

# Preventing Conflict-Related Sexual Violence in Detention Settings

Principles and Commentary



**ALL SURVIVORS  
PROJECT**



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# Principles on the Prevention of Conflict-Related Sexual Violence (CRSV) in Detention Settings

1. All forms of CRSV in detention settings are prohibited in all circumstances.
2. Detaining authorities have a general duty to take proactive and effective measures to prevent CRSV in detention settings.
3. Preventive policies and processes should address and mitigate heightened risks of CRSV during capture or arrest, interrogation, detainee transfer, and body searches.
4. Detainees should be kept in accommodation that takes into consideration their specific needs, risks, and circumstances, including based on sex, sexual orientation, gender identity and/or expression, and sex characteristics.
5. Detention personnel should be trained to prevent and appropriately respond to CRSV.
6. Detaining and other relevant authorities should ensure timely, effective, and adequate medical response, inclusive of physical, mental, and psychosocial care and services, to all survivors of CRSV in detention settings.
7. Relevant independent monitoring bodies should have confidential and unhindered access to all detention settings to monitor treatment of detainees and document cases of CRSV and other abuses.
8. Survivors of CRSV in detention settings, their families, and their representatives, should have safe access to complaint mechanisms that allow them to report sexual violence.
9. CRSV in detention settings must be effectively investigated and, when appropriate, prosecuted.
10. Survivors of CRSV in detention settings are entitled to adequate, effective, and timely remedy and reparation.

## Acronyms

CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CRSV	Conflict-related sexual violence
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICL	International criminal law
ICRC	International Committee of the Red Cross
IHL	International humanitarian law
IHRL	International human rights law
NSAG	Non-state armed group
OHCHR	Office of the [UN] High Commissioner for Human Rights
OPCAT	Optional Protocol to CAT

# INTRODUCTION

## Purpose and scope

The pervasive nature and appalling consequences of sexual violence against women, men, girls, and boys, including lesbian, gay, bisexual, transgender, and intersex (LGBTI+) persons, in situations of armed conflict are well established. Detention settings are a key context of vulnerability to conflict-related sexual violence (CRSV), as noted by United Nations Security Council Resolution 2467 (2019).<sup>1</sup> These Principles aim to outline and clarify existing international law and standards to prevent and address CRSV in detention settings.

These Principles apply to all types of detention settings where people are deprived of their liberty for reasons linked to armed conflict (international and non-international). Such settings include official and unofficial places of detention operated by state security forces, such as armed forces, police, border guards, and others. The Principles also apply to situations of deprivation of liberty by non-state armed groups (NSAGs). Under international humanitarian law (IHL) it is contested whether NSAGs have a legal basis to lawfully deprive people of their liberty. Nonetheless, whenever NSAGs detain people, they must comply with a range of detention-related IHL obligations, including to treat detainees humanely and take measures to prevent and address sexual violence.

The Principles identify preventive and responsive measures applicable to all persons deprived of their liberty in situations of armed conflict. While the Principles are specific to situations of ongoing armed conflict, they are also relevant to the immediate post-conflict phase, when sexual violence linked to the conflict may still be occurring in detention settings.

While the scope of these principles is focused on CRSV, in practice, places of detention in armed conflict contexts often house a mix of detainees whose detention is related to the armed conflict and others whose detention is not so related. These populations may or may not be separated from each other. In the implementation of the guidance set out in these Principles, prevention and response efforts will need to be integrated with systems and procedures aimed at ensuring that all detainees are protected from sexual violence, regardless of the reasons for their detention and connection to armed conflict.

Protecting the rights of detainees, including against sexual violence, is especially challenging in situations of armed conflict. Nevertheless, there are examples where conflict-affected states have taken steps that have led to improvements.

These Principles, based on existing international law and standards, aim to support the actions of national and international actors to prevent CRSV in detention settings. The commentary accompanying each Principle identifies the sources of legally binding obligations and other international standards of normative value, and includes recommendations to support their implementation.

## **CRSV against men and boys in detention settings**

In accordance with its mandate, All Survivors Project (ASP) has researched and documented CRSV against men and boys in different detention settings in countries affected by armed conflict. Men and boys can be particularly vulnerable to arrest and detention in conflict-related settings – including as real or perceived opponents of the state or because they have or are presumed to have links with armed opposition groups – and have been subjected to sexual violence in such contexts.<sup>2</sup> Situations of mass detention of civilians can also pose a significant risk of sexual violence, including against detained men and boys. Male refugees and asylum-seekers have been subjected to sexual violence in the context of immigration detention in some countries,<sup>3</sup> and men and boys have also been subjected to sexual violence when deprived of their liberty by NSAGs.<sup>4</sup>

Broader discriminatory treatment and violence against LGBTI+ persons can also be heightened in detention contexts where LGBTI+ persons have increased vulnerability to human rights abuses including sexual violence.<sup>5</sup>

Historically, interpretations of IHL and international human rights law (IHRL) have tended to focus on the protection of women and girls, who are disproportionately affected by CRSV. In recent years UN treaty bodies and other experts have also begun to address CRSV against men, boys, and LGBTI+ victims/survivors in detention settings, clarifying how human rights protection standards apply to them. It is hoped that this increased attention will help to overcome some of the obstacles to preventing and addressing CRSV, particularly by tackling the stigma attached to sexual violence against men and boys and the specific vulnerabilities faced by LGBTI+ persons.



## Relevant international law

Since 2000, the UN Security Council has referred to the obligation to prohibit, prevent, and redress CRSV by invoking a broad combination of IHRL, IHL, and international criminal law (ICL).

Sources of relevant law:

- International treaties, including:
  - International Covenant on Civil and Political Rights (ICCPR) (1966)
  - Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (1984)
  - Convention on the Rights of the Child (CRC) (1989)
  - Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979)
  - Convention on the Rights of Persons with Disabilities (CRPD) (2006)
  - International Convention for the Protection of all Persons from Enforced Disappearance (2006)
  - Geneva Conventions of 1949 and Additional Protocols I and II (1977)
  - Rome Statute of the International Criminal Court (ICC) (1998)
- Customary international law
- Domestic law and military codes

IHRL applies at all times and in all places, whereas IHL is the law applicable specifically in situations of armed conflict; the two fields are complementary. ICL provides for accountability for international crimes, which may or may not have been committed during an armed conflict.

IHRL and IHL require states to take measures to prevent and respond to CRSV, including in detention settings. While states bear primary responsibility for the protection of human rights within their jurisdiction, IHL related to non-international armed conflicts applies to all parties to such a conflict, including NSAGs, as do prohibitions on rape and other forms of sexual violence under customary IHL.<sup>6</sup> There is also an emerging consensus that organised NSAGs exercising some degree of control over territory and populations within that territory may be bound by IHRL.<sup>7</sup>

As noted throughout the Principles, international law and standards offer useful and, in some cases, detailed guidance to prevent and address CRSV in detention settings. Relevant UN Security Council resolutions include 1820 (2008), 1888 (2009), 1960 (2010), 2106 (2013), 2242 (2015) and 2467 (2019).

## Definitions

**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. This 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 or networks; the profile of the victim/[survivor], who is frequently an actual or perceived member of a persecuted political, ethnic or religious minority 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 the provisions of a ceasefire agreement. The term also encompasses trafficking in persons for the purpose of sexual violence and/or exploitation, when committed in situations of conflict.”<sup>8</sup>

**Detention setting:** any place where a person is deprived of their liberty<sup>9</sup> for reasons linked to an armed conflict (international or non-international). Detention settings include official and unofficial places of detention by state security forces (such as armed forces, police, border guards, and others) as well as detention by NSAGs.

**LGBTI+:** an acronym for lesbian, gay, bisexual, transgender, and intersex persons that is used as shorthand for persons of diverse sexual orientations, gender identities and/or expressions, and sex characteristics. Sexual orientation refers to “a person’s physical, romantic, and/or emotional attraction towards other people,” whereas gender identity refers to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical, or other means) and other gender expressions, including dress, speech, and mannerisms; sex characteristics refer to “each person’s physical characteristics relating to sex, including genitalia and other reproductive anatomy, chromosomes and hormones, and secondary physical characteristics emerging from puberty.”<sup>10</sup>

**Non-state armed group:** an armed group that is distinct from state security forces and which uses violence to pursue its political, religious, ideological, or other objectives. The term encompasses many different types of entities from ill-defined, loosely structured groups to those with higher levels of organisation, command structures, and/or some level of territorial control.

**Victim/survivor:** any child or adult who has suffered CRSV in whatever form, including being forced to witness CRSV against another person or persons. The term “victim/survivor” acknowledges that people who have experienced sexual violence may identify themselves as a victim or as a survivor and that each individual has the right to choose the most appropriate language to express their individual experience.<sup>11</sup>

## Methodology

These Principles were drafted by ASP and the International Human Rights Clinic at Harvard Law School on the basis of a review of international law and standards and secondary research on CRSV, including: reports, briefings, guidelines, protocols, and other publications by UN entities, agencies, bodies, mechanisms, and experts, international criminal tribunals, non-governmental organisations (NGOs), initiatives such as the United Kingdom Government's Preventing Sexual Violence Initiative (PSVI), and academic sources. These Principles reflect ASP's research on CRSV against men and boys.

## Endnotes

- 1 UN Security Council Resolution 2467, 23 April 2019, UN Doc. S/RES/2467 (2019), para. 32 (noting that “sexual violence in armed conflict and post-conflict situations disproportionately affects woman and girls” and recognising that “men and boys are also targets of sexual violence in conflict and post-conflict settings, including in the context of detention settings and those associated with armed groups”).
- 2 See, e.g., reported incidents in **Afghanistan**: UN Committee against Torture, Concluding observations on the second periodic report of Afghanistan, UN Doc. CAT/C/AFG/CO/2 (12 June 2017); UN Assistance Mission in Afghanistan (UNAMA) and Office of the High Commissioner for Human Rights (OHCHR), Treatment of Conflict-Related Detainees: Implementation of Afghanistan’s National Plan on the Elimination of Torture (April 2017); **Burundi**: UN Human Rights Council, Report of the Commission of Inquiry on Burundi, UN Doc. A/HRC/39/63 (8 August 2018); UN Secretary-General, Report of the Secretary-General on conflict-related sexual violence, UN Doc. S/2019/280 (29 March 2019); **Democratic Republic of Congo (DRC)**: OHCHR, Democratic Republic of the Congo, 1993–2003 (DRC Mapping Report) (August 2010); **Iraq**: United Nations Mission in Iraq (UNAMI) and OHCHR, Report on Human Rights in Iraq: July – December 2012 (June 2013); **Libya**: OHCHR and United Nations Support Mission in Libya (UNSMIL), *Abuse Behind Bars: Arbitrary and unlawful detention in Libya* (April 2018); **Israel**: B’Tselem and HaMoked, *Unprotected: Detention of Palestinian Teenagers in East Jerusalem* (October 2017) <https://perma.cc/VB7T-SMJQ>; **Myanmar**: UN Human Rights Council, Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, UN Doc. A/HRC/39/CRP.2 (17 September 2018); UN Human Rights Council, The Mission on Myanmar, Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts, UN Doc. A/HRC/42/CRP.4 (22 August 2019); **Somalia**: UN Security Council (UNSC), Report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 2244 (2015), Annex 7.2, pages 147–50, UN Doc. S/2016/919 (31 October 2016); **South Sudan**: Amnesty International, *“Do Not Remain Silent” Survivors of Sexual Violence in South Sudan Call For Justice and Reparations* (24 July 2017) <https://perma.cc/9C3P-3932>; **Sudan (Darfur)**: Amnesty International, *Rape as a Weapon of War: Sexual Violence and Its Consequences* (18 July 2004) <https://perma.cc/DS45-N5TZ>; **Syria**: Independent International Commission of Inquiry on the Syrian Arab Republic (IICI Syria), “I lost my dignity”: Sexual and gender-based violence in the Syrian Arab Republic, UN Doc. A/HRC/37/CRP.3 (8 March 2018); **Sri Lanka**: UN Human Rights Council, Report of the OHCHR Investigation on Sri Lanka (OISL), UN Doc. A/HRC/30/CRP.2 (16 September 2015); **Ukraine & Autonomous Republic of Crimea**: UN Human Rights Council, Report of the United Nations High Commissioner for Human Rights: Conflict-related Sexual Violence in Ukraine (14 March 2014 to 31 January 2017), UN Doc. A/HRC/34/CRP.4 (16 March 2017); OPCAT, Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Ukraine, UN Doc. CAT/OP/UKR/1 (16 March 2016); **Yemen**: UN Human Rights Council, Report of United Nations High Commissioner for Human Rights, Situation of Human Rights in Yemen, including violations and abuses since September 2017, UN Doc. A/HRC/39/43 (17 August 2018); UN Human Rights Council, Report of the Group of Eminent International and Regional Experts, Situation of human rights in Yemen, including violations and abuses since September 2014, UN Doc. A/HRC/42/17 (9 August 2019).
- 3 See, e.g., **Libya**: UNSMIL and OHCHR, Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya (20 December 2018); Women’s Refugee Commission, *“More Than One Million Pains”*: Sexual Violence Against Men and Boys on the Central Mediterranean Route to Italy (March 2019) [hereinafter WRC, “More Than One Million Pains”] <https://perma.cc/739R-DGD8>; **Yemen**: UN Secretary-General, Report of the Secretary-General on conflict-related sexual violence, UN Doc. S/2019/280 (29 March 2019); UN Human Rights Council, Report of United Nations High Commissioner for Human Rights, Situation of Human Rights in Yemen, including violations and abuses since September 2017, UN Doc. A/HRC/39/43 (17 August 2018).
- 4 See, e.g., **Central African Republic (CAR)**: All Survivors Project, *“I don’t know who can help”*: Men and boys facing sexual violence in Central African Republic (2018) <https://perma.cc/AJD9-5U7J>; **Iraq**: UNSC, Report of the Secretary-General on conflict-related sexual violence, UN Doc. S/2018/250 (23 March 2018); **Libya**: UNSC, Report of the Secretary-General on conflict-related sexual violence, UN Doc. S/2018/250 (23 March 2018); WRC, “More Than One Million Pains”; **Niger**: WRC, “More Than One Million Pains”; **Ukraine**: UN Human Rights Council, Report of the United Nations High Commissioner for Human Rights: Conflict-related Sexual Violence in Ukraine (14 March 2014 to 31 January 2017), UN Doc. A/HRC/34/CRP.4 (16 March 2017); **Syria**: IICI Syria, “I lost my dignity”: Sexual and gender-based violence in the Syrian Arab Republic, UN Doc. A/HRC/37/CRP.3 (8 March 2018).
- 5 See Association for the Prevention of Torture (APT), *Towards the Effective Protection of LGBTI Persons Deprived of Liberty: A Monitoring Guide* (December 2018), <https://perma.cc/HYR8-KP5Q>.

- 6 See International Committee of the Red Cross (ICRC), Commentary of 2020 to Geneva Convention (III) relative to the Treatment of Prisoners of War [hereinafter Commentary of 2020 to Third Geneva Convention], paras. 503-504; ICRC, *Customary International Humanitarian Law – Volume 1: Rules* (2009) [hereinafter ICRC, Rules of Customary International Humanitarian Law], Rule 93, <https://perma.cc/4P4J-DSYR>.
- 7 As the ICRC notes, this is an unsettled area of law. See ICRC Report, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* (December 2015), p. 54.
- 8 The definition is from Office of the Special Representative of the Secretary-General, Conflict-Related Sexual Violence: Report of the United Nations Secretary-General, UN Doc. S/2020/487 (3 June 2020), para. 4.
- 9 Article 4(2) of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) defines deprivation of liberty as “any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.” See also UN Human Rights Committee, General Comment No. 35 – Article 9 (Liberty and security of person), UN Doc. CCPR/C/GC/35 (16 December 2014) [hereinafter UN Human Rights Committee, General Comment No. 35], para. 5 (“Deprivation of liberty involves more severe restriction of motion within a narrower space than mere interference with liberty of movement under article 12. Examples of deprivation of liberty include police custody, *arraigo*, remand detention, imprisonment after conviction, house arrest, administrative detention, involuntary hospitalization, institutional custody of children and confinement to a restricted area of an airport, as well as being involuntarily transported.”).
- 10 OHCHR, *Born free and equal: Sexual Orientation, Gender Identity and Sex Characteristics in International Human Rights Law*, HR/PUB/12/06/Rev.1 (2nd edition 2019), pp. 5-6.
- 11 See United Nations, *Handbook for United Nations Field Missions on Preventing and Responding to Conflict-Related Sexual Violence* (2020), p. 8 n.9.



