to participate in criminal justice processes.

Informed consent ensures that victims of crime maintain full control over their experiences and are informed, willing participants in the criminal justice process. This is particularly important in cases of sexual violence.¹³²⁸ It allows them time to reflect on the potential consequences of providing information¹³²⁹ and is therefore important in order to build a victim's trust.¹³³⁰

8.2.2. When and how should informed consent be obtained?

Informed consent should be explicit and ongoing. It should be obtained before gathering any information from your interviewee and should be reaffirmed before every successive intervention,¹³³¹ including: recording any interview on devices; taking notes of any interview; taking photographs; medical or other examinations; scanning or otherwise reproducing any documents or other evidence the victim/witness might have; referring them to any support services, or sharing their information with third parties (among others).¹³³²

Where these interventions involve different actors, it will be important to ensure that information delivered to the victims or witness remains clear and consistent. Where appropriate, this may mean doing so through a *pro forma* template. Where practical and in those cases where the victim or witness is able to write, they should be asked to indicate in writing whether they consent to disclosure of their information/evidence to the specific justice mechanism, whether local, national or international. This may be done, for example, within the body of any witness statement. Where this is not possible, the consent may be audio-recorded.¹³³³

Informed consent should be voluntary,¹³³⁴ meaning that the victim or witness should not be coerced or put under any pressure to provide consent. This may be difficult to achieve in certain situations in The Gambia, where police stations, courthouses and prosecutor's offices are public locations with little or no expectation of privacy. Interviews or interventions conducted in these settings therefore risk exposing victims or witnesses to coercive circumstances. Consequently, in these situations, prosecutors should recognise the possible negative effects these kinds of

¹³²⁸ [PILPG Handbook](#), p. 24; [Canadian Framework for Collaborative Police Response on Sexual Violence](#), p. 15; [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), pp. 89-90; [Standard Operating Procedures for Gender-Based Violence Prevention and Response](#), p. 35.

¹³²⁹ [PILPG Handbook](#), p. 24.

¹³³⁰ [Canadian Framework for Collaborative Police Response on Sexual Violence](#), p. 16.

¹³³¹ [PILPG Handbook](#), pp. 23-24.

¹³³² [PILPG Handbook](#), p. 23; Phillip Kirsch Institute, [Prosecuting International Crimes Series: Investigation Policy and Principles of Cooperation and Collaboration](#) (Phillip Kirsch Institute, 7 June 2018).

¹³³³ [PILPG Handbook](#), p. 24.

¹³³⁴ [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 89.

interview environments may have in securing voluntary informed consent and wherever possible, take steps in mitigation. This may include trying to speak to the victim/witness alone in a safe, private location, where they are not influenced by others (*see* section 8.8).

When explaining and obtaining informed consent, prosecutors and practitioners should not hurry. Make sure the victim/witness has sufficient time to make a considered decision and ask any questions they wish (*see* section 8.8). Explain to the victim/witness that they are free to leave and withdraw from the process at any time (*see* section 8.8).

It is recommended that wherever possible, prosecutors undertake the following steps to ensure informed consent:¹³³⁵

- (i) make sure the victim or witness is informed and understands what they are consenting to;
- (ii) provide the victim or witness with full, clear, understandable, objective and honest information about their range of options, rights and risks to allow them to make their own informed choices whether to engage or not, and on what terms;¹³³⁶
- (iii) ensure that the victim or witness understands the implications (benefits and risks) of participating in the justice process, such as the difference between their involvement in TRRC investigations and criminal trials;
- (iv) ask the victim or witness about their security concerns (for those who had previously given evidence before the TRRC, ask them whether they had any concerns as a result of that testimony);
- (v) discuss what measures can realistically be put in place to protect the victim or witness, and ensure they understand the risks that remain (*see* section 8.1.3).¹³³⁷
- (vi) check that the victim or witness has understood the information you have provided and precisely what they are consenting to by asking them to explain what they have understood and clarify when necessary;¹³³⁸
- (vii) be aware of factors that may impede the ability to give informed consent, such as literacy level, age or disabilities that inhibit understanding. Take measures to enable consent (such as gaining the consent of a legal guardian or carer where appropriate). If this is not possible, do not attempt to gain consent and stop the planned activity;

¹³³⁵ See e.g., Syria Justice and Accountability Centre, ‘SJAC Gender & SGBV Documentation Policy’ (Syria Accountability, February 2015) (‘[SJAC Gender & SGBV Documentation Policy](#)’), pp. 10-11; [Standard Operating Procedures for Gender-Based Violence Prevention and Response](#), p. 36; [GBV Pocket Guide](#), p. 91.

¹³³⁶ [Draft Murad Code](#), Principle 1.4.

¹³³⁷ See [Directive 2012/29/EU](#), articles 3, 4.

¹³³⁸ [Directive 2012/29/EU](#), article 3.

- (viii) use a language that is understood by the victim or witness and provide interpreters if necessary and appropriate. If none are available, understand that true informed consent cannot be given;¹³³⁹ and
- (ix) avoid unrealistic promises given to the victim/witness regarding the benefits of their participation in the justice process such as guarantees of bringing the perpetrator to justice or available protective measures.¹³⁴⁰

It is important to note that even when prior informed consent has been obtained, criminal justice actors still have the ongoing responsibility of assessing the risk of harm to the person providing the information.¹³⁴¹

8.3. Sharing information

The preceding sections, ‘Do no harm’ and ‘Informed Consent’ are based on respect for a victim’s ability to freely make their own decisions. In order to empower and enable them to do so, it is important that investigators, prosecutors and judges establish a practice of pro-actively informing victims about their rights; their case; their safety and security (including any changes in the perpetrator’s custodial situation) and the progress of the investigation (or court proceedings) in a language the victim understands, and support them in making the best decisions they can.¹³⁴² They should ensure that information sharing with victims is not delayed by procedural or other bureaucratic barriers. Information for the victim should be shared promptly, as early as possible and on an ongoing basis, and in a manner that does not undermine any criminal proceedings (such as information about other victims, for example).

8.4. Confidentiality

Confidentiality is not just an ethical obligation – it is a legal imperative¹³⁴³ and an operational necessity. Confidentiality requires investigators, prosecutors and judges to protect not only the information they gather about victims throughout all stages of the criminal justice process, but to protect their privacy.¹³⁴⁴ It is an important means of avoiding safety and security risks, secondary

¹³³⁹ [Directive 2012/29/EU](#), article 7; [Istanbul Convention Explanatory Report](#), para. 291; [Handbook on Effective Prosecution Responses to Violence Against Women and Girls](#), p. 51.

