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## Trafficking Terror and Sexual Violence: Accountability for Human Trafficking and Sexual and Gender-Based Violence by Terrorist Groups under the Rome Statute

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# Trafficking Terror and Sexual Violence: Accountability for Human Trafficking and Sexual and Gender-Based Violence by Terrorist Groups under the Rome Statute

Cóman Kenny\* and Nikita Malik\*\*

## ABSTRACT

*Terrorist groups are increasingly involved in human trafficking, specifically targeting women and girls of ideologically opposed groups or religions. Frequently, this phenomenon involves the perpetration of various forms of sexual violence against those trafficked. The commission of the interlinked crimes of human trafficking, sexual violence, and terrorism is relatively new, encompassing a vicious cycle in which each crime effectively flows from the commission of the others: sexual violence is facilitated by human trafficking, human trafficking is motivated, in part, by sexual violence, and both crimes spread terror among civilian populations. In light of the Prosecutor of the International Criminal Court signaling the possibility of investigating crimes of human trafficking committed in Libya, this Article argues that the link between human trafficking, sexual and gender-based violence, and terrorism needs to be judicially addressed. The authors argue that prosecuting these interlinked crimes would break new ground in the development of international criminal law and that doing so would also recognize and punish the full extent of the criminality suffered by victims.*

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## I. INTRODUCTION

In May 2018, the Prosecutor of the International Criminal Court (ICC) informed the United Nations (UN) Security Council that her office considered Libya a “priority situation”<sup>1</sup> and that its investigation there had recently “focus[ed] on crimes relating to human trafficking and abuses against migrants.”<sup>2</sup> The prosecutor noted with concern “the reports of slave auctions in Libya,”<sup>3</sup> reporting that investigations into crimes within the ICC’s jurisdiction had been conducted “on the ground” for the first time in Libya since 2012.<sup>4</sup> Prosecutor Bensouda concluded by stating that the Office of the Prosecutor (OTP) expected to be “in a position to apply for warrants of arrest . . . in the near future.”<sup>5</sup> This followed Prosecutor Bensouda’s 2017 statement to the Security Council labelling Libya as a “marketplace for the trafficking of human beings”<sup>6</sup> and informing the UN Security Council that her office’s investigation into the situation in Libya had broadened to include such criminality.<sup>7</sup>

Support for these allegations can be found in the UN’s Support Mission in Libya documenting crimes against trafficking victims by terrorist groups.<sup>8</sup> Such details touch upon a relatively new and complex phenomenon that has never been the subject of a judicial investigation or prosecution: the deliberate use of human trafficking and sexual and gender-based violence (SGBV) as a tactic of terrorism. While the connected commission of these crimes has never been a focus for international criminal law, their interlinked commission is a major concern to the international community. Evidence from conflicts around the globe reveals the growing use of human trafficking for sexual purposes to be a terror tactic increasingly adopted by nonstate

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1. Office of the Prosecutor, Statement to the United Nations Security Council on the Situation in Libya, Pursuant to UNSCR 1970 (2011), paras. 2, 9 (May 9, 2018), <https://www.icc-cpi.int/Pages/item.aspx?name=180509-otp-stat-UNSC-lib> [<https://perma.cc/4HZW-G7K6>] (archived Nov. 2, 2018), [hereinafter OTP May 2018 Statement].

2. *Id.* para. 38.

3. *Id.* para. 45.

4. *Id.* paras. 2, 9.

5. *Id.* para. 46.

6. Office of the Prosecutor, Statement of ICC Prosecutor to the UNSC on the Situation in Libya, para. 27 (May 9, 2017), <https://www.icc-cpi.int/Pages/item.aspx?name=170509-otp-stat-lib>, [<https://perma.cc/F4VV-Y7AP>] (archived Nov. 2, 2018).

7. *Id.* para. 25.

