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## **Best Practice Handbook**

Prepared for the Afghanistan Independent Human Rights Commission and the International Crimes Directorate of the Afghan Attorney General's Office



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## **Introduction**

This Handbook is a rights-based tool offering techniques and methodologies drawn from international human rights law, and domestic and international criminal law and best practice for the investigation and prosecution of cases of serious violations of human rights, crimes against humanity and war crimes, including crimes of rape and other acts of sexual and gender-based violence. It has been guided by a gendered perspective, and has been tailored, with local input, to the legal, political, cultural and social landscape of Afghanistan.

This Handbook is composed of four parts:

- (i) **Part I:** cues for practitioners conducting investigations into listed violations of human rights, or domestic and international criminal law, including crimes of rape and other acts of sexual violence;
- (ii) **Part II:** a legal analysis of international best practices in the investigation of rape and other forms of sexual violence in Afghanistan, and how Afghan domestic legislation can be interpreted and applied in light of best practice; the investigation and prosecution of rape and other acts of sexual violence against women in Afghanistan;
- (iii) **Part III:** an overview of victim-centred principles in dealing with victims of crime, and
- (iv) **Part IV:** interviewing.

This Handbook does not deal with the crime of genocide, sentencing or *Had* punishments.



## **Part I: International crimes in the Afghanistan Penal Code – Factors to Consider**

### **1. Introduction**

The definitions of offences contained in Article 332 of the Penal Code apply to both crimes against humanity (Article 335) and war crimes (Articles 337, 339 and 340).

This section will consider both the contextual and physical elements for crimes against humanity and war crimes under the Afghanistan Penal Code. Given that the precise relationship between the international and domestic interpretation at this time, however, it will not address mental elements. Whilst they are not explored in this section, mental elements must still be established in order to prove an accused’s liability relation to each of the crimes considered below.

The section is structured to first explore contextual elements, before moving on to lay out the physical elements of crimes. Practitioners should be aware that these contextual elements will apply to, and must be proven in order to establish, each crime set out in this section. It is not intended to review all war crimes and crimes against humanity comprehensively, and instead is directed to exploring those most relevant to Afghanistan and to the focus of this Handbook.

#### **1.1. Crimes against humanity – contextual elements**

Crimes against humanity include any of the acts referred to under Article 335 of the Afghanistan Penal code when perpetrated intentionally and knowingly as part of a widespread or systematic attack directed against a civilian population.<sup>1</sup> Proof of a “widespread or systematic attack” may be broken down into several elements, which are set out in the table below, alongside factors investigators may consider in the evidence they collect.

<b>Element</b>	<b>Factors to consider</b>
Was there an attack?	1. Did the course of conduct involve the commission of multiple acts listed in Article 335 of the Penal Code?
Was the attack directed against a civilian population?	2. Were civilians the <i>primary</i> or principal target, as opposed to combatants or other non-civilians?

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<sup>1</sup> Penal Code of the Islamic Republic of Afghanistan, in Ministry of Justice, Official Gazette 1260, Special Issue, May 15, 2017 ('Afghanistan Penal Code'), Article 335.

	<p>3. Was the population civilian, or, given the presence of combatants, primarily civilian? Practitioners should consider that the presence of some non-combatants will not necessarily deprive that population of its civilian status).</p>
Was the attack widespread?	<p>4. Did the attack involve a number of crimes?  5. Over what period of time did the attack take place?  6. What and where were the locations involved on the attack?  7. How geographically widespread were those locations?  8. What was the number of victims?  9. What was the overall effect, in context, on the victim population?</p>
Was the attack systematic?	<p>10. Was there any pattern to the criminal acts?  11. Were they connected to the widespread or systematic attack?  12. Did they appear organised or coordinated in any way?  13. Was there anything about the means and manner of attacking that would show the criminal acts were organised or coordinated?  14. Were military or political authorities involved in the attack, including its ordering or direction?</p>
Was the attack committed pursuant to or in furtherance of a state or organisational policy to commit such attack?	<p>15. Were military or political authorities involved in the attack, including its ordering or direction?  16. Were identified suspects state officials or members of an organisation?  17. Did identified suspects identify targets of the criminal acts before they were carried out?  18. Were the criminal acts preceded by prior statements of the authorities?</p>
Did the identified suspect know or intend the conduct to be part of a widespread or systematic attack directed against a civilian population?	<p>19. Is there evidence to indicate that the identified suspect was aware of the attack?  20. Is there evidence to show that the identified suspect intended to contribute to the attack (e.g., through statements or comments prior to the attack)?  21. Was the identified suspect involved in the planning or execution of the attack?</p>

## 1.2. Crimes against humanity - physical elements

### 1.2.1. Torture as a crime against humanity – Article 335(6)<sup>2</sup>

Element	Factors to consider
<p>The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons<sup>3</sup></p>	<ol style="list-style-type: none"> <li>1. What was the nature of the harm that was inflicted? In particular:               <ol style="list-style-type: none"> <li>(i) Was the harm <b>objectively</b> severe in a way that satisfies this element without reference to other factors, e.g., did it involve rape?                   <ol style="list-style-type: none"> <li>a. What was the nature of the harm inflicted? Objectively severe acts may be anticipated as including: the mutilation of body parts or rape, for example. These examples are non-exhaustive. Objectively severe acts may include any acts that, due to their gravity, would be considered to be severe by anyone, in any circumstance.</li> <li>b. If the harm involved sexual violence, did this sexual violence amount to rape? (see, Rape, below).</li> </ol> </li> <li>(ii) If not, did the <b>subjective</b> factors associated with the individual victim or the surrounding circumstances combine to collectively render that harm severe? Relevant questions in this regard include:                   <ol style="list-style-type: none"> <li>a. Was the effect of the harm experienced by the victim heightened because of their age, sex, or underlying health conditions?</li> <li>b. If they were detained, was the victim detained for a long time (e.g., can the victim recall the dates between which they were detained, even roughly)?</li> <li>c. If they were detained, what was the general atmosphere and conditions of detention?</li> </ol> </li> </ol> </li> </ol>

<sup>2</sup> It should be noted that the second two elements included here are not derived from the Afghanistan Penal Code, but from the ICC Elements of Crimes. It is necessary to infer these elements in this way as the definition of ‘torture’ as a crime against humanity is not elaborated in the Penal Code, and it is important, as a matter of law, to differentiate this crime from other types of torture, such as torture as a war crime, for example, which uses entirely separate elements. Ultimately, this will be a matter that must be resolved by the local legislature or judiciary.

<sup>3</sup> Note that, contrary to the domestic definition of torture in Article 450 of the Afghanistan Penal Code, there is no ‘prohibited purpose’ requirement that must be proven in order to establish the commission of torture as a crime against humanity. For the purposes of this offence, this additional element is instead replaced with the requirement that the victim was under the custody or control of the accused.

	<ul style="list-style-type: none"> <li>d. Was the harm inflicted through active maltreatment, or passively, e.g., by imposing very poor conditions of detention or by depriving the victim of food, water, or medical treatment?</li> <li>e. What was the frequency of the harm? (i.e., was it repeated, consistent, or systematic?)</li> <li>f. 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; electroshocks or burns; mock executions or simulated amputations; extended hanging from hand and/or leg chains; standing for great periods of time; kneeling on sharp instruments; flogging; or water treatment?</li> <li>g. 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; 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)?</li> <li>h. Was medical care or support available after abuse?</li> <li>i. Did the effects of any mistreatment get worse over time? (e.g., was there a marked decline in the victim's long or short term mental or physical health?)</li> </ul>
<p>Such person or persons were in the custody or under the control of the accused</p>	<ul style="list-style-type: none"> <li>2. What were the methods by which the accused kept the victim under their custody and control? <ul style="list-style-type: none"> <li>(i) Can the victim remember the location at which they were detained?</li> <li>(ii) If not, is there any evidence they can recall from conversation with their captors or with other prisoners which might help practitioners to piece this information together?</li> </ul> </li> <li>3. How long was the victim in the accused's custody and control? <ul style="list-style-type: none"> <li>(iii) Can the victims remember the date or time of year that they were arrested or detained and/or the date of their release?</li> <li>(iv) Is this length of time supported by other material facts, such as the nature of the mistreatment or injuries suffered by the victim?</li> </ul> </li> </ul>
<p>Such pain or suffering did not arise only from, and was not</p>	<ul style="list-style-type: none"> <li>4. If so, was the detention itself lawful (i.e., not arbitrary)? <ul style="list-style-type: none"> <li>(i) Was there a lawful basis for the detention?</li> </ul> </li> </ul>

<p>inherent in or incidental to, lawful sanctions</p>	<ul style="list-style-type: none"> <li>(ii) Did the detention result from exercising protected rights or liberties, such as the right to free speech?</li> <li>(iii) Was the detention characterised by other human rights violations, such as those resulting from mistreatment?</li> </ul> <p>5. If so, was the nature / severity of the harm such that it could never be reasonably seen as arising from lawful sanction?</p> <ul style="list-style-type: none"> <li>(iv) Why was the harm inflicted? Was it used as a punishment, or for the purposes of interrogation, for example?</li> <li>(v) Was the harm objectively or subjectively severe?</li> </ul>
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**1.2.2. Rape as a crime against humanity – Article 335(7) or as a grave breach of the Geneva Conventions – Article 339(1)(22);**

Element	Factors to consider
<p>The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body</p>	<ul style="list-style-type: none"> <li>1. Was there penetration of any part of the victim's body with a body part or object? <ul style="list-style-type: none"> <li>(i) Was the victim penetrated (however slightly, including, in the case of vaginal rape for example, penetration of the labia majora)?</li> <li>(ii) What part of the victim's body was penetrated?</li> <li>(iii) With what body part or object was the victim penetrated? <ul style="list-style-type: none"> <li>a. In all sexual violence investigations, have practitioners ensured that they have employed a victim-centred approach (see, Part II)?</li> </ul> </li> </ul> </li> </ul>
<p>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</p>	<ul style="list-style-type: none"> <li>6. Did the accused do so with actual or threatened force? <ul style="list-style-type: none"> <li>(iv) Was the actual or threatened force directed against the person or a third party (e.g., a family member)?</li> </ul> </li> </ul>

person or another person, or the invasion was committed against a person incapable of giving genuine consent <sup>4</sup>	<p>(v) What was the nature of the actual or threatened physical force (e.g., did it involve acts such as hitting, slapping, physical restraining, pushing, dragging, stabbing, or pointing or firing a gun at the victim)?</p> <p>7. Did the accused do so by coercion?</p> <p>(vi) Did the accused use coercion in order to inflict the invasion, for example by using: threat of violence; duress; detention; psychological oppression; abuses of power; or promises to the victim; including financial promises made to support them and / or their family in return for sexual favours?</p> <p>(vii) Did the accused do so by taking advantage of a victim's incapacity to freely and genuinely consent, for example because of a physical or mental disability, or by intoxication resulting from sedative drugs or other substances that alters state of consciousness to the victim?</p>
If charged as a grave breach of the Geneva Conventions	8. Practitioners must consider that although the elements are similar, in order to charge rape as a grave breach of the Geneva Conventions, it must be shown that the victim was a protected person and that the accused was aware of the victim's protected status (see, War Crimes - Contextual Elements').

### 1.2.3. Sexual slavery as a crime against humanity – Article 335(7)

Element	Factors to consider
The perpetrator enslaved the victim with use of force and threat and caused the victim to constantly provide sexual services	<ol style="list-style-type: none"> <li>1. Did the accused purchase, sell, lend or barter the victim(s), or impose on them a similar deprivation of liberty?</li> <li>2. Did the accused's actions nonetheless enslave the victim through depriving them 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?</li> <li>3. What was the nature of the sexual services provided? <ol style="list-style-type: none"> <li>(i) What was the precise nature of the sexual acts that the victim was forced to perform?</li> <li>(ii) Who was the victim forced to perform those sexual acts upon?</li> </ol> </li> </ol>

<sup>4</sup> See the corresponding Rome Statute of the International Criminal Court (17 July 1998, entered into force 1 July 2002) UN Doc A/CONF. 183/9 of 17 July 1998) ('Rome Statute') Article: 8(2)(e)(vi)-1.

	(iii) Where was the victim forced to perform these sexual acts?
The victim cannot cease providing sexual services or leave the place where they provide sexual services <sup>5</sup>	<ol style="list-style-type: none"> <li>4. Over what period was the victim forced to provide sexual services?</li> <li>5. What was the duration and frequency of the sexual services provided?</li> <li>6. How was the victim forced to provide, and prevented from stopping the provision of, sexual services?</li> </ol>

#### 1.2.4. Enforced prostitution as a crime against humanity– Article 335(7)

Element	Factors to consider
The perpetrator forced the victim to provide sexual services	<ol style="list-style-type: none"> <li>1. Did the accused cause the rape of the victim by the perpetrator or another person?</li> <li>2. Did the accused cause the victim(s) to engage with any other physical or non-physical act of a sexual nature with them or another person?</li> <li>3. Did the accused do so by actual or threatened force, coercion, or by taking advantage of a victim's incapacity (see Rape, above)?</li> <li>4. What was the nature of the sexual services provided?               <ol style="list-style-type: none"> <li>(i) What was the precise nature of the sexual acts that the victim was forced to perform?</li> <li>(ii) Who was the victim forced to perform those sexual acts upon?</li> <li>(iii) Where was the victim forced to perform these sexual acts?</li> </ol> </li> </ol>
The perpetrator did so for financial reasons	<ol style="list-style-type: none"> <li>5. 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?</li> </ol>

<sup>5</sup> Afghanistan Penal Code, Article 332.9. See the definition and elements in the corresponding Rome Statute Articles 8(2)(b)(xxii)-2 and 8(2)(e)(vi)-2: 1) The perpetrator 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; and 2) the perpetrator caused such person or persons to engage in one or more acts of a sexual nature. It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to 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. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.

	6. 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?
The perpetrator did so constantly <sup>6</sup>	7. Over what period was the victim forced to provide sexual services? 8. What was the duration and frequency of the sexual services provided? 9. Where was the victim forced to provide sexual services? 10. How was the victim forced to provide, and prevented from stopping the provision of, sexual services?

### 1.2.5. Forced pregnancy as a crime against humanity – Article 335(7)

Element	Factors to consider
The illegal imprisonment of a woman in which she is forcibly pregnant to affect the ethnic composition of any population and it is along with serious violations of international law <sup>7</sup>	1. Was the victim confined or imprisoned? 2. Was this detention legal (i.e., not arbitrary)? (i) Was there a lawful basis for the detention? (ii) Did the detention result from exercising protected rights or liberties, such as the right to free speech? (iii) Was the detention characterised by other human rights violations, such as those resulting from mistreatment? 3. Did the perpetrator express a motive for committing the act (e.g., was it carried out because of the ethnic or religious background of the victims)? 4. How did the victim feel through the events of this crime?

<sup>6</sup> Afghanistan Penal Code, Article 332.10. See, the definition and elements in the corresponding Rome Statute Articles 8(2)(b)(xii)-3 and 8(2)(e)(vi)-3: 1) The perpetrator caused one or more persons to engage in on 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; and 2) The perpetrator 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.

<sup>7</sup> Afghanistan Penal Code, Article 332.5. See the definition and elements in the corresponding Rome Statute Articles See Articles 8(2)(b)(xxii)-4 and 8(2)(e)(vi)-4: The perpetrator confined one or more women forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.

	<p>5. Did the victim have the choice to seek medical help? Especially with regard to the choice of the foetus' abortion or the like?</p> <p>6. Was there a power relationship between the perpetrator and the victim that the perpetrator? If so, was it used in expressing a threat?</p> <p>7. Did the victim feel that they had the capacity to give genuine consent?</p>
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### 1.2.6. Enforced sterilization as a crime against humanity – Article 335(7)

Element	Factors to consider
The perpetrator deprived one or more persons of biological reproductive capacity, provided that the deprivation is not affected by a birth-control measure or medical treatment <sup>8</sup>	<ol style="list-style-type: none"> <li>1. Did the accused deprive one or more persons of biological reproductive capacity?</li> <li>2. Was this conduct neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent? <ol style="list-style-type: none"> <li>(i) When was the procedure carried out?</li> <li>(ii) How was the procedure carried out?</li> <li>(iii) For what alleged purpose was the procedure carried out?</li> <li>(iv) Was the victim incapable of giving genuine consent (e.g., because the procedure was carried out under actual or threatened force or coercion)?</li> </ol> </li> </ol>

### 1.2.7. Any other type of sexual violence in the level of rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation as a crime against humanity– Article 335(7)<sup>9</sup>

Element	Factors to consider

<sup>8</sup> Afghanistan Penal Code, Article 332.7. This in part mirrors the first element of the corresponding Rome Statute Articles 7(1)(g)-5, 8(2)(b)(xxii)-5 and 8(2)(e)(vi)-5. These Articles have the following additional (second) element: The conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent.

<sup>9</sup> As “Any other type of sexual violence” of a gravity in the level of other violations enumerated in this section is not defined in the Afghanistan Penal code, we have turned to Article 7 (1) (g)-6 for guidance, the definition of which appears above.

<p>The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent</p>	<ol style="list-style-type: none"> <li>1. Did the accused <b>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?</b> <ol style="list-style-type: none"> <li>(i) Over what period was the victim forced to provide sexual services?</li> <li>(ii) What was the type, duration, and frequency of the sexual services provided?</li> <li>(iii) Where was the victim forced to provide sexual services?</li> </ol> </li> <li>2. Did the accused do so by actual or threatened force, coercion, or by taking advantage of a victim's incapacity (see Rape, above)?</li> </ol>
<p>The conduct was of a gravity comparable to the other offences in Article 335</p>	<ol style="list-style-type: none"> <li>3. Which crime under Article 335 is of comparable gravity?</li> <li>4. What are the circumstances establishing this gravity?</li> </ol>

**1.2.8. Other similar inhumane acts committed deliberately and intended to cause great suffering, or serious injury to body or to mental or physical health – Article 335(11)<sup>10</sup>**

Element	Factors to consider
<p>The perpetrator inflicted great suffering, or serious injury to</p>	<ol style="list-style-type: none"> <li>1. Was the harm objectively severe?</li> </ol>

<sup>10</sup> It should be noted that, as with the crime against humanity of torture, these elements are not derived from the Afghanistan Penal Code, but from the ICC Elements of Crimes. It is necessary to infer these elements in this way as the definition of 'other similar inhumane acts' is not elaborated in the Penal Code, and without it, there is no basis upon which to differentiate this crime from the others in Article 335. Ultimately, this will be a matter that must be resolved by the local legislature or judiciary.

body or to mental or physical health, by means of an inhumane act	<p>2. Was the harm subjectively severe (see, Torture, above)?</p> <p>3. Was the harm of comparable gravity to acts causing serious physical harm, such as mutilation, severe bodily harm, or serious beatings?</p> <p>4. 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?</p>
Such act was of a character similar to any other act referred to in Article 335 of the Penal Code	<p>5. Which crime under Article 335 is of comparable gravity?</p> <p>6. What are the circumstances establishing this gravity?</p> <p>7. Could the crime be successfully charged as another crime under Article 335?</p> <p>(i) If so, which crime?</p> <p>(ii) On the evidence available, would practitioners face better odds of achieving a successful prosecution under an alternative charge?</p> <p>(iii) Can practitioners consider bringing two alternative charges concurrently?</p>
The perpetrator was aware of the factual circumstances that established the character of the act	<p>8. Does the evidence suggest that the accused intentionally inflicted harm upon the victim?</p> <p>9. Was the accused aware of the factual (rather than legal) circumstances establishing the gravity of this crime?</p>

### 1.3. War crimes - contextual elements

War crimes are serious violations of the laws and customs applicable in an armed conflict, also known as ‘international humanitarian law’, which gives rise to individual criminal responsibility under international (or, under Articles 337, 339, and 340 of the Afghanistan Penal Code, domestic) criminal law. In order to prosecute an act as a war crime, it must be shown that it was associated with either an international or a non-international armed conflict. Factors to consider in assessing whether the act was associated with the armed conflict include: whether the act was temporally linked to the period of conflict; whether the act occurred in conflict-affected areas, and whether the existence of the conflict played a substantial part in the perpetrator’s ability to commit the act.<sup>11</sup> Even a single act can constitute a war crime if committed within the context of either an international or non-international armed conflict.

<sup>11</sup> Handbook for United Nations Field Missions on Preventing and Responding to Conflict-Related Sexual Violence, 2020, pp. 6-7 (‘Handbook for United Nations Field Missions 2020’).

