
CSSF Women, Peace and Security Helpdesk

Conflict-related sexual violence in Myanmar: barriers to and prospects for accessing international justice

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Research team: Fiona MacGregor and Catherine O'Rourke with Naw Anthea

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Abstract

There is substantial activity both from local women's organisations and international mechanisms to advance accountability for conflict-related sexual violence (CRSV) in Myanmar. This report involves a review of this local and international activity to identify obstacles and to make recommendations for improving the prospects of justice for CRSV. Research for the report involved a series of key informant interviews with individuals involved in documenting CRSV in Myanmar. Researchers also undertook a desk-based review of best practice and current activity towards delivering liability for CRSV in Myanmar. The report identifies a set of important findings concerning local documentation and international efforts towards answerability. The report makes a series of recommendations designed to support and enhance both local documentation and international accountability efforts.

Summary

The report has two main purposes, so is divided into two parts. The purpose of Part One is to better understand the scale, practices and challenges confronting civil society organisations (CSOs) engaged in documenting conflict-related sexual violence (CRSV) in Myanmar.¹ The information underpinning Part One is based on 13 key informant interviews. Part One addresses, in turn, what data is being collected; who is documenting data; documentation practices; challenges to documentation, including ethical and procedural obstacles; and the relationship of documentation to future justice goals.

The purpose of Part Two is to better understand international accountability options for CRSV in Myanmar and how local CSO documentation might support international answerability for CRSV. The information underpinning Part Two is drawn from a desk-based doctrinal review of international accountability options for CRSV, combined with comparative analysis of where these options have proved effective, and further desk-based analysis of current international accountability mechanisms that have been activated to date to investigate CRSV in Myanmar. Part Two addresses, in turn, international accountability options for CRSV under international humanitarian law, international criminal law, international human rights law and processes of the United Nations Security Council; best practice to date in securing liability for CRSV under international law; and relevant evidentiary standards and examples of testimonial and documentary evidence used to meet evidentiary standards for delivering international accountability for CRSV.

The report includes a detailed series of recommendations for supporting both local documentation and international accountability efforts for CRSV.

Background

With much of Myanmar inaccessible to international groups since the February 2021 military coup, civil society organisations (CSOs) within the country have a particularly critical role in recording human rights violations and other breaches of international law. Women's organisations have played an especially prominent and important role in documenting and highlighting conflict-related sexual violence (CRSV) by the Myanmar Military (*Tatmadaw*). Their work builds on decades of research, advocacy and community support by Myanmar's women

¹ According to the United Nations, "the term 'conflict-related sexual violence' refers to rape, sexual slavery, forced prostitution, forced pregnancy, forced abortion, enforced sterilization, forced marriage, trafficking in persons when committed in situations of conflict for the purpose of sexual violence/exploitation 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." For this definition and further details see the website of the Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict (<https://www.un.org/sexualviolenceinconflict/our-work/our-mandate/#:~:text=The%20term%20%20conflict%2Drelated%20sexual,any%20other%20form%20of%20sexual>)

activists for survivors of CRSV, particularly those from ethnic minority areas. These areas continued to experience conflict even during the country's ostensible transition to democracy.

While several international bodies are also investigating such violations, they often rely heavily on these local organisations to provide them with information. Yet those gathering information in Myanmar and their umbrella organisations – many of which now operate from neighbouring Thailand – face considerable challenges. CRSV is recognised as a widely-underreported violation of international law around the world. Cultural taboos, stigma, risk/fear of retribution and potential for additional trauma to victims and/or survivors all contribute to difficulties in documenting such crimes. It is also notoriously difficult to secure convictions for perpetrators of sexual violence under national and international law.

Ongoing documentation work has the potential to provide vital evidence in efforts to secure justice for victims and/or survivors from Myanmar. There are also considerable dangers and challenges for those who collect such information. These have implications for documenters, victims and/or survivors, and for future justice proceedings – including international justice mechanisms. The situation in Myanmar is complex and hazardous and involves countless groups with different motivations, priorities and ethical approaches. Time-limited remote research could not encompass all relevant factors or include all relevant voices. Nevertheless, the following findings provide a broad overview of the background to and ongoing challenges around CRSV documentation in Myanmar, particularly for women's organisations, with a view to informing recommendations for how such work may contribute to international justice mechanisms.

Research scope

Part One of this report drew on remote interviews with 13 key informants. These comprised five representatives of Myanmar women's organisations and a senior figure from another Myanmar CSO that documents CRSV; two international figures who work closely with women's organisations documenting CRSV in Myanmar; one leading member of a Myanmar umbrella organisation that collects data from CSOs relating to human rights violations, including CRSV; one representative of the National Unity Government of Myanmar (NUG) in exile, one representative from an international organisation that documents human rights violations in Myanmar; and two United Nations (UN) representatives who work with international mechanisms documenting CRSV.

Key informants were identified and interviewed according to the methods and ethical procedures approved prior to the research commencing (see Annex III). Informed consent was obtained from all participants. As agreed, for ethical and safeguarding purposes, the following report does not name individual contributors or their organisations.

Part Two is drawn from a desk-based doctrinal review of international accountability options for CRSV, combined with comparative analysis of where these options have proved effective. It also involved further desk-based analysis of current international accountability mechanisms that have been activated to date to investigate CRSV in Myanmar.

Limitations

One finding to emerge from this report is that procedures and practices for CRSV documentation, data gathering, storage and sharing vary significantly between organisations

and individual documenters. It has therefore not been possible to provide a very detailed account of specific documentation practices and procedures that would accurately represent the many different approaches. Limitations of scope, time and remote interviews carried out in a context of widespread insecurity and restricted communications access, also meant that these findings do not reflect all CRSV documentation activities nor every gap in documentation. For example, the report authors are aware that the civilian sections of ethnic armed organisations also oversee justice proceedings in areas under their control. However, they were unable to conduct interviews with representatives of such groups during the research period.

Nevertheless, by including representatives from umbrella organisations of women's groups and other significant actors, several important themes emerged – as highlighted below. These offer some important insights into how documentation efforts could be better supported in relation to potential international and transitional justice mechanisms.

Part Two aims to provide an accessible and summary presentation of complex and evolving legal standards and practice. Therefore, the report does not provide the level of detail and nuance needed to, for example, inform submissions to legal proceedings.

Summary of important findings

Documentation is being conducted by a broad range of people, including women's groups and volunteers for the NUG. Different organisations and documenters follow different protocols and practices in terms of what data is collected, how it is stored and with whom it is shared. As such, there is no single set of solutions to addressing concerns about data security and victim and/or survivors' privacy and protection.

Established women's groups are aware of the principles of 'do no harm' and the need for safe and secure documentation processes. They also acknowledge that conditions in conflict-affected areas, including security threats, population displacement and lack of resources, mean that it is difficult to always follow best practice. A commonly expressed opinion was that documenters based in Myanmar were best placed to make the most appropriate decisions in relation to how to proceed with documenting individual cases.

Documentation by women's groups largely focuses in CRSV by the Myanmar Military and is conducted with several aims, including victim support and broader advocacy. Documentation is also aimed at potentially securing justice in the future, both through international judicial proceedings and through transitional justice processes.

There are widespread gaps in understanding across different organisations as to how their documentation efforts may be used as evidence. This is likely contributing to 'over-documentation' in some cases, where intensive fact-finding or repeat visits are being conducted to gain evidence of a type similar to that which could be used in a case-specific 'criminal trial'. This is despite there being little likelihood of evidence gained in such a manner being used in that way.

The NUG says it has 3,000 women across the country it has been supporting to gather evidence of CRSV since 2021. Other than an NUG representative stating that these women had been 'trained', it was not clear how much expertise these documenters had on the sensitivities of CRSV documentation. Nevertheless, they likely constitute the largest group of CRSV documenters operating under a single organisation.

Documentation is taking place in all states and regions and across ethnic groups. Regular internet and electricity blackouts, particularly in the most conflict-affected areas, and the fact the telecoms system is controlled by the Myanmar Military create particular challenges for documenters seeking to access victims and/or survivors and to share information with their organisations.

Critically, there is no single organisation tasked with overseeing, coordinating documentation or collating data related to CRSV. While the Independent Investigative Mechanism for Myanmar (IIMM), could serve that role, a lack of transparency and complex protocols have created barriers in trust. This means some women's organisations are now reluctant to share documentation with the IIMM. Further, the IIMM focuses on a range of rights violations and does not solely specialise in documenting CRSV.

Even within established networks and alliances of women's groups, not all members share their findings with each other. Likewise, relevant UN entities do not necessarily share data with each other. There is also no country-wide cross-referencing system to establish whether the same cases are being counted by more than one organisation. (For example, it is unclear if cases recorded by the NUG include cases that have appeared in reports by other organisations).

There is also a perception among women's organisations that international bodies' strict verification processes may create additional harm to victims and/or survivors, either through arduous interviews or by dismissing cases where evidence is considered insufficient. This adds to concerns that international reports on CRSV in Myanmar vastly under-represent the number of cases actually being documented.

While there have been important improvements in the legal prohibition of CRSV under international law, the number of successful international prosecutions remains low. For example, after 21 years of operation, the International Criminal Court (ICC) has to date delivered two convictions for CRSV.

In order to establish individual criminal liability for CRSV as an international crime (that is, a war crime, crime against humanity or genocide), both specific and contextual elements of the crime must be established 'beyond a reasonable doubt' or with 'intimate conviction'. Often, criminal defendants will not dispute the specific elements of the crime (that is, that CRSV took place). Instead, defendants will dispute the contextual elements of the crime (for example, that the CRSV was part of the conflict or widespread and systematic attack on the civilian population; or that the military leader had the requisite control over the lower-ranked military officer to be criminally responsible for the CRSV).

In particular, in contexts of military regimes perpetrating widespread CRSV, such as in Latin American military dictatorships in the 1980s and 1990s, and the more recent case of CRSV perpetrated by the Royal Nepalese Army during the armed conflict in neighbouring Nepal, domestic transitional justice processes shaped by international human rights law have largely proved more significant than international mechanisms for establishing individual criminal liability in delivering accountability for CRSV.

Evidentiary standards for human rights and transitional justice processes are typically more flexible than evidentiary standards required to establish individual criminal responsibility. International and domestic criminal processes typically require the establishment of facts 'beyond a reasonable doubt' or with 'intimate conviction'. International human rights and

domestic transitional justice processes typically operate to a standard that requires 'reasonable grounds' to believe that violations were committed.

Documentation for human rights and transitional justice processes can serve several important purposes distinct from prosecutions. In the short term, documentation of CRSV can inform the design and delivery of humanitarian assistance, helping to ensure that appropriate assistance is delivered where it is most needed. Documentation of CRSV for human rights and transitional justice processes can also underpin: official and societal acknowledgement of CRSV violations, for example, through truth-telling and memorialisation; material and symbolic, individual and collective, reparations for victims and/or survivors of CRSV; guarantees of non-recurrence, such as reforms to state institutions connected with the police, security forces and justice sector reform; and post-conflict reconstruction priorities.