¹³⁴⁰ [SJAC Gender & SGBV Documentation Policy](#), p. 11; [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), pp. 180, 239; [OHCHR Protection of victims of sexual violence: Lessons learned](#), p. 5.

¹³⁴¹ [OHCHR Training Manual](#), p. 8.

¹³⁴² [Directive 2012/29/EU](#), preamble, para. 26, articles 4-6; [Istanbul Convention](#), article 56(1); [Istanbul Convention Explanatory Report](#), paras 285-286; OSCE Office for Democratic Institutions and Human Rights, [Opinion on the Draft Amendments to the Legal Framework on Preventing and Combatting Domestic Violence in Georgia](#) (OSCE ODIHR 2013) pp. 12, 17; UNODC, [Handbook on Effective Prosecution Responses to Violence Against Women and Girls](#) (United Nations New York 2014), p. 44; [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 88.

¹³⁴³ See Criminal Procedure Bill 2020, section 177; [Istanbul Convention](#), articles 1, 18, 56(1)(a) and (f).

¹³⁴⁴ [PILPG Handbook](#), p. 23.

and repeat victimisation, intimidation, retribution and retaliation, and stigmatisation,¹³⁴⁵ and is particularly important in dealing with vulnerable categories of victims. Protecting confidentiality ensures safety and security, promotes trust¹³⁴⁶ and empowerment, and will be a key step in getting victims to disclose information or testify.

Concerns about confidentiality, safety and security will vary from individual to individual and will be highly context specific. By way of example, specific confidentiality concerns may arise due to the certain intersectional factors such as those relevant to the victims/witnesses' sexual orientation, gender identity, HIV/AIDS status, or due to them being a sex worker, undocumented migrant, victim of human trafficking, or, particularly in the Gambia, an alleged witch.

Victims of sexual and gender based violence crimes may have particular concerns about information being shared, including negative consequences stemming from retaliation by family members or the local community, coercive pressure to marry assailants or lie about what happened, and sometimes punishment or arrest in situations where sexual activity outside of marriage or homosexual sex is condemned (*see* section 5.5.).¹³⁴⁷

Nonetheless, there are limits to confidentiality (that should be clearly explained to victims or witnesses, and their informed consent to continue with the process should be obtained).¹³⁴⁸ For example, disclosure of information to investigators or courts will often mean that it will be subsequently disclosed to any accused or their defence counsel.¹³⁴⁹ Public media reporting of testimony, even when confidentiality measures have been implemented, may still identify a victim/witness – in The Gambia's small, close-knit society multiple attributes, though seemingly unattributable on their own, could aggregately identify a victim/witness who wishes to remain anonymous.

Confidentiality concerns and measures to protect personal data and information must be discussed with the victim/witness when attempting to gain their informed consent for their participation and any ongoing activities (see above). This requires criminal justice actors to:

- (i) **ask** the victim or witness if they have any specific concerns or suggestions regarding confidentiality;
- (ii) **explain** the conditions and limitations of confidentiality and ensure that the victim or witness gives their informed consent as to how the information may be used. In particular, possible disclosure to criminal justice authorities or investigative mechanisms (whether

¹³⁴⁵ [Directive 2012/29/EU](#), preamble, para. 54, article 21.

¹³⁴⁶ [PILPG Handbook](#), p.28; Amnesty International and CODESRIA 'Monitoring and Reporting Human Rights Violations in Africa – A Handbook (Ukweli Series, Amnesty International 2000) (['Ukweli Handbook'](#)), p. 35.

¹³⁴⁷ [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 95.

¹³⁴⁸ [PILPG Handbook](#), p. 28-29.

¹³⁴⁹ *See e.g.*, ICC, Rules of Procedure and Evidence, reproduced from the *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court*, First session, New York, (3-10 September 2002) ICC-ASP/1/3 and Corr.1 (['ICC Rules of Procedure and Evidence'](#)), section II.

national or international) and what this means for the confidentiality of information should be explained;¹³⁵⁰

- (iii) ensure the victim or witness **understands** the risks of providing information and **provide** information about procedures in place in the possible event of a security breach; and
- (iv) **ask** the victim or witness how they would like confidentiality to be approached, including any specific concerns or measures they would like to be implemented (e.g., how they would like to be contacted in a way that respects their privacy, where they would like interviews to take place, and how they would like to be approached in public, if at all) (*see* section 8.6).¹³⁵¹

8.5. Referrals

Wherever possible, criminal justice actors should establish pathways to social and other support networks to facilitate victim access.¹³⁵² Referrals may need to occur prior to participation in the investigation, for example when the victim requires immediate medical, psychological or security assistance. Referrals may also need to occur after interacting with the investigation if it has been emotionally difficult, traumatic or puts the victim/witness at additional risk.¹³⁵³

Referrals should never be dependent on participation in the investigation or justice process.¹³⁵⁴

Support services should be confidential and discrete.¹³⁵⁵ Referral pathways should be identified based on the individual characteristics and needs of the victim/witness.¹³⁵⁶ Referred services should be neutral and independent from prosecutorial authorities.¹³⁵⁷ This can be enhanced through practitioners working locally with partners within the victims' community.¹³⁵⁸

Wherever possible, victims of sexual violence should be enabled to access services facilitating their recovery from sexual violence, from the first stages of the investigation,¹³⁵⁹ throughout and after any criminal proceedings.

¹³⁵⁰ [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 96.

¹³⁵¹ [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 95.

¹³⁵² [Directive 2012/29/EU](#), article 8(2); [Istanbul Convention](#), article 56(1)(c); [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), pp. 14, 16, 94, 164; [Istanbul Convention Explanatory Report](#), paras 138-142, 255; Alberta Justice and Solicitor General, Sexual Violence Police Advisory Subcommittee, [Best Practice Guide for Law Enforcement Investigations into Sexual Violence](#) (Government of Alberta 2018), p.10; [Directive 2012/29/EU](#), preamble, paras. 38, 40, articles 8-9; [Hate Crimes Training Curricula](#), pp. 50, 54.

¹³⁵³ [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 98.

