

# Manual for Journalists on Collecting and Preserving Information About International Crimes

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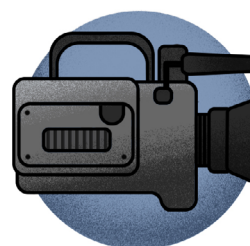
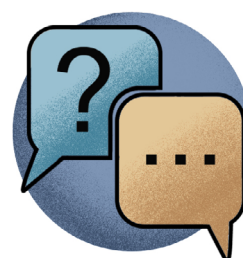
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# Table of Contents

Executive Summary.....	4
Introduction.....	6
1. Overview of International Crimes and International Justice.....	8
1.1. Definition of Core International Crimes.....	8
1.2. Avenues for Prosecutions.....	12
2. Crimes Against Journalists.....	15
2.1. Legal Protections for Journalists in Situations of Armed Conflict.....	15
2.2. When Crimes Against Journalists Amount to International Crimes.....	16
2.2.1. Attacks on Civilians and Civilian Infrastructure including Media and Journalists .....	16
2.2.2. Property Crimes.....	22
2.2.3. Crimes Relating to Restrictions on Liberty and Mobility.....	23
2.2.4. Violence and Mistreatment.....	24
2.2.5. Sexual and Gender-based Violence and Gender-based Persecution.....	25
3. Documenting International Crimes and the Role of Journalists.....	27
3.1. Introduction to Evidentiary Concepts.....	27
3.2. Protection of Confidential Sources and Testimonial Privilege.....	29
3.3. Some General Considerations.....	31
3.4. Best Practices for Collecting and Preserving Information.....	32
3.4.1. Interviewing Techniques.....	32
3.4.2. Keeping Information Secure.....	33
3.4.3. Improving Reliability of Information.....	34
4. Resources.....	37
4.1. Mobile Applications for Capturing and Securing Evidence.....	37
4.2. Written Material.....	37
4.3. International NGOs.....	38

## Executive Summary

During armed conflicts, journalists play a vital role in providing information to both the local population and the international community, including shedding light on violations of international law. When conducting their investigations, journalists may come across relevant information about “international crimes”, international law norms the violation of which can result in individual criminal liability. This Manual seeks to provide advice to Ukrainian journalists about how to recognise international crimes and how to collect and preserve information in a way that improves the likelihood that it could be used to support investigations of international crimes and as evidence in judicial proceedings. The Centre for Law and Democracy prepared this Manual with support from the Global Media Defence Fund managed by the United Nations Educational, Scientific and Cultural Organization.

Journalists are not criminal investigators and should not allow these activities to distract from their primary role of informing the public. However, where journalists come across information which is relevant to current or future accountability efforts for international crimes, they should consider taking steps to collect and preserve this information in a manner which, as far as possible, conforms with the requirements for information to be able to be presented as evidence in court, while at the same time minimising as much as possible risks to them, their colleagues and their sources.

For the purposes of this Manual, the focus is on three of the four international crimes found in the Rome Statute of the International Criminal Court, the so-called “atrocities crimes”, namely war crimes, crimes against humanity and genocide. War crimes are serious violations of international humanitarian law norms. Crimes against humanity are serious criminal acts, including murder, torture and persecution, committed as part of a widespread or systematic attack directed against a civilian population, of which the perpetrator had knowledge. Genocide consists of certain serious acts, such as killing or causing serious bodily harm, when done with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group.

Among the kinds of actions which may amount to international crimes are directing attacks at civilian infrastructure and at civilians who are not directly participating in hostilities. Under international humanitarian law, journalists are considered civilians, so that attacks specifically targeting them are war crimes. The same can be said for attacks on media infrastructure as long as it has not been transformed into a military target (as might occur, for example, if a media outlet were being used to support military operations).

In some instances, civilian harms result from attacks directed at a legitimate military target, sometimes called “collateral damage”. Under the international humanitarian law principle of proportionality, combatants are required to take into account expected civilian harm before launching an attack and weigh this against the anticipated military advantage of the attack. While some civilian harm is permitted under international humanitarian law as an inevitable concession to the realities of warfare, where that harm is clearly excessive, those responsible may be liable for war crimes.

The destruction, appropriation and seizure of civilian property may also amount to war crimes. A key consideration here is whether the actions were justified by military necessity. For example, taking over a strategically located building may be justified in certain circumstances. In addition, pillage (i.e. taking property for private or personal reasons) is a separate war crime. Certain restrictions on liberty and mobility are also proscribed as war crimes, including the taking of hostages and, in international armed conflicts, the unlawful deportation, transfer or confinement of civilians.

Some severe forms of mistreatment of non-combatants, including torture, are proscribed as war crimes, as are various kinds of sexual violence, including rape, sexual slavery and enforced prostitution. Under the Rome Statute of the International Criminal Court, war crimes of rape and sexual violence must have been committed through force, or threat of force or coercion. However, the victim need not have manifested resistance for criminal liability to ensue; the presence of coercive, forceful or threatening circumstances, which may be apparent from the wider context in which the actions took place, may be sufficient.

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When undertaken as part of a widespread or systematic attack against the civilian population, certain acts may constitute crimes against humanity. This includes murder, certain forms of sexual violence and torture. In addition, severe deprivation of fundamental rights, when accompanied by discriminatory intent, may amount to the crime against humanity of persecution. Among the recognised grounds of discrimination for the purposes of the crime against humanity of persecution are nationality, gender and political opinion. It is enough for the perpetrator to perceive the victim as being a part of the identifiable group, whether or not he or she actually is. Thus, for example, in the context of persecution based on political opinion, discriminatory acts in retaliation for critical, although objectively impartial, media coverage could meet the test for this crime.

Journalists may collect relevant information in various formats. Evidence can broadly be broken down into three main types, namely direct – showing that a crime has been committed (for example, a picture of a dead civilian showing that they died from a bullet wound) – linkage – pointing to who is responsible (for example, eye-witness testimony about who fired the gun which shot the bullet) – or contextual – helping to understand wider issues in the case which help interpret other evidence (for example, satellite images showing that no enemy soldiers were present in the area at the time the bullet was fired).

Although all of these kinds of evidence are key, it bears emphasising that linkage evidence is often a critical missing piece for international investigations. Often, there is overwhelming evidence that an international crime has been committed but evidence as to who exactly the perpetrators are is lacking. Information on the kinds of military equipment soldiers had at the time of a violation, any distinct insignia on their clothing or the kinds of uniforms they were wearing, and names overheard are all examples of the kinds of linkage evidence which may assist investigators with establishing or absolving of responsibility for international crimes.

Among the key requirements for evidence to be useful in court is that it meet minimum standards of reliability. Certain best practices can be followed to enhance the reliability of any information collected and to minimise security risks to journalists and their sources.

## Journalists should:

- Avoid asking leading questions which influence the answers and perhaps also the thinking of the interviewee
- Secure informed consent before conducting any interview
- Be aware of the applicable rules on source protection
- Try to collect additional corroborating information, such multiple kinds of information that show the same fact
- Preserve a “chain of custody” when collecting and transmitting information
- Take steps to preserve metadata for digital files
- Take steps to enhance the security of any information collected such as using encryption and secure servers for electronic files

In the context of the collection and preservation of digital evidence, some technical resources may assist journalists. These include applications, such as eyeWitness to Atrocities and Proofmode, which automatically attach a range of metadata to videos and photos captured by smartphones, help verify a chain of custody for such files and facilitate the transmission of files to secure servers.

# Introduction

Since the beginning of the Russian invasion of Ukraine, mounting evidence has emerged of serious violations of international criminal law. For example, a report from the UN's Independent International Commission of Inquiry on Ukraine “found reasonable grounds to conclude that an array of war crimes and violations of human rights and international humanitarian law have been committed in Ukraine since 24 February 2022”<sup>1</sup>. While the Commission found certain instances of Ukrainian troops violating international humanitarian law and two situations where they had committed war crimes, the “vast majority” of violations were attributed to Russian armed forces<sup>2</sup>.

Ukrainian and international journalists are actively playing a role in shedding light on such violations but in certain situations they might also be able to facilitate prosecutions of these crimes, as well as to exculpate innocent parties. While the core business of journalists is to investigate what is going on in society and to report back to the public about it, in carrying out these duties journalists may discover information about crimes or themselves fall victim to crimes, including international crimes, especially where they are reporting on or working in conflict zones. In addition to reporting this often very high-value information to the public, journalists may also be able to preserve that information in such a way that it might be able to be submitted to a court as evidence of crimes in individual cases.

The purpose of this Manual is to help journalists in Ukraine understand what information may represent evidence of the commission of international crimes, with a particular focus on crimes against journalists and media workers, and then to secure and preserve that information so as to enhance the possibility that it might be able to be presented as evidence in court. For purposes of this Manual, the term “evidence” or “admissible evidence” may be distinguished from information in that the former is what has been accepted by a court as part of the information that goes to prove either the guilt or the innocence of the accused.

Journalists are not police or criminal investigators, and there are risks associated with their becoming involved in collecting information about criminal behaviour. If their work in this area becomes publicly known, they can become targets of attack by those who are responsible for the crimes, who obviously do not want to be prosecuted and who have already demonstrated that they are capable of engaging in criminal activities.

It is also important that journalists do not let any role in collecting information about international crimes undermine their core role as journalists, especially if they work in the area of news. Providing the public with timely and high-quality news content is more important than ever during armed conflicts and diverting journalists' attention to criminal prosecutions could undermine this. In armed conflicts, journalists play an important role both in informing domestic audiences and in bringing the realities of the conflict to the attention of foreign audiences. This latter key role was noted by the International Criminal Tribunal for Yugoslavia in the case of Prosecutor v. Radoslav Brdjanin and Momir Talic where both the Trial and Appeals Chambers recognised, “that war correspondents ‘play a vital role in bringing to the attention of the international community the horrors and reality of conflict’”<sup>3</sup>.

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<sup>1</sup>[Report of the Independent International Commission of Inquiry on Ukraine, A/77/533, 18 October 2022, para. 109.](#)

<sup>2</sup>[Ibid.](#)

<sup>3</sup>[Appeals Chamber Decision on Interlocutory Appeal, 11 December 2002, Case No. IT-99-36-AR73.9, para. 36.](#)

whether information is admissible in court. But this Manual does seek to help journalists understand what sort of information may be useful for judicial processes – and thereby limit the collection of irrelevant information – as well as how to take some simple steps to enhance the chance that the information may be admissible in court as evidence.

As a starting point, journalists interested in evidence collection should have a basic understanding of international criminal justice and the kinds of behaviour (actions) which might constitute international crimes. To this end, the first section of this Manual provides both an overview of international crimes and also of avenues for prosecuting them, including through the international criminal justice system. The Manual then turns to the issue of crimes against journalists, focusing on actions which are more likely to impact journalists and which may amount to international crimes. Readers should thus come away with a better understanding of both the scope of protection afforded to journalists and media outlets, and more generally what kinds of acts may constitute international crimes and thus be better equipped to identify relevant information not only of international crimes against their colleagues but also more broadly. The remainder of the Manual turns to the issue of preserving information as potential evidence, providing readers with a brief overview of evidentiary principles before turning to practical tips to improve information collection and preservation practices.