A very extensive range of international accountability mechanisms has been activated with respect to CRSV in Myanmar, under international human rights law, international criminal law, the United Nations Security Council and the International Court of Justice (ICJ). The Independent Investigative Mechanism for Myanmar (IIMM) established by the UN Human Rights Council in 2018 is a relatively novel mechanism, modelled on the International, Impartial and Independent Mechanism (IIIM) for Syria, which was established by the UN General Assembly in 2016. The novelty of these mechanisms is that they have a mandate similar to the offices of the prosecutor for the International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR) and ICC, in terms of investigation and evidence gathering, while not being linked to a specific accountability process. Instead, their mandate is to engage in investigation and evidence gathering that might serve a range of domestic and international accountability processes, including the ICC, the ICJ and prosecutions in jurisdictions outside of Myanmar. The IIIM for Syria has received widespread praise for its approach both to gender and to the investigation of CRSV. This has been in particular through its the adoption of a progressive Gender Policy and a detailed Gender Implementation Plan. To date, the IIMM has declined to adopt such policies; neither has it indicated plans to adopt such policies. Further, the IIIM for Syria has adopted a series of memorandums of understanding (MOUs) with CSOs to assist in its core activities; this is also a practice not yet adopted by the IIMM.

CSO documentation of CRSV has proved to be most significant for delivering answerability in the following four ways: (1) to inform fact-finding in truth-telling and reparations processes; (2) in identifying victims/survivors to act as witnesses for prosecutions and human rights proceedings; (3) influencing the prioritisation of CRSV in international investigations, by providing evidence of the scale, seriousness, patterns and impact of the violation; (3) as corroborative of direct testimonial evidence in prosecutions and human rights proceedings; and (4) in establishing the contextual elements of crimes.

In the absence of domestic or international prosecutions, the international community has sometimes played a valuable role in supporting systematic documentation of conflict-related violations, including CRSV. Positive examples include the work of the UN Office of the High Commissioner in leading both the Transitional Justice Reference Archive (TJRA) in Nepal and the mapping exercise in the DRC. In particular, the TJRA offers a valuable model of the international community improving documentation by resourcing the systematic coordination of existing available CSO and other documentation. The result is a comprehensive, public and searchable database of recorded violations, including crime-mapping of documented offences.

Recommendations

These findings highlight the need for additional support and guidance for organisations documenting CRSV in Myanmar, as well as the potentially productive role to be played by the UK Government and embassy in enhancing the efficacy of the work of the international community. The following recommendations draw on both parts of the report:

- 1) All key informants involved in documentation said they would welcome clearer guidance on what role their documentation work may play in international and potentially future transitional justice mechanisms. In particular, there was interest in receiving knowledge about what sort of information should be documented to support future *international and transnational justice* proceedings. A simple ‘pocket guide’ (in different languages) to the ‘dos and don’ts’ of documentation and any differences in relevant evidential requirements would be welcome. Given ongoing sensitivities in which some women’s organisations feel international groups criticise their documentation practices and ethics, while failing to understand the local context, the focus of such a guide should be from an ‘evidential requirement’ perspective rather than an ethical one. Nevertheless, it could also serve to reinforce the importance and value of victim-centred approaches to CRSV documentation.
- 2) Further research and engagement with the relevant NUG ministries (particularly, the Ministry for Women, Youth and Children and the Ministry for Justice) could help identify any particular support needs regarding CRSV documentation and data management. Their work could also be supported by the guidelines document suggested in recommendation one.
- 3) This research highlights the need for better coordination of documentation records at the nation-wide level. At present, neither the UN nor the NUG have effective systems in place to do this. A dedicated nation-wide CRSV incident recording repository, with capacity to securely store data with consideration for victim and/or survivor privacy and security, would support monitoring and reporting efforts. Such a facility would enable cross-referencing, as well as more timely and broader recognition of the scale and patterns of credibly documented CRSV, even where evidence has not been independently corroborated by international legal organisations. It could also support best practice and developing skills by providing technical support on data management to local and national organisations working on CRSV documentation. Early engagement with a broad range of relevant groups, particularly women’s organisations and CSOs, would be critical to the trust building necessary for such a facility to be established and operate successfully.
- 4) Greater transparency and trust building is critical. A major challenge for the IIMM has been how to maintain its strict confidentiality codes and intensive witness interview style, while effectively communicating its role and value to women’s organisations. This is creating a barrier to information sharing, which may lead to important evidence being excluded from international justice processes. While the IIMM does conduct workshops for/with women’s organisations, this research suggests important elements of its work remain misunderstood.
- 5) Education and support to CSOs could usefully emphasise both the breadth of available accountability mechanisms and the different evidentiary standards that accompany different accountability mechanisms. Education and support could emphasise, in particular: (a) the distinction between specific and contextual evidence and the

importance of documenting both; as well as good practice in (b) avoiding re-documentation; (c) referrals; (d) corroboration; and (e) effective use of documentary and pattern evidence.

- 6) Education and support to CSOs could provide greater clarity as to where and how CSO documentation has proved to be most significant in supporting liability for CRSV. That is, in terms of: (a) informing truth-telling and reparations processes; (b) identifying victims/survivors to act as witnesses for prosecutions; (c) corroboration of direct testimonial evidence in prosecutions and human rights proceedings; and (d) establishing the contextual elements of international crimes.
- 7) Support to the IIMM should facilitate the IIMM learning from the good practice of the IIMM for Syria. In particular, this sharing of good practice should focus on: (a) adoption and implementation of a gender policy; (b) investigating and documenting sexual and gender-based violence (SGBV) crimes; and (c) engaging with CSOs, specifically including the IIMM practice of concluding memorandums of understanding with CSOs.
- 8) A specific strategy of engagement with the International Committee of the Red Cross (ICRC) by CSOs working in CRSV could prove beneficial in the short term to inform ICRC humanitarian assistance delivery in Myanmar and ICRC current engagement with armed groups. In particular, there seems to be scope for further education work with ethnic armed organisations on the substance of prohibitions of CRSV under international law, which includes protections of members of one's own armed group. In the longer term, the ICRC may prove to be an influential partner in future legislation for transitional justice in Myanmar. It will also be valuable for CSOs to already have established relationships with the ICRC.
- 9) There is considerable scope for improved communication and public understanding of the alleged crimes being investigated by the International Criminal Court Office of the Prosecutor. In its decision to open the investigation, the ICC was deliberately open about what alleged crimes may fall within the investigation:

The Chamber stresses that the Prosecutor is not linked to investigating only the events mentioned in her Request, much less their provisional legal characterisation... The Prosecutor is also not restricted to the persons or groups of persons identified in the Request.

The Prosecutor's only temporal limitation is to when Bangladesh first ratified the Rome Statute; the investigation can also investigate alleged violations committed after authorisation of the investigation. This decision around whether and what prosecutions to pursue will, in turn, have important implications for who may ultimately be eligible for reparations and assistance, through the both the assistance and reparations mandates of the ICC Trust Fund for Victims.

- 10) Regarding the 'listing' of perpetrators of patterns of CRSV in annual reports to the United Nations Security Council, the inclusion of the Myanmar Military has proved to be important in maintaining international scrutiny of the ongoing violations. However, greater clarity is needed concerning the sources used to make this annual determination, particularly now that the Myanmar Military has discontinued its engagement with the UN Special Representative of the Secretary-General (SRSG) office and UN presence in the country is limited. Scope for amplifying CSO voices in this documentation work should be investigated.

Part One: Practices on documenting CRSV in Myanmar

The first part of this report addresses questions on: the kind of CRSV data being collected; who is documenting data; barriers to documentation; documentation practices; and documentation aims. It aims to identify how some existing practices may contribute to or act as barriers to international justice. It considers the tensions between generalised international standards relating to documenting CRSV and the very real dangers and challenges faced by local organisations conducting such research. Finally, it offers some areas for further exploration in relation to options under international justice.

What data is being collected and what gaps exist?

Current CRSV data being documented includes in-depth details of incidents, locations, and a description of perpetrators and physical injuries. Such data generally conforms with the kind of information identified in Part Two of this report as being useful for evidence in international accountability proceedings.

Different groups and different documenters work in different ways, meaning there is no signal format for what specific information is being collected. Key informants stressed that given security concerns, the exact nature of questions asked and information sought depended on the individual case. Within this context, rape and sexual assault by the Myanmar Military (also known as the *Tatmadaw*) is the principal focus of most documentation efforts.

Some women's groups and NUG-associated documenters are also collecting evidence of rape and sexual assault by other armed groups, the police and local administrators. This makes their activities particularly dangerous and complex, as they may face retribution from several different parties in areas where they operate. National media coverage of such events has helped to raise awareness of crimes by non-state groups, while the NUG has committed to ensuring perpetrators from People's Defence Forces (PDFs) are punished. As a government in exile, its justice processes are extremely limited and women's organisations who do seek to document or highlight such activities may face accusations of disloyalty.

CRSV is also being experienced by some of those displaced into Thailand: for example, in women's shelters or by Thai authorities. Such cases are also very difficult to document. The

situation has been further complicated by the increasingly insecure environment for Myanmar activists who have recently escaped into Thailand.²

One emerging form of CRSV, which may fall outside traditional concepts of CRSV but has been highly prevalent since the coup and documented in a one-off project, is digital conflict-related sexual and gender-based violence (SGBV).³ Women and girls involved in anti-coup and women's rights activities face 'doxing'⁴ along with threats of rape and sexual violence, and other sexualised abuse online. Such acts are directly harmful to the victims, while also serving to deter and threaten those documenting and other human rights activities. This illustrates the complex intersections between documentation of CRSV and experience of CRSV.

It was not the purpose of this research to explore the many different forms of CRSV happening in Myanmar. However, some examples of issues identified during this research by informants, which they mentioned were not being treated as CRSV in the documentation process, include:

- A. Women revolutionary soldiers feeling forced to take 'boyfriends' to protect them from other men soldiers they are working alongside.
- B. Sexual violence against women and girls displaced across state borders.
- C. Trafficking, including sex-trafficking, of those displaced across state borders by the conflict.⁵
- D. Increased sex trafficking of women from neighbouring countries *into* Myanmar. This exploits conflict-related insecurity and may be facilitated by armed groups who control border areas.⁶

The reasons such violations are not being covered by current documentation processes are complex. All key informants recognised that CRSV may cover acts beyond strategic 'rape as a weapon of war'. Rape by members of the Myanmar Military remains, as explored in more detail below, the principal focus of documentation. On a practical level, limited resources and travel restrictions also create significant barriers to documentation of other forms of CRSV.

Additionally, it appears that CRSV against men and boys is largely not being documented, other than in the context of detention and a very small number of cases recorded by NUG-associated documenters. Key informants stressed cultural barriers, including the fear of being stigmatised, mean very few men victims and/or survivors are willing to speak about their experiences.

² A number of important figures from women's organisations were already well-established and officially registered in Thailand after seeking refuge there from earlier waves of violence, which long predated the 2021 coup. However, many women's rights activists who have fled into Thailand since the coup, entered without official paperwork and carry out their activities in constant fear of refolement.