# PRINCIPLE 1: PROHIBITION OF CRSV IN DETENTION

All forms of CRSV in detention settings are prohibited in all circumstances

1. CRSV against any individual in detention settings is prohibited in all circumstances under international law. Obligations to prevent, monitor, investigate, and hold perpetrators accountable for CRSV stem from this general prohibition. The prohibition of CRSV in detention settings flows from established IHRL, IHL, and ICL. In some circumstances, international law prohibits CRSV directly; for instance, certain provisions of IHL explicitly prohibit rape and other forms of sexual violence. In other cases, international legal rules prohibit conduct—such as torture—that could include CRSV.
2. Taken together, these international obligations prohibit CRSV in detention settings regardless of the gender of the victim. This prohibition applies to all parties to a conflict, including NSAGs. International law also requires states to adopt domestic legislation to implement the obligation to prohibit CRSV in detention settings. States should additionally review domestic legislation to ensure that legal definitions in the area of sexual violence are gender-inclusive to cover all individuals, irrespective of their sex, sexual orientation, or gender identity.<sup>12</sup>
3. Since 2000, the UN Security Council has referred to the prohibition on CRSV by invoking a broad combination of IHRL, IHL, and ICL. Security Council Resolution 1960 (2010), for example, explicitly reminds all parties to armed conflict of “the prohibition on all forms of sexual violence” under international law.<sup>13</sup> As the Security Council has recognised, this prohibition applies regardless of gender.<sup>14</sup>

## Prohibition under IHRL

4. Under IHRL, sexual violence, including in detention settings, violates a range of rights. These rights could include: the right to life; the right to freedom from torture and other cruel, inhuman and degrading treatment or punishment (other ill-treatment); the right to health; and the right of all persons deprived of their liberty to be treated humanely and with respect for their dignity.<sup>15</sup>
5. CRSV can constitute torture or other ill-treatment, which is forbidden in all circumstances under the ICCPR,<sup>16</sup> the CAT,<sup>17</sup> the CRPD,<sup>18</sup> and the CRC.<sup>19</sup>
6. Specific to the detention context, the ICCPR requires that “all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”<sup>20</sup> Further, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles)<sup>21</sup> and the revised UN Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules)<sup>22</sup> reinforce this obligation and the prohibition on torture and other ill-treatment in the specific context of detention settings.
7. The UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (UN Special Rapporteur on torture) has recognised that the powerlessness of persons in detention is an important consideration in the determination of torture, where “[r]ape is an extreme expression” of the power disparity between guards and detainees in detention settings.<sup>23</sup> The Special Rapporteur has also noted that “lesbian, gay, bisexual and transgender persons who are deprived of their liberty are at particular risk of torture and ill-treatment.”<sup>24</sup> In addition, CRSV is a form of gender-based violence (GBV) and GBV is prohibited under international law.<sup>25</sup>
8. Under the CRC, the detention of anyone under the age of 18 years must be used only “as a measure of last resort and for the shortest appropriate period of time,” but when children are detained, echoing the ICCPR, the CRC requires that they be treated with humanity and respect for the inherent dignity of the human person.<sup>26</sup> In general, the CRC requires states to protect children from all forms of sexual exploitation and sexual abuse.<sup>27</sup> The Committee on the Rights of the Child (the treaty body of independent experts established to monitor implementation of the CRC) has recognised the important role of gender in sexual violence.<sup>28</sup>

## Prohibition under IHL

9. Under IHL, sexual violence is prohibited in both international and non-international armed conflicts.<sup>29</sup> In order for CRSV to fall under the purview of IHL, the conflict must have, at a minimum, “played a substantial part in the perpetrator’s ability to



commit [sexual violence], his decision to commit it, the manner in which it was committed or the purpose for which it was committed.”<sup>30</sup> Given broad prohibition in domestic law, military codes, and international treaties, and the consistent condemnation of such acts by the UN, states, and international organisations, the prohibition on rape and other forms of sexual violence is understood to be a customary rule of IHL.<sup>31</sup> Because IHL rules differ between international and non-international armed conflicts, the sources of prohibition depend on the type of conflict involved. Though treaty sources vary, the outcome is a uniform customary prohibition of sexual violence in both international and non-international armed conflict.

10. Under the Fourth Geneva Convention of 1949, which deals with the protection of civilians during international armed conflicts, non-combatants “are entitled, in all circumstances, to respect for their persons” and their “honour.”<sup>32</sup> Moreover, they “shall at all times be humanely treated.”<sup>33</sup> The International Committee of the Red Cross (ICRC) has interpreted these provisions to prohibit acts, such as CRSV, that jeopardise the mental and physical well-being of the individual.<sup>34</sup> The Fourth Geneva Convention also explicitly provides that civilian women “shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.”<sup>35</sup>
11. In addition to the prohibition contained within the Fourth Geneva Convention, Additional Protocol I to the Geneva Conventions (which applies in international armed conflicts) prohibits “violence to the life, health, or physical or mental well-being of persons” including “torture of all kinds, whether physical or mental”; and “outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault.”<sup>36</sup> Additional Protocol I also specifically addresses the protection of children, including that they shall be protected “against any form of indecent assault.”<sup>37</sup>
12. With regards to specific protections for detainees, the Third Geneva Convention, which covers prisoners of war in international armed conflicts, requires that they “must at all times be humanely treated,” and prohibits “any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of the prisoner.”<sup>38</sup> Mirroring the Fourth Geneva Convention, Article 14 entitles prisoners of war to “respect for their persons and their honour.”<sup>39</sup>
13. Non-international armed conflicts are subject to Article 3 common to the four Geneva Conventions, which is customary IHL and binding on all parties to a conflict. Common Article 3 sets minimum standards of treatment, implicitly prohibiting sexual violence against civilians and persons hors de combat (for example, fighters who have been captured or laid down their arms) through its prohibition – “at any time and in any place whatsoever” – of “violence to life and person,” “cruel treatment and torture,” “outrages on personal dignity,” and “humiliating and degrading

treatment,<sup>40</sup> as well as in its requirement of humane treatment.<sup>41</sup> The ICRC commentary to Common Article 3 clarifies that “the prohibition of sexual violence is recognized to encompass violence not only against women and girls, but any person, including men and boys.”<sup>42</sup> More specifically, Additional Protocol II (which applies in non-international armed conflicts) prohibits “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault” against all civilians and persons hors de combat.<sup>43</sup>

14. Organised NSAGs are bound by Common Article 3, by Additional Protocol II, and by customary IHL. Moreover, some NSAGs have adopted commitments declaring themselves bound by IHL rules, including rules covering the prohibition of CRSV.<sup>44</sup>

## **International criminal law and sexual violence**

Under the framework of the International Criminal Court (ICC), as established under the 1998 Rome Statute, an act of sexual violence can constitute a crime against humanity,<sup>45</sup> a war crime,<sup>46</sup> and/or genocide.<sup>47</sup> The ICC defines rape broadly to include any invasion of “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.”<sup>48</sup> Under this definition, the crime includes violations against all persons, regardless of their sex or gender.

In 1997, the International Criminal Tribunal for Rwanda (ICTR) defined sexual violence as “any act of a sexual nature which is committed on a person under circumstances which are coercive.”<sup>49</sup> This gender-inclusive definition has been incorporated into the ICC’s elements of sexual violence, and covers a much broader range of criminal behaviour than rape. For example, international courts have found mutilation of sexual organs<sup>50</sup> and forced public nudity<sup>51</sup> to constitute crimes of sexual violence.

## Endnotes

- 12 See All Survivors Project (ASP), *Checklist on preventing and addressing conflict-related sexual violence against men and boys* (2019) [hereinafter *ASP Checklist*]; Callum Watson, DCAF (Geneva Centre for Security Sector Governance), *Preventing and Responding to Sexual and Domestic Violence against Men: A Guidance Note for Security Sector Institutions* (2014), <https://perma.cc/P2P5-ME3Q>.
- 13 UN Security Council Resolution 1960 (2010), preamble para. iv (“*Reiterating* the necessity for all States and non-State parties to conflicts to comply fully with their obligations under applicable international law, including the prohibition on all forms of sexual violence”); see also UN Security Council Resolution 2106 (2013), para. 10 (“*Reiterates* its demand for the complete cessation with immediate effect by all parties to armed conflict of all acts of sexual violence”).
- 14 See UN Security Council Resolution 2467 (2019), paras. 1 and 32.
- 15 See ICCPR Arts. 6, 7, 9, 10; International Covenant on Economic, Social and Cultural Rights (ICESCR) Art. 12. As noted above, IHRL largely speaks to the obligations of states, but there is an emerging consensus that organised NSAGs exercising some degree of control over territory and populations within that territory can be bound by IHRL. See also ICCPR Art. 9(1), which stipulates that “Everyone has the right to liberty and security of person.” According to the UN Human Rights Committee, the independent expert body established under the ICCPR to monitor its implementation, Article 9 protects “individuals against intentional infliction of bodily or mental injury, regardless of whether the victim is detained or non-detained.” Further, ‘everyone’ in Article 9(1) “includes, among others, girls and boys, soldiers, persons with disabilities, lesbian, gay, bisexual and transgender persons, aliens, refugees and asylum seekers, stateless persons, migrant workers, persons convicted of crime, and persons who have engaged in terrorist activity.” UN Human Rights Committee, General Comment No. 35, para. 9.
- 16 ICCPR Art. 7 (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”) Under Article 4 of the ICCPR, there can be no derogation from Article 7, even “in time of public emergency which threatens the life of the nation.” This provision recognises “the peremptory nature” of this fundamental right. UN Human Rights Committee, General Comment No. 29, States of Emergency (Article 4). UN Doc. CCPR/C/21/Rev.1/Add.11 (31 August 2001) [hereinafter UN Human Rights Committee, General Comment No. 29], para. 11.
- 17 CAT Art. 1(1) (defining torture (for the purpose of this Convention) as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”). In addition, “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as justification of torture” (CAT Art. 2.2). The UN Committee against Torture, the independent expert body established under the CAT to monitor its implementation, has stated that “the absolute and non-derogable character of this prohibition has become accepted as a matter of customary international law. The provisions of article 2 reinforce this peremptory *jus cogens* norm against torture...” UN Committee against Torture, General Comment No. 2, Implementation of article 2 by States parties, UN Doc. CAT/C/GC/2 (24 January 2008), [hereinafter UN Committee against Torture General, Comment No. 2], para. 1. In the case that an incident of CRSV does not amount to torture, it could amount to “other acts of cruel, inhuman or degrading treatment or punishment.” See CAT Art. 16(1). According to the Committee against Torture, “The obligations to prevent torture and other cruel, inhuman or degrading treatment or punishment (hereinafter ‘ill-treatment’) under article 16, paragraph 1, are indivisible, interdependent and interrelated. The obligation to prevent ill-treatment in practice overlaps with and is largely congruent with the obligation to prevent torture... In practice, the definitional threshold between ill-treatment and torture is often not clear. Experience demonstrates that the conditions that give rise to ill-treatment frequently facilitate torture and therefore the measures required to prevent torture must be applied to prevent ill-treatment. Accordingly, the Committee has considered the prohibition of ill-treatment to be likewise non-derogable under the Convention and its prevention to be an effective and non-derogable measure.” UN Committee against Torture, General Comment No. 2, para. 3.
- 18 CRPD Art. 16.
- 19 CRC Art. 37.
- 20 ICCPR Art. 10(1). Although this right is not explicitly mentioned in the list of non-derogable rights in article 4, paragraph 2, “the [Human Rights] Committee believes that here the Covenant expresses a norm of general international law not subject to derogation. This is supported by the references to the inherent dignity of the human person in the preamble to the Covenant and by close connection between articles 7 and 10.” UN Human Rights Committee, General Comment No. 29, para. 13(a).
- 21 Adopted by UN General Assembly resolution 43/173 (9 December 1988), Principle 1 (“All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person”), Principle 6 (“No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment”).

- 22 Adopted by UN General Assembly on 17 December 2015, UN Doc. A/RES/70/175 (8 January 2016), Rule 1 (“All prisoners shall be treated with the respect due to their inherent dignity and value as human beings. No prisoner shall be subjected to, and all prisoners shall be protected from, torture and other cruel, inhuman or degrading treatment or punishment, for which no circumstances whatsoever may be invoked as a justification.”). It should be noted that preliminary observation 2 to the Mandela Rules recognises that “[i]n view of the great variety of legal, social, economic and geographical conditions in the world, it is evident that not all of the rules are capable of application in all places and at all times. They should, however, serve to stimulate a constant endeavour to overcome practical difficulties in the way of their application, in the knowledge that they represent, as a whole, the minimum conditions which are accepted as suitable by the United Nations.”
- 23 UN Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment [hereinafter Special Rapporteur on torture], UN Doc. A/HRC/7/3 (15 January 2008), para. 28.
- 24 UN Human Rights Council, Report of the Special Rapporteur on torture, UN Doc. A/HRC/31/57 (5 January 2016), para. 34.
- 25 For example, the CEDAW has been interpreted by the Committee on the Elimination of Discrimination Against Women (CEDAW’s treaty body) to prohibit GBV directed against women as a form of unlawful discrimination. See UN Committee on the Elimination of All Forms of Discrimination Against Women, General Recommendation No. 19: Violence against women (1992), para. 6 (recognising GBV as a form of sex discrimination under CEDAW Art. 1); UN Committee on the Elimination of All Forms of Discrimination Against Women, General Recommendation No. 35: Gender Based Violence against women, updating general recommendation No. 19, UN Doc. CEDAW/C/GC/35 (26 July 2017), para. 2 (noting that “the prohibition of gender-based violence against women has evolved into a principle of customary international law”). The UN Special Rapporteur on torture has also recognised that CAT’s definition of torture or other ill-treatment may encompass gender-based violence. See UN Human Rights Council, Report of the Special Rapporteur on torture, UN Doc. A/HRC/31/57 (5 January 2016), para. 8.
- 26 CRC Art. 37. See also United Nations Rules for the Protection of Juveniles Deprived of their Liberty, Adopted by UN General Assembly 45/113 (14 December 1990) [hereinafter Havana Rules], Rule 2; UN Committee on the Rights of the Child, General Comment No. 10: Children’s Rights in Juvenile Justice, UN Doc. CRC/C/GC/10 (25 April 2007), para. 1.
- 27 See CRC Art. 34. In the context of caregiving, CRC Art. 19(1) further requires states parties to take appropriate measures to protect children from “all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, *including sexual abuse*” (emphasis added). For more detailed information, see UN General Assembly, Report of the Independent Expert leading the United Nations global study on children deprived of liberty, UN Doc. A/74/136 (11 July 2019).
- 28 See UN Committee on the Rights of the Child, General comment No. 13: The right of the child to freedom from all forms of violence, UN Doc. CRC/C/GC/13 (18 April 2011), paras. 19, 72.
- 29 At its most basic, an international armed conflict involves two or more States resorting to the use of force against each other. A non-international armed conflict, on the other hand, involves an outbreak of hostilities between governmental forces and NSAGs, or solely between NSAGs, which meets a certain threshold of violence and which involves parties meeting a certain level of organisation. See ICRC Opinion Paper, *How is the Term “Armed Conflict” Defined in International Humanitarian Law?* (March 2008), <https://perma.cc/VK4N-PSJL>.
- 30 *Prosecutor v. Dragoljub Kunarac and Others*, International Criminal Tribunal for the former Yugoslavia (ICTY), Trial Chamber (22 February 2001), para. 58.
- 31 See ICRC, Rules of Customary International Humanitarian Law, Rules 93 and 134.
- 32 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949) [Hereinafter Fourth Geneva Convention] Art. 27.
- 33 Fourth Geneva Convention Art. 27.
- 34 See ICRC, Commentary of 1958 to the Fourth Geneva Convention, Article 27 (“The right of respect for the person must be understood in its widest sense: it covers all the rights of the individual, that is, the rights and qualities which are inseparable from the human being by the very fact of his existence and his mental and physical powers; it includes, in particular, the right to physical, moral and intellectual integrity – an essential attribute of the human person.”).
- 35 Fourth Geneva Convention Art. 27. This reference to ‘honour’ has been widely critiqued for its reliance on gender stereotypes and its assumption that the dishonour would befall the victim, rather than the perpetrator. See Judith Gardam & Michelle Jarvis, *Women, Armed Conflict and International Law* (2001), p. 108; Hilary Charlesworth & Christine Chinkin, *The Boundaries of International Law* (2000), p. 314.
- 36 Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts (1977) (hereinafter Additional Protocol I) Art. 75(2).
- 37 Additional Protocol I Art. 77(1).
- 38 Third Geneva Convention Art. 13.
- 39 Third Geneva Convention Art. 14.