The following contextual elements are required for any offence to be charged as a war crime. Practitioners should be particularly aware that any offence amounting to a grave breach of the Geneva Conventions can only be committed against a protected person. For these offences, it is therefore essential to prove that the victim was a protected person, and that the accused was aware of the factual circumstances establishing that this was the case (see below).

Element	Factors to consider
<p style="text-align: center;">There was an international or non-international armed conflict</p>	<ol style="list-style-type: none"> <li>1. Did the situation amount to an international armed conflict (i.e., a conflict between states)?               <ol style="list-style-type: none"> <li>(i) Was there a resort to armed conflict between states?</li> </ol> </li> <li>2. Did the situation amount to non-international armed conflict (i.e., an internal conflict within a state's borders)?               <ol style="list-style-type: none"> <li>(i) Did the conflict reach a minimum threshold of intensity so as to distinguish it from other forms of civil unrest? In assessing this requirement, practitioners may consider:                   <ol style="list-style-type: none"> <li>a. the prevalence, duration, geographical scope and intensity of the armed confrontations.</li> <li>b. the type of weapons and other military equipment used;</li> <li>c. the amount and calibre of munitions used during the conflict;</li> <li>d. the fact that the violence cannot be addressed through routine peacetime policing but rather requires the intervention of armed forces;</li> <li>e. the number of persons and type of forces taking part in the fighting;</li> <li>f. the number of casualties and the level of material destruction occurred during the conflict;</li> <li>g. the number of civilians fleeing combat zones; and</li> <li>h. the fact that the conflict drew the attention of the UN Security Council.</li> </ol> </li> <li>(ii) Were the groups taking part in that conflict sufficiently organised as to be considered 'parties' to that conflict? In assessing this requirement, practitioners may consider whether the prospective parties:                   <ol style="list-style-type: none"> <li>a. had a responsible command structure, including disciplinary rules and mechanisms within the group;</li> <li>b. operated from a headquarters owned by the group;</li> <li>c. controlled a certain territory;</li> </ol> </li> </ol> </li> </ol>

	<ul style="list-style-type: none"> <li>d. had access to weaponry, other military equipment, recruits and military training;</li> <li>e. were able to define a unified military strategy and use military tactics;</li> <li>f. were able to speak with one voice, and negotiate and conclude agreements such as cease-fire or peace accords.</li> </ul>
The conduct took place in the context of and was associated with the armed conflict	<ul style="list-style-type: none"> <li>3. Did the conduct take place at the time that an armed conflict was taking place?</li> <li>4. Did the conduct take place on the territory on which an armed conflict was taking place?</li> <li>5. Did the existence of the armed conflict play a <i>substantial part</i> in the accused's <i>ability</i> and <i>decision</i> to commit a crime, and the <i>manner</i> in which they chose to do so? Relevant questions in this regard may include: <ul style="list-style-type: none"> <li>(i) Was the perpetrator an active combatant (i.e., were they actively involved in hostilities, for example as a member of state or non-state armed forces)?</li> <li>(ii) Was the victim a non-combatant, or a member of the opposing forces?<sup>12</sup></li> <li>(iii) Was the crime committed in relation to, or in order to further a military goal?</li> <li>(iv) If they were a member of the armed forces, was the accused on duty when they committed the crime (e.g., were they wearing uniform, or discharging their professional responsibilities)?</li> </ul> </li> </ul>
In cases charged as violations contrary to Articles 337 or 339 of the Penal Code, the evidence must demonstrate that the victim(s) affected were protected under one or more of the Geneva Conventions of 1949	<ul style="list-style-type: none"> <li>1. Is the armed conflict of an international nature?</li> <li>2. Is the crime in consideration listed in Article 337 of the Penal Code?</li> <li>3. If not, is the crime listed in Article 339 of the Penal Code?</li> <li>4. What is/are the act(s) the perpetrator has committed?</li> <li>5. What is the effect of these acts?</li> <li>6. Does/Do the victim(s) falls under the following categories: <ul style="list-style-type: none"> <li>(i) Civilians (people not fighting directly);</li> <li>(ii) People displaced due to the armed conflict (Internally displaced persons)</li> </ul> </li> </ul>

<sup>12</sup> Note that war crimes may still be committed against civilians and those not taking an active part in hostilities. However, if the victim was a member of the opposing forces, this would likely support an argument that the crime was linked to the armed conflict.

	<ul style="list-style-type: none"> <li>(iii) Missing persons</li> <li>(iv) Shipwrecked</li> <li>(v) Prisoners of war</li> <li>(vi) Detainees</li> <li>(vii) Wounded people</li> <li>(viii) Sick people</li> </ul> <p>7. What evidence justified the victims' classification under these protected categories?</p>
<p>In cases charged as violations contrary to Article 340 of the Penal Code, the evidence must demonstrate that the victim(s) were either <i>hors de combat</i>, or were civilians, medical personnel or religious personnel taking no active part in the hostilities</p>	<p>8. Is the armed conflict of an internal nature?</p> <p>9. Does the act fall under the following acts listed in Article 340 of the penal code?</p> <ul style="list-style-type: none"> <li>(i) Violence to life of a person, in particular murder, mutilation, cruel treatment and torture;</li> <li>(ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;</li> <li>(iii) Taking of hostages;</li> <li>(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 recognized as indispensable.</li> </ul> <p>10. If not, what is/are the act(s) the perpetrator has committed? What is their gravity?</p> <p>11. Do the victims fall under one of the following categories?</p> <ul style="list-style-type: none"> <li>(i) <i>Hors de combat</i> (meaning a combatant or fighter who cannot take part in fighting because of illness, injury or another justified incapacitation);</li> <li>(ii) Civilians;</li> <li>(iii) Medical personnel;</li> <li>(iv) Religious personnel.</li> </ul>

<p>In all cases charges contrary to Articles 337, 339 and 340 of the Penal Code, the evidence must show that the perpetrator was aware of the factual circumstances that established the status of the victim(s)</p>	<p>13. Was an accused aware of the <i>factual</i> circumstances that led to the victim’s protected status?<sup>13</sup> For example, when the victim was initially brought under the perpetrators control:</p> <ul style="list-style-type: none"> <li>(i) Was the victim wearing insignia that would indicate that they were not taking an active part in hostilities?</li> <li>(ii) Was the victim armed or unarmed?</li> <li>(iii) Was the victim wearing civilian clothing, or army uniform?</li> <li>(iv) Where was the victim detained / brought under the accused’s control? <ul style="list-style-type: none"> <li>a. Were they arrested/detained/discovered in close proximity to active hostilities?</li> <li>b. Were they in an area known to be constituted of a predominantly civilian population?</li> <li>c. Were they in a hospital or other medical or non-military facility?</li> </ul> </li> </ul>
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#### 1.4. War crimes – physical elements

##### 1.4.1. Torture as a war crime – Article 337(2); Article 340(1)(1)<sup>14</sup>

Element	Factors to consider
<p>The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons</p>	<p>1. What was the nature of the harm that was inflicted? In particular:</p> <ul style="list-style-type: none"> <li>(i) Was the harm <b>objectively</b> severe in a way that satisfies this element without reference to other factors, e.g., did it involve mutilation of body parts, or rape?</li> <li>(ii) If not, did the <b>subjective</b> factors associated with the individual victim or the surrounding circumstances combine to collectively render that harm severe? Relevant questions in this regard include: <ul style="list-style-type: none"> <li>a. Was the effect of the harm experienced by the victim heightened because of their age, sex, or underlying health conditions?</li> </ul> </li> </ul>

<sup>13</sup> Note that there is no requirement for the perpetrator to have made a legal evaluation regarding the legal consequences of these factual circumstances. See ICC Elements of Crimes, General Introduction, para. 4.

<sup>14</sup> See, Rome Statute, Article 8(2)(c)(i)-4.

	<ul style="list-style-type: none"> <li>b. If they were detained, was the victim detained for a long time (e.g., can the victim recall the dates between which they were detained, even roughly)?</li> <li>c. If they were detained, what was the general atmosphere and conditions of detention?</li> <li>d. Was the harm inflicted through active maltreatment, or passively, e.g., by imposing very poor conditions of detention or by depriving the victim of food, water, or medical treatment?</li> <li>e. What was the frequency of the harm? (i.e., was it repeated, consistent, or systematic?)</li> <li>f. 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; electroshocks or burns; mock executions or simulated amputations; extended hanging from hand and/or leg chains; standing for great periods of time; kneeling on sharp instruments; flogging; or water treatment?</li> <li>g. 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; 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)?</li> <li>h. Was medical care or support available after abuse?</li> <li>i. Did the effects of any mistreatment get worse over time? (e.g., was there a marked decline in the victim's long or short term mental or physical health?)</li> </ul>
<p>The perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion</p>	<p>6. Was the torture inflicted for the purposes of obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind?<sup>15</sup> Relevant questions in this regard may include:</p> <ul style="list-style-type: none"> <li>(i) What were the circumstances that led to the infliction of harm (e.g., was the harm inflicted to 'punish' the victim, or to interrogate or extract a 'confession' from them)?</li> <li>(ii) Was the harm inflicted to coerce or intimidate a victim into using or not using a position of influence, or to prevent them or a family member from disclosing information they had or were believed to have had?</li> </ul>

<sup>15</sup> It is less clear as to whether humiliation may satisfy this purpose for the purpose of international crimes, although it will likely be an important factor to consider whether, in context, the purpose of an act may satisfy the definition of torture.

or for any reason based on discrimination of any kind	<p>(iii) Was the torture inflicted on the basis of the victim’s race, religion, gender, disability, sexual orientation or other protected characteristic? In determining whether this was the case, practitioners may consider the following:</p> <ol style="list-style-type: none"> <li>a. Was the torture part of a pattern of harm inflicted upon people with these shared characteristics?</li> <li>b. If not, in circumstances in which they were detained in a detention facility, for example, was the victim singled out and subjected to particularly severe harm because of one of these characteristics?</li> <li>c. Does the type of harm inflicted suggest that it was intended to be discriminatory (e.g., was there a particular focus on the infliction of a particular type of sexual violence)?</li> </ol>
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**1.4.2. Inhuman treatment including biological experiment as a war crime – Article 337(2); 340(1)(1)<sup>16</sup>**

Element	Factors to consider
In the case of inhuman treatment: The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons	<ol style="list-style-type: none"> <li>1. Was the harm objectively or subjectively severe? (see Torture, above).</li> </ol>
In the case of biological experiments	<ol style="list-style-type: none"> <li>2. Was the victim subjected to biological, medical, or scientific experimentation?</li> <li>3. Did this experiment seriously endanger the physical or mental health or integrity of such person or persons?               <ol style="list-style-type: none"> <li>(i) What were the medical effects of the procedure? (Practitioners should be aware that there is no need for these effects to be permanent).</li> <li>(ii) Were the effects reversible?</li> <li>(iii) How did these effects affect the victim’s life / quality of life?</li> </ol> </li> </ol>

<sup>16</sup> Again, these elements are not derived from the Afghanistan Penal Code, but from the ICC Elements of Crimes. It is necessary to infer these elements in this way as the definition of this offence is not elaborated in the Penal Code. Ultimately, this will be a matter that must be resolved by the local legislature or judiciary.

	4. Was the intent of the experiment non-therapeutic and neither justified by reasons of medical, dental, or hospital treatment nor carried out in such person's or persons' interest? (Practitioners should be aware that consent is not a defence for this crime. It is therefore unnecessary to attempt to obtain evidence to this end).
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#### 1.4.3. Intentionally inflicting great suffering or serious injury to body or health of people as a war crime – Article 337(3)

Element	Factors to consider
The perpetrator caused great physical or mental pain or suffering to, or serious injury to body or health of, one or more persons	<ol style="list-style-type: none"> <li>1. Did the perpetrator cause great physical or mental suffering to one or more persons by committing an act that may amount to, but did not necessarily satisfy the elements of, torture?               <ol style="list-style-type: none"> <li>(i) Was the harm objectively or subjectively severe? (see Torture, above)</li> </ol> </li> <li>2. Did the perpetrator cause serious injury to the body or mental health of the victim?               <ol style="list-style-type: none"> <li>(i) Was this injury sufficiently serious? (e.g., was the victim left unable to work, or was the harm much above average in size, amount, or intensity? See Torture, above)</li> <li>(ii) What was the nature of the injury? (i.e., was it physical or mental?)</li> <li>(iii) What was the duration of the injury (i.e., were the effects short or long term)?<sup>17</sup></li> </ol> </li> </ol>

#### 1.4.4. Committing outrages upon personal dignity, in particular humiliating and degrading treatment – Article 339(1)(21); Article 340(1)(2)<sup>18</sup>

Element	Factors to consider
The perpetrator humiliated, degraded or otherwise violated	<ol style="list-style-type: none"> <li>1. Was the nature of the conduct such that it humiliated, degraded, or violated the human dignity of another person?               <ol style="list-style-type: none"> <li>(i) Is the conduct such that it amounted, or was of equal severity, to:</li> </ol> </li> </ol>

<sup>17</sup> Note that there is no requirement that injuries be long-term in nature – *Prosecutor v. Akeyesu*, ICTR-96-4-T, Judgment, 2 September 1998 ('*Akeyesu Trial Judgment*'), para. 502. However, if an injury had particular long-term effects, this would likely support a finding that the injury was serious.

<sup>18</sup> See *Rome Statute* Article 8(2)(c)(ii).

<p>the dignity of one or more persons<sup>19</sup></p>	<ul style="list-style-type: none"> <li>a. Indignities against a corpse (e.g., the mutilation of a dead body);</li> <li>b. Forcing prisoners to violate religious requirements (e.g., by making Sikhs to cut off their hair and beards);</li> <li>c. Public sexual assault or rape during the presence of multiple onlookers; and</li> <li>d. Regularly beating, sexually assaulting prisoners whilst forcing them to live in squalid conditions, with no access to sanitation and minimal food or water.</li> </ul> <p>2. Where practitioners have witness testimony of conduct potentially amounting such humiliation or degradation, is that testimony supported by other media, such as photographs or recordings, which might also convey the severity of the conduct to a court or tribunal?</p>
<p>The severity of the humiliation, degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity</p>	<p>3. Was the humiliation, degradation, or violation of human dignity <i>objectively</i> severe?</p> <ul style="list-style-type: none"> <li>(i) Setting aside the particular personal sensitivities of the victim, was this humiliation, degradation, or violation of dignity so intense that <i>any</i> reasonable person would be outraged? <ul style="list-style-type: none"> <li>a. What was the factual nature of the conduct?</li> <li>b. What were the surrounding circumstances?</li> <li>c. How many victims were involved?</li> <li>d. What was their position in relation to the accused?</li> <li>e. What was the frequency and duration of the acts in question?</li> </ul> </li> <li>(ii) If the humiliation, degradation, or violation of dignity arise from an infringement of cultural or religious norms, was it such that any person <i>of that cultural or religious background</i>, would be outraged? <ul style="list-style-type: none"> <li>a. In considering whether the conduct was such that it humiliated, degraded, or violated the human dignity of another person, have prosecutors ensured that they have taken a victim centred, context sensitive approach to the facts at hand? This would involve ensuring that all possible reasons for particular humiliation or degradation, e.g., specific religious practices followed by the victim, have been explored.</li> </ul> </li> </ul>

<sup>19</sup> For this crime, “persons” can include dead persons. It is understood that the victim need not personally be aware of the existence of the humiliation or degradation or other violation. This element takes into account relevant aspects of the cultural background of the victim.

#### 1.4.5. Committing sexual slavery, constituting a grave breach of the Geneva Conventions – Article 339(1)(22)

Element	Factors to consider
The perpetrator enslaved the victim with use of force and threat and caused the victim to constantly provide sexual services	<ol style="list-style-type: none"> <li>2. Was there a use of force involved e.g., was the victim battered? Was it the family of the victim who were physically harmed? Was it anyone in the vicinity such that it could be viewed as demonstrative to the victim?</li> <li>3. If there was no direct force, then was there an imminent or general threat of force? E.g., Did the perpetrator describe violent acts they would commit if the victim did not do as told? Was there a power relationship between the perpetrator and the victim that the perpetrator? If so, was it used in expressing a threat?</li> <li>4. What were the services provided by the victim? How did they make the victim feel?</li> <li>5. What were the conditions of how the victim was housed? Did the perpetrator exercise ownership over the victim? Were transactions of commerce involved?</li> <li>6. How was the victim treated? What was the level of free will they were enabled to exercise?</li> </ol>
The victim cannot cease providing sexual services or leave the place where they provide sexual services 20	<ol style="list-style-type: none"> <li>7. What was the level of free will the victim was enabled to exercise?</li> <li>8. Could they leave the premises in which they were housed, as they wished? Why could they not? And if they were allowed to on occasion, what were the conditions?</li> <li>9. Why did the victim feel compelled to keep providing them even if they did not want to?</li> </ol>

#### 1.4.6. Committing enforced prostitution, constituting a grave breach of the Geneva Conventions – Article 339(1)(22)<sup>21</sup>

Element	Factors to consider
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<sup>20</sup> Afghanistan Penal Code, Article 332.9. See the definition and elements in the corresponding Rome Statute Articles 8(2)(b)(xxii)-2 and 8(2)(e)(vi)-2: 1) The perpetrator 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; and 2) the perpetrator caused such person or persons to engage in one or more acts of a sexual nature. It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to 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. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.

<sup>21</sup> See Rome Statute Articles 8(2)(b)(xii)-3 and 8(2)(e)(vi)-3.

<p>The perpetrator forces the victim to provide sexual services for financial reasons constantly<sup>22</sup></p>	<ol style="list-style-type: none"> <li>1. What kind of force did the perpetrator exert on the victim and how did it make the victim feel?</li> <li>2. Was it physical e.g., battering the victim or those the victim sought to protect or a fear of physical violence? Was it mental force e.g., by blackmail, duress or coercion? Was there detention? Or a threat of one or more of the above?</li> <li>3. Was there a power relationship between the perpetrator and the victim that the perpetrator? If so, was it used in expressing a threat?</li> <li>4. Did the victim feel that they had the capacity to give genuine consent?</li> <li>5. What were the commercial transactions involved in the perpetrator's abuse? How did the perpetrator derive pecuniary benefit from them e.g., through money, other services?</li> <li>6. What were the services? How did they make the victim feel?</li> <li>7. Why did the victim feel like they could not refuse?</li> <li>8. How often was the victim expected to abide by the orders/wishes of the perpetrator?</li> </ol>
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#### 1.4.7. Committing forced pregnancy, constituting a grave breach of the Geneva Conventions – Article 339(1)(22)

Element	Factors to consider
<p>The illegal imprisonment of a woman in which she is forcibly pregnant to affect the ethnic composition of any population and it is along with serious</p>	<ol style="list-style-type: none"> <li>1. How did the victim feel through the events of this crime?</li> <li>2. Was the victim confined or imprisoned?</li> <li>3. Did the victim have the choice to seek medical help? Especially with regard to the choice of the foetus' abortion or the like?</li> <li>4. Was there a power relationship between the perpetrator and the victim that the perpetrator? If so, was it used in expressing a threat?</li> </ol>

<sup>22</sup> Afghanistan Penal Code, Article 332.10. See the definition and elements in the corresponding Rome Statute Articles 8(2)(b)(xii)-3 and 8(2)(e)(vi)-3: 1) The perpetrator caused one of more persons to engage in on 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; and 2) The perpetrator 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.

violations of international law <sup>23</sup>	5. Did the victim feel that they had the capacity to give genuine consent?
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**1.4.8. Committing enforced sterilization, constituting a grave breach of the Geneva Conventions – Article 339(1)(23)<sup>24</sup>**

Element	Factors to consider
The perpetrator deprived one or more persons of biological reproductive capacity, provided that the deprivation is not affected by a birth-control measure or medical treatment <sup>25</sup>	<ol style="list-style-type: none"> <li>1. What was the act of the perpetrator? How was the victim affected?</li> <li>2. Was the effect of this act reversible?</li> <li>3. How did it make the victim feel?</li> <li>4. Was it in anyway part of a medical treatment? Was this treatment deemed required or was it justified by a competent medical professional that the victim was comfortable in consenting? Even if essential, was it the only way to address the issue? Did the victim feel so as well?</li> <li>5. How did this make the victim feel?</li> <li>6. Was there a power relationship between the perpetrator and the victim that the perpetrator? If so, was it used in expressing a threat?</li> <li>7. Did the victim feel that they had the capacity to give genuine consent?</li> </ol>

<sup>23</sup> Afghanistan Penal Code, Article 332.5. See, the definition and elements in the corresponding Rome Statute Articles, See Articles 8(2)(b)(xxii)-4 and 8(2)(e)(vi)-4: The perpetrator confined one or more women forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.

