



*Accountability for
Sexual Violence in Conflict:*

IDENTIFYING GAPS
IN THEORY AND PRACTICE
OF NATIONAL
JURISDICTIONS IN THE
ARAB REGION

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WORKSHOP REPORT

Regional workshop, 16-17 April 2018, Beirut, Lebanon

UN Women, UNDP and UN Team of Experts on the Rule of Law and
Sexual Violence in Conflict

United Nations
Team of Experts
Rule of Law/Sexual Violence in Conflict



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Definitions

What is conflict-related sexual violence (CRSV)?

It is important to distinguish between CRSV, which is the focus of this discussion and broader forms of sexual violence and gender-based violence (GBV) which also increase during and following conflict. The term “conflict-related sexual violence” refers to rape, sexual slavery, forced prostitution, forced pregnancy, forced abortion, enforced sterilization, forced marriage and any other form of sexual violence of comparable gravity perpetrated against women, men, girls or boys that is directly or indirectly linked to a conflict. That link may be evident in the profile of the perpetrator, who is often affiliated with a State or non-State armed group, which includes terrorist entities, the profile of the victim, who is frequently an actual or perceived member of a political, ethnic or religious minority group or targeted on the basis of actual or perceived sexual orientation or gender identity, the climate of impunity, which is generally associated with State collapse, cross-border consequences such as displacement or trafficking, and/or violations of a ceasefire agreement. The term also encompasses trafficking in persons when committed in situations of conflict for the purpose of sexual violence or exploitation.

What is sexual and gender-based violence (SGBV)?

Sexual and gender-based violence (SGBV) refers to any act that is perpetrated against a person’s will and is based on gender norms and unequal power relationships. It encompasses threats of violence and coercion.

EXECUTIVE SUMMARY

In April 2018, the United Nations Entity for Gender Equality and Women's Empowerment (UN Women), the United Nations Development Programme (UNDP) and the United Nations Team of Experts on the Rule of Law and Sexual Violence in Conflict organized a two-day experts group meeting on the complex theme of Accountability for Sexual Violence in Conflict. The aim of the consultation was to share best practices and lessons learnt for promoting justice and accountability for sexual violence occurring in conflict and post-conflict settings, with a focus on women and girls, as well as to identify steps required to enable the prosecution of sexual violence crimes under national jurisdictions with a focus on Iraq, although thematic discussions were also held on Syria, Libya, Sudan and Yemen¹. The event took place in Beirut, Lebanon on 16-17 of April. The consultation brought together 45 participants, which included experts in international law and criminal prosecution and sexual violence in conflict, as well as national legal practitioners and judges.

Key emerging themes from the meeting include:

- **How to bring perpetrators of conflict-related sexual violence (CRSV)¹ crimes to justice**, in particular, in contexts where national legislation on sexual violence is weak. This is also a challenge in contexts where CRSV crimes attributed to alleged terrorists are simply not charged, due to the exclusive use by judicial authorities of general terrorism legislation. Despite the obstacles to justice, experts emphasized the importance of addressing these crimes through national systems. In this context, it was noted that International Humanitarian Law (IHL) and International Criminal Law (ICL) offer useful frameworks that can be brought into national codes to prosecute these crimes, and that existing national laws on human trafficking, torture, early marriage and kidnapping have limitations, but can also be useful in terms of prosecutions for crimes of sexual violence in conflict. Furthermore, participants stressed the importance of repealing laws that criminalize consensual sex between adults (such as 'adultery' and 'pre-marital

consensual sex') or laws that condone sexual violence (e.g. repealing laws that allow rapists to be exonerated from the crime if they marry their victims).

- **How to address the needs of victims/survivors (through comprehensive justice and access to services), and secure the necessary support to ensure survivors are safe in bringing evidence to court.** Experts asserted the need to separate the issue of 'sex' from 'sexual violence', to destigmatize the issue, and to shift the shame from the victim to the perpetrator. Experts also agreed on the importance of holistic and comprehensive justice for survivors of sexual violence and their communities, going beyond criminal prosecutions, to include the right to truth and reparations which can address the individual human rights violation and broader structural inequalities. Finally, participants agreed that survivors will continue to be reluctant to come forward if they cannot access basic services, including health care and education, or live secure and dignified lives. Legal assistance should be linked to holistic services, with referral pathways in place for survivors who come forward to provide evidence and testimony.

