Overlooking forensic evidence? A review of the 2014 International Protocol on the Documentation and Investigation of Sexual Violence in Conflict

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ABSTRACT
The main task of this article is to determine whether the attention paid to the coverage of documenting, collecting and preserving physical and digital evidence is sufficient to ensure its admissibility in both national and international courts. This article undertakes this task by critically examining the 2014 International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, which was part of the 2014 Global Summit to End Sexual Violence in Conflict. The objectives of this article are threefold. It first considers the special evidentiary rules of international courts. Secondly, it reviews the limited references to physical and digital evidence in the 2014 Protocol and discusses the potential pitfalls of failing to recognise the weight this evidence carries in national and international courts. Finally, the article recommends the use of trained forensic experts in the investigations of sexual violence and the establishment of uniform and comprehensive policies and procedures on the documentation, collection and preservation of forensic evidence, which are currently lacking in the 2014 Protocol.

Introduction
In recent years, policy-makers, academics, researchers, human rights advocates, humanitarian organisations and legal professionals have paid increasing attention to combating sexual violence around the globe; specifically, those acts that occur during mass atrocities. This increased attention towards victims of sexual violence has been accompanied by myriad changes in policies and procedures concerning the investigation and prosecution of sexual violence under international law. The most recent of such endeavours is the 2014 International Protocol on the Documentation and Investigation of Sexual Violence in Conflict (hereafter referred to as the 2014 Protocol). The 2014 Protocol was part of the Global Summit to End Sexual Violence in Conflict, which called for ‘practical steps to tackle impunity for the use of rape as a weapon of war’ (UK Foreign & Commonwealth Office [FCO], 2014a, para. 2). The 2014 Protocol seeks to ‘promote accountability for crimes of sexual violence under international law’ (UK FCO, 2014b, p. 10) by purportedly including best practices in the documentation and investigation of sexual violence in international courts, such as international criminal tribunals (e.g. International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda; ICTY and ICTR, respectively), special courts (e.g. Special Court for Sierra Leone) and the International Criminal Court (ICC).

These justice mechanisms promote the rule of law by enabling the criminal prosecution of perpetrators of mass atrocities. These mechanisms are also intended to convey to citizens and governments alike that everyone can be held accountable to existing laws and can be prosecuted for violations of these laws. Accordingly, these tribunals and courts lay the essential groundwork for efficient, effective and transparent international justice. As part of the post-conflict development of a region, measures are implemented to build domestic capacity to promote and enforce the rule of law. Here, national justice mechanisms are strengthened to ensure that perpetrators are held responsible for the crimes that they commit. To accomplish this, numerous countries have transposed the Rome Statute of the ICC (hereafter referred to as the Rome Statute) into national law through revisions of their criminal code (wherever needed). Speakers at the 2014 Global
Sexual violence as a mass atrocity

Mass atrocities include (but are not limited to) crimes against humanity, war crimes and genocide. Crimes against humanity refer … to the illicit and inhumane acts, which are part of a widespread systematic attack, that are intentionally designed to cause serious bodily harm or mental injury, and significant suffering in a target population. International law has specified which crimes are considered inhumane (Maras, 2014b, p. 238).

Particularly, Article 7(g) of the Rome Statute includes “[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity” as crimes against humanity. The crimes of sexual enslavement and rape were added to this category by both the ICTY and ICTR.5

War crimes include ‘crimes that are committed during conflict that are in violation of existing laws of war or international law’ (Maras, 2014b, p. 238). Article 8(2) of the Rome Statute includes ‘[c]ommitting rape, sexual slavery, enforced prostitution, forced pregnancy … enforced sterilization, or any other form of sexual violence’ as war crimes. The ICTY and ICTR have also recognised rape as a war crime (Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic, and Esad Landzo, 1998; The Prosecutor v. Jean Paul Akayesu, 1998).

Acts of sexual violence may also amount to genocide, which refers to ‘the systematic destruction of a particular group of individuals on the basis of their culture, disability, ethnicity, nationality, political affiliation, race, religion, or sex’ (Maras, 2014b, p. 239). As the ICTR noted in Prosecutor v. Jean Paul Akayesu,

[s]exual violence which includes rape, … [to be considered as an act of genocide,) must be committed … as part of a widespread or systematic attack; … on a civilian population; … on certain [sic] catalogued discriminatory grounds, namely: national, ethnic, political, racial, or religious grounds (The Prosecutor v. Jean Paul Akayesu, 1998, para. 598).

The jurisprudence of the ICTR and ICTY reveals that rape and other forms of sexual violence satisfy the ‘serious bodily and mental harm element’ of genocide listed in Article 6(b) and Article 2(2)(b) of the ICTR and ICTY Statutes, respectively (The Prosecutor v. Clément Kayishema and Obed Ruzindana, 1999, para. 108; The Prosecutor v. Alfred Musema, 2000, para. 156; The Prosecutor v. Radislav Krstic, 2001, para. 509 and 513; The Prosecutor v. Jean de Dieu Kamuhanda, 1998, para. 634; The Prosecutor v. Laurent Semanza, 2003, para. 320; The Prosecutor v. Milomir Stakic, 2003, para. 516; The Prosecutor v. Juvénal Kajelijeli, 2003, para. 815).