<sup>24</sup> See Rome Statute Articles 8(2)(b)(xxii)-5 and 8(2)(e)(vi)-5.

<sup>25</sup> Afghanistan Penal Code, Article 332.7. This in part mirrors the first element of the corresponding Rome Statute Articles 8(2)(b)(xxii)-5 and 8(2)(e)(vi)-5. These Articles have the additional following element: The conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent.

**1.4.9. Committing any other form of sexual violence, constituting a grave breach of the Geneva Conventions – Article 339(1)(23)<sup>26</sup>**

Element	Factors to consider
<p>The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent</p>	<ol style="list-style-type: none"> <li>1. What were the acts of the perpetrator against the victim? What was the effect perceived by the victim and how did this make them feel?</li> <li>2. Was it physical e.g., battering the victim or those the victim sought to protect or a fear of physical violence? Was it mental force e.g., by blackmail, duress or coercion? Was there detention? Or a threat of one or more of the above?</li> <li>3. Was there a power relationship between the perpetrator and the victim that the perpetrator? If so, was it used in expressing a threat?</li> <li>4. Did the victim feel that they had the capacity to give genuine consent?</li> <li>5. Was there a power relationship between the perpetrator and the victim that the perpetrator? If so, was it used in expressing a threat? Why did the victim, at any time, feel that they could not refuse?</li> </ol>
<p>The conduct was of a gravity comparable to that of a grave breach</p>	<ol style="list-style-type: none"> <li>6. Did it involve a protected person i.e. sick, wounded and shipwrecked <b>persons</b> not taking part in hostilities, prisoners of war and other detainees, civilians and civilian objects?</li> </ol>

<sup>26</sup> See Rome Statute, Articles 8(2)(b)(xxii)-6 and 8(2)(e)(vi)-6.

<p>of the Geneva Conventions</p>	
<p>The perpetrator was aware of the factual circumstances that established the gravity of the conduct</p>	<ol style="list-style-type: none"> <li>7. What were the perpetrator's interactions with the victim, apart from the act itself? Did they seem to be aware of the lack of genuine consent?</li> <li>8. Were they cognisant of the power relation and the position of oppression they were in, in comparison to the victim?</li> </ol>

## **Part II: International Best practice in Relation to Rape and Sexual and Gender Based Violence**

### **2. Introduction**

Acts of sexual violence are gender-based human rights violations<sup>27</sup> which, in certain contexts, may constitute international crimes.<sup>28</sup> For example, 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.<sup>29</sup> If linked to an armed conflict, acts of sexual violence can amount to grave breaches of the Geneva Conventions.<sup>30</sup> Similarly, if committed as part of a widespread or systematic attack against a civilian population, those acts may also amount to crimes against humanity.<sup>31</sup> Evidence of sexual violence can also be relevant to proving the international crimes of torture or inhuman treatment.<sup>32</sup>

The Afghan Penal Code criminalises rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence as war crimes,<sup>33</sup> and crimes against humanity,<sup>34</sup> and also criminalises

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<sup>27</sup> Rabia Akhtar, ‘The Neglected Boys of War: Trapped in a Vicious Cycle of Slavery and Sexual Abuse’, *Journal of Trafficking and Human Rights Exploitation*, February, 2019 ([‘The Neglected Boys of War \(2019\)’](#)); *Handbook for United Nations Field Missions* 2020) p.20.

<sup>28</sup> [The Neglected Boys of War \(2019\)](#).

<sup>29</sup> 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’) articles 49, 50; 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’) articles 50, 51; ICRC, ‘Geneva Convention (III) Relative to the Treatment of Prisoners of War’ (12 August 1949) 75 UNTS 135 (‘Geneva Convention III’), articles 129, 130; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War’ (12 August 1949) 75 UNTS 287 (‘Geneva Convention IV’), articles 146, 147.

<sup>30</sup> [The Neglected Boys of War \(2019\)](#).

<sup>31</sup> [The Neglected Boys of War \(2019\)](#).

<sup>32</sup> Torture as a war crime contrary to Article 337(1) Afghanistan Penal Code; Torture as a crime against humanity contrary to [Afghanistan Penal Code](#), Article 335(6); 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) UN Doc CEDAW/C/GC/35, (‘[CEDAW/C/GC/35](#)’), paras. 16, 33; [Aydin v. Turkey](#) (1997) (App. No. 51/1996/676/866) ECHR (25 September 1997), paras. 81-86; [Prosecutor v. Kunarac et. al.](#) Case No. IT-96-23/1-3, Appeal Judgment, 12 June 2002, (‘[Kunarac 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 pain or suffering); [Prosecutor v. Krnojelac](#), Case No. IT-97-25-A, Appeal Judgment, 17 September 2003, paras. 151-152; [Prosecutor v. Celebici](#), Case No. IT-96-21-T, Trial Judgment, 16 November 1998, paras. 495-496; [Prosecutor v. Brdanin](#), Case No. IT-99 Trial Judgment, 1 September 2004, 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; [Prosecutor v. Martić](#), Case No. IT-95- 11-T, Trial Judgment, 12 June 2007, para. 76.

<sup>33</sup> [Afghanistan Penal Code](#), Article 339 (1).22.

<sup>34</sup> [Afghanistan Penal Code](#), Article 335 (7).



The 2009 Law on the Elimination of Violence Against Women ('EVAW') criminalises a range of acts of violence against women, including rape,<sup>35</sup> attempted rape,<sup>36</sup> forced prostitution, selling or buying a woman for the purpose of or on the pretext of marriage and forced marriage.<sup>37</sup> Part Eight of the Penal Code criminalises includes a range of stand-alone sexual violence offences, including rape,<sup>38</sup> attempted rape<sup>39</sup> and the crime of *Bacha Bazi*,<sup>40</sup> all captured under the Section "Crimes Against Public Morals and Ethics."

An understanding of international human rights and criminal law best practice in sexual violence investigations and prosecutions, drawn from multiple jurisdictions over a number of years, may be useful for human rights and criminal justice practitioners in Afghanistan in interpreting domestic legislation to deal with these cases in a victim-centred way.<sup>41</sup>

## **2.1. Understanding sexual violence in international law**

### **2.1.1. What is sexual violence?**

Rape and other acts of sexual violence are internationally regarded as intentional, non-consensual acts of a sexual nature.<sup>42</sup> They can be single, multiple, continuous, or intermittent.<sup>43</sup>

While sexual violence includes physically and psychologically abusive and coercive behaviour, acts of sexual violence can occur without physical contact between the perpetrator and victim. Sexual violence also includes, for example, psychologically abusive and coercive behaviour, for which no physical contact is required, such as forced nudity,<sup>44</sup> humiliation,<sup>45</sup> and intimidation.<sup>46</sup> Acts of sexual violence do not necessarily result in physical injury.<sup>47</sup>

An act of sexual violence may be committed against one or more persons. It may involve forcing or coercing a person to perform a sexual act on the perpetrator, themselves or a third party.<sup>48</sup>

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<sup>35</sup> Described as sexual assault under Article 5(1) but limited to "fornication and pederasty on adult women with force," on underage women, or "assaulting to the chastity and honour of a woman."

<sup>36</sup> Law on the Elimination of Violence Against Women, Issue No. 989, 1<sup>st</sup> August 2009 ('EVAW'), Article 17(4).

<sup>37</sup> EVAW, Articles 5(1), (2), (8) and (10).

<sup>38</sup> Afghanistan Penal Code, Article 636.

<sup>39</sup> Afghanistan Penal Code, Article 640 (1).

<sup>40</sup> Afghanistan Penal Code, Article 653.

<sup>41</sup> See, for example: UN Security Council Resolution 2467 (2019), UN Doc. S/RES/2467(2019), paras.15-16.

<sup>42</sup> Council of Europe Treaty Series No. 210 Article 36 ('Istanbul Convention'), Article 36; Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, ('Istanbul Convention Explanatory Report'); paras. 189-190; Handbook for United Nations Field Missions 2020, p.20.

<sup>43</sup> Civil Society Declaration of Gender Justice, 4genderjustice.org (2019), ('Civil Society Declaration') p.6. See also, Istanbul Convention, Article 36.

<sup>44</sup> Civil Society Declaration, p. 13; Handbook for United Nations Field Missions 2020, p.21.

<sup>45</sup> EVAW, Article 3(5).

<sup>46</sup> EVAW, Article 3(6).

<sup>47</sup> Civil Society Declaration, p. 13.

<sup>48</sup> Istanbul Convention, Article 36(1); Istanbul Convention Explanatory Report, Article 36, para. 190; ICC Elements of Crimes, Articles 7(1)(g)-6, 8(2)(b)(xxii)-6, and 8(2)(e)(vi)-6, Element One; Civil Society Declaration, pp.39-40; See, for



Sexual violence may be intended for a variety of reasons, including to dominate, punish, humiliate, or intimidate.<sup>49</sup> For example, at the ICTY, the use of sexual violence for public shaming in front of other members of a targeted ethnic group was reported, in situations of detention and occupation.<sup>50</sup>

Acts of sexual violence can take place in a wide range of situations and settings.<sup>51</sup> They can be committed at any time and in any environment, including between husband and wife or between family members.<sup>52</sup> Acts of sexual violence can be committed against any person (female or male), regardless of age, sex, or gender.<sup>53</sup> Sexual violence therefore includes same-sex acts.<sup>54</sup>

### 2.1.2. Acts which might constitute sexual violence

The first step to proving the commission of sexual violence is to establish that a sexual act took place.<sup>55</sup> Whether an act is sexual in nature is rooted in the perceptions of the victim, the perpetrator, and/or their communities.<sup>56</sup> An act may be sexual in nature regardless of whether it produced, or was intended to produce, sexual gratification for the perpetrator.<sup>57</sup> Accordingly, there is a broad spectrum of acts, both physical and non-physical, which may be deemed to be sexual in nature.<sup>58</sup>

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example: *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Trial Judgment, 16 November 1998, para. 1065; *Prosecutor v. Todorović et. al.*, Case No. IT-95-9/1-S, Sentencing Judgment, 31 July 2001, paras 38-40.

<sup>49</sup> Women's Initiative for Gender Justice, 'The Hague Principles on Sexual Violence' (2019) ('The Hague Principles on Sexual Violence'), p.14; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Judgement I, 26 February 2009, para. 199 (*Milutinović Trial Judgment*).

<sup>50</sup> Prosecuting Conflict-Related Sexual Violence at the ICTY, Ed. by Brammertz and Jarvis, 2016, p. 309 ('Prosecuting Conflict-Related Sexual Violence at the ICTY 2016').

<sup>51</sup> CEDAW/C/GC/35, Article 20; WHO, Guidelines for medico-legal care for victims of sexual violence, Geneva 2003, ('WHO Guidelines') pp.6-7.

<sup>52</sup> Civil Society Declaration, pp.6, 13; K Seelinger, H Silverberg, R Mejia, 'Investigation and Prosecution of Sexual Violence' (UC Berkeley, 2011), p.6. See also, e.g., Article 11.1 Criminal Code of Georgia.

<sup>53</sup> See e.g., Articles 653-666 Afghanistan Penal Code; Civil Society Declaration, pp.6, 13.

<sup>54</sup> Civil Society Declaration, p.39; *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Judgment Pursuant to Article 74 of the Statute, 21 March 2016, ('Bemba Trial Judgment') para. 100; *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Judgment, 8 July 2019 ('Ntaganda Trial Judgment'), para. 933. See also, ICC Office of the Prosecutor, 'Policy Paper on Sexual and Gender-Based Crimes' (June 2014) ('Policy Paper on Sexual and Gender-Based Crimes 2014').

<sup>55</sup> See e.g., Policy Paper on Sexual and Gender-Based Crimes 2014, p.4, ICC Elements of Crimes, Articles 7(1)(g)-1, 7(1)(g)-6, 8(2)(b)(xxii)-1, 8(2)(b)(xxii)-6, 8(2)(e)(vi)-1, 8(2)(e)(vi)-6.

<sup>56</sup> The Hague Principles on Sexual Violence, pp. 5, 22.

<sup>57</sup> The Hague Principles on Sexual Violence, pp. 6, 14. See also, e.g., *Milutinović Trial Judgment*, para. 199.

<sup>58</sup> *Akayesu Trial Judgment*, para. 688; *Prosecutor v. Furundžija*, IT-95-17/1-T, Judgment, 10 December 1998 ('*Furundžija Trial Judgment*'), para. 186; *Prosecutor v. Brima et al.*, SCSL-04-16-T, Judgment, 20 June 2007 ('*Brima et al. Trial Judgment*'), para. 720; *Milutinović 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 ('UNCHR Final Report'), paras 21-22.



The following non-exhaustive list offers some examples of the broad range of conduct that may amount to acts of a sexual nature, as identified in international best practice.<sup>59</sup> This is offered to as guidance to investigators may rely on to help recognise acts of a sexual nature. Some examples may be common to detention settings. Evidence of these acts will be relevant to accountability for rape and other crimes of sexual violence in Afghanistan. That same evidence may help to properly classify the crime as well as place the violations in context. Understanding what may constitute acts of a sexual nature will also be relevant to any risk assessment.

Some of these examples have also been criminalised under either the Penal Code or EAW, but many have not. Only those which have been criminalised as international crimes are proscribed in a gender inclusive manner. The rest have not.

- (i) Causing someone to form reasonable apprehension, or fear, of acts of sexual violence.<sup>60</sup> This may include threats of rape (against female relatives, including daughters);
- (ii) Depriving someone of reproductive autonomy, such as by subjecting them to forced pregnancy, forced sterilization (including castration and other forms of sexual mutilation), reproductive sabotage, forced parenthood; or preventing them from making choices as to whether or not to use contraception, undergo sterilization, impregnate another person, or carry a pregnancy in their own body to term;<sup>61</sup>
- (iii) Depriving someone of access to hygiene, treatment, or medicine related to menstruation, pregnancy, childbirth, fistula care, rectal hematoma, HIV or other sexually transmitted infections, sexual maiming, disfigurement, gynaecological, urological or urinary treatment, or any other aspect of sexual health or reproductive health;<sup>62</sup>
- (iv) Humiliating or mocking a person based on their perceived sexual orientation, gender identity, sexual performance, sexual reputation, sexual choices, sexual activity (or lack thereof), or sexual body parts;<sup>63</sup>
- (v) Intentionally transmitting HIV or other sexually transmitted infection(s);<sup>64</sup>
- (vi) Prohibiting someone from engaging in consensual sexual activity due to a person's sex, sexual orientation, gender identity, disability, or any other grounds on which discrimination is prohibited under international law;<sup>65</sup>
- (vii) Punishing someone for refusing to engage in sexual activity;<sup>66</sup>

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<sup>59</sup> The Hague Principles on Sexual Violence.

<sup>60</sup> The Hague Principles on Sexual Violence, p. 8.

<sup>61</sup> The Hague Principles on Sexual Violence, p. 8.

<sup>62</sup> The Hague Principles on Sexual Violence, p. 8.

<sup>63</sup> The Hague Principles on Sexual Violence, p. 8.

<sup>64</sup> The Hague Principles on Sexual Violence, p. 8.

<sup>65</sup> The Hague Principles on Sexual Violence, p. 8.

<sup>66</sup> The Hague Principles on Sexual Violence, p. 8.



- (viii) Sexually harassing someone by engaging in (repeated) unwelcome sexual conduct which can be interpreted as offensive, humiliating, or intimidating under the circumstances. Unwelcome sexual conduct may include:
  - a. making noises, statements, or gestures with a sexual overtone;
  - b. sending sexually explicit messages;
  - c. using phones or other devices to invade privacy; or
  - d. staring in a way that could be reasonably interpreted as indicating sexual objectification or sexual desire.<sup>67</sup>
- (ix) Subjecting a person to child marriage or a sexually exploitative relationship;<sup>68</sup>
- (x) Enforced prostitution;<sup>69</sup>
- (xi) Exposing a person to nudity, especially to naked sexual body parts, or exposing them to acts of a sexual nature, including seeing or hearing through images, descriptions, footage, art, or audio recordings thereof;
- (xii) Having someone perform movements, including dance movements, with a sexual association.<sup>70</sup> This was seen, for example, in the ICTY Kunarac case where women were forced to dance naked for the amusement of guards.<sup>71</sup>
- (xiii) Forced nudity or partial nudity (of men and women).<sup>72</sup> This may include the removal of headwear in cultures where this has a sexual implication, or requiring them to wear clothing with a sexual association;<sup>73</sup>
- (xiv) Human trafficking for sexual exploitation and slavery;<sup>74</sup>
- (xv) Inspecting someone's genitals, anus, breasts, or hymen without medical or similar necessity;<sup>75</sup>
- (xvi) Kissing or licking a person, especially a sexual body part;<sup>76</sup>

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<sup>67</sup> EVAW, Articles 5(13) and 5(14); The Hague Principles on Sexual Violence, p. 9.

<sup>68</sup> EVAW, Article 5(12); The Hague Principles on Sexual Violence p. 9.

<sup>69</sup> Rome Statute, articles 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi); Afghanistan Penal Code Articles 332(10), 335(7), 339(1).22; EVAW, Article 5(2).

<sup>70</sup> EVAW, Article 5(2); The Hague Principles on Sexual Violence, p. 9.

<sup>71</sup> Prosecuting Conflict-Related Sexual Violence at the ICTY 2016, p. 313.

<sup>72</sup> The Hague Principles on Sexual Violence, p. 10; *Akayesu*, para. 688.

<sup>73</sup> The Hague Principles on Sexual Violence, p. 9.

<sup>74</sup> EVAW, Article 5(8).

<sup>75</sup> The Hague Principles on Sexual Violence , p. 10.

<sup>76</sup> The Hague Principles on Sexual Violence, p. 10.



- (xvii) Rape (including gang rape, marital rape or ‘corrective’ rape), which includes penetration, however slight, of the vagina, anus or mouth by any part of the body or object;<sup>77</sup>
- (xviii) Forced masturbation (of men), or forced simulated sexual acts (including oral sex);
- (xix) Witnessing sexual violence;<sup>78</sup>
- (xx) Sexually harassing someone by engaging in (repeated) unwelcome sexual conduct which can be interpreted as offensive, humiliating, or intimidating under the circumstances;<sup>79</sup>
- (xxi) Touching a person in a sexual manner, for example by giving or receiving massages;<sup>80</sup>
- (xxii) Touching a person’s sexual body parts.<sup>81</sup>

## **2.2. Understanding international standards in sexual violence**

### **2.2.1. International standards – consent and coercion**

International criminal and human rights law states that free, voluntary and genuine and specific consent cannot be given to a sexual act imposed by force; threat of force; coercion (such as that caused by fear of violence, duress, detention, intimidation, blackmail, psychological oppression or abuse of power and other forms of duress); by taking advantage of a coercive environment, or committed against a person incapable of giving genuine consent.<sup>82</sup>

International standards suggest that the above should be given a broad interpretation, as any “rigid” approach to the prosecution of sexual offences “...risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual's sexual autonomy”.<sup>83</sup> The sections below reflect what a broad interpretation would look like, based on international human rights standards and best practice.

Consent to sexual acts should be given on an ongoing basis. This means that each and every sexual act should be consensual, and the act should be consensual throughout its duration.<sup>84</sup> In order to establish whether the victim was able to give free, voluntary, genuine and specific consent to the sexual act in question, a context-based investigation is necessary. This means that in order

<sup>77</sup> EVAW, Article 5(1); Article 636 Afghanistan Penal Code; Rome Statute, Article 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi); The Hague Principles on Sexual Violence , p. 12.

<sup>78</sup> Prosecuting Conflict-Related Sexual Violence at the ICTY 2016, p. 313.

<sup>79</sup> EVAW, Articles 5(13), 5(14); , p. 9.

<sup>80</sup> The Hague Principles on Sexual Violence, p. 10.

<sup>81</sup> The Hague Principles on Sexual Violence , p. 10.

<sup>82</sup> Case of M.C. v. Bulgaria App no 39272/98 (ECtHR, 4 March 2004), para. 181 (*‘MC v. Bulgaria’*); International Criminal Court, Rules of Procedure and Evidence, ICC-ASP/1/3 and Corr.1, 3-10 September 2002 (as amended), Rule 70 (*‘ICC Rules of Procedure and Evidence’*); ICC Elements of Crimes, Articles 7(2) and 8(2); *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on the confirmation of charges, 30 September 2008, para. 440 (*‘Katanga Decision on the Confirmation of Charges’*); CEDAW/C/GC/35, para. 5; Bemba Trial Judgment, para. 105-106; Prosecuting Conflict-Related Sexual Violence at the ICTY 2016, p. 135.