- 40 Common Article 3 of the Geneva Conventions (1949). The 2020 ICRC commentary on Common Article 3 has noted the implicit prohibition of sexual violence contained in the “obligation of humane treatment and prohibit[ion] [against] violence to life and person, including mutilation, cruel treatment, torture and outrages upon personal dignity.” See ICRC, Commentary of 2020 to the Third Geneva Convention, para. 732.
- 41 ICRC, Commentary of 2020 to the Third Geneva Convention, para. 732.
- 42 ICRC, Commentary of 2020 to the Third Geneva Convention, para. 736.
- 43 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-international Armed Conflicts (1977) (hereinafter Additional Protocol II) Art. 4(2).
- 44 See, e.g., Their Words, *Deed of Commitment under Geneva Call for the Prohibition of Sexual Violence in Situations of Armed Conflict and Towards the Elimination of Gender Discrimination* (listing 24 NSAGs that have committed to “take all feasible measures towards effectively preventing [...] acts of sexual violence by any person, in areas where [they] exercise authority” and “to ensure that persons deprived of their liberty are protected from sexual violence”). Their Words database is at [theirwords.org/pages/geneva-call](http://theirwords.org/pages/geneva-call) (last accessed 1 September 2020).
- 45 Rome Statute of the ICC (1998) [hereinafter Rome Statute] Art. 7(1)(g) (establishing that “[r]ape [...] or any other form of sexual violence of comparable gravity” can constitute a crime against humanity if “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”).
- 46 Rome Statute Arts. 8(2)(b)(xxii) and 8(2)(e)(vi) (defining war crimes to include “rape [...] or any other form of sexual violence also constituting a grave breach of the Geneva Conventions”).
- 47 Rome Statute Art. 6(b) (defining genocide to include “[c]ausing serious bodily or mental harm to members of the group.”); Office of the Prosecutor of the International Criminal Court, *Policy Paper on Sexual and Gender-Based Crimes* (June 2014), para. 31 (“The Office position is that acts of rape and other forms of sexual violence may, depending on the evidence, be an integral component of the pattern of destruction inflicted upon a particular group of people, and in such circumstances, may be charged as genocide.”)
- 48 See International Criminal Court, Elements of Crimes Art. 7(1)(g)-1 (crime against humanity of rape) Art. 8(2)(b)(xxii)-1 (war crime of rape in international armed conflicts), Article 8(2)(e)(vi)-1 (war crime of rape in non-international armed conflicts).
- 49 *The Prosecutor v. Akayesu*, ICTR, Trial Chamber (2 September 1998), para. 688.
- 50 *The Prosecutor v. Théoneste Bagosora*, ICTR, Trial Chamber (18 December 2008), para. 976.
- 51 *The Prosecutor v. Akayesu*, ICTR, Trial Chamber (2 September 1998), paras. 766–774.

## PRINCIPLE 2: GENERAL DUTY TO PREVENT CRSV IN DETENTION

Detaining authorities have a general duty to take proactive and effective measures to prevent CRSV in detention settings

1. The prohibition of sexual violence in international law is accompanied by a general duty to prevent it. This broad requirement to proactively and effectively protect all individuals against CRSV in all circumstances, and in detention settings in particular, is reinforced by the more specific prevention measures described in subsequent principles.
2. In conflict settings, the UN Security Council has demanded that “all parties . . . immediately take appropriate measures to protect civilians, including women and girls, from all forms of sexual violence”<sup>52</sup> and has also empowered the Secretary-General and other UN entities to monitor and coordinate national efforts to prevent CRSV.<sup>53</sup> In 2019, the Security Council called for “a survivor-centered approach in preventing and responding to sexual violence in conflict and post-conflict situations,”<sup>54</sup> and noted that detention settings are among the contexts in which men and boys are the targets of sexual violence.<sup>55</sup>

### The duty to prevent under international law

3. Under IHRL, states must adopt legislative, administrative, judicial, and other measures to prevent human rights violations, including CRSV in detention settings. Generally, under IHRL, states must take effective measures to prevent torture and other ill-treatment (including CRSV)<sup>56</sup> and uphold minimum standards of detention in recognition of detainees’ humanity and inherent dignity;<sup>57</sup> they must also “take all appropriate measures” to protect individuals<sup>58</sup> and prevent abuse.<sup>59</sup>
4. The means of prevention can vary widely, and should include implementation of standards or protocols,<sup>60</sup> criminalisation and prosecution as a form of deterrence,<sup>61</sup>

and education and awareness campaigns. As part of the duty to prevent, detainees should not be held in unofficial or secret detention facilities, but only in “places officially recognized as places of detention,” with readily accessible registers of who is being held, where, and by whom.<sup>62</sup> These and other detailed preventive measures are set out in a range of UN standards, including the Body of Principles, the Mandela Rules, and the UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules).

5. The duty of states to prevent CRSV is not limited to the prevention of CRSV perpetrated by state actors.<sup>63</sup> Instead, UN treaty bodies and regional human rights bodies have increasingly recognised that states must take broad measures to prevent anyone within their jurisdiction, including private actors, from committing CRSV.<sup>64</sup> States must exercise “due diligence” to prevent CRSV by non-state actors, including by other detainees.<sup>65</sup> The Committee against Torture (the treaty body that monitors implementation of the CAT) has determined that in cases where the state fails to meet this obligation, the state “bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under [CAT] for consenting to or acquiescing in such impermissible acts.”<sup>66</sup>
6. The Committee against Torture has also explicitly recognised that the duty to exercise due diligence in the prevention of torture and other ill-treatment by private parties applies in the case of sexual violence, and that such duties are particularly salient in instances when minority or marginalised groups are involved.<sup>67</sup>
7. The failures of an NSAG to prevent CRSV can be attributable to a state when the NSAG acts under the direction or effective or overall control of the state.<sup>68</sup> In addition, NSAGs are increasingly being called upon to respect international human rights norms, including the duty to prevent CRSV, if such actors have supplanted the state as the de facto governing authority of an area and if they maintain a sufficient organisational apparatus to carry out public functions and uphold human rights norms.<sup>69</sup>
8. With specific regard to children, the CRC requires states to protect children from all forms of sexual exploitation and abuse through appropriate legislative, administrative, and educational measures,<sup>70</sup> which includes giving particular attention to the prevention of abuse in detention.<sup>71</sup> The CRC provides a non-exhaustive list of possible measures to prevent sexual exploitation and abuse, including “social programs to support and care for the child, and means for the identification, reporting, referral, investigation, treatment, and follow-up to cases.”<sup>72</sup> The UN Rules for the Protection of Juveniles Deprived of their Liberty (the Havana Rules) underline the increased need for “protection from physical, sexual and emotional abuse and exploitation” in the case of juvenile detainees.<sup>73</sup>
9. In recognition of the heightened risk of sexual violence women and girls face in detention settings, the Bangkok Rules provide a range of measures to address these risks and other specific needs of women.<sup>74</sup> The Rules include measures to protect women’s dignity during body searches (see Principle 3); to carry out medical

screening to identify sexual violence that may have been suffered prior to admission and to provide gender-specific health services (see Principle 6); as well as to adopt policies and regulations on the conduct of detention personnel “aimed at providing maximum protection for women prisoners from any gender-based physical or verbal violence, abuse and sexual harassment.”<sup>75</sup>

10. It is also important to recognise the particular risk faced by detainees who do not conform to dominant gender perceptions or heteronormative expectations.<sup>76</sup> The UN Special Rapporteur on torture and the UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (Independent Expert on SOGI) have indicated that authorities should take measures to protect and promote the rights and to address the specific needs of LGBTI+ detainees.<sup>77</sup>
11. Under IHL, the prevention of CRSV in both international and non-international conflicts flows from the obligation of states and all parties to an armed conflict to take legal and practical measures to respect and ensure respect for IHL.<sup>78</sup> In addition, some NSAGs have specifically undertaken to take measures to prevent sexual violence and gender discrimination.<sup>79</sup> For example, some have signed the Geneva Call Deed of Commitment for the prohibition of sexual violence in situations of armed conflict and towards the elimination of gender discrimination, which includes an undertaking “to ensure that persons deprived of their liberty are protected from sexual violence.”<sup>80</sup>

## Standards and guidance on prevention of CRSV

- The revised UN Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules), <https://perma.cc/N5ZT-6YSU>.
- The UN Rules for the Protection of Juveniles Deprived of their Liberty (the Havana Rules), <https://perma.cc/WED9-LLG8>.
- The UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), <https://perma.cc/MU3E-7VR5>
- Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, <https://perma.cc/94EV-8JCW>.
- UNICEF/OCHA, Strengthening Prevention of Conflict-related Sexual Violence with Non-state Armed Groups: A Preliminary Framework for Key Prevention Strategies, <https://perma.cc/6ZDE-C3NW>.
- Deed of Commitment Under Geneva Call for the Prohibition of Sexual Violence in Situations of Armed Conflict and Towards the Elimination of Gender Discrimination, <https://perma.cc/JJX5-3ST9>.



## Endnotes

- 52 UN Security Council Resolution 1820 (2008), para. 3; UN Security Council Resolution 1888 (2009), para. 3.
- 53 See, e.g., UN Security Council Resolution 1960 (2010).
- 54 UN Security Council Resolution 2467 (2019), para. 16.
- 55 See UN Security Council Resolution 2467 (2019) at paras. 28 and 32; see also Christine Chinkin and Madeleine Rees, *Commentary on Security Council Resolution 2467: Continued State Obligation and Civil Society Action on Sexual Violence in Conflict*, London School of Economics Centre for Women, Peace and Security (2019), <https://perma.cc/H9YV-JNWT>.
- 56 CAT Arts. 2(1) and 16.
- 57 See ICCPR Art. 10. See also Association for the Prevention of Torture, *A Handbook on State Obligations under the UN Convention against Torture* (May 2002), p. 51 n.181 (citing UN Human Rights Committee, General comment No. 21 (1994), p. 33, § 4 (“Treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule. Consequently, the application of this rule, as a minimum, cannot be dependent on the material resources available in the State Party.”)), <https://perma.cc/Y7XC-CGXN>.
- 58 See CRC Art. 3(2) (“States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.”); CRPD Art. 4 (requiring that State Parties take “all appropriate legislative, administrative, and other measures for the implementation”).
- 59 See CRPD Art. 12(2) (“States Parties shall also take all appropriate measures to prevent all forms of exploitation, violence and abuse . . . States Parties shall ensure that protection services are age-, gender- and disability-sensitive.”); CAT Art. 2.1 (stating each State Party must “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”); UN Committee on the Elimination of All Forms of Discrimination Against Women, General Recommendation No. 35: Gender Based Violence against women, updating general recommendation No. 19, UN Doc. CEDAW/C/GC/35 (26 July 2017), para. 30.
- 60 See, e.g., UN Committee against Torture, General Comment No. 2, paras. 13–14.
- 61 UN Committee against Torture, General Comment No. 2, para. 11.
- 62 UN Human Rights Committee, General Comment No. 20: Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment (Article 7) (10 March 1992) [Hereinafter UN Human Rights Committee, General Comment No. 20], para. 11.
- 63 See, e.g., jurisprudence of the UN Human Rights Committee in *Fulmati Nyaya v. Nepal*, UN Doc. CCPR/C/125/D/2556/2015 (11 June 2019) and *McCallum v. South Africa*, UN doc. CCPR/C/100/D/1818/2008 (2 November 2010).
- 64 See, e.g., UN Human Rights Committee, General Comment No. 20, para. 2 (interpreting Article 7 of the ICCPR to require states parties to prevent torture by private actors); UN Committee on the Elimination of All Forms of Discrimination Against Women, General Recommendation No. 19: Violence against women (1992), para. 9 (noting that states may also be responsible for private acts if they “fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.”); see also *Velásquez Rodríguez v. Honduras*, Inter-American Court of Human Rights (IACtHR), Merits (29 July 1988), para. 172; *Osman v. UK*, European Court of Human Rights (ECtHR) (28 October 1998), para. 116.
- 65 UN Committee against Torture, General Comment No. 2, para. 18; UN Human Rights Council, Report of the Special Rapporteur on torture, UN Doc. A/HRC/7/3 (15 January 2008), para. 31.
- 66 UN Committee against Torture, General Comment No. 2, para. 18.
- 67 UN Committee against Torture, General Comment No. 2, para. 21 (“The protection of certain minority or marginalized individuals or populations especially at risk of torture is a part of the obligation to prevent torture or ill-treatment. States parties must ensure that, insofar as the obligations arising under the Convention are concerned, their laws are in practice applied to all persons, regardless of race, colour, ethnicity, age, religious belief or affiliation, political or other opinion, national or social origin, gender, sexual orientation, transgender identity, mental or other disability, health status, economic or indigenous status, reason for which the person is detained, including persons accused of political offences or terrorist acts, asylum-seekers, refugees or others under international protection, or any other status or adverse distinction. States parties should, therefore, ensure the protection of members of groups especially at risk of being tortured, by fully prosecuting and punishing all acts of violence and abuse against these individuals and ensuring implementation of other positive measures of prevention and protection, including but not limited to those outlined above.”).
- 68 See UN Committee against Torture, General Comment No. 2, para. 18; International Law Commission, *Responsibility of States for Internationally Wrongful Acts* (2001), Art. 8; see also UN Committee on the Elimination of All Forms of Discrimination Against Women, Concluding observations on the second periodic report of Syria 2016, UN Doc. CEDAW/C/SYR/CO/2 (18 July 2014), para. 27(a) (“[T]he Committee urges the State party: (a) To prohibit and undertake efforts to prevent all forms of violence against women, in particular sexual violence, by Government forces and affiliated militias and non-State armed groups.”).

- 69 For further discussion of IHRL obligations of NSAGs, see OHCHR, *International Legal Protection of Human Rights in Armed Conflict* (2011), <https://perma.cc/9FBE-6JXP>.
- 70 CRC Art. 19(1); see also Committee on the Rights of the Child, General Comment No. 13: The right of the child to freedom from all forms of violence, UN Doc. CRC/C/GC/13 (18 April 2011).
- 71 See UN Committee on the Rights of the Child, General Comment No. 24 on children's rights in the child justice system, 2019, UN Doc. CRC/C/GC/24 (18 September 2019) [hereinafter UN Committee on the Rights of the Child, General Comment No. 24], para. 92.
- 72 CRC Art. 19(2) (These include measures relating to the identification of harms suffered by children, the reporting of harm, referrals to appropriate agencies, investigation of allegations of abuse and mistreatment, treatment and follow-up, and judicial involvement.).
- 73 Havana Rules, Rule 87(d).
- 74 United Nations Office on Drugs and Crime, *The Bangkok Rules: United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders with their Commentary* [hereinafter Bangkok Rules or, when referencing commentary, The Bangkok Rules with their Commentary], <https://perma.cc/3KGD-EHJP>. The Bangkok Rules were adopted by the UN General Assembly on 21 December 2010, UN Doc. A/RES/65/229 (16 March 2011).
- 75 Bangkok Rules, Rule 31.
- 76 See OSCE ODIHR, *Guidance document on the Nelson Mandela Rules* (9 August 2018) [hereinafter *OSCE Guidance on Mandela Rules*], p. 28.
- 77 UN Human Rights Council, Report of the Special Rapporteur on torture, UN Doc. A/HRC/31/57 (5 January 2016), para. 34; UN Human Rights Council, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, UN Doc. A/HRC/38/43 (11 May 2018), paras. 26–28.
- 78 ICRC, Rules of Customary International Humanitarian Law, Rules 139 and 144. See also Common Articles 1 and 3 of the 1949 Geneva Conventions; Article 1(1) of Additional Protocol I; ICRC, Commentary of 2020 to the Third Geneva Convention), para. 938 (“It follows from common Article 3, which is binding on all Parties to a non-international armed conflict, that non-State armed groups are obliged to ‘respect’ the guarantees contained therein. Furthermore, such armed groups have to ‘ensure respect’ for common Article 3 by their members and by individuals or groups acting on their behalf.”) Additionally, the UN Security Council has repeatedly called on all parties to armed conflict to respect international IHL. Specifically in relation to CRSV, the UNSC in Resolution 2467 (2019) “[r]eiterates its demand for the complete cessation with immediate effect by all parties to armed conflict of all acts of sexual violence and its call for these parties to make and implement specific time-bound commitments to combat sexual violence, which should include, inter alia, issuance of clear orders through chains of command and development of codes of conduct prohibiting sexual violence and establishment of related enforcement procedures to ensure accountability for breaching these orders, commitments by individual commanders, investigation of all credible allegations including on the basis of information reported by relevant UN entities and accountability for those responsible, unimpeded access for monitoring and provision of services and humanitarian assistance in areas under their control.”
- 79 Geneva Call Database, search “sexual” or “gender,” (listing several NSAGs including those that have signed deeds of commitment to prevent sexual and gender-based violence): [theirwords.org/pages/geneva-call](https://theirwords.org/pages/geneva-call) (last accessed 1 September 2020).
- 80 See *Deed of Commitment under Geneva Call for the Prohibition of Sexual Violence in Situations of Armed Conflict and Towards the Elimination of Gender Discrimination* [hereinafter *Geneva Call Deed of Commitment*].