## International criminal law

is a branch of international law that creates international criminal proscriptions for certain serious kinds of crimes and provides avenues for prosecuting perpetrators both by States and at the international level.<sup>4</sup>

The focus of this Manual is on the core international crimes as defined in the **Rome Statute of the International Criminal Court** (Rome Statute). These are genocide, crimes against humanity, war crimes and the crime of aggression. However, the last of these applies only to those who are responsible for the “*planning, preparation, initiation or execution*” of sufficiently serious acts of aggression and who are “*in a position effectively to exercise control over or to direct the political or military action of a State*”<sup>5</sup>. Journalists working in the field are unlikely to uncover evidence that would establish responsibility for this crime. As a result, this Guide focuses on the three other crimes, which are often referred to as “*atrocity crimes*”.

Although each of these three categories of international crimes long predated the establishment of the International Criminal Court (ICC), the elaboration of the treaty that established that Court, the Rome Statute, was a key development in their codification and development. As a result, for ease of reference, this Manual primarily refers to the definition of these crimes as they appear in the Rome Statute. The aim of outlining very briefly here the essence of the core international crimes covered by the Rome Statute is not to try to provide readers with a precise understanding of their scope. Rather, the aim is to give a general sense of the types of acts that might constitute international crimes so as to narrow down the collection of information to what is potentially relevant to those crimes.

## 1.1 Definition of Core International Crimes

Each of the core international crimes can be broken down into specific elements (or parts), each of which needs to be proven to secure a conviction. Each crime requires proof both that the accused committed each physical element of the crime (or act) and that the accused was mentally guilty. The exact subjective (mental) requirements vary according to the crime but require, at a minimum, that perpetrators intended to commit certain acts or acted recklessly<sup>6</sup>. There is significant overlap between the conduct covered by definitions of different international crimes, such that certain acts could potentially be prosecuted as a war crime, a crime against humanity or an act of genocide, although each crime has distinguishing features, which are summarised below. Ultimately, as noted above, journalists interested in collecting information for use in potential international crime prosecutions do not have to be legal experts. However, a general awareness of the elements of these crimes can help journalists determine what kinds of information they should consider retaining.

<sup>4</sup>Antonio Cassese, et al., *Cassese’s International Criminal Law*, 3rd ed. (2013, Oxford, Oxford University Press), p. 3.

<sup>5</sup>[Rome Statute, adopted 17 July 1998, in force 1 July 2002, Article 8 bis](#). The ICC does not currently have jurisdiction over this crime with respect to Russia’s invasion, although the possibility of establishing a special tribunal to fill in this gap has been widely discussed and debated.

<sup>6</sup>For a limited number of war crimes acting in grossly negligent manner may be sufficient. See Antonio Cassese, et al., note 4, p. 76.



# Genocide

is defined in Article 6 of the Rome Statute as “*any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such*”. The article goes on to list five specific acts, namely:

- killing members of the group;
- causing serious bodily or mental harm to members;
- inflicting on the group conditions designed to bring about its physical destruction in whole or in part;
- measures aimed at preventing births within the group; and
- forcibly transferring children to another group.

One of the most challenging aspects of securing convictions for genocide is its heightened intent requirement. Prosecutors must show not only that the accused intended to commit the underlying act, such as killing members of the group or causing them serious bodily or mental harm, but also that they did so with the intent to destroy the group, in whole or in part. The latter requirement, known as a kind of “*specific intent*” (*dolus specialis*) requirement, is an important distinguishing feature of the crime of genocide and often the most difficult element to prove.

## Crimes Against Humanity

are defined in Article 7(1) of the Rome Statute as “*any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack*”. This is followed by the following list of serious underlying crimes:

- murder;
- extermination;
- enslavement;
- deportation or forcible transfer of population;
- imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- torture;
- rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or “*any other form of sexual violence of comparable gravity*”;
- persecution (against an identifiable group);
- enforced disappearance;
- the crime of apartheid; and
- other “inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health”.

Several of the terms used in Article 7(1) are defined in Article 7(2). The list of acts is broad and certain terms have been interpreted broadly.

A key distinguishing feature of crimes against humanity is that the underlying offence must have been committed as part of a widespread or systematic attack directed against civilians and by someone with knowledge of that attack. A widespread or systematic attack in this context means a “*course of conduct*” involving “multiple commission” of the underlying crimes listed in Article 7(1) “*pursuant to or in furtherance of a State or organizational policy to commit such attack*”. This means that a State or organisation was actively promoting or encouraging the attack<sup>7</sup>. While this broader context is a distinguishing characteristic of the attack, crucially, the underlying offences of the perpetrator need not be widespread or systematic. Indeed, a perpetrator’s commission of a single murder or rape, for example, could qualify in certain circumstances as a crime against humanity when committed as part of a broader attack.

In relation to the requirement that the perpetrator have knowledge of the widespread or systemic attack against the civilian population, this does not mean that the perpetrator has to have “*knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization*”; rather this part of the mental requirement can be satisfied if they “*intended to further such an attack*”<sup>8</sup>. Although crimes against humanity are characterised by the existence of a widespread or systematic attack against civilians of which the offence in question forms a part, the victims of the offence in question do not necessarily have to be civilians as long as the overall widespread or systematic attack is primarily directed at civilians.<sup>9</sup>

**Persecution**, one of the crimes against humanity, pertains to the severe denial of fundamental human rights in connection with any other crime under the ICC’s jurisdiction. It involves a further mental element, namely that the perpetrator act with the specific intent to persecute or discriminate based on “*political, racial, national, ethnic, cultural, religious, gender... or other grounds that are universally recognized as impermissible under international law*”<sup>10</sup>. What constitutes a fundamental human right under international human rights law is quite broad, including various civil and political rights – such as freedom of expression, privacy, fair trial rights and torture – as well as economic, social and cultural rights. However, for the purposes of persecution as a crime against humanity, the deprivation must be “*severe*”, so not every human rights violation would meet that threshold. Indeed, in one judgment of the International Criminal Tribunal for the Former Yugoslavia, the Trial Chamber found that the denial of rights must be of “*the same level of gravity*” as other acts listed as crimes against humanity<sup>11</sup>.

Persecution has, however, sometimes been interpreted somewhat broadly. For example, in the case of Prosecutor v. Nahimana, Barayagwiza and Ngeze, the Trial Chamber of the International Criminal Tribunal for Rwanda held that hate speech could, of itself, constitute persecution<sup>12</sup>. Nevertheless, the Rome Statute departed from the customary international law understanding of persecution by introducing a requirement that persecution occur “in connection with” any other crime within the ICC’s jurisdiction<sup>13</sup>.

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<sup>7</sup>[International Criminal Court, Elements of Crimes, 2013, Article 7\(3\), p. 3.](#)

<sup>8</sup>*Ibid.*, Article 7(2), p. 3.

<sup>9</sup>Antonio Cassese, et al., Cassese’s International Criminal Law, note 4, pp. 91, 101-105.

<sup>10</sup>ICC, Elements of Crimes, note 7, Article 7(1)(h).

<sup>11</sup>[Prosecutor v. Kupreskic, et al., Judgment, 14 January 2010, Case No. IT-95-16-T, para. 621.](#)

<sup>12</sup>[Judgment and Sentence, 3 December 2003, Case No. ICTR-99-52-T, para. 1072.](#)

<sup>13</sup>Article 7(1)(h).

# War crimes

are defined in Article 8(2) of the Rome Statute as encompassing a series of serious violations and grave breaches of international humanitarian law. Certain of the crimes provided for under Article 8(2) are applicable in international armed conflicts (generally wars between States, such as that currently between Russia and Ukraine), whereas others are applicable in non-international armed conflicts.

The lists of specific acts include serious crimes against persons – such as murder of persons taking no active part in hostilities, torture, rape or outrages upon personal dignity – attacking protected objects – such as buildings carrying the distinctive emblems of the Geneva Conventions or dedicated to religion, education or art – pillaging or destroying property without any military purpose, and engaging in prohibited forms of warfare – such as using poison or certain types of prohibited bullets, or using civilians as shields. As with crimes against humanity, the scope of acts covered is broad.

The existence of an armed conflict is a precondition for war crimes to have taken place. In addition, to qualify as war crimes, there must also be a link (a “*nexus*”) between the criminal act and the armed conflict, although the acts do not necessarily have to have been committed in the course of a battle, nor does the conflict have to be the primary motivation of the perpetrator<sup>14</sup>.

The Rome Statute provides for several different modes of liability for international crimes apart from directly committing crimes<sup>15</sup>. These include “*indirect commission*” of crimes (i.e. using another person to commit a crime), command and superior responsibility (whereby leaders and superior officers can be held responsible for crimes perpetrated by their subordinates), having a “*common plan*”, aiding and abetting, and attempting to commit a crime. A detailed understanding of these and other modes of liability is not necessary for the purposes of documentation efforts by journalists. However, it is important to keep in mind that international criminals are not only those who directly “*pull the trigger*” but that individuals can sometimes be held responsible for more indirect actions in support of international crimes, such as ordering others to commit acts, or failing to prevent soldiers under one’s command from engaging in atrocities or failing to refer cases involving the commission of such atrocities for investigation and prosecution.

Journalists should always retain their objectivity and, when evaluating whether information could be useful for international criminal investigations, it is important to consider, collect and preserve both incriminating and exculpatory evidence<sup>16</sup>. As with criminal trials for ordinary crimes, for international crimes certain information may cast doubt on key elements of the case and several general defences are available, such as defences of duress and mental incapacity<sup>17</sup>. For example, if a journalist came across information which indicated that a commander attempted to stop his subordinates from committing war crimes, this would be relevant to efforts to ensure just and credible accountability processes, as it may properly absolve that commander of responsibility for the crimes of his subordinates.

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<sup>14</sup>[International Criminal Tribunal for the Former Yugoslavia, Prosecutor v. Kunarac, Appeals Chamber Judgment, 12 June 2002, Case Nos. IT-96-23 & IT-96-23/1-A, paras. 58-60.](#)

<sup>15</sup>Articles 25 and 28.

<sup>16</sup>[European Agency for Criminal Justice Cooperation, Documenting international crimes and human rights violations for accountability purposes: Guidelines for civil society organisations, 21 September 2022, pp. 9 and 36.](#)

<sup>17</sup> Rome Statute, Articles 31(1)(a)- 31(1)(b) and 31(1)(d).