¹³⁵⁴ [Directive 2012/29/EU](#), article 8(5).

¹³⁵⁵ [Directive 2012/29/EU](#), article 8(2); [Principles for Global Actions: Preventing and Addressing Stigma Associated with Conflict-Related Sexual Violence](#), p. 52.

¹³⁵⁶ [OHCHR Protection of victims of sexual violence: Lessons learned](#), pp. 4-5.

¹³⁵⁷ [OHCHR Protection of victims of sexual violence: Lessons learned](#), p. 4.

¹³⁵⁸ [OHCHR Protection of victims of sexual violence: Lessons learned](#), pp. 4-5.

¹³⁵⁹ [Directive 2012/29/EU](#), article 8.2; [Istanbul Convention](#), articles 18(2), 20; [Hate Crimes Training Curricula](#), pp. 50, 54.

Best practice suggests that when criminal justice actors engage with victims of rape and other acts of sexual violence, they do so knowing what discrete formal and informal social, legal, medical services and other services are available for the victim in order to ensure they provide the most suitable referral options.¹³⁶⁰

8.6. Survivor centred best practices in interviewing: the PEACE model

Victim or witness interviewing in The Gambia is generally the responsibility of police, while prosecutor interaction with victims or witnesses tends to take place within the context of ‘Pre-trial Interviews’ (known as ‘witness proofing’ in international practice). Both will be discussed in this section, as even though the goals of the two processes are different, there is some overlap in terms of methodology. In the event post TRRC accountability measures take place within a framework which calls for prosecutors to conduct victim or witness interviews, an understanding of the PEACE interview methodology will provide a useful foundation for this newer aspect of their work.

The PEACE¹³⁶¹ methodology is a framework for investigative interviewing based on best practice which was developed in England at the beginning of the 1990s and is now internationally accepted as an effective interview model which can be used with a wide range of interviewees in all types of interview situations. The PEACE interview methodology incorporates the principle of ‘Do no harm’.

The model is broken up into five stages from which its acronym is derived: (i) Planning and preparation; (ii) Engage and Explain; (iii) Account; (iv) Closure; and (v) Evaluation.¹³⁶²

8.6.1. Planning and preparation

A successful interview does not just happen. It needs to be adequately planned, prepared and structured.¹³⁶³ A properly prepared interview has the potential to empower victims, will lead to a more fully developed investigation, and will enable charging decisions that fully reflect the scope of the criminality.¹³⁶⁴

¹³⁶⁰ [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 98; [Istanbul Convention Explanatory Report](#), paras 146-148; [OHCHR Protection of victims of sexual violence: Lessons learned](#), p. 15.

¹³⁶¹ [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 163; [PILPG Handbook](#), pp. 97-98.

¹³⁶² M Schollum, [Review of Investigative Interviewing: Investigative Interviewing: The Literature](#) (New Zealand Police, September 2005), pp. 43 *et seq.*

¹³⁶³ [PILPG Handbook](#), pp. 23, 98.

¹³⁶⁴ See [Directive 2012/29/EU](#), article 23.2 (b).

Do you need to interview?

As a first step, practitioners should assess the state of the investigation and determine whether they need to conduct the interview.¹³⁶⁵ ‘Do no harm’ involves practitioners taking measures to avoid unnecessary, repeated interviews and multiple statements.¹³⁶⁶ Practitioners should therefore ask themselves whether the evidence of the identified witness is essential for their case,¹³⁶⁷ and, where the witness has been interviewed previously, what added benefit interviewing again will bring to that case, in light of the recognition that multiple interviews can result in additional trauma to victims and witnesses.¹³⁶⁸ In order to avoid such re-traumatisation, practitioners may consider using previously-recorded evidence given by your witness to prove your case in court.

In situations in which the victim has given previous statements, assessments regarding the necessity of interviewing again will involve collecting, reviewing and critically analysing those statements, any related statements by other witnesses, and documentary and other evidence to understand the case.¹³⁶⁹ In the context of Jammeh era violations this will involve the collection and analysis of TRRC statements and testimony, media interviews, and depositions made on oath with the Economic Community of West African States (‘ECOWAS’) court¹³⁷⁰ (among others).

Making contact

The chosen method of approach will likely flow from the risk assessment. Practitioners should consider if they have sufficient information on how they can safely, securely and *discretely* contact or approach their interviewee in a manner designed to attract as little attention as possible¹³⁷¹ in order to avoid putting that interviewee or anyone else at risk, which might arise through something as simple as eavesdropping.

Intermediaries

Practitioners may wish to consider the use of intermediaries, such as reliable, trusted civil society organisations (‘CSOs’), to identify potential victims or witnesses,¹³⁷² liaise with the community, and overcome social and cultural barriers.¹³⁷³ This may be especially appropriate if witnesses are

¹³⁶⁵ [ICTY Manual on Developed Practices](#), p. 21.

¹³⁶⁶ [ICTY Manual on Developed Practices](#), p. 22; [Directive 2012/29/EU](#), article 20; [Istanbul Convention](#), article 49(1); [Istanbul Convention Explanatory Report](#), para. 255; [CEDAW General Recommendation 35](#), para. 21.

¹³⁶⁷ [ICTY Manual on Developed Practices](#), p.21.

¹³⁶⁸ [Draft Murad Code](#), principles 5.4 – 5.5.

¹³⁶⁹ [Draft Murad Code](#), principle 5.7.

¹³⁷⁰ See e.g., *Ousain Darboe et al. v. The Republic of The Gambia*, Judgment No. ECW/CCJ/APP/27/1, 20 January 2020.

¹³⁷¹ [ICTY Manual on Developed Practices](#), p. 21; [OHCHR Guidance on Integrating Gender Perspective in Investigations](#), p. 19; [OHCHR Training Manual](#), p. 15.

¹³⁷² [Dakar Guidelines](#), pp. 54-55.