## **PRINCIPLE 3:**

# **PREVENTION OF CRSV IN SETTINGS OF HEIGHTENED RISK IN DETENTION**

Preventive policies and processes should address and mitigate heightened risks of CRSV during capture or arrest, interrogation, detainee transfer, and body searches

1. At particular points in the process leading up to detention and in detention itself, detainees face heightened risks of sexual violence, such as during: capture or arrest; interrogation or questioning; transfer of detainees between facilities or to other authorities; and body searches. In the context of an armed conflict, when peacetime measures to protect detainees at these points may be under strain and actors may lack capacity to focus resources on providing protection to detainees, risks of sexual violence can become even more acute.

### **Capture and arrest**

2. The reasons for and lead up to an individual's detention vary widely. Some examples include: law enforcement personnel (either military or civilian) arrest an individual on suspicion of a criminal offence or on security-related grounds under civilian or military laws; during an international armed conflict, the armed forces of a state capture a member of another state's armed forces; during a non-international armed conflict, an NSAG captures a member of state armed forces, or vice versa, or members of one NSAG capture members of other such groups.
3. All these forms of capture or arrest could take place during the same armed conflict and involve different actors, but every actor should implement measures to prevent sexual violence at the point at which an individual first comes under the control or power of that actor.

4. Actors should ensure that the individual is brought to the correct authority – a judge, commanding officer, or other relevant authority – as soon as possible and record the details of and reasons for that individual’s arrest or capture; they should also inform the individual of their right to contact the outside world. Doing so establishes under what authority or law the individual is being detained, creates a record of that person’s detention, and enables the fact of the individual’s detention to be known externally. Visibility and an official record are the starting points for a system of rules and measures that collectively guards against risks of sexual violence.
5. The Body of Principles, which applies regardless of the reasons for detention, state that records must be maintained of the reasons for the arrest (defined broadly as “the act of apprehending a person for the alleged commission of an offence or by the action of an authority”); the time of arrest, the taking of the arrested person to the place of custody, and his or her first appearance before a judicial or other authority; the identity of the law enforcement officials involved; and precise information on the place of custody.<sup>81</sup> The Body of Principles also provides for the detainee’s communication with the outside world, in particular communication with the detainee’s family and legal representatives.<sup>82</sup>
6. When internment follows the capture or other apprehension of a person in an armed conflict, the ICRC’s Procedural Principles and Safeguards for Internment/ Administrative Detention in Armed Conflict and Other Situations of Violence recognise internees’ right to information about the reasons for internment; internees should also be registered, held in a recognised place of internment, and permitted to contact their families.<sup>83</sup>

## Interrogation or questioning

7. Interrogation or questioning of detainees carries risks of intimidation, coercion, and mistreatment, including risks of sexual violence. Torture and other ill-treatment, including acts of sexual violence, occur frequently during interrogations and questioning. These risks are heightened in the initial phase of detention if the authority that is interrogating the detainee has decision-making power on where the detainee will be held and under what conditions.<sup>84</sup> The separation of the authorities responsible for detention and those responsible for interrogation is an important safeguard against torture or other ill-treatment.<sup>85</sup> CAT requires states to keep their interrogation rules and practices “under systematic review” to prevent torture and other ill-treatment.<sup>86</sup>
8. The Body of Principles prohibits subjecting a detainee who is being interrogated to violence, threats, or methods of interrogation that impair the detainee’s judgment or decision-making capacity.<sup>87</sup> The Body of Principles also requires that certified records are kept of the interrogation’s duration, the intervals between questioning, the officials who conducted the interrogation, and any other persons present during the interrogation.<sup>88</sup>

9. The UN Human Rights Council has likewise enumerated safeguards for interrogations, including that the physical environment and conditions of interrogation are humane, that interrogations are of length that is in accordance with IHRL, and that the personal circumstances of the individual being interrogated are considered.<sup>89</sup>

## Transfer of detainees

10. During transfers between places of detention, detainees face the risk of sexual violence at the hands of individuals involved in the transfer and other detainees being transferred at the same time.<sup>90</sup> The frequency of transfer may be particularly high for detainees held by NSAGs that lack control over territory, exposing them to this risk multiple times. Risks may also increase when detainees are transferred from one authority to another, rather than within the same detention system (for example, from the authorities of one state to another state).
11. To prevent sexual violence, gender-sensitive safeguards should be established for transfers. Accordingly, in general, the separation of men and women, as well as juveniles and adults, should be maintained during the course of transfers (although, this may not always be the case, see Principle 4 and discussion there).<sup>91</sup> After being transferred, detainees should be able to inform, or require the relevant authority to inform, at a minimum their family members about the transfer and their new place of custody.<sup>92</sup>
12. Under IHRL, states may not transfer detainees to other states if doing so would expose the detainee to a risk of torture or other ill-treatment, including sexual violence.<sup>93</sup> For all parties to an armed conflict, including NSAGs, Common Article 3 has been interpreted to prohibit transfers to other parties who would not meet its minimum guarantees of humane treatment or other applicable IHL rules.<sup>94</sup>

## Body searches

13. IHRL protects the right to privacy and requires that detainees are treated “with humanity and respect for the inherent dignity of the human person.”<sup>95</sup> As such, the Mandela Rules only permit searches of a detainee’s body if the search complies with human rights law principles of legality, necessity, and proportionality.<sup>96</sup> Before initiating a body search, detaining authorities should evaluate the official basis on which the search would take place, the necessity of a body search (including considering its specific purpose), the manner in which the search would be carried out, and whether it would be the least intrusive method that could be pursued.<sup>97</sup>

14. The search itself must respect the detainee’s dignity and privacy.<sup>98</sup> As such, body searches should be conducted in private by staff members with appropriate training or qualifications.<sup>99</sup> In order to ensure accountability, the detaining authority should maintain records of: body searches, the reasons for such searches, the identities of the officials who conducted the searches, and the results.<sup>100</sup>
15. In response to the risk of sexual violence women detainees face during body searches, the Bangkok Rules specify that body searches of women may only be conducted by women staff members who have undergone the requisite training, among other measures to protect the detainee’s dignity.<sup>101</sup> Further, the Bangkok Rules require the development of “alternative screening methods, such as scans” to replace strip searches and invasive body searches, to avoid possible harmful psychological and physical impacts of invasive body searches.<sup>102</sup>
16. International standards recommend that body searches are conducted by persons of the same sex as detainees.<sup>103</sup> However, there is growing recognition of the need to take into account detainees’ wishes in this regard, as some detainees, including LGBTI+ persons and male victims of sexual violence, may have specific needs or face specific risks of trauma.<sup>104</sup>

## Endnotes

- 81 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Adopted by UN General Assembly resolution 43/173 (9 December 1988) [hereinafter Body of Principles], Principle 12.
- 82 Body of Principles, Principles 15 and 19.
- 83 See Jelena Pejic (ICRC), “Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence,” *International Review of the Red Cross*, Volume 87, Number 858, June 2005, pp. 384-5, 389-90, <https://perma.cc/Z9EF-YUCG>.
- 84 See UN General Assembly, Interim report of the Special Rapporteur on torture, UN Doc. A/71/298 (5 August 2016), para. 8. See also *The Bangkok Rules with their Commentary*, p. 28 (noting that during the time of detention prior to incarceration, such as arrest and interrogation, “women are at particular risk of sexual abuse, including rape”).
- 85 The UN Committee against Torture has said that it “expects that the detention and interrogation functions will be separated.” Committee against Torture, Concluding observations on the initial report under CAT of Jordan. UN Doc. A/50/44 (1995), para. 176.
- 86 CAT Art. 11.
- 87 Body of Principles, Principle 21(2).
- 88 Body of Principles, Principle 23.
- 89 UN Human Rights Council, Resolution, Torture and other cruel, inhuman or degrading treatment or punishment: safeguards to prevent torture during police custody and pretrial detention, UN Doc. A/HRC/RES/31/31 (21 April 2016), para. 12. It must also be noted that the United Nations Special Rapporteur on torture has proposed a universal protocol to further standards of non-coercive interviewing and relevant procedural safeguards. If this document does come into force, such standards would supplement the safeguards stipulated above.
- 90 See OSCE ODIHR, *Preventing and Addressing Sexual and Gender-based Violence in Places of Deprivation of Liberty: Standards, Approaches and Examples from the OSCE Region* (2019) [hereinafter *OSCE Standards*], pp. 97–98.
- 91 See UN Human Rights Council, Report of the Special Rapporteur on torture, UN Doc. A/HRC/31/57 (5 January 2016), para. 70(g).
- 92 Body of Principles, Principle 16. See also *OSCE Standards*, pp. 97–98.
- 93 See CAT Art. 3(1); ICCPR Art. 7; UN Human Rights Committee, General Comment No. 20, para. 9.
- 94 See ICRC, Commentary of 2020 to the Third Geneva Convention, para. 744 (“Because of the fundamental rights it protects, common Article 3 should be understood as also prohibiting Parties to the conflict from transferring persons in their power to another authority when those persons would be in danger of suffering a violation of those fundamental rights upon transfer.”).
- 95 ICCPR Art. 10(1). See also World Medical Association (WMA), *WMA Statement on Body Searches of Prisoners* (2016), para. 12; *The Bangkok Rules with their Commentary*, p. 33 (commentary to Rule 20).
- 96 See *Mandela Rules*, Rule 50.
- 97 For a discussion of best practices to prevent traumatisation during body searches, see *OSCE Standards*, p. 94.
- 98 See UN Human Rights Committee, General Comment No. 16: Article 17 (The right to respect of privacy, family, home and correspondence, and protection of honour and reputation), 8 April 1988; *Mandela Rules*, Rule 50; *Bangkok Rules*, Rule 19; *The Bangkok Rules with their Commentary*, pp. 32–33 (commentary to Rule 19).
- 99 *Mandela Rules*, Rule 52(1); *The Bangkok Rules with their Commentary*, pp. 32–33 (commentary to Rule 19).
- 100 *Mandela Rules*, Rule 51; *OSCE Standards*, p. 93.
- 101 *Bangkok Rules*, Rule 19.
- 102 *Bangkok Rules*, Rule 20.
- 103 *Mandela Rules*, Rule 52(1); *Bangkok Rules*, Rule 19.
- 104 See Prison Reform International and Association for the Prevention of Torture, *Detention Monitoring Tool, Body searches - addressing risk factors to prevent torture and ill-treatment* (2nd edition 2015); Association for the Prevention of Torture, *Towards the Effective Protection of LGBTI Persons Deprived of Liberty: A Monitoring Guide* (December 2018); *OSCE Standards*, p. 95.



## **PRINCIPLE 4:**

# **ACCOMMODATION IN DETENTION**

Detainees should be kept in accommodation that takes into consideration their specific needs, risks, and circumstances, including based on sex, sexual orientation, gender identity and/or expression, and sex characteristics

1. In all cases, places of detention must meet health standards and ensure human dignity.<sup>105</sup> Ensuring appropriate accommodation<sup>106</sup> and systemically reviewing arrangements for custody and treatment are part of the obligation to prevent torture and other ill-treatment.<sup>107</sup>
2. International law requires authorities to separate persons deprived of their liberty based on sex, age, and reasons for their detention. However, to prevent CRSV and provide for the safest conditions of detention, the decision on where to place detainees should consider a range of specific characteristics of each detainee. Because these characteristics necessarily interact differently in different circumstances, individuals in detention should ultimately be held in accommodation that takes account of their specific needs, risks, and circumstances.<sup>108</sup>

### **Accommodation based on sex, sexual orientation, gender identity and/or expression, and sex characteristics**

3. Traditionally, standards on separation of detainees within IHL and IHRL have largely focused on an individual's sex assigned at birth. For example, the Third and Fourth Geneva Conventions provide that women shall be held in separate accommodation from men and cared for by female guards,<sup>109</sup> largely based on the assumption that sex segregation will protect women from male aggression. The Additional Protocols

to the Geneva Conventions present similar requirements,<sup>110</sup> and the Mandela Rules require that “men and women shall so far as possible be detained in separate institutions; in an institution which receives both men and women, the whole of the premises allocated to women shall be entirely separate.”<sup>111</sup>

4. However, the spectrum of sexual orientations and gender identities requires that detaining authorities go beyond binary sex distinctions, which may in fact place individuals at a higher risk of sexual violence in detention settings.<sup>112</sup> For example, transgender and intersex individuals face stigma and marginalisation that can render them particularly vulnerable if placed in accommodation based on their sex assigned at birth. Accommodation should ultimately be based on an assessment of individual well-being and risk.<sup>113</sup> The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has recommended that “judicial and prison authorities, when deciding allocation of [a] transgender person to either a male or female prison, do so in consultation with the prisoner concerned and on a case-by-case basis” and noted that “safety considerations and the wishes of the individual must be paramount.”<sup>114</sup>
5. Under the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (Yogyakarta Principles), detaining authorities should ensure that “placement in detention avoids further marginalising persons on the basis of sexual orientation or gender identity or subjecting them to risk of violence, ill-treatment or physical, mental or sexual abuse.”<sup>115</sup> To that end, detainees should be included in decisions regarding the facilities in which they are placed.<sup>116</sup> Detaining authorities should not rely on solitary confinement as a means of protection<sup>117</sup> and protective segregation should be done only with the detainee’s consent and when there are no other alternatives.<sup>118</sup>

## Accommodation of children

6. When, in exceptional circumstances (see Principle 1), children are detained, they must be held separately from adults.<sup>119</sup> Keeping children separate from adults is understood to lower the risk of violence against children, including the risk of sexual violence.<sup>120</sup> However, there are exceptions to this general rule: when a parent is being detained, a child may stay with that parent if to do so would be in the best interests of the child, for example.<sup>121</sup> Children should also be held in accordance with age, and age groups should be separated in order to reduce risk of CRSV.<sup>122</sup>