<sup>83</sup> *MC v. Bulgaria*, para. 166; Istanbul Convention Explanatory Report, para. 191. See also: Roadblocks to Justice: How the Law is Failing Survivors of Sexual Violence in Eurasia, Equality Now, 2019, p.11 (*‘Roadblocks to Justice’*).

<sup>84</sup> Civil Society Declaration, p.6; Istanbul Convention, Article 36(2); Istanbul Convention Explanatory Report, Article 36, para. 192.



to determine whether a victim has freely consented, consent must be assessed based on the context at the time the sexual act in question took place.<sup>85</sup> This would include establishing whether their circumstances or environment were coercive.<sup>86</sup>

At international law there is no requirement to prove a victim's lack of consent,<sup>87</sup> including by showing that the victim clearly refused or physically resisted a rape or act(s) of sexual violence.<sup>88</sup> Even if the victim submitted without protest, **a context-based investigation** may reveal evidence of coercive circumstances which will negate their consent. They may, for example, have submitted because **in context**, they feared further violence by the perpetrator and felt it was not safe to resist or refuse in any way.

Threats, intimidation, extortion, and other forms of duress that prey on fear or desperation may constitute coercion.<sup>89</sup> Threats or coercion do not necessarily need to refer to physical violence.<sup>90</sup> They may include such things as: a threat to record and publish the identity of a victim of sexual violence;<sup>91</sup> abusing, humiliating and intimidating a woman;<sup>92</sup> depriving from inheritance;<sup>93</sup> prohibiting access to personal property;<sup>94</sup> and prohibiting from the right to education, work and health services.<sup>95</sup> These are offences under EAW.

Coercion should always be assessed in the wider context of the relationship between the victim and the perpetrator. This is because coercion will often take place within an unequal power relationship between a perpetrator and their victim.<sup>96</sup> This can arise in a variety of situations,

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<sup>85</sup> Istanbul Convention, Article 36; Istanbul Convention Explanatory Report, paras. 191-193; Supplement to the International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: Guidance for Practitioners in Iraq, Institute for International Criminal Investigations, (March 2018), p.32 ('Iraq Supplement to IP2, 2018').

<sup>86</sup> See Istanbul Convention, Article 36(2); Istanbul Convention Explanatory Report, paras. 191-193; Iraq Supplement to IP2, 2018, p.32.

<sup>87</sup> Ntaganda Trial Judgment, para. 934; Bemba Trial Judgment, para. 106; ICC Rules of Procedure and Evidence, rule 70.

<sup>88</sup> Case of E.B. v. Romania, App no 49089/10 (ECtHR, 19 March 2019) ('E.B. v. Romania') para. 56; M.C. v. Bulgaria, paras. 143, 156-158, 166; ICC Rules of Procedure and Evidence, rule 70; Prosecutor v. Gacumbitsi, Case No. ICTR-2001-64-A, Judgement, 17 June 2004 ('Gacumbitsi Trial Judgment'), para. 325; Prosecutor v. Dragolub Kunarac, Radomir Kovac and Zoran Vukovic, Case Nos. IT-96-23-T & IT-96-23/1-T, Judgement, 22 February 2001, ('Kunarac et al. Trial Judgment'), paras 644-646. See also, 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') paras 8.7, 8.9.b(ii)(b); 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; Istanbul Convention, Article 36; Istanbul Convention Explanatory Report, para. 191. See also The Impact of Trauma on Adult Sexual Assault Victims (Last accessed on 20<sup>th</sup> December 2020).

<sup>89</sup> Ntaganda Trial Judgment, paras. 934- 935.

<sup>90</sup> Bemba Trial Judgment, para 103; Ntaganda Trial Judgment, para 935. See also, Katanga Decision on the Confirmation of Charges, para 440; Akeyesu Trial Judgment, para 688.

<sup>91</sup> An offence contrary to EAW, Article 19.

<sup>92</sup> An offence contrary to EAW, Article 19.

<sup>93</sup> An offence contrary to EAW, Article 33.

<sup>94</sup> An offence contrary to EAW, Article 34.

<sup>95</sup> An offence contrary to EAW, Article 35.

<sup>96</sup> Civil Society Declaration, p. 11.



including (among others) in the home and between spouses or family members.<sup>97</sup> There, coercive behaviour can be well-established as a pattern before an incident of sexual violence is reported to authorities.<sup>98</sup> An unequal power relationship is found in situations of isolation and detention;<sup>99</sup> and a wide number of other situations where the perpetrator is in a position of authority and the victim is dependent on the perpetrator, or in a relationship with the perpetrator that gives rise to a risk of exploitation.<sup>100</sup> This is often the case in situations in where the crime of *Bacha Bazi* takes place.<sup>101</sup> These situations may arise in armed conflict in the context of armed house-searches or forced expulsions.<sup>102</sup>

To determine whether there was an unequal power relationship, practitioners may consider those examples set out in the table below:

<b>Evidence to consider in identifying unequal power relationships</b>
The victim's age, maturity and ability to understand what was happening (this does not exclude the elderly or the disabled as possible victims of coercion).
The history of the relationship between the victim and the alleged perpetrator.
Whether the victim knew or understood the position they were in and what they were being asked/told to do. Whether the victim knew or believed that the perpetrator had committed violence against others.
Whether the alleged perpetrator's social or political status made the victim think that they could not refuse.
Whether the victim knew that the perpetrator had committed violence to others.
Whether any force or threats of force were used previously against the victim or a third person (such as a family member or loved one).
Whether the perpetrator was in a position to exert power/ influence over the victim.
Whether the victim was under the influence of alcohol or drugs.

<sup>97</sup> Istanbul Convention Explanatory Report, para. 194; National Research on Domestic Violence in Georgia, Final Report (2010) ('[National Research on Domestic Violence in Georgia](#)') p.84; Istanbul Convention Explanatory Report, Article 209; See 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](#)'); <https://www.womenshealth.gov/relationships-and-safety/other-types/sexual-coercion> (Last Accessed on 20<sup>th</sup> December 2020)

<sup>98</sup> See <https://www.cps.gov.uk/legal-guidance/controlling-or-coercive-behaviour-intimate-or-family-relationship> (Last Accessed on 20<sup>th</sup> December 2020)

<sup>99</sup> [Civil Society Declaration](#), p. 47.

<sup>100</sup> [Civil Society Declaration](#), p. 46.

<sup>101</sup> [Afghanistan Penal Code](#), Chapter 5.

<sup>102</sup> Prosecuting Conflict-Related Sexual Violence at the ICTY 2016, p. 305.



Whether the perpetrator made any promises or offered any inducements to the victim.<sup>103</sup>

### 2.2.2. Examples of coercion

There are many examples of what might constitute coercion and coercive behaviour applicable to cases of rape and other acts of sexual violence. The list below is not exhaustive. It provides examples of circumstances that, in context, may amount to threats or intimidation, or make the victim helpless. They should not be considered in isolation. It is noted that some of these acts are offences contrary to EAW:

<b>Examples of coercive behaviours and circumstances:</b>
Threatening abuse if the victim doesn't perform certain sexual acts.
Physical assault, not of a sexual nature. <sup>104</sup>
Threats to hurt or kill the victim, their children or other persons close to them. <sup>105</sup>
Making the victim feel obligated, guilty for refusal to have sex.
Making promises to the victim that they or another person close to them would be rewarded if they had sex with the perpetrator.
Using intimidating and aggressive language or gestures (yelling, destroying household goods or other aggressive behaviour). <sup>106</sup>
Isolating the victim from their friends or family. <sup>107</sup>
Depriving the victim of basic needs or access to support services, like medical help. <sup>108</sup>
Monitoring the victim's activities and the length of time they spend engaged in them.
Monitoring the victim's communication.
Taking control over aspects of the victim's everyday life, such as not allowing them to leave the house, dictating where they can go, who they can see, what they can wear or where they can sleep. It should

<sup>103</sup> See [https://www.cps.gov.uk/sites/default/files/documents/publications/what\\_is\\_consent\\_v2.pdf](https://www.cps.gov.uk/sites/default/files/documents/publications/what_is_consent_v2.pdf) (Last Accessed on 20<sup>th</sup> December 2020).

<sup>104</sup> EVAW, Articles 5(4), 5(6) and 5(7).

<sup>105</sup> See Controlling or conservative behaviour in an intimate or family relationship, <https://www.cps.gov.uk/legal-guidance/controlling-or-coercive-behaviour-intimate-or-family-relationship> (Last Accessed on 20<sup>th</sup> December 2020).

<sup>106</sup> EVAW, Article 5 (13).

<sup>107</sup> EVAW, Article 5 (15).

<sup>108</sup> EVAW, Article 5 (19).



be noted that women are often expected to seek permission from their husband before seeing a health care provider or going outside of the house for any reason. <sup>109</sup>
Insulting, ridiculing or belittling the victim, such as by telling them they are worthless (whether publicly or privately). <sup>110</sup>
Devising or enforcing rules or activities that humiliate, degrade or dehumanise the victim. <sup>111</sup>
Forcing the victim to take part in a criminal activity, such as prostitution. <sup>112</sup>
Controlling the finances of the victim.
Preventing the victim from being able to attend school, college or university. <sup>113</sup>
Threats to reveal private information about the victim to their family/friends or to the public. <sup>114</sup>
Reputational damage to honour, such as societal stereotypes regarding divorced women or the sex life of an unmarried woman.
Threats or accusations related to family or religious dishonour.
Demanding obedience. <sup>115</sup>

### 2.3. Consent in domestic law

There remain some shortcomings in Afghan legislation which affect accountability for sexual violence (including CRSV). The Afghan Penal Code does not define sexual offences in terms of free and voluntary consent, and criminalises what may be consensual sexual relations. For example, the offence of *zina* criminalises all sexual intercourse between unmarried men and women, regardless of consent.<sup>116</sup> Same sex relations are criminalised. The Penal Code

<sup>109</sup> See <https://sexualrightsdatabase.org/countries/399/Afghanistan> (Last Accessed on 20<sup>th</sup> December 2020).

<sup>110</sup> EVAW, Articles 5(13) and 5(14).

<sup>111</sup> EVAW, Articles 5(13) and 5(14).

<sup>112</sup> EVAW, Article 5(2).

<sup>113</sup> On the legal framework to protect the right to education, see also Articles 3, 17, 43 and 44 of the Afghan Constitution on the right to education, as well as EVAW, Article 5(19).

<sup>114</sup> EVAW, Article 5(3).

<sup>115</sup> See Roadblocks to Justice, p.11; UN Women, 'Handbook for Legislation on Violence Against Women' (2012) ('UN Handbook for Legislation on Violence Against Women'); Also, See CPS Controlling or Coercive Behavior in an Intimate of Family Relationship; <https://www.womenshealth.gov/relationships-and-safety/other-types/sexual-coercion>; <https://www.cps.gov.uk/legal-guidance/domestic-abuse-guidelines-prosecutors>; International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, pp.13, 23; WHO Guidelines, p.6; 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').

<sup>116</sup> The Legal Framework for Child Protection in South Asia, UNICEF, 2020, ('UNICEF Legal Framework') p.122.



criminalises any act of sodomy (**Article 646**).<sup>117</sup> *Mosahiqah* and *Tafkhez* (Articles 645 and 649) are offences regardless of consent.<sup>118</sup>

An analysis of the provisions of the Penal Code and the Law on the Elimination of Violence Against Women related to sexual violence, their interpretation and application in light of international human rights law and investigative and legal best practices follows.

## **2.4. Domestic offences**

### **2.4.1. Rape under Article 636 Afghan Penal Code:**

Under Article 636, rape is defined as: “A person who has sexual intercourse with another person or penetrates body parts or any other object in vagina or anus of the victim using the following means: force, threat, or other intimidating means; taking advantage of physical or mental disability of victim, or disability of victim to express consent, including male or female, or by feeding sedative drugs or other substances that alters state of consciousness shall be deemed perpetrator of rape.” This wording is generally in line with the international standards set out above.

This article only refers to penetrative acts. It does not cover non-penetrative sexual violence. However, it should be stressed that full penetration is not required to give rise to rape. The depth of penetration is immaterial. Any form of penetration, however slight,<sup>119</sup> is sufficient to complete the crime. Evidence of ejaculation is not required.

Rape is defined in a gender-inclusive manner.<sup>120</sup> According to the definition in Article 636, a perpetrator can be any “person”. In accordance with international best practice, a perpetrator may therefore be of any sex or gender. Article 636 does not define who may be a victim of rape. They may therefore also be of any sex or gender. It follows that a perpetrator and victim may be of the same sex or gender.<sup>121</sup>

Although the English translation of Article 636 is unclear, it appears that even though oral penetration is not specifically criminalised under domestic legislation. If this is indeed the case, and if contextual elements for international crimes are satisfied, and the facts disclose oral penetration, prosecutors may consider charging the violation as an inhumane act. The translation, however, should be verified.

International law recognises marital rape, (i.e., rape that occurs between husbands and wives),<sup>122</sup> which is not explicitly mentioned in either the Penal Code or the EVAW. This is not in line with

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<sup>117</sup> Violating the right to privacy and non-discrimination under the ICCPR. See also [UN Doc. A/HRC/29/23](#) (2015).

<sup>118</sup> [UNICEF Legal Framework](#), p.122.

<sup>119</sup> See [Rome Statute](#), Article 7(1)(g)(1); FBI definition: See <https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/violent-crime/rape> (Last Accessed on 20<sup>th</sup> December 2020); [Kunarac Appeal Judgment](#), para 127; [WHO Guidelines](#), p.8.

<sup>120</sup> [Briefing for the UN Security Council Open Debate on Sexual Violence in Conflict](#), All Survivors Project, July 2020.

<sup>121</sup> See e.g., [Ntaganda Trial Judgment](#), para. 933; [Bemba Trial Judgment](#), para. 100.

<sup>122</sup> The Hague Principles on Sexual Violence, pp. 6, 13; 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. 20; , article 36(3); Istanbul Convention Explanatory Report, para. 194.



international best practice and represents a violation of a range of human rights, among them the right to equality and non-discrimination.

### Force

International law holds that use of force provides clear evidence of non-consent.<sup>123</sup> Where physical force does occur, it does not need to reach a significant level, such a 'excessive' or 'life-threatening physical force'.<sup>124</sup> As noted above, however, most rapes do not involve a significant amount of physical force and do not necessarily result in physical injury and may not leave any visible traces of injury on the body of a victim.<sup>125</sup> These cases should not be ignored.

### Threats and intimidation

Collectively, threats and intimidation constitute coercion,<sup>126</sup><sup>127</sup> and are therefore evidence of non-consent.<sup>128</sup> They are designed to instill fear in their recipient.<sup>129</sup>

A threat can be expressed in words or actions or a combination of both. Threats can refer to immediate or future acts of violence. There is no need for physical violence to actually occur.<sup>130</sup> A threat is made out when the person threatened has a "reasonable fear" that the act will be carried out.<sup>131</sup> It is not necessary for the perpetrator to actually carry out the threat or even have the ability to do so; but for the victim to believe he could.

Threats, intimidation and other acts of coercion are acts of psychological violence. Psychological violence can create or exploit vulnerabilities in victims to make them dependant on or subordinate to their abuser.

Investigating coercion requires practitioners examine the contextual factors surrounding the act of sexual violence as these may, individually or collectively, indicate psychological violence or abuse of power capable of negating the victim's consent. Examples as to what these circumstances may include have been set out above. In assessing whether a perpetrator's conduct amounts to sexual violence, practitioners should consider the abovementioned and other

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<sup>123</sup> See e.g., *Kunarac Appeal Judgment*, para 129; , Article 36; Istanbul Convention Explanatory Report, Article 36, para. 192; *M.C. v. Bulgaria*, para. 161, 163; CEDAW/C/GC/35, para. 33. See also, *ICC Elements of Crimes*, Article 7(1)(g)-(1)&(6), 8(2)(b)(xxii)-(1)&(6), 8(2)(e)(vi)-(1)&(6); *Ntaganda Trial Judgment*, para 934; *Akeyesu Trial Judgment*, para 688; *Kunarac Appeal Judgment*, para 129; *Prosecutor v. Taylor*, SCSL-03-01-T, Judgment, 18 May 2012 ('*Taylor Trial Judgment*') para 416; *Prosecutor v. Prlić et al.*, IT-04-74-T, Judgment, 29 May 2013, para 70.

<sup>124</sup> Amnesty International, 'Rape and Sexual Violence: Human Rights Law and Standards in the International Criminal Court', (2011) ('Rape and Sexual Violence Amnesty'), p. 18.

<sup>125</sup> *WHO Guidelines*, p. 11; WHO, World Report on Violence and Health, 2002, Chapter 6, ('*WHO Report*') p.162.

<sup>126</sup> *Akeyesu Trial Judgment*, para. 688.

<sup>127</sup> *ICC Elements of Crimes*, article 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(iv).

<sup>128</sup> SCSL: *Taylor Trial Judgment*, para. 416; ICTY, *Kunarac Appeal Judgment*, paras. 127-130, 133.

<sup>129</sup> *R v. McGraw*, [1991] 3 SCR 72; *Lamontagne* (1998), 129 CCC (3d) 181 (QCA); *R v. George*, 2002 YKCA 2; *Burns*, 2008 ONCA 6; *R. v. Kohl*, 2009 ONCA 100; *R. v. MacDuff*, 2011 BCSC (534).

<sup>130</sup> *Ntaganda Trial Judgment*, para. 935; *Bemba Trial Judgment*, para. 103. See also, Decision on the confirmation of charges, para. 440; *Akeyesu Trial Judgment*, para. 688; *Taylor Trial Judgment*, para. 416.

<sup>131</sup> *Prosecutor v. Furundžija*, IT-95-17/1-T, Judgment, 10 December 1998 ('*Furundžija Trial Judgment*'), para. 174, (referring to *M.C. v. Bulgaria*, para. 102).

similar factors in their totality. Cumulatively, they may show a pattern of controlling and abusive conduct by the perpetrator against the victim.<sup>132</sup>

### Helplessness

Victims who are wholly incapable of giving free, voluntary to give consent to sexual contact because they are mentally incapacitated by drugs or alcohol,<sup>133</sup> or physically helpless because of unconsciousness, from illness<sup>134</sup>, or injury, or asleep are among those traditionally considered helpless and unable to consent.

Assessing helplessness is a context-based determination. International law suggests that helplessness can also be the result of coercion and coercive circumstances<sup>135</sup> which effectively negate a victim's ability to consent to sexual contact.

#### **2.4.2. Rape under Article 638 Afghan Penal Code:**

If an adult male has intercourse with a person under the legal age, his act shall be considered rape and the victim's consent is invalid. The reference to victim in this case is gender neutral. Accordingly, the victim may also be a male. It should be noted that any prosecution contrary to Article 638 will be required to show that the victim was "under the legal age."<sup>136</sup> "Legal age" is not defined in the Penal Code, but is taken to refer to the legal age of marriage (18 for boys and 16 for girls, or 15 with consent of parents).<sup>137</sup> While it is unclear whether such a defence is available, but it may be that if the adult male had reasonable cause to believe and did believe that his sex partner was above the legal age, he may be acquitted.

#### **2.4.3. Sexual offences under Article 640 Afghan Penal Code:<sup>138</sup>**

- 1) If a person commits aggression to chastity and *namoos*<sup>139</sup> of a female but his aggression does not lead to penetration to anus or vagina of a female but it leads to *Tafkhez*, *Mosahiqah*,<sup>140</sup> or sexual contact, shall be sentenced to long imprisonment up to seven years.
- 2) Virginty testing by a forensic medical official without consent of the female or order of a competent court is prohibited. The perpetrator shall be sentenced to short imprisonment.

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<sup>132</sup> CPS Controlling or Coercive Behavior in an Intimate of Family Relationship.

<sup>133</sup> Iraq Supplement to IP2, 2018, p.59; *M.C. v. Bulgaria*, paras. 79, 150; Roadblocks to Justice.

<sup>134</sup> Kunarac Appeal Judgment, para 387; *Prosecutor v. Sesay et al.*, SCSL-04-15-T, Judgment, 2 March 2009 ('Sesay et al. Trial Judgment'), para 148.

<sup>135</sup> *M.C. v. Bulgaria*, para. 102, referring to *Furundzija* Trial Judgment.

<sup>136</sup> See also Article 639(1): If the victim is a child, this shall be considered an aggravating circumstance.