¹ Please note that the terms conflict-related sexual violence (CRSV) and sexual violence in conflict (SVC) are used interchangeably throughout the text. For the purposes of the discussion the terms should be read under the light of the definition used in the UN Secretary General Annual Report on Sexual Violence in Conflict (see S/2018/250, 23 March 2018).

- **How to engage in transitional justice approaches, and the important role of civil society in supporting survivors of sexual and gender-based violence (SGBV).** Examples were drawn from international best practices (e.g. Guatemala and Uganda) as well as from actual practice in the region (e.g. Tunisia).

Participants requested follow up discussions through similar expert's meetings at national level, which would facilitate an exploration of the nuances of each country's legal system, to enable action for redress and legal accountability for sexual violence in each country setting.

I.

LEGAL FRAMEWORKS: STRATEGIES AND CHALLENGES TO PROSECUTING CRIMES OF SEXUAL VIOLENCE

Globally, rape and other forms of sexual and gender-based violence remain the least-condemned war crimes. International and national jurisdictions have largely failed to prosecute perpetrators for using sexual and gender-based violence as an act of genocide, crime against humanity, or war crime. Legal redress for survivors of CRSV is critical to the rehabilitation of conflict-affected communities and to the establishment of peace.

Prosecuting CRSV and holding perpetrators to account sets important legal precedents, and conveys that impunity will no longer be tolerated. Equally important, it ensures that survivors have the right to justice, and provides an acknowledgement of the crimes committed against them. Many survivors have indicated that the acknowledgement of the crimes committed is as important as compensation and redress.² In some jurisdictions, a criminal conviction also opens the opportunity for victims to receive compensation.

In the Arab region, women and girls are often placed in a subordinate role in the family and society, and crimes of sexual violence, including CRSV, are deprioritized. Nonetheless, as long as inequality and impunity prevail, the risk of recurrence – of both conflict and conflict-related sexual violence – is high. Of the countries from the Arab region represented

at the workshop, only Sudan has national legislation that explicitly criminalizes incidents of CRSV as a war crime. Libya has a decree (Ministerial Decree 119) that recognizes victims of sexual violence during the Libya uprising as victims of war and provides them with a right to reparations.

The international community has encouraged national accountability processes in the region. In September 2017, the Security Council passed Resolution 2379 to support Iraq's domestic efforts to hold the Islamic State of Iraq and the Levant (ISIL/Da'esh) accountable for war crimes, crimes against humanity and genocide. In December 2016, the General Assembly voted to establish the International, Impartial and Independent Mechanism for Syria (the IIIM).³ The IIIM is mandated to collect, preserve and analyze evidence, and develop criminal case files that can be used by others who have jurisdiction to prosecute crimes

² Global Study on the Implementation of UN Resolution 1325, available at: <http://wps.unwomen.org/>

³ United Nations Resolution 71/248

committed in Syria since March 2011. In executing this mandate, the IIIM will engage with potential providers of information and evidence relevant to crimes against victims on all sides, regardless of any affiliation of the alleged perpetrators.

None of the countries of focus in the discussion are party to the International Criminal Court (Rome Statute)⁴. The focus of the discussion was therefore on what existing instruments potentially applicable by the relevant national jurisdictions can be used to ensure the prosecution of sexual crimes committed during conflict (e.g. including IHL, Convention against Torture (CAT), human trafficking legislation, penal codes (rape, kidnapping, etc.), family law (child marriage, forced marriage, male guardianship, etc.) and anti-terrorist legislation). While these instruments present certain limitations, they also offer important opportunities for prosecuting crimes of CRSV that cannot be dismissed.

A fundamental barrier to prosecution is the national legal framework. Narrow definitions of sexual violence codify gender inequalities, and make the implementation of international conventions and frameworks difficult. Also, as a result of ingrained gender social norms, no penal code in the Arab world currently criminalizes rape within marriage. In addition, many legal systems include provisions that potentially criminalize sexual acts themselves and/or the victims of sexual violence, such as legislation that criminalises consensual sexual acts between non-married adults (zina) and adultery, and legislation that allows for alleged rapists to be exonerated if they agree to marry their victim.

Moreover, in all countries discussed, there are major gaps in national law regarding the modes of liability for CRSV, even if committed as war crimes, crimes against humanity or genocide. As a result, only direct perpetrators can be held accountable, while members of security forces and/or the army in leadership or high-ranking positions, who may have ordered these

4 Syria and Yemen have signed but not ratified the Statute. Iraq, Libya and Sudan have not signed nor acceded to the Rome statute.

In Iraq, there are gaps in the legal framework for prosecuting SVIC. As one example, Article 393(1) of the penal code (revised March 2011) defines rape as *sexual intercourse with a female without her consent OR commits buggery with any person without their consent*. The Institute for International Criminal Investigations notes the many gender inequalities embedded in this clause, including:

- *Gendered language clearly assumes female victims and male perpetrators*
- *'Sexual intercourse' connotes penile-vaginal sexual relations and does not necessarily include all forms of sexual penetration as defined under the ICC and general international law*
- *Lack of definitions of the elements of crimes leaves uncertainty*

Source: Supplement to the International Protocol on the Documentation and Investigation of Sexual Violence in Conflict (2018), ICII

acts, cannot. National laws should be amended to allow superiors to be held accountable for their role in ordering or failing to prevent crimes, especially when those crimes are recognized as war crimes, crimes against humanity or genocide.

In cases of sexual violence where the perpetrator is affiliated with a non-state group – such as ISIS – the focus across the region has been on prosecuting alleged perpetrators as members of a terrorist group instead of for crimes of SGBV (these can include, rape, trafficking, forced marriage, sexual slavery, forced prostitution, genital mutilation, forced virginity testing and forced abortion). A desire for expediency and relative ease in prosecution under terrorism legislation, coupled with a lack of political will to prosecute sexual violence, perpetuate this cycle. This is a barrier to justice and is a disservice to survivors of sexual violence, who face – *inter alia* – long term trauma, health issues and stigma as a result of the violence they have faced.

Where terrorism legislation is being used to prosecute perpetrators allegedly responsible for CRSV,

national authorities should consider the use of cumulative charging, i.e. adding charges of CRSV crimes to general charges of terrorism, for the same underlying conduct.⁵ This prosecutorial option was acknowledged as legally possible and recommended by different participants. Regarding modes of liability, national legislation also allows the possibility to charge command responsibility and include sexual crimes, allowing the possibility to bring commanders to account. The exclusive use of anti-terrorism legislation in the investigation of crimes committed

in the context of the conflicts in the region also raised concerns about allowing perpetrators aligned with or close to state actors to escape justice.

Legal barriers also exist when prosecuting perpetrators directly affiliated with government entities. Across a number of Arab states, members of the armed forces or those with direct ties to the government or other ruling parties are exempt from criminal charges.

5 Cumulative charging allows the same act (e.g. a rape) to be charged as *both* terrorism and sexual violence (as a war crime, crime against humanity, and act of genocide, as applicable). For more information on the practice of cumulative charging, see *The Practice of Cumulative Charging at the International Criminal Court*, Washington College of Law War Crimes Research Office (2012), available at <https://www.wcl.american.edu/impact/initiatives-programs/warcrimes/our-projects/icc-legal-analysis-and-education-project/reports/report-11-the-practice-of-cumulative-charging-at-the-icc/>

II.

BARRIERS TO REPORTING

In addition to the constraints of existing national legal systems to prosecute sexual violence in conflict, participants identified a number of other key barriers in the laws and in social and cultural norms that impede or seriously challenge the options for survivors to seek redress.

- **Social stigma.** The stigma associated with the victim instead of the perpetrator continues to make it very difficult for survivors of sexual violence to report and pursue justice. Survivors often refuse to report for fear of shaming their families and communities given that sexual violence is societally understood as a “sexual” interaction and not a crime, therefore related to a woman’s honor.
- **Physical access.** Access issues are compounded by the physical layout of courts where survivors often encounter the accused in waiting rooms. Practical solutions like separate waiting rooms, or alternative forms of evidence could be easily implemented.
- **Legal protections.** Currently, national laws fail to provide legal protection to victims of sexual violence. For example, in most penal codes in the region, ‘mitigating circumstances of honor crimes’, detaining women for their protection but against their will, and denying access to abortion in cases of rape prevail. These pose enormous challenges for women to come forward and seek justice.
- **Civil documentation.** Access to national justice systems is reserved for those with legal residency status; many survivors living as refugees or who have been internally displaced do not have proper national identification documents with them. The lack of national I.D. cards or other identifying documents often prevents survivors living in displacement from reporting experiences of sexual violence for fear of being forcibly returned to their home countries or villages or worse, for fear of further exploitation at the hands of the local police, military, or other security forces. Without the proper documentation, survivors are often turned away from police stations, leaving them without access to legal redress and justice.
- **Cost.** The cost of legal aid is commonly mentioned by survivors as a primary barrier to legal redress and justice. These costs are distinct from the costs incurred by survivors and their families relative to the necessary psychosocial or hospital services; without financial support for survivors to hire a lawyer and access courts – including travel costs and costs of filing the case – access to legal redress is severely restricted. The percentage of IDP and refugee camps and settlements that have a state court located within or nearby is negligible. This creates an array of problems, including the challenges of finding and paying for safe transportation that is willing to take survivors the often-long distances to access national courts.
- **Civil society.** Not only can civil society organisations provide services and psycho-social support, but they can play an important role in giving survivors the confidence to seek justice (e.g. Guatemala). The role of CSOs in turn should be acknowledged and supported by the state, which has a responsibility as a duty bearer.

III.

INVESTIGATION: GUIDELINES AND BEST PRACTICES

In addition to the stigma, trauma and absence of legal protection which are key factors that stop survivors of sexual violence in conflict from reporting crimes. Another key inhibitor is the belief by survivors and their families that justice will not be served, even if they come forward and risk retaliation and stigma.

In order to address this concern, it is important to ensure effective and independent investigations of alleged SVC crimes. The group discussed the challenges and best practices for investigating cases of CRSV. Challenges include:

- The need to investigate during ongoing conflict, preventing safe access to relevant locations and the collection of forensic evidence;
- A tendency of police and prosecutors to overlook crimes related to SVC and therefore an overreliance on victims as a primary/sole source of criminal evidence for prosecution;
- An overreliance on first hand testimony as the primary source of evidence for prosecution; and
- The tendency of multiple actors to get involved in documentation and collection of information, often without the skills and expertise needed to collect information that can be used and upheld as evidence in a criminal court. This causes duplication of efforts and risks traumatizing survivors through countless rounds of interviews.

To counter some of these challenges, experts discussed a number of best practices for investigating cases of sexual violence in conflict:

a. Dedicated expertise. There should be prosecutors and investigators dedicated specifically to crimes of SGBV. It was agreed that where these units exist, the quality of the investigation and the overall prosecutorial strategy is stronger, more comprehensive and there is a greater likelihood for cases to be successfully prosecuted in court. These units are often better equipped to conduct a gender analysis of the crimes; speak with survivors in a way that is sensitive to the risk of further traumatization; identify contextual biases that prevent survivors, especially women and girls, from reporting incidences of SGBV; and ensure that cases of SGBV receive full attention from the prosecution and are not sidelined, with the aim to end impunity for crimes of SGBV.

b. Gender analysis. Criminal justice practitioners and especially prosecution teams should begin investigations into allegations of sexual violence in conflict with a thorough gender analysis. A rigorous gender analysis can give the prosecution team insight into why the crime was committed, including the contextual factors that contributed to the enabling environment. A gender analysis can also

give the prosecution the necessary tools to broaden the scope of the case beyond an individual case to one that implicates a group of perpetrating sexual violence as part of a tactic of war.

Investigators and prosecutors should understand that CRSV is often used systematically and/or in large scale as a strategy to induce fear in rival groups and to exercise power over minority groups. In these cases, it is critical to create a case that can link all these inter-related aspects with the aim to prosecute everyone who might have been involved in or have knowledge of CSRV incidents and patterns.

c. Diversification of evidence. A comprehensive investigation is critical to the success of the prosecution in cases of CRSV. As previously mentioned, there is a tendency to rely almost exclusively on survivor and witness testimony. Not only is witness and survivor testimony insufficient and inadequate to prosecute those with command responsibility, but it puts an undue burden on the survivor who might be at risk of further social stigma and even violence for reporting her experience. Alternatives to direct witness testimony such as the use of pre-recorded statements were discussed. For example, marriage contracts, often obtained under duress, media and digital sources, and broadcasts can also be forms of evidence.

d. Witness protection. Ensuring witness protection, and anonymity when necessary, is critical to maintain a survivor-centered approach and adhere to the principle of ‘do no harm’.⁶ Case-related evidence should be protected and not made public to ensure the survivor’s safety. This is especially important given the breakdown of health, legal, and security services in conflict settings, which contributes to the misuse of survivors’ personal information, lost case files, and incomplete collection of forensic evidence – all of which perpetuate survivor mistrust of systems that are in place to provide services and aid.

e. Gender balance in investigation and prosecution teams. In the Arab region, investigations of SGBV should also take into consideration the gender makeup of the investigation and prosecution teams. In the case of the special Fact-Finding Mission to Iraq in 2014, it was noted that survivors overwhelmingly preferred same-sex investigators, interpreters and service providers, as a result of existing social stigma and bias towards SGBV. Having female staff in place allowed the Mission to access survivors who were previously unwilling to report and created a safe environment for survivors. This was critical to the overall success of the Mission.

6 For more information on the principle of ‘do no harm’, see <http://gender.care2share.wikispaces.net/Do+no+harm+guidelines+for+GBV>.

IV.

REDRESS, REPARATION AND SERVICE DELIVERY

The expert group discussed the importance of redress beyond the courts. Experts from Tunisia spoke about Tunisia's transitional justice process as one mechanism for non-judicial accountability. The work undertaken through Tunisia's Truth and Dignity Commission enables a social discussion on the crimes committed during conflict and transition, and for the needs of survivors to be acknowledged and addressed.

It was noted that there is a general lack of psycho-social support across the Arab world. It was also noted that survivors of sexual violence need immediate and long-term service delivery support. In the immediate, health, trauma and legal aid is needed. In the longer-term, psycho-social support and economic support are priorities. A particular concern was raised about the fate of children born as a result of conflict-related

sexual violence. The acute problems of children of foreign ISIS fighters were mentioned, including issues around nationality; in Iraq, women are not legally able to pass on nationality to their children, so many children born as a result of sexual violence are stateless. As part of support services to victims it is particularly important that the issue of children is also addressed.

V.

RECOMMENDATIONS

Primarily the expert group called for similar discussions to take place at the national level across the region, to unpack legal frameworks and country-specific challenges in order to take forward prosecutions for crimes related to sexual violence in conflict.

a. Decouple sex from sexual violence. Action on sexual violence in conflict would benefit from a shift away from thinking about sexual violence within the framework of ‘sex’. Issues related to sex are often confined to the personnel realm, while sexual violence must be squarely situated in issues of violence. Conflating sex with sexual violence impacts the ability of practitioners to focus on the crime and the violence, it also allows for sexual violence to be relegated to the private sphere, obscuring the need to recognize rape and sexual violence acts as crimes and as an inhibitor to peace.

b. Define sexual and gender-based crimes in line with international legal frameworks. The definitions of gender, gender-based violence, and sexual violence are all still highly contested in the Arab region. These definitions also vary between international human rights law and conventions and national frameworks. The need to explicitly define CRSV is critical for effective prosecution, and to distinguish between consensual sexual relations and violence. International human rights jurisprudence has established that the criminalization of sexual relations between consenting adults is a violation of their right to privacy and infringement of article 17 of the International Covenant on Civil and Political Rights⁷. The criminalization of adultery or consensual sex before marriage in many countries in the region gives rise to confusion between sex and sexual violence, potentially diminishing the perceived gravity of the sexual violence incidents and therefore the attention of investigators and prosecutors.