## Endnotes

- 105 ICCPR Art. 10(1). See also Mandela Rules, Rule 1 (“All prisoners shall be treated with the respect due to their inherent dignity and value as human beings. No prisoner shall be subjected to, and all prisoners shall be protected from, torture and other cruel, inhuman or degrading treatment or punishment, for which no circumstances whatsoever may be invoked as a justification. The safety and security of prisoners, staff, service providers and visitors shall be ensured at all times.”); Havana Rules, Rule 31; Third Geneva Convention Art. 22 (“Prisoners of war may be interned only in premises located on land and affording every guarantee of hygiene and healthfulness.”); Fourth Geneva Convention Art. 85 (“The Detaining Power is bound to take all necessary and possible measures to ensure that protected persons shall, from the outset of their internment, be accommodated in buildings or quarters which afford every possible safeguard as regards hygiene and health, and provide efficient protection against the rigours of the climate and the effects of the war.”).
- 106 Association for the Prevention of Torture, *A Handbook on State Obligations under the UN Convention against Torture* (May 2002), p. 50.
- 107 CAT Art. 11.
- 108 See ICRC, Commentary of 2020 to Third Geneva Convention, para. 2104 (noting in relation to Article 25(4) that “the requirement of separate dormitories may also extend to other categories of persons with distinct needs or facing particular risks where not doing so would violate the obligation of humane treatment”).
- 109 See Third Geneva Convention Arts. 25 and 97; Fourth Geneva Convention Arts. 76, 82, 85, 124.
- 110 Additional Protocol I Art. 75(5); Additional Protocol II Art. 5(2)(a); see also *UK Joint Service Manual of the Laws of Armed Conflict*, Joint Service Publication 383 (2004), p. 218 (“[W]omen arrested, detained, or interned for reasons connected with the armed conflict must be kept in separate quarters from men and under the immediate supervision of women.”).
- 111 Mandela Rules, Rule 11(a).
- 112 See UN Committee against Torture, Eighth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. CAT/C/54/2 (26 March 2015), para. 68 (“The absence of appropriate means of identification, registration and detention leads in some cases to transgender women being placed in male-only prisons, where they are exposed to a high risk of rape, often with the complicity of prison personnel.”); see also *OSCE Guidance on Mandela Rules*, p. 28; *OSCE Standards*, p. 4.
- 113 See Association for the Prevention of Torture, *Towards the Effective Protection of LGBTI Persons Deprived of Liberty: A Monitoring Guide* (December 2018); *OSCE Guidance on Mandela Rules*, p. 3 (“Specific risks and needs are also associated with lesbian, gay, bisexual, trans- and/or intersex (LGBTI) prisoners.”); ICRC, *Sexual Violence in Detention in Brief* (2017), p. 12 (“Detaining authorities who conduct a need and risk assessment upon arrival can identify which detainees are at particular risk of sexual violence and those who present a risk of inflicting such violence. The assessment should influence what kind of support and supervision is needed to address specific vulnerabilities. Confidentiality should be carefully maintained so that protective measures do not create any new risks.”); Havana Rules, para. 29.
- 114 See UN Human Rights Council, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on a gender-sensitive approach to arbitrary killing, UN Doc. A/HRC/35/23 (6 June 2017), para. 110(e).
- 115 Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (2006) [hereinafter Yogyakarta Principles], Principle 9(a); see also *OSCE Guidance on Mandela Rules*, p. 99 (“Transgender persons should either be accommodated in the prison section corresponding to their gender identity or, if exceptionally necessary for security or other reasons, in a separate section which will best ensure their safety. If accommodated in a separate section, they should be offered activities and association time with the other prisoners of the gender with which they self-identify.”).
- 116 Yogyakarta Principles, Principle 9(c) (stating that states shall “[e]nsure, to the extent possible, that all prisoners participate in decisions regarding the place of detention appropriate to their sexual orientation and gender identity”); *OSCE Guidance on Mandela Rules*, p. 84 (stating that detaining authorities should consider “information about the detainee’s own perceptions of risk and vulnerability”).
- 117 See Mandela Rules, Rules 43–45 (discussing the limited use of solitary confinement).
- 118 *OSCE Guidance on Mandela Rules*, p. 100 (“Protective segregation must only be instituted with the agreement of the prisoner/detainee concerned and should be subject to safeguards and regular review.”).
- 119 ICCPR Art. 10(2)(b) (“Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.”) and Art. 10(3) (“Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.”); CRC Art. 37(c) (“every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so”); see also UN Committee on the Rights of the Child, General Comment No. 24, para. 92; Fourth Geneva Convention Art. 76 (“Proper regard shall be paid to the special treatment due to minors.”); ICRC, Rules of Customary International Humanitarian Law, Rule 120 (“Accommodation for Children Deprived of Their Liberty.”)
- 120 UN Committee on the Rights of the Child, General Comment No. 24, para. 92.

- 121 CRC Art. 37(c); see also Mandela Rules, Rule 29(1) (“A decision to allow a child to stay with his or her parent in prison shall be based on the best interests of the child concerned.”). However, the UN Committee on the Rights of the Child has stated this provision should be read narrowly and should not be used for the convenience of states. See UN Committee on the Rights of the Child, General Comment No. 24, para. 92. See also Bangkok Rules, Rule 49 (“Decisions to allow children to stay with their mothers in prison shall be based on the best interests of the children. Children in prison with their mothers shall never be treated as prisoners.”), Rules 50–51.
- 122 *OSCE Standards*, p. 49 (stating that there remains a higher risk of CRSV when younger and older children are held together).



# PRINCIPLE 5: TRAINING OF DETENTION PERSONNEL

## Detention personnel should be trained to prevent and appropriately respond to CRSV

1. Preventing and responding to CRSV means that detention personnel – including civil and military law enforcement personnel, medical personnel, public officials, and any other persons involved in custody, interrogation, or treatment of detainees – should be appropriately trained. Under CAT, personnel training must include education as well as information on the prohibition against torture and other ill-treatment.<sup>123</sup> Personnel should not assume their duties before undergoing training on preventing and responding to CRSV, and training must be provided and required on an ongoing basis.<sup>124</sup> Under IHL, states and parties to armed conflict are required to provide instruction in IHL, including in the prohibition of sexual violence, to armed forces.<sup>125</sup>
2. Under the Mandela Rules, the Bangkok Rules, and the Yogyakarta Principles, topics that the training of detention personnel should cover include:
  - All relevant national legislation, regulations, policies and international and regional instruments, including on complaint and other reporting mechanisms;<sup>126</sup>
  - The rights of detainees and duties of personnel including, but not limited to, respecting the human dignity of prisoners and the prohibition on torture and other ill-treatment;<sup>127</sup>
  - Security and safety, inclusive of the concept of dynamic security and responding to the medical and psychosocial needs of detainees. Examples of such skills include basic first aid, as well as social care and assistance;<sup>128</sup>
  - Cross-cutting vulnerabilities related to the age, sexual orientation, gender identity and/or expression, and sex characteristics of those in detention, including addressing social attitudes, gender norms, and stereotypes;<sup>129</sup>
  - Recognising and addressing the gender-specific<sup>130</sup> and specialised health needs of detainees; and
  - HIV prevention, treatment, care and support, including addressing stigma and discrimination.<sup>131</sup>

3. A comprehensive and effective training package that includes these topics can help to protect detainees from many forms of abuse, including CRSV. However, general trainings should be supplemented by evidence-based trainings specifically on preventing and responding to sexual violence.
4. While anyone involved in the custody, interrogation, or treatment of detainees should receive some level of training to prevent and respond to CRSV, training of personnel who regularly carry out detention-related duties should be prioritised.

## Endnotes

123 CAT Art. 10(1).

124 Mandela Rules, Rules 75(2) and 75(3).

125 ICRC, Rules of Customary International Humanitarian Law, Rule 142.

126 Mandela Rules, Rule 76(1).

127 Mandela Rules, Rule 76(1).

128 Mandela Rules, Rule 76(1).

129 Yogyakarta Principles, Principle 10 (“States shall: Take all necessary legislative, administrative and other measures to prevent and provide protection from torture and cruel, inhuman or degrading treatment or punishment, perpetrated for reasons relating to the sexual orientation or gender identity of the victim, as well as the incitement of such acts . . . [and] . . . Undertake programmes of training and awareness-raising for police, prison personnel and all other officials in the public and private sector who are in a position”); Prison Reform International and Association for the Prevention of Torture, *LGBTI persons deprived of their liberty: a framework for preventive monitoring*, (2nd edition 2015), pp. 9, 11; *ASP Checklist*, p. 25.

130 Bangkok Rules, Rule 33(1).

131 Bangkok Rules, Rule 34.

## PRINCIPLE 6: MEDICAL RESPONSE TO CRSV IN DETENTION SETTINGS

Detaining and other relevant authorities should ensure timely, effective, and adequate medical response, inclusive of physical, mental, and psychosocial care and services, to all survivors of CRSV in detention settings

1. IHL rules require parties to an armed conflict to provide sexual violence victims/survivors in detention with appropriate medical care and attention.<sup>132</sup> IHRL likewise protects, in all circumstances, the right to health, which is enshrined in a number of treaties, including the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>133</sup> Authoritative human rights and humanitarian guidance, including the Mandela Rules,<sup>134</sup> the Bangkok Rules, and WHO Guidelines,<sup>135</sup> outlines how to operationalise the right to health in the context of detention settings. Applying these rules and standards helps ensure that all detainees who have suffered CRSV are afforded adequate medical care, inclusive of physical, mental, and psychosocial care and services.

### Law and standards related to medical response

2. In a non-international armed conflict, IHL rules require that wounded or sick detained individuals are afforded the relevant medical care and attention that their condition requires with the least possible delay and to the fullest extent practicable.<sup>136</sup> All detainees must also be given access to medical examinations within the capabilities of the detaining authority.<sup>137</sup>
3. In an international armed conflict, detaining authorities have more extensive obligations,<sup>138</sup> including the requirement to undertake medical inspections at least once a month.<sup>139</sup> Every place of detention must also have medical facilities, under the operation of a qualified doctor, that are sufficient to provide for the necessities of detainees, and detainees must have access to medical examinations.<sup>140</sup>



4. IHRL reinforces and supplements these conflict-specific requirements. Detainees have the right to be examined by a doctor as promptly as possible and, when necessary, to receive health care and treatment free of charge.<sup>141</sup> UN treaty bodies and the Human Rights Council have repeatedly stressed the importance of prompt and regular medical care for detainees to prevent and address torture and other ill-treatment.<sup>142</sup>
5. Specifically in the context of sexual violence, the Committee on Economic, Social, and Cultural Rights (the treaty body of independent experts that monitors implementation of the ICESCR) has determined that states “should aim to ensure universal access without discrimination for all individuals, including those from disadvantaged and marginalized groups, to a full range of quality sexual and reproductive health care” and must provide both physical and mental health care for survivors, including voluntary testing for sexually transmitted infections (HIV, hepatitis, and others) and the provision of post-exposure prophylaxis.<sup>143</sup>
6. The Mandela Rules state that detention sites must be equipped with medical care facilities that are sufficiently staffed and able to tend promptly and adequately to detainees’ physical and mental health care needs, such as the particular needs of survivors of sexual violence.<sup>144</sup> Rape and other forms of CRSV may require specialised responses and the Mandela Rules also require that detainees in need of specialised treatment be transferred to an appropriate institution or civil hospital.<sup>145</sup>
7. Medical services should be provided by a qualified, interdisciplinary team that includes expertise in psychology and psychiatry.<sup>146</sup> Clinical independence is paramount.<sup>147</sup> As such, the ability to make clinical decisions should be confined to relevant healthcare professionals, who should not be overruled or ignored by non-medical detention personnel.<sup>148</sup>
8. A qualified healthcare professional should, as soon as possible upon the admission of a detainee, see, speak with, and examine the detainee and continue to do so thereafter as necessary, in order to determine whether sexual abuse has occurred and provide treatment where necessary.<sup>149</sup>
9. Healthcare professionals remain bound by the same ethical and professional standards to which they must adhere in relation to the general community, such as obtaining informed consent prior to carrying out a medical procedure.<sup>150</sup> They should treat all detainees with humanity and respect for their dignity and human rights, without discrimination.<sup>151</sup> In keeping with the paramount importance of clinical independence, medical professionals, when identifying and responding to CRSV, should act in the interests of the detainee regardless of any pressure from the detaining authority.<sup>152</sup>

10. The Mandela Rules state that if, during the provision of services, healthcare professionals identify signs of torture, including CRSV, they must document and report such cases to the competent medical, administrative, or judicial authority, while ensuring that reporting does not put the detainee at greater risk.<sup>153</sup>
11. In fulfilling their obligations to ensure the right to health, states should facilitate detainees' access to humanitarian actors who provide health care and support to victims of CRSV, including the ICRC.<sup>154</sup> Similarly, NSAGs should encourage and facilitate access to health providers.<sup>155</sup>

## Addressing gender-specific concerns

12. States should ensure gender-specific medical responses, such as giving specific attention to women or girls who were subjected to sexual violence in detention.<sup>156</sup> The Bangkok Rules provide a number of measures on the health treatment of women detainees.<sup>157</sup> In particular, they require that “[w]omen prisoners who have been subjected to sexual abuse, and especially those who have become pregnant as a result, shall receive appropriate medical advice and counselling and shall be provided with the requisite physical and mental health care, support and legal aid.”<sup>158</sup>
13. Although social stigma is an obstacle to reporting common to all victims of sexual violence, deeply held assumptions about male invulnerability, especially in relation to sexual violence, exacerbate the problem for men and boys. Fear of being perceived as gay often accompanies these assumptions. For such reasons, male victims may be hesitant to report or seek treatment after experiencing sexual violence. Such assumptions can also affect the institutional response to CRSV. If healthcare professionals and other workers within detention settings lack understanding about male-directed sexual violence, they are unlikely to pick up on subtle cues that might alert them to the abuse.<sup>159</sup>
14. The Yogyakarta Principles indicate that states should “provide adequate access to medical care and counselling appropriate to the needs of those in custody, recognising any particular needs of persons on the basis of their sexual orientation or gender identity, including with regard to reproductive health, access to HIV/AIDS information and therapy.”<sup>160</sup>

## Endnotes

- 132 In relation to situations of international armed conflict, see Third Geneva Convention Arts. 30 and 31; Fourth Geneva Convention Arts. 81, 91, 92; Additional Protocol I Arts. 8 and 10. In relation to situations of non-international armed conflict, see Common Article 3 to the Geneva Conventions; Additional Protocol II Arts. 5 and 7; ICRC, Rules of Customary International Humanitarian Law, Rule 110 (“The wounded, sick and shipwrecked must receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition.”)
- 133 ICESCR Art. 12; International Convention on the Elimination of All Forms of Racial Discrimination (CERD) Art. 5(e) (iv); CEDAW Arts. 11(1)(f), 12, 14(2)(b); CRC Art. 24; CRPD Art. 25.
- 134 See specifically Mandela Rules, Rule 24.
- 135 World Health Organization, *Clinical management of rape and intimate partner violence survivors: Developing protocols for use in humanitarian settings* (2020), <https://perma.cc/HU5S-XNVP>.
- 136 Additional Protocol II Arts. 5 and 7. See also ICRC, Rules of Customary International Humanitarian Law, Rule 110.
- 137 Additional Protocol II Art. 5(2)(d).
- 138 See Additional Protocol I Art. 10.
- 139 Fourth Geneva Convention Art. 92; Third Geneva Convention Art. 31.
- 140 Fourth Geneva Convention Art. 91; Third Geneva Convention Art. 30. See also ICRC, Commentary of 2020 to Third Geneva Convention, para. 2271.
- 141 Mandela Rules, Rule 24.
- 142 See, e.g., UN Human Rights Committee, General Comment No. 20, para. 11; UN Human Rights Council, Resolution 13/19 – Torture and other cruel, inhuman or degrading punishment: the role and responsibility of judges, prosecutors and lawyers, UN Doc. A/HRC/RES/13/19 (15 April 2010), para. 5.
- 143 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 22 (2016) on the right to sexual and reproductive health, UN Doc. E/C.12/GC/22 (2 May 2016), para. 45.
- 144 Mandela Rules, Rules 25 and 27.
- 145 Mandela Rules, Rule 27.
- 146 Mandela Rules, Rule 25.
- 147 Mandela Rules, Rule 25.
- 148 Mandela Rules, Rule 27.
- 149 See Mandela Rules, Rule 30 (requiring that a physician or other health care professional examine detainees to identify any “ill-treatment”); Bangkok Rules, Rule 6(e) (specifying that medical screening should determine whether “sexual abuse and other forms of violence that may have been suffered prior to admission”).
- 150 Mandela Rules, Rule 32; OHCHR, *Manual on the Effective Investigation and Documentation of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol)* (2004), [hereinafter *Istanbul Protocol*], para. 64, <https://perma.cc/PVJ8-TG42>; Bangkok Rules, Rules 6(1) and 8; The Bangkok Rules with their Commentary, p. 28 (commentary to Rule 8).
- 151 UN Secretary-General, *Guidance Note of the Secretary-General: Reparations for Conflict Related Sexual Violence* (June 2014) [hereinafter UNSG Guidance Note], p. 4, <https://perma.cc/2YZT-Z9X8>.
- 152 *Istanbul Protocol*, para. 61.
- 153 Mandela Rules, Rule 34.
- 154 Additional Protocol I, Arts. 17 and 81; Geneva Conventions Common Article 3.
- 155 See *Geneva Call Deed of Commitment* (stating that signatories “will encourage and facilitate: access to services, including medical, psychological, social and legal services, in cooperation with humanitarian and development organizations where appropriate”).
- 156 UN Security Council Resolution 2467 (2019), para. 18.
- 157 Bangkok Rules, Rules 6, 7, 10, 12, 14, 16, 25(2), 35, 42, 47–52.
- 158 Bangkok Rules, Rule 25(2).
- 159 For some examples of possible indicators of sexual violence against men, see Institute for International Criminal Investigations, *Guidelines for investigating conflict-related sexual and gender-based violence against men and boys* (29 February 2016) [hereinafter *IICI Guidelines for Investigating CRSV*]; and Callum Watson, DCAF, *Preventing and Responding to Sexual and Domestic Violence against Men: A Guidance Note for Security Sector Institutions* (2014).
- 160 Yogyakarta Principles, Principle 9(b). See also Association for the Prevention of Torture, *Towards the Effective Protection of LGBTI Persons Deprived of Liberty: A Monitoring Guide* (December 2018).