³ See this report for more details: Myanmar Witness (2023), 'Digital Battlegrounds', 25 January (www.myanmarwitness.org/reports/digital-battlegrounds)

⁴ Doxing involves publishing private or identifying information about someone on the internet, usually with malicious intent. For more information see: <https://www.cybersmile.org/advice-help/doxing>

⁵ US Department of State (2023), '2022 Trafficking in Persons Report: Burma' (www.state.gov/reports/2022-trafficking-in-persons-report/burma/)

⁶ Humphrey C (2023), 'Traffickers switch to Myanmar after China erects Border Fence', Al Jazeera, 24 May (www.aljazeera.com/news/2023/5/24/traffickers-switch-to-myanmar-after-china-erects-border-fence)

The research identified one group that may be involved in documenting CRSV targeted against LGBTQIA+ people, but the group did not respond to requests for an interview. Likewise, efforts to speak to an organisation that supports the rights of people living with disabilities did not generate a response. Given the cultural context in which people from gender and sexual minority groups face widespread discrimination, as well as previous patterns of CRSV by the Myanmar Military, LGBTQIA+ people and people living with disabilities are not only subject to specific forms of CRSV abuse, but also face additional cultural and practical barriers in accessing support and justice.

Even when it comes to the most documented form of CRSV – rape by members of the Myanmar Military – the dangers of documenting such violations and reluctance of victims and/or survivors to talk about their experiences means the number of these crimes documented is likely to significantly under-represent the true prevalence.

Who is documenting data?

Ongoing⁷ documentation of CRSV in Myanmar has traditionally primarily been conducted by members of established women's organisations. Most of these groups represent ethnic minority populations and have been documenting CRSV by the Myanmar Military during the country's long-running civil war/s in ethnic areas.⁸ These groups have worked with and received support and training from international organisations while in exile, and within Myanmar during the Myanmar's ostensible transition to democracy prior to the coup. They therefore have extensive practical experience within Myanmar, along with a good understanding of international best practice in documenting CRSV.⁹ (Tensions between these will be addressed in the next section.)

Most of these groups are also members of umbrella groups, wider alliances and networks working on gender and/or human rights violations in Myanmar. The number of documenters vary by organisation from fewer than 5 to around 20. Key informants from 2 of these umbrella

⁷ The use of the term 'ongoing' here is intended to convey that these organisations have a long-term commitment to, and practice of, documenting CRSV cases within their area of operation. This is as opposed to cases of CRSV documented by international rights groups or other organisations for the purposes of a specific time-limited report.

⁸ Understandings of ethnic identity in Myanmar are complex and diverse. There are 135 officially recognised (that is, by the state) ethnic groups, as well as notable exclusions such as the Rohingya. Many people identify as belonging to two or more ethnic groups. The country is divided into seven ethnic minority 'states' and seven 'divisions', which are predominantly home to ethnic majority Bamar people. Each state and division contains people from different ethnic backgrounds. For the purposes of this report, it should be understood that there are women's organisations operating across all the ethnic minority states and in the Bamar districts. These organisations collect evidence from different ethnic groups. Nevertheless, there may be tensions that mean some groups in some areas may be additionally marginalised. The larger ethnic groups in the ethnic minority areas may also be better resourced than those from the smaller ethnic groups in those areas. It may therefore be that some smaller ethnic minority populations have even less access to support for CRSV than those from the larger groups. This must be understood within the context that access to support is limited for *all* victims and/or survivors.

⁹ See this report: Unheard Voices (2022), 'Unheard Voices', 19 June (www.un.org/sexualviolenceinconflict/wp-content/uploads/2022/08/report/auto-draft/Unheard-Voices-Research-Report.pdf)

organisations estimated that, across these different groups, there may be between 150 and 200¹⁰ individual documenters working with women's organisations inside Myanmar.

Since the 2021 coup, civil conflict has also erupted in the ethnic-majority Bamar heartlands of central Myanmar. These areas had no recent experience of prolonged armed conflict, including CRSV, but since the coup have been subject to some of the worst military atrocities. Women's organisations in those areas, even if members of wider women's group networks and alliances, had little or no previous experience in documenting CRSV, but are now undertaking documentation work.

Key informants expressed concern that many documenters in these areas lacked both experience in such work and faced additional struggles working across multi-ethnic contexts.¹¹ A representative of one women's group working in the areas said training from international organisation was proving helpful. However, (as will be addressed further below) at least one area of potential concern regarding repeated interviews also emerged during this research.

In addition to documentation work conducted by women's groups, a key informant from the NUG said that, since the coup, the NUG had trained 3,000 women to document CRSV. These women are generally 'mature women' identified by parliamentarians (or former National League for Democracy parliamentarians) from within their local communities. In total, as of June 2023, such documenters had according to the NUG representative, identified 106 cases of CRSV. The representative explained the number of victims was higher than the case number as some of these incidents included multiple victims.

The key informant said such documenters operated across the entire country. In doing so, given their numbers, they may help bolster CRSV documentation efforts and at least some have the capacity to offer emergency support – such as helping victims and/or survivors to safe areas or providing them with emergency post-exposure prophylaxis (PEP). Given the large number of these new documenters and widespread difficulties in travel and internet access, it remains unclear how extensive their training has been and how victim-centred or secure their documentation methods are. The NUG key informant acknowledged that staff, documenters and victims may all be 'confused' as to what role such documentation may play in future justice mechanisms and also about whether evidence will be kept confidential.

There is also an unknown number of documenters working 'underground', independently of established women's organisations. These include human rights defenders and youth organisations. Given the security situation and the secret nature of their activities, it was not possible to formally connect with those involved in such documentation efforts. It is unclear what, if any, training such documenters have or what security practices are in place for storing and sharing their documentation.

Some documentation is also being carried out on behalf of international organisations, including international human rights groups operating outside the country. These are largely one-off

¹⁰ This figure is an estimate only. One of the largest umbrella groups for organisations documenting CRSV noted that, cumulatively, its members had around 80 documenters. However, there are also women's organisations operating outside its membership.

¹¹ Ethnic women's rights groups credibly assert that their cultural connections with victims and/or survivors help facilitate trust and understanding during interview processes.

projects conducted to highlight specific issues or events, such as the earlier report on digital CRSV. UN organisations, including the Independent Investigative Mechanism for Myanmar, are also engaged in documenting CRSV. They are largely reliant on those organisations based in Myanmar to make initial contacts with survivors. Their role will be addressed further in the following sections.

Documentation practices

Throughout this research, tensions repeatedly emerged between what different international organisations believe are best documentation practices and what women's organisations in Myanmar believe are best practices. These tensions were described by some interviewees as being due to 'cultural' differences and could more broadly be understood as being rooted in differences between principles and practicalities and different aims.

Challenges to documenting CRSV

Those documenting CRSV in Myanmar face considerable dangers in carrying out this work. To avoid retribution from armed groups and other powerholders, they must work in secret. For understandable security reasons, key informants are reluctant to share too much detail. Such challenges may mean visiting victims and/or survivors to document while pretending to be meeting them for other purposes and/or arranging to meet them in neutral locations. Victims and/or survivors may also be displaced and on the move to avoid conflict, so can be difficult to find to provide follow-up support or to clarify information.

One key informant described how documenters in her organisation had to relocate every two weeks. Anyone travelling in Myanmar at present faces regular checkpoints, which may be staffed by the Myanmar Military, ethnic armed groups, militia, the police or other organisations depending on location. Bags and phone searches mean carrying technical equipment, notes or large sums of money (for example, to provide financial support to victims and/or survivors) could all result in severe repercussions.

Large parts of the country are subject to frequent internet and electricity blackouts, which may make it difficult or impossible to use phones and laptops to store and share data. The only telecoms system still operating is run by the Myanmar Military. As one key informant described, "we just have to put our trust [in] Signal encryption".

To address these various challenges, key informants highlighted that many documenters did not take notes at the time, but instead "have to remember everything [until] they [access] a safe place". Others, where possible, send their notes to their organisations' headquarters via encrypted services, then delete primary data immediately. However, according to key informants, some documenters do keep and carry documents with them in written form, putting themselves and those whose stories they have recorded at serious risk were that evidence to be discovered. Sometimes evidence may be destroyed before it can be shared to avoid it being discovered.

While several women's groups organisations have their headquarters in neighbouring Thailand, members of documenting groups living in exile still risk retaliation against family members who remain in Myanmar. Those who have crossed into Thailand illicitly since the coup risk harassment from Thai authorities and refoulement.

In addition to the physical and technical challenges faced by documenters, victims and/or survivors of CRSV face numerous harmful consequences in sharing their stories. These include retribution by perpetrators or their associates, social stigma and shame, and further trauma, particularly in relation to repeated recounting of stories. For these and other personal reasons, key informants from women's organisations noted that many victims and/or survivors did not want to share their stories at all.

Particular and repeated concerns were raised that there were no protection mechanisms in place for those who did speak to international documenters. Efforts by women's organisations and other CSOs to provide shelters or other protective measures for victims and/or survivors who share their stories are becoming increasingly difficult. The military junta has created significant barriers for women's organisations and CSOs when it comes to renewing their registration. It is also putting increasing pressure on such groups to give precise details of all their activities.

Key informants said it was unsurprising that so few survivors were willing to engage with international justice mechanisms, given the additional physical and reputational risks each time they spoke to an international documenter and the lack of protection for those who did so. This is exacerbated by the fact victims and/or survivors may be unclear where their information will end up or what benefit they will gain from sharing their experiences.

The above factors speak to a lack of trust between victims and/or survivors and international justice mechanisms. Key informants from one major international organisation supporting such mechanisms provided more context about such claims, as will be further addressed below.

Ethical and procedural challenges to documenting CRSV

In addition to these serious practical challenges, other barriers to documenting CRSV in relation to international justice mechanisms relate to difficulties in meeting certain ethical and procedural standards. There are a number of international organisations offering training in documentation practices to Myanmar women's organisations. However, during this research it emerged that, while women's organisations recognise the importance of data security, there was no single procedural practice for documentation methods, storage or safeguarding data and victims' security and privacy.

Women's organisation representatives explained that they relied on encrypted services and used virtual private networks (VPNs) to help safeguard data from hacking attempts. Nevertheless, as highlighted in the previous section on documenting CRSV on the ground, data remains vulnerable to interception – particularly during the time from which it is collected and when it is received at the organisation's headquarters.

A representative from the NUG said that data sent to relevant ministries was stored securely. However, a representative of another international organisation that monitors and reports on human rights violations, expressed concern that data it received from the NUG was sometimes shared in what they described as 'data dumps' that did not protect victims' security and privacy.

In line with international standards, such as the Murad Code,¹² the requirement that ‘no interviews without referrals’ is stressed. However, within the context of the conflict, it is often not possible for survivors to connect with referral services. For example, while there are several existing survivor helplines, these may not be available to those without access to electricity and/or where there are telecom blackouts.

Additionally, it is not always clear to documenters whether a ‘referral’ means to legal and/or psychosocial support. Given the lack of existing accessible effective legal mechanisms for survivors, who may also have security concerns around speaking to external organisations, legal referrals can seem of little value and not worth the risk. Likewise, psychosocial services are limited and survivors may face similar barriers in accessing them.

It is therefore worth considering how such requirements may create unintended barriers to documentation and how alternative approaches to referrals can be developed to better reflect realities in Myanmar.

A common perception among international groups is that women’s organisations may pressure victims and/or survivors to give evidence against their will for advocacy purposes (see below for more detail), regardless of whether referrals are available. However, women’s organisation representatives stressed that one of their roles was to ‘comfort’ victims and/or survivors, which was seen as a valid form of psychosocial support otherwise unavailable through referrals.