8. See U.N. SUPPORT MISSION IN LIBYA & OFFICE OF THE U.N. HIGH COMM’R FOR HUMAN RIGHTS, “DETAINED AND DEHUMANISED”: REPORT ON HUMAN RIGHTS ABUSES AGAINST MIGRANTS IN LIBYA 12 (2016).

actors.<sup>9</sup> The systemization and even the bureaucratization of the nefarious intersection between human trafficking, SGBV, and terrorism can be seen in the exploitation of modern communication tools and technologies to disseminate ideologies which dehumanize and sell women and children online.<sup>10</sup> Added to this is the mechanization of doctors and medicine to prevent pregnancies and speed up physical maturation of young girls for the purposes of sexual abuse.<sup>11</sup>

Prosecutor Bensouda's 2018 report to the Security Council suggested that the investigation into crimes related to human trafficking in Libya was aimed at understanding which of the existing "judicial actors is in the best position to investigate or prosecute alleged crimes."<sup>12</sup> This Article argues for the need to address the commission of the interlinked crimes of human trafficking, SGBV, and terrorism at the international level. The Article is split into four main Parts: (i) how these crimes are linked in practice; (ii) how the crimes could be addressed under the Rome Statute; (iii) the difficulties in constructing a prosecution of these crimes; and, ultimately, (iv) why the ICC should seek to exercise jurisdiction to confront their commission.

## II. HUMAN TRAFFICKING AND SGBV AGAINST TRAFFICKED PERSONS AS AN INSTRUMENT OF TERRORISM

### A. *The Interconnectedness of Human Trafficking, SGBV, and Terrorism*

The UN has noted that within the rise in prominence of violent extremist groups in recent years, the systematic use of sexual violence against women and children has become a tactic of terrorism.<sup>13</sup> Concurrently, the UN acknowledges that in armed conflict and post-conflict situations, the vulnerability of displaced persons to human trafficking for the purposes of exploitation, including sexual violence, increases.<sup>14</sup> In practice, human trafficking, SGBV, and terrorism have become so interwoven and the boundaries between them so blurred that these crimes are each effectively both the means and the result of certain groups' criminal policies. Islamic State (IS), Boko Haram, and al-Shabaab are the nonstate actors best known for committing these

9. Press Release, Security Council, Prevention, Protection, Prosecution Stressed as Security Council Holds Open Debate on Human Trafficking, Modern Slavery, Forced Labour in Conflict Situations, U.N. Press Release SC/12751 (Mar. 15, 2017).

10. Letter from Ban Ki-moon, U.N. Sec'y-Gen., to the President of the Sec'y Council 3, U.N. Doc. S/2016/1090 (Dec. 21, 2016) [hereinafter Secretary-General December 2016 Letter].

11. *Id.*

12. OTP May 2018 Statement, *supra* note 1, para. 38.

13. Secretary-General December 2016 Letter, *supra* note 10, at 1.

14. U.N. OFFICE ON DRUGS & CRIME, GLOBAL REPORT ON TRAFFICKING IN PERSONS 2016, at 61 (2016).

interlinked crimes as part of their operations.<sup>15</sup> However, a large number of other groups, including the Taliban, Hezbollah, Maoist rebel groups in Nepal, guerrilla groups in Colombia, and militias in Congo, Ivory Coast, and Sri Lanka are thought to have employed similar tactics.<sup>16</sup> Terrorist organizations use human trafficking, SGBV, and terrorism in distinct but related ways. The core underlying motivations and purported justifications for the connected commission of these crimes may be characterized as: financing,<sup>17</sup> recruitment,<sup>18</sup> ideology,<sup>19</sup> and military strategy,<sup>20</sup> each of which will be addressed in turn.

## *B. The Practical Intersection between Human Trafficking, SGBV, and Terrorism*

### 1. Financing of Groups

The UN Special Representative on Sexual Violence in Armed Conflict has stated that the trafficking of women and children is “critical” to the financial flows of terrorist groups.<sup>21</sup> Reports show that Boko Haram abducts women and girls to generate revenue through sale and ransom payments,<sup>22</sup> while IS has reportedly followed a practice of gifting women and children to fighters in lieu of payment.<sup>23</sup> The value of trafficking women and children and their commodification is seen in measures taken to ensure that their value is protected. For example, IS has reportedly forced victims to take birth control so that they do not get pregnant and can continue to be resold.<sup>24</sup>

15. NIKITA MALIK, *TRAFFICKING TERROR: HOW MODERN SLAVERY AND SEXUAL VIOLENCE FUND TERRORISM* 10 (2017).

16. See generally LOUISE SHELLEY, *HUMAN TRAFFICKING: A GLOBAL PERSPECTIVE* (2010) (discussing different forms of human trafficking around the globe).