<sup>137</sup> Afghan Civil Code, Article 70; Afghanistan 2019 Human Rights Report – State Department, p.36.

<sup>138</sup> This Article is almost identical to EVAW, Article 17(4): "If a person commits assault on chastity of a woman but his act does not result to adultery or pederasty (Tafkhiz and Mosahiqah etc...) - rubbing together of sexual organs -, considering the circumstances he shall be sentenced to long term imprisonment not exceeding 7 years."

<sup>139</sup> Understood as honour. See National Inquiry Report on Factors and Causes of Rape and Honour Killing in Afghanistan, AIHRC, ('National Inquiry Report')p.22.

<sup>140</sup> Understood as non-consensual sexual touching. See UNICEF Legal Framework, p.122.



- 3) If the act stated in paragraph (2) of this article is committed by force, threat or intimidation, the perpetrator shall be sentenced to medium imprisonment.

#### Aggression to chastity and namoos under Article 640

Unlike Article 636, which is gender-neutral, Article 640(1) is gender-dependant, referring to female victims. It does not therefore apply to non-consensual non-penetrative sexual acts between males but will apply to those same acts between two women.

#### Attempted rape under Article 640

This offence of “aggression to chastity and namoos” may include the crime of attempted rape. An attempted rape is a serious incident of sexual violence, particularly where there is evidence of aggravating factors. It is generally composed of three elements: the defendant’s intention to commit the crime; conduct on his part that represents a substantial step towards committing the crime, and his failure to complete the crime. Where penetration has not been established but a lack of consent, along with the specific intent of the perpetrator has been proved, this violation can be classified as an attempted rape contrary to Articles 47 and 636 of the Penal Code.

#### Non-consensual sexual contact under Article 640

This offence also appears to contemplate non-consensual sexual contact. This may include a wide range of acts that can amount to sexual violence, such as sexual touching, exposing oneself, or even kissing. In certain contexts, non-consensual sexual contact may be classified as a war crime or crime against humanity. Examples might include, among others, body searches carried by security forces during detention; acts of a humiliating and sexual nature in prisons (for example, forced nudity); vaginal examinations carried out by police and not health personnel as a first and not a last resort measure, purportedly to maintain security in prisons.<sup>141</sup>

#### Virginity examinations under Article 640

Hymen examination (or virginity testing) is the practice of assessing one’s ‘virginity’ based on the state of their hymen.<sup>142</sup> A virginity examination may be court-ordered in Afghanistan and without the consent of the woman being examined.<sup>143</sup> As recently as 2019 the US State Department reported that police, prosecutors and judges continue to order virginity tests for women and girls suspected of *zina* are forced to submit to virginity tests, purportedly to gather evidence as to whether they are still a virgin or recently had sexual intercourse.<sup>144</sup>

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<sup>141</sup> *Case of the Miguel Castro Castro Prison v. Peru*, IACHR (Merits, Reparations and Costs) Judgment of November 25, 2006, p. 98; Handbook for United Nations Field Missions 2020, p.21.

<sup>142</sup> Physicians for Human Rights, ‘Virginity and Hymen Testing: No Factual, Scientific, or Medical Basis’, 1 May 2005, (PHR Virginity and Hymen Testing), p. 1

<sup>143</sup> Afghanistan Penal Code, Article 640(2).

<sup>144</sup> Report of the Special Rapporteur on violence against women in Afghanistan, its causes and consequences, 12 May 2015, A/HRC/29/27/Add.3, (Special Rapporteur Afghanistan Report) para. 25; The Never-ending Cases of Rape in Afghanistan, The Typewriter, May, 2016; Afghanistan 2019 Human Rights Report, p.32.



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.<sup>145</sup> The hymen may not break or incur noticeable damage as a result of sexual intercourse or forced sexual penetration.<sup>146</sup> 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.

Afghani domestic practice regarding virginity tests is not in line with international practice, which suggests that a virginity exam should not be considered mandatory,<sup>147</sup> but only ordered where necessary<sup>148</sup> **and only** carried out with the victim's informed consent.<sup>149</sup> International standards make it clear that virginity testing should not be undertaken to establish whether a victim has been raped or sexually abused.<sup>150</sup> Forcing a girl or woman to have a virginity test as a requirement of the criminal justice system is a serious human rights violation,<sup>151</sup> and when committed forcibly may amount to rape.<sup>152</sup>

#### 2.4.4. *Zina* under Article 643 Afghan Penal Code

Article 643 of the Penal Code refers to the crime of *zina*, which as noted above criminalises sexual intercourse between unmarried couples, irrespective of consent. Prosecution for consensual sex – including between people of the same sex - is a violation of the human right to privacy, enshrined in Article 17 of the ICCPR.<sup>153</sup>

As noted above, girls and women who have been raped continue to be charged with *zina*.<sup>154</sup> This violates their right to non-discrimination, their rights to privacy and their right to an effective remedy for the violation. It punishes victims and deters them from reporting violations. For

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<sup>145</sup> PHR Virginity and Hymen Testing, p. 1; World Health Organisation, UN Women, and UNOHCHR, 'Eliminating Virginity Testing: An Interagency Statement' (2018) WHO/RHR/18.15, ('WHO Eliminating Virginity Testing'), p. 4; Iraq Supplement to IP2, 2018, p.29.

<sup>146</sup> PHR Virginity and Hymen Testing, p. 1; WHO Eliminating Virginity Testing, pp. 5, 10.

<sup>147</sup> The Administration of Justice on Sexual Violence Crimes, p. 9.

<sup>148</sup> 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 20(d); The Administration of Justice on Sexual Violence Crimes, p. 32.

<sup>149</sup> WHO Guidelines, p.30

<sup>150</sup> See e.g., 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. 62; WHO Eliminating Virginity Testing.

<sup>151</sup> PHR Virginity and Hymen Testing; 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'), N°12, 239–240; Handbook for United Nations Field Missions, p.21.

<sup>152</sup> PHR Virginity and Hymen Testing; International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p.62.

<sup>153</sup> See also, Organization of the Islamic Conference (OIC), Cairo Declaration of Human Rights in Islam (5 August 1990), Article 18; League of Arab States, Arab Charter of Human Rights (15 September 1994) Articles 16 and 21.

<sup>154</sup> Afghanistan: End Moral Crimes Charges 'Virginity tests', Human Rights Watch, ( 25 May 2016) (Last accessed on 20 December 2020).



example, fears of prosecution for *zina* force women to tolerate abusive domestic situations.<sup>155</sup> Women trying to live alone after ending an abusive marriage also face the same risk.<sup>156</sup>

Pregnancy may be considered sufficient evidence to establish *zina*.

#### **2.4.5. *Mosahiqah* or *Tafkhez* under Article 645 Afghan Penal Code:**

This Article is gender neutral. Under this Article, if two persons have non-penetrative consensual sex (*Mosahiqah* or *Tafkhez*), **each** of the perpetrators shall be sentenced to short imprisonment (a term of six months to one year).<sup>157</sup> This is not in line with international standards.

#### **2.4.6. *Bacha Bazi* under Article 653 Afghan Penal Code:**

*Bacha Bazi* usually involves older men (often former Mujahadin warlords) keeping a male or transgendered child (between the age of 10 and 18) who may be made to dress as a female, wear makeup, and dance seductively at male-only parties (either at private events or in public). They are compelled to engage in sexual acts.<sup>158</sup> Often the boys are kidnapped; most are from poor families, who work in the street, or who are the breadwinners of their families.<sup>159</sup>

In certain specific contexts and depending on the facts of the individual cases, *Bacha Bazi* may amount to the war crime or crime against humanity of enforced prostitution or sexual slavery, contrary to Articles 339(1).22 or 335(7) of the Penal Code.<sup>160</sup> *Bacha Bazi* may equally, again, subject to the context and evidence in the individual cases, be classified as “outrages upon personal dignity, in particular humiliating and degrading treatment,” contrary to Article 340(1)2. of the Penal Code.<sup>161</sup>

Those subjected to the crime of *Bacha Bazi* are victims of sexual violence crimes, and should not be charged with moral crimes or treated as equally responsible perpetrators as adults.<sup>162</sup>

#### **2.4.7. Harassment and persecution under Articles 668 Penal Code and 5(13) EVAW**

While the Afghan Penal Code does not include provisions specifically referring to sexual harassment, Article 668 of the Penal Code and EVAW Article 5(13) both criminalise harassment of women (and children) defined in almost identical terms: through speech or acts or “illegal requests,” causing harm to the personality, body and dignity of a woman or “causes fear,

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<sup>155</sup> Justice through the eyes of Afghan women: Cases of violence against women addressed through mediation and court adjudication (April 2015) (‘Justice through the eyes of Afghan women’), p. 32; Special Rapporteur Afghanistan Report, para. 65.

<sup>156</sup> Justice through the eyes of Afghan women, p. 32.

<sup>157</sup> Contrary to Articles 339(1).22 or 335(7) of the Afghanistan Penal Code.

<sup>158</sup> Sayed Jalal Shajjan, *The Revised Afghanistan Criminal Code: An End for Bacha Bazi?* (24 January 2018). See, (Last accessed on 20 December 2020) (‘The Revised Afghanistan Criminal Code: An End for Bacha Bazi?’)

<sup>159</sup> Zarifa Sabet, *Bacha Bazi in Afghanistan*, Geopolitical Monitor (26 May 2020) (‘Bacha Bazi in Afghanistan’).

<sup>160</sup> The Revised Afghanistan Criminal Code: An End for Bacha Bazi?

<sup>161</sup> As violations of Common Article 3 of the Geneva Conventions.

<sup>162</sup> Afghanistan 2019 Human Rights Report – State Department, p.8



insecurity or psychological pressure or reduction of social participation of females.” While these words, acts, writing or “illegal requests” are undefined,<sup>163</sup> a broad, context-based interpretation of the evidence surrounding these incidents may show them to amount to acts of a sexual nature.

## **2.5. Importance of a victim-centred approach**

A victim-centred approach means treating all victims of sexual violence with respect, dignity, and equally, without discrimination.<sup>164</sup> However, sexual violence is heavily stigmatised in Afghanistan.<sup>165</sup>

In Afghanistan’s patriarchal cultural men are viewed as dominant, protectors, providers and decision-makers, and women as submissive.<sup>166</sup> Women are perceived as ‘custodians’ of family honour who dishonour their families when they fall victim to sexual violence.<sup>167</sup> They are pressured by their families not to report the violence<sup>168</sup> to avoid bringing disgrace on their family. As a result, cases of sexual violence against women are concealed and heavily under-reported.<sup>169</sup> Survivors are often compelled to marry their attacker or face other severe forms of retaliation,<sup>170</sup> such as honour killings, beating and burning,<sup>171</sup>

Sexual violence against men is similarly under-reported. Male victims of sexual violence may have difficulty speaking about their experiences because they may be labelled as less manly.<sup>172</sup> They may be reluctant to report sexual violence for fear of prosecution for as homosexuals.<sup>173</sup>

Addressing and combatting this stigma and insecurity requires a victim-centred approach, placing the victim’s safety, security, confidentiality and well-being at the forefront of any investigative or justice process. This means that you should ensure that no aspect of your investigation, assessment of evidence or charging is affected by any personal views about sexual violence,

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<sup>163</sup> Ehsan Qaane, *Harassment of Women in Afghanistan: A hidden phenomenon addressed in too many laws*, (2 April 2017).

<sup>164</sup> *Handbook for United Nations Field Missions* 2020, p.16.

<sup>165</sup> *Special Rapporteur Afghanistan Report*, para. 19; All Survivors Project Foundation, *Compilation of Documentation by the United Nations and National Bodies on Sexual Violence Against Men and Boys in Afghanistan* (‘*Compilation on Sexual Violence Against Men and Boys in Afghanistan*’).

<sup>166</sup> *The Neglected Boys of War* (2019); *Iraq Supplement to IP2, 2018*, p.33.

<sup>167</sup> *Special Rapporteur Afghanistan Report*, para. 19 ;*Iraq Supplement to IP2, 2018* p.33.

<sup>168</sup> *Justice through the eyes of Afghan women*, p. 31.

<sup>169</sup> *Justice through the eyes of Afghan women*, p. 31; *National Inquiry Report*, p.5; *Special Rapporteur Afghanistan Report*, para. 17, *Prosecuting Conflict-Related Sexual Violence at the ICTY 2016*, pp. 35-36; Crown Prosecution Service, ‘*Domestic Abuse Guidelines for Prosecutors*,’ (UK 2020) (‘*Domestic Abuse Guidelines for Prosecutors*’). See also *Handbook for United Nations Field Missions* 2020, p.16.

<sup>170</sup> *Handbook for United Nations Field Missions* 2020, p.14; Report of the Secretary-General to the Security Council (S/2020/487) issued on 03 June 2020.

<sup>171</sup> *National Inquiry Report*, p.2.

<sup>172</sup> *The Neglected Boys of War* (2019); *Prosecuting Conflict-Related Sexual Violence at the ICTY 2016*, p. 151.

<sup>173</sup> *Afghanistan Penal Code*, Article 646.



gender or other stereotyping.<sup>174</sup> For example, although the local perception is that a woman's honour is diminished by being a victim of sexual violence and concrete harm flow to victims and their families from her victimisation, a victim-centred approach does not reinforce that view.<sup>175</sup>

### 2.5.1. Particular vulnerabilities to consider as part of a victim-centred approach

A victim-centred approach requires practitioners to take vulnerabilities into account when seeking to understand and identify sexual violence. Examples of these are explored below.

#### Domestic violence

Female victims of domestic violence are frequently subjected to a pattern of controlling or coercive behaviour which can include physical violence, rape and other acts of sexual violence, humiliation and other forms of degrading treatment (among others) by their spouses or other family members. These cases should not fall outside the law.

Some women accepted violence due to their fear of losing custody of their children;<sup>176</sup> a way of avoiding other harm.<sup>177</sup>

Women are generally dependent financially on their father, husband or brother.<sup>178</sup> In a recent UNAMA study, women stated that they were willing to accept abusive behavior because abusers were often providers.<sup>179</sup> Raising complaints against such perpetrators of violence often means being cut off from their support, with serious consequences for the entire family.<sup>180</sup>

#### Forced and early marriage

Early marriages are widespread in Afghanistan, with forced marriage at the root of most violence within the household.<sup>181</sup> Parents push their daughters into marriage long before they are ready.<sup>182</sup> Some victims of forced marriage self-immolate.<sup>183</sup> Women and girls who run away from home to escape physical, psychological or sexual abuse or being forced into marriage or being killed by relatives for refusing are sometimes charged with intention to commit *zina* or attempted *zina*.<sup>184</sup> The Penal Code does not contain any offence of "intention to commit *zina*."

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<sup>174</sup> The Grand Chamber of the European Court of Human Rights in *Konstantin Markin v. Russia* (No. 30078/06) 22 March 2012, para. 142-3 recognised the importance of identifying and dismissing gender-based stereotypes.

<sup>175</sup> Prosecuting Conflict-Related Sexual Violence at the ICTY 2016, p. 14; Handbook for United Nations Field Missions 2020, p.16.

<sup>176</sup> Justice through the eyes of Afghan women, p. 32.

<sup>177</sup> Domestic Abuse Guidelines for Prosecutors.

<sup>178</sup> Justice through the eyes of Afghan women, p. 32.

<sup>179</sup> Justice through the eyes of Afghan women, p. 32. See, for example, Wazhma Samandary, *Shame and Impunity: Is violence against women becoming more brutal?* (30 November, 2014) ('Shame and Impunity 2014').

<sup>180</sup> Justice through the eyes of Afghan women, p. 32.

<sup>181</sup> Special Rapporteur Afghanistan Report, para. 14; Compilation on Sexual Violence Against Men and Boys in Afghanistan.

<sup>182</sup> Special Rapporteur Afghanistan Report, para. 14.

<sup>183</sup> Special Rapporteur Afghanistan Report, para. 15.

<sup>184</sup> Special Rapporteur Afghanistan Report, para. 16; Afghanistan 2019 Human Rights Report – State Department, p.8.



Forced marriage automatically creates a coercive environment which is which is often characterised by physical as well as psychological violence. Sexual violence may be used as a tool to prevent the victim from leaving the forced marriage, since intercourse is considered to decrease her “value” and make her unsuitable for marriage. In considering cases of forced marriage, practitioners may find that further evidence may not be required to establish lack of consent. In context, evidence of forced marriage in and of itself may be sufficient to establish lack of consent. Sex as a consequence of forced marriage may be classified as rape committed by force, threat or intimidation, based on the circumstances of the violation.

### Women in prostitution

Although not specifically addressed in the Penal Code, prostitution is illegal in Afghanistan, falling under the crime of *zina*. Nevertheless, women may be forced into prostitution by their families, due to poverty or drug addiction.<sup>185</sup> Those women may be unaware of sexually transmitted diseases.<sup>186</sup> They are perceived as immoral and untrustworthy, not deserving of protection. They are particularly vulnerable, and may be specifically targeted for different forms of physical, sexual and psychological violence, yet to report it would put them at risk of harsh punishment for *zina*.

### Male victims

One particularly acute example of male victimisation is the grossly under-reported incidents of *Bacha bazi*.<sup>187</sup> As noted above, *Bacha bazi* it may be considered a form of sexual slavery. Once the *Bacha bazi* become adults, the boys are released.<sup>188</sup> With no education and the stigma attached to having been a *Bacha bazi*, they tend to be unemployable, and turn to prostitution.

Even though *Bacha Bazi* is a criminal offence (as noted above), because of their power and influence, perpetrators enjoy impunity. Victims, on the other hand, face social stigma, shame, and fear of prosecution for adultery, homosexuality or prostitution.<sup>189</sup> Many victims also report being abused by law enforcement officials, which is clearly a further disincentive to reporting the violations.<sup>190</sup>

As part of victim-centred approach, practitioners should take care to avoid these cultural stereotypes, and to be vigilant in their attempts to identify both female *and male* victims of sexual violence.

## **2.5.2. Avoiding myths, gender bias or stereotyping**

### Avoid drawing adverse inferences as to credibility

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<sup>185</sup> Waslat Hasrat-Nazimi, Human trafficking, prostitution thrive in Afghanistan (24 October 2012) ([‘Human Trafficking in Afghanistan’](#)).

<sup>186</sup> [Human Trafficking in Afghanistan](#).

<sup>187</sup> [The Neglected Boys of War \(2019\)](#).

<sup>188</sup> [Bacha Bazi in Afghanistan](#).

<sup>189</sup> [The Neglected Boys of War \(2019\)](#).

<sup>190</sup> Afghanistan 2019 [Human Rights Report](#) – State Department, p.32.



The credibility of a victim should only be considered based on the evidence and not because of their behaviour.<sup>191</sup> This means that investigators, police and judges **should not** draw any adverse inferences or make assumptions as to the credibility of victims who have delayed reporting their cases.<sup>192</sup>

Equally, women who remained with their abuser and who have no marks of physical violence should not be considered less credible.<sup>193</sup>

### Sufficiency of evidence

In cases of rape and other acts of sexual violence the victim's own evidence can establish that an act of sexual violence took place; the nature of the attack; the identification of the alleged perpetrator; the circumstances surrounding the act and the existence of coercive circumstances.<sup>194</sup> This has been the case in international courts and tribunals, which rely heavily on testimonial evidence.

### Prior sexual behaviour

As consent is ongoing and each sexual act must be agreed to independently, questions about a victim's prior sexual conduct are irrelevant to any investigation of rape or other acts of sexual violence.<sup>195</sup> They do not provide information regarding consent at the time the crime was committed and are therefore of no use to proving or disproving the charges.<sup>196</sup> They attribute blame to the victim's supposed immorality, rather than focussing on the behaviour of the perpetrator,<sup>197</sup> and should not be permitted.

Examination of private correspondence (email, text messages) of the victim with the perpetrator or with other individuals should only be done to the extent that is necessary for proving the charges against the perpetrator, and the process of gathering evidence should not be abused to collect information about the personal life and sexual history of the survivor which has no bearing on establishing the facts of the case.

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<sup>191</sup> Directive 2012/29/EU, para. 25.

<sup>192</sup> Directive 2012/29/EU, para. 25. See also Shame and Impunity 2014.

<sup>193</sup> Justice through the eyes of Afghan women, p. 24.

<sup>194</sup> Iraq Supplement to IP2, 2018, p.148. See also Gender Equality in Georgia: Barriers and Recommendations, 2018, Vol. 1, p.74.

<sup>195</sup> Gambian Sexual Offences Act 2013, s. 18(1); UN Women, 'Handbook for Legislation on Violence Against Women' (2012) ('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.