¹³⁷³ [PILPG Handbook](#), p. 53.

apprehensive about interacting with police or other state authorities. If so, their use should be guided by:

- (i) the definition of their status;
- (ii) the scope of their involvement;
- (iii) ethical expectations for intermediaries' engagement with victims and witnesses.¹³⁷⁴

Working with intermediaries trusted by the victim community may boost the capacity and credibility of local or other accountability mechanisms.¹³⁷⁵

Planning the interview

Effective interview planning requires practitioners to know their interviewee.¹³⁷⁶ This means having a familiarity with their: age; literacy; personal and family situation; home environment; religion or faith (in order to take time for prayer into account); ethnicity; physical and mental health; sexual orientation; any disability which might affect the risk assessment; and the agreed strategy for handling their privacy, safety and security, and presenting their evidence.¹³⁷⁷

A first step in developing the interview plan will be for investigators and prosecutors to look at what has been alleged: the nature of the crimes; what the charges (or potential charges) are; the key elements of those offences; and what is needed to satisfy those elements.¹³⁷⁸

Practitioners should accept that their information may not be complete and identify any gaps in the evidence which could be filled by this witness. They should ask themselves, for example, whether aggravating circumstances have been investigated; whether checks have been made into whether the violence was, or is, systematic; and/or whether, in sexual violence cases, the existence of coercive circumstances has been sufficiently explored.

Based on their research, practitioners should decide what the aims and objectives of the interview are¹³⁷⁹ and should prepare the interview plan accordingly, including: the range of topics to be covered; points necessary to prove the elements of the alleged crimes; any potential defences; and lead evidence (among others).¹³⁸⁰

¹³⁷⁴ [Dakar Guidelines](#), pp. 55.

¹³⁷⁵ [Dakar Guidelines](#), pp. 62.

¹³⁷⁶ [Investigative Interviewing](#) (UK College of Policing 2013) ('[UK College of Policing Investigative Interviewing](#)'); ADC-ICTY, [Manual on International Criminal Defence: ADC-ICT Developed Practices within the framework of the War Crimes Justice Project](#) (UNICRI, ADC-ICTY & OHCHR 2020) ('[ADC-ICTY Manual on International Criminal Defence](#)'), p. 75.

¹³⁷⁷ [UK College of Policing Investigative Interviewing](#).

¹³⁷⁸ [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 125.

¹³⁷⁹ [UK College of Policing Investigative Interviewing](#).

¹³⁸⁰ [UK College of Policing Investigative Interviewing](#).

All necessary documents or other potential exhibits that might be needed during the interview should be prepared in advance.¹³⁸¹ In addition, a tentative outline of questions should be drawn up, which may seek to elucidate:¹³⁸²

- (i) personal information about the victim/ witness;
- (ii) the date, time, location and other circumstances of an act of sexual violence;
- (iii) the description of the incident;
- (iv) the description of the injuries sustained during an act of sexual violence;
- (v) any information about an alleged perpetrator.¹³⁸³

Practitioners may also consider arranging for another person to take notes during the interview to allow them to fully focus on the victim's/witness' story whilst also having an accurate record of their account of events.¹³⁸⁴ It is important that the interviewers agree on their respective roles and maintain those during the interview.¹³⁸⁵

Interview location and environment

Practitioners should consider how a victim or witness is going to perceive the interview location and its surrounding environment. In doing so, they might consider whether:

- (i) the location is discreet;¹³⁸⁶
- (ii) it is an environment where they are and feel safe to speak freely (not only during the interview, but on arriving and leaving);¹³⁸⁷
- (iii) there are other people at the interview location who will recognise the interviewee; and
- (iv) those people can see or hear your conversation.

The timing/ease of access/distance of the location for the interviewee should also be considered,¹³⁸⁸ especially given that, for those with confidentiality concerns, their travel to the

¹³⁸¹ [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), pp. 164-166; Women's Initiatives for Gender Justice, *Gender in Practice: Guidelines & Methods to address Gender Based Crime in Armed Conflict* (WIJG, 2005) ('[WIGJ Gender in Practice](#)'), p. 37; [PILPG Handbook](#), p. 98.

¹³⁸² This is by no means an exhaustive list. [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 165; [WIGJ Gender in Practice](#), pp. 39-45.

¹³⁸³ This is by no means an exhaustive list. *See also*, [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 165; [WIGJ Gender in Practice](#), pp. 39-45.

¹³⁸⁴ [WIGJ Gender in Practice](#), p. 37.

¹³⁸⁵ [UK College of Policing Investigative Interviewing](#).

¹³⁸⁶ [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 239.

¹³⁸⁷ [Istanbul Convention](#), article 50; [Istanbul Convention Explanatory Report](#), para. 258; [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), pp.165, 239; [Canadian Framework for Collaborative Police Response on Sexual Violence](#), pp.14, 16; [Ukweli Handbook](#), p. 29.

¹³⁸⁸ [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 165

interview location, or interaction with unfamiliar police or prosecutors at their home may reveal their identity.

In The Gambia, complainants may be summoned to police stations or prosecutor's offices for their interviews. Both are busy, public areas. Police stations in particular have no private interview rooms and for many victims locations are still associated with the agencies involved in the abuses under the Jammeh regime. This is a disincentive to reporting crimes, and particularly so for persons who may have been victims of acts of sexual violence. Such locations should, if possible, be avoided for interviewing, particularly in cases involving sexual violence.¹³⁸⁹

A victim-centred approach guided by international best practices and the principle of "Do no harm" would be, wherever possible, to provide safe, private interview spaces.¹³⁹⁰ Practitioners should consider whether the circumstances warrant doing telephone interviews or interviews via the internet. If possible, internet-based interviews will allow prosecutors to observe the demeanour of witnesses who may be giving testimony. They will also be cost-effective.¹³⁹¹

As noted above under the heading *Intermediaries*, local, established CSOs who have a relationship of trust with the victim community in The Gambia may also be able to play a constructive role in creating safe spaces where they can interview and document evidence of violations.

Parent/guardian/support person presence during the interview

Interviewees should be asked whether they would like to have a support person present during the interview.¹³⁹² This should be someone the victim trusts,¹³⁹³ but preferably not a witness or potential witness. In certain sexual violence cases where practitioners suspect coercive circumstances or incidents of domestic violence, this support person should not be a member of the interviewee's family. This may be a situation where local CSOs can offer discrete but specialised support. The presence of a guardian or caregiver may be required for persons who are ill, elderly, or with certain disabilities.

While the support person should have no part in the interview, and only be present during the *Engage and explain phase* (below),¹³⁹⁴ there may be cases where a lawyer may need to be present during the interview. This may arise in interviews of perpetrators or insiders (such as a

¹³⁸⁹ [PILPG Handbook](#), p. 100; [Ukweli Handbook](#), p. 66.