17. See S.C. Res. 2331, at 2 (Dec. 20, 2016); S.C. Res. 2242, at 2 (Oct. 13, 2015); EUROPOL, *SERIOUS AND ORGANISED CRIME THREAT ASSESSMENT: CRIME IN THE AGE OF TECHNOLOGY* 18 (2017); Secretary-General December 2016 Letter, *supra* note 10, at 2–3.

18. S.C. Res. 2242, *supra* note 17, at 2; U.N. Secretary-General, *Conflict-Related Sexual Violence*, ¶ 83, U.N. Doc. S/2015/203 (Mar. 23, 2015) [hereinafter March 2015 Report].

19. U.N. Secretary-General, *Conflict-Related Sexual Violence*, ¶ 8, U.N. Doc. S/2017/249 (Apr. 15, 2017) [hereinafter April 2017 Report]; March 2015 Report, *supra* note 18, at 9–18.

20. S.C. Res. 2242, *supra* note 17, at 2; April 2017 Report, *supra* note 19, at 3; March 2015 Report, *supra* note 18, at 9–18; Secretary-General December 2016 Letter, *supra* note 10, at 3.

21. Secretary-General December 2016 Letter, *supra* note 10, at 7.

22. See generally MAUSI SEGUN, HUM. RTS. WATCH, “THOSE TERRIBLE WEEKS IN THEIR CAMP”: BOKO HARAM VIOLENCE AGAINST WOMEN AND GIRLS IN NORTHEAST NIGERIA (2014) (sharing stories of survivors and witnesses regarding Boko Haram’s abduction practices); Josie Ensor, “I cried for my family every day”, says six-year-old slave freed from Isil captors, *TELEGRAPH* (June 22, 2017, 7:46 PM), <https://www.telegraph.co.uk/news/2017/06/22/treated-badly-reveals-six-year-old-slave-freed-isil-family/> [<https://perma.cc/E2PD-XU2V>] (archived Nov. 2, 2018).

23. Secretary-General December 2016 Letter, *supra* note 10, at 3, 6.

24. Rukmini Callimachi, *To Maintain Supply of Sex Slaves, ISIS Pushes Birth Control*, *N.Y. TIMES* (Mar. 12, 2016), <https://www.nytimes.com/2016/03/13/>

## 2. Recruitment and Retention of Fighters

Groups such as IS have used propaganda on sexual slavery, usually facilitated by human trafficking, to act as an incentive for recruiting both local youths and foreign fighters.<sup>25</sup> This includes the promise of “wives” and access to sex slaves.<sup>26</sup> Recruits are usually economically marginalized men seeking status, power, and access to sex that is unavailable in the socially conservative religious societies from which they often come.<sup>27</sup> Women’s bodies are strategically used not only to lure fighters but also to retain fighters. IS pays fighters for each additional sex slave they acquire, as well as for children born within the “caliphate”—creating a financial incentive for fighters and encouraging slavery and sexual violence against detainees.<sup>28</sup> Issue 4 of IS’s official magazine, *Dabiq*,<sup>29</sup> detailed how Yazidi women and children were to be divided among fighters,<sup>30</sup> with a percentage to be given to IS authorities as *khums* (a tax on war spoils).<sup>31</sup> Additionally, the UN Special Representative on Sexual Violence in Conflict has emphasized that the gifting of women and girls to fighters “should not be underestimated as a way to maintain the motivation and ‘*esprit de corps*’ of fighting units.”<sup>32</sup>

## 3. Ideological Basis and Justification for the Commission of Crimes

Terrorist groups espouse various ideological bases for trafficking and sexually abusing women and children. These justifications are frequently rooted in the perceived “otherness” of the targeted victims, with different strategies employed by terror groups depending on the religious or ideological identity of the targeted community.<sup>33</sup> For

world/middleeast/to-maintain-supply-of-sex-slaves-isis-pushes-birth-control.html [https://perma.cc/LKA4-52PA] (archived Nov. 2, 2018).

25. MALIK, *supra* note 15, at 11.

26. U.N. Secretary-General, *Conflict-Related Sexual Violence*, ¶ 19, UN Doc S/2016/361/Rev.1 (June 22, 2016) [hereinafter Secretary-General June 2016 Letter]; Secretary-General December 2016 Letter, *supra* note 10, at 3, 6.