## 1.2 Avenues for Prosecutions

Multiple opportunities to prosecute international crimes exist, including through national courts. For example, since the beginning of the Russian invasion of Ukraine, there have been successful prosecutions of certain war crimes cases before the Ukrainian courts<sup>18</sup>. The principle of “universal jurisdiction” may also lead to prosecutions in States that do not have any direct connection to the crime, its perpetrator or its victims. The basic concept underlying universal jurisdiction is that certain crimes, such as the atrocity crimes listed in this Manual – along with certain other international crimes like torture, piracy and terrorism – harm the whole international community such that it is appropriate to prosecute individuals for them anywhere, even in the absence of a traditional ground of jurisdiction (such as where the crime takes place of the nationality of the victims or perpetrators).

Normally, the domestic basis for universal jurisdiction prosecutions will be found in the relevant national criminal law statute. As a result, the approach to universal jurisdiction and requirements for initiating prosecutions under it differ across jurisdictions. Some countries with particularly broad approaches to universal jurisdictions, such as Argentina, allow for prosecutions even if the accused is not physically present in the jurisdiction. Where such prosecutions occur in absentia, it may be difficult to enforce any sanction which is imposed upon conviction. However, the mere issuance of a conviction represents a form of sanction, for example by making it difficult for the individual to travel abroad and by labelling him or her as a criminal.

The movement for international justice gained significant momentum in the 1990s with the development of several ad hoc tribunals (described in more detail below). But a key milestone was the establishment of the ICC by the 1998 Rome Statute. The ICC is located in the Hague and began operations in 2002 after 60 States had become parties to the Rome Statute. Article 12 of the Rome Statute establishes the following conditions for the Court to exercise jurisdiction over war crimes, crimes against humanity and genocide: the crimes were committed on the territory of a State Party to the Rome Statute (or a ship or aircraft registered in that State), the crimes were committed by nationals of a State party, the situation has been referred to the ICC by the UN Security Council or a State makes a declaration under Article 12(3) accepting jurisdiction. As for temporal jurisdiction, the Court has jurisdiction over crimes that were committed since the Statute came into effect (i.e. 2002) or, in the case of a State which only later acceded to the Statute, over crimes committed since the date the treaty came into force for that State (or pursuant to a declaration under Article 12(3)).<sup>19</sup> For the Ukrainian conflict, as a result of two declarations by Ukraine under Article 12(3), the ICC has jurisdiction over alleged war crimes, crimes against humanity and genocide committed since 21 November 2013.<sup>20</sup> On 2 March 2022, the ICC’s Office of the Prosecutor announced that an investigation into the Ukrainian situation had been opened.<sup>21</sup>

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<sup>18</sup>See, for example, Bryan Pietsch, et al., “[Russian soldier gets life in prison in Ukraine’s initial war crimes trial](#)”, 23 May 2022, Washington Post,; and Reuters, “[Ukraine probing almost 26,000 suspected war crimes cases](#)”, 7 August 2022.

<sup>19</sup>Rome Statute, Article 11(2).

<sup>20</sup>Ukraine’s first declaration covered crimes alleged to have been committed on Ukrainian territory from 21 November 2013 to 22 February 2014, whereas the second declaration extended this on an open-ended basis. See <https://www.icc-cpi.int/ukraine>.

<sup>21</sup>See *ibid*.

On 17 March 2023, Pre-Trial Chamber II of the ICC issued arrest warrants for Russian President Vladimir Putin and Maria Alekseyevna Lvova-Belova, the Commissioner for Children's Rights in Russia's Office of the President.<sup>22</sup> The warrants contain allegations that they are responsible for war crimes of unlawful transfer and deportation of population from occupied parts of Ukraine to Russia under articles 8(2)(a)(vii) and 8(2)(b)(viii) of the Rome Statute, focusing in particular on the transfer and deportation of children.<sup>23</sup>

In addition to the need for crimes to come under the jurisdiction of the Court, the Rome Statute establishes certain other "admissibility" criteria. These include that a State with jurisdiction over the international crimes must not either be engaging in an investigation or prosecution, or have decided not to prosecute after an investigation, unless that State is unwilling or unable to do so.<sup>24</sup> This principle is often referred to as the principle of "complementarity" and reflects the Court's role as an institution that supplements rather than supplants the role of national prosecutions. In view of the limited resources of the ICC and the significant cost associated with these kinds of trials, cases must also be of "sufficient gravity" to justify action by the Court.<sup>25</sup> In evaluating whether cases meet the gravity threshold, the Court has been guided by quantitative and qualitative factors including *"the extent of damage caused, in particular, the harm caused to victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime"*.<sup>26</sup>

The international community has also occasionally established ad hoc tribunals to prosecute the perpetrators of international crimes, notably those established in the 1990s for the former Yugoslavia and Rwanda. These tribunals were established by the UN Security Council. Their cost, the current availability of a permanent tribunal in the form of the ICC with jurisdiction over atrocity crimes committed in Ukraine (which was lacking in the situations covered by the ad hoc tribunals), and gridlock on the Security Council make the establishment of a similar international body unlikely today. This is particularly true in the case of the invasion of Ukraine, given that the Russian Federation wields a veto power at the Security Council. Another option is what are called "hybrid tribunals", usually set up with assistance of the UN at the invitation of a State and involving a mixture of international and local personnel sometimes applying domestic, or a mixture of domestic and international, law. Examples of such hybrid tribunals with varying mandates and structures are those established for Cambodia, Sierra Leone and Lebanon.

Regardless of the mechanism through which international justice is ultimately achieved, the road to criminal accountability is often long and it can often take many years before prosecutions are even able to even begin. Despite this, it is important to collect and safeguard information that could one day be used as evidence in these proceedings. No prosecution can be successful, and most prosecutions would not even be lodged, without evidence.

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<sup>22</sup>See [ICC, "Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova", 17 March 2023.](#)

<sup>23</sup>*Ibid.*

<sup>24</sup>Rome Statute, Article 17(1)(a).

<sup>25</sup>*Ibid.*, Article 17(1)(d).

<sup>26</sup>[Prosecutor v. Bahar Idriss Abu Garda, Decision on the confirmation of charges, 8 February 2010, Case No. ICC-02/05-02/09-243-Red, para. 32.](#)

# Atrocity Crimes

## Genocide

Any of five enumerated acts (killings, causing serious bodily or mental harm, forcible transfers of children, preventing births, or inflicting conditions designed to bring about the physical destruction of a group, in whole or in part) when done with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group.

## Crimes Against Humanity

Certain serious offences against one or more people, committed as part of a widespread or systematic attack against the civilian population.

Key underlying offences are various crimes such as murder, enforced disappearances, forcible transfers, sexual violence, torture, and persecution (a severe discriminatory denial of fundamental rights).

## War Crimes

Serious violations of international humanitarian law, such as:

- Crimes against individuals who are not or no longer taking part in hostilities.
- Attacking protected objects, including those carrying the distinctive emblems of the Geneva Conventions.
- Actions which are not justified by military purpose (such as directing attacks at civilians or pillaging or destroying civilian property).
- Prohibited forms of warfare (using weapons such as expanding bullets or poisonous gas, or civilians as shields).

This section of the Manual focuses on crimes against journalists. After providing some context on legal protections for journalist in situations of armed conflict, this section turns to the issue of when certain types of actions amount to international crimes, with a focus on those sorts of actions which are mostly likely to affect journalists.

## 2.1. Legal Protections for Journalists in Situations of Armed Conflict

In the context of armed conflicts, international human rights law continues to apply alongside international humanitarian law and international criminal law. However, certain human rights may be suspended in such situations (a process known as “derogating” from human rights treaties), subject to strict conditions, whereas other rights are not susceptible to derogations. Non-derogable rights include among others the right to life and the prohibition against torture and cruel, inhuman and degrading treatment punishment.

During armed conflicts, international humanitarian law establishes acceptable limits for waging warfare, including by imposing obligations on combatants with respect to treatment of civilians. This body of law applies to all parties of armed conflicts, regardless of who was responsible for the outbreak of the conflict. Under international humanitarian law, journalists are considered to be civilians.<sup>27</sup> As such, they benefit from all of the protections which are afforded to civilians, including crucially that they must be distinguished from enemy combatants and never have attacks directed at them, as long as they do not directly participate in hostilities. This concept, known as the principle of distinction, is a fundamental principle of international humanitarian law and is binding on all parties to both international and non-international armed conflicts.<sup>28</sup> International humanitarian law also entitles a subcategory of journalists (those who are considered “war correspondents” in international armed conflicts, namely those who accompany and are authorised by an armed force) to the same protections as prisoners of war should they be captured.<sup>29</sup>

Under international law, a subset of violations of humanitarian law amount to war crimes. However, not all violations of international humanitarian law will constitute a war crime. International humanitarian law provides detailed rules that combatants are required to follow. Some of these are quite technical. For example, prisoners of war are entitled to tobacco and soap at local market rates.<sup>30</sup> Charging a prisoner of war excessive prices for such items or not giving them access to cigarettes is a violation of international humanitarian law but it is not a war crime. Rather, only more serious violations of international humanitarian law amount to war crimes.

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<sup>27</sup>[ICRC, Customary International Humanitarian Law Study, Rule 34: Journalists](#); and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the [Protection of Victims of International Armed Conflicts \(Protocol I\)](#), 8 June 1977, Article 79(1) [Additional Protocol I].

<sup>28</sup>[ICRC, Customary International Humanitarian Law Study, Rule 1: The Principle of Distinction between Civilians and Combatants](#).

<sup>29</sup>[Geneva Convention Relative to the Treatment of Prisoners of War \(Third Geneva Convention\)](#), 12 August 1949, Article 4(4).

<sup>30</sup>*Ibid.*, Article 28.



## 2.2. When Crimes Against Journalists Amount to International Crimes

This Manual does not attempt to elaborate in detail on international crimes beyond the outline in the first section. Instead, this section focuses more deeply on some examples of the international crimes which journalists are more likely to encounter due to the nature of their work, with a particular focus on the kinds of international crimes likely to be directed at them, as journalists. Despite the media focus of this section, it is important to highlight that the international crimes covered in this Manual are not specific to journalists or other media workers. Also, targeting journalists and media outlets may be part of a wider criminal effort. For example, it may contribute to the war crime of intentionally starving civilians as a method of warfare “by depriving them of objects indispensable to their survival” through denying them access to information about where to find food.<sup>31</sup>

### 2.2.1

#### Attacks on Civilians and Civilian Infrastructure including Media and Journalists

Intentionally directing military attacks at civilians (whether specific civilians or a civilian population), as long as they are not directly participating in hostilities, is a war crime.<sup>32</sup> Likewise, in the context of international armed conflicts, intentionally directing attacks against civilian objects (i.e. non-military objectives) is included as a war crime under the Rome Statute.<sup>33</sup> In the absence of a definition of “attacks” in the Rome Statute, the ICC has used the definition found in Article 49(1) of the Additional Protocol I to the Geneva Conventions, namely “acts of violence against the adversary, whether in offence or in defence”.<sup>34</sup>

Not every instance of a civilian being seriously injured or killed, or civilian infrastructure being damaged, in a combat situation will amount to a war crime. First, to qualify as a war crime, the attacker must satisfy the mental element of the crime by having a “guilty mind”. For example, a combatant may make a mistake in the “fog of war” and mistakenly believe that a civilian is a combatant despite having taken appropriate precautions. Such a “mistake of fact” may mean the accused did not purposely kill a civilian or act in a sufficiently reckless manner. In this respect, it is important to bear in mind when collecting information that anything which points to whether or not a civilian’s identity as a civilian was likely known to the attacker. For example, for journalists, it would be relevant to collect information showing: that they were wearing clothes or bearing insignia identifying themselves as members of the press; whether they were carrying any weapons or objects that could have been misconstrued as weapons; whether there were any legitimate military targets nearby that could have been the object of the attack; and the time of day and visibility conditions.