<sup>196</sup> Resolution adopted by the General Assembly on 21 December 2010, 'Strengthening crime prevention and criminal justice responses to violence against women', A/RES/65/228, para 15; UN Handbook for Legislation on Violence Against Women; International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 62; See e.g., *R. v. Goldfinch* (2019) SCC 38 R (Canada).

<sup>197</sup> Trial International, 'Rape Myths in Wartime Sexual Violence Trials: Transferring the Burden from Survivor to Perpetrator' (2018) ('Trial, Rape Myths'), p. 25; 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. 33.

In addition, it should be recalled that pre-marital consensual sex is illegal in Afghanistan.<sup>198</sup> Any questions about a victim's prior sexual conduct may therefore put her at risk of sanction for the charge of *zina*.

### Subsequent behaviour

Victims of rape and other acts of sexual violence exhibit a wide range of behavioural responses during and after the violence, and also in the re-telling of their experiences. Police, prosecutors and judges should therefore not base their assessment of the victim's credibility and reliability on their own assumptions of typical behaviour in such situations.<sup>199</sup>

Some documented examples of the different behavioural responses that victims exhibit during and after experiencing sexual violence in order to protect themselves from additional harm and survive the situation, include:<sup>200</sup>

<b>Fights</b>	Physically fighting, pushing, struggling, and fighting verbally e.g. saying 'no'.
<b>Flight</b>	Putting distance between the victim and danger, including running, hiding or backing away.
<b>Freeze</b>	This is a state of involuntary paralysis. It means becoming tense; immobile, or silent. This is a common reaction to rape and sexual violence. Freezing is not giving consent; it is a defence mechanism; a survival response arising from the desire to avoid fights and/ or potential further harm. <sup>201</sup>
<b>Faint</b>	Similar to freezing, except the muscles become loose and the body goes floppy. This is an automatic reaction that can reduce the physical pain of what is happening to the victim. The victim's mind can also shut down to protect itself.
<b>Friend</b>	Calling for a 'friend' or bystander for help, for example by shouting or screaming, and/or 'befriending' the person who is dangerous, for example by placating, negotiating, bribing or pleading with them. This does not mean the victim is giving her attacker consent; it is an instinctive survival mechanism.

Women and girls might not physically resist (fight) or flee because of reasons associated with their unique, coercive environment. For example, they may have been wholly overpowered by the physical strength of their abuser; they may have been abducted for marriage and felt there was no point in resisting; or they may have been detained in an isolated location; they may submit based on a genuine fear rooted in the perpetrator's previous violent behaviour; they may be afraid of escalating the situation, reprisals, or believe that actively resisting might provoke even more violent, abusive behaviour; they may just be terrified.

<sup>198</sup> Afghanistan Penal Code, Article 643.

<sup>199</sup> , Article 36; , 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/C/GC/35, Para. 26(c).

<sup>200</sup> Rape Crisis England and Wales, see <https://rapecrisis.org.uk/get-help/looking-for-tools-to-help-you-cope/feelings/fight-or-flight-response/> (Last Accessed on 20 December 2020).

<sup>201</sup> The Impact of Trauma on Adult Sexual Assault Victims.

### 2.5.3. Investigating sexual violence as discrimination

Article 218.8 of the Penal Code provides that “Commission of a crime as a result of race, tribe, religion, sect, gender, region, social status or political ideology-based discrimination” will be an aggravating circumstance for criminal responsibility. Women have a human right to physical, mental integrity and sexual autonomy without discrimination. Rape and other forms of sexual violence against women are a form of discrimination.<sup>202</sup>

### 2.5.4. Investigating discriminatory motive

It is not necessary that discrimination be the only motivation for the crime. There may be more than one motive.<sup>203</sup> It is sufficient that a discriminatory motive is a contributing factor for the commission of the crime.<sup>204</sup>

There is no list of different types of evidence practitioners may use to prove discriminatory intent.<sup>205</sup> Discriminatory intent can be established through evidence in the period leading up to, during or after the incident in question.<sup>206</sup> It may be obvious from evidence of the perpetrator's biased language, statements to or communication with the victim,<sup>207</sup> within his social circle or in public.<sup>208</sup> Investigators should pay special attention to the circumstances surrounding the commission of the offence, as the discriminatory motive may be revealed by examining the specific manner or method in which the perpetrator committed the crime.<sup>209</sup> For example, the crime may have been accompanied by insults which were sexually or ethnically demeaning.

### 2.5.5. Avoid repeated interviews

Victims of rape and other acts of sexual violence can be re-traumatized by re-living their experiences in repeated interviews throughout the criminal justice process.<sup>210</sup> International human rights law requires states to ensure that during criminal investigations the number of victim interviews are kept to a minimum and only carried out where strictly necessary for the purpose of investigation.<sup>211</sup> Against all this, it is important to recall that trust is built over time. The victim may

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<sup>202</sup> CEDAW/C/GC/35, para. 21; 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; Preamble, Article 3(a); OHCHR, 'Latin America Model Protocol for the Investigation of Gender-Related Killings of Women (femicide/feminicide) (UN 2014) ('OHCHR Latin America Protocol') , Introduction, p.3.

<sup>203</sup> Prosecuting Hate Crimes - A Practical Guide, International Association of Prosecutors – OSCE/ODIHR, 2014 ('Prosecuting Hate Crimes') p. 63.

<sup>204</sup> Student Manual, United States Dept of Justice, National Hate Crimes Training Curriculum, ('Hate Crimes Training Curricular') pp.16-17.

<sup>205</sup> Prosecuting Conflict-Related Sexual Violence at the ICTY 2016, p. 206.

<sup>206</sup> Prosecuting Hate Crimes, p.60.

<sup>207</sup> Prosecuting Conflict-Related Sexual Violence at the ICTY 2016, p. 206.

<sup>208</sup> Prosecuting Hate Crimes, p. 47-48.

<sup>209</sup> Prosecuting Hate Crimes, pp. 47-48.

<sup>210</sup> Iraq Supplement to IP2, 2018, p.40.

<sup>211</sup> Directive 2012/29/EU, Article 20(b); The Administration of Justice in Sexual Violence Crimes, pp.33-34; 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') pp.14, 16; International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, pp.7-8.



not have felt comfortable revealing everything at first. It may take more than one interview before they do.<sup>212</sup>

## 2.6. Victim retracts or withdraws complaint

A victim may drop their complaint at any stage of the prosecution.<sup>213</sup> In this case the proceedings are generally stopped.<sup>214</sup>

Complaints can be withdrawn for many reasons. It is important to investigate the withdrawal, as this may uncover credible risks to the victim and her family.<sup>215</sup> It may be that a victim has been coerced or intimidated into withdrawing her complaint. Special measures may be needed to ensure the victim's protection.

Some possible reasons for withdrawing a complaint are set out in the list below. This is not an exhaustive list:

Possible reasons for withdrawal or retraction of complaint
Fear of being further harmed by the perpetrator or members of their own or the perpetrator's family or associates.
Threats, intimidation or other forms of pressure from the perpetrator, his family or associates.
Pressure from other family members of the victim, other members of the community or community 'elders', including being pressured to reconcile, resolve 'differences' between parties through mediation, or other community-based measures.
Fear of being publicly shamed, disowned or outcast from the community. A wish to be reconciled with the perpetrator, or a wish to return to the family.
Feelings of isolation or vulnerability, and fears they may not be believed as a result of those vulnerabilities.
Fear of HIV status or other very sensitive personal information being revealed if not already known.
Fear of being prosecuted. <sup>216</sup>

<sup>212</sup> Trauma-Informed Victim Interviewing (Office for Victims of Crime: Training and Technical Assistance Center).

<sup>213</sup> Afghanistan Penal Code, Article 672(1).

<sup>214</sup> Afghanistan Penal Code, Article 672(1).

<sup>215</sup> Istanbul Convention, Articles 18, 26, 50, 56; Istanbul Convention Explanatory Report, para. 59; Domestic Abuse Guidelines for Prosecutors.

<sup>216</sup> See, for example, *Opuz v. Turkey*, App. No. 33401/02, (ECtHR, 9 June 2009) ('*Opuz v. Turkey*'), para. 143; Domestic Abuse Guidelines for Prosecutors.



Below is a checklist of questions which can assist practitioners in discovering reasons why a victim refuses to testify:

1.	Why do you feel reluctant (or refuse to) testify?
2.	When did you become reluctant (or decide to refuse) to testify?
3.	Were you living with the defendant when the incident happened?
4.	Are you now living with the defendant?
5.	(If not) Does the defendant know where you are staying?
6.	Are you financially dependent on the defendant?
7.	Do you and the defendant have children together?
8.	Have you discussed the case with the defendant?
9.	Has the defendant made any promise to do something for you if you do not testify?
10.	Is that promise to do something the reason you do not wish to proceed/or testify?
11.	Has the defendant or anyone else threatened you, your children or your family and told you not to testify?
12.	Is there some other reason you are afraid of the defendant?
13.	(If injuries are visible) How did you receive the injuries?
14.	Have you talked about your desire not to testify with the local women's shelter/counselling centre/a victim's services?
15.	If not, would you be willing to talk to them? <sup>217</sup>

Pursuant to article 39 (1) (2) of the EAW law, however, a female complainant can withdraw her case at any stage of proceedings, except with regard to five acts of violence against women which the State **must** act on, irrespective of a woman's failure to file a complaint or her subsequent withdrawal of a complaint. These are the crimes of rape, enforced prostitution, publicizing the identity of a victim, burning or the use of chemical substances and forced self-immolation or suicide.<sup>218</sup>

<sup>217</sup> 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.74.

<sup>218</sup> Justice through the eyes of Afghan women, p.18.



While it is unclear whether in these situations the victim may be required to appear, in the event a victim recants, refuses to testify or is otherwise unable to appear in court, investigators may be called to give evidence about their observations, the information they received and evidence collected during their engagement in the incident.<sup>219</sup> Compelling a victim to give evidence in court should be a last resort until all other avenues of investigation have been explored.<sup>220</sup>

The onus is therefore on investigators and prosecutors to build a robust case by collecting evidence in addition to that of the victim which will work towards ensuring that the case can continue if the victim withdraws the complaint or is otherwise unavailable to testify.<sup>221</sup> Make sure all the evidence has been gathered and consider other, alternative sources of evidence.<sup>222</sup>

## 2.7. Aggravating factors

Article 639 of the Penal Code sets out aggravating circumstances in cases of rape. Some are discussed in the table below, as they impact on some of the first steps in an investigation. The presence of these factors may also be relevant to determining whether the victim was under coercive circumstances and will be relevant to any assessments of the victim's safety and security.

<p><b>If the victim is a child:</b></p>	<p>This factor is problematic, as a child is defined in Article 95 of the Penal Code as a person who has not reached the age of 18.<sup>223</sup> It seems that proof of the offence only requires it be established that the perpetrator had intercourse with a victim under the age of eighteen. The long prison term upon conviction for this offence makes it inappropriate <b>to charge in</b> those cases where the victim and complainant were of similar age, and the sex was consensual.</p>
<p><b>If the perpetrator has influence or dominance over the victim in one way or another:</b></p>	<p>This should refer to anyone who is in a position of superiority over the victim, and include perpetrators who abuse the victim's material, official or other kind of dependence. Practically speaking, it may include spouses or intimate partners; parents; religious figures; police officers; guards or other officials in detention or other state facilities, teachers, employers and medical professionals among a wide range of others. The common element of these cases is the position of trust which is normally connected with such a relationship and the specific coercive environment and emotional harm that can result when committing an offence within such a relationship.<sup>224</sup></p>

<sup>219</sup> Gender Equality in Georgia: Barriers and Recommendations, p.64; International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p.6.

<sup>220</sup> Domestic Abuse Guidelines for Prosecutors.

<sup>221</sup> Istanbul Convention, Article 55; Opuz v. Turkey, para. 145; Istanbul Convention Explanatory Report, para. 280; Domestic Abuse Guidelines for Prosecutors.

<sup>222</sup> Istanbul Convention, Article 55; Istanbul Convention Explanatory Report, para. 280; Domestic Abuse Guidelines for Prosecutors.

<sup>223</sup> See Article 95 of the Afghanistan Penal Code.

<sup>224</sup> Istanbul Convention Explanatory Report, para. 236.



<p><b>If the act causes injury or serious mental harm to the victim:</b></p>	<p>As this can refer to both physical and psychological harm, and may require a medical, psychological or psychiatric assessment of the victim to ensure that the scope of that harm is properly taken into account on sentencing.</p>
<p><b>If the victim is the permanent or temporary Mahram of the perpetrator:</b></p>	<p>Mahram refers to anyone who in Islamic law who the victim is forbidden to marry because of blood ties, marriage ties or breastfeeding. a former or current marital partner or former or current non-marital partner as recognised by internal law, by a member of the family, or any person cohabiting with the victim.<sup>225</sup> International practice suggests that this should not be limited to Mahram, but understood as including: a former or current marital partner or former or current non-marital partner as recognised by internal law, by a member of the family, or any person cohabiting with the victim.<sup>226</sup></p>
<p><b>If as a result of rape, the victim dies, the perpetrator shall be sentenced to death penalty:</b></p>	<p>The critical issue here is to establish whether there has been a causal link. This arbitrary penalty fails to address situations where the victim may equally die as a result of being infected by HIV during the rape, or commit suicide following the rape, or have been killed as an act of retribution (or in an honour killing or as punishment) for having reported the rape.<sup>227</sup></p>

While it is noted that the Penal Code does not refer to factors such repeated offenders, investigators should collect evidence of any patterns of sexual violence, including previous complaints against the perpetrator. Evidence of the offence being committed with extreme cruelty will also be important – such as acts of physical violence that are particularly high in intensity and present a serious risk to the life of the victim.<sup>228</sup>

<sup>225</sup> Special Rapporteur Afghanistan Report, para. 26. See also: Istanbul Convention, Article 46(a); Istanbul Convention Explanatory Report, Article 236.

<sup>226</sup> Istanbul Convention, Article 46(a); Istanbul Convention Explanatory Report, Article 236.

<sup>227</sup> WHO Guidelines, p.12; WHO Report, Chapter 6, p. 149.

<sup>228</sup> Istanbul Convention Explanatory Report, para. 241; Prosecuting Conflict-Related Sexual Violence at the ICTY 2016, p. 283.



## Part III: Survivor-centred principles in dealing with victims and witnesses

### 3. Introduction

This section of the Handbook highlights a number of best practice principles for dealing with victims of crime. First is the general principle of ‘Do no harm’, followed by the inter-dependent principles of ‘informed consent’, ‘information sharing’, ‘confidentiality’, and survivor centred access to justice.

Survivor-centred principles require a context-sensitive investigation and assessment of the evidence<sup>229</sup> and taking into consideration the victim’s specific needs<sup>230</sup> to enable their effective participation in the criminal proceedings. They should be applied simultaneously in interactions with victims of crime.<sup>231</sup>

#### ‘Do no harm’

‘Do no harm’ is a basic principle of human rights monitoring<sup>232</sup> now used in humanitarian and human rights law,<sup>233</sup> and, more recently, in the international criminal justice sector.<sup>234</sup> It recognises that victims of crime, harmed by the perpetrators, may be subject to secondary harm from institutions, judicial processes, their families and communities.<sup>235</sup>

Particular attention should be paid to traumatized victims, and victims of sexual and gender-based violence and torture who, harmed by their perpetrators, can suffer further harm as a result of the criminal justice process.<sup>236</sup> ‘Do no harm’ has been described by the United Nations as a “cornerstone” of conflict-related sexual violence work.<sup>237</sup>

‘Do no harm’ requires practitioners to recognise the potential harmful impact of their interventions with victims and witnesses, including re-traumatization, stigmatisation, violence and marginalization,<sup>238</sup> and take steps to:

- (i) avoid exposing them to risk through their actions,<sup>239</sup> and

<sup>229</sup> Istanbul Convention Explanatory Report, paras. 191-192.

<sup>230</sup> See Equality Now, Learning from Cases of Girls’ Rights (29 May, 2018).

<sup>231</sup> Handbook for United Nations Field Missions 2020, p.35.

<sup>232</sup> Office of the High Commissioner of Human Rights (‘OHCHR’), ‘Training Manual on Human Rights Monitoring’ (United Nations (‘UN’) 2001), (‘OHCHR Training Manual’) p. 626.

<sup>233</sup> 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’).

<sup>234</sup> *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Observations relevant to reparations, 31 October 2016, para. 22, (‘Bemba Reparations’); ‘ICTY Manual on Developed Practices’ (United Nations Interregional Crime and Justice Research Institute (‘UNCRI’) 2009), (‘ICTY Manual on Developed Practices’) p. 34.

<sup>235</sup> Handbook for United Nations Field Missions 2020, pp.13-14.

<sup>236</sup> OHCHR Latin America Protocol, para. 61.

<sup>237</sup> Handbook for United Nations Field Missions 2020, p.13.

<sup>238</sup> Handbook for United Nations Field Missions 2020, p.14.

<sup>239</sup> ‘Prosecuting International Crimes Series: Investigation Policy and Principles of Cooperation and Collaboration’ (Philippe Kirsch Institute June 7 2018), (‘Investigation Policy and Principles’); ‘Handbook on Civil Society

(ii) mitigate their possible negative effects.<sup>240</sup>

Implementing the principle of 'Do no harm' means working to a victim-centred approach,<sup>241</sup> not exhibiting judgmental behaviour,<sup>242</sup> never blaming a victim,<sup>243</sup> and always prioritising the safety of the victims and witnesses over the evidence.<sup>244</sup>

As part of a victim-centred approach, practitioners 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.<sup>245</sup> Some of these vulnerabilities were discussed earlier in this Handbook. 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.<sup>246</sup> This is done through 'risk assessments', which are discussed in more detail below. See Annex A.

### 3.1.1. Who should observe the 'Do no harm' principle, and when?

'Do no harm' is based on the safety and dignity of victims of crime.<sup>247</sup> It also applies to any person involved in the investigation of domestic and international crimes.<sup>248</sup>

'Do no harm' applies through all stages of investigations and related proceedings, whether those are human rights investigations or criminal prosecutions.<sup>249</sup> It has been translated into concrete measures in dealing with victims/witnesses of crime, which will be discussed below.

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Documentation of Serious Human Rights Violations: Principles and Best Practices' (Public International Law Policy Group ('PILPG') 2016) ('PILPG Handbook') pp. 8, 21; Handbook for United Nations Field Missions 2020, p.13.

<sup>240</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p.85; Istanbul Convention Explanatory Report, paras. 116, 255; Handbook on Effective Prosecution Responses to Violence Against Women and Girls, p. 25; PILPG Handbook, pp. 8, 21.

<sup>241</sup> 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').

<sup>242</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 182; GBV Pocket Guide, pp. 7, 16.

<sup>243</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 172; Sarah Paine MBE, 'Rape: The Victim Experience Review' (US Home Office 2009), p. 11. ('Rape: The Victim Experience Review')

<sup>244</sup> Investigation Policy and Principles; ICTY Manual on Developed Practices, p. 34.

<sup>245</sup> Draft Murad Code, Principle 1.1.

<sup>246</sup> Investigation Policy and Principles.

<sup>247</sup> Investigation Policy and Principles.

<sup>248</sup> Investigation Policy and Principles; OHCHR Training Manual, p. 15; PILPG Handbook, p. 21.

<sup>249</sup> PILPG Handbook, p. 20.



## 2. Risk assessment

Police, prosecutors and judges share a responsibility for the protection of victims of crime through all stages of the investigation and judicial process.<sup>250</sup> This is done through a thorough risk assessment. A risk assessment is one of the first<sup>251</sup> and most important steps practitioners should take in dealing with victims. Risk assessments should be reviewed and updated throughout the criminal justice process.<sup>252</sup>

A risk assessment involves identifying all potential threats which could cause harm (physical, psychological, legal, property or other damage) to victims, assessing the likelihood they will come to pass and then taking mitigating measures which could reduce the impact or likelihood of harm. These potential threats can change dramatically from situation to situation.<sup>253</sup>

A risk assessment should be individualised, done on a case by case basis.<sup>254</sup> Risk assessments are therefore location, time, date, person, organisation, action and victim specific.<sup>255</sup> Among a wide range of other factors, they should take into account the individual characteristics of the victim, the nature of the crime, the circumstances of the crime and the context in which it took place, as well as the victim's relationship to the perpetrator.<sup>256</sup>

Among others, investigators should consider the following possibilities when conducting risk assessments:

- (i) retaliation, intimidation or threats by the perpetrators and their families or the broader community against victims, witnesses and their families;<sup>257</sup>
- (ii) punishment, including physical violence, by members of the victim/witness' immediate family or community;<sup>258</sup> This can include honour killings or acts of physical violence against victims suspected of being homosexual; self-immolation or burning, and suicide.<sup>259</sup>
- (iii) re-traumatization,<sup>260</sup> including by being subject to poorly conducted, multiple interviews.<sup>261</sup> Even though, in theory, there should be no shame associated with being a victim of violent

<sup>250</sup> [Istanbul Convention](#), Article 56; [Istanbul Convention Explanatory Report](#), para. 260; [CEDAW/C/GC/35](#), para. 40(b).