Special evidentiary rules

Special evidentiary rules exist in international courts, especially relating to sexual violence. These special evidentiary rules hold that: corroboration of victim testimony is not required in criminal proceedings;6 the non-consent of the victim is virtually implied when sexual violence occurs during mass atrocities and does not need to be established (with limited exceptions);7 and the victim’s prior sexual conduct cannot be admitted in court.8 The latter two restrictions, providing evidence of consent and the introduction of prior sexual history, were created in an effort to reduce trauma to the victim and prevent revictimisation. Nonetheless, evidence of consent and the introduction of prior sexual history may be admitted under limited circumstances.

The lack of requirement in international courts to corroborate a victim’s testimony in a sexual violence case signifies a significant departure from most domestic rules of evidence. In sexual violence cases, domestic rules of evidence often require proof of non-consent and/or use or threat of force or other coercive tactics (O’Byrne, 2011, p. 499), and allow the introduction of information about the character of the victim. Therefore, prosecuting these cases in national courts means that previously omitted information about the victim in international courts may be introduced in criminal proceedings. Particularly, issues of consent and the victim’s background in terms of sexual history may be admissible in national courts depending on the jurisdiction.
Because international crimes can be prosecuted in national courts, national rules of evidence and legal requirements must be met. Whilst many countries have transposed the Rome Statute into national law, the special evidentiary rules of international courts have not been widely adopted in national courts (O’Byrne, 2011, p. 499). This means that in national courts victim testimony on sexual violence will be required. What is more, victim testimony alone cannot ensure that a case is heard in a national court; some other form of corroborative evidence of sexual violence, which can be obtained from eyewitness interviews, suspect confessions, medical records, physical evidence and digital evidence, is required to prosecute cases in national courts.

Special evidentiary rules thus pose particular challenges when cases are prosecuted in national rather than international courts. International courts only prosecute the most serious international crimes (Ward & Marsh, 2006, p. 28), meaning that a large portion of sexual violence cases are not dealt with in international courts. For this reason, the documentation, collection and preservation of corroborative evidence, especially physical and digital evidence, in a manner that ensures its admissibility in national and international courts is required.

The United Nations Team of Experts (2013) stated that the current practices of collection, analysis and use of forensic evidence served as an impediment to combating impunity for sexual violence (p. 9). Moreover, the World Health Organization (2013) noted that there remains a lack of clarity about what medicolegal evidence should be collected to support national and international criminal justice processes (p. 2). Furthermore, the WHO (2013) identified key challenges in evidence collection, such as knowledge/awareness gaps; resource constraints; and system weaknesses (e.g. lack of/insufficient guidance/standards). These challenges serve as obstacles to the effective investigation and prosecution of perpetrators of sexual violence during conflict.

A review of the role of physical and digital evidence in the 2014 Protocol

Current practices for conflict and post-conflict sexual violence investigations focus almost exclusively on the introduction of testimonial evidence in international courts. The recent ICC case against the President of Kenya demonstrates that without other forms of corroborative evidence, such as forensic evidence, perpetrators can evade prosecution for crimes they commit (Odula, 2016, para. 6). Unfortunately, the introduction of forensic evidence, particularly physical and digital evidence, in international courts as corroborative evidence is not a common practice.

The aim of the 2014 Protocol is the effective documentation and investigation of crimes of sexual violence under international law (UK FCO, 2014b, p. 6). This protocol is recommended in capacity-building efforts for national and local security, judicial, law enforcement, forensic medicine and science and investigative institutions aiming to improve their understanding of how to collect and document information on sexual violence as an international crime (UK FCO, 2014b, p. 10). While the title uses the broad terms ‘documentation’ and ‘investigation’ with regard to sexual violence in regions of conflict, the 2014 Protocol focuses primarily on victim interviewing and testimonial evidence obtained from these interviews. Its narrow scope makes it limited in its application to capacity building efforts that extend beyond obtaining this type of evidence. Although the focus is on testimonial evidence, the authors of the protocol note the importance of ensuring the integrity of other evidence (e.g. documentary evidence) and add that practitioners should be aware of national laws regarding evidence collection (UK FCO, 2014b, pp. 10 and 11, respectively).

The authors of the 2014 Protocol further highlight the fact that the definitions of criminal acts can vary between jurisdictions, as well as national laws and rules of evidence and criminal procedure (UK FCO, 2014b, p. 17). Objective documentation and gathering of evidence in sexual violence complaints is therefore critical to accommodate the various rules of evidence and criminal procedure. Notwithstanding the differences in national laws, and rules of evidence and criminal procedure, standard investigative practices should be utilised for mass atrocities and crimes that transcend traditional geographic borders. Evidence of mass atrocities should also be documented, collected and preserved in a manner that will ensure its admissibility irrespective of what venue is ultimately chosen to try the case.