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<sup>31</sup>Proscribed under Article 8(2)(b)(xxv) of the Rome Statute.

<sup>32</sup>Rome Statute, Article 8(2)(b)(i), for international armed conflicts.

<sup>33</sup>Article 8(2)(b)(ii). Article 8(2)(b)(ix) of the Rome Statute also recognises separate war crimes for targeting certain specific kinds of civilian objects as long as they are not being used for military purposes, such as religious buildings, educational buildings and hospitals.

<sup>34</sup>[Prosecutor v. Bosco Ntaganda, Separate opinion of Judge Howard Morrison and Judge Piotr Hofmański on the Prosecutor’s appeal, ICC-01/04-02/06-2666-Anx1, 30 March 2021, para. 27.](#)



Second, even if a soldier engaging in or a commander directing an attack foresees that civilians may die or nearby civilian infrastructure may be damaged or destroyed because of it, this does not necessarily mean that it was unlawful. International criminal law recognises that such harms may occur incidentally to an attack on a legitimate military target (sometimes referred to as “collateral damage”). Nevertheless, there are certain limits to what is permissible even for attacks on legitimate targets, including the following key considerations:

- Under international humanitarian law, attacks should always respect the principle of proportionality, meaning that combatants should not launch attacks which could be expected to cause death and injury to civilians or damage civilian objects which is excessive in comparison to the “*concrete and direct military advantage anticipated*”.<sup>35</sup> The Rome Statute reflects this principle by prohibiting disproportionate attacks as a war crime, albeit with the difference that the foreseen incidental damage must be “*clearly excessive*”, rather than just “*excessive*”. In addition, the Rome Statute adds “*widespread, long-term and severe damage to the natural environment*” to the kinds of damage which are relevant to the proportionality analysis.<sup>36</sup>
- A report resulting from a meeting of international humanitarian law experts organised by the International Committee of the Red Cross (ICRC) to discuss the principle of proportionality emphasised that assessing civilian damage in the context of the proportionality analysis must give due weight to contextual matters such as, for example, incidental damage to churches being considered differently depending upon the religiosity of a population.<sup>37</sup> On an analogous basis, the assessment of proportionality of attacks should arguably factor in, for those which will foreseeably result in harm to media facilities, the impact this may have on freedom of expression and the public’s right to information, which is more significant than damage to some other kinds of civilian infrastructure. However, there are concerns with extending this principle to the loss of journalists’ lives, with the same expert panel generally rejecting the idea of taking an individual’s status or role in society into account in the proportionality calculation. This was both because this was far too “granular” a requirement for combatants and it could lead to a “slippery slope” whereby the value of human life is assessed differently for different people.<sup>38</sup>
- The use of certain means and methods of warfare are always prohibited under international humanitarian law and sometimes amount to war crimes. For example, the Rome Statute prohibits the use of certain kinds of weapons like bullets that “*expand or flatten easily in the human body*”<sup>39</sup>, poison<sup>40</sup> and poisonous or asphyxiating gases.<sup>41</sup>

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<sup>35</sup>[Additional Protocol I, note 27, Article 51\(5\)\(b\); and ICRC, Customary International Humanitarian Law Study, Rule 14: Proportionality in Attack.](#)

<sup>36</sup>Article 8(2)(b)(iv).

<sup>37</sup>[ICRC, International Expert Meeting Report on the Principle of Proportionality in the Rules Governing the Conduct of Hostilities under International Humanitarian Law, 3 September 2018, p. 62.](#)

<sup>38</sup>*Ibid.*, p. 61.

<sup>39</sup>Article 8(2)(b)(xix).

<sup>40</sup>Article 8(2)(b)(xvii).

<sup>41</sup>Article 8(2)(b)(xviii).

- Under international humanitarian law, an attack may never be indiscriminate, which refers to attacks which are not “directed at a specific military objective” or which employ means or methods which do not distinguish between military and civilian objects.<sup>42</sup> In this context, “means” of warfare refers to the weapons or weapons systems used, while “methods” refers to the kinds of tactics or strategies used. The ICC cannot currently prosecute using inherently indiscriminate weapons as a distinct war crime.<sup>43</sup> However, in certain circumstances the use of such weapons may be relevant to determining whether an attack on a lawful military objective caused clearly excessive incidental harms (such as for example where combatants could have used a different tactic or weapon to achieve the same military purpose). In addition, the ICC has indicated that the use of indiscriminate weapons may sometimes show that an attack was in reality directed against civilians or the civilian population and may be prosecuted as such.<sup>44</sup> As such, information that points to the indiscriminate nature of an attack or weapons may be relevant to establishing whether a war crime has been committed. This would include not only the use of inherently indiscriminate weapons but also the choice to use certain weapons, such as explosives with wide area effects, in densely populated areas, which in many, but not all, instances constitute indiscriminate or disproportionate attacks. Here, gathering contextual information about circumstances of an attack – such as about weapons shards, about how densely populated the area was or whether any military targets were in the vicinity – may be key.
- Combatants are required under international humanitarian law to take certain precautions prior to launching or ordering attacks to minimise harm to civilians, including taking every feasible precaution to ensure that the objects of an attack are military in nature (i.e. not civilian persons or objects).<sup>45</sup> This principle is not reflected directly in the Rome Statute but information about this may be relevant to assessing whether combatants have met the required mental element for the purposes of war crimes prosecutions by acting recklessly or not.<sup>46</sup>

Attacks on media and journalists often occur within a broader context of violence against the civilian population. Therefore, care should be taken to collect any information about the wider context (for example if it is part of a broader attack on that area or an isolated incident), as well as to any hateful or retaliatory motives behind the attacks, as they may be relevant for other core crimes. A key consideration to keep in mind is that any information pointing to journalists’ professional activities, gender, ethnicity or nationality as factors motivating any attack are key to collect.

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<sup>42</sup>[Additional Protocol I, note 27, Article 51\(4\)\(a\); and ICRC, Customary International Humanitarian Law Study, Rule 11: Indiscriminate Attacks.](#)

<sup>43</sup>Article 8(2)(b)(xx), applicable to international armed conflicts, proscribes certain inherently indiscriminate weapons but these are limited to those found in an annex, which does not yet exist and would have to be brought about through amendments.

<sup>44</sup>[See Prosecutor v. Katanga, Judgment pursuant to article 74 of the Statute, 7 March 2014, Case No. ICC-01/04-01/07, para. 802.](#)

<sup>45</sup>[Additional Protocol I, note 27, Article 57\(2\)\(a\)\(i\); ICRC Customary International Humanitarian Law, note 27, Rule 16: Target Verification.](#)

<sup>46</sup>Knut Dörmann, et al., *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (2002, Cambridge, Cambridge University Press and ICRC), pp. 138-147.

# Identifying Potentially Relevant Information on Attacks

- Were people or buildings nearby being used for military purposes or could they reasonably have been mistaken for legitimate military targets?
- For attacks on journalists, was their media role clearly identified (for example through labelling on jackets or vehicles)?
- Were any of the weapons used potentially absolutely prohibited?
- Does anything suggest the attack may have been indiscriminate? It can be dangerous to touch potentially live ammunition, which can instead be photographed ideally next to a recognisable object (such as a hand) to show size. Also relevant here is information about the context of the attack, such as whether the area was heavily or sparsely populated.
- How much harm was caused to civilian infrastructure, civilians or the environment? Does that appear to be excessive compared to the military advantage that was or could have been gained? Was any harm inflicted on military targets (if there were any)?
- Do any precautions appear to have been taken before the attack to mitigate risks to civilians, such as advance surveillance of the area or warning civilians to evacuate?
- Is there any indication that victims may have been targeted due to their profile (such as their gender or journalistic work)?
- Is there any information on which individuals or military units may have been responsible for the attack (for example based on uniforms, insignia, equipment used or names of individual soldiers)?

Civilians, including journalists, may become legitimate military targets if they directly participate in hostilities, during the period they do so. This includes taking up weapons and engaging in fighting or other acts of violence against troops, although certain actions taken in personal self-defence are not included in this. More complex issues arise when civilians are supporting a party to an armed conflict through other means. Certain direct military logistical support, like driving a truck to deliver ammunition to combatants who are directly engaged in hostilities, is likely to qualify as direct participation in hostilities, while more indirect forms of support, such as providing food or shelter to combatants, is unlikely to do so. To provide guidance on this area of the law, in 2009 the ICRC published an Interpretive Guidance on what constitutes “direct participation in hostilities”.<sup>47</sup> However, some of its findings were controversial and aspects of the law remain unsettled.

As far as journalists are concerned, certain considerations are worth keeping in mind. Merely publishing “political propaganda” would almost never qualify as directly participating in hostilities. Publishing reports or engaging in journalistic work which supports one side in a conflict or lacks objectivity may thus be inconsistent with journalistic ethics but is generally insufficient to lose civilian protection from attacks.

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<sup>47</sup>[Nils Melzer, Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, \(2009, Geneva, ICRC\).](#)

Certain other acts may constitute direct participation in hostilities, for example transmitting sensitive tactical information to assist with a military operation (for example reporting on troop movements to assist the other party with responsive military measures).<sup>48</sup> If journalists undertook such actions, attacks directed at them at the time of those activities might no longer qualify as attacks on civilians for the purposes of the principle of distinction. However, they would generally regain protection from attacks under international humanitarian law when they stopped if these were spontaneous or sporadic, rather than organised, actions. However, there are prohibitions on certain forms of behaviour even vis-à-vis combatants (and by extension civilians participating in hostilities). For example, it is still illegal to use poison on a combatant or kill a combatant who has laid down their weapons and surrendered.<sup>49</sup>

Civilian infrastructure, including media offices or broadcasting infrastructure, might end up being used for military purposes and, as a result, become a lawful military target during the time it was being used as such.<sup>50</sup> For example, a radio transmitter might be used by combatants for tactical communications. More complex considerations emerge in respect of infrastructure which has a dual military and civilian use, such as some power or communications infrastructure. While such objects may at times constitute legitimate targets, attacks on them which disproportionately harm civilians may amount to war crimes in certain circumstances. For example, where an attack on energy infrastructure which is used by both the military and civilians causes clearly excessive harm to the latter, the acts may constitute war crimes (and potentially crimes against humanity in certain circumstances).<sup>51</sup> For example, a report from the UN's Independent International Commission of Inquiry on Ukraine found that certain Russian attacks on Ukrainian energy infrastructure had predictably caused severe harm to civilians who lacked electricity and heat in the winter and concluded that they "*were disproportionate and that they constituted the war crime of excessive incidental death, injury, or damage*", in addition to possibly amounting to the crime against humanity of other inhumane acts.<sup>52</sup> Ultimately, journalists do not need to be legal experts on these issues for documentation purposes. Rather, what is important is to understand that information pointing to the civilian or military character of any objects of attacks and information about broader, potentially disproportionate impacts on civilians or civilian infrastructure are relevant to determining whether an attack may qualify as a war crime.