Key informants from women’s organisations described their interview style as culturally sensitive, while stressing that the formal and repeated questioning techniques of international legal organisations was distressing for victims and/or survivors. This led to a number of them ending their engagement with these international groups. While some key informants said there were insufficient referral mechanisms, others suggested the main challenge for referrals was that those referral mechanisms set up by international organisations that did exist may not be considered culturally suitable: “It’s not that we don’t know about the [existing] referral mechanisms, or don’t inform victims. It is that they don’t want to use them.”

The tension between these different narratives merits further consideration. However, documentation practices may and need not be the same depending on the intended purpose. Importantly, a lack of clarity around what documentation might be used for presents a specific barrier to sensitive and effective documentation (explained further below).

There is no single international body overseeing CRSV within the Myanmar context. The UN Human Rights Office (UNOCHR) does not have an official mandate to operate in Myanmar – although it does monitor and engage with rights groups remotely. Other UN entities that address CRSV in Myanmar include: the UN Population Fund (UNFPA), the UN Children’s Fund (UNICEF), UN subclusters, the Independent Investigative Mechanism for Myanmar, UN Special Rapporteurs, the Office of the SRSG on sexual violence in conflict, and the Office of the Special Envoy for Myanmar.

¹² For more information about the Murad code see: <https://www.muradcode.com>

Documentation aims

Background

Documentation of CRSV in Myanmar has mostly been conducted by women's organisations representing the country's ethnic minority populations. Prior to the coup, their advocacy efforts around sexual violence by the Myanmar Military included calls for justice for survivors and highlighted how such crimes were conducted with impunity.

However, particularly considering the limited hope for justice, such cases were primarily documented and publicised to draw attention inside the country and internationally to the widespread rights violations and war crimes inflicted on ethnic communities. In this context, acts of CRSV have been conceived of and depicted as violations of the entire ethnic group, as well as acts of violence against individuals. As such, traditional CRSV documentation may be perceived as having a wider political agenda than purely being a pursuit of formal justice.

Despite decades of CRSV documentation by women's groups from other ethnic minority areas in Myanmar and UN knowledge of such violations, it was only after the widespread rape of Rohingya women during the genocidal violence of 2016/17 that CRSV by the Myanmar Military drew international attention. The UN finally made the Myanmar Military a listed party for CRSV in 2018. The Myanmar Military is now also the subject of proceedings in the international courts, including in relation to CRSV (see below for more details).

This acknowledgement impacted on the purpose of documentation by women's organisations, which began to focus less on advocacy and awareness raising. As one key informant stated:

We don't have to do these kind[s] of [awareness raising] reports. Everyone knows the Myanmar Military does these kind of things [CRSV].

It was not possible to ascertain how much those original advocacy goals continued to influence ongoing documentation practices. However, it is likely that, despite the recent change in focus of some women's organisations, these earlier approaches contribute to the long-standing perception among some international organisations that certain documentation practices may not be sufficiently victim centred. An example here comes from the allegations that sometimes women's group documenters put considerable pressure on victims and/or survivors to share their stories. Within Myanmar, reports of violations against the Rohingya were rejected by the country's civilian leadership as propaganda. This was a position largely accepted by most of the population.¹³ However, as CRSV post-coup has spread to the country's Bamar ethnic majority heartlands, it is now recognised by the anti-coup government in exile, the NUG, as being a nation-wide issue. One key informant said that within Bamar majority areas, community trust in the NUG is high. Victims and/or survivors expect that documentation shared with the NUG will lead to justice.

¹³ It was when the Myanmar Military's genocidal campaign against the widely vilified Muslim Rohingya was being conducted with little objection from, or indeed with the active support of the wider Myanmar population that some of the earliest criticism of this campaign came from some of these Myanmar's women's groups. They expressed solidarity with Rohingya survivors of military sexual violence, even while the civilian administration under Aung San Suu Kyi continued to deny it.

Documentation, domestic justice and the NUG

Key informants recognised that any international justice proceedings are likely to be slow and limited in terms of how many cases reach court. As such, documentation efforts are also being conducted with the aim of contributing to future transitional justice processes. Given the widespread popularity of the NUG, some documenters and organisations envisage transitional justice as taking place under the NUG or some future iteration of that government. As noted, an NUG representative said its ministries were receiving documentation related to CRSV from documenters across the country and that its volunteers had documented more cases than any other organisation.

However other Myanmar key informants said they saw no point sharing data with a government whose ministers were abroad and had no means to enforce justice. International key informants also expressed concerns about data insecurity and lack of communication between different NUG ministries relating to CRSV cases. More broadly, women's rights groups have expressed concern that the NUG treats CRSV as something to be 'dealt with after the coup' rather than a matter requiring urgent action.

Some ministers of the NUG, including State Counsellor Aung San Suu Kyi, also played a significant role, including in the International Court of Justice, in attempting to discredit reports of CRSV by Rohingya people. This was to the extent that these ministers have faced allegations of complicity. It is unlikely, therefore, that those documenting CRSV against Rohingya people in Rakhine State or elsewhere would consider it wise to share such testimonials with the NUG.¹⁴ Other ethnic minority human rights activists have also expressed anger at the ways in which Aung San Suu Kyi's National League for Democracy Government (the forerunner of the NUG) ignored rights violations – including CRSV – against members of ethnic minority groups. At present, therefore, there is mistrust of the NUG and its justice processes by a range of documenters, victims and/or survivors for different reasons. So, efforts to support justice for victims and/or survivors of CRSV at a *nation-wide* level should recognise that the NUG is not necessarily trusted by all people as an appropriate institution with which to share documentation of CRSV.

Future justice goals

With little prospect of domestic justice mechanisms being in place soon, women's organisations are documenting CRSV with goals relating to both international justice and future transitional justice mechanisms within the country. However, understanding of what such mechanisms might look like or what kind of documentation they might require is limited.

There appears a relatively broad awareness of transitional justice principles, which became a matter for discussion during Myanmar's ostensible transition towards democracy in the decade prior to the coup. One key informant discussed the four pillars of transitional justice, while others

¹⁴ Efforts were made to connect with ethnic Rakhine women's organisations and Rohingya CSOs in Rakhine State for this research. However, the impact of Cyclone Mocha, which caused widespread devastation to the state in mid-May 2023, made communications even more challenging and it was not possible to connect with relevant actors there.

mentioned memorialisation. A particular emphasis in several interviews relating to documentation was on 'truth-telling'.

These concepts, inspired by transitional justice, appear to be considered significant by women's groups when they describe efforts to offer victims and/or survivors some kind of informal 'justice' (for example, financial support or 'having their stories believed') as part of their documentation process *during* the ongoing civil conflict. Key informants from women's organisations suggested such aims were important whether or not a recognised transition out of conflict and/or towards democracy was underway.

With regards to formal transitional justice mechanisms as a future goal, key informants said that they did not know what kind of documentation efforts would be useful for different forms of justice. However, there was a general belief that the documentation work being done now could be useful for *some* kind of future justice processes, whatever these might be.

All Myanmar key informants said they would welcome more information about the different international justice mechanisms available and relevant documentation guidelines and processes.

The significance of 'managing victim expectations'

It was clear during interviews that women's organisation representatives and women's rights activists were familiar with 'victim-centred' approaches. However, there was a discrepancy between how different documenting organisations may approach this when it comes to managing victim expectations.

One women's group key informant suggested this was one of the reasons victims and/or survivors refused to speak to or ended contact with international documenters. They suggested that these organisations put so much emphasis on 'we can't promise anything' that Myanmar people decided there was no point in speaking to them. That key informant said that women's organisations recognised and supported the importance of managing victim expectations and not making false promises. However, the *manner* in which international groups stressed this was off-putting within Myanmar culture.

Ethnic minority women's groups were adamant they fully recognised and respected the importance of victim consent to documentation. Yet, it was also clear that not all women's organisations fully appreciated the principles of victim- and survivor-centred approaches when it came to managing expectations.

For example, one central Myanmar-based women's group representative, when asked why victims and/or survivors might agree to documentation if there was no viable prospect of justice or compensation in the near future, appeared not to have previously considered that question. They also acknowledged victims and/or survivors might have unrealistic expectations when it came to potential justice mechanisms. This was concerning, given that the same representative stressed that it was important to go back to victims and/or survivors "again and again and again to get all the information", although it was not clear to what purpose.

This witness's comment may reflect the relatively limited experience of CRSV documentation in central Myanmar, as raised in earlier-mentioned concerns about documenting groups in those geographical areas. In this case, the key informant's group had been receiving recent training

from an international organisation. This indicates there may be gaps in training methods when it comes to highlighting the importance of victim- and survivor-centred approaches. There may also be gaps in relation to exploring the purpose and intended outcomes of documentation.

One international key informant expressed concern that a recent multi-million dollar funding initiative to support documentation of CRSV in Myanmar could encourage documentation for the sake of documentation. It could do this by offering financial incentives to local organisations to carry out such activities and to international groups to run projects that encourage documentation. Given the potential for power imbalances between international organisations and local civil society in this context, it is important to consider that international actors who are encouraging documentation might have motivations beyond upholding human rights.

A key informant from an organisation offering training and legal support countered this suggestion. They suggested that organisations in Myanmar would carry out CRSV documentation regardless, and that it was better that they received appropriate training and support to meet international standards.

Women's organisation representatives highlighted concerns about the ways in which international investigators interacted with victims and/or survivors of CRSV. However, representatives of one such international organisation stressed that efforts were made to ensure victims were supported throughout the process. This was particularly with regards to understanding the implications of becoming a witness in international legal proceedings.

Nevertheless, the interview process, which involves sharing evidence over many days, is an extremely arduous process. While efforts are made to offer follow-up support, the constraints mentioned earlier in this report relating to access, fear of retribution and stigma are very real,

The international representatives concerned noted that some victims and/or survivors felt it was important to be involved in such justice mechanisms. They said that aspect should not be overlooked. Yet, when considering options for justice under international mechanisms, the evidential requirements of court-based proceedings do create considerable barriers for many victims and/or survivors. For them, the process presents too many potential mental, emotional and physical dangers.

The international representatives concerned also said they were involved in workshops and other engagements with women's organisations, the aims of which included addressing some of the barriers of trust identified in this research. As will be addressed further in the final recommendations of this full report, there appears room for improved communication here.

For example, key informants from Myanmar organisations, particularly women's groups, expressed concerns that "nothing happened" to most reports that were shared with international organisations. They said "only a few" cases were considered "relevant". Representatives of this particular international organisation explained that all the information they received was being used to build up a larger body of evidence. This would then play an important role in informing judges in international court proceedings. Yet, that message does not appear to be getting through effectively to the Myanmar women's organisations and victims and/or survivors.

Conclusion to this section: faith (or lack of) in international justice

One issue that emerged during the research was a belief among some international key informants that CRSV and other human rights violations since the coup were unlikely to be the subject of international justice proceedings. These beliefs are based on several factors. However, they particularly relate to the suggestion that since there are already proceedings underway in the International Criminal Court and International Court of Justice, as well as in Argentina, in relation to the Myanmar Military's genocidal violence against the Rohingya in 2016/17, the international community is unlikely to be interested in pursuing additional actions in relation to post-coup violence.

Key informants from women's organisations expressed dismay at this view and an unwillingness to accept it. One such informant, who sought to stress that documentation of CRSV by women's groups was driven by how much documenters cared about this matter at a personal level, said:

We just have to keep trying to find a way. There must be something, otherwise what is the point of international justice?