In addition, the 2014 Protocol refers to mode of liability and reasonable doubt (UK FCO, 2014b, p. 25), which are determinations that can be made objectively through the presence, analysis and interpretation of physical and digital evidence. Physical and digital evidence, which are not given the necessary attention needed to ensure the admissibility of these types of evidence in international and national courts, are essential in demonstrating liability and can provide an objective interpretation of a criminal event. Indeed, physical and digital evidence can serve as objective records of events; as such, these forms of evidence should not be overlooked. Physical and digital evidence are obtained to establish: the alleged perpetrator or perpetrators; the commission of a criminal act; the manner in which the act was perpetrated; and to corroborate or impeach the testimony of the suspect(s), victim(s) and witness(es) (Maras & Miranda, 2014). These types of
Evidence can be crucial in meeting the standard of proof required in criminal proceedings.

Moreover, there are several sections in the 2014 Protocol in which broad statements are made pertaining to the collection and perceived weight of forensic evidence. These statements are somewhat misleading and require clarification. In one section, the authors state, ‘[t]his other information (statements from other witnesses of the crime), if collected properly, can be very powerful and may remove the need for the physical evidence’ (UK FCO, 2014b, p. 62). This statement is problematic because there should always be a need to collect physical evidence and the idea that witness statements negate the need to collect physical evidence is without merit. The authors add, ‘[p]hysical evidence without survivor and witness testimony … will not be very useful from an evidentiary point of view’ and ‘[w]hile survivor or witness evidence can replace physical evidence the reverse is not true; physical evidence cannot in most instances replace survivor or witness evidence’ (UK FCO, 2014b, p. 62). It is incorrect for any practitioner to believe that there is no reason or need to collect physical evidence if victim testimony or witness statements do not exist. Particularly, in the absence of witness statements, forensic evidence may be all there is to indicate a crime has been committed. Consider the victim of a homicide. The victim is unable to provide verbal (testimonial) or written (documentary) statements; accordingly, an autopsy is conducted on the body and physical evidence is obtained from the scene and the remains. This information is subsequently used for the investigation to reconstruct the event and find the perpetrator, with the ultimate goal of obtaining justice for the deceased victim.

The 2014 Protocol also notes that ‘practitioner[s] must know that the collection of physical evidence must at all times be accompanied by the collection of other corroborative and/or explanatory evidence in order for it to be of use’ (UK FCO, 2014b, p. 63). This statement, like those cited earlier, implies that in the absence of corroborative witness statements, the collection of physical evidence is irrelevant and useless. Witness statements are important in providing contextual information, but it should be up to the legal system where the case is being tried to determine the admissibility and weight of physical evidence, not the practitioner/investigator. Indeed, the decision to collect evidence should not be left to the interviewer or others involved in the incident. As such, it is best for practitioners to err on the side of caution and collect physical evidence.

Furthermore, the 2014 Protocol describes the rules of criminal procedure and the special evidentiary rules in international courts (UK FCO, 2014b, pp. 135–137). While corroboration is not required, its presence in the form of forensic evidence can certainly strengthen a case and be used when either the credibility of the victim is being challenged or the victim is unavailable during subsequent legal proceedings. To rely solely on the fact that no corroboration is required and to use this rule to disregard other evidence, including physical evidence, is a significant oversight and could have far-reaching implications in criminal trials. To disregard any evidence or information that may serve to strengthen a criminal investigation or case, or simply aid in the reconstruction of events, is to go against the fundamental principles of forensic science and crime scene investigation. In order to demonstrate that the circumstances in which the act took place were such that consent was impossible, the 2014 Protocol states that the prosecutor must ensure that s/he presents sufficient evidence of the circumstances which made consent impossible (UK FCO, 2014b, p. 136); the presence, analysis and interpretation of physical evidence and its presentation in court may be one way to address this issue. This statement contradicts earlier accounts in the 2014 Protocol that physical evidence is rendered useless when testimonial evidence is unavailable.

**Physical evidence**

Physical evidence encountered in sexual violence cases can include biological evidence, trace evidence and pattern evidence. The presence of this evidence, also referred to as transfer evidence, is based on the Locard exchange principle (often described simply as the phrase ‘Every contact leaves a trace’), which indicates that contact between objects will result in an exchange of materials between them (Maras & Miranda, 2014). Due to the contact that results from sexual violence, the exchange of materials between the perpetrator(s) and the victim as well as the exchange of materials of the individuals within the scene of the occurrence, is probable, with the type of evidence, amount of material transferred and retention of material varying based on several factors.

Collection methods of forensic evidence from the crime scene, the victim and even the suspected perpetrator can vary, depending on the type and location of the evidence. Biological samples may be taken by cutting, swabbing, scraping and washes, rinses or aspirates (Deforest, Gaensslen, & Lee, 1983). Trace evidence may be collected by brushing or combing, visual examination and the use of forceps or tape lifting (1983). The first interaction with the victim, much like the first visit to the crime scene after the incident of sexual violence, is often the only opportunity to collect and safeguard evidence that may prove valuable to the investigation and any legal actions taken against the perpetrator(s). Evidence that is overlooked or not collected and secured at the initial phases of the investigation may be lost forever, which can have
far-reaching implications for the pursuit of justice. As such, physical evidence must be documented, collected and preserved during the initial phase of a sexual violence investigation. Types of physical evidence that may be present can be further subdivided by source attribution; namely, medical evidence and crime scene evidence.