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<sup>48</sup>The ICRC's Interpretive Guidance included "wiretapping the adversary's high command" or "transmitting tactical targeting information for an attack" as possible examples of acts which might meet the "threshold of harm" for directly participating in hostilities, one of the required elements for direct participation in hostilities under their approach to this issue. See *ibid.*, p. 48.

<sup>49</sup>Rome Statute, Articles 8(2)(b)(vi) and 8(2)(b)(xvii).

<sup>50</sup>Under international humanitarian law, in order to qualify as a military objective, an object must fulfil two conditions: first, that "by their nature, location, purpose" they make "an effective contribution to military action" and second, that their "partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage". See [ICRC, Customary International Humanitarian Law Study, Rule 8: Definition of Military Objectives](#).

<sup>51</sup>See Michael Schmitt, Articles of War, "[Ukraine Symposium: Attacking Power Infrastructure under International Humanitarian Law](#)", 20 October 2022; and, for a more general overview, Ben Tobias, "[Is attacking Ukraine's power grid a war crime?](#)", 1 December 2022, BBC.

<sup>52</sup>[Report of the Independent International Commission of Inquiry on Ukraine, A/HRC/52/62, 15 March 2023, paras. 40-43.](#)

One emerging area of international criminal law is the question of to what extent certain cyberattacks might constitute international crimes, including war crimes. A series of three meetings of a panel of international experts under the auspices of the Permanent Mission of Liechtenstein to the UN were dedicated to examining the application of the Rome Statute to cyberwarfare in 2020 and 2021. The experts were in unanimous agreement that cyberoperations undertaken in armed conflicts may qualify as war crimes if they satisfy the general conditions for these crimes.<sup>53</sup> It follows that certain wartime cyberattacks on civilian digital infrastructure, indiscriminate cyberattacks, or cyberattacks on military infrastructure with disproportionate impacts on civilians, civilian infrastructure or the environment might qualify as war crimes. Although this issue is still relatively novel, cyberattacks may well undergo judicial scrutiny as war crimes in relation to Ukraine due to their frequency of their use in that conflict, including where they affect media infrastructure.<sup>54</sup>

Although this subsection focusses on war crimes of intentionally directing attacks at civilians and civilian infrastructure (as well as disproportionate attacks on lawful targets), the wilful killing of non-combatants, including not only civilians but also injured or sick combatants or prisoners of war, is considered to be a distinct war crime.<sup>55</sup> Similarly, such acts, whether or not related to an armed conflict, may amount to crimes against humanity if committed as part of a “widespread or systematic” attack on a civilian population, and the perpetrator knew of the attack and intended these killings to be part of it. In such circumstances, the acts may meet the criteria for different crimes against humanity, specifically:

- The crime against humanity of “murder”.<sup>56</sup>
- In more extreme circumstances involving a mass killing of civilians, the crime against humanity of “extermination”.<sup>57</sup>
- The crime against humanity of “persecution”.<sup>58</sup>

In relation to the crime against humanity of persecution, its inclusion in this list stems from its prohibition of sufficiently grave and discriminatory denials of fundamental rights in connection with any crimes under the ICC’s jurisdiction. This would include, among other things, wilful killings of journalists, as the right to life is certainly a fundamental right. However, for persecution, in addition to satisfying the other criteria for crimes against humanity, the perpetrator has to have acted with a discriminatory intent.<sup>59</sup> As a result, information pointing to discriminatory motives for the attack, such as targeting individuals based on political opinion, gender or nationality, is relevant to the crime of persecution.

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<sup>53</sup>[Permanent Mission of Liechtenstein to the UN, The Council of Advisors’ Report on the Application of the Rome Statute of the International Criminal Court to Cyberwarfare, August 2021, pp. 27 and 46.](#)

<sup>54</sup>See, for example, [Jon Bateman, Russia’s Wartime Cyber Operations in Ukraine: Military Impacts, Influences, and Implications \(2022, Washington D.C., Carnegie Endowment for International Peace\)](#) ; AJ Vicens, Cyberscoop, [“Cyber criminals attack Ukrainian radio network, broadcast fake message about Zelensky’s health”, 21 July 2022.](#)

<sup>55</sup>Rome Statute, Article 8(2)(a)(i).

<sup>56</sup>ICC, Elements of Crimes, note 7, Article 7(1)(a).

<sup>57</sup>Other than the difference of scale of the mass killings directed at a civilian population, a further distinction between the crimes against humanity of extermination and murder is that the former expressly includes certain indirect means of causing death in a manner similar to genocide, albeit without the genocidal specific intent requirement that the action be intended to destroy in whole or part a group. See ICC, Elements of Crimes, 7(1)(b); Robert Cryer et. al, *An Introduction to International Criminal Law and Procedure*, 3rd Edition (Cambridge, Cambridge University Press, 2014), p. 246.

<sup>58</sup>Rome Statute, Article 7(1)(h).

<sup>59</sup>ICC, Elements of Crimes, note 7, Article 7(1)(h), provides a list of possible grounds for discrimination.

When identifying the relevant grounds of persecution, it is sufficient if the persecutor identified the victim as a member of the group; this perception does not need to be objectively well-founded. Thus, the Appeal Chamber of the International Criminal Tribunal for the Former Yugoslavia found that a “Serb mistaken for a Muslim may still be the victim of the crime of persecution”.<sup>60</sup> It follows that persecution on political grounds may extend beyond retaliation for expressions of actual political beliefs or political advocacy. Sadly, in the heated context of an armed conflict, even impartial and objective journalism, such as coverage of war crimes committed by a party to a conflict, may be construed as a political statement even if journalists do not consider their reporting to be political in nature.

## 2.2.2 Property Crimes

The Rome Statute contains a number of war crimes covering unlawful uses of property during international armed conflicts, specifically the crimes of destruction and appropriation of property,<sup>61</sup> the destruction and seizure of enemy property,<sup>62</sup> and pillaging a town or place.<sup>63</sup> In addition, the disproportionate destruction of civilian property incidental to an attack on a military target would be covered by the previously discussed war crime covering disproportionate attacks.<sup>64</sup>

Destruction, appropriation and seizure of property will not constitute war crimes if justified by military necessity.<sup>65</sup> Thus, for example, in the context of urban warfare, combatants might be justified in temporarily taking over a media office situated in a particularly strategic location with clear views of nearby enemy sniper positions. However, taking over a media office solely to punish media workers for their coverage would not qualify as military necessity and may constitute a war crime. In the case of pillaging, military necessity is irrelevant since it refers to appropriation of property for “private or personal” reasons.<sup>66</sup>

Discriminatory attacks on public or private property may also meet the definition of persecution for the purposes of crimes against humanity, as long as the other elements of this crime are met and, in the context of an armed conflict, the attacks were not justified by military necessity. The property damage must have a sufficiently severe impact on the victim. For example, in one judgment by the International Criminal Tribunal for the Former Yugoslavia, the Tribunal observed that burning a car would not qualify unless it constituted an “indispensable and vital asset to the owner” but, in that case, the “comprehensive destruction of homes and property” of Bosnian Muslims was found to qualify.<sup>67</sup>

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<sup>60</sup>Prosecutor v. Milorad Krnojelac, Appeals Chamber Judgment, 17 September 2003, Case No. IT-97-25-A, para. 185, <https://www.icty.org/x/cases/krnjelac/acjug/en/krn-aj030917e.pdf>.

<sup>61</sup>8(2)(a)(iv).

<sup>62</sup>Article 8(2)(b)(xiii).

<sup>63</sup>Article 8(2)(b)(xvi).

<sup>64</sup>Article 8(2)(b)(iv).

<sup>65</sup>ICC, Elements of Crimes, note 7, Articles 8(2)(a)(iv) and 8(2)(b)(xiii).

<sup>66</sup>Ibid., Article 8(2)(b)(xvi), Elements 2 and 3.

<sup>67</sup>Prosecutor v. Kupreskic et. al., Trial Chamber Judgment, 14 January 2010, Case No. IT-95-16-T, para. 631, .



The Rome Statute recognises certain war crimes relating to unlawful restrictions on liberty and mobility, such as taking hostages<sup>68</sup> or, in international armed conflicts, the unlawful deportation, transfer or confinement of civilians.<sup>69</sup> However, in assessing lawfulness for the purpose of this crime, it is important to bear in mind that the detention and transfer of civilians is permitted in certain circumstances under international humanitarian law.<sup>70</sup> For example, under the Fourth Geneva Convention of 1949, civilian internments in international armed conflicts are allowed for security reasons “if absolutely necessary”<sup>71</sup>, and this Convention also regulates both the procedures<sup>72</sup> and the material conditions of such internment.<sup>73</sup>

International humanitarian law recognises two situations which may justify deportations and/or forcible transfers of civilian populations in occupied territories, namely if required for either “the security of the population” or “imperative military reasons”. This body of law also establishes conditions on the exercise of these powers, such as that civilians be transferred back to their homes “as soon as hostilities in the area in question have ceased”.<sup>74</sup>

The Rome Statute also recognises crimes which are relevant to protecting the rights of individuals who find themselves in situations of captivity, such as denying them a fair trial and declaring “abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party”.<sup>75</sup>

Information relating to the circumstances of a detention, including to any potential motivation behind and official justification for the detention, as well as any mistreatment of detainees in captivity, may be relevant for war crimes investigations. For example, information indicating that journalists working at a given media outlet appear to have been taken into captivity while nearby civilians were spared may be relevant to establishing whether the detention was lawful.

In addition, the Rome Statute lists imprisonment or other “severe deprivation of physical liberty in violation of fundamental rules of international law”, as well as enforced disappearance, as crimes against humanity.<sup>76</sup> International humanitarian law sets out detailed rules governing detentions in international armed conflict which are pertinent to what the “fundamental rules of international law” are for purposes of deprivation of liberty in situations of armed conflict. More generally, under international human rights law, also part of the “fundamental rules of international law”, detentions undertaken to punish the legitimate exercise of rights, which, most relevantly for journalists, would include freedom of expression, are not allowed (arbitrary).<sup>77</sup>

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<sup>68</sup>Articles 8(2)(a)(viii) and 8(2)(c)(iii)

<sup>69</sup>Article 8(2)(a)(vii). Article 8(2)(b)(viii) also prohibits the transfer by a party to an armed conflict of its own civilian population into occupied territory.