This research has highlighted the immense challenges that women's organisation documenting CRSV face in their work. These include: the risks of reprisals from different parties; cultural concerns that leave victims and/or survivors reluctant to report CRSV; and tensions between the documentation practices and aims of women's organisations and those of international organisations and mechanisms.

Nevertheless, while key informants from women's organisation were fully aware of the lengthy and convoluted ways in which international court proceedings unfold, they still had faith in international support for achieving some form of justice for victims and/or survivors of CRSV.

Practical and cultural barriers to securing evidence for sexual violence is a global concern, as are tensions between victim-centred approaches to justice and evidential requirements for court proceedings. However, this research indicates that within the Myanmar context, an improved understanding of different international justice mechanisms and their evidential requirements could help counteract potentially harmful documentation practices, particularly where the resulting 'evidence' may not count as such. Such improved understanding could also support women's organisation in their goal of achieving international-backed justice. Supporting women's groups with such information would help to ensure they are able to move forward in their documentation processes based on their own informed priorities, rather than those of individual international non-governmental organisations (INGOs) who provide training or backing but may be interested in only certain forms of justice.

Key informants spoken to during this research indicated they would welcome such information. Recommendations on this will follow Part Two of this report.

Part Two: International accountability for CRSV in Myanmar

This part of the report answers the following questions:

1. What international accountability options are available for CRSV? Which of these options have delivered to date for CRSV occurring in other countries and contexts? Which of these international accountability options are available or likely to be available for Myanmar, in particular, in light of Myanmar's current treaty commitments?
2. What evidentiary standards have been applied by international accountability mechanisms to date in establishing CRSV?
3. What are the best options for international accountability for CRSV in Myanmar, given available CRSV documentation?
4. How might ongoing documentation work be supported, enhanced and supplemented in order to meet the evidentiary standards for the most promising international accountability options?

International accountability mechanisms for CRSV and relevant evidentiary standards

Background and context

In contexts of military regimes perpetrating widespread CRSV – such as in the Latin American military dictatorships of the 1980s and 1990s, and the more recent case of CRSV perpetrated by the Royal Nepalese Army during the armed conflict in neighbouring Nepal – domestic transitional justice processes shaped by international human rights law have largely proved to be most significant in delivering accountability for CRSV.

Evidentiary standards for human rights and transitional justice processes are typically more flexible than the evidentiary standards required to establish individual criminal responsibility. International and domestic criminal processes typically require the establishment of facts 'beyond a reasonable doubt' or with 'intimate conviction'. International human rights and domestic transitional justice processes, by contrast, typically operate to a standard that requires 'reasonable grounds' to believe that violations were committed.

Documentation for human rights and transitional justice processes can serve several important purposes distinct from prosecutions. In the short term, documentation of CRSV can inform the design and delivery of humanitarian assistance, helping to ensure that appropriate assistance is delivered where it is most needed. Documentation of CRSV for human rights and transitional justice processes can also underpin: (1) official and societal acknowledgement of CRSV violations, for example, through truth-telling and memorialisation; (2) material and symbolic, individual and collective, reparations for victims and/or survivors of CRSV; (3) guarantees of non-recurrence, such as reforms to state institutions connected with the police, security forces and justice sector reform; and (4) post-conflict reconstruction priorities.

Best practice and ongoing challenges in securing international accountability for CRSV

Important progress has been made in the past three decades in recognising CRSV as a violation of international humanitarian law (IHL), international human rights law (IHRL) and international criminal law (ICL), and in establishing further accountability mechanisms for CRSV under the UN Security Council (UNSC). Each of these international law regimes bring different strengths and comparative advantages to the pursuit of answerability for CRSV. Broadly speaking, the comparative advantage of IHL is that its emphasis is on educating state and non-state armed groups to prevent CRSV and to end ongoing CRSV. Uniquely, IHL involves direct engagement with belligerent groups to that end, principally by the International Committee of the Red Cross (ICRC), which engages confidentially with state and non-state armed organisations. Engagements by the ICRC with belligerent groups can also be important in countering misperceptions that CRSV is somehow 'private' and so not prohibited by IHL.

International criminal law focuses on establishing individual criminal accountability for those most responsible for the most serious offences. While recognition of CRSV as an international crime prohibited by international criminal law is well-established, securing convictions for CRSV has continued to be challenging. For example, in two decades of operation, the International Criminal Court has secured only two convictions for CRSV. The reason for this poor conviction rate is seldom a lack of evidence that CRSV has taken place. Dispute is more likely to concern contextual elements of the crime; that is, whether the CRSV was sufficiently linked to the armed conflict/widespread and systematic attack against a civilian population/genocide. An important evidentiary challenge has been establishing the requisite mode of liability; that is, that the alleged perpetrator is criminally responsible for the CRSV, in circumstances in which the defendant may not have been directly involved in either perpetrating or commissioning the act of CRSV.

International human rights law focuses on holding relevant states accountable for both their direct perpetration of CRSV and their failure to exercise due diligence to prevent CRSV. Because of their focus on state responsibility, human rights documentation and accountability processes typically do not name individual alleged perpetrators. Instead, the complicity of state organisations and institutions (and sometimes non-state armed groups) is the focus of investigation, documentation and accountability processes. Likewise, because they do not determine individual criminal responsibility, human rights accountability processes typically operate to more flexible evidentiary standards. It is these international human rights standards that have typically proved to be most important in determining mandates and evidentiary standards for domestic transitional justice processes.

Finally, the United Nations Security Council has developed its own documentation system for CRSV, known as the Monitoring, Analysis and Reporting Arrangements (MARA). This system is led by the UN Special Representative on Sexual Violence and linked to annual 'naming and shaming' processes for the most serious perpetrators. The documentation and 'naming and shaming' in turn informs UNSC actions in conflict settings. These include, for example, actions that inform the work of UNSC sanctions committees and lead to the imposition of sanctions on named known perpetrators of CRSV. This 'naming and shaming' is limited to 'parties credibly suspected of committing or being responsible for patterns of rape or other forms of sexual violence in situations of armed conflict on the agenda of the Security Council'.¹⁵ Therefore:

¹⁵ UN Security Council Resolution 1960 (2010), paragraph 3.

- state and non-state armed groups are listed, but not individuals
- the listing requires evidence of 'patterns' of CRSV and not only isolated incidents
- only parties to conflict in situations on the Security Council agenda can be listed
- the documentation work can only inform UNSC sanctions where a sanctions committee has been established for the relevant conflict

While these represent distinct regimes and institutions of international law, they operate in practice in ways that are interdependent – for example, relying on shared sources of evidence and documentation of CRSV. (Annex 2 sets out the full range of potential international accountability mechanisms for CRSV.)

Definitions

One broad definition of conflict-related sexual violence that is commonly utilised comes from the United Nations Secretary-General: 'sexual violence occurring in a conflict or post-conflict setting that has a direct or indirect causal link with the conflict itself'.¹⁶ Conflict-related sexual violence includes manifestations of violence that may reach the tactic of war threshold, as well as sexual violence against civilians within the wider context of the conflict. Conflict-related sexual violence can be individual and collective, and the harms that ensue are physical, moral, emotional, social, immediate and intergenerational. Acts falling within the definition of conflict-related sexual violence include rape, forced pregnancy, forced sterilisation, forced abortion, forced prostitution, trafficking, sexual enslavement and forced nudity.¹⁷ This broad definition, however, is not strictly legal.

Definitions vary across the different legal regimes, but the following are the most pertinent elements that must be established to meet the legal definitions of conflict-related sexual violence:¹⁸

- Specific elements: what happened, to whom, when and where?
- Contextual elements: what was the context in which the underlying act was committed? For human rights violations, was the act perpetrated by a state actor or, if perpetrated by a private actor, did the state fail to exercise due diligence to prohibit, prevent and punish the act? For violations of international humanitarian law and for war crimes, was there a nexus between the act and the conflict? For crimes against humanity, was the act part of a widespread and systematic attack on the civilian population? For genocide, was the act committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group?

To establish individual criminal liability under international criminal law, there is a further requirement to establish the mode of liability – that is, who is responsible and how they are responsible. International criminal law focuses on those most responsible for the most serious crimes.

¹⁶ UN Secretary-General (2010), 'Report of the Secretary-General on the Implementation of Security Council Resolutions 1820 (2008) and 1888 (2009)', UN Doc. A/65/592-S/2010/604, para 5.

¹⁷ UN Action Against Sexual Violence in Conflict (2011), 'Analytical & Conceptual Framing of Conflict-Related Sexual Violence', 1 (<http://perma.cc/D97Z-YJDC>)

¹⁸ The following typology lays out a synthesis of the law drawn from a diverse range of sources. An effective summary of these sources is provided in: Ferro Ribeiro S, van der Straten Ponthoz D (2017), *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: Best Practice on the Documentation of Sexual Violence as a Crime or Violation of International Law*, Second Edition, March (London: FCDO).

Evidentiary standards

Table 1. Evidentiary standards

| Regime of international law | Evidentiary standard |
|--------------------------------|---|
| International humanitarian law | The ICRC guidelines stipulate that determining the credibility of an allegation is not the same as whether there are 'reasonable grounds' to believe a criminal offence has been committed. While the latter standard is used to trigger a criminal investigation, the former constitutes a much lower threshold. It is not necessary to demonstrate that an incident involving possible violations of the law actually occurred, only that the allegation itself is deemed credible. ¹⁹ |
| International human rights law | Human rights documentation is generally based on 'reasonable grounds' to believe that violations were committed. The standard is typically considered met when a sufficient and reliable body of primary information, consistent with other information, would allow an ordinarily prudent person to reasonably conclude that a case, incident or pattern of conduct occurred. This standard of proof is lower than that required in criminal proceedings. |
| International criminal law | The establishment of facts 'beyond a reasonable doubt' or with 'intimate conviction'; criminal investigations requiring the establishment of specific elements of crimes based on legal principles, such as the 'chain of custody' of evidence and the examination of inculpatory as well as exculpatory evidence. |
| UNSC MARA and listing | The threshold for inclusion of parties on the annex list revolves around the notion of a 'pattern'. Based on the use of the notion in similar contexts, a 'pattern' denotes a 'methodical plan', 'a system' and a collectivity of victims. It is a 'multiple commission of acts', which, as such, excludes a single, isolated incident or the random conduct of an individual acting alone and presumes intentional, wilful conduct. In proving the acts to be systematic, it would also be necessary to show that all such acts in contravention of applicable international law involving sexual violence, are being perpetrated in the same context and, from that perspective, are considered 'linked'. |

¹⁹ International Committee of the Red Cross, Geneva Academy of International Human Rights and Humanitarian Law (2019), *Guidelines on Investigating Violations of International Humanitarian Law: Law, Policy, and Good Practice* (Geneva: ICRC?)

International humanitarian law

The most identified weakness of IHL concerns its institutional structures and enforcement procedures. Grounded in a principle of reciprocity between armed groups, the regime operates without an effective monitoring body or enforcement procedure. The regime relies primarily on states to ensure the lawful behaviour of their own armed forces. The only effective independent international monitoring that occurs is undertaken by the International Committee of the Red Cross. The ICRC engages in protection activities, which is analogous to a monitoring role. However, it also involves direct representations to weapons bearers to encourage the cessation of named IHL violations. The Third Geneva Convention requires that states give the ICRC access to prisoners of war;²⁰ the organisation conducts hundreds of confidential visits and authors numerous reports to monitor compliance by armies, security forces and non-state armed groups with IHL. Its protection activities are largely conducted through its country field offices, which visit prisons and places of detention and monitor the behaviour of belligerent groups. The aim of such activities is to determine compliance with IHL, draft relevant reports and discuss recommendations with responsible authorities at different levels. This monitoring role involves direct communication between the ICRC and those involved in armed conflicts (or other situations in which the ICRC plays a role, such as security detentions) about their past or current conduct.