**Medical evidence**

Medical (or medicolegal) evidence encompasses any physical evidence that is collected from the victim of sexual violence. This evidence includes the physical injuries to the victim, toxicological examinations of the victim (to determine the presence of drugs and/or alcohol and the types of drugs present), as well as any clothing or associated transfer or trace evidence on the victim or their garments (Shapiro & Maras, 2015). Signs of physical abuse may be apparent, such as bruising, scratches, bite marks and other traumatic wounds, but may not be present in all cases of sexual violence. During the medical examination, the medical evidence should be documented, diagrammed, photographed and collected and stored when possible. These methods require an understanding of evidence types and their respective identification and collection methods, maintaining evidence integrity and chain of custody records, the knowledge and utilisation of proper photography techniques and the use of thorough documentation techniques (Maras & Miranda, 2014).

Medical evidence can be used to substantiate an allegation of sexual violence. The availability of forensic evidence depends on a multitude of factors, such as the presence of physical injuries, the presence of semen or other biological fluids on the victim and time between the assault and the collection of evidence by a medical professional, who may or may not be specifically trained in the identification, collection and retention of medical evidence. Where forensic evidence is required, healthcare providers must be able to collect it in a timely manner and be prepared to present their evidence at trial’ (Ward & Marsh, 2006, p. 28). In both Kenya and the Democratic Republic of Congo, victims are instructed to go to a medical facility within 72 h of a sexual violence incident (Redress, 2012, p. 9). This, however, may not be possible for those who are far away from these medical facilities and have no means of transportation to these facilities within the allotted time frame. Some guidelines are more cautionary in providing a narrow window for evidence collection.

The likelihood of finding evidence after 72 h is greatly reduced, however it is better to collect evidence up to 96 h in case the survivor may be unsure of the number of hours lapsed since the assault … Evidence on the outside of the body and on materials such as clothing can be collected even after 96 h (Centre for Enquiry into Health & Allied Themes, 2012, p. 17).

The roles of the medical professionals are to collect and document physical evidence of sexual violence, provide treatment for trauma and related issues (e.g. injuries, sexually transmitted diseases and emotional distress) and obtain patient history and an account of what happened (e.g. statements by the victim during the interview). In many cases, the physician draws a conclusion about suspected sexual violence by interpreting the physical findings and laboratory results. The degree of the injuries sustained depends on several factors, including the type of assault or penetration; the degree of force; the use of lubrication during the sexual assault; the use of drugs or alcohol or extreme fear to render the victim unable to resist the attack; and the time between the assault and medical exam, as well as any cleansing conducted by the victim prior to examination (Shapiro & Maras, 2015). Furthermore, the detection of injuries may be limited by the skill and training of the examiner and the tools available for conducting an examination (such as an alternate light source to detect wounds under the skin’s surface). Consequently, physical exams may not provide evidence of sexual violence, and the lack of physical evidence does not imply consent or does not serve as an affirmation that sexual violence did not occur (National Maternal Child Women’s Health & Nutrition Cluster Technical Group, 2003). National and international courts can admit expert testimony that explain why victims may not always present symptoms of sexual violence.

Medical certificates are the documents prepared during the course and completion of the physical examination of the victim of sexual violence. These certificates can serve as documentary evidence of sexual violence (UK FCO, 2014b, p. 66), and the format, content and information collected within these documents exhibit a high degree of variation. The protocols in place for filling out these forms, determining what personnel are qualified or authorised to fill out these forms, and the admissibility of these forms in domestic and international courts also varies. In some jurisdictions, medical certificates or other forms of medical documentation of sexual violence are required to proceed with criminal cases (Redress, 2012, p. 9). Conversely, medical certificates issued may or may not be admissible in court, as admissibility depends on the rules of evidence of the country in which the case is being presented (Ibid.). ‘In most countries, local protocols, rules or laws govern the provision of medico-legal services to victims of sexual violence … Failure to comply with local regulations may compromise future investigations or court hearings’ (WHO, 2003, p. 19). Therefore, it is imperative that medical professionals involved in sexual violence cases familiarise themselves with national laws and rules of evidence and develop uniform certificates which will meet admissibility standards.15
Furthermore, the 2014 Protocol includes a segment on the organisation of information about reported incidents of sexual violence, the digitisation of such information, and its storage in electronic databases (UK FCO, 2014b, p. 41). The importance of these databases should be underscored, as these databases can: identify serial crimes and serial perpetrators; identify a modus operandi; and provide additional situational information which can be extremely useful when coupled with databases based on physical evidence analysis and scientific data (i.e. biometric databases that store DNA profiles, fingerprints, ballistic evidence, etc.). While identification works best in conflict and post-conflict societies where the perpetrator is known, biometric databases may initially serve to link criminal activities and demonstrate systematic mass atrocities perpetrated by one or a select group of individuals. The collection of such evidence, paired with its storage in a database, may also serve as a deterrent for potential criminals. DNA databases, as well as other biometric databases, do not exist in most countries due to the cost of their maintenance, the lack of capacity to obtain samples and the lack of qualified personnel to operate and maintain such databases.