<sup>251</sup> [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 92; [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.

<sup>252</sup> [PILPG Handbook](#), p. 45; , Article 51; [Istanbul Convention Explanatory Report](#), para. 260; [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), p. 92; [Domestic Abuse Guidelines for Prosecutors](#).

<sup>253</sup> [Iraq Supplement to IP2, 2018](#), p.38.

<sup>254</sup> [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.

<sup>255</sup> [Iraq Supplement to IP2, 2018](#), p.38.

<sup>256</sup> [Directive 2012/29/EU](#), paras 22.2, 22.3; [UNODC Handbook for Violence against Women and Girls](#), p. 54.

<sup>257</sup> [PILPG Handbook](#), p. 39; [Iraq Supplement to IP2, 2018](#), p.39.

<sup>258</sup> [PILPG Handbook](#), p. 39.

<sup>259</sup> [Iraq Supplement to IP2, 2018](#), p.31.

<sup>260</sup> [PILPG Handbook](#), p. 39.

<sup>261</sup> [Iraq Supplement to IP2, 2018](#), p.31.

- crime, be mindful that you may need to minimize the degree or number of times victims are required to repeat the details of the violence they experienced.<sup>262</sup>
- (iv) women victims of sexual violence may be traumatised by forced virginity testing.<sup>263</sup> Trauma may also be exacerbated by a lack of professional, supportive mental health response and services for survivors.<sup>264</sup>
  - (v) risks from the conflict environment or armed groups<sup>265</sup>
  - (vi) women who have been victims of sexual violence may be subjected to coercive pressure to reconcile with or even marry the perpetrators.<sup>266</sup> This may lead to additional physical abuse and cause further psychological harm.<sup>267</sup> Mediation may also put victims at risk of further abuse.<sup>268</sup>
  - (vii) evidence of coercive or controlling behaviour, environments, or escalating violence should factor into the risk assessment.<sup>269</sup>
  - (viii) 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.<sup>270</sup> They may be stigmatised or isolated,<sup>271</sup> even encouraged to suicide by their family and community.<sup>272</sup> The stigma and shame of being a victim may leave them unable to access medical treatment;<sup>273</sup> or homeless, shunned by their families and communities.<sup>274</sup>
  - (ix) women victims of sexual violence may be subjected to forced virginity testing;<sup>275</sup>
  - (x) risks that sexual violence victims contract sexually transmitted infections or become pregnant as a result of the violation.<sup>276</sup> Note that cultural attitudes towards sex outside

<sup>262</sup> Prosecuting Conflict-Related Sexual Violence at the ICTY 2016, p. 14.

<sup>263</sup> [Iraq Supplement to IP2, 2018](#), p.31.

<sup>264</sup> [Iraq Supplement to IP2, 2018](#), p.31.

<sup>265</sup> [Iraq Supplement to IP2, 2018](#), p.39.

<sup>266</sup> PILPG Handbook, p. 39.

<sup>267</sup> [Iraq Supplement to IP2, 2018](#), p.31.

<sup>268</sup> [Iraq Supplement to IP2, 2018](#), p.31.

<sup>269</sup> Istanbul Convention Explanatory Report, para. 260; 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'), Table 5.

<sup>270</sup> PILPG Handbook, p. 39.

<sup>271</sup> '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.

<sup>272</sup> [Iraq Supplement to IP2, 2018](#), p.31.

<sup>273</sup> [Iraq Supplement to IP2, 2018](#), p.31.

<sup>274</sup> Directive 2012/29/EU, para. 22.

<sup>275</sup> [Iraq Supplement to IP2, 2018](#), p.31.

<sup>276</sup> Directive 2012/29/EU, para. 22.



marriage may prevent women from reaching out for testing for sexually transmitted infections.

(xi) medical risks to victims may be harmed by ineffective medical treatment.<sup>277</sup>

(xii) arrest and punishment, (e.g., when certain acts are criminalized);<sup>278</sup>

(xiii) victims of sexual violence may be particularly concerned about confidentiality<sup>279</sup>. For example, they may not want anyone in their family or community to know about the incident under investigation. Depending on their situation, it may not always be possible to ensure this – for example, if the victim is in a refugee camp. Therefore, harms stemming from potential breaches of confidentiality also need to form a part of risk assessment and guide the entire investigation process.

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and when should risk assessments be completed?



Risk assessments are conducted in three steps (see, Annex A).<sup>280</sup>

**Step 1: Identification.** Practitioners should identify all potential threats (e.g. threat to life, health, property, reputation, etc.). Consider who or what is threatened, and who or what has made the threat or presents a threat.<sup>281</sup>

This will include such evidence-based factors as the use of weapons in the commission of the offence; the presence of weapons at the incident location or threats to use weapons.<sup>282</sup>

Certain victims, such as victims who are drug users or in prostitution may require special protective measures to ensure their safety.

**Step 2:** Assess how likely it is that the threats in Step 1 could become a reality or recur, and their impact on the victim and her family, the outcome of the case and the public interest.<sup>283</sup>

Analysis conducted at this stage of the assessment needs to be as comprehensive as possible, in order to deal effectively with all types of risks and take into account the particular circumstances of the case at hand.<sup>284</sup> Assessments of risk should be based on objective and reliable information

<sup>277</sup> Iraq Supplement to IP2, 2018, p.31.

<sup>278</sup> PILPG Handbook, p. 39; International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 127.

<sup>279</sup> Hate Crimes Training Curricular, pp.50, 54.

<sup>280</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 93.

<sup>281</sup> Iraq Supplement to IP2, 2018, p.93

<sup>282</sup> See <https://eige.europa.eu/gender-based-violence/risk-assessment-risk-management/step-1-define-purpose-and-objectives-police-risk-assessment> (Last Accessed on 20 December 2020); Istanbul Convention Explanatory Report, para. 263.

<sup>283</sup> Iraq Supplement to IP2, 2018, p.93; See <https://eige.europa.eu/gender-based-violence/risk-assessment-risk-management/step-1-define-purpose-and-objectives-police-risk-assessment> (Last Accessed on 20 December 2020).

<sup>284</sup> See <https://eige.europa.eu/gender-based-violence/risk-assessment-risk-management/step-3-identify-most-relevant-risk-factors-police-risk-assessment> (Last Accessed on 20 December 2020).



concerning potential threats.<sup>285</sup> In particular, practitioners 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.<sup>286</sup>

**Step 3: Mitigation.** Practitioners should mitigate or manage the assessed risks by identifying what measures can be put in place to counter those risks<sup>287</sup> and implementing them. This may require a coordinated safety plan involving different agencies and organisations, including the police, prosecutors and judges, particularly to ensure the safety and security of high risk and vulnerable victims.<sup>288</sup> Challenges in the Afghan context in this regard relate to the lack of infrastructure. For example, a challenge in this regard is the identified lack of space at women’s shelters, and the cultural stigmatisation of women who spend even one night outside the home.<sup>289</sup>



### 3. 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.<sup>290</sup> It reflects the idea that victims and witnesses must fully understand such things as why they are being interviewed, photographed, being asked to undergo medical or other examinations, the procedures that will be followed, how their personal information will be shared and how it will be protected.<sup>291</sup>

This means that you will need to present the information in a way that the victim or witness will understand. In practice this means that your explanations should be appropriate to the level of education, knowledge and understanding of the victim/witness, taking into account any customs and traditions which may impact on the way they understand your explanations. This is important to build a victim’s trust.<sup>292</sup>

While the informed consent process should also make victims/witnesses aware of the impact of their declining to take part in any procedure (it may, for example, negatively impact on your investigation) it is important to respect their decisions. In this way, informed consent ensures that

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<sup>285</sup> IICI, ‘Victims and Witnesses: Support, Protection, Compensation and Participation’, pp. 10-11, (‘IICI Victims and Witnesses Support’). See also, ICC, *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.

<sup>286</sup> Istanbul Convention Explanatory Report, para. 260; *Opuz v. Turkey*, para. 96.

<sup>287</sup> Istanbul Convention Explanatory Report, para. 261; [Iraq Supplement to IP2, 2018](#), p.9

<sup>288</sup> Istanbul Convention Explanatory Report, paras. 64, 261. See Articles 67-68 of the [Afghanistan Criminal Procedure Code](#).

<sup>289</sup> Afghanistan 2019 [Human Rights Report](#) – State Department, p.32.

<sup>290</sup> 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.

<sup>291</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 90; PILPG Handbook, p. 23; Phillip Kirsch Institute, ‘Prosecuting International Crimes Series: Investigation Policy and Principles of Cooperation and Collaboration’ (Phillip Kirsch Institute, June 7 2018); [Handbook for United Nations Field Missions 2020](#), p.14.

<sup>292</sup> Canadian Framework for Collaborative Police Response on Sexual Violence, p. 16;



victims of crime maintain full control over their experiences and are informed, willing participants in any investigation (or trial). It promotes empowerment, by ensuring their choices are at the centre of your responses.<sup>293</sup>

#### When and how should informed consent be obtained?

Informed consent must be obtained before the victim/witness makes any disclosures or undergoes any procedures.<sup>294</sup> Where these interventions involve different actors, it will be important to ensure that information delivered to the victims or witness is clear and consistent. Informed consent may also be obtained at the start of your engagement with the victim/witness. If so, explain that they need to tell you if they wish to stop at any time.<sup>295</sup>

Victims/witnesses need to understand what will happen to the information/evidence they give you. Where there is a possibility that the information/evidence they give to AIHRC investigators may be shared with the ICD, it is critical that this is part of informed consent. Victims/witness should be told how information/evidence they share will be used by both agencies, how it will be protected by both agencies and how both agencies will guarantee its confidentiality. This may be facilitated through a checklist developed and agreed by both agencies.

Informed consent should be voluntary,<sup>296</sup> 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 Afghanistan, such as in public locations with little or no expectation of privacy, and may be mitigated by trying to speak to the victim/witness alone in a safe, private location, where they are not influenced by others.

When explaining and obtaining informed consent, make sure the victim/witness has enough time to make a considered decision and ask any questions they wish.

As guidance, here are some steps you may take to ensure informed consent:<sup>297</sup>

- (i) Consider whether the victim/witness is competent to give informed consent. People with severe intellectual abilities or mental illnesses, for example, may be unable to understand all the facts needed to give proper, informed consent. While children are generally considered unable to give informed consent, their age and maturity may indicate capacity to make these kinds of decisions;<sup>298</sup>
- (ii) Make sure the victim/witness is informed and understands what they are consenting to;

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<sup>293</sup> [Handbook for United Nations Field Missions](#) 2020, p.15.

<sup>294</sup> PILPG Handbook, pp. 23-24.

<sup>295</sup> See also, PILPG Handbook, p. 23; Principles for Global Actions: Preventing and Addressing Stigma Associated with Conflict-Related Sexual Violence, p. 52.

<sup>296</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 89.

<sup>297</sup> 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.

<sup>298</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 89.



- (iii) Provide the victim/witness with 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;<sup>299</sup>
- (iv) ensure that the victim/witness understands the benefits and risks of providing information/evidence;
- (v) ask the victim/witness about any security concerns they might have;
- (vi) discuss what measures can realistically be put in place to protect them, and make sure they understand the risks that remain;<sup>300</sup>
- (vii) check that they have 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;<sup>301</sup>

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.<sup>302</sup>

#### 3.1.4. Providing 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. To enable them to do so, it is important to establish a practice of pro-actively informing victims about their rights; all aspects of their case, and their safety and security in a language they understand, and support them in making the best decisions they can.<sup>303</sup> Information for the victim should be shared promptly, as early as possible and on an ongoing basis. Keep in mind that cases may take a long time to come to court. Consider how you will maintain contact with the victim to keep them informed during this period about developments in their case. If it is not possible to maintain such contact, explain this to the victim.

#### 3.1.5. Confidentiality

Confidentiality is not just an ethical obligation – it is a legal imperative<sup>304</sup> and an operational necessity. Confidentiality requires investigators to protect the information they gather about victims and to protect their privacy.<sup>305</sup> All personally identifiable information should be considered

<sup>299</sup> Draft Murad Code, Principle 1.4.

<sup>300</sup> See Directive 2012/29/EU, Articles 3, 4.

<sup>301</sup> Directive 2012/29/EU, Article 3.

<sup>302</sup> OHCHR Training Manual, p. 8.

<sup>303</sup> Directive 2012/29/EU, Preamble Para. 26, Articles 4-6; , 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; Georgian Law on Elimination of Domestic Violence, Protection of and Support to Its Victims (2008) Article 17 (3); Handbook on Effective Prosecution Responses to Violence Against Women and Girls, p. 44; International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 88; Hate Crimes Training Curricular, p. 54.

<sup>304</sup> See Criminal Procedure Bill 2020, Section 177; Istanbul Convention, Articles 1, 18, 56(1)(a) and (f).

<sup>305</sup> PILPG Handbook, p. 23.

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confidential.<sup>306</sup> It is an important means of avoiding safety and security risks, secondary and repeat victimisation, intimidation, retribution and retaliation, and stigmatisation.<sup>307</sup> Protecting confidentiality ensures safety and security, promotes trust<sup>308</sup> 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 context-specific.

Victims of sexual violence may have particular concerns about information being shared, including fear of 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 is criminalised.<sup>309</sup>

There are limits to confidentiality that should be clearly explained to victims/witnesses.<sup>310</sup> Other than the measures which investigators can take to protect information, victims/witnesses should be made aware that if their information is brought to the attention of authorities for criminal prosecutions, protective measures are at the discretion of those authorities. Consider for example, the prospect that the identities of victims/witnesses will be revealed during a trial in a crowded courtroom, or in media coverage of the proceedings. Public identification of the victim is traumatizing, humiliating, and risks exposing them to other physical harm for bringing shame to family honour.<sup>311</sup>

Confidentiality concerns and measures to protect personal data and information must be discussed with the victim/witness as part of obtaining their informed consent (see above). This requires you to:

- (i) **explain** the limitations of confidentiality and make sure the victim or witness gives their informed consent as to how the information may be used. As noted above, discuss possible disclosure to the ICD or other criminal justice and what this means for the confidentiality of information;<sup>312</sup>
- (ii) ensure the victim/witness **understands** the risks of providing information and **provide** information about procedures in place in the possible event of a security breach (this will be part the mitigation phase of your risk assessment); and
- (iii) **ask** the victim/witness about 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,

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<sup>306</sup> [Handbook for United Nations Field Missions](#) 2020, p.14.

<sup>307</sup> Directive 2012/29/EU, Preamble, para. 54, Article 21.

<sup>308</sup> 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.

<sup>309</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 95.

<sup>310</sup> PILPG Handbook, p. 28-29.

<sup>311</sup> [Shame and Impunity 2014](#).

<sup>312</sup> PILPG Handbook, p. 96.



where they would like interviews to take place, and how they would like to be approached in public, if at all).<sup>313</sup>

Understand that some victims may be illiterate or ill-educated, and may not fully understand the consequences of their decisions. Think of how you would approach this from a “do no harm” point of view.



## 6. Referrals

Protection and healing are core to a victim-centred response to sexual violence and other serious crimes. Under Article 6 EAW victims have rights to: access to shelter or other safe place (s) with the consent of the victim; free access to emergency health services; having an advocate or legal aid provider, and confidentiality (among others). Wherever possible, practitioners in Afghanistan should establish pathways to support networks such as health care, shelter, legal aid and psychosocial support to facilitate access for victims of sexual violence and *Bacha Bazi* (among others).<sup>314</sup> These networks may be available through UN and other agencies. Find out whether UN or other agencies in Afghanistan have referral guidelines in place.

A local challenge is that victims, restricted by local cultures or faith, may fear punishment for approaching such services. Factor this into your risk assessment. Support services should be confidential and discrete.<sup>315</sup>

There may be a lack of services for male survivors and gender minorities. Consider whether discrete, informal support networks might be available. Be guided by UN agencies or specialist NGOs.<sup>316</sup>

Referrals may be required when you begin 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.<sup>317</sup>

Referrals should never be dependent on participation in the investigation or justice process.<sup>318</sup>

Specific support services may change over time. Make sure your list of those services is up to date.

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<sup>313</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 95.

<sup>314</sup> Directive 2012/29/EU, Article 8.2; , 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.

<sup>315</sup> Directive 2012/29/EU, Article 8(2); Principles for Global Actions: Preventing and Addressing Stigma Associated with Conflict-Related Sexual Violence, p. 52.

<sup>316</sup> Iraq Supplement to IP2, 2018, p. 41.

<sup>317</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 98.

<sup>318</sup> Directive 2012/29/EU, Article 8(5).



## **Part IV: Survivor-centred practices in interviewing - the PEACE model**

The PEACE<sup>319</sup> methodology is a framework for investigative interviewing based on best practice which is now internationally accepted as an effective interview model that 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. This is where it gets its acronym: (i) Planning and preparation; (ii) Engage and Explain; (iii) Account; (iv) Closure; and (v) Evaluation.<sup>320</sup>

### **3.2. Planning and preparation**

A successful interview needs to be planned, prepared and structured.<sup>321</sup> 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.<sup>322</sup>

#### **3.2.1. Do you need to interview?**

As a first step, assess the evidence and decide whether you need to conduct the interview.<sup>323</sup> 'Do no harm' involves practitioners taking measures to avoid unnecessary, repeated interviews and multiple statements.<sup>324</sup> Ask yourselves whether the evidence of the witness is essential for your case.<sup>325</sup> If they have been previously interviewed, consider what added benefit interviewing again will bring to the case, recognising that multiple interviews can result in additional trauma to victims and witnesses.<sup>326</sup>

#### **3.2.2. Making contact**

The method you choose to approach the witness will likely flow from the risk assessment. Consider whether you have sufficient information on how they can safely, securely and *discretely*

<sup>319</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p.163; PILPG Handbook, pp.97-98.

<sup>320</sup> M Schollum, Review of Investigative Interviewing: Investigative Interviewing: The Literature (New Zealand Police, September 2005).

<sup>321</sup> Achieving Best Evidence in Criminal Proceedings, Ministry of Justice, March 2011 ('Achieving Best Evidence in Criminal Proceedings') p.10; Interviewing Victims and Witnesses of Crime, Myklebust, Oxburgh and Webster, Quality Control in Criminal Investigation, Torkel Opsahl Academic Epubliser, Brussels, 2020, ('Interviewing Victims and Witnesses of Crime') p. 299; PILPG Handbook, pp. 23, 98.

<sup>322</sup> See Directive 2012/29/EU, Article 23.2 (b).

<sup>323</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 94; ICTY Manual on Developed Practices, p.21, para. 48; Interviewing Victims and Witnesses of Crime, p. 299.

<sup>324</sup> ICTY Manual on Developed Practices, p.22, para. 57; Directive 2012/29/EU, Article 20; Istanbul Convention Explanatory Report, para. 255; CEDAW/C/GC/35, para. 21.

<sup>325</sup> ICTY Manual on Developed Practices, p.21, para. 48.

<sup>326</sup> Draft Murad Code, Principle 5.4 – 5.5.



contact or approach their interviewee in a manner designed to attract as little attention as possible<sup>327</sup> in order to avoid putting that interviewee or anyone else at risk.

### 3.2.3. Planning the interview

Get to know who you are planning to interview. Review the personal information you have on file about your witness.<sup>328</sup> Do you know their age; level of education; personal and family situation? For victims of sexual assault or domestic violence, it is important to learn whether the victim/witness is currently in a safe environment.<sup>329</sup> Are you familiar with their religion; ethnicity; physical and mental health; and if they are suffering from any disability?<sup>330</sup>

Consider whether they are they a member of any vulnerable group, or are at risk of violence or intimidation.<sup>331</sup>

To develop the interview plan, consider your information about the alleged offence: the nature of the crimes; what the charges (or potential charges) might be; the key elements of those offences; and what is needed to satisfy those elements.<sup>332</sup> Do you have information about any forensic or medical examinations of the victim; any scene of crime examination; other potential witnesses, and witness support pathways?<sup>333</sup>

Consider what information will be important to the investigation and identify any gaps in the evidence which could be filled by this witness.

Decide on the objectives of the interview<sup>334</sup> and prepare interview plan, including: the range of topics to be covered; points you need to prove the elements of the crimes; any potential defences; and lead evidence (among others).<sup>335</sup>

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.<sup>336</sup>

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<sup>327</sup> ICTY Manual on Developed Practices, p.21, para. 49; OHCHR, 'Integrating a Gender Perspective into Human Rights Investigations: Guidance and Practice' (UN 2018) ('OHCHR Guidance on Integrating Gender Perspective in Investigations') p. 19; OHCHR Training Manual, p.15.

<sup>328</sup> UK College of Policing, 'Investigative Interviewing' ('[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, para. 21.

<sup>329</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 167; [Achieving Best Evidence in Criminal Proceedings](#), p.43.

<sup>330</sup> [UK College of Policing Investigative Interviewing; Achieving Best Evidence in Criminal Proceedings](#) p.13.

<sup>331</sup> [Achieving Best Evidence in Criminal Proceedings](#), p.13.

<sup>332</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p.125; Interviewing Victims and Witnesses of Crime, p. 299.

<sup>333</sup> [Achieving Best Evidence in Criminal Proceedings](#), p.11.

<sup>334</sup> [UK College of Policing Investigative Interviewing](#).

<sup>335</sup> [UK College of Policing Investigative Interviewing](#).

<sup>336</sup> 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.

### 3.2.4. Interview location and environment

Consider how a victim or witness is going to perceive the interview location and its surrounding environment. In doing so, they might consider:

- (i) is the location discreet?<sup>337</sup>
- (ii) is it an environment where they are and feel safe to speak freely (not only during the interview, but on arriving and leaving)?<sup>338</sup>
- (iii) are there other people at the interview location who will recognise the interviewee? and
- (iv) can those people see or hear your conversation?

The timing/ease of access/distance of the location for the interviewee should also be considered,<sup>339</sup> especially given that, for those with confidentiality concerns, their travel to the interview location, or interaction with unfamiliar police or prosecutors at their home may reveal their identity.

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.<sup>340</sup> You may wish to ask the victim/witness where they would prefer to be interviewed.<sup>341</sup> Consider whether the person you want to interview has a phone. Do the circumstances warrant doing telephone interviews?

### 3.2.5. 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.<sup>342</sup> This should be someone the victim trusts,<sup>343</sup> 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.

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<sup>337</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p.239.

<sup>338</sup> 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; Hate Crimes Training Curricular, p.54; Ukweli Handbook, p.29.

<sup>339</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p.165

<sup>340</sup> Directive 2012/29/EU, Article 23.2 (a); International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 165; OHCHR Training Manual, p. 15.

<sup>341</sup> Achieving Best Evidence in Criminal Proceedings, p.61.

<sup>342</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 167; Achieving Best Evidence in Criminal Proceedings, p.42; Directive 2012/29/EU, Article 20(a); International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, pp.7, 10; OHCHR Lessons learned, pp. 5, 15; Ukweli Handbook, p.66; Hate Crimes Training Curricular, p.50, 54.

<sup>343</sup> Preventing and Combating Domestic Violence against Women, A learning resource for training law enforcement and justice officers, p.43; International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 167.



The support person should have no part in the interview, and only be present during the “engage and explain” phase (below).<sup>344</sup>

### **3.2.6. Avoid interviewing witnesses together**

Witnesses should be spoken to one at a time; other witnesses should be excluded from the room.<sup>345</sup>

### **3.2.7. Recording the interview**

Decide whether or not you want to record the interview. While audio or video recording is a more reliable method of documentation, depending on the situation, you may consider taking notes.<sup>346</sup> If so, consider interviewing in a team of two, as one member of the interview team can take notes or transcribe what is said, while the other conducts the actual interview.<sup>347</sup>

### **3.2.8. Potential confidentiality of information/safety and security issues**

As noted in the previous section of this Handbook, 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.<sup>348</sup>

## **3.3. Engage and explain**

In this first critical phase of the actual interview, it is important therefore to aim to create a positive atmosphere, develop trust, encourage conversation and secure informed consent.

Victims of sexual violence in Afghanistan may be reluctant to speak openly during interviews. There may be many reasons for this, linked to the social stigma in the country around sexual violence; fear of the perpetrator, or fear of punishment or acts of retribution from the victim’s family/community or fear of disclosure of their identity among them.<sup>349</sup> Be aware that some members of vulnerable groups may have experienced discrimination or violence on the part of local authorities, and may, as a consequence, distrust investigators from your agency because of what happened before.<sup>350</sup> Keep this in mind as you work to develop rapport with the

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<sup>344</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 167.

<sup>345</sup> OHCHR Lessons learned, pp. 5, 15; Ukweli Handbook, p.66.

<sup>346</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 164; Sergeant Joanne Archambault and Kimberly A. Lonsway, ‘Interviewing the Victim: Techniques Based on the Realistic Dynamics of Sexual Assault’ (February 2006), (‘Interviewing the Victim: Techniques Based on the Realistic Dynamics of Sexual Assault’), pp. 45-46.

<sup>347</sup> ADC-ICTY Manual on International Criminal Defence, p. 79, para. 29.

<sup>348</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p.96.

<sup>349</sup> Achieving Best Evidence in Criminal Proceedings, p.45.

<sup>350</sup> Achieving Best Evidence in Criminal Proceedings, p.46.

victim/witness.<sup>351</sup> It may take more than one session to understand and address some of these concerns.<sup>352</sup>

Introduce yourselves and explain why you are and the objectives of the interview.<sup>353</sup> Explain how long the interview might take and ask the victim/witness how much time they have.<sup>354</sup>

Tell the person you are interviewing why it is important for you to listen to what they have to say.

Create an environment that encourages people to talk. Pay attention to seating arrangements.<sup>355</sup> The layout of the room should be open and unthreatening. This is particularly relevant for victims who might have been subject to detention, torture, rape or other forms of sexual violence.

Ask the interviewee if they are comfortable and whether they would like to have anything removed or changed - including the interviewer(s).<sup>356</sup> For example, a woman who has been a victim of sexual violence may be reluctant to speak with a male investigator. In this circumstance and where it is not possible to offer the victim the opportunity to speak with a female investigator, consider trying to reassure her and build her trust by describing your experience in investigations. If this is unsuccessful, consider trying to find a female investigator.

Be polite, respectful and patient.<sup>357</sup> Do not patronise, intimidate or express judgment, disbelief or skepticism in their questions or manner of speaking.<sup>358</sup> Avoid intimidating, discriminatory or sexist language.<sup>359</sup>

Explain 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.<sup>360</sup> 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.<sup>361</sup>

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<sup>351</sup> Interviewing Victims and Witnesses of Crime, pp. 300, 307.

<sup>352</sup> Achieving Best Evidence in Criminal Proceedings, p.45.

<sup>353</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 169; Interviewing Victims and Witnesses of Crime, p. 300; PILPG Handbook, pp. 24, 101; Ukweli Handbook, p.30; Ukweli Handbook 2000, p.67.

<sup>354</sup> Interviewing Victims and Witnesses of Crime, p. 300.

<sup>355</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 166.

<sup>356</sup> Achieving Best Evidence in Criminal Proceedings, p.56; , p. 169.

<sup>357</sup> Achieving Best Evidence in Criminal Proceedings; Hate Crimes Training Curricular, p.50.

<sup>358</sup> Council of Europe, Improving the Effectiveness of Law Enforcement and Justice Officers in Combating Violence against Women and Domestic Violence, Training of Trainers Manual (2016), page 65; Preventing and Combating Domestic Violence against Women, A learning resource for training law enforcement and justice officers, p.43; Hate Crimes Training Curricular, pp.50, 54.

<sup>359</sup> See, for example: International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 180.

<sup>360</sup> Achieving Best Evidence in Criminal Proceedings, p.71; SJAC Gender & SGBV Documentation Policy, p. 11; International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, pp. 179-180, 239; PILPG Handbook, pp. 33, 102.

<sup>361</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 235; WIGJ Gender in Practice, p. 36.



Explain the nature of the questions.<sup>362</sup> This is also part of informed consent.<sup>363</sup> Questions about sexual violence and torture 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.<sup>364</sup> In these situations, help the victim or witness to deal with feelings of shame and guilt by telling them that they are not to blame.<sup>365</sup>

Discuss whether and how you may record the interview; explain how the information might be used, including the possibility of its disclosure if the victim or witness testifies in a criminal case.<sup>366</sup> A best practice would be having the victim repeat this back to you to ensure they understand the consequences of sharing information.<sup>367</sup> It is during this phase where you can obtain informed consent.<sup>368</sup>

Ask (if you don't already know) whether the interviewee has made previous statements or interviews, and with whom these topics have been discussed.<sup>369</sup> If so, this may provide an additional potential witness.

Advise the interviewee to tell the truth, and to clarify that they understand what it means to tell the truth.

Invite them to tell you if they don't understand any of the questions and to ask clarifying questions or correct you if you have got something wrong.<sup>370</sup>

### **3.4. 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.

Take your time. The interview should go at the pace of the witness.<sup>371</sup>

Be a good, attentive listener and show it in your posture and body language because it is important to avoid creating an atmosphere of intimidation. Avoid expressions of disbelief or judgement.<sup>372</sup>

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<sup>362</sup> PILPG Handbook, p.24; Hate Crimes Training Curricular, p. 166.

<sup>363</sup> PILPG Handbook, p.25.

<sup>364</sup> Canadian Framework for Collaborative Police Response on Sexual Violence, 2019, p.17.

<sup>365</sup> WIGJ Gender in Practice, p. 36.

<sup>366</sup> WIGJ Gender in Practice, p. 34; PILPG Handbook, p. 102.

<sup>367</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 169.

<sup>368</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 168.

<sup>369</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 170.

<sup>370</sup> Achieving Best Evidence in Criminal Proceedings, p.71; International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p.11.

<sup>371</sup> Achieving Best Evidence in Criminal Proceedings, p.63.

<sup>372</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 182; GBV Pocket Guide, p. 7.



Listening attentively will allow you to recognise changes in behaviour (such as fear; discomfort; embarrassment or reluctance). These should be treated as a signal that it might be time to stop, change the subject, or take a break.<sup>373</sup> An attentive listener remembers also detail better and can show their interest by paraphrasing/repeating/summarising the information they have received. In doing this, try and avoid asking rhetorical questions, such as: “Are you telling me that...” and instead consider formulations such as: “Let me see if I have understood you correctly.”

Where interviews are conducted as part of a team, co-interviewers should be briefed to act in a similar way.

Be mindful that during the course of an interview, a reluctant victim/witness may disclose a credible threat of violence by the perpetrator, their family or community. Consider recording the details of this threat in the victim/witness statement to make sure it is properly documented. Have a response plan in place in the event a threat is reported.

### The format of the questions

Appropriate language and terminology should be used during the interview. Phrase the questions in a way that allows the full experience of the victim to be shared. There may be different cultural ways of framing questions and answers.<sup>374</sup> In sexual assault cases, for example, consider using local dialect that may be used to describe the sexual activities and sexual body parts<sup>375</sup> to avoid confusion or misunderstandings.

The interviewer should use language that is clear. Questions should be short, simple, and open-ended.<sup>376</sup> These tend to be the “who/what/where/when/and how do you know” questions, or the “TED” questions:<sup>377</sup>

TED Questions	
<b>Tell</b>	Could you <b>tell</b> me exactly what happened?
<b>Explain</b>	Could you <b>explain</b> to me what happened afterwards?
<b>Describe</b>	Could you <b>describe</b> to me what that person looked like?
<b>Show</b>	Could you <b>show</b> me on the map where this happened?

These prompts are non-specific. They encourage a victim to provide an account in their own words.<sup>378</sup> Other, similar types of questions such as: “did anything else happen?”, “is there

<sup>373</sup> Achieving Best Evidence in Criminal Proceedings, p.62.

<sup>374</sup> Ukweli Handbook, p.29.

<sup>375</sup> WIGJ Gender in Practice, p. 37.

<sup>376</sup> PILPG Handbook, pp.33, 104; Interviewing Victims and Witnesses of Crime, p. 312; Ukweli Handbook, p.31; Ukweli Handbook 2000, pp.67-68.

<sup>377</sup> PILPG Handbook, p.105; Interviewing Victims and Witnesses of Crime, pp. 312, 319. See also UK College of Policing Investigative Interviewing.

<sup>378</sup> Achieving Best Evidence in Criminal Proceedings, p.74.



anything more you can tell me”, or “can you put it another way to help me better understand,” may also be useful in this regard.<sup>379</sup> Open-ended questions tend to elicit more information from victims/witnesses.<sup>380</sup>

In the event the victim is fearful, reluctant, or traumatised, a conversational approach might be used rather than a rapid series of questions to obtain preliminary information.<sup>381</sup> Some examples might be: “What are you able to tell me about your experience?”; “Where would you like to begin?” This will encourage a victim to describe the incident their own words.<sup>382</sup> Asking questions that elicit sensory details (such as: “Do you recall hearing anything?”) may provide information that will help interviewers later corroborate the victim’s account.<sup>383</sup>

In these circumstances, you may also consider modifying the questions to make the interview environment as safe as possible for the witness. For example, instead of asking direct questions about the violence, abuse or mistreatment, you may be able to ask whether the victim whether she or her family members experienced changes of behaviour in the household.<sup>384</sup>

Work to “funnel information”, starting with broad questions and then getting more specific.<sup>385</sup>

Leading questions (e.g. “He hit you, didn’t he?”), compound (e.g. “What did they look like and what did they say?”) tend to influence the witness<sup>386</sup> and should be avoided. Closed (e.g. “Did he use a condom?”), and forced-choice (e.g. “Were the uniforms green or blue?”) questions should also be avoided.<sup>387</sup> Forced choice questions only give a limited number of options for a victim/witness to choose from in their answer, and neither of them might be correct.<sup>388</sup> 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.<sup>389</sup>

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<sup>379</sup> Achieving Best Evidence in Criminal Proceedings, p.74.

<sup>380</sup> Achieving Best Evidence in Criminal Proceedings, p.78.

<sup>381</sup> See <https://www.ovcttac.gov/taskforceguide/eguide/5-building-strong-cases/53-victim-interview-preparation/trauma-informed-victim-interviewing/> (Last accessed on 20 December 2020).

<sup>382</sup> The Impact of Trauma on Adult Sexual Assault Victims (2019).

<sup>383</sup> The Impact of Trauma on Adult Sexual Assault Victims (2019).

<sup>384</sup> Khadija Hosseini, COVID-19 in Afghanistan: The effects of the pandemic on the private lives and safety of women at home, (1 October, 2020).

<sup>385</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 172.

<sup>386</sup> Achieving Best Evidence in Criminal Proceedings, p.81; Interviewing Victims and Witnesses of Crime, p. 313.

<sup>387</sup> PILPG Handbook, pp.33, 103-104; International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 175; Ukweli Handbook, p.31.

<sup>388</sup> Achieving Best Evidence in Criminal Proceedings, p.80; Interviewing Victims and Witnesses of Crime, p. 313; <https://www.app.college.police.uk/app-content/investigations/investigative-interviewing/>.

<sup>389</sup> Achieving Best Evidence in Criminal Proceedings, p.79; International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 172; Sarah Paine MBE, ‘Rape: The Victim Experience Review’ (November 2009) (‘Rape: The Victim Experience Review’), p. 11.)



Avoid overly interrupting the interviewee, as this can negatively impact memory recall and cause missing critical information.<sup>390</sup> Topic-hopping (moving rapidly from one topic to another and back again) should also be avoided.<sup>391</sup>

### 3.4.1. Basis for knowledge

Remember to establish the basis for knowledge of every statement of fact made by the interviewee.<sup>392</sup> The interviewee may be a survivor of the crime, or they may have seen it, or heard about it. If they heard about it, it should be established from whom, and how. If they heard about it, is the incident something everyone knew? Was everybody talking about it?

### 3.4.2. 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 an established fact, do not assume that those inconsistencies must be corrected – they are sometimes indications of reliability and credibility. Inconsistencies do not necessarily demonstrate a lack of credibility.<sup>393</sup> They may arise for many reasons, depending on the victim's individual context. Inconsistent testimonies are not necessarily false testimonies.<sup>394</sup>

Many inconsistencies may be completely innocent in nature.<sup>395</sup> 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. They may also not be able to recall things in a linear way. Remedy this by changing the framing of their questions (i.e., by asking “what else happened? instead of “what happened next?”).<sup>396</sup>

Victims/witnesses 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.<sup>397</sup> They may offer only partial accounts; try to misdirect the investigation; and omit mentioning the presence of other victims, witnesses or of attackers.

If there are inconsistencies, do not confront the victim/witness. Consider first that explanations for inconsistencies should only be sought when the inconsistency is significant, and after careful

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<sup>390</sup> UK College of Policing Investigative Interviewing; International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, pp. 172, 174

<sup>391</sup> UK College of Policing Investigative Interviewing.

<sup>392</sup> Afghanistan Criminal Procedure Code, Sections 75(1), 76(2); See also Ukweli Handbook 2000, p.33.

<sup>393</sup> Prosecuting Conflict-Related Sexual Violence at the ICTY 2016, p. 141.

<sup>394</sup> 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 Appeal Judgment*, para. 309)

<sup>395</sup> Achieving Best Evidence in Criminal Proceedings, p.50.

<sup>396</sup> See <https://www.ovcttac.gov/taskforceguide/eguide/5-building-strong-cases/53-victim-interview-preparation/trauma-informed-victim-interviewing/> (Last accessed on 20 December 2020).

<sup>397</sup> Simon 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).



consideration has concluded that that there is no obvious explanation for them.<sup>398</sup> Take them back through their story step-by-step and asked to clarify or explain why they believe events unfolded in the way they describe. For this, interviewers can, for example, use specific closed questions such as: “What else can you tell me about the incident?”, or “Where did this happen?”<sup>399</sup> If this does not reconcile an inconsistency, note it and move on. Remember that the purpose of asking a witness to explain an inconsistency is to pursue the truth of the matter under investigation, not to alter their account.<sup>400</sup>

### **3.5. Closure**

Concluding a victim/witness statement seldom marks the end of an investigation. It is often only the beginning. Do not end interviews abruptly<sup>401</sup> and 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.<sup>402</sup> Interviewees should be asked if there is anything they want to add, clarify, or whether they have any questions.<sup>403</sup> Agree how you will get in contact with one another again, based on their preference.<sup>404</sup> 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.<sup>405</sup>

Closure is a good time to re-confirm the interviewee’s informed consent<sup>406</sup> 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 consent<sup>407</sup> 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.<sup>408</sup>

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<sup>398</sup> Achieving Best Evidence in Criminal Proceedings, p.51.

<sup>399</sup> UK College of Policing Investigative Interviewing; Achieving Best Evidence in Criminal Proceedings, p.52; Ukweli Handbook 2000, pp.67-68.

<sup>400</sup> Achieving Best Evidence in Criminal Proceedings, p.51.

<sup>401</sup> PILPG Handbook, pp. 106-107.

<sup>402</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 182.

<sup>403</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 182; Ukweli Handbook 2000, p.70.

<sup>404</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 183.

<sup>405</sup> PILPG Handbook, p.33.

<sup>406</sup> PILPG Handbook, p. 107

<sup>407</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 183.

<sup>408</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 183.



Discuss the interviewee's needs with them and the available referral options.<sup>409</sup> Don't make promises you can't keep (such as guaranteeing you will get the perpetrator, or that you will be able to offer specific protective measures).<sup>410</sup>

In as far as possible, steps should be taken to ensure that the interviewee leaves in a relatively positive state of mind.<sup>411</sup>

### **3.6. 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.<sup>412</sup> Based on the interview, possible further lines of inquiry should be pursued<sup>413</sup> and case strategies amended accordingly.

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<sup>409</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 183; GBV Pocket Guide, pp. 11-12.

<sup>410</sup> Ukweli Handbook 2000, p.70; SJAC Gender & SGBV Documentation Policy, p. 11; International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, pp. 180, 239; OHCHR Lessons learned, p. 5.

<sup>411</sup> Achieving Best Evidence in Criminal Proceedings, p.85; PILPG Handbook, p.107.

<sup>412</sup> PILPG Handbook, p.108.

<sup>413</sup> PILPG Handbook, p.108.



## **Appendix A: Threat and Risk Assessments Template**

To conduct a threat and risk assessment follow these steps:



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**Best Practice Handbook: Prepared for the Afghanistan  
Independent Human Rights Commission and the International  
Crimes Directorate of the Afghan Attorney General's Office  
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