The ICRC engages in a highly confidential dialogue with targets to end violations of IHL. The ICRC has special protection under international law not to disclose confidential information to legal proceedings, including criminal trials. Nevertheless, the work of the ICRC during conflict in receiving reports of IHL violations and communicating about these directly with state and non-state armed groups can have several important immediate and medium-term implications for accountability. In the immediate term, confidential engagement with belligerent groups is important in educating state and non-state armed groups about the substance of their legal obligations concerning CRSV. This may be particularly important for smaller, more-newly formed and less-coordinated armed groups. The exposure of such groups to IHL is likely limited and their understanding of CRSV may be limited only to their treatment of civilians and not, for example, to their treatment of detainees and to members of their own armed groups.

International criminal law

Enforcement activity under ICL is epitomised by the International Criminal Court (ICC), established by the 1998 Rome Statute. It can also be argued that the ICC Office of the Prosecutor (OTP) plays a monitoring role through its mandate to consider all credible evidence of wrongdoing to determine whether authorisation should be sought from the ICC to proceed to an investigation.

Types of evidence in international criminal trials comprise victim testimony, non-victim witness testimony, expert testimony and documentary evidence.

- Victim testimony

²⁰ Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316; 75 U.N.T.S. 135, article 125.

In cases against direct perpetrators, prosecutors have relied on testimonial rather than documentary evidence to prove sexual violence charges. In leadership cases prosecuting commanders of forces believed to have perpetrated CRSV, however, the accused is less inclined to challenge the occurrence of sexual violence. Further, the International Criminal Tribunal for the former Yugoslavia (ICTY) Appeals Chamber affirmed in the context of sexual violence charges, 'that there is no requirement that an alleged victim personally testify in a case for a trial chamber to make a finding that a crime was committed'.²¹

Text box 1. Considerations for sexual violence testimonial evidence²²

Typical sexual violence testimonial evidence may include:

- » a record as accurate as possible of the date, time and place of the sexual violence, if known
- » a description of how the victim came to be in the control of the perpetrator(s)
- » a description of the process of how the victim was taken to the place of violence; that is, what the place looked like, who else was present, how long the victim walked or was driven for, etc.
- » information about the context in which the crimes took place to help prove, for instance, the existence of an armed conflict or a widespread or systematic attack against a civilian population; the use of specific derogatory words or language to help prove the intent to destroy, in whole or in part, a specific group
- » a description of the appearance, demeanour and clothing worn by the perpetrator(s) (e.g. civilian clothing, uniform, insignias) and identity, if known
- » a description of the language spoken by the perpetrator(s) and how they referred to each other (e.g. nicknames, title such as 'Captain', 'Chief') which may help determine the command structure of the perpetrator's group, if any
- » a description of any eyewitnesses to the sexual violence
- » a description of the physical and mental harm the victim suffered as a result of the sexual violence and the subsequent economic, social, psychological loss it may have caused, keeping in mind that the level of detail required regarding the specific act(s) of sexual violence will vary according to practitioners' mandate and that they should avoid asking difficult questions that are not strictly necessary for their purposes

Avoiding re-documentation: Multiple accounts of the same incidents from the same individuals could create possible inconsistency and conflicting factual statements. This in turn may impact on the credibility or reliability of survivors in future criminal justice, reparation or other processes. Consequently, an important first step before seeking victim testimony is determining whether documentation of the CRSV incident has already taken place. Practitioners should assess, to the extent possible, whether the information they are seeking has already been documented by other practitioners and organisations, whether that information is accessible, and whether re-documentation, including interview, is necessary.

Gathering of testimony for prosecutions by 'intermediaries': Questions over their role and impartiality in international criminal investigations gained significant attention over the course of the Thomas Lubanga Dyilo case at the ICC. In its judgement, the Lubanga Trial Chamber

²¹ *Đorđević* Appeal Judgment, para 858 ('The Court has established as legitimate the use of circumstantial evidence, evidence and presumptions to reach a Judgment "when consistent conclusions regarding the facts can be inferred"').

²² Redress (2012), *Litigation Strategies for Sexual Violence in Africa* (London: Redress), pp 71–72, cited in cited in Ferro Ribeiro, van der Straten Ponthoz (2017), p 146.

rejected the reliability of testimony of some of the prosecution witnesses, including of alleged child soldiers, based on the alleged conduct of some intermediaries, which included buying testimony and influencing witnesses.

Referrals: the UK International Protocol on the Documentation and Investigation of Sexual Violence in Conflict advises that, if formal services are not available or accessible, practitioners should assess what informal systems are in place that can be of support to the victim/witness, including family and community support systems. These forms of family and social support must always be considered when identifying child victims and witnesses.²³

- Non-victim witness testimony

Prosecutors have successfully utilised testimony from non-victim witnesses to prove sexual violence charges. For example, in the *Dorđević* case, in order to establish that a young Kosovo Albanian girl had been sexually assaulted, the prosecution led with the evidence of a witness who had observed the young girl being removed from a convoy of displaced persons and taken to the woods by two armed men.²⁴ In the absence of direct evidence as to what transpired in the woods, the Trial Chamber found it was unable to conclude that the young girl had been sexually assaulted. This was despite evidence that the witness heard the girl “screaming and crying”, and indicated that the girl returned “wrapped in a blanket and appeared to be naked”.²⁵ Following an appeal by the prosecution, the Appeals Chamber found that the Trial Chamber had committed a factual error.²⁶ The Appeals Chamber found that it was unreasonable not to conclude that the young girl had been “subjected to mistreatment that was sexual in nature”.²⁷ This was the first time the ICTY Appeals Chamber confirmed that a crime of sexual violence could be established through circumstantial evidence.²⁸

- Expert testimony

Expert testimony can be useful to bolster victim credibility and establish contextual elements of sexual violence crimes. The ICC-OTP ‘Policy Paper on Prosecuting Sexual and Gender-based Violence’ notes:

*The Office will consult with experts, and, where appropriate, propose their testimony on different aspects, such as the socio-political, psychological, and medical aspects, of sexual and gender-based crimes. Such experts may also be useful in identifying patterns of sexual and gender-based crimes, the nature of injuries and their consistency with victim testimony, and the personal and social consequences of the crime.*²⁹

²³ See ‘Referrals’ in Ferro Ribeiro, van der Straten Ponthoz (2017), p 98.

²⁴ See *Dorđević* Trial Judgment, para 832.

²⁵ Ibid. See also *Stakić* Trial Judgment, para 244 (where the Trial Chamber expressed its reluctance to conclude that sexual violence had occurred at Trnopolje camp in Prijedor Municipality on the basis of hearsay evidence alone, but noted that it had in fact heard from a rape victim).

²⁶ *Dorđević* Appeal Judgment, paras 853–9.

²⁷ Ibid, para 857.

²⁸ Ibid. See also para 858, and *Cantú v Mexico* (169) para 102 (‘The Court has established as legitimate the use of circumstantial evidence, evidence and presumptions to reach a Judgment “when consistent conclusions regarding the facts can be inferred”’).

²⁹ ICC-OTP (2014), ‘Policy Paper on Prosecuting Sexual and Gender-based Violence’, The Hague, para 97.

- Documentary evidence

Photographs: While not specifically concerning the prosecution of crimes of sexual violence, photographs of camps were commonly relied on by prosecutors at the ICTY to establish the layout and organisation of such camps, for example, in the *Tadić* Trial Judgment.³⁰

Non-governmental organisation (NGO) reports and media coverage: For example, in the *Đorđević* case, the prosecution tendered NGO and media reports documenting crimes against Kosovo Albanian civilians to argue that the accused was well aware of the prevailing contextual factors that made sexual violence foreseeable in that case.³¹ Such reports were similarly used at the Special Court for Sierra Leone (SCSL) in the prosecution of Charles Taylor. The Trial Chamber admitted into evidence two independent reports on the unlawful killings that took place in Sierra Leone in the year 1998, one from Amnesty International and another from Human Rights Watch.

Reports by armed forces: In the *Prlić* case, the prosecution relied on reports by armed forces to show that sexual violence was taking place in relevant localities. The prosecution tendered a military security service report recounting that women and girls were taken daily from collection centres to houses where they were ‘raped, abused and humiliated’, acts that had ‘been happening systematically for a considerable time’.³²

Reports by international observers: In *Stanišić and Župljanin*, reports by international observers were used to show that sexual violence had taken place in a locality. A report by the Special Rapporteur to the UN noting that displaced Muslims from Travnik were driven in buses by Serb forces to Muslim-controlled territory, and in some instances were beaten, raped and even killed during transport.³³ In *Prlić*, the Trial Chamber noted that UN Protection Force (UNPROFOR) and UN reports mentioned the ‘rape’ of two Muslim women from Stupni Do by members of the Bosnian Croat army,³⁴ which corroborated victim testimony.

International human rights law

Documentation for the purposes of accountability under international human rights law serves a much wider array of purposes than, for example, the prosecution of the most serious perpetrators under international criminal law. Documentation of human rights violations can underpin, *inter alia*, the range of purposes listed in Table 2.

Table 2. Documentation of human rights violations can underpin a range of purposes via various mechanisms

| Purpose | Mechanism |
|-----------------|----------------------------------|
| Acknowledgement | Truth-telling Memorialisation |
| Reparations | Individual and collective |

³⁰ *Tadić* Trial Chamber, para 155.

³¹ See, for example, *Đorđević* Trial Judgment, paras 1996–9 (relying on Human Rights Watch and media reports to infer the accused was on notice of crimes).

³² *Prlić* Trial Judgment, vol 2, para 235, citing Exhibit P4177.

³³ *Stanišić and Župljanin* Trial Judgment 1, para 653; also *Prlić* Trial Judgment 3, paras 426–9.

³⁴ *Prlić* Trial Judgment 3, paras 426–9.

| | |
|------------------------------|---|
| | Material and symbolic |
| Guarantees of non-recurrence | Vetting for reformed state institutions Security sector and justice sector reform |
| Rehabilitation and recovery | Designing and targeting humanitarian assistance for victims/survivors Post-conflict reconstruction |

These wider range of purposes and mechanisms typically do not involve the naming of individual perpetrators; instead, they focus on identifying the groups and institutions at fault.

Even fact-finding missions established by the UN Human Rights Council are clear and explicit that their missions do not substitute for criminal investigations. These missions are careful about what they can and cannot establish. They are important vehicles for:

- identifying violations
- identifying potential witnesses
- determining willingness from an individual to cooperate with future criminal prosecutions
- obtaining corroboration for particular incidents (medical reports; news reports; NGO reports, etc.)