27. Secretary-General December 2016 Letter, *supra* note 10, at 7; Rukmini Callimachi, *ISIS uses Koran to justify rape*, THE TIMES (Aug. 18, 2015, 1:01 AM), <https://www.thetimes.co.uk/article/isis-uses-koran-to-justify-rape-5dcvxb9255> [https://perma.cc/E2L6-U2M5] (archived Nov. 2, 2018).

28. See Aymenn Jawad Al-Tamimi, *A Caliphate under Strain: The Documentary Evidence*, PUNDICITY (Apr. 22, 2016), [www.aymennjawad.org/18749/a-caliphate-under-strain-the-documentary-evidence](http://www.aymennjawad.org/18749/a-caliphate-under-strain-the-documentary-evidence) [https://perma.cc/M9WZ-XGB8] (archived Nov. 2, 2018).

29. *The Failed Crusade*, DABIQ, Oct. 11, 2014, at 14.

30. *Iraq: ISIS Escapees Describe Systematic Rape*, HUM. RTS. WATCH (Apr. 14, 2015, 11:45 PM), <https://www.hrw.org/news/2015/04/14/iraq-isis-escapees-describe-systematic-rape> [https://perma.cc/L6PM-95Q3] (archived Nov. 2, 2018).

31. *The Failed Crusade*, *supra* note 29, at 15.

32. Secretary-General December 2016 Letter, *supra* note 10, at 7. See generally Ariel Ahram, *Sexual Violence and the Making of ISIS*, 57 SURVIVAL 57 (2015) (emphasis added) (describing how ISIS deploys sexual violence against women and girls and how the climate out of which it grew influenced this form of oppression).

33. MALIK, *supra* note 15, at 20.

example, IS mostly targets Yazidi women and girls for sexual violence, the Turkmen Shia community less so, while there are few reports of sexual violence against the Christian community under IS control.<sup>34</sup> IS has classified the Yazidis as “infidels,” referring to them as a “pagan minority” whose “women could be enslaved . . . as spoils of war.”<sup>35</sup> After IS invaded the Sinjar region of Iraq in 2014, Yazidi women and girls were forcibly transferred numerous times to sites in Iraq and Syria, having been evaluated on age, beauty, and virginity.<sup>36</sup> These Yazidis were “bought, sold, gifted, or even bequeathed and transferred by deceased ISIL fighters as part of their will or estate,” demonstrating how the women and girls are considered as property.<sup>37</sup> Similar to IS’s religiously motivated treatment of the Yazidis, Boko Haram primarily targets Christians, with Human Rights Watch documenting incidents where Muslims and Christians were separated during raids, with the Muslims usually released and the Christians abducted.<sup>38</sup>

#### a. How Justifications Are Spread

Propaganda is key to disseminating and reinforcing the ideology that supports the connected commission of human trafficking, SGBV, and terrorism. This is exemplified by IS, which created two “departments” dedicated to “war spoils.” The first focused on the sale of slaves, the second was committed to the issuance of religious edicts to justify the use of slavery.<sup>39</sup> In 2014, the Diwan al-Iftaa wa al-Buhuth (Research and Fatwa Department of IS) published a pamphlet providing ideological justifications for human trafficking<sup>40</sup> that included the freeing of enslaved women from “shirk” (disbelief) and precipitating conversions to Islam; the punishment of *kuffar* (disbelievers); the need to illustrate the supremacy of IS captors; the requirement to increase the offspring of *mujahideen* (fighters); and, the use of slaves as a reward for *mujahideen*.<sup>41</sup>

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34. Secretary-General December 2016 Letter, *supra* note 10, at 6.

35. *Id.*

36. See MALIK, *supra* note 15, at 42 n.225 (explaining the sex markets run by ISIS through which the Yazidi girls were often sold).

37. *Id.*

38. *Id.* at 31.

39. Emily Chertoff, Note, *Prosecuting Gender-Based Persecution: The Islamic State and the ICC*, 126 YALE L.J. 908, 1058 (2017).