<sup>70</sup>For the circumstances in which such detentions and transfers are lawful under international humanitarian law and relevant procedural guarantees see, [Geneva Convention Relative to the Protection of Civilian Persons in Time of War \(Fourth Geneva Convention\), 12 August 1949, Articles 41-43, 68, 78 and 79-141.](#)

<sup>71</sup>*Ibid.*, Article 42.

<sup>72</sup>For example, this includes a right to have the internment reviewed. See *ibid.*, Article 43.

<sup>73</sup>For example, persons are not to be interned in areas “exposed to the dangers of war”. See *ibid.*, Article 83.

<sup>74</sup>*Ibid.*, Article 49.

<sup>75</sup>Articles 8(2)(a)(vi) and 8(2)(b)(xiv).

<sup>76</sup>Articles 7(1)(e) and 7(1)(i).

<sup>77</sup>[UN Human Rights Committee, General comment No. 35: Article 9 \(Liberty and security of person\), 16 December 2014, para. 17.](#)

Other circumstances which would render a detention to be considered arbitrary under international human rights law are if there were no legal basis for it<sup>78</sup> or if it were based on a case involving sufficiently grave violations of the right to a fair trial.<sup>79</sup>

Article 7(2)(i) of the Rome Statute defines the enforced disappearance of persons, for the purposes of crimes against humanity, as follows:

[A]rrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

It is apparent from this definition that a key characteristic of enforced disappearances is the failure to acknowledge the disappearance or provide information about the person who has been detained, including whether that person is alive and their location.

Lastly, Article 7(1)(d) of the Rome Statute recognises the “[d]eportation or forcible transfer of population” as a crime against humanity. For this crime, the deportation or transfer must be contrary to international law,<sup>80</sup> which would preclude any of the situations in which transfers are permitted under international humanitarian law. It bears noting that the reference to “forcible” includes not only physical force but also other forms of coercion, such as “fear of violence” or “psychological oppression”.<sup>81</sup> Another element of this crime is that the victims were “lawfully present” in the area prior to the deportation or transfer.<sup>82</sup>

## 2.2.4 Violence and Mistreatment

Several war crimes in the Rome Statute prohibit certain severe mistreatment of non-combatants (civilians, injured or sick combatants or prisoners of war). One of these is the prohibition on compelling nationals of the opposing hostile forces to take part in “operations of war directed against their own country”.<sup>83</sup>

Other war crimes relating to violence and mistreatment include wilful killing,<sup>84</sup> and subjecting captives to “physical mutilation”, to harmful medical or scientific experiments<sup>85</sup> or torture or inhumane treatment (which includes biological experiments).<sup>86</sup> Elements of the war crime of torture include that there be “severe physical or mental pain or suffering” and that it be done for purposes of “*obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind*”.<sup>87</sup>

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<sup>78</sup>This would generally exclude detentions which were authorised by international humanitarian law.

<sup>79</sup>See, for example, [Working Group on Arbitrary Detention, Opinion No. 16/1997, p. 23, para. 3.](#)

<sup>80</sup>ICC, Elements of Crimes, note 7, Article 7(1)(d), Element 1.

<sup>81</sup>*Ibid.*, 7(1)(d), footnote 12.

<sup>82</sup>*Ibid.*, 7(1)(d), Element 2.

<sup>83</sup>Article 8(2)(b)(xv).

<sup>84</sup>Rome Statute, 8(2)(a)(i).

<sup>85</sup>*Ibid.*, Article 8(2)(b)(x).

<sup>86</sup>*Ibid.*, Article 8(2)(a)(ii).

<sup>87</sup>ICC, Elements of Crimes, note 7, 8(2)(a)(ii), Elements 1 and 2.



Torture is also a crime against humanity under the Rome Statute.<sup>88</sup> Unlike the war crime of torture, in this case there is no requirement that the mental or physical pain be for certain purposes. As the purpose of the mistreatment may or may not be relevant, journalists should air on the side of caution and preserve any information which may be relevant to this issue in addition to information regarding physical or psychological harms caused, and the identity and responsibility of the perpetrator(s).

Article 7(1)(k) of the Rome Statute additionally prohibits, as a crime against humanity, other “*inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health*”. This encompasses various forms of severe mistreatment which may not meet the exact definition of torture.

## 2.2.4

### Sexual and Gender-based Violence and Gender-based Persecution

The Rome Statute explicitly prohibits as war crimes several kinds of sexual violence, specifically “*rape, sexual slavery, enforced prostitution, forced pregnancy...enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions*”.<sup>89</sup> The ICC’s Elements of Crimes adopts a traditional, anatomical view of rape, albeit a gender-neutral one, by requiring “*penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body*.”<sup>90</sup> However, sexual violence would cover other sexual acts which met a test of sufficient gravity.<sup>91</sup>

Under the Rome Statute, rape and sexual violence must have been committed through force, or threat of force or coercion. Examples given in the ICC’s Elements of Crimes are “*fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment or such person’s or persons’ incapacity to give genuine consent*”.<sup>92</sup> The presence of coercive, forceful or threatening circumstances, which may be apparent from the circumstances surrounding the sexual violence, are enough to constitute these crimes even if the victim did not specifically manifest resistance. Moreover, under the ICC’s Rules of Procedure, consent cannot be inferred by the silence of a victim of sexual violence or from their words or conduct in coercive situations.<sup>93</sup> It is also important to keep in mind that, minors do not have the capacity to consent.

The Rome Statute also includes a war crime of “*outrages upon personal dignity, in particular humiliating and degrading treatment*”.<sup>94</sup> This expression is taken from Article 3 common to the 1949 Geneva Conventions, which has been interpreted as encompassing some forms of sexual violence (and threats of such violence), as well as other kinds of degrading treatment. For example, the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia found that outrages on personal dignity had regularly occurred against detainees in a camp where “*they endured the constant fear of being subjected to physical, mental, or sexual violence in the camp*”.<sup>95</sup>

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<sup>88</sup>Article 7(1)(f).

<sup>89</sup>Article 8(2)(b)(xxii).

<sup>90</sup>ICC, Elements of Crimes, note 7, 8(2)(b)(xxii)-1.

<sup>91</sup>Ibid., Article 8(2)(b)(xxii)-6.

<sup>92</sup>Ibid., Articles 8(2)(b)(xxii)-1 and 8(2)(b)(xxii)-6.

<sup>93</sup>[Rules of Procedure and Evidence of the International Criminal Court, 2019, Rules 70\(a\)-\(c\).](#)

<sup>94</sup>Article 8(2)(b)(xxi).

<sup>95</sup>[Prosecutor v. Miroslav Kvocka et al., Trial Chamber Judgment, 20 November 2001, Case No. IT-98-30/1-T, paras. 173-174.](#)

Rape is also a crime against humanity under the Rome Statute, along with “*sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity*”.<sup>96</sup> As with other crimes against humanity, a single rape may qualify as a crime against humanity if it is committed as part of a widespread or systematic attack on civilians which transforms it into an international crime.

More broadly, instances of serious rights abuses undertaken with persecutory intent based on gender grounds may fall under the crime against humanity of persecution. The Rome Statute, like any treaty, was the product of a negotiation involving States with varied viewpoints on certain issues and Article 7(3) defines gender somewhat ambiguously as “*the two sexes, male and female, within the context of society*”. In a 2014 position paper, the ICC’s Office of the Prosecutor asserted that this definition “*acknowledges the social construction of gender, and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and to girls and boys*”.<sup>97</sup> As with other forms of persecution, it is sufficient that the persecutor identify the victim as a member of the group even if the victim does not agree with that identification.

International criminal tribunals have recognised the intersectional nature of sexual violence finding, for example, that sexual violence may be motivated by ethnic and gender-based discrimination in the context of violence against Tutsi women in Rwanda.<sup>98</sup> It is therefore key to look for any potentially overlapping discriminatory motivations behind violations such as, for example, gender and nationality.

It bears emphasising that for the purposes of the crime against humanity of persecution, the kinds of rights violations which constitute an element of the offence may extend beyond sexual or even physical violence. Although the rights deprivation must be severe to qualify, this has sometimes been interpreted fairly broadly by international criminal tribunals. For example, the International Criminal Tribunal for the Former Yugoslavia found that “*mental harm or infringements upon individual freedom*” may qualify as persecutory acts or omissions.<sup>99</sup>

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<sup>96</sup>Article 7(1)(g).

<sup>97</sup>[Policy Paper on Sexual and Gender-Based Crimes, June 2014, p. 3.](#)

<sup>98</sup>[International Criminal Tribunal for Rwanda, Prosecutor v. Nahimana, Barayagwiza and Ngeze, Trial Chamber Judgment, 3 December 2003, Case. No. ICTR-99-52-T, para. 1079.](#)

<sup>99</sup>[Prosecutor v. Mitar Vasiljevic, Trial Chamber Judgment, 29 November 2002, Case No. IT-98-32-T, para. 246.](#)

### 3 Documenting International Crimes and the Role of Journalists

Whereas the previous parts of this Manual were focussed on understanding the substance of international crimes, the remainder of this Manual is devoted to understanding what kinds of information may constitute evidence of international crimes and contains best practices for journalists on collecting and preserving such evidence.

#### 3.1. Introduction to Evidentiary Concepts

Journalists may come into contact with various different kinds of information stored in various formats during the course of their work. This information will take different forms, of which some of the more relevant for present purposes are: images or videos; testimony (for example of survivors or witnesses, which may be documentary or audio or video recordings); physical (for example weapon fragments or bullet shells); documentary (for example, a signed letter); and expert (for example forensic analysis of a picture to identify evidentiary conclusions may be drawn from it). Journalists will normally focus on the first four and mainly on the first two.

Evidence can broadly be broken down into three main types, namely direct – showing that a crime has been committed (for example, a picture of a dead civilian showing they died from a bullet wound) – linkage – pointing to who is responsible (for example, eye-witness testimony about who fired the gun which shot the bullet) – or contextual – helping to understand the wider issues in the case which help interpret other evidence (for example, satellite images showing that no enemy soldiers were present in the area at the time the bullet was fired).

In relation to the second kind of evidence, linkage evidence, it bears emphasising that this kind of evidence is often a critical missing link in international investigations. Often, there may be overwhelming evidence of an international crime while evidence as to who exactly are the perpetrators is lacking. You may come across information that does not seem to be sufficient to establish exactly who was responsible but which may ultimately help investigators determine this and then go out and investigate further. For example, information on the kinds of military equipment soldiers had at the time of a violation, any distinct insignia on their clothing, the kinds of uniforms they were wearing and names overheard may all be relevant to determining who was responsible for crimes. Moreover, even if it is not possible to identify the individual direct perpetrator, information pointing to which military unit was involved may support investigations into potential responsibility of superior officers.

In general, three key elements must be present for information to be able to be admitted in court as evidence, as outlined below. Even if information does not meet all three of these elements, it might still be relevant for administration of justice actors. For example, information lacking some of these qualities may still be sufficiently pertinent to trigger a formal investigation or even an arrest, since the very strict rules of evidence do not apply in the same way to these actions as to court hearings.