¹³⁹⁰ [Directive 2012/29/EU](#); [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 165; [OHCHR, Integrating Gender Perspectives into Human Rights Monitoring](#), p. 15.

¹³⁹¹ [ADC-ICTY Manual on International Criminal Defence](#), p. 75.

¹³⁹² [Directive 2012/29/EU](#); [Protocol on Sexual Violence Crimes](#), pp. 7, 10; [OHCHR Protection of victims of sexual violence: Lessons learned](#), pp. 5, 15; [Ukweli Handbook](#), p. 66; [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 167.

¹³⁹³ [Preventing and Combating Domestic Violence against Women, A learning resource for training law enforcement and justice officers](#) (Council of Europe, January 2016), p. 43; [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 167.

¹³⁹⁴ [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 167.

fellow soldier within the same unit, for example). If this is the case, the witness' lawyer may need to be present for the entire interview.

Avoid interviewing witnesses together

Witnesses should be spoken to one at a time; other witnesses should be excluded from the room.¹³⁹⁵

Recording the interview

Practitioners should decide whether or not they need to record the interview. While audio or video recording is a more reliable method of documentation, depending on the circumstances of the interview, they may consider taking notes.¹³⁹⁶

Potential confidentiality of information/safety and security issues

The parameters and limits of confidentiality should be explained to the witness in a manner and language that they understand before any information is on the record.¹³⁹⁷ Witnesses may be extremely unwilling to speak out about what happened to them, particularly in the Gambian context because of factors noted above. It will likely only be by conducting an interview that the investigator can determine whether the interviewee has legitimate safety and security concerns.¹³⁹⁸ If, during the interview, the victim discloses a credible threat of violence or violent acts of revenge by the perpetrator, practitioners should know what their response is going to be in advance.

If the witness is vital to a prosecution, and the security concerns are legitimate, practitioners should make sure they know what protective measures are available to the witness and explain those to them (e.g., those listed in section 177 of the Criminal Procedure Bill 2020).¹³⁹⁹

8.6.2. Engage and explain

This is the first phase of the actual interview. The purpose of this step is to create a positive atmosphere, develop trust, encourage conversation and secure informed consent.

Practitioners should create an environment that encourages people to talk. Attention should be paid to seating arrangements,¹⁴⁰⁰ and the layout of the room should be open and unthreatening. This gives the interviewee power and shows them respect and ensures that the layout of the room

¹³⁹⁵ [OHCHR Protection of victims of sexual violence: Lessons learned](#), pp. 5, 15; [Ukweli Handbook](#), p. 66.

¹³⁹⁶ [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 164; Sergeant J Archambault and K A Lonsway, 'Interviewing the Victim: Techniques Based on the Realistic Dynamics of Sexual Assault' (February 2006, updated June 2019) (['Interviewing the Victim: Techniques Based on the Realistic Dynamics of Sexual Assault'](#)), pp. 45-46.

¹³⁹⁷ [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 96.

¹³⁹⁸ [ICTY Manual on Developed Practices](#), p. 21.

¹³⁹⁹ [ICTY Manual on Developed Practices](#), p. 21.

¹⁴⁰⁰ [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 166.

does not prove intimidating to victims, thereby mirroring the unequal power relationship within which the crime took place. This is particularly relevant for victims who might have been subject to detention, torture, rape or other forms of sexual violence. During the interview, interviewees should be asked if they are comfortable and whether they would like to have anything removed or changed (including the interviewer).¹⁴⁰¹

It should be explained to the interviewee that they have control over the situation, and can stop the interview, take a break or terminate their participation in the process at any time.¹⁴⁰² Interviewers should realise that the interview may be the first time that the interviewee has recounted the incident and should be prepared for them becoming distressed or displaying post-traumatic stress syndrome symptoms.¹⁴⁰³

It is during this phase where practitioners can obtain informed consent (*see* section 8.2). Part of this involves practitioners introducing themselves and explaining why they are there and what the objectives of the interview are.¹⁴⁰⁴ The presence of two interviewers is desirable if the interview is not tape-recorded or filmed, as one member of the interview team will be able to take notes or transcribe what is said, intervening only if the main interviewer has omitted something relevant.¹⁴⁰⁵

Interviewees should be told why it is important for the practitioner to listen to what they have to say. Practitioners should ensure to ask (if they do not already know) whether the interviewee has made previous statements or interviews, and with whom these topics have been discussed.¹⁴⁰⁶ If the witness has spoken with anyone about the incident in question, this may provide an additional potential witness. If interview preparation has been done properly, practitioners should be able at this point to explain the nature of the questions.¹⁴⁰⁷ This is also part of informed consent.¹⁴⁰⁸ Questions about sexual violence, for example, are very intimate and may be difficult for victims to discuss as they may create feelings of embarrassment or shame. In certain communities these feelings may be amplified.¹⁴⁰⁹ In these situations, practitioners should help the victim or witness to deal with feelings of shame and guilt by reinforcing that they are not to blame.¹⁴¹⁰

¹⁴⁰¹ [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 169.

¹⁴⁰² [SJAC Gender & SGBV Documentation Policy](#), p. 11; [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), pp. 179-180; [PILPG Handbook](#), pp. 33, 102.

¹⁴⁰³ [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 235; [WIGJ Gender in Practice](#), p. 36.

¹⁴⁰⁴ [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 169; [PILPG Handbook](#), pp. 24, 101; [Monitoring and Reporting Human Rights Violations in Africa – A Handbook for Community Activists](#), Ukweli Series, p. 30; [Ukweli Handbook](#), p. 67.

¹⁴⁰⁵ [ADC-ICTY Manual on International Criminal Defence](#), p. 79.

¹⁴⁰⁶ [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 170.

¹⁴⁰⁷ [PILPG Handbook](#), p. 24; [Hate Crimes Training Curricula](#), p. 166.

¹⁴⁰⁸ [PILPG Handbook](#), p. 25.

¹⁴⁰⁹ [Canadian Framework for Collaborative Police Response on Sexual Violence, 2019](#), p. 17.

¹⁴¹⁰ [WIGJ Gender in Practice](#), p. 36.