## PRINCIPLE 7: INDEPENDENT MONITORING

Relevant independent monitoring bodies should have confidential and unhindered access to all detention settings to monitor treatment of detainees and document cases of CRSV and other abuses

1. Effective and independent monitoring regimes are essential to preventing CRSV and ensuring that survivors in detention settings are properly cared for and protected. By proactively reporting on the shortfalls of prevention mechanisms and documenting cases of CRSV, independent monitoring ensures that international obligations to prohibit and prevent CRSV in detention settings are realised.<sup>161</sup> Moreover, monitoring and subsequent reporting on CRSV can increase awareness of the issue, which in turn contributes to wider prevention efforts.
2. Monitoring bodies can take different forms, including arms-length independent governmental organisations, human rights commissions, ombudspersons, NGOs, and international bodies, such as the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Subcommittee on Prevention of Torture) and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, as well as UN human rights bodies that undertake monitoring activities (for example, in the context of UN peacekeeping missions). Which domestic or international independent monitoring bodies should have access to a particular place of detention will depend on the country context and the mandates of the various bodies.
3. Independent monitoring within detention settings forms part of a broader accountability framework to ensure that parties to an armed conflict fulfil their obligations under international law. This framework includes complaint mechanisms (Principle 8), training of detention personnel (Principle 5), and coverage of detention conditions by media and independent monitoring organisations.<sup>162</sup>

4. In recognition of the role monitoring plays in ensuring adherence to international law, the UN Security Council has articulated that all parties to armed conflict must provide “unimpeded access for monitoring” in areas under their control.<sup>163</sup>

## ICRC detention monitoring

5. Based on its mandate under the Geneva Conventions, the ICRC has a right to visit detainees in international armed conflict, and a right to offer its services to do the same in non-international armed conflict. Under IHL, parties to international armed conflicts must grant the ICRC regular and confidential access to detainees (regardless of whether they are considered civilians or prisoners of war) to verify their conditions of detention, subject to limited exceptions.<sup>164</sup> During these visits, the ICRC and its delegates should be allowed full liberty to select the places they wish to visit.<sup>165</sup>
6. In non-international armed conflicts, the ICRC may “offer its services” to all parties to the conflict with a view to visiting all detainees in order to verify the conditions of detention and to restore contact between these individuals and their families.<sup>166</sup> In addition, because the purpose of ICRC visits is to safeguard existing rules of IHL (including the prohibition of sexual violence), any ICRC offer to visit detainees must be “examined in good faith and may not be refused arbitrarily.”<sup>167</sup> When parties have not allowed the ICRC to access detainees, the UN Security Council has condemned the action “in the strongest possible terms” and demanded the ICRC be given immediate and unimpeded access to detainees.<sup>168</sup>
7. The requirement to examine ICRC visitation offers in good faith applies equally to NSAGs. Some NSAGs have voluntarily committed to allow the monitoring of detention conditions.<sup>169</sup>

## Domestic monitoring

8. States must have domestic monitoring regimes in place. In order to prevent torture and other ill-treatment, including CRSV, the ICCPR and the CAT require states to establish systems for regular and independent monitoring of all places of detention.<sup>170</sup> The Optional Protocol to CAT (OPCAT) requires states to establish national preventive mechanisms for the prevention of torture.<sup>171</sup> International standards such as the Body of Principles and the Mandela Rules reinforce the obligation for impartial external investigations in detention contexts,<sup>172</sup> and apply regardless of whether a state has joined OPCAT.<sup>173</sup>
9. Under these standards, external inspection teams should be composed of “qualified and experienced inspectors appointed by a competent authority,” with due regard to balanced gender representation, and include healthcare

professionals.<sup>174</sup> Detaining authorities should provide information on the number of detainees and the places of their detention,<sup>175</sup> as well as all relevant information on detainee treatment (including detainee records and the condition of their detention).<sup>176</sup> Further, without prearrangement, inspectors may conduct private and confidential interviews with detainees and staff of their choice.<sup>177</sup>

10. A written report should be submitted to the competent authority following the inspection, and, if possible, should be made public after ensuring that identifying information has been removed.<sup>178</sup> As part of a “constructive dialogue with authorities” on how to improve the treatment of detainees and conditions in detention,<sup>179</sup> where appropriate the competent authority should then respond to the findings of the report within a reasonable time.<sup>180</sup> In keeping with the principle that investigators may inspect freely, follow-up visits to the facility should be permitted as needed.<sup>181</sup>

## The OPCAT regime

Intending to “establish a system of regular visits undertaken by independent international and national bodies,” the Optional Protocol to the Convention against Torture (OPCAT) establishes additional monitoring obligations for states parties.<sup>182</sup> The protocol creates a two-tiered monitoring regime, in which the Subcommittee on the Prevention of Torture (OPCAT’s treaty body) visits places of detention and provides international oversight and advice to states parties,<sup>183</sup> paired with an obligation to create domestic-level independent monitoring bodies, or “national preventative mechanisms” (NPMs).<sup>184</sup>

Although OPCAT gives states some discretion on the design of NPMs, it does impose requirements that must be in place for a body to be recognised as an NPM. States parties must take steps to ensure the functional independence of the mechanism, as well as the independence of its personnel.<sup>185</sup> In addition, the NPM must be staffed by persons with relevant professional expertise, and due regard must be paid to gender balance and the representation of minorities.<sup>186</sup> Further guidance on NPMs has been adopted by the Subcommittee on the Prevention of Torture.<sup>187</sup>

States must allow visits from both the Subcommittee and NPMs.<sup>188</sup> Although increased secrecy and suspicion of outside actors during conflict place extensive pressure on the OPCAT regime, states must ensure independent monitors are given safe access to all facilities, including secret detention facilities.<sup>189</sup>

## Other international monitoring

11. UN bodies have established numerous mechanisms to monitor compliance with international human rights obligations. For example, the Subcommittee on Prevention of Torture is mandated to visit places of detention and advise on the implementation of OPCAT (discussed above) and the UN Human Rights Council has established several thematic and country mandates under its special procedures aimed at examining specific international human rights issues that encompass detention and CRSV. Detaining authorities should cooperate with these mechanisms in an effort to prevent CRSV in detention settings.<sup>190</sup>
12. One such special procedure, the Special Rapporteur on torture, is responsible for seeking out, examining, and reporting on issues and alleged cases concerning torture and other ill-treatment, including CRSV. To this end, the Human Rights Council urges states to fully cooperate with and assist the Special Rapporteur, respond favourably to the Special Rapporteur's country visit requests, and ensure that no one, including those in detention, faces prejudice for seeking to contact or contacting international or national monitoring bodies.<sup>191</sup> The Special Rapporteur on violence against women, its causes and consequences, and the Independent Expert on SOGI inhabit similar roles. Likewise, the Special Representative of the Secretary General on Sexual Violence in Conflict is mandated to provide strategic leadership and carry out advocacy to address CRSV.<sup>192</sup>
13. UN Security Council infrastructure related to CRSV includes the Monitoring, Analysis and Reporting Arrangements (MARA) on CRSV and the Monitoring and Reporting Mechanism (MRM) on Grave Violations against Children. These monitoring arrangements facilitate data gathering and analysis of incidents, patterns, and trends of CRSV to inform early warning systems, programmatic responses, and advocacy to the UN Security Council, including in relation to sanctions.<sup>193</sup> In 2019, the Security Council specifically requested through Resolution 2467 that “the monitoring, analysis and reporting arrangements on conflict-related sexual violence focus more consistently on the gender specific nature of sexual violence in conflict and post-conflict situations against all affected populations in all situations of concern, including men and boys.”<sup>194</sup>
14. While these mechanisms are not exclusively aimed at investigating or monitoring detention facilities, their focus includes CRSV occurring in detention facilities. Since 2019, these monitoring arrangements have sought to improve the consistency of monitoring and reporting of CRSV against men and boys particularly in the context of formal and informal detention.<sup>195</sup> They have also highlighted the need for greater monitoring and reporting of sexual violence perpetrated against LGBTI+ individuals.<sup>196</sup>

## Endnotes

- 161 OSCE *Guidance on Mandela Rules*, p. 170.
- 162 See OSCE ODIHR, *Monitoring places of detention: a practical guide for NGOs* (2002), p. 16.
- 163 UN Security Council Resolution 2467 (2019), para. 1.
- 164 This obligation may only be temporarily suspended in exceptional circumstances due to reasons of “imperative military necessity.” Third Geneva Convention Art. 126; Fourth Geneva Convention Arts. 76 and 143. See also ICRC, *Rules of Customary International Humanitarian Law*, Rule 124 (“In international armed conflicts, the ICRC must be granted regular access to all persons deprived of their liberty in order to verify the conditions of their detention and to restore contacts between those persons and their families”); Dayton Peace Accords (1995), Annex 1A: Agreement on the Military Aspects of the Peace Settlement, Art. IX (also recognising the right of the ICRC to visit detainees).
- 165 Fourth Geneva Convention Art. 143.
- 166 Geneva Conventions Common Article 3; ICRC, *Rules of Customary International Humanitarian Law*, Rule 124 (“In non-international armed conflicts, the ICRC may offer its services to the parties to the conflict with a view to visiting all persons deprived of their liberty for reasons related to the conflict in order to verify the conditions of their detention and to restore contacts between those persons and their families.”).
- 167 ICRC, *Rules of Customary International Humanitarian Law*, Rule 124.
- 168 ICRC, *Rules of Customary International Humanitarian Law*, Rule 124 (citing UN Security Council Resolution 1019, 1995).
- 169 See, e.g., The Interim Transitional National Council (TNC), *The Treatment of Detainees and Prisoners* (25 March 2011) (“The TNC will vow to punish those who violate this code and will allow local and international human rights organizations to freely visit and talk to the detainees and prisoners at any time.”) (emphasis added); Kurdistan Workers’ Party/People’s Defence Forces, *Rules for the Conduct of Warfare* (2004) (“In war the lives of those affected, such as the wounded and captured, are to be protected and medical treatment supplied it is essential to give the opportunity for international humanity organizations such as Red Cross and Red Crescent to work and to inspect freely.” (Unofficial translation)).
- 170 UN Human Rights Committee, General Comment No. 35, para. 58; UN Committee against Torture, General Comment No. 3 (2012): Implementation of article 14 by States parties, UN Doc. CAT/C/GC/3 (13 December 2012), [hereinafter UN Committee against Torture, General Comment No. 3], para. 18.
- 171 OPCAT leaves states parties with significant discretion as to the design of the NPM regime. Depending on the jurisdiction, states parties concentrate NPM responsibilities within a single body or distribute them amongst several. See OPCAT Subcommittee on Prevention of Torture (SPT), *National Preventive Mechanisms*, <https://www.ohchr.org/EN/HRBodies/OPCAT/Pages/NationalPreventiveMechanisms.aspx> (containing a compilation of information on NPMs based on State Parties’ submissions to the SPT) (last accessed 1 September 2020).
- 172 See Body of Principles, Principle 29; Mandela Rules, Rule 83(1)(b) (requiring “[e]xternal inspections conducted by a body independent of the prison administration, which may include competent international or regional bodies”). See also OSCE *Standards*, pp. 144–48.
- 173 OSCE *Guidance on Mandela Rules*, Chapter 7, para. 2, p. 170.
- 174 Mandela Rules, Rule 84(2).
- 175 Mandela Rules, Rule 84(1)(a).
- 176 Mandela Rules, Rule 84(1)(b).
- 177 Mandela Rules, Rule 84(1)(c); OSCE *Guidance on Mandela Rules*, Chapter 7, para. 17, p. 173. (clarifying that “[p]rison staff and administrations should ensure that all external monitors are able to perform their functions effectively and should cooperate with them, including by agreeing to be interviewed by them [emphasis added].”); see also OHCHR, *Professional Training Series No. 7 – Training Manual on Human Rights Monitoring: Chapter IX: Visits to Persons in Detention*, 2007.
- 178 Mandela Rules, Rule 85(1).
- 179 OSCE *Guidance on Mandela Rules*, Chapter 7, para. 11, p. 172.
- 180 Mandela Rules, Rule 85(2).
- 181 OHCHR, *Preventing Torture - The Role of National Preventive Mechanisms*, UN Doc. HR/P/PT/21 (2018).
- 182 Optional Protocol to the Convention against Torture (OPCAT) (2002) Art. 1.
- 183 See OPCAT Art. 11.
- 184 See OPCAT Art. 14. See also UN Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Guidelines on national preventive mechanisms*, UN Doc. CAT/OP/12/5 (9 December 2010) [hereinafter SPT Guidelines on national preventive mechanisms].
- 185 See OPCAT Art. 14(1)(c). See also UN General Assembly, *Resolution, Principles Relating to the Status of National Institutions (The Paris Principles)*, Res. 48/134 (20 December 1993).
- 186 OPCAT Art. 18(2). See also SPT Guidelines on national preventive mechanisms.
- 187 See SPT Guidelines on national preventive mechanisms.



- 188 See OPCAT Art. 4 (“Each State Party shall allow visits, in accordance with the present Protocol, by the mechanisms referred to in articles 2 and 3 to any place under its jurisdiction and control where persons are or may be deprived of their liberty [...] These visits shall be undertaken with a view to strengthening, if necessary, the protection of these persons against torture and other cruel, inhuman or degrading treatment or punishment.”).
- 189 Felice Gaer, *Non-traditional Places of Detention and the OPCAT*, Presentation, OPCAT Conference at University of Bristol School of Law (April 2007). OPCAT allows states to object to a Subcommittee “visit to a particular place of detention ... only on urgent and compelling grounds of national defence, public safety, natural disaster, or serious disorder in the place to be visited that temporarily prevent the carrying out of such a visit”), OPCAT Art. 14(2).
- 190 The SPT established under OPCAT follows the model of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) established by the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. See “CPT,” Council of Europe, <https://perma.cc/3QX4-6Q82>.
- 191 UN Human Rights Council, Resolution 25/13 – Torture and other cruel, inhuman or degrading treatment or punishment: mandate of the Special Rapporteur, UN Doc. A/HRC/RES/25/13 (15 April 2014), paras. 2(a)–(c).
- 192 See UN Security Council Resolution 1888 (2009), para. 4.
- 193 The MARA was established by Security Council Resolution 1960 (2010), which requested that the UN Secretary-General establish monitoring, analysis, and reporting arrangements to gather data on CRSV, including rape in situations of armed conflict, post-conflict and other situations of concern. The MRM was established by UN Security Council Resolution 1612 (2005) to gather information and report on grave violations against children in armed conflict including rape and other forms of sexual violence.
- 194 UN Security Council Resolution 2467 (2019), para. 32.
- 195 UN Secretary-General, Report of the Secretary-General on conflict-related sexual violence, UN Doc. S/2019/280 (29 March 2019), para. 138.
- 196 UN Secretary-General, Report of the Secretary-General on conflict-related sexual violence, UN Doc. S/2019/280 (29 March 2019), para. 139.

## PRINCIPLE 8: COMPLAINT MECHANISMS

Survivors of CRSV in detention settings, their families, and their representatives should have safe access to complaint mechanisms that allow them to report sexual violence

1. Availability of and access to effective complaint mechanisms support the right to remedy for CRSV and the duties to investigate (Principle 9) and to ensure access for independent monitoring mechanisms (Principle 7). Detainees, their families, and their representatives should have safe access to complaint mechanisms, as well as access to relevant information concerning other reporting, monitoring, and investigative mechanisms.