## Relevance

Relevance mainly refers to the tendency of information make the “existence of a fact at issue more or less probable”,<sup>100</sup> which at criminal trials mainly refers to its ability to prove or cast doubt on one of the elements of the crime or a defence. Often, evidence needs to be corroborated by other evidence. The fact that information does not single-handedly prove or disprove an element of a crime does not mean it is not relevant. But it does need to materially support the proof or otherwise of an element of a crime or a defence, even if only in a contextual way. For example, information showing that a suspected perpetrator was in the vicinity of the scene of the crime shortly before or after the crime was committed is likely relevant information even if, without further evidence, it is insufficient to establish individual liability. Ultimately, investigators, prosecuting and defence lawyers and judges will decide on relevance. But the elaboration of the core international crimes, above, is intended to help journalists focus on information which is more likely to be relevant.

## Reliability

Reliability refers to information being sufficiently trustworthy to allow courts to admit it as evidence. As such, this is for our purposes the most important of the three elements, and the one where the specific actions journalists take in relation to information can have the most impact. Reliability, in turn, can broadly be broken down into three sub-qualities:

- **Verifiability:** the information is what it claims to be. A number of features go to this, of which metadata – for example showing the location, date and time the information was captured – can be very important.
- **Authenticity:** the information has not been tampered with. Several features are relevant here, of which being able to demonstrate a trusted chain of custody over the information can be important (for example, so that it is clear who had access to digital files).
- **Probative value:** the weight to be assigned to the information. This again depends on a number of factors such as the credibility of the source or author of the information and how determinative it is of facts at issue in the case.

## Absence of Prejudicial Effect

Information may in certain circumstances be excluded or deemed to be inadmissible if it is likely to create a prejudicial effect, with a particular focus on prejudice against the accused, which would breach the presumption of innocence. For example, even information which is reliable may be misleading or be likely to create emotional bias or unfairly sway a decision-maker, i.e. a judge or a jury. For example, a live, gory video of a bullet hitting the head of a civilian may evoke a strong emotional reaction while a still picture of the head of the civilian showing a bullet hole may have the same evidentiary value but not have significant emotional impact. A video of an accused person acting aggressively and swearing at police, although they are charged with an entirely different offence, might also be deemed to be prejudicial. As a practical matter, the best way for journalists to try to avoid having information excluded on this basis may be to try document information in several formats if possible.

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<sup>100</sup>Nikita Mehandru and Alexa Koenig, “Open Source Evidence and the International Criminal Court”, (2022) 35 Harvard Human Rights Journal, <https://harvardhrj.com/2019/04/open-source-evidence-and-the-international-criminal-court/>.

## Kinds of Evidence for Establishing International Crimes

- **Direct Evidence:** Evidence showing a crime has occurred, such as the corpse of a civilian with a fatal bullet wound
- **Linkage Evidence:** Evidence showing who may be responsible, such as photos showing an individual soldier or military unit was in the area at the time
- **Contextual Evidence:** Evidence which supports a conclusion that a crime was committed, such as the use of non-precision weapons in a densely populated civilian neighbourhood

## Key Elements for Information to be Admissible

- **Relevance:** Helps prove or cast doubt on a fact at issue in the case, such as an element of the offence or a defence
- **Reliability:** The trustworthiness of the information based on its verifiability, authenticity and probative value
- **Absence of Prejudicial Effect:** The information will not unfairly influence decision-makers. To cover cases where evidence is excluded on this basis, it is helpful to collect different kinds of information establishing the same fact.

## 3.2 Protection of Confidential Sources and Testimonial Privilege

The right of journalists to refuse to disclose the identity of their confidential sources of information is protected under international law and in many national legal systems, often constitutionally as well as by statute. Professional codes of conduct for the media often also impose an obligation on journalists not to disclose their confidential sources of information. The core rationale for this is to protect the right of the public to receive public interest information from sources through the media since sources may not come forward in the first place if they are not convinced that their confidentiality will be protected.

Like the core right to freedom of expression from which it is derived, this right is not absolute under either international law or most national legal systems, although the former places strict conditions on when it may be overridden. Journalists should always be aware of the status of this right – both legally and in practice – in their own countries, so that they understand the conditions which may apply to their keeping any promises of confidentiality to sources they make. And, in making such promises, journalists should always make sure that sources are aware of any conditions or limitations on those promises.

Collecting information about international crimes, including crimes against journalists, may raise special issues relating to source confidentiality. Specifically, while journalists can report on incidents in a way that does not expose confidential sources, for information to be accepted as evidence in court often requires the provision of more detailed background and metadata about that information. Courts may even require individuals to testify before them to verify information or to allow claims to be probed through cross-examination by lawyers representing accused persons. Furthermore, in many countries, the investigation and prosecution of serious crimes is one of the grounds for overriding source confidentiality.

As a result, it is important for journalists to be very careful, when providing information about international crimes, not to expose any confidential sources either willingly or inadvertently, including by putting themselves in a position where a court may decide to override their right to protect their confidential sources and require the disclosure of those sources to the court. When faced with a choice between protecting a confidential source and supporting an international criminal investigation, journalists should almost invariably opt for the former, including to protect the editorial integrity of journalistic work.

A slightly different issue, albeit largely based on the same rationale of protecting the flow of information to the public, as well as ensuring the security of journalists, is the question of whether journalists may themselves refuse to testify before a court. To the extent that they are protected against having to testify, this may also affect their right to protect their confidential sources of information.

In the Radoslav Brdjanin and Momir Talic case, the Trial Chamber took the position that while journalists reporting on conflict should not be “subpoenaed unnecessarily”, once material had been published and the source identified, the risk testifying posed to news gathering and reporting was minimal and it was thus sufficient if the evidence was “pertinent”.<sup>101</sup> The Appeals Chamber differentiated between journalists in general and war correspondents as a particular category of journalists, focusing its decision only on the latter group. It recognised that even where a source had been exposed and information published, issues such as the independence and safety of war correspondents continued to be relevant considerations when it came to compelling them to testify, especially if such practices became routine. In light of that, the Appeals Chamber proposed a two-part test for deciding whether it was legitimate to require a war correspondent to testify:

- First, the petitioning party must demonstrate that the evidence sought is of direct and important value in determining a core issue in the case.
- Second, it must demonstrate that the evidence sought cannot reasonably be obtained elsewhere.<sup>102</sup>

Much of the specific reasoning of the Appeals Chamber revolved around the special role and activities of war correspondents, so that it is unclear how far these standards would apply to other journalists. Much may depend on the specific circumstances of each case. The Chamber also held that the original published article would be admissible, depending on its relevance and other related considerations.

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<sup>101</sup>Note 3, para. 8.

<sup>102</sup>*Ibid.*, para. 50. The Chamber’s full reasoning on this issue is contained in paras. 34-51 of the decision.

### 3.3. Some General Considerations

The kinds of information journalists may collect can be broken down into information that journalists themselves capture first-hand and testimonies, and other information which has been provided to them.

The basic goal when recording information directly – whether by photograph, video or audio recording – is to capture as much supporting information, including metadata, as possible so as to establish where and when the information was collected, who or what it relates to and so on. Many modern devices can automatically attach date, time and location information to recordings and a number of apps – such as those provided by eyeWitness and ProofMode, a joint project of The Guardian and WITNESS (see below, under Resources) – can also do this and more. Capturing external sources – such as a clock, street sign or picture of that day's newspaper – as part of the recording can be a useful supplementary way of doing this. Establishing supporting information in more than one way is always helpful. Corroboration of the substance of your recording with eyewitnesses is very useful when this is possible.

Supporting information can also be provided alongside the recording, for example by providing it in audio format as part of the recording or on a signed document. It is always useful to keep a separate written summary of both the relevant metadata and a description of what exactly was captured, by whom, and with any additional supporting information (*"I entered this street shortly after it had been the site of active combat and active shooting could still be heard nearby."*) This not only helps verify and supplement the recorded information but it can also be helpful to refresh your memory should you be called upon to testify in court later on about the information.

In terms of the scope of information to capture, think about the types of crimes that may have been committed and what information may be useful to establish criminal responsibility. This could include, for example, the fact that a crime was committed (such as of physical destruction of property or injuries or deaths of victims), who committed it, information suggesting a motivation (for example, a recording of a soldier screaming an insult while attacking a civilian), and broader contextual evidence (such as the presence or not of nearby military targets). As discussed more below, interviewing victims, eyewitnesses and potentially even parties who were involved can be an extremely powerful way of expanding the scope of information captured.

Where information – such as a recording, a document or physical evidence – is provided by a third party, it is important to document who provided it to you and also relevant metadata relating to it (where and when did they obtain it).

Interviews which journalists conduct with victims and witnesses as part of their newsgathering can also provide important corroborating information or direct information about the commission of crimes. The points made above about supporting information (such as metadata) and the scope of information to obtain apply here just as they do to the direct capture of information.



## 3.4. Best Practices for Collecting and Preserving Information

The decision by a media outlet or individual journalist to engage in collecting and preserving information for the purpose of assisting with accountability efforts for international crimes raises a number of practical and logistical questions and should not be taken lightly without sufficient forethought and planning.

One paramount concern is the need for journalists to recognise and take steps to minimise any risks to themselves, their colleagues and their sources, in line with the ‘do no harm’ approach.<sup>103</sup> Documenting criminal behaviour can be dangerous, including because guilty parties do not want to be brought to justice and they may be willing to engage in further criminal behaviour, including retaliation, to avoid being caught. It is important for journalists to understand the wider context in which their activities to document crimes is taking place. Given the risks involved in this kind of information gathering, journalists will also want to ensure they have proper protocols in place to improve the likelihood that any information they gather will be reliable. Some best practices for mitigating risks and enhancing reliability of information are discussed below.

### 3.4.1 Interviewing Techniques

It is very important to get informed consent from a potential interviewee before actually interviewing them. The concept of “informed consent” is rooted in four fundamental principles: prior disclosure to them of the purpose and intended use of the interview, voluntariness (i.e. the absence of undue pressure to consent to the interview), comprehension on their part about how the interview will be used, and competence on their part to give consent. Normally, this means that the person understands who you are, where the interview will be shown/used and who will see it, and any potential risks associated with giving the interview. Any decision to withdraw consent subsequently (i.e. after it has already been given) should of course be respected.

Often the best way to demonstrate consent is to get a simple signed consent form from the person, although a live recorded oral consent – video is better than audio – may also suffice. In the case of a video recording of testimony, a good practice is to not only to have the interviewee consent verbally at the outset of the interview but also, as part of the recording, to ask them to describe the purpose and potential use of the material (which should have been explained to them before any consent was asked for). By providing such information in their own words, they can demonstrate true understanding of the purpose of the interview. Non-recorded oral consent is still consent, but it can be difficult to prove later on that it was given should the need arise.

Note that anonymous evidence may not be admissible in court or may be awarded little weight, so you may need to disclose the name of anyone providing an interview. An interview may be admissible on its own in court as evidence or the court may require the person who provided the interview to be made available for cross-examination by lawyers for the defence.

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<sup>103</sup>Jo Healy, [Safety of journalists covering trauma and distress ‘Do no harm’](#) (2022, UNESCO).



Particular care must be taken when dealing with individuals who have been exposed to trauma and other vulnerable persons. This is true for many, if not most, victims of international crimes, and often also witnesses, but takes on particular salience when dealing with minors and survivors of torture and sexual violence. Before engaging with witnesses or victims in any information collecting activity, including interviews, it is important to assess whether the individual is in fact capable of giving informed consent and whether the information collection may cause additional harm, as well as to identify any needed supportive or protective measures.<sup>104</sup> Interviewing involves reliving the event and may risk further traumatising, and appropriate care is therefore required.

It is also important to be professional when conducting interviews. It is particularly important not to let any assumptions you might have about what happened creep into the interview. For example, if you ask very leading questions which influence the answers and perhaps also the thinking of the interviewee, that interview may not only be inadmissible in court later on but it may also “corrupt” the interviewee so that even a subsequent interview of the same person by a professional criminal investigator may be deemed to be inadmissible. If your questions convince the interviewee that something happened, their attesting to it may no longer be accepted as independent evidence.

The credibility of the interviewee is also an important consideration. A number of factors go to this, such as the coherence of their interview both internally (i.e. they do not contradict themselves) and with other evidence (i.e. they do not contradict what others say). The extent to which they have direct knowledge of the events in question is also important. As such, when interviewing, you should try to stick to the facts about which the interviewee has direct knowledge and to focus on factual issues, avoiding questions which elicit opinions.

## 3.4.2 Keeping Information Secure

It is obviously very important to keep both physical and digital information secure. This can be particularly important when the government which controls the territory on which you are operating is likely to be hostile to the capture of information about international crimes. In this case, security of information is important both to preserve it and potentially for your own safety.

There are a number of ways to minimise security risks. Some options here are:

- storing the information in encrypted format;
- deleting/concealing files from/on your device;
- encrypting/anonymising/deleting the names of contacts to protect them;
- archiving evidence securely, ideally on an external hard drive and/or in cloud storage; and
- keeping your information organised (see [WITNESS' Activists' Guide to Archiving Video](#)).

Using mobile applications developed by international civil society groups can also help here. For example, the eyeWitness app automatically deletes copies from your phone as soon as information is uploaded to their server and the app is camouflaged on the phone's home screen.

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<sup>104</sup>European Agency for Criminal Justice Cooperation, Documenting international crimes and human rights violations for accountability purposes: Guidelines for civil society organisations, note 16, pp. 13-15.

Traditionally, a major limiting factor regarding the usefulness of information obtained by journalists and civil society groups (as well as open-source information provided by ordinary citizens, such as many YouTube videos) revolve around reliability. Concerns about reliability have at times led to such information, even if admitted as evidence, being deemed to be of limited probative value (i.e. being given limited weight) and being admitted as evidence only for limited purposes such as corroborating other evidence or ascertaining whether an accused would have had knowledge of the actions of individuals under his command.<sup>105</sup>

It is important for journalists to consider using certain techniques to improve the likelihood of their information being deemed to meet requirements of reliability. Mobile applications developed by civil society groups have the potential to play a significant role in securing the reliability of information gathered by journalists. For example, the CameraV and InformaCam system, developed by the Guardian and WITNESS, automatically attaches metadata derived from built-in sensors in smartphones to photographs and videos taken with it. Such metadata often includes things like the kind of phone used to take the recording, GPS coordinates at the time of capture, the time and date of capture, and weather data.<sup>106</sup> The user manual for the CameraV/InformaCam indicates that since each camera in a smartphone has a “unique pattern of sensor noise”, it is able to create a unique “fingerprint” of the phone when the application is first set up.<sup>107</sup> More recently, an updated and more simplified version of this application has been launched called ProofMode.<sup>108</sup>

This is one of a number of applications which can be used for the purposes of improving the reliability of information recorded by journalists. A similar mobile application, eyeWitness to Atrocities, has been used extensively in documenting alleged human rights and humanitarian law violations in Ukraine, reportedly forwarding 20,000 video, audio and photographic recordings to the United Nation’s Commission of Inquiry.<sup>109</sup> The Prosecutor General of Ukraine has signed a memorandum of understanding with the International Bar Association, which allows, with users’ consent, use of evidence gathered with that application.<sup>110</sup> Different applications have different safety features, and journalists should be sure to be familiar with them to ensure they can delete any sensitive information or the applications themselves in situations of danger.

An important part of verifiability for digital information is maintaining the chain of custody over the digital files containing that information. Otherwise, intervening parties who “touch” the files could alter them. Maintaining the chain of custody over the files helps prevent the information from being manipulated or altered. It is also very important to avoid any form of file corruption due to other reasons, such as harm to the device storing the files. In most cases, courts will require proof of how a digital file got to the courtroom. Here again, mobile applications developed by civil society groups can play an important role in helping to show chain of custody by automatically and rapidly uploading recordings to secure digital servers and maintaining custody thereafter.

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<sup>105</sup>Lindsay Freeman, “Prosecuting Atrocity Crimes with Open Source Evidence: Lessons from the International Criminal Court”, in Sam Dubberly, et al. (editors), *Digital Witness: Using Open Source Information for Human Rights Investigation, Documentation, and Accountability* (2019, Cambridge, Cambridge University Press), pp. 50 and 62.

<sup>106</sup>See <https://guardianproject.github.io/informacam-guide/en/InformacamGuide.html>.

<sup>107</sup>The user is instructed to take a number of photos of different types to establish the fingerprint, much like the process of establishing biometric access codes for personal devices.

<sup>108</sup>See [Guardian Project, “Proofmode critiques and progress”, 30 March 2017.](#)

<sup>109</sup>[International Bar Association, “eyeWitness to Atrocities app surpasses collection of 20,000 verifiable items of potential human rights violations in Ukraine, and group submits evidence to UN COI”, 4 October 2022.](#)

<sup>110</sup>[International Bar Association, “Andriy Kostin, Prosecutor General of Ukraine, endorses eyeWitness to Atrocities app”.](#)

## Civil Society Evidence in Action<sup>111</sup>

In 2003, the Democratic Republic of Congo (DRC)-based organisation, AJEDI-Ka, in collaboration with other NGOs, videotaped the use of child soldiers during a civil war in the DRC. This resulted in two films produced by the NGO WITNESS. After seeing a screening of the films, the ICC's Office of the Prosecutor asked for all the original, unedited footage from AJEDI-Ka, as well as chain-of-custody information. This information was used by the Office of the Prosecutor to open an in-depth investigation into international crimes relating to the use of child soldiers in eastern DRC. In 2012, militia leader Thomas Lubanga Dyilo was convicted of the war crimes of conscripting, enlisting, and using child soldiers.

As is apparent from this example, evidence from civil society has played a key role in assisting international criminal investigations, especially in earlier stages where prosecutors may benefit from broader contextual evidence to decide whether to launch more in-depth investigations into certain crimes. Nevertheless, even at this stage, it was important to be able to provide chain-of-custody information. Certain new technological advances, notably the development of specialised mobile phone applications and the advancement of techniques for analysing open-source data have the potential to allow journalists and other members of civil society to play an even larger role in accountability efforts.

Sometimes journalists take or receive recordings which were captured without the assistance of specialised mobile applications. In such cases, journalists should still attempt to take steps to enhance their reliability. For example, these files may still have some metadata attached to them and journalists should take steps to ensure that they do not accidentally erase this information (which sometimes happens, for example, when uploading videos to social media sites). They should also try to get information from the source of the recording about the time and location of its capture, and how and when and by whom it was provided.

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<sup>111</sup>This example is found in WITNESS' Video as Evidence Field Guide, which provides several other case studies of video evidence being used in international criminal justice proceedings. See [Kelly Matheson, Video as Evidence Field Guide \(v. 1.0\), 2016, WITNESS, pp. 23-24.](#)

## Tips for Capturing and Preserving Evidence

- Be aware of your legal right to protect your sources and do not expose confidential sources.
- Get informed consent before interviewing witnesses and survivors of international crimes. This includes assessing whether the individual is capable of giving informed consent, for which age or trauma may be relevant.
- Assess whether collecting information may cause additional harm, especially when interacting with vulnerable people.
- When taking photos or videos, consider using specialised applications for this, such as the ProofMode or eyeWitness to Atrocities applications.
- Do not accidentally delete metadata for electronic files, for example by uploading videos to social media sites.
- Try to preserve a 'chain of custody' over any information collected.
- Try to collect supporting information, such as written descriptions of where and when you took photographs/videos, and who, where and when third parties gave you information.
- Ensure that information is kept secure and organised, and take steps to minimise security risks, such as by:
  - storing the information in encrypted format
  - deleting/concealing files from/on your device
  - encrypting/anonymising/deleting the names of contacts to protect them
  - archiving evidence securely, ideally on an external hard drive and/or in cloud storage

## 4.1. Mobile Applications for Capturing and Securing Evidence

- [eyeWitness to Atrocities](#): App that records and embeds metadata to facilitate authentication of footage and its use by courts
- [CameraV and the InformaCam system](#): App that helps capture verifiable photo and video proof securely & privately (see [here](#) for more information)
- [Proofmode](#): New, more simplified version of the CameraV app
- [BoxCryptor](#): Encrypts files before exporting them
- [Tella application](#): Encrypts, locks and hides files

## 4.2. Written Material

- [Field Guide for Civil Society Documentation of Serious Human Rights Violations](#), Public International Law and Policy Group
- [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#)
- [Video as Evidence Field Guide](#), WITNESS
- [Amnesty International Evidence Lab](#)
- [Canada's War Crimes Project](#)
- [Justice Info Map](#)
- [International Bar Association War Crimes Committee](#)
- [One-page overview on crimes](#), eyeWitness
- [Activists' Guide to Archiving Video](#), WITNESS
- [Documenting International Crimes and Human Rights Violations for Criminal Accountability Purposes: Guidelines for Civil Society Organisations](#), jointly developed by Eurojust, the EU's Genocide Network and the Office of the Prosecutor of the ICC
- [Berkeley Protocol on Digital Open Source Investigations](#)
- [Identifying Gender Persecution in Conflict and Atrocities](#) (A UN Women Toolkit for Prosecutors and Adjudicators of Crimes against Humanity)

## 4.3 International NGOs

NGOs Supporting Journalists to Capture War Crimes Evidence:

- [EyeWitness](#)
- [Free Press Unlimited](#)
- [WITNESS](#)
- [Clooney Foundation](#)
- [The Centre for Civil Liberties](#)
- [Truth Hounds](#)

Organisations conducting investigations with a Ukraine focus:

- [Bellingcat](#)
- [Global Diligence](#)
- [Ukraine 5am Coalition](#)
- [Human Rights Center at UC Berkeley](#)
- [Ukrainian Legal Advisory Group](#)