Practitioners should discuss whether and how they may record the interview; explaining how the information might be used, including the possibility of its disclosure if the victim or witness testifies in a criminal case.¹⁴¹¹ A best practice would be having the victim repeat this back to you to ensure they understand the consequences of sharing information.¹⁴¹²

Interviewees should be advised to tell the truth, and to clarify that they understand what it means to tell the truth. They should be invited to tell the interviewer if they don't understand any of the questions and to ask clarifying questions or correct them if they have got something wrong.¹⁴¹³

8.6.3. Account

As part of the eventual interview, witnesses should be allowed to review previous statements to refresh their memory. They may wish to correct, change or adopt that previously recorded information. In this way, practitioners may be able to limit the risk of re-traumatisation by only asking additional, clarifying questions. This will help in obtaining the fullest, most coherent account of the crimes.

Practitioners should be good, attentive listeners and show it in their posture and body language because it is important to avoid creating an atmosphere of intimidation. Attention should be paid to facial expressions – avoid expressions of disbelief or judgement.¹⁴¹⁴ Listening attentively will allow interviewers to recognise changes in behaviour (such as fear; discomfort; embarrassment or reluctance). This should be treated as a signal that the process needs to be adjusted, for example by stopping, changing the subject, or taking a break. An attentive listener remembers also detail better and can show their interest by paraphrasing/repeating/summarising the information they have received. Where interviews are conducted as part of a team, co-interviewers should be briefed to act in a similar manner.

The format of the questions

Appropriate language and terminology should be used during the interview and practitioners should remember to phrase the questions in a manner that allows the full experience of the victim to be shared. There may be different cultural ways of framing questions and answers.¹⁴¹⁵ In sexual assault cases, for example, consider using local dialect that may be used to describe the sexual activities and sexual body parts¹⁴¹⁶ to avoid confusion or misunderstandings (*see* section 8.7)

¹⁴¹¹ [WIGJ Gender in Practice](#), p. 34; [PILPG Handbook](#), p. 102.

¹⁴¹² [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 169.

¹⁴¹³ [Protocol on Sexual Violence Crimes](#), p.11.

¹⁴¹⁴ [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 182; [GBV Pocket Guide](#), p. 7.

¹⁴¹⁵ [Ukweli Handbook](#), p. 29.

¹⁴¹⁶ [WIGJ Gender in Practice](#), p. 37.

Language should be clear and accessible, and questions should be short, simple, and open-ended.¹⁴¹⁷ These tend to be the ‘who/what/where/when/and how do you know’ questions, or the ‘TED’ questions:¹⁴¹⁸

TED	
Tell	Could you tell me exactly what happened?
Explain	Could you explain to me what happened afterwards?
Describe	Could you describe to me what that person looked like?
Show	Could you show me on the map where this happened?

Table 30: TED questions

Practitioners should work to ‘funnel information’, starting with broad questions and then getting more specific.¹⁴¹⁹ Leading (e.g., ‘He hit you, didn’t he?’), compound (e.g., ‘What did they look like and what did they say?’), closed (e.g., ‘Did he use a condom?’), and forced-choice (e.g., ‘Were the uniforms green or blue?’) questions should be avoided.¹⁴²⁰ These questions tend to result on only a yes/no answer. When dealing with cases of sexual violence, questions such as ‘why didn’t you leave’ or ‘why didn’t you know’ are victim-blaming and should be avoided in all circumstances.¹⁴²¹

Practitioners should avoid interrupting the interviewee, as such interruptions can negatively impact memory recall and cause missing critical information.¹⁴²² Topic-hopping (moving rapidly from one topic to another and back again) should also be avoided.¹⁴²³

Basis for knowledge

Investigators should take care to establish the basis for knowledge of every statement of fact made by the interviewee.¹⁴²⁴ The interviewee may be a survivor of the alleged crime, or they may have seen it, or heard about it. If they heard about it, it should be established from whom,

¹⁴¹⁷ PILPG Handbook, pp. 33, 104; [Monitoring and Reporting Human Rights Violations in Africa – A Handbook for Community Activists, Ukweli Series](#), p. 31; [Ukweli Handbook](#), pp. 67-68.

¹⁴¹⁸ PILPG Handbook, p. 105. See also: [UK College of Policing Investigative Interviewing](#).

¹⁴¹⁹ [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 172.

¹⁴²⁰ PILPG Handbook, pp. 33, 103-104; [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 175; [Ukweli Handbook](#), p. 31.

¹⁴²¹ [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 172.

¹⁴²² [UK College of Policing Investigative Interviewing](#); [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), pp. 172, 174.

¹⁴²³ [UK College of Policing Investigative Interviewing](#).

¹⁴²⁴ Code of Criminal Procedure, sections 75(1), 76(2); *See also*, [Ukweli Handbook](#), p.33.

and how. If they heard about it, is the incident something everyone knew? Was everybody talking about it? Was it reported in the media or social media?

Clarify and challenge

If a victim or witness tells you something that is inconsistent with something that they have said earlier or something different from a fact established during the investigation, practitioners should not assume that those inconsistencies must be eradicated – they are sometimes indications of reliability and credibility, and not the opposite. That said, inconsistencies do not necessarily demonstrate a lack of credibility. They may arise for many reasons, depending on the victim's individual context. Inconsistent testimonies are not necessarily false testimonies.¹⁴²⁵

Sources of inconsistencies and contradictions may range from lack of victim's understanding of what happened, to trauma-caused incapacity to recollect and describe the events, to lack of culturally appropriate vocabulary of sexual violence or different vocabularies employed by a victim, an interpreter and a practitioner/ legal professional.¹⁴²⁶

Victims/witnesses may be confused about facts, dates, times, locations, or have trouble remembering many of these details. Their memory may be affected by the trauma of the incident in question. They may also not be able to recall things in a linear way. Practitioners can remedy this by changing the framing of their questions (i.e., by asking 'what else happened?' instead of 'what happened next?').¹⁴²⁷ Additionally, victims may alter their narrative because they fear retaliation, are ashamed, embarrassed or in shock, want to avoid stigma, re-victimisation, or meet the requirements of their cultures, traditions and societies.¹⁴²⁸ They may offer only partial accounts; attempt to misdirect the investigation; and omit mentioning the presence of other victims, witnesses or of attackers.

If there are inconsistencies, practitioners should clarify, rather than confront. The witness should be taken back through their story step-by-step and asked to clarify or explain why they believe events unfolded in the manner in which they describe. Questions could be posed in a different way in order to remedy the inconsistency,¹⁴²⁹ or interviewers can, for example, use specific closed questions such as: 'What words did he use?', or 'Where did this happen?'¹⁴³⁰. If these steps still do not reconcile an inconsistency, it should be noted and interviewers should move on.