40. Aymeen Jawad Al-Tamimi, *Unseen Islamic State Pamphlet on Slavery*, PUNDICITY (Dec. 29, 2015), [www.aymennjawad.org/2015/12/unseen-islamic-state-pamphlet-on-slavery](http://www.aymennjawad.org/2015/12/unseen-islamic-state-pamphlet-on-slavery) [https://perma.cc/YHD2-D9QY] (archived Nov. 2, 2018); Ihsaan Tharoor, *The Islamic State's horrifying practice of sex slavery, explained*, WASH. POST (Aug. 20, 2015), [https://www.washingtonpost.com/news/worldviews/wp/2015/08/20/the-islamic-states-horrifying-practice-of-sex-slavery-explained/?noredirect=on&utm\\_term=.35cf0f049610](https://www.washingtonpost.com/news/worldviews/wp/2015/08/20/the-islamic-states-horrifying-practice-of-sex-slavery-explained/?noredirect=on&utm_term=.35cf0f049610) [https://perma.cc/PD5W-QXA6] (archived Nov. 2, 2018).

41. See Nikita Malik, *Surviving Islamic State: The Plight Of The Yazidi Community*, FORBES (Sept. 18, 2018, 6:30 AM), <https://www.forbes.com/sites/>



Issue 4 of *Dabiq* provided further reasons to sexually abuse captured Yazidi women.<sup>42</sup> It made the case that enslaving the women of the *kuffar* and taking them as concubines was part of Sharia law, meaning it could not be criticized. To do so would mean criticizing the Quran and the Prophet, and therefore, apostatizing from Islam.<sup>43</sup>

Notably, this issue of *Dabiq* detailed the enslavement of abducted Christian women by Boko Haram in Nigeria,<sup>44</sup> in order to draw parallels in the perceived righteousness of doing so.

#### b. Examples of Practices Supported by Ideology

The ideological underpinning of targeting opposing faiths/ideologies through attacks against women and children is manifested in practices such as forced conversions, marriages, and pregnancies. After Boko Haram abducted the Chibok girls in 2014, its leader Abubakar Shekau publicly declared that “we would . . . give their hands in marriage because they are our slaves. We would marry them out at the age of 9. We would marry them out at the age of 12.”<sup>45</sup> Testimony of survivors demonstrates how Boko Haram emphasizes the importance of converting the women they abduct to Islam.<sup>46</sup> The rape of virgin girls is committed by the group with the intention to force victims to marry Muslim men.<sup>47</sup> Evidence suggests that IS has established “marriage bureaux” in areas under its control,<sup>48</sup> with IS publications and *fatwas* having “institutionalized the use of sexual violence (including forced marriage and forced pregnancy) as part of their operations and nation-building enterprise.”<sup>49</sup> Forced inseminations, forced pregnancies, and forced conversions also represent means for terrorist groups to create the next generation of fighters.<sup>50</sup> As the wife of a former al-Shabaab militant purportedly stated when revealing the existence of an organized breeding program

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nikitamalik/2018/09/18/surviving-islamic-state-the-plight-of-the-yazidi-community/#711d10ca770d [https://perma.cc/M2Y8-REJX] (archived Nov. 18, 2018) [hereinafter *Surviving Islamic State*].

42. *The Failed Crusade*, *supra* note 29, at 14–15; see also *They Plot and Allah Plots*, DABIQ, May 21, 2015, at 44–49.

43. *The Failed Crusade*, *supra* note 29, at 17; *Surviving Islamic State*, *supra* note 41.

44. *The Failed Crusade*, *supra* note 29, at 15.

45. Dionne Searcey, *Years After Boko Haram Kidnapping, Dozens of Girls Are Freed*, *Nigeria Says*, N.Y. TIMES (May 6, 2017), <https://www.nytimes.com/2017/05/06/world/africa/nigeria-boko-haram-chibok-girls.html> [https://perma.cc/HD8F-2GMW] (archived Jan. 21, 2019).

46. SEGUN, *supra* note 22, at 29–30.

47. Atta Barkindo et al., *Our Bodies, Their Battleground: Boko Haram and Gender-Based Violence Against Christian Women and Children in North-Eastern Nigeria since 1999* at 19 (Open Doors Int'l, Nigeria's Political Violence Research Network, Working Paper No. 1, 2013).

48. Secretary-General December 2016 Letter, *supra* note 10, at 5.

49. *Id.*

50. Tharoor, *supra* note 40.

by the terror group, “They want to multiply so they just want women to give birth.”<sup>51</sup>

#### c. The Direct or Indirect Practice of Targeting Groups for Destruction

The trafficking of members of rival groups or opposing ideologies and the perpetration of sexual violence against those trafficked sunders the targeted communities by separating families and attacking elements of group identity.<sup>52</sup> In 2015, the UN Security Council acknowledged that acts of SGBV were being used as instruments to increase terrorist groups’ power through “the destruction of communities.”<sup>53</sup> Similarly, the Secretary General’s 2017 report on sexual violence in conflict stressed that armed groups target people for sexual violence based on ethnic, religious, and political lines, mirroring rivalries within the conflicts in which they are embedded.<sup>54</sup> For example, IS and Boko Haram rely on forced marriages and forced conversions to solidify connections of victims to fighters and break down the connection between victims and their community.<sup>55</sup> The five thousand Yazidi women who have been sold into slavery by IS are a prime example,<sup>56</sup> given that Yazidi culture does not typically accept intermarriage and sexual relations with people from other faiths.<sup>57</sup>

### 4. Military Strategy

#### a. To Spread Terror

Human trafficking and the commission of sexual violence against those trafficked serves to terrorize those trafficked and the groups or communities from which they come, both by dint of the fear of being victimized and the consequences of such victimization for individuals and the collective. Terrorist groups employing these interlinked strategies are aware of negative consequences for survivors, as the 2017 Secretary General’s report on sexual violence in conflict highlights:

Shame and stigma are integral to the logic of sexual violence being employed as a tactic of war or terrorism: aggressors understand that this type of crime can turn victims into outcasts, thus unravelling the family and kinship ties that hold

51. *Id.*

52. Secretary-General December 2016 Letter, *supra* note 10, at 3.

53. S.C. Res. 2242, *supra* note 17, at 2.

54. April 2017 Report, *supra* note 19, at 3.

55. See Adaobi Tricia Nwaubani, *Girl held by Boko Haram: “Td have shot at rescuers,”* CNN (Apr. 14, 2016), [www.edition.cnn.com/2016/04/14/opinions/boko-haram-girl-nwaubani/index.html](http://www.edition.cnn.com/2016/04/14/opinions/boko-haram-girl-nwaubani/index.html) [<https://perma.cc/4YEQ-FY43>] (archived Nov. 2, 2018).

56. See U.N. Human Rights Council, Rep. on the Work of Its Twenty-Eighth Session, at 118, U.N. Doc A/HRC/28/2 (May 27, 2015).

57. U.N. Human Rights Council, “They Came to Destroy”: ISIS Crimes Against the Yazidis, ¶ 19, U.N. Doc. A/HRC/32/CRP.2 (June 15, 2016) [hereinafter *ISIS Crimes Against the Yazidis*].

communities together. The effect may be diminished reproductive capacity and prospects for group survival. Just as there are many manifestations of conflict-related sexual violence, there are multiple and intersecting stigmas that follow in its wake. These include the stigma of “guilt by association” with the perpetrator and their group; fear of suspected sexually transmitted infections such as HIV; the perceived dishonour of lost chastity or virginity; the stigma of maternity out of wedlock, especially where children conceived through rape are considered “children of the enemy”; homosexuality taboos, in the case of male rape; and the shame of being unable to defend oneself and loved ones.<sup>58</sup>

Since 2014, Boko Haram has abducted an estimated two thousand women and girls.<sup>59</sup> Due to the stigmatization surrounding the sexual violence endured, survivors often struggle to reintegrate within their societies—wherein they are ostracized because they are seen to have been indoctrinated by extremist ideologies, making them a perceived risk to the wider community.<sup>60</sup> Many of the abducted Chibok school girls—who detailed harrowing accounts of rape (frequently in the context of forced marriages), beatings, intimidation, and starvation during their captivity—returned pregnant or with babies as a result of rape.<sup>61</sup> Children born from relationships with Boko Haram fighters face increased risks of “rejection, abandonment and violence.”<sup>62</sup>

The humiliation of those trafficked is at the core of using SGBV as a tactic of terrorism.<sup>63</sup> In line with the ideological underpinning of dehumanizing individuals of a targeted group to commit barbaric acts against them, so too dehumanization acts to instill fear and terror throughout the wider targeted community.<sup>64</sup> Victims that suffer trafficking at the hands of terror groups may suffer abuses such as rape by one or several fighters,<sup>65</sup> forced marriages,<sup>66</sup> forced inseminations,<sup>67</sup> abductions,<sup>68</sup> forced conversions,<sup>69</sup> and threats of beatings and

58. April 2017 Report, *supra* note 19, at 4.

59. *Nigeria: Abducted women and girls forced to join Boko Haram attacks*, AMNESTY INT’L (Apr. 14, 2015, 12:01 AM), <https://www.amnesty.org/en/latest/news/2015/04/nigeria-abducted-women-and-girls-forced-to-join-boko-haram-attacks/> [<https://perma.cc/D8VS-PXJ5>] (archived Nov. 2, 2018).

60. See generally MALIK, *supra* note 15.

61. *Girls held by Boko Haram need support to rebuild shattered lives*, UNICEF (Oct. 18, 2016), [https://www.unicef.org/nigeria/media\\_10782.html](https://www.unicef.org/nigeria/media_10782.html) [<https://perma.cc/BB59-9SPS>] (archived Nov. 2, 2018).

62. *Id.*

63. See Nick Squires, *Yazidi girl tells of horrific ordeal as Isis sex slave*, TELEGRAPH (Sept. 7, 2014, 4:38 PM), <https://www.telegraph.co.uk/news/worldnews/middleeast/iraq/11080165/Yazidi-girl-tells-of-horrific-ordeal-as-Isil-sex-slave.html> [<https://perma.cc/7TP4-5VG7>] (archived Nov. 2, 2018).

64. See Iraq: *ISIS Escapees Describe Systematic Rape*, *supra* note 30.

65. See SEGUN, *supra* note 22, at 34; Adam Nossiter, *Boko Haram Militants Raped Hundreds of Captives in Nigeria*, N.Y. TIMES (May 18, 2015), <https://www.nytimes.com/2015/05/19/world/africa/boko-haram-militants-raped-hundreds-of-female-captives-in-nigeria.html> [<https://perma.cc/2QJM-9CT6>] (archived Nov. 1, 2018).

66. See SEGUN, *supra* note 22, at 34; Nossiter, *supra* note 65.

67. See Nossiter, *supra* note 65.

68. See SEGUN, *supra* note 22, at 34; Nwaubani, *supra* note 55.

69. See SEGUN, *supra* note 22, at 30.

killings.<sup>70</sup> Evidence also illustrates women being repeatedly sold by terror groups, demonstrating the institutionalized sexual market that exists.<sup>71</sup> These and other practices all belong to the sphere of intimidation and fear that is characteristic of terrorism.<sup>72</sup>

## b. To Conduct Military Operations

The threat and use of abduction and sexual violence terrorizes civilian populations to such an extent that it drives forced displacement of civilians—particularly minorities—internally and across borders.<sup>73</sup> This allows terror groups to clear territory and extend military control.<sup>74</sup> The trafficking of women and children has been employed for other strategic military purposes, with Boko Haram purportedly using the kidnapping of women and children as a tactic to lure security forces into ambushes or for the purpose of prisoner exchanges.<sup>75</sup> In some cases, terror groups use trafficked victims to directly commit acts of terror, further blurring the lines of the crimes committed and turning terrorized victims of trafficking and sexual violence into perpetrators of acts of terrorism. For example, since 2015, Boko Haram has utilized abducted children as suicide bombers<sup>76</sup> and human shields.<sup>77</sup> Similarly, the Independent Commission of Inquiry has highlighted how abducted Yazidi boys have been trained and forced to fight in IS offensives in Syria.<sup>78</sup> Al-Shabaab has also been documented kidnapping children in Somalia for use as soldiers.<sup>79</sup>

70. *See id.*; Nossiter, *supra* note 65.

71. U.K. HOUSE OF LORDS SELECT COMMITTEE ON SEXUAL VIOLENCE IN CONFLICT, REPORT OF SESSION 2015–16: SEXUAL VIOLENCE IN CONFLICT: A WAR CRIME 2015–16 at 134–35 (2016).

72. *See* Office of the U.N. High Comm’r for Human Rights, Rep. on the Human Rights Situation in Iraq in the Light of Abuses Committed by the So-Called Islamic State in Iraq and the Levant and Associated Groups, ¶ 36, U.N. Doc. A/HRC/28/18 (Mar. 13, 2015).

73. Secretary-General December 2016 Letter, *supra* note 10, at 6.

74. *Id.* at 2.