Evidentiary standard: Commissions of inquiry and fact-finding missions of the Human Rights Council have most often adopted ‘reasonable suspicion’ or ‘reasonable grounds to believe’, and less frequently ‘balance of probabilities’, as the standard to make a finding of fact. The standard may depend on the information to which the commission/mission has access. The standard is typically considered met when a sufficient and reliable body of primary information, consistent with other information, would allow an ordinarily prudent person to reasonably conclude that a case, incident or pattern of conduct occurred. This standard of proof is lower than that required in criminal proceedings.

Corroboration: Whatever the standard of proof adopted, the commission/mission must ensure that the incidents or events on which it is reporting have been adequately corroborated. While investigators should aim at corroborating any given piece of information by obtaining concurring information from two other independent and reliable sources, this may not always be necessary or possible. Information from a reliable primary source may need corroboration by only one additional independent and reliable source, which may include the investigator’s own direct observations. For example, when an interviewee alleges torture, the investigator’s assessment of the reliability of the source and the viewing and noting down of scars or injuries consistent with the account, can provide corroboration.

In some instances, for example, incidents of sexual violence or torture, it may be difficult to obtain corroboration of the victim’s account from another independent source, especially if the victim has not received medical assistance or been able to report the incident to the authorities. In such cases, corroboration may be obtained by assessing the details of the victim’s account, evaluating if they are consistent with what is generally known about the incident (for example, the area where it occurred, the alleged perpetrators or the methods used), and by establishing whether the incident reveals a pattern that is consistent with other similar incidents.

Corroboration of information obtained from an initial source can take different forms, such as:

- the investigator's observations, for example, during site visits or of material information or injuries
- a first-hand account by a victim or an eyewitness
- a first-hand account by a perpetrator
- other collected and reliable materials, such as maps, photographs, satellite imagery, sourced videos, medical records or official documents
- second-hand accounts by credible sources (an experienced NGO, expert advice, a doctor, etc.)

Statistical evidence

Statistical evidence is especially important in providing pattern evidence, where patterns must be established in terms of profiles of perpetrators, profiles of victims, the geographical and chronological distribution of the crime, and the modus operandi of the commission of the crime (see Table 3).

Table 3. Examples of statistical evidence used to establish contextual elements of CRSV

| | |
|-----------------------|--|
| <i>Surveys</i> | Examples include surveys conducted using different methods in Sierra Leone and Liberia and among refugees from Darfur in Chad. ³⁵ |
| <i>Medical data</i> | For example, the data on sexual violence provided by different hospitals in Kenya was used by the inquiry into the post-election violence in 2007–8. ³⁶ |
| <i>Crime reports</i> | For example, the data on rape collected by the UN in the Central African Republic contributed greatly to assessing the pattern related to the armed conflict in this country in 2002–3. ³⁷ |
| <i>Public reports</i> | Examples include the monitoring of crime reports in Darfur and Iraq, as well as the new options explored by the Ushahidi project with web-based user-generated content since 2008 in Kenya, the DRC, Gaza and elsewhere. ³⁸ |

³⁵ Amowitz LL et al. (2002), 'Prevalence of War-Related Sexual Violence and Other Human Rights Abuses among Internally Displaced Persons in Sierra Leone', *Journal of the American Medical Association* 287 (4), p 513.

³⁶ CIPEV, 'Report of the Commission of Inquiry into Post-election Violence', 15 October 2008, at 247–8 (www.communication.go.ke/documents/CIPEV_FINAL_REPORT.pdf). See also Nairobi: The Centre for Rights Education and Awareness (2008), 'Women Paid the Price! Sexual and Gender-Based Violence in the 2007 Post-election Conflict in Kenya' (http://creawkenya.org/index.php?option=com_content&view=article&id=100&Itemid=127)

³⁷ International Federation for Human Rights (FIDH), International Investigative Mission (2003), 'War Crimes in the Central African Republic, "When the Elephants Fight, the Grass Suffers"', Report.

³⁸ For Darfur, with a focus on mortality but also including data on rape, see: Petersen AH, Tullin L (2006), 'The Scorched Earth of Darfur: Patterns in Death and Destruction Reported by the People of Darfur: January 2001–September 2005'. Copenhagen: Bloodhound (http://www.bloodhound.se/06_04_26_DARFUR_report.pdf).

| | |
|-------------------------|--|
| <i>Internal records</i> | The most notorious example is the records produced by the German SS on the Holocaust, which were subject to analysis by the official SS statistician to assess the pattern of the extermination. ³⁹ |
| <i>Proxy data</i> | For example, in 1993, a UN team found in the former Yugoslavia within a limited sample, 119 pregnancies due to rape. Assuming conservatively that 1 per cent of intercourse resulted in pregnancy, the team estimated 11,900 rapes related to the sampling frame as an indicator of the large scale of the pattern. Mental health indicators have also been explored to analyse sexual violence in the aftermath of Hurricane Katrina. ⁴⁰ |

Further, some noteworthy practice in the documentation of human rights violations, including CRSV, has emerged from the UN Office of the High Commissioner for Human Rights, in particular in respect of the Transitional Justice Reference Archive (TJRA) for Nepal⁴¹ and the mapping exercise for the DRC.⁴² Annex II sets out fuller detail about the substance and operation of the TJRA.

United Nations Security Council

The purpose of MARA is to ensure the systematic gathering of timely, accurate, reliable and objective information on conflict-related sexual violence against women, men and children in all situations of concern. This information is intended to be used to promote increased and timely action to prevent and respond to conflict-related sexual violence. MARA draws on information gathered from a variety of sources in a given country context. These sources include local government authorities and institutions, health and psychosocial service providers, UN civilian, police and military peacekeeping presence, UN country team members, local and international NGOs, civil society organisations, religious institutions and faith-based networks. Country-specific working groups review information, monitor and verify incidents of sexual violence, analyse data, trends and patterns, prepare reports, and build capacity to strengthen MARA. MARA operates with limited transparency as to the specific sources of information on which it relies and the criteria by which it determines allegations to be credible or well-founded. However, it does rely primarily on in-country UN presence as its primary information source.

³⁹ Challen S (1993), *Richard Korherr His Reports*. London: Cromwell Press. Korherr, an actuary by training, was the official statistician of the SS. He was asked by Himmler to produce an assessment on the 'final solution'. His report was used in the interrogations of Eichmann, and Korherr himself testified subsequently in several trials in Germany.

⁴⁰ Lawry L, Anastario MP, Larrance R (2008), 'Using Mental Health Indicators to Identify Post-disaster Gender-Based Violence among Women Displaced by Hurricane Katrina', *Journal of Women's Health* 17, p 1437.

⁴¹ UN Human Rights Office (2023), 'The Armed Conflict in Nepal, 1996–2006: A Transitional Justice Reference Archive' (<https://nepalconflictreport.ohchr.org>)

⁴² UN Human Rights Office (2010), 'DRC: Mapping human rights violations 1993–2003' (www.ohchr.org/en/countries/africa/2010-drc-mapping-report)

Current and potential international accountability options for CRSV in Myanmar

International humanitarian law

To date, several international accountability avenues for CRSV in Myanmar have been activated. Specific activity under international humanitarian law appears to be limited. Myanmar has ratified the four Geneva Conventions,⁴³ though has declined to ratify either of the Additional Protocols, which have particular significance given the non-international nature of the conflict. Common Article 3 of the four Geneva Conventions is relevant in establishing minimum humanitarian standards that bind both the state and non-state armed groups. Myanmar is also bound by customary elements of Additional Protocol II, which prohibit CRSV in non-international armed conflicts.

In practical terms, the **International Committee of the Red Cross** continues to be one of few international organisations that is permitted to operate in Myanmar. Since the onset of COVID-19, the ICRC is no longer permitted to conduct detention visits. Further, its humanitarian access to Rakhine State has been restricted. ICRC annual country reporting on its Myanmar mission does not expressly reference work on CRSV. Given the confidential nature of ICRC engagements with belligerent groups, what level of activity is dedicated to CRSV cannot be concluded with confidence.

International criminal law

Under international criminal law, the operation of the **International Criminal Court** in Myanmar is circumscribed in significant ways by the decision of Myanmar not to ratify the Rome Statute. Consequently, establishing jurisdiction in the country would require a referral from the UN Security Council, which is almost certainly not going to happen given repeated use of their veto by Russia and China to block UNSC sanctions on Myanmar. The decision of the ICC to authorise a preliminary investigation into alleged international crimes occurring in Bangladesh connected to the Myanmar conflict has opened the door to international accountability concerning some specific forms of CRSV.

The **International Independent Investigative Mechanism for Myanmar** straddles international criminal law – as it is mandated to support criminal investigations and prosecutions under international and universal jurisdiction – but is also an output of the international human rights system. Further, the IIMM is the successor to the Fact-finding Mission for Myanmar, which was established by the Human Rights Council to investigate both international crimes and international human rights violations. There may be a perception that the work of the IIMM is primarily focused on international crimes connected to the forced displacement of the Rohingya. However, the IIMM in fact reports that specific events since the military takeover in February 2021 are now a major focus of the Mechanism's investigations.⁴⁴

⁴³ International Committee of the Red Cross, International Humanitarian Law Databases: Treaties and State Parties, (<https://ihl-databases.icrc.org/en/ihl-treaties/treaties-and-states-parties>).

⁴⁴ Report of the Independent Investigative Mechanism for Myanmar, July 5, 2021, UN Doc. A/HRC/48/18.

In its most recent annual report, the IIMM states that it currently has almost 3 million ‘information items, including interview statements, documentation, videos, photographs, geospatial imagery and social media material’. The IIMM has also been explicit that:

Discussions with several States on how the Mechanism can access their territory in order to carry out its mandated activities have been slow. This has substantially impacted the Mechanism’s ability to obtain signed statements from those who witnessed or experienced events relevant to proving serious international crimes. Detailed signed witness statements obtained by trained and experienced investigators in face-to-face interviews are critical products that the Mechanism aims to share with judicial authorities, so that they have the best evidence available in their search for the truth.

The IIMM is not and will not be substituting testimonials gathered by CSOs for its own interviews. The IIMM makes use of CSO reporting and evidence to identify suitable witnesses, to corroborate claims and to establish contextual elements of crimes. What is not clear from IIMM reporting to date is where its most significant information and evidence gaps exist, though the IIMM reports that it does make targeted requests to a wide range of information providers. The extent to which such requests involve CSOs is not clear.

International human rights law

Activities to secure accountability for CRSV in Myanmar under international human rights law have been circumscribed by Myanmar’s highly selective ratification of international human rights treaties. Myanmar is among a small number of UN member states not to have ratified either the International Covenant on Civil and Political Rights or the Convention Against Torture. Likewise, it has not ratified the UN Convention on the Elimination of Racial Discrimination, nor the Convention on the Rights of Migrant Workers. Significantly, even where Myanmar has ratified the relevant human rights treaty (for example, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, the Convention on the Rights of Persons with Disabilities), the state has carefully declined to ratify or formally exempted itself from the relevant accountability or enforcement mechanisms. The effect of this patchy treaty ratification is that Myanmar is subject to none of the inter-state, individual or inquiry complaints mechanisms established by international human rights treaty law. Further, Myanmar is not party to any relevant regional human rights treaty.