¹⁴²⁵ In the *Kunarac* Judgment for example, the Tribunal held that the inconsistencies did not 'cast doubt' on the witness's credibility, and in fact, a lack of 'natural discrepancies could form the basis for suspicion as to the credibility of a testimony' - *Kunarac et al. Appeal Judgment*, para. 309.

¹⁴²⁶ OHCHR, 'Manual on Human Rights Monitoring' (2011) HR/P/PT/7/Rev1 ('[OHCHR Manual on Human Rights Monitoring](#)'), p. 19.

¹⁴²⁷ [Trauma-Informed Victim Interviewing](#) (Office for Victims of Crime: Training and Technical Assistance Center).

¹⁴²⁸ S McCarthy-Jones, [Survivors of sexual violence are let down by the criminal justice system – here's what should happen next](#) (The Conversation, 29 March 2018).

¹⁴²⁹ [Ukweli Handbook](#), p. 68.

¹⁴³⁰ [UK College of Policing Investigative Interviewing; Ukweli Handbook](#), pp. 67-68.

Courts have accepted witness/victim testimony that have included inconsistencies, but in certain instances may only rely on part of the account for reliability purposes.¹⁴³¹

8.6.4. Closure

Concluding a victim/witness statement seldom marks the end of an investigation. It is often only the beginning. Practitioners should not end interviews abruptly¹⁴³² and should always choose a safe ending point.

If the interviewee's statement has been taken down in writing, it should be read back to them in order to obtain their signature, if needed.¹⁴³³ Interviewees should be asked if there is anything they want to add, clarify, or whether they have any questions,¹⁴³⁴ and practitioners should agree how they will get in contact with one another again, based on their preference, including alternative means of contact.¹⁴³⁵ It takes time to develop a relationship of trust and it may take more than one interview for a person to feel comfortable enough to discuss the details of the incidents under investigation.¹⁴³⁶ Practitioners should ensure that the victim is aware they can provide more information as they recall it.

Closure is a good time to re-confirm the interviewee's informed consent¹⁴³⁷ for the interview or any information collected in its course to be used in the investigation / prosecution. Interviewees should be given the option to revoke their consent¹⁴³⁸ and should understand that they are allowed to change their mind about participation in the criminal justice process. They should also be told what will happen next and what might they might be asked to do.¹⁴³⁹

A discussion should take place regarding the interviewee's needs and the available referral options.¹⁴⁴⁰ Practitioners should refrain from making promises that they can't keep¹⁴⁴¹ and should ensure that they do not promise benefits to the witness (for example, free health care, education, expenses beyond the cost of attending the interview).¹⁴⁴² In as far as possible, steps should be taken to ensure that the interviewee leaves in a relatively positive state of mind.¹⁴⁴³

¹⁴³¹ See e.g. *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Judgment, 8 July 2019 ('*Ntaganda Trial Judgment*'), para. 80.

¹⁴³² *PILPG Handbook*, pp. 106-107.

¹⁴³³ *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict*, p. 182.

¹⁴³⁴ *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict*, p. 182; *Ukweli Handbook*, p.70.

¹⁴³⁵ *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict*, p. 183.

¹⁴³⁶ *PILPG Handbook*, p.33.

¹⁴³⁷ *PILPG Handbook*, p. 107

¹⁴³⁸ *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict*, p. 183.

¹⁴³⁹ *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict*, p. 183.

¹⁴⁴⁰ *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict*, p. 183; *GBV Pocket Guide*, pp. 11-12.

¹⁴⁴¹ *Ukweli Handbook*, p. 70.

¹⁴⁴² *PILPG Handbook*, p. 36.

¹⁴⁴³ *PILPG Handbook*, p. 107.

8.6.5. Evaluation

The information obtained during the interview should be evaluated and practitioners should consider whether the interview has revealed any new or changed risks to the interviewee or any other person.¹⁴⁴⁴ Based on the interview, possible further lines of inquiry should be pursued¹⁴⁴⁵ and case strategies amended accordingly.

8.7. Best practices in collecting evidence of sexual violence

Investigating coercion and coercive circumstances

Investigating coercion and coercive circumstances requires a context-based analysis. This might include exploring the following:

- (i) the complete details of the victim (name, date and place of birth, address, nationality, education level, marriage status, personal circumstances, etc);¹⁴⁴⁶
- (ii) the date, time and place of the violence, including whether the act took place within the context of a coercive environment, such as whether the victim was detained,¹⁴⁴⁷ held against their will,¹⁴⁴⁸ or restrained in any way;¹⁴⁴⁹
- (iii) whether weapons were present at the location of the sexual violence, or used or threatened to be used during the commission of the offence;
- (iv) a description of the appearance, demeanour and language of the perpetrator(s), and identity if known, including the nature of the relationship between the victim and perpetrator. This will include asking a victim about past violence, which will also inform your risk assessment (*see* section 8.1.3). To establish whether there has been systematic violence, investigators might ask:
 - How did you meet?
 - How did you communicate?
 - Has this ever happened before?
 - Do you have any concerns for your children or fears about their safety?
 - Can you describe how X treats you as a person?
 - What's the worst thing X has ever done to you?

¹⁴⁴⁴ [PILPG Handbook](#), p. 108.

¹⁴⁴⁵ [PILPG Handbook](#), p. 108.

¹⁴⁴⁶ *See e.g.*, V Nainar, 'Litigation Strategies for Sexual Violence in Africa' (REDRESS, September 2015) (['REDRESS Litigation Strategies for Sexual Violence in Africa.'](#)), p. 71.

¹⁴⁴⁷ *Kunarac et al.* [Appeal Judgment](#), paras 131-132.

¹⁴⁴⁸ *Kunarac et al.* [Appeal Judgment](#), paras 131-132.

¹⁴⁴⁹ *Kunarac et al.* [Appeal Judgment](#), paras 131-132.