Crime scene evidence
To a certain extent, crime scene investigation and related evidence is discussed in the 2014 Protocol. Particularly, the 2014 Protocol notes that:

[n]ot only is the site of an attack useful as a potential source of valuable physical evidence, but the location and existence of the site in itself can help to establish the presence of alleged perpetrators in the area, and be analysed as part of the pattern of movement of the alleged perpetrators, and other contextual elements or elements of modes of liability (UK FCO, 2014b, p. 63).

This implies that the responsibility of crime scene investigation and reconstruction falls under the purview of the practitioners as defined in the 2014 Protocol. Indeed, the 2014 Protocol instructs practitioners (not including investigators and forensic specialists) to: avoid moving physical evidence; record the scene with sketches and photographs, including the location of potential physical evidence; and to leave the site as they found it after they record the scene (UK FCO, 2014b, p. 64–65). This type of work, however, is complex and requires extensive expertise and education, and an individual trained in witness interviewing is unlikely to be the best person to conduct these types of reconstructions. The 2014 Protocol appears to undermine the importance of having trained professionals handle this kind of investigation.

Digital evidence
Apart from a brief mention of photographic and video evidence, and audio and satellite imagery (UK FCO, 2014b, pp. 101, 110 and 129–130), no other forms of digital evidence are presented in the 2014 Protocol. And yet, mobile phones, smartphones and other digital devices can provide a wealth of data, with the type of information that can be retrieved from them including (but not limited to): text messages; multimedia messages; metered data (i.e. numbers dialled, received and missed; and the time and date of calls); emails; Internet data; image, sound and audio files; and location data (Maras, 2014a, pp. 332–333). These devices can provide evidence which can be used to link a perpetrator to a particular crime. For example, mobile phone records may place a particular individual at a crime scene because of the location data that is retained by the digital device and/or obtained from service providers during an investigation.

Digital images and videos can provide substantial data for use in an investigation (as long as this information has been authenticated). In addition to providing documentary evidence of a crime, images and videos contain what is known as metadata:

[M]etadata is relevant when the process by which a document was created is … [an] issue or there are questions concerning a document’s authenticity; metadata may reveal when a document was created, how many times it was edited, when it was edited and the nature of the edits (Kingsway Financial Services, Inc. v. Pricewaterhouse-Coopers, 2008, para. 54).

For example, metadata of a video and photo can provide information about the time and location where an image or video was taken/created (i.e. the latitude and longitude coordinates) and can reveal information about the type of camera used to take the picture or video.

Digital devices and the Internet enable the uploading, collection, storage and transfer of vast amounts of information. The type of digital evidence available will depend on the technologies used and Internet use in the region. For instance, certain countries in Africa have far more mobile phone users than computer users (Ericsson, 2014, p. 2; International Telecommunication Union, 2013, p. 8; Smith, 2014; UNODC, 2013, p. 2) due in large part to weak or non-existent landline infrastructure. Mobile phones in these countries are primarily used for text messages; however, they are also widely used take pictures and videos (Pew Research Center, 2014). Mobile phones have been used to provide documentary evidence of mass atrocities and other violent acts (e.g. photographs and videos of the incident) (UK FCO, 2014b, p. 67). For example, in 2008, documentary evidence of the post-election violence in Kenya in the form of images and videos was posted on websites and the video sharing platform, YouTube (Meier & Leaning, 2009, p. 4). Another example in 2014 involved a witness video taken from a mobile phone documenting an incident in Kenya where a woman was stripped in public by a mob of men for purportedly being dressed
inappropriately; this video was posted on YouTube and Facebook and distributed to other social media websites (Hatcher, 2014). Similarly, videos of sexual violence against women in Tahrir Square in Egypt in 2014 were posted on YouTube (Dearden, 2014).

Information about sexual violence in conflict and post-conflict societies can also be gathered from social media websites. Individuals using social media websites, such as Twitter, Facebook, Instagram and YouTube, can post and communicate real-time, even through live streaming, information about sexual violence, including text, images, videos and audio clips. The links to these images and videos can be posted on these social media websites, increasing the breadth and scope of viewership. Evidence of mass atrocities can thus be obtained from digital devices, mobile applications and the websites on the Internet. The recording of the incidents of sexual violence can serve as documentary evidence in a criminal trial; this information can reveal trends and patterns in sexual violence in a region (UK FCO, 2014b, p. 66), as well as aid in the identification of perpetrators and related actors.

Just as with physical evidence, an issue widely encountered in the investigation and prosecution of sexual violence is the proper collection and preservation of digital evidence from these sites. Here, investigators must ensure that the evidence is collected in such a way as to ensure its integrity; that is, to ensure that it was not altered in any way. In Kenya, there is currently no law in place that clearly stipulates the methods that should be used to determine the validity and reliability of digital forensics tools. The rules of evidence in Kenya only require the investigator to testify that s/he has the necessary knowledge and skills to conduct a digital forensics investigation and to use digital forensics tools (see Kenya’s Evidence Act of 2009 and Evidence Act of 2012). In this country, certifications and licences need not be obtained to prove that the investigator has the necessary knowledge and skills to use the tools; however, this may not be the case in other jurisdictions.

A main barrier to the collection and use of digital evidence in a manner that ensures its admissibility in national and international courts is the problem of authentication. Information extracted from digital devices must be authenticated in order to be used as evidence in a court of law. To authenticate digital evidence, such as text messages and emails, the identity of the author must be established; that is, attribution is required. For example, emails can be authenticated by direct evidence, such as eyewitness testimony, which establishes a fact, and/or circumstantial evidence that allows a person to infer the truth of another fact (Maras, 2014a, pp. 40–41). To authenticate digital evidence, such as videos and images, the identity of the author does not need to be established (with few exceptions depending on the case). What should be established is the integrity of the image or video; that is, whether or not it has been altered in any way.

Digital evidence in international courts has been authenticated through expert testimony and source identity information (The Prosecutor v. Edouard Karemera & Matthieu Ngorumpate, 2012; The Prosecutor v. Stanislav Galic, 2003; The Prosecutor v. Théoneste Bagosora, Gratien Kabili, Aloys Ntabakuze, & Anatole Nsengiyumva, 2008). To establish authenticity of digital evidence, corroboration is often preferred. To authenticate evidence in international and national courts, testimony about the evidence is sought, either from someone with knowledge about the item or a digital forensics expert. For example, expert testimony can be provided which demonstrates that the methods used to obtain evidence promoted reliability; such testimony can improve the probative value of digital evidence (The Prosecutor v. Zdravko Tolimir, 2012, para. 64). In addition, an expert witness may testify that the evidence in question is what it purports to be (People v. Buckley, 2010). This authentication is required to ensure the admissibility of evidence in court.

Proposed solutions

Currently, there are no standardised, uniform methods for the documentation, collection and preservation of physical and digital evidence, both in the field (crime scene) and in the clinical setting (during medical treatment of the victim) for use in international and national court proceedings. Proper evidence handling, including the preservation, storage and maintenance of the chain of custody, is necessary to prevent deleterious change and loss all the while ensuring that the integrity of the evidence is maintained. While several organisations have developed their own protocols, often using established guidelines (such as those developed by the WHO), no unified protocols for the analysis of physical and digital evidence exist, nor does the infrastructure capable of analysing such samples. Matters concerning the disposition and analysis of recovered evidence are often absent from such protocols, likely because the burden of developing analytical standard operating procedures (SOPs) is on the forensic laboratory. Analytical methods of analysis, including microscopic and instrumental techniques, can provide an objective interpretation of the criminal event and can function to serve as an unbiased witness to the presence and actions of a perpetrator. The resources required in order to properly conduct evidence analysis include trained laboratory personnel, numerous analytical instruments, technology for the input and retention of data and its interpretation and a secure facility for the analysis and storage of evidence. To ensure evidence integrity and uniformity in
the examination and reporting phases of forensic investigations, SOPs pertaining to evidence analysis should be developed which include comprehensive procedures on the collection and preservation of evidence.

It is counter-intuitive to work towards the establishment of uniform rules of evidence and lay the groundwork for effective prosecutions of cases of sexual violence against women only to determine that no evidence has been collected or retained in such cases. While addressing the matter of adjudicating sexual violence cases, evidence collection and preservation SOPs have to be developed and implemented concurrently. The training of existing investigators and law enforcement personnel and the development of secure evidence storage facilities are required. Not only will this provide a means for obtaining justice for victims, but the collection and retention of physical and digital evidence will also serve as a deterrent to perpetrators of mass atrocities and demonstrate the decreased propensity towards impunity for these illicit acts.

First and foremost, the development of standardised procedures and policies for the scene investigators, evidence collection personnel, medical professionals and laboratory analysts is essential. These procedures need to address the methods of collecting, preserving, transporting, storing and safeguarding forensic evidence. Upon development of standardised, uniform guidelines, forensic programmes that are designed to educate and train law enforcement personnel, medicolegal investigators, crime scene investigators, forensic scientists, medical staff (e.g. pathologists and nurses), as well as any other first responders, are required. The development of standardised field test kits and collection kits with instructions and forms for evidence collection and documentation are additionally needed. Finally, bearing in mind the costs of its implementation, the development of suitable infrastructure is vital, including the development or enhancement of forensic laboratories, as well as secure storage systems for both physical and digital evidence.