⁷ *Statement by the United Nations Working Group on discrimination against women in law and in practice: Adultery as a criminal offence violates women’s human rights*, Geneva, (18 October 2012).

Although rape is criminalized in all countries of the region its definition needs to be more comprehensive. The continuing existence of legal provisions defining sexual violence as honor crimes, allowing the alleged perpetrator to marry the victim or prompting the detention of the victim discourages victims from coming forward. Revising the national legislations and shifting the current societal mindsets that place the stigma on the victim instead of the perpetrator is necessary to ensure that victims can access justice.

c. Prioritize the investigation and prosecution of sexual and gender-based crimes. Prosecution teams, comprised of investigators and prosecutors, should proactively prioritize the analysis of information on CRSV crimes and ensure a comprehensive gender analysis of all crimes under examination, relying on diverse sources of evidence (beyond witness testimony). The investigation and prosecution of sexual violence should be part of the core work of prosecution offices, with dedicated gender expertise, and policies and strategies to ensure that gender issues are mainstreamed across the justice mechanism. Gender-sensitive witness protection measures should be built into prosecutorial strategies.

d. Strengthen capacities on International Humanitarian Law (IHL) and International Criminal Law (ICL). In collaboration with national systems and ministries, international organizations such as the UN should provide trainings on IHL/ICL and what implementation of IHL/ICL looks like on the ground in specific contexts. In order for IHL/ICL to substantively complement national frameworks and judiciary systems, criminal justice practitioners must be trained on how to incorporate IHL/

ICL in their own countries in ways that will allow for comprehensive implementation. Such contextualized trainings will enable national actors to draft tangible action items that national and local organizations can adhere to with the aim to better support survivors' access to legal redress and justice.

In addition, trainings on the prevalence and types of CRSV; the social stigma associated with reporting; underlying gender inequalities that contribute to such high prevalence rates; proper prevention and response mechanisms and systems; and the barriers for survivors relative to legal redress should be given to both state and non-state actors in the legal and security sectors to familiarize them on proper protocol and language related to working with survivors of sexual violence.

e. Implement comprehensive transitional justice programmes. It was agreed that the role of broad transitional justice mechanisms should be further explored as a means to guarantee non-recurrence and support rehabilitation. Given the level of social stigma and bias associated with survivors of SGBV, it is important to consider alternative modalities of justice that allow the survivor to participate without putting them at further risk. In certain country contexts, experts noted that transitional justice mechanisms have allowed survivors to anonymously report crimes of SGBV that then become part of a collaborative report released publicly.

f. Deliver services to survivors. Access to legal redress and justice does not signify the end for survivors of sexual violence. Instead, survivors who have participated in a public court trial might face serious social stigma upon return to their home communities if not complete exile. They might also be returning to a community wherein they might not have access to economic support or healthcare services. In all of these instances, justice practitioners must recognize the equal importance of reintegration into home communities and the necessary rehabilitative services survivors of conflict-related sexual violence will need upon their return. These services

complement legal redress and lead to comprehensive justice for survivors.

g. Bolster engagement with civil society. While the long-term goal might be legal redress and justice, many survivors of CRSV have only their community organizations – including religious institutions – to turn to immediately after experiencing sexual violence. National justice and security sector actors should be knowledgeable about the critical work that civil society members are doing around sexual violence including service provision and survivor-centered case management. In these instances, it might be counterproductive and lead to further traumatization of survivors to force reporting to national security forces, such as the police. Civil society should be seen as a critical partner for seeking legal redress and justice for survivors of sexual violence.

h. Combat the stigma attached to survivors of sexual and gender-based violence. The expert group reiterated the damaging impact of stigma on individuals and communities. It was noted that it is possible to survive sexual violence, but that the ensuing ostracism, abandonment, poverty, 'honour crimes', trauma caused by stigma can lead to suicide or self-harm, unsafe pregnancies, and untreated medical conditions. There is an urgent need to address social stigma around sexual violence in conflict, which is linked to broader structural issues of patriarchy, gender inequalities and women's subordination.

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