### Standards on complaint mechanisms

2. International standards, such as the Body of Principles and the Mandela Rules, contain minimum standards related to complaint mechanisms. In the context of prisons, these include: the right to make complaints to the prison director or the prison staff member; the right to make complaints to the inspector of prisons “freely and in full confidentiality, without the director or other members of the staff being present”; and the right to make a “complaint regarding his or her treatment, without censorship as to substance, to the central prison administration and to the judicial or other competent authorities, including those vested with reviewing or remedial power.”<sup>197</sup> The principle of access to multiple avenues of complaint likewise should apply in other detention settings. Detainees also have the right to information about complaint mechanisms and applicable rules.<sup>198</sup>
3. The UN Special Rapporteur on torture has recommended that complaint mechanisms be simple and accessible and has stated that “[t]he threshold for a complaint must be as low as possible, in particular in the context of detention.”<sup>199</sup> Complaints should be recorded and detainees should be informed of the outcome.<sup>200</sup> Further, if a request or complaint is rejected, or if there is an undue delay, the

complainant should be able to bring the complaint before a judicial or other authority.<sup>201</sup>

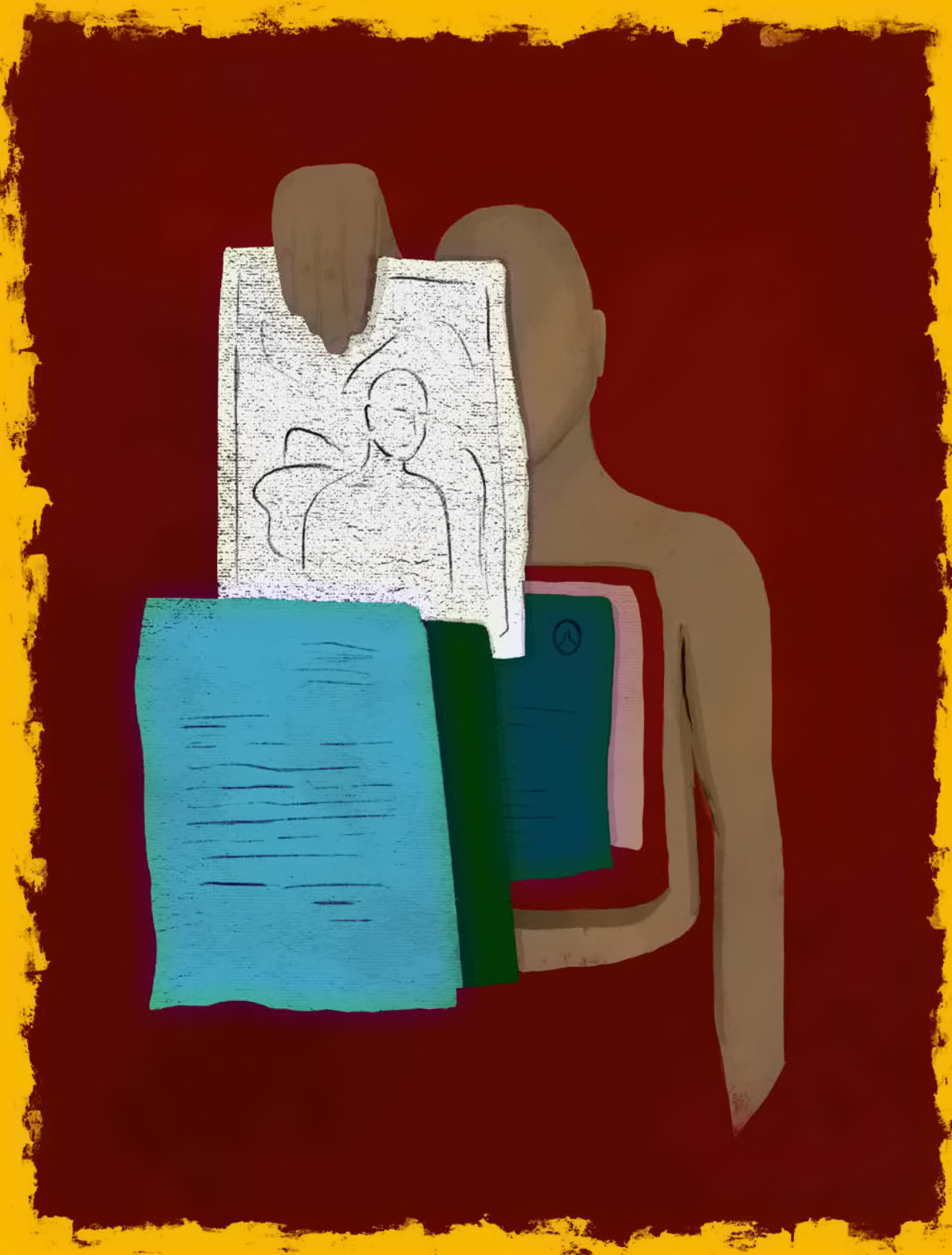
4. According to the Body of Principles and the Mandela Rules, detaining authorities should take effective measures to protect complainants against any risk of retaliation, intimidation, or other negative consequences (such as solitary confinement) as a result of having submitted a request or complaint.<sup>202</sup>
5. For civilians who have been interned during an international armed conflict, IHL rules contain “the right to present to the authorities in whose power they are, any petition with regard to the conditions of internment to which they are subjected.”<sup>203</sup> Prisoners of war also have a similar right, which includes the right to make their complaints regarding detention conditions known to specified outside authorities.<sup>204</sup>

## Addressing barriers to reporting CRSV

6. There are a range of common barriers to reporting and disclosures that victims of sexual violence in detention settings may face. These include: absence of independent or effective complaint mechanisms/lack of information about, or trust in, available mechanisms; fear of retaliation or reprisals; and stigma and feelings of shame or embarrassment.<sup>205</sup>
7. In order to address these obstacles, guidance and best practice documents offer a range of recommendations including:<sup>206</sup>
  - Providing various confidential means of conveying reports, including by written reports, telephone hotlines, or in person;
  - Allowing detainees to choose the person to whom they would feel most comfortable disclosing their complaint;
  - Providing training to detention personnel, including medical personnel, on how to receive complaints and make reports when they become aware of signs of CRSV;
  - Respecting the confidentiality of the person reporting the violation, including by allowing anonymous complaints to be made;
  - Accepting reports from witnesses and third parties, such as family members, lawyers, and monitoring bodies; and
  - Providing immediate protection and supervision for the victim from the moment they report abuse, as well as specialised support and assistance.

## Endnotes

- 197 Mandela Rules, Rule 56.
- 198 Mandela Rules, Rules 54 and 55. See also Bangkok Rules, Rule 7 (specifically referring to sexual violence in detention, noting that “if the existence of sexual abuse or other forms of violence before or during detention is diagnosed, the woman prisoner shall be informed of her right to seek recourse from judicial authorities. The woman prisoner should be fully informed of the procedures and steps involved. If the woman prisoner agrees to take legal action, appropriate staff shall be informed and immediately refer the case to the competent authority for investigation. Prison authorities shall help such women to access legal assistance.”).
- 199 See UN General Assembly, Interim report of the Special Rapporteur on torture, UN Doc. A/68/295 (9 August 2013), para. 80..
- 200 See Mandela Rules, Rules 8(f) and 57(1).
- 201 See Mandela Rules, Rule 57(1).
- 202 Body of Principles, Principle 33(4); Mandela Rules, Rule 57(2). See also Bangkok Rules, Rule 25. Rather than using solitary confinement, the UN Special Rapporteur on torture has noted that “[m]easures in this regard include the transfer of the complainant or the implicated personnel to a different detention facility or the suspension from duty of the personnel.” Interim report of the Special Rapporteur on torture, UN Doc. A/68/295 (9 August 2013), para. 77.
- 203 Fourth Geneva Convention Art. 101.
- 204 Third Geneva Convention Art. 78.
- 205 See *OSCE Standards*; *OSCE Guidance on Mandela Rules*.
- 206 *OSCE Standards*, p. 141–42; *OSCE Guidance on Mandela Rules*.



## PRINCIPLE 9: INVESTIGATION AND PROSECUTION OF CRSV IN DETENTION

CRSV in detention settings must be effectively investigated and, when appropriate, prosecuted

1. The consistent and rigorous investigation and prosecution of CRSV is central to responding to, as well as preventing, violations. CRSV may amount to war crimes, crimes against humanity, or other crimes under international law: states in whose jurisdiction the alleged crime occurred bear primary responsibility to bring perpetrators to justice by “investigat[ing] violations effectively, promptly, thoroughly and impartially and, where appropriate, tak[ing] action against those allegedly responsible in accordance with domestic and international law.”<sup>207</sup> In other cases, when particular instances of CRSV do not amount to international crimes, international law may nonetheless require states to undertake domestic investigation and, when appropriate, prosecution.<sup>208</sup> Investigation and prosecution are linked to monitoring (Principle 7) and complaint regimes (Principle 8), as allegations may come to light through these mechanisms.
2. Best practices for investigations include specialised training of investigators and proper collection, preservation, and storage of evidence. Whenever a state finds sufficient evidence of CRSV, it has the duty to prosecute the person(s) allegedly responsible.<sup>209</sup> Prosecutions that occur within post-conflict transitional justice efforts should, where applicable, include charges for sexual violence.
3. Although international law is generally silent on the extent to which NSAGs should investigate CRSV, NSAGs are expected to cooperate with independent investigations and prosecutions of CRSV and should adopt measures to support investigations and prosecutions.<sup>210</sup>

## The duty to investigate

4. States have a general obligation to combat impunity for violations of IHRL or IHL.<sup>211</sup> This obligation includes the duty to “undertake prompt, thorough and impartial investigation of violations of international human rights and international humanitarian law,”<sup>212</sup> including CRSV.<sup>213</sup> The duty to investigate may also be derived from the requirement that states protect, respect, and fulfil human rights and respect and ensure respect for IHL.<sup>214</sup> The scope of this obligation includes the requirement to investigate gross violations of IHRL and serious violations of IHL “effectively, promptly, thoroughly and impartially” and to exercise due diligence to prevent violations by non-state actors.<sup>215</sup>
5. The duty to investigate applies regardless of the identity of the victim(s) or perpetrator(s).<sup>216</sup> Allegations of CRSV that has been perpetrated against men, boys, or LGBTI+ individuals must therefore be investigated without discrimination related to victims’ sex, gender identity, or sexual orientation. The investigation and prosecution of CRSV against men, boys, and LGBTI+ individuals in detention settings presents unique challenges due to stigma, shame, and cultural attitudes about gender and sexuality, which can inhibit victims’ ability to speak about their experiences and prevent investigators from detecting or prioritising evidence of CRSV. In order to meet their obligation to effectively investigate and prosecute CRSV against men, boys, and LGBTI+ individuals, states must therefore address the additional barriers to justice these groups face. Official state policy should explicitly promote the investigation of CRSV against men, boys, and LGBTI+ persons. Otherwise this issue may be missed, overlooked, or ignored.<sup>217</sup>

### International guidelines for investigating and documenting CRSV

The UK Foreign and Commonwealth Office’s International Protocol on the Documentation and Investigation of Sexual Violence in Conflict<sup>218</sup> (the International Protocol) provides specific guidance on best practices for investigations of CRSV. The International Protocol sets out basic principles for documenting and investigating CRSV, highlighting the need for investigators to be informed about the impacts of sexual violence and the specific techniques that should be used when interviewing witnesses and gathering information. Further, the Institute for International Criminal Investigations (IICI)’s Guidelines for Investigating Conflict-Related Sexual and Gender-Based Violence Against Men and Boys (the IICI Guidelines) assist criminal justice and human rights investigators, reporters, and monitors to document and investigate CRSV against men and boys in particular.<sup>219</sup>

The Guidelines on Investigating Violations of International Humanitarian Law (issued by the ICRC and the Geneva Academy of International Humanitarian Law and Human Rights) provide a general framework for investigations and outline the different types of investigations in armed conflict (criminal and administrative). The Guidelines highlight how to enable effective investigative practices that can assist in the detection of potential violations and support various forms of accountability for IHL violations, among other outcomes. The Guidelines are focused on investigations carried out by states into possible violations of IHL, but “may also prove useful for actors other than states” and are a helpful reference point for the investigation of other crimes under international law.<sup>220</sup>

There are a number of measures that authorities should take to facilitate the investigation of CRSV and the preservation of evidence, including in detention settings:

- Steps should be taken at the earliest possible time to document military operations.
- All cases of capture and detention should be recorded.
- Relevant evidence of possible violations should be preserved.
- Strong reporting requirements and an effective and accessible process for handling reports of potential violations, including reports by external parties, should be established.
- If there are reasonable grounds to believe that sexual violence has been committed, a criminal investigation must be opened promptly and carried out “without unreasonable delay.”
- An independent and impartial investigative authority must be available to carry out investigations into CRSV. The authority should be independent of the detaining authorities (and outside of the chain of command).
- Investigators must take “all feasible steps” to collect, analyse, preserve and store evidence. Investigations should be transparent and thorough.
- Investigators who are gathering information about allegations of CRSV should seek to document the varying forms of harm caused to victims/survivors and their families. Forms of harm to document should include physical harm, mental harm, social harm, and economic harm.
- If the circumstances suggest that underlying causes are likely to have led to the CRSV or could lead to future abuses, as is often the case when CRSV occurs in detention settings, then an independent investigation into systemic issues should be carried out, alongside a criminal investigation of individual abuses.
- Investigators need to have expertise on specific vulnerabilities related to CRSV. Special expertise is particularly important for the investigation of CRSV against men, boys, and LGBTI+ persons, as trauma, shame, and attitudes about gender and sexuality are likely to complicate the



investigative process, and poorly conducted interviews carry the risk of triggering re-traumatisation.

- Investigators of CRSV against men, boys, and LGBTI+ persons in detention settings should be trained in accordance with international best practices, including those noted in the International Protocol and the IICI Guidelines.

These and other measures are contained in:

- UK Foreign and Commonwealth Office, *The International Protocol on the Documentation and Investigation of Sexual Violence in Conflict* (2nd edition March 2017), <https://perma.cc/QUU5-AMVS>.
- Institute for International Criminal Investigations, *The Guidelines for Investigating Conflict-Related Sexual and Gender-Based Violence Against Men and Boys* (2016), <https://perma.cc/NEJ4-24K3>.
- Geneva Academy of International Humanitarian Law and Human Rights and ICRC, *The Guidelines on Investigating Violations of International Humanitarian Law: Law, Policy, and Good Practice* (2019), <https://perma.cc/7BEP-7U7U>.
- UN Department of Peace Operations, *The Handbook for United Nations Field Missions on Preventing and Responding to Conflict-Related Sexual Violence* (2020), <https://perma.cc/ZM2P-M8GB>.

## The duty to prosecute

6. Linked to the duty to investigate is the duty to prosecute CRSV in detention settings. The UN Security Council has affirmed that states have a responsibility to end impunity and to bring perpetrators of CRSV to justice through “consistent and rigorous” prosecution.<sup>221</sup> To this end, the Security Council encourages national authorities to “strengthen legislation to foster accountability for sexual violence,”<sup>222</sup> including through enacting victim and witness protection laws, providing legal aid to survivors, and, where appropriate, establishing specialised police units and courts to address such crimes.<sup>223</sup>
7. In the context of CRSV against men and boys, the Security Council specifically urges states to strengthen “policies that offer appropriate responses to male survivors and challenge cultural assumptions about male invulnerability to such violence.”<sup>224</sup> Such policies should aim to combat the stigma that might otherwise present a barrier to reporting, and should explicitly contemplate CRSV against men, boys, and LGBTI+ persons as a crime requiring specific prosecutorial attention.
8. In terms of IHRL, states have an obligation to prosecute CRSV in detention settings under the ICCPR,<sup>225</sup> CAT,<sup>226</sup> CRC,<sup>227</sup> and CRPD.<sup>228</sup> Provisions providing a right to an “effective remedy” before a national authority, which in certain instances includes

the right to recourse to a judicial authority, may also be found in regional human rights instruments, including the American Convention on Human Rights<sup>229</sup> and the European Convention on Human Rights.<sup>230</sup>

9. Under international law, there should be no statute of limitations for genocide, crimes against humanity, or war crimes; in armed conflict, rape and other forms of sexual violence often fall into one of these categories of crime.<sup>231</sup> There should also be no immunities for rape and other acts of sexual violence or defences of superior order which could preclude their prosecution.<sup>232</sup>
10. Under IHL, the Geneva Conventions require states to provide “effective penal sanctions” for certain “grave breaches” of IHL,<sup>233</sup> which include torture and inhuman treatment.<sup>234</sup> States are obliged to “search for persons alleged to have committed” torture or inhuman treatment, including CRSV, and to “bring such persons, regardless of their nationality, before [their] own courts” or to hand such persons over for trial to another state that is concerned with the case.<sup>235</sup> Like the duty to investigate, the duty to prosecute applies regardless of the identity of the victim(s).<sup>236</sup> More generally, under IHL in both international and non-international armed conflicts, “[s]tates must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction, and, if appropriate, prosecute the suspects.”<sup>237</sup>
11. Though the ICC and certain other international tribunals may exercise jurisdiction where an international crime has been committed and a state’s legal system is “unwilling or unable genuinely to carry out . . . investigation or prosecution,”<sup>238</sup> states have the primary responsibility and right to prosecute rape and other crimes of sexual violence in conflict.<sup>239</sup> If a state is unable or unwilling to conduct effective investigations and prosecutions, it should cooperate with international tribunals.<sup>240</sup> States should also incorporate within their domestic law provisions for universal jurisdiction and/or facilitate extradition or surrender of offenders to other states and to appropriate international judicial bodies.<sup>241</sup>
12. In a post-conflict setting, prosecution is only one aspect of a complete response to sexual violence that took place during the armed conflict. Prosecutions should be accompanied by other transitional justice measures such as reparation, investigations by truth commissions, other forms of social repair, and institutional reform.