Despite this challenging context of treaty non-ratification, the international human rights system has endeavoured to pursue accountability for human rights violations in Myanmar, including for CRSV. In terms of treaty-based human rights system, the CEDAW Committee request for an exceptional report from Myanmar is noteworthy.⁴⁵ Further, the UN Charter-based human rights system, which monitors the human rights compliance of all UN member states, has been proactive concerning conflict-related human rights violations in Myanmar. Most significant is the Human Rights Council establishment of the **Fact-Finding Mission for Myanmar**, a dedicated country-specific Special Rapporteur for Human Rights in Myanmar, and attempts (largely declined) by multiple human rights Special Rapporteurs to conduct country visits to Myanmar. In terms of CRSV, the 2018 report of the Fact-Finding Mission for Myanmar dedicated to CRSV has proved to be highly influential. This is both in terms of the initiation of ICC proceedings and of the provisional order against Myanmar of the International Court of Justice. Myanmar was

last reviewed under the Human Rights Council's Universal Periodic Review (UPR) in January 2021, one month before the coup. In the UPR, Myanmar declined to accept recommendations from Australia, Croatia and Luxembourg concerning investigation and accountability for CRSV. The military regime has since entirely disengaged from the Human Rights Council activities on Myanmar.

United Nations Security Council

Finally, the mechanisms established by the UN Security Council for documenting and seeking to bring an end to sexual violence in conflict have been activated in respect of Myanmar. Since 2018, the Myanmar Military has specifically been listed as a perpetrator of patterns of sexual violence in armed conflict in the Secretary-General's annual reports to the UN Security Council on conflict-related sexual violence. In 2019, the UN Special Representative of the Secretary-General on Sexual Violence in Armed Conflict finalised a Communique and Action Plan with the Myanmar Military noting several commitments to bring CRSV perpetrated by the military to an end. Nevertheless, in 2020, the Myanmar Military was again listed as a perpetrator of patterns of sexual violence, while the Secretary-General's annual report noted continued engagement between UN and the military on the matter. Since 2021, the Myanmar Military has continued to be listed, though the military discontinued its engagement with the UN on the matter. In 2022, in addition to listing the Myanmar Military, its sub-division, 'the integrated Border Guard', was specifically listed.

Table 4. Current international accountability mechanisms for CRSV in Myanmar

| | |
|--|---|
| <p>International humanitarian law</p> <p>ICRC protection and promotion activities</p> | <p>International Criminal Court</p> <p>Investigation into Bangladesh/Myanmar</p> |
| <p>International human rights law</p> <p>CEDAW Exceptional Report Request</p> <p>Special Rapporteur for Myanmar</p> <p>Fact-finding Mission for Myanmar</p> | <p>United Nations Security Council</p> <p>MARA and annual reporting of Special Representative of the Secretary-General</p> <p>Annex 'Listing' perpetrators of systematic sexual violence</p> |
| <p>International Investigation Mechanism for Myanmar</p> <p>Proceedings before the International Court of Justice</p> <p>Ongoing investigations before the International Criminal Court</p> <p>Ongoing investigation by judicial authorities of Argentina and future relevant jurisdictions</p> | <p>International Court of Justice</p> <p>Application of the Convention on the Prevention and Punishment of the Crime of Genocide (<i>The Gambia v Myanmar</i>)</p> |

Annex 1. Key sources

Ferro Ribeiro S, van der Straten Ponthoz D (2017), *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: Best Practice on the Documentation of Sexual Violence as a Crime or Violation of International Law*, Second Edition, March (London: FCDO).

International Committee of the Red Cross, Geneva Academy of International Human Rights and Humanitarian Law (2019), *Guidelines on Investigating Violations of International Humanitarian Law: Law, Policy, and Good Practice* (Geneva: ICRC).

International Criminal Court Office of the Prosecutor (2014), 'Policy Paper on Prosecuting Sexual and Gender-based Violence', The Hague.

International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 (2022), *Gender Strategy and Implementation Plan: Addressing the Adverse Impact of the Discriminatory Gender Hierarchy to Facilitate Inclusive Justice for International Crimes in the Syrian Arab Republic*, Technical Version, 30 September (Geneva: IIMM).

United Nations Independent International Fact-Finding Mission on Myanmar (2019), *Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts*, UN Doc. A/HRC/42/CRP.4, 22 August (Geneva: Human Rights Council).

United Nations Office of the High Commissioner on Human Rights (2015), *Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice* (Geneva and New York: United Nations).

United Nations Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict (2011), *Implementation of Security Council Resolution 1960 (2010) On Women, Peace and Security (Conflict-related Sexual Violence), Provisional Guidance Note* (New York: United Nations).

Annex II. Transitional Justice Reference Archive for Nepal

Original source documents and other material relating to alleged human rights violations and abuses committed during the Nepal conflict should be preserved and archived for current and future use, including but not limited to use by post-conflict transitional justice mechanisms. The archive was conceived as a tool for:

- **compiling** existing public information from disparate sources relevant to alleged violations and abuses during the conflict
- **preserving** and consolidating this material, which may otherwise be overlooked, discarded or lost
- **systematising** and integrating individual sources of information into a unified, fully-searchable electronic archive to make investigation and follow-up of conflict-related human rights issues, on both micro- and macro-levels, more effective, efficient and comprehensive

The archive is a compilation of relevant source materials and does not engage in analysis or evaluation of the accuracy or veracity of these source materials, which are preserved verbatim, in their original languages. The design of the archive is based on the principle that any piece of information from any source – including documents circulated by the parties to the conflict – may ultimately be of use in recovering the truth about conflict-era incidents. This archive is not a final or definitive record of the facts of the conflict, but rather a preliminary collection of reports and other documents, reflecting claims and counter-claims made by multiple stakeholders, which is meant to serve as a resource for more systematic research and investigation.

The archive consolidates public information from a wide range of sources, including:

- Public **reporting** from national and international organisations and institutions.
- Public **statements** and **documents** issued by the parties to the conflict, including a substantial amount of material from the Nepalese Army and the Communist Party of Nepal (Maoist). This material includes information, as available, on conflict-era organisational structures and **chains of command** as documented by the parties themselves, indexed by date and location.
- International **instruments** relevant to investigation of human rights violations and abuses, particularly with respect to International Humanitarian Law (IHL) and International Human Rights Law (IHRL).
- National **legislation** with an impact on human rights issues.
- Supreme Court **judgements** with an impact on human rights issues.
- A range of **maps** and other data visualisation tools that present detailed textual information in a more accessible visual form.

The archive is meant to function as a structured, but flexible information tool that that will assist users in a range of tasks and objectives. The archive may be useful, for example, in:

- Cross-checking and consolidating victim name lists from multiple organisations, with a view to finalising an integrated, comprehensive list of conflict victims. Victim names

can be systematically sorted and searched in multiple ways, including full name search, reversed name search and search by name segments or fragments; all results can be filtered and sorted by date, location and other criteria.

- Fact-checking information provided by parties to the conflict against information from other sources and evaluating these accounts in light of broader trends and patterns.
- Situating individual incidents in the context of other alleged incidents, both locally and nationally, and identifying trends with respect to incident dates, locations and alleged perpetrators.
- Examining individual incidents in relation to legislation or policy documents issued by parties to the conflict, including ordinances, press statements, party directives, etc.
- Identifying legal frameworks and international standards relevant to specific incidents.
- Providing victims or relatives with an overview of existing documentation of a particular incident and with information on related legislation and international standards.

Source: UN Human Rights Office (2023), 'The Armed Conflict in Nepal, 1996–2006: A Transitional Justice Reference Archive' (<https://nepalconflictreport.ohchr.org>)

Annex III. Informed consent

(To be read to the interviewees at the start of any interview to receive their informed consent. The contact details for follow up, complaints or mental health and psychosocial support (MHPSS) will be sent via signal or email):

This interview is being conducted by Fiona MacGregor an independent consultant based at the University of Durham and/or Naw Anthea from Saferworld. We are conducting this interview on behalf of the Women's Peace and Security helpdesk, which provides support to the UK Government's Foreign and Commonwealth Development Office (FCDO).

The aim of this research is to better understand the legal challenges of documenting conflict-related sexual violence (CRSV) in Myanmar and help identify ways to support efforts to achieve accountability for these crimes. We have a particular focus on the role of women's organisations in this work.

This particular interview is being carried out to seek your opinion and experience on matters relating to documenting CRSV in Myanmar to help inform this project.

We will ask you some general questions around these issues and also seek your input and ideas on areas that you consider important that we may not have asked about.

Your name and any identifying details in relation to this work will be kept confidential and not shared with anyone other than the two researchers (Fiona MacGregor and/or Naw Anthea).

Contact between the researcher and you, and the researchers and each other, is conducted via an encrypted service to ensure information, including your name, is secure.

We will generally rely on taking handwritten notes during the interview. If there is a specific reason to use audio recording during the interview, we will request your official consent before doing so. Any recordings will be transcribed as soon as possible after the event and deleted immediately on doing so.

Any information you provided will be anonymised and no materials will be produced or shared as a result of this research which contain details that may identify you.

In general, we will avoid naming organisations operating in Myanmar. If there is a reason to name your specific organisation (or you have a specific reason for wanting it to be named), we will discuss that with you and request your specific consent on that matter.

Our goal is to learn more about current documenting practices, aims and challenges of women's organisations documenting CRSV. We will NOT be asking for details about specific cases.

You can choose to immediately pause or stop the discussion at any time, including if you find any topic of discussion uncomfortable or distressing or do not wish to speak about it for any reason.

The length of the interview will be determined by the issues identified in our questions, but will normally take no longer than an hour and may be considerably shorter. Again, you can choose to immediately pause or stop the discussion at any time.

The information you share with us will be used anonymously to support the FCDO in its efforts to support those documenting CRSV in Myanmar and wider efforts to secure international accountability for perpetrators.

If, as a result of this research, documents are later produced for publication or to support those working on documenting CRSV in Myanmar, then these will also be anonymised. The FCDO can share any relevant materials published in future with you if you choose at this point to provide a secure contact method you are willing for us, as researchers, to share with the FCDO – we will not share any other details.

We will also, where appropriate, encourage umbrella organisations working on this issue in Myanmar to make relevant published documents available via their networks so those that who do not wish to be contacted by the FCDO in future can access them.

We will provide you with a list of contacts if, after this interview, you wish to contact either one of the interviewers directly or to confidentially contact the organisations we work for in relation to any matters arising from this interview.

We will also provide you with the contact details of a confidential service who can provide support in the event that any matters raised in this interview result in distress or other concerns.

It is possible that emerging issues give rise to follow up questions. Are you willing for the researchers (Fiona MacGregor or Naw Anthea) to reach out to you by a secure method in future if necessary for the purposes of this project? You can choose at any time to change your mind.

Contacts for post-interview follow-up

To reach the researchers:

Researchers' contact details

To raise any complaints or concerns about the way in which this interview was conducted:

Saferworld: safeguarding@saferworld.org.uk.

FCDO: *contact here for FCDO*

If you feel any distress as a result of this interview or in relation to the issues raised in our discussion, support is available at:

Referral details

Record of verbal consent

Please let me know if you are happy with all the following statements. This will be considered to constitute giving your consent to participate in the interview:

*Do you give your permission for me to interview/record you?

*Do you give permission for me to re-contact you to clarify information?

*Do you give me permission to quote you anonymously?

*(Only where believed necessary – do you give me permission to name your organisation)

*Are you happy to take part in the interview?

*Are there any ways you would want not to take part?

Confirmation of verbal consent:

Name of interviewee:

Time/date/location:

Name of interviewer:

Signature of interviewer: