



INVESTIGATION AND COLLECTION OF EVIDENCE CONCERNING AND FROM CHILDREN

Gabriel Oosthuizen & Penny Hart

Online training Course "*International Criminal
Jurisdiction and Children in Armed Conflict*"

Co-organised by Universities Network for
Children in Armed Conflict (UNETCHAC) &
others

28 September 2022



OPENING REMARKS

- Session on “Investigation and collection of evidence concerning and from children”
- Two presenters: Gabriel Oosthuizen & Penny Hart



SCHEDULE

Proposed schedule of next 3 hours

- 0.00-0.15: Opening remarks, bios of 2 presenters, content to be covered & other introductory remarks
- 0.15-0.25: Your experience & interests
- 0.25-1.20: Investigations involving/affecting children: overview.
Gabriel Oosthuizen
- 1.20-1.35: Questions for Gabriel & Penny



SCHEDULE

- 1.35-1.45: Break
- 1.45-2.40: Investigative interviewing: overview. *Penny Hart*
- 2.40-2.55: Questions for Penny
- 2.55-3.00: Concluding remarks



PRESENTERS

- Presenters:
 - Who are we?
 - IICI connection
 - What is IICI? Specialist capacity-building NGO for war-crimes investigators, including re children.
www.iici.global

- **Gabriel's bio:**

Mr Gabriël OOSTHUIZEN, Programme Director of the Institute for International Criminal Investigations (IICI). Gabriël Oosthuizen is the Programme Director of the Institute for International Criminal Investigations (www.iici.global). He is IICI's lead on the Murad Code project (www.muradcode.com) which aims to ensure the documentation and investigation of systematic and conflict-related sexual violence is survivor/victim-centred, ethical and effective. Gabriel also leads IICI's capacity-building and other work on the investigation of international crimes and grave human-rights violation affecting children. Specialised in the field of international criminal law, his earlier legal advisory, training and management positions include Chief of Party of the Uganda Project of the Public International Law & Policy Group. Gabriël also was the Executive Director of the NGO International Criminal Law Services (ICLS); Head, Legal Unit, UN mission in Kosovo (UNMIK); and Associate Legal Officer, Chambers, UN International Criminal Tribunal for the former Yugoslavia (ICTY). He has edited and written books, academic and NGO publications, and consulted on various areas of law, and on international and southern African affairs. He holds an LLB from the University of Pretoria (South Africa) and an LLM in Public International Law cum laude from the University of Leiden (Netherlands).

- Penny's bio:

PENNY HART is a retired Canadian Police Inspector with 30 years of experience with the Halifax Regional Police where she retired as Divisional Commander of the Department in 2018. She is an expert in oversight of criminal investigations in Canada and abroad, accomplished in directing high-profile investigations, peacekeeping missions and international police-force training, with experience in many countries including East Timor, Sierra Leone, Jordan, the Netherlands, Jerusalem (State of Palestine) and Ireland. She also has a vast array of experience in the field as an investigator of international and domestic crimes. She is an internationally recognized expert in law enforcement, investigative best practices, legislation and public safety policy, with a specialization in sexual and gender-based violence. She is a trainer for the Institute for International Criminal Investigations (IICI, www.iici.global), including on investigation planning, investigative-interviewing skills and investigating international crimes and violations of international human rights and humanitarian law involving children. Penny has a bachelor's degree from Memorial University in Newfoundland and is currently pursuing a Master's degree in Women and Gender Studies from Saint Mary's University in Halifax, Nova Scotia, Canada.

- What will we cover: flow of session
 - Any effort to secure justice, accountability and redress in different fora/ mechanisms start with something of fundamental importance: investigation = focus of this session.
 - 2 related components to this session:
 - ✓ Basic introduction to need for, elements of & process of investigations
 - ✓ Basic introduction to investigative interviewing, a potentially very important element of investigations



CONTENT OF SESSION

- Both components will include but not be focused solely on children. *Why? Examples:*
 - Depending on specifics of mandate, etc, of an investigation, you are unlikely to ever focus exclusively on children. Explanation.
 - Your threat and risk and other assessments may show that it would be harmful or otherwise inappropriate or impossible to investigate crimes/violations by directly engaging children, so you will have to engage adults and/or other sources (e.g., digital sources) to gather evidence of crimes/violations which affected or involved children.
- So, necessary to start with the general and then cover some children-related specifics



CONTENT OF SESSION

- Special attention given to opportunities and challenges of international investigations concerning crimes/violations affecting children (e.g., investigations into international crimes/human rights violations, or in another country/ies, by national, international, hybrid official and unofficial, incl NGO, investigation teams)
 - Usually take place in resource-constrained environments: *serious implications*
 - Contrast with “simpler” investigations which may involve only a small number of investigators and other professionals operating in a familiar national ecosystem governed by clear laws, policies and procedures.

- Concepts:
 - “Investigations”/ “documentation”/ “reporting”/ “monitoring”
 - “Victims”/ “survivors”
 - Crimes/ violations “against, involving, concerning or otherwise affecting children”
 - “Crimes” and/or “violations”
 - “Justice”, “accountability”, redress = “justice” broadly defined to include truth-telling, reparations, criminal and other court processes, human-rights fact-finding missions, etc

- **Disclaimer:** Despite title of course and the content of this session:
 - This is not a training course or session which can equip anyone to investigate crimes/violations involving children, especially regarding interviewing
 - Highly specialised area and skill-set
 - Need to undergo **intensive** training and mentoring
 - Don't make mistake that too many prosecutors and other lawyers make of thinking that they know how to plan and conduct investigations, including investigative interviews – it's a special skill and approach which not everyone can do



SENSITIVE TOPICS

- Theme & topics of this course/session:
sensitive
 - Personal experiences; colleagues, friends, family
 - Presenters & students to be responsible



YOUR EXPERIENCES & SKILLS



COMPONENT # 1: BASIC OVERVIEW OF INVESTIGATIONS

- Component # 1 of session – overview of investigation – addressed through series of questions
- Based in part on pre-reading that has been given to you (planning & interviewing chapters in IP2 (see reference/source at end of slides, under “Further reading”), and Murad code of conduct) and what we assume to be your existing knowledge

- Is the investigation /documentation as opposed to the other phases of a justice process important? Why (not)? Examples
- Is investigation work a responsible, consequential task, i.e., does doing this job poorly or well have consequences? Why (not)? Examples
- Should lawyers understand and know investigation processes? Why (not)? Examples
- Can anyone plan and conduct investigations, or are expert skills & knowledge required? Why (not)? Examples

- When hearing “investigator”, “investigation”, “investigation team”, people with which professional backgrounds are you thinking of?
- Do investigations have to be planned? Why (not)? Examples
- Do investigation plans have to be written down? Why (not)?
- Are investigations easy and quick to plan and conduct? Why (not)? Examples
- What roles do the law and lawyers play in investigations?

- What is the importance of the mandate or terms of reference of an investigation for the investigation? Why (not)? Examples
- What are the basic phases of an investigation?
- Regarding an investigation plan, what are the elements or components of a thorough investigation plan?
- Are investigation plans fixed documents, prepared at the start of a process and not changed again?

- Do investigation plans specifically have to integrate sexual and/or gender-based violence crimes/violations? Why (not)?
Examples
- Do investigation plans specifically have to integrate children? Why (not)? Examples
- Would an investigation plan focus exclusively on crimes/violations involving children? And SGBV? Why (not)?

- When crimes/violations involving children form part of the focus of an investigation, which elements of the investigation plan will have to specifically consider and address children-related considerations? How will an investigation focusing only on adults as victims look different from one which properly includes children? Examples
- What are examples of likely differences between investigations involving children in good national jurisdictions versus investigations in resource-constrained environments?
- What comes to mind when you hear about investigations in “resource-constrained environments”?

- Will investigations of crimes/violations involving children necessarily involve direct engagement with children, including investigative interviews? Why (not)?
Examples
- How can crimes/violations involving children be investigated without directly engaging with children? Examples

- Investigation is a *dynamic* process demanding a professional, ethical and careful approach undertaken by competent professionals
- Health and well-being of survivors, witnesses and investigation-team members
- Threat and risk assessments, including regarding health, security, legal risks
- True experts (as opposed to people who claim to be competent)
- Interviewing: very important, highly specialised



QUESTIONS FROM YOU





COMPONENT # 2: INVESTIGATIVE INTERVIEWING

[Covered by Penny Hart]

- Do No Harm
- The rights of the child to participate
- The best interest of the child

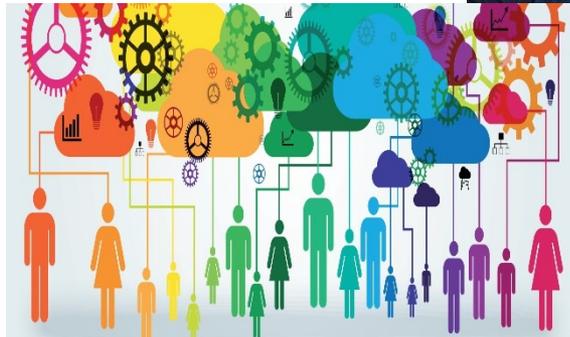




Interviewing is a skilled task, requiring training, practice, and judgement. Interviewing witnesses is part of day-to-day business for an investigator. Witnesses come from a wide range of backgrounds and each present with unique challenges. They have different needs and concerns, and levels of involvement in the investigation. Individual circumstances should always be taken into consideration. Regardless of what approach taken, an interviewer should always behave ethically, and treat all witnesses with empathy and sensitivity. Treat all victims with courtesy and compassion and respect their dignity and privacy.

Impacts of poor interviews

- Psychological
- Social
- Legal



Differences between interviewing children and adults

- Child-interview techniques differ from those that are often used with adults
- Children do not elaborate on their answers like adults
- Eliciting information on the elements of crime has to be secondary to the using of open prompts
- Questions are to be formed in a different way even if the objective is to obtain the same information

Interviewing children in conflicted-affected environments

- Setting requirements are not often available
- Lot of actors involved > higher risk of multiple interviews > higher risk of contamination
- Language barrier effect – Special requirements for interpretation
- Effects of trauma are most likely to appear
- Challenges in interviewing might appear regarding distinctions of the events and forming the timeline

The malleability of memories

- Multiple interviews cause malleable memories and result in compromised credibility
- In conflict-affected environments there are a lot of actors and interviewers which cause a risk of contamination of the memories
- Interviewers have diverse objectives to retrieve information – lack of documentation of the previous interviews significantly complicates the assessment of the credibility



Trauma & Memory

“Individual trauma results from an event, series of events, or set of circumstances that is experienced by an individual as physically or emotionally harmful or life threatening and that has lasting adverse effects on the individual’s functioning and mental, physical, social, emotional, or spiritual well-being.” U.S. Substance Abuse and Mental Health Services Administration (SAMHSA)

Trauma may lead to:

- Complete inability to recall information
- Difficulties recalling details
- Fragmentation- incoherence; lack of sequence during recall

Stanford: Center for Human Rights and International Justice



- Trauma during childhood/adolescence more pervasive and severe consequences than adult exposure
 - negative impact on the development of cognitive and intellectual capacities, executive functioning, emotion regulation, and interpersonal skills
 - chronic fight/flight mode allocates resources to survival, rather than to developing skills in language, planning, or creative problem-solving
 - lasting alterations in individuals' sense of self as well as relationships with others
 - impulsivity, difficulties with regulation
- 40% of children who suffer from PTSD symptoms are subsequently diagnosed with 2 additional mental health disorders
 - Mood disorders
 - obsessive compulsive disorder
 - anxiety disorders
 - generalized anxiety disorder; agoraphobia; social anxiety disorder; specific phobia

Child-specific trauma



Memory development

- Ability to recall events starts approximately at the age of 3 - verbal skills start improving at the same age
- Young children are able to make accurate observations but do not necessarily have sufficient linguistic skills to communicate them properly
- Ability to recall events does not depend only on the age but on variations of personal development (comprehension)



Aspects of language use

- Language has to be age-proper and to be modified to the child's linguistic level
- The explanation of the process has to be planned in advance in a child-proper language
- Even when explained, it's challenging to understand the judicial process as a whole



Let's try....

- Crime
- Human rights violation
- Suspect
- Evidence
- Prosecutor
- Trial
- Commission of inquiry



Understanding of Concepts

- Abstract thinking develops gradually
- Children might use words the meaning of which they do not completely understand and they also might answer questions they do not understand
- Pleasing the interviewer, finding the right answers and the tendency to answer yes
- Use of language and formulation of questions properly are of great importance when interviewing children
- Children are also more sensitive to suggestive questions

3 – 6 Years

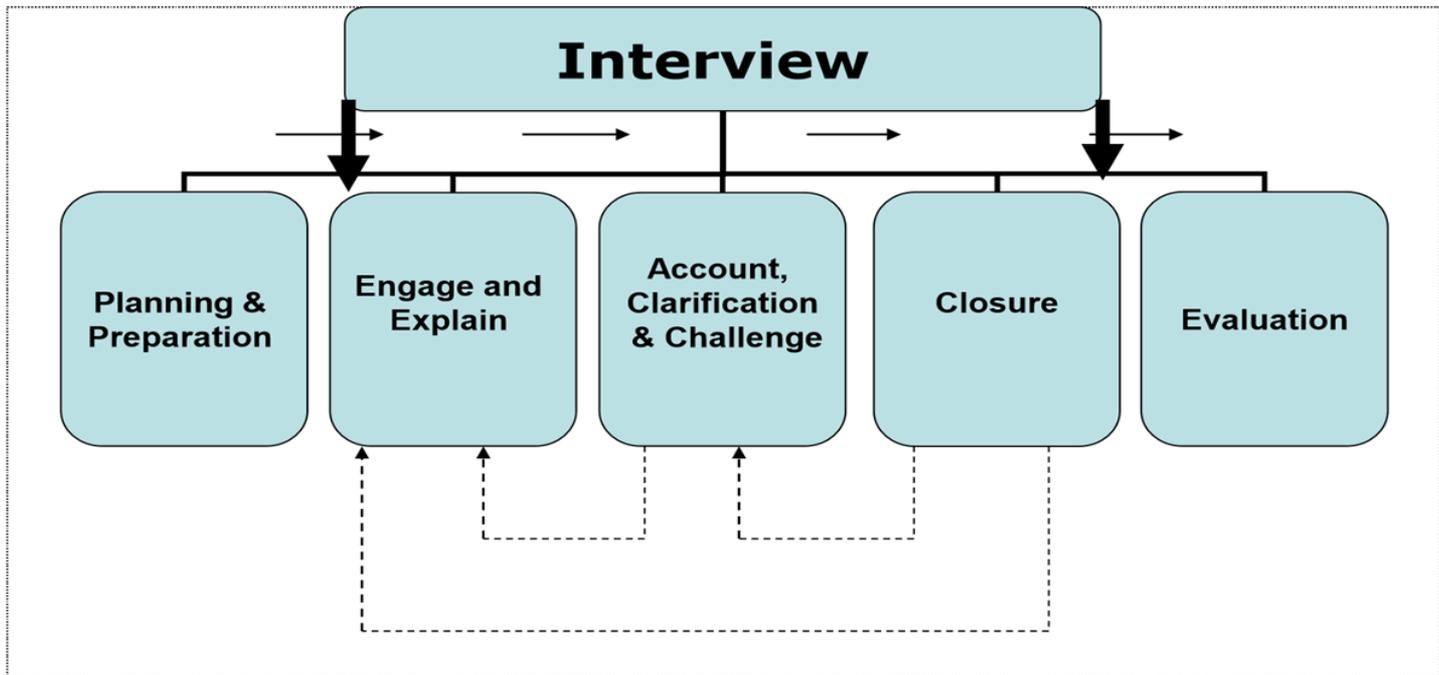
- Limited language comprehension and communication abilities
- Brief accounts

7 – 12 Years

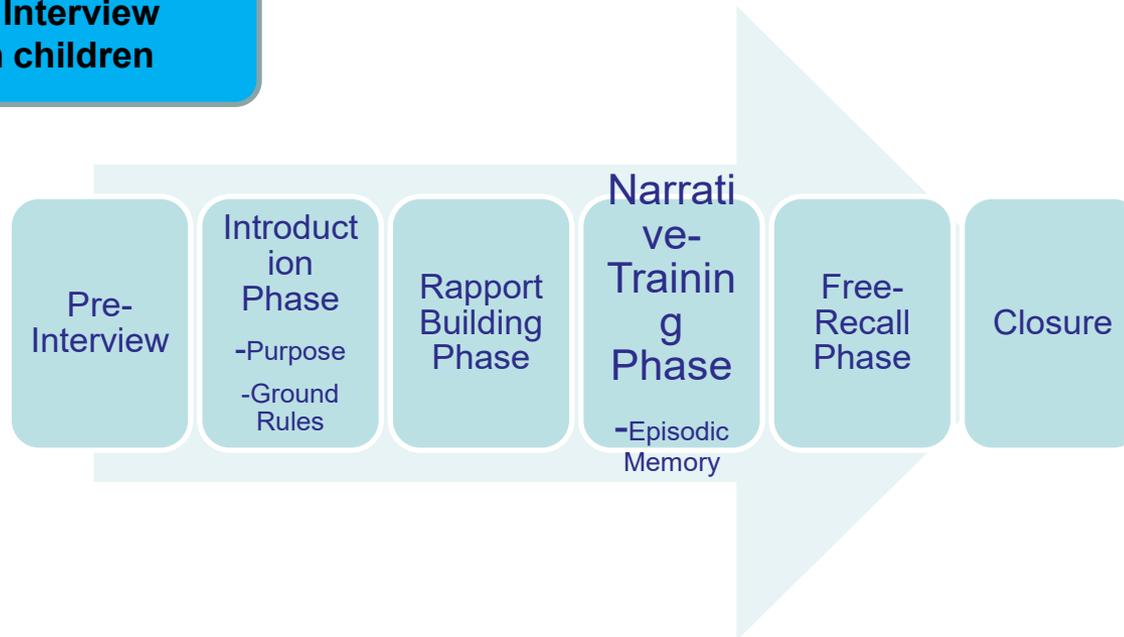
- Understanding of abstracts develops
- Memory retrieval strategies develop gradually

13 Years and above

- Memory skills develop further
- Differences between abstracts are clear



Investigative Interview Process with children





Tell Me What Happened



Tell Me more about that....



What Happened Next...



Directive questions

- Cued invitations
- Used to elicit more information on a detail that has already been mentioned
- Pairing with open-ended questions recommendable



You mentioned that there were others. Tell me more about it?

You told me that you had no clothes on. Tell me more about it?

You mentioned that he was showing you a picture. Tell me more about the picture /What was the picture depicting? / What happened next?

Tell me everything that happened before you went into the room



Direct option-posing or yes/no questions

- Often including details that are not mentioned by the child
- Not recommendable when interviewing a child

Remote Interviewing

From the outset, the well-being and security of the potential interviewee, and the security of the evidence potentially obtained, are paramount. Control of the witness's environment and security are critical factors. Particularly with potentially traumatized witnesses, control of follow-up in relation to any psycho-social or other support services is as important. This requires appropriate policies and procedures, and careful planning and risk assessments. Remote interviews never should be done ad hoc, or opportunistically. Economies of time and money should not be determining factors.



(IICI Guidelines on remote interviewing)

Box 1: Remote investigative interviewing and children

The risks of causing or contributing to serious harm to the child and compromising evidence are extremely high. Circumstances allowing for such and other grave risks to be appropriately controlled or mitigated will be exceedingly rare. Furthermore, real expertise to conduct - in the kinds of investigations and contexts covered by these guidelines - child interviews which are professional, ethical, of real use to investigations, and not harmful, unfortunately still is very scarce. However, being unable to engage children directly does not mean that crimes and violations affecting them cannot and should not be otherwise properly investigated.



Investigative Interviewing





FURTHER READING

Several of these sources focus on the investigation and documentation of conflict-related sexual violence (variously but broadly defined), or do not focus exclusively on children. However, all of them are to varying degrees applicable or relevant to the investigation or documentation of crimes and violations involving children, including but not limited to sexual or gender-based violence crimes/violations.

FURTHER READING

- *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict*, 2nd edition (March 2017), Foreign and Commonwealth Office of UK government publication (“IP2”), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/598335/International_Protocol_2017_2nd_Edition.pdf.

See e.g.

- chapter 9 (planning)
- chapter 11 (interviewing)
- pp 257-259 of chapter 16 (sexual violence against children)
- pp 277-279 of chapter 17 (sexual violence against men and boys)
- annex 9 (chain of custody form).

FURTHER READING

- Global Code of Conduct for Gathering and Using Information About Systematic and Conflict-Related Sexual Violence, 13 April 2022 (“Murad code of conduct”), www.muradcode.com.

Note that this Code applies to the investigation of crimes/violations involving/affecting children too. Even though the Code focuses on systematic and conflict-related sexual violence, most if not all of it would also apply to the investigation of crimes/violations other than sexual violence.



FURTHER READING

- “IICI guidelines on remote interviewing”, August 2021, <https://iici.global/0.5.1/wp-content/uploads/2021/08/IICI-Remote-Interview-Guidelines.pdf>
The whole document is useful, but note paragraph 11 on the remote investigative interviewing of children.
- NICHD protocol on investigative interviewing of children: <https://nichdprotocol.com/>. See revised protocol: <https://nichdprotocol.com/wp-content/uploads/2013/03/RevisedProtocolTMWH2final-1.pdf>, and its appendices.
For an example of the skills and experience required to properly interview children, read the NICHD protocol.



FURTHER READING

- “Tell me what happened: Questioning Children About Abuse”, ME Lamb et al, 2nd ed, Wiley Blackwell, 2018.

Excellent book showcasing the advanced skills and knowledge required to do proper investigative interviews with children.



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- Important:
 - in general, children are capable & “vulnerable”:
capable in terms of having and exercising their rights, participating in accountability processes, etc, but also have particular characteristics, vulnerabilities and needs (depending on gender, age, developmental level, societal and economic context, etc)
 - But, *individualise* assessments, i.e., ask is **this** child in particular (given their age, developmental stage, security situation, context, etc) capable and/or “vulnerable” in which specific ways, and what does that mean for if and how (or not) we can approach them directly?



CONCLUSION

- Lawful, professional, ethical, safe, survivor/victim/child-centric, effective investigations etc: **if that cannot be done, don't do it**
- Extraordinary responsibility towards especially survivors/victims, including children: life, health, well-being, prospects for justice, reparations, etc – do it wrong, and you jeopardise undermine those rights
- Thank you
- Best of luck with rest of course and for your future plans