## Endnotes

- 207 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Adopted by UN General Assembly resolution 60/147 of 16 December 2005. UN Doc. A/RES/60/147 (21 March 2006) [hereinafter Basic Principles and Guidelines], para. 3(b).
- 208 See discussion below on obligations under IHL and IHRL for examples.
- 209 Basic Principles and Guidelines, Principle 4; Report of the independent expert to update the Set of principles to combat impunity. Addendum: Updated Set of principles for the protection and promotion of human rights through action to combat impunity, UN Doc. E/CN.4/2005/102/Add.1 (8 February 2005) [hereinafter Updated Set of Principles], Principle 19.
- 210 See *Geneva Call Deed of Commitment* (includes commitments to investigate as well as to cooperate with monitoring and investigation mechanisms).
- 211 Updated Set of Principles, Principle 1.
- 212 Updated Set of Principles, Principle 19.
- 213 The ICCPR, CAT, CRC, CRPD and CEDAW have all been interpreted to require investigation. See UN Human Rights Committee, General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add. 13 (26 May 2004), para. 18 (“Where the investigations referred to in paragraph 15 reveal violations of certain Covenant rights, States Parties must ensure that those responsible are brought to justice.”); UN Committee against Torture, General Comment No. 2, para 18. (“[A] state can be held liable for an act of torture by private individuals that it fails to *investigate*, prosecute, or punish.”) (emphasis added); CRC Art. 19 (noting that protective measures should include “effective procedures for . . . identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment”); UN General Assembly, Report of the third session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, UN Doc. A/AC.265/2004/5 (9 June 2004), p. 28 (noting that the CRPD requires that states parties undertake to ensure that incidents of exploitation, violence, and abuse are identified and investigated).
- 214 Basic Principles and Guidelines, para. 3.
- 215 Basic Principles and Guidelines, para. 3.
- 216 Basic Principles and Guidelines, para. 25.
- 217 See *IICI Guidelines for Investigating CRSV*, p. 5.
- 218 UK Foreign and Commonwealth Office, *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict* (2nd edition March 2017). The Protocol provides guidance for anyone who is documenting CRSV for the purpose of securing or supporting accountability for victims, including NGOs and civil society organisations, international authorities, and national authorities.
- 219 *IICI Guidelines for Investigating CRSV*.
- 220 ICRC and Geneva Academy of International Humanitarian Law and Human Rights, *Guidelines on Investigating Violations of International Humanitarian Law: Law, policy, and good practice* (September 2019), p. 1.
- 221 UN Security Council Resolution 2467 (2019), pp. 2–3.
- 222 UN Security Council Resolution 2467 (2019), p. 4.
- 223 UN Security Council Resolution 2467 (2019), para. 14.
- 224 UN Security Council Resolution 2467 (2019), para. 32.
- 225 See UN Human Rights Committee, General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add. 13 (26 May 2004), para. 18 (“States Parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (article 7).”). See also William A. Schabas, *UN International Covenant on Civil and Political Rights – Nowak’s CCPR commentary* (3rd revised edition 2019).
- 226 See UN Committee against Torture, General Comment No. 2, para. 18 (“[A] state can be held liable for an act of torture by private individuals that it fails to investigate, *prosecute*, or punish.”) (emphasis added). States’ obligation to take remedial action in the aftermath of CRSV includes “repression against individual perpetrators of torture by means of domestic criminal law and the principle of universal jurisdiction.” See also Manfred Nowak, Moritz Birk & Giuliana Monina (Eds.), *The United Nations Convention against Torture and its Optional Protocol – A Commentary* (2nd edition 2019).
- 227 With regard to crimes against children, the CRC requires states parties to investigate allegations of abuse and maltreatment, and to consider judicial involvement “as appropriate.” The appropriateness of judicial intervention must be assessed in accordance with the nature and severity of the abuse suffered by the victim, as well as the overarching principle of due respect for the expressed views of the child. The best interests of the child are paramount. See CRC Arts. 3(1), 12, 19.

- 228 The CRPD requires that states parties undertake to ensure that incidents of exploitation, violence and abuse are identified, investigated and, where appropriate, prosecuted. The Convention does not elaborate on the appropriateness of prosecution, but appropriateness may be a stand-in for considerations of nature and severity—an interpretation that is supported by references to “adequate deterrence and effective sanctions” in earlier drafts of the Convention. See UN General Assembly, Report of the third session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, UN Doc. A/AC.265/2004/5 (9 June 2004), p. 28.
- 229 American Convention on Human Rights Art. 25 (“Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.”).
- 230 Convention for the Protection of Human Rights and Fundamental Freedoms Art. 13 (“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”).
- 231 Rome Statute of the International Criminal Court Arts. 29. See ICRC, Rules of Customary International Humanitarian Law, Rule 160 (“Statutes of limitation may not apply to war crimes”).
- 232 Rome Statute of the International Criminal Court Arts. 27 and 33.
- 233 First Geneva Convention Arts. 49–50; Second Geneva Convention Arts. 50–51; Third Geneva Convention Arts. 129–30; Fourth Geneva Convention Arts. 146–47.
- 234 First Geneva Convention Art. 50; Second Geneva Convention Art. 51; Third Geneva Convention Art. 130; Fourth Geneva Convention Art. 147.
- 235 Fourth Geneva Convention Art. 146.
- 236 See Basic Principles and Guidelines, para. 25.
- 237 ICRC, Rules of Customary International Humanitarian Law, Rule 158 and associated practice.
- 238 In determining “unwillingness,” the ICC shall consider: 1) whether the national proceedings were for the purpose of shielding the person from criminal responsibility; 2) whether there was an unjustified delay in the proceedings which was inconsistent with an intent to bring the person to justice; and 3) whether the proceedings were not conducted independently or impartially or were not conducted in a manner consistent with bringing the person to justice. In determining “inability,” the ICC shall consider whether “due to the total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out proceedings.” Rome Statute of the International Criminal Court Art. 17.
- 239 Updated Set of Principles, Principle 20.
- 240 Updated Set of Principles, Principles 19–21.
- 241 See, e.g., Basic Principles and Guidelines, p. 5; Updated Set of Principles, Principle 32; CAT Art. 8; Inter-American Convention on Extradition (1981).

# PRINCIPLE 10: REMEDY AND REPARATION

Survivors of CRSV in detention settings are entitled to adequate, effective, and timely remedy and reparation

1. Victims of serious violations of IHRL or IHL have a right to adequate, effective, and timely remedy, including reparation. Reparation should aim to repair the harm caused to the injured party, including through rehabilitation when required. With respect to CRSV, reparation programmes should be comprehensive and transformative in nature, and may include collective reparations in addition to individual reparations. Independent monitoring (Principle 7), complaint mechanisms (Principle 8), and investigation and prosecution (Principle 9) may reveal specific instances as well as patterns of CRSV in detention settings that require reparation.

## Remedy and reparation in international law

2. The right to an effective remedy for violations of IHRL and IHL is enshrined in numerous sources of international law.<sup>242</sup> International human rights treaties that provide for a right to a remedy for victims of violations of IHRL include the ICCPR,<sup>243</sup> CAT,<sup>244</sup> and CRC.<sup>245</sup> Such provisions also appear in regional human rights conventions.<sup>246</sup> Under IHRL, the right to a remedy can encompass a range of measures, including reparation, judicial proceedings, and measures intended to protect the right to truth. IHL, meanwhile, contains norms imposing obligations on states to make reparation, while there are some examples suggesting that NSAGs also have duties to make reparation.<sup>247</sup>
3. The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (the Basic Principles and Guidelines)<sup>248</sup> provide that states should make available “adequate, effective, prompt and appropriate remedies” for victims of violations.<sup>249</sup> According to the Basic Principles and Guidelines, states should develop means to inform the general public, and in particular, victims of serious violations of IHRL and IHL, of available rights and remedies.<sup>250</sup>

4. Remedies for serious violations of IHRL and IHL include the victim's right to "adequate, effective, and prompt reparation for harm suffered."<sup>251</sup> "Reparation" can serve as a shorthand way of describing a holistic framework of redress that includes a range of measures, from individual compensation to institutional reforms.<sup>252</sup>
5. In accordance with the Basic Principles and Guidelines, a state should provide reparation for acts or omissions that can be attributed to it and that constitute gross violations of IHRL or serious violations of IHL. The Basic Principles and Guidelines also contemplate the responsibility of non-state actors to provide reparation for violations or to compensate a state if a state has already provided reparation to the victim.<sup>253</sup> In the event that non-state parties are liable for harm to a victim but are unable or unwilling to meet their obligations to provide reparations, states should endeavour to establish national programmes to provide reparation and other assistance.<sup>254</sup>

## Key considerations for reparation of CRSV

6. The UN Secretary-General's Guidance Note on Reparations for Conflict-Related Sexual Violence states that reparations should strive to be "transformative" in design, implementation, and impact and "address pre-existing structural subordination and discrimination for both men and women."<sup>255</sup>
7. Reparations frameworks addressing CRSV should be "comprehensive," with programmes including "all or some variation of individual, collective, symbolic, and material reparations as well as priority access to services."<sup>256</sup> A comprehensive framework should include both judicial and administrative programmes.<sup>257</sup> Administrative programmes are out-of-court processes used by states to identify violations and victims and provide victims with reparation through a procedure established by the state.<sup>258</sup> They are particularly useful for addressing CRSV when it takes place at a large scale.<sup>259</sup>
8. The concept of comprehensive reparation includes restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. While each of these measures are relevant, rehabilitation is a particularly important form of reparation for survivors of CRSV, particularly as rape and other serious forms of CRSV, including when it amounts to torture, may require specialised medical, mental, and psycho-social responses (see Principle 6).<sup>260</sup>
9. Collective reparations, such as those that honour victims of CRSV without requiring naming of victims and individual violations suffered, may be helpful in combatting stigma and encouraging victims to speak about their experiences, although they are not a substitute for individual reparations.<sup>261</sup> Consultation with victims is vital in designing and implementing any effective reparations scheme, and is particularly important when crafting collective reparations for victims of CRSV.<sup>262</sup>

10. Because comprehensive reparations programmes can take time to design and implement, interim reparations should be made available to respond to the most urgent and immediate harm affecting victims/survivors of CRSV. This response should include providing urgent medical treatment and livelihood support, and should be appropriate to the gender- and age-specific needs of survivors.<sup>263</sup>

## Endnotes

- 242 Within human rights law, the term “remedy” encompasses any actions or measures taken to prevent, redress, or compensate the violation of a right. See Dinah Shelton, *Human Right, Remedies*, Max Planck Encyclopedia of Public International Law (2006), para. 1.
- 243 ICCPR Art. 2.
- 244 CAT Art. 14.
- 245 CRC Art. 39.
- 246 See African Charter on Human and Peoples’ Rights Art. 7; American Convention on Human Rights Art. 25; Convention for the Protection of Human Rights and Fundamental Freedoms Art. 13.
- 247 See ICRC, *Rules of Customary International Humanitarian Law*, Rule 150. See also Hague Convention respecting the Laws and Customs of War on Land (Convention IV) (1907) Art. 3; Additional Protocol I Art. 91. The ICRC commentary on the rule notes some practice to the effect that armed groups “are required to provide appropriate reparation for the damage resulting from violations of international humanitarian law.” The *Geneva Call Deed of Commitment* also includes the commitment to provide reparations to victims.
- 248 The Basic Principles and Guidelines summarise existing legal obligations under IHL and IHRL and identify how to implement those obligations.
- 249 Basic Principles and Guidelines, para. 2(c).
- 250 Basic Principles and Guidelines, para. 24.
- 251 Basic Principles and Guidelines, para. 11.
- 252 “The term is used in a wide sense to refer to all those measures that may be employed to redress the various types of harms that victims may have suffered as a consequence of certain crimes.” Pablo de Grieff, “Justice and Reparations,” in *The Handbook of Reparations* (Pablo de Grieff, ed.) (2006), p. 452.
- 253 Basic Principles and Guidelines, para. 15.
- 254 Basic Principles and Guidelines, paras. 15–16.
- 255 UNSG Guidance Note, p. 8.
- 256 UNSG Guidance Note, p. 6.
- 257 UNSG Guidance Note, p. 6.
- 258 UNSG Guidance Note, p. 6. Administrative reparations programmes should not preclude victims of CRSV from obtaining reparations through courts, however. Instead, “[d]omestic or international courts should take into account and complement reparations awarded by administrative reparations programmes when deciding on redress for victims of [CRSV].”
- 259 UNSG Guidance Note, p. 6.
- 260 See, *inter alia*, CAT Art. 14; UN Committee against Torture, General Comment No. 3.
- 261 UNSG Guidance Note, p. 7.
- 262 UNSG Guidance Note, p. 8.
- 263 See *ASP Checklist*, p. 52.

# APPENDIX:

## SUGGESTED GUIDES AND PUBLICATIONS

- All Survivors Project (ASP), *Checklist on preventing and addressing conflict-related sexual violence against men and boys*, December 2019, <https://perma.cc/5P4Y-R8XM>.
- International Committee of the Red Cross (ICRC) and Geneva Academy of International Humanitarian Law and Human Rights, *Guidelines on Investigating Violations of International Humanitarian Law: Law, policy, and good practice*, September 2019, <https://perma.cc/K26J-6MTR>.
- ICRC, *Protecting People Deprived of their Liberty*, 9 June 2020, <https://perma.cc/9DV3-LF6N>.
- United Kingdom Foreign & Commonwealth Office, *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict*, Second edition: March 2017, <https://perma.cc/QUU5-AMVS>.
- Institute for International Criminal Investigations, *Guidelines for Investigating Conflict-Related Sexual and Gender-Based Violence Against Men and Boys*, 29 February 2016, <https://perma.cc/Q7NY-8DUS>.
- United Nations Office on Drugs and Crime, *The Bangkok Rules: United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders with their Commentary*, <https://perma.cc/UE5Z-NWKX>.
- Office of High Commissioner for Human Rights (OHCHR), *Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law*, Second edition, 2019, <https://perma.cc/L6GA-SJ3P>



- Organization for Security and Co-operation in Europe (OSCE) Office for Democratic Institutions and Human Rights (ODIHR), *Preventing and Addressing Sexual and Gender-based Violence in Places of Deprivation of Liberty: Standards, Approaches and Examples from the OSCE Region*, August 2019, <https://perma.cc/4BWY-K99E>.
- OSCE Office for Democratic Institutions and Human Rights and Penal Reform International (PRI), *Guidance Document on the Nelson Mandela Rules: Implementing the United Nations Revised Standard Minimum Rules for the Treatment of Prisoners*, August 2018, <https://perma.cc/J4WH-LYMA>.
- Prison Reform International and Thailand Institute of Justice, *Guidance Document on the United Nations Rules on the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (The Bangkok Rules)*, October 2013, <https://perma.cc/Y524-59LK>.
- Prison Reform International, Bangkok Rules Toolbox, [www.penalreform.org/issues/women/work/tools-resources/](http://www.penalreform.org/issues/women/work/tools-resources/) (last accessed 1 September 2020).
- Association for Prevention of Torture, *Towards the Effective Protection of LGBTI Persons Deprived of Liberty: A Monitoring Guide*, December 2018, <https://perma.cc/5V8W-Q2JJ>.
- United Nations, *Handbook for United Nations Field Missions on Preventing and Responding to Conflict-Related Sexual Violence*, 2020, <https://perma.cc/ZM2P-M8GB>.
- UNICEF/OCHA, *Strengthening Prevention of Conflict-related Sexual Violence with Non-state Armed Groups: A Preliminary Framework for Key Prevention Strategies*, July 2011, <https://perma.cc/6ZDE-C3NW>.
- *Deed of Commitment Under Geneva Call for the Prohibition of Sexual Violence in Situations of Armed Conflict and Towards the Elimination of Gender Discrimination*, 2012, <https://perma.cc/5MLW-U7D5>.

As recognised by the UN Security Council in Resolution 2467 (April 2019), detention settings are a key context of vulnerability to conflict-related sexual violence (CRSV), particularly for men and boys. **The Principles on the Prevention of Conflict-Related Sexual Violence in Detention Settings** draw from existing international law – primarily international human rights law and international humanitarian law – as well as authoritative guidance to bring together in a single instrument ten key international principles to prevent and respond to CRSV, applicable to all persons deprived of their liberty in armed conflict. Each principle is accompanied by commentary on its sources and content.

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