- Tell me about how much freedom you have in your everyday life?
 - Who decides how you spend your money?
 - Do you have any concerns, fears or anxieties that I should be aware of?
 - Have you ever had to get medical help because of anything that happened at home?
 - Have there been any incidents seen by someone outside the family?
 - What happens when he wants to have sex and you don't?
- (v) whether the perpetrator was in a position of power or influence vis-à-vis the victim (e.g., Jammeh or a member of his inner circle of power, a soldier, police officer, prison guard, caregiver, teacher, doctor, immigration authority, etc);
- (vi) whether the victim was dependent on the perpetrator for any reason (e.g., financial, legal, professional, familial and/or personal);¹⁴⁵⁰
- (vii) how many people were involved in the sexual violence;
- (viii) whether the victim was vulnerable due to any factors considered by the perpetrator to be strategic advantages, such as the affected person's sex, sexual orientation, gender identity, age, disability, poverty, class, social status, caste, ethnicity, indigeneity, race, religion, illiteracy or other grounds.¹⁴⁵¹
- (ix) the presence of psychological intimidation, blackmail or threats of any type (e.g., threat of physical violence, threat of losing a job, threats to family members);¹⁴⁵²
- (x) whether the victim was unable to give consent (underage, under the influence of drugs or alcohol, or mentally incapable of understanding the situation);¹⁴⁵³ and
- (xi) a detailed description of the physical and mental harm suffered as a result of the violence.¹⁴⁵⁴

Linguistic or cultural specificities

When conducting interviews, prosecutors should be aware that sexual violence is often referred to in culturally or linguistically specific ways, which may not be easily recognised as such by criminal justice actors. By way of example, a witness at the TRRC explained the different terminology used to describe rape in the Gambia, including:

¹⁴⁵⁰ Women's Initiative for Gender Justice, [The Hague Principles on Sexual Violence](#) (2019), p. 11.

¹⁴⁵¹ [The Hague Principles on Sexual Violence](#), p. 11.

¹⁴⁵² World Health Organisation ('WHO'), 'Chapter 6: Sexual Violence' (World Report on Violence and Health, undated) ('[WHO Chapter 6: Sexual Violence](#)'), pp. 149-181 ; *Kunarac et al. Appeal Judgment*, para. 113.

¹⁴⁵³ ICC Rules of Procedure and Evidence, fn. 16, 51 and 64; *Prosecutor v. Bemba*, ICC-01/05-01/08, [Judgment pursuant to Article 74 of the Statute](#), 21 March 2016, para. 107; *Ntaganda Trial Judgment*, para. 981; *Prosecutor v. Sesay et al.*, SCSL-04-15-T, Judgment, 2 March 2009, para. 148.

¹⁴⁵⁴ See e.g., [REDRESS Litigation Strategies for Sexual Violence in Africa](#), p. 71.

- (i) ‘he jumped onto me’ in Mandinka;
- (ii) ‘he forced himself onto me’ in Wolof; and
- (iii) ‘he fell on me’ in Fula.¹⁴⁵⁵

To overcome any potential difficulties in this regard, when planning interventions with victims/witnesses or during the course of testimony in court, prosecutors should make efforts to familiarise themselves with local terms of use that may refer to rape or other acts of sexual violence. If these are mentioned, consider asking clarifying questions in order to fully understand the nature and extent of any violations.

8.8. Practical tips for pre-trial interviews

Gambian prosecutors will meet witnesses during pre-trial interviews. This is analogous to the international practice of ‘witness proofing,’¹⁴⁵⁶ a practice which generally refers to ‘a meeting held between a party to the proceedings and a witness, usually shortly before the witness is expected to testify in court, to review their potential evidence, prepare them to testify and familiarise them with courtroom procedures.’¹⁴⁵⁷ Although certain aspects may be prohibited in some common-law jurisdictions,¹⁴⁵⁸ it was an accepted practice at the International Criminal Tribunal for the Former Yugoslavia (‘ICTY’) and has since been accepted at the International Criminal Court (‘ICC’).¹⁴⁵⁹ It may reduce trial-related stress on witnesses required to recall traumatic events.¹⁴⁶⁰

In essence, a ‘proofing session’ involves presenting the witness with their prior recorded statements, and inviting them to review those statements, affirm them, or where appropriate, make corrections, additions or clarifications.¹⁴⁶¹ In this event, best practice would be for the party calling the witness to produce notes of the proofing session with that information to the opposing party, consistent with fair trial requirements.¹⁴⁶² This may result in delaying the witness’s testimony, particularly if the changes are significant or offer new information, as the defence may require an opportunity to investigate.¹⁴⁶³

It may then be appropriate to take notes of new information that may not have been previously recorded so that this information may be disclosed to defence counsel. Prosecutors should

¹⁴⁵⁵ Aneked, ‘Truth, Reconciliation & Reparations Commission (TRRC) Digest, Edition 9’ ([‘Aneked TRRC Digest 9’](#)), p. 28.

¹⁴⁵⁶ [ICTY Manual on Developed Practices](#), p. 83.

¹⁴⁵⁷ [ICTY Manual on Developed Practices](#), p. 83.

¹⁴⁵⁸ See, article 705 of the Code of Conduct of the Bar Council of England and Wales, which provides that a barrister must not practice, rehearse, or coach a witness in relation to his evidence.

¹⁴⁵⁹ [ADC-ICTY Manual on International Criminal Defence](#), pp. 140-141.

¹⁴⁶⁰ [ICTY Manual on Developed Practices](#), p. 84.

¹⁴⁶¹ [ADC-ICTY Manual on International Criminal Defence](#), p. 141.

¹⁴⁶² [ICTY Manual on Developed Practices](#), pp. 83-84; [ADC-ICTY Manual on International Criminal Defence](#), p. 141.

¹⁴⁶³ [ADC-ICTY Manual on International Criminal Defence](#), p. 141.

consider, if possible, assigning another person to take notes during the interview to be able to fully focus on the victim's/witness' story while also having an accurate record of their account of events.¹⁴⁶⁴ These notes should be recorded in the third person. The focus should be on facts and not opinions, and dates should be recorded accurately. The summary should state whether the matters indicated are from: the witness's personal knowledge and observation, or common knowledge. Nothing should be excluded, including hearsay information.

Sensitive and appropriate preparation during the proofing phase can only contribute to enhance a witness' sense of control and confidence and can produce positive results for the court process.¹⁴⁶⁵

¹⁴⁶⁴ WIGJ Gender in Practice, p. 37.

¹⁴⁶⁵ ICTY Manual on Developed Practices, p. 84.