While physical evidence was addressed in the 2014 Protocol and other international documents (Office of the United Nations High Commissioner for Human Rights, 2004; WHO, 2004) in some capacity, the digital forensics discipline and its associated evidence were not or at best were only covered in a limited and cursory manner in international investigative protocols and guidelines. International courts have to build their capacities to conduct digital forensics investigations. These justice systems cannot rely on national courts to assist them in investigations. Mainly, this assistance may not be provided because many countries themselves lack the capacity to conduct digital forensics investigations. Additionally, these countries often do not have the necessary personnel with the knowledge and skills needed to effectively conduct digital forensics investigations (UNODC, 2013, p. 163). For example, African countries reported that they had insufficient ‘resources [(e.g. computer forensics tools and equipment)] to handle and analyze electronic evidence’ (UNODC, 2013, p. 165). These countries also often lack financial resources to conduct these investigations, let alone assist other jurisdictions with their investigations. Presently, many aspects of daily life involve the utilisation of computers, mobile phones, wireless connections and the Internet in both developed and developing nations, with user reliance on these technologies increasing on a daily basis (Maras, 2015). The Internet and these devices can thus provide a wealth of evidence for potential use in national and international criminal proceedings. Accordingly, the key is to develop a domestic forensic capacity to handle physical and digital evidence of sexual violence, which can then be applied internationally.

Developing this domestic capacity to conduct investigations, and identify, collect and store digital evidence is critical in mass atrocities cases, such as sexual violence in conflict. This capacity can be built in two ways. Firstly, ‘train the trainers’ programmes can be utilised. Here, digital forensics academics and professionals travel to countries and train criminal justice professionals. The point of these programmes is to train those who participate in them in such a way as to enable these participants to then train others in the field. Notwithstanding, these programmes are quite limited and work best only in the short term. Secondly, to meet the current deficit in capacity, digital forensics should not be limited to a small, understaffed, specialised unit in law enforcement agencies. Those termed as non-specialised law enforcement (i.e. those who receive basic training to serve as police officers) should be trained on basic computer knowledge and digital forensics in police academies (Maras, 2015). Such basic training is crucial because very few crimes have been left untouched by computers and related technology. Therefore, it is reasonable to assume that non-specialised law enforcement officers, at some point, will be faced with crime that is linked in some way to technology. Initiatives are thus needed which are designed to improve cyber-crime-related training for non-specialised law enforcement officers. The same holds true for other criminal justice professionals.

In addition to capacity building, uniform SOPs pertaining to digital forensics investigations are needed, along with the implementation of these protocols and procedures around the globe. These protocols and procedures should include the ways to collect, analyse and preserve digital evidence to ensure its admissibility in any national or international court. Furthermore, to sustain such programmes and ensure the integrity of the process,
programme accreditation and analyst certification is required, along with the establishment of quality assurance guidelines and continuing education for trainers and trainees. These fundamentals can also be applied to physical evidence and scene investigations.

The main task of the 2014 Protocol was ‘to promote accountability for crimes of sexual violence under international law ... by setting out the basic principles of documenting sexual violence as a crime under international law, gleaned from best practice in the field’ (UK FCO, 2014b, p. 10). While a laudable attempt in this regard, the 2014 Protocol fails to provide adequate best practices for evidence of crimes of sexual violence beyond testimonial evidence. In its current form, the 2014 Protocol is unsustainable in the long term because it provides insufficient attention to physical and virtually no attention to most forms of digital evidence. The 2014 Protocol was largely developed by lawyers and activists, with little to no representation of forensic experts (specifically those with digital, criminalistics, or crime scene processing expertise). Since forensic evidence is not needed in international courts hearing sexual violence cases, its importance is often overlooked and its use in judicial proceedings is often not pursued. Unfortunately, this poses significant problems if these cases are not heard in international courts, especially since national courts require evidence beyond the traditional testimonial evidence obtained.

What is more, cases such as that of The Prosecutor v. Uhuru Muigai (2011) illustrate that this is a problematic practice even in international courts. Therefore, there is a need to make lasting changes in evidentiary documentation, collection and preservation practices which will provide the necessary tools to prosecute perpetrators irrespective of the venue chosen to do so; namely, national or international courts.

**Conclusions**

This analysis revealed that the 2014 Protocol paid insufficient attention to best practices in forensic evidence documentation, collection and preservation. The document was written with only the special evidentiary rules of international courts in mind. The issue with such an approach is that sexual violence cases in conflict and post-conflict societies are heard in other courts as well. Given that sexual violence cases that are heard in international courts can also be heard in national courts, it is imperative that best practices are created and implemented for the documentation, collection and preservation of forensic evidence, including all forms of physical and digital evidence. Presently, local capacities do not exist in every country and thus should be developed to ensure that evidence which is collected can be admissible in any national and international court; this will enable the effective prosecution of perpetrators of sexual violence. The use of forensic evidence in international courts should also be encouraged and physical and digital evidence should play a greater role in the adjudication of cases that come before these courts. Lasting changes are needed that will provide investigators and prosecutors with the necessary tools to pursue perpetrators irrespective of where the case is heard.

This analysis also revealed that uniform standardised protocols and procedures are needed which cover the investigation of sexual violence cases. To achieve this, collaboration on sexual violence cases with equal representation of medical, law enforcement, legal and forensic expertise is required. The training of these individuals on best practices in collecting, handling, preserving and presenting evidence for potential use in a criminal trial, with each role clearly defined for each type of expert, is also required. Procedures that are created, communicated and implemented need to be harmonised to ensure uniform standards in the handling of forensic evidence recovered in sexual violence cases. Educated and trained experts are required to ensure that forensic evidence is appropriately obtained, and any relevant examinations are conducted properly for potential use in a criminal proceeding. These changes will ensure that the procedures and protocols in place for sexual violence cases are sustainable over time.

**Notes**

1. Sexual violence can include the following acts: rape and marital rape, child sexual abuse, defilement and incest, forced sodomy/rape, attempted rape/sodomy, sexual abuse, sexual exploitation, forced sterilisation and forced prostitution, as well as sexual mutilation and sexual slavery (UN High Commissioner for Refugees, 2003, pp. 16–18).

2. Mass atrocities are defined as ‘widespread and often systematic acts of violence against civilians or other non-combatants including killing; causing serious bodily or mental harm; or deliberately inflicting conditions of life that cause serious bodily or mental harm’ (U.S. Army Peacekeeping and Stability Operations Institute, 2012, p. 10).

3. The ICC is considered as a ‘court of last resort’ and only hears cases that domestic courts are unable or unwilling to prosecute.

4. Physical evidence includes biological materials (fluids such as semen, blood or saliva, materials such as pubic hair, skin/epithelial tissue and injury such as scratches, bruises and bite marks) and non-biological materials (such as fibres, paint, soil and vegetative matter). Digital evidence refers to any type of information that is extracted from computers, mobile technologies, or other digital devices that can be used to prove or disprove facts of a case. See Maras and Miranda (2014) and Maras (2014a, p. 38).
5. The ICTY held that sexual enslavement was a crime against humanity in *The Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (Judgment) Case No. IT-96-23-T & IT-96-23/1-T (February 22, 2001). Rape is listed as a crime against humanity under Article 5(g) of the Statute of the ICTY and Article 3(g) of the Statute of the ICTR.  

6. See Rule 63(4) of the ICC Rules of Procedure and Evidence and Rule 96 of the Rules of Procedure and Evidence of both the ICTY and the ICTR. For an overview of character evidence, such as prior sexual history, in case law see *Character Evidence in Rape Trials: A Comparative Study of Rape Shield Laws and the Admissibility of Character Evidence in Rape Cases* (2015), available at http://www.trust.org/contentAsset/raw-data/7c70a653-6c85-4734-981b-72a1de7db614/file.  

7. See Rule 70 of the ICC Rules of Procedure and Evidence and Rule 96 of the Rules of Procedure and Evidence of both the ICTY and the ICTR.  

8. Ibid.  

9. Eyewitness testimony is not infallible. The accuracy of eyewitness identification can include environmental, social, biological and psychological factors. Human cognitive biases may impact the ability to recall events objectively, which can affect the recollections of victims and witnesses. In addition, the effects of false memory imprinting, whether intentional or unintentional, can also affect victim and witness recollections.  

10. Beyond the impediments to proper evidence collection identified by the UN Team of Experts and the WHO, governments and law enforcement agencies in conflict societies can block, restrict and/or deter evidence collection efforts. For example, medical professionals and humanitarian organisations could be ordered to leave the country if they seek to collect medical evidence for use in criminal proceedings. This occurred in Sudan, when Oxfam, CARE, Medicins Sans Frontieres (MSF)-Holland, Mercy Corps, Save the Children, the Norwegian Refugee Council, the International Rescue Committee, Action Contre la Faim, Solidarites, and CHF International (a.k.a., Global Communities) were ordered to leave the country after Omar Hassan Ahmad al-Bashir was indicted (NBC News, 2009).  

11. Testimonial evidence is the ‘evidence given by a lay or expert witness under oath in a court of law’ (Maras & Miranda, 2014).  

12. In this case, *The Prosecutor v. Uhuru Muigai* (2011), witness tampering occurred (on a large scale); where some witnesses refused to testify in court and others drastically changed their testimony (in a manner that contradicted their original statements).  

13. Documentary evidence is defined as ‘[a]ny kind of writing, video, or sound recording material whose authenticity needs to be established if it is introduced as evidence in a court of law’ (Maras, 2014a, p. 39).  

14. Trace evidence refers to items that are of small size or quantity and may require the aid of a microscope to view; examples may include fibres, glass, paint and soil. Pattern evidence refers to the impression or mark(s) that one item/object leaves when it comes into contact with another item/object; examples include bloodstain patterns and footwear impressions. See Maras and Miranda (2014) for further information.  

15. For an overview of the use of medical evidence to document mass rape, see Morse (2014).  

16. Current programmes include the Program on Sexual Violence in Conflict Zones by Physicians of Human Rights and the Investigation of Cases of Sexual and Gender Based Violence as International Crimes by the Institute for International Criminal Investigations (IICI). The IICI also conducts an International Investigator Course, intended to ‘conduct field investigations into serious violations of international humanitarian law in the context of criminal proceedings’ and provide a broad-based approach to investigations (IICI Investigators Manual, 2006).  

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