75. SEGUN, *supra* note 22, at 4.

76. UNICEF, BEYOND CHIBOK: OVER 1.3 MILLION CHILDREN UPROOTED BY BOKO HARAM VIOLENCE 2 (Apr. 2016), [https://www.unicef.org/infobycountry/files/Beyond\\_Chibok.pdf](https://www.unicef.org/infobycountry/files/Beyond_Chibok.pdf) [<https://perma.cc/FP9J-HF6D>] (archived Nov. 1, 2018); Press Release, UNICEF, Lake Chad Conflict: Alarming Surge in Number of Children Used in Boko Haram Bomb Attacks This Year (Apr. 12, 2017), <https://www.unicef.org.uk/press-releases/lake-chad-conflict-alarming-surge-number-children-used-boko-haram-bomb-attacks-year-unicef> [<https://perma.cc/R6ZK-4NTS>] (archived Nov. 1, 2018).

77. April 2017 Report, *supra* note 19; *Nigerian Army: Boko Haram May Have Used Chibok Girls as Shields During Attack*, VOICE OF AM. NEWS (Dec. 28, 2016, 2:28 PM), <https://www.voanews.com/a/nigerian-army-boko-haram-chibok-girls-human-shields/3654377.html> [<https://perma.cc/WK5A-MUAG>] (archived Nov. 1, 2018).

78. ISIS Crimes Against the Yazidis, *supra* note 57, at ¶ 6.

79. U.N. Secretary-General, *Rep. on Children and Armed Conflict*, ¶ 6, U.N. Doc. A/72/361/S/2017/821 (2017).

### III. PROSECUTING THESE INTERLINKED CRIMES AT THE ICC

Having established how the commission of human trafficking, SGBV, and terrorism are connected in practice, the following subparts address the relevant provisions of the Rome Statute and international law to analyze how these crimes fit within the jurisdiction of the ICC and could form the basis of a prosecution.

#### A. Human Trafficking and the Rome Statute

The Rome Statute (the Statute) is the first international criminal law instrument to expressly include the crime of human trafficking. Article 7(2)(c) provides that: “[e]nslavement’ means the exercise of any or all of the powers attaching to the right of ownership over a person and *includes the exercise of such power in the course of trafficking in persons*, in particular women and children.”<sup>80</sup> The Statute contains no definition or further elaboration on human trafficking. The ICC’s Elements of Crimes adds little clarity, merely providing examples of the types of acts that may be encompassed within the exercise of ownership, “such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.”<sup>81</sup> In the accompanying footnote, it is confirmed “that the conduct described in this element includes trafficking in persons, in particular women and children.”<sup>82</sup> Given the dearth of detail in the constituent documents of the ICC, it is necessary to look at how human trafficking has been defined elsewhere. This review may be separated between international instruments and international jurisprudence.

Early international legislative efforts relating to trafficking focused primarily on the prohibition of trafficking women—particularly white women—for prostitution.<sup>83</sup> These various instruments failed to cover the true extent of human trafficking, such as more temporary forms of trafficking for commercial exploitation.<sup>84</sup> In 2000, a trafficking protocol supplementing the UN Convention against Transnational Organized Crime was adopted (Trafficking

80. Rome Statute of the International Criminal Court art. 7.2(c), July 17, 1998, U.N. Doc. A/CONF.183/9 (emphasis added) [hereinafter Rome Statute].

81. INT’L CRIM. CT. (ICC), ELEMENTS OF CRIMES art. 7(1)(c) at 6 (2010), <https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf> [<https://perma.cc/S5ZQ-5VMM>] (archived Nov. 1, 2018) [hereinafter ELEMENTS OF CRIMES].

82. *See id.* n.11.

83. *See, e.g.*, The Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Mar. 21, 1950, 96 L.N.T.S. 271; The International Convention for the Suppression of the White Slave Traffic, May 4, 1949, 98 L.N.T.S. 101; International Convention for the Suppression of Traffic in Women of Full Age, Oct. 11, 1933, 150 L.N.T.S. 431; Convention for the Suppression of Trafficking in Women and Children, Sept. 30, 1921, 9 L.N.T.S. 415; International Agreement for the Suppression of White Slave Traffic, May 18, 1904, 1 L.N.T.S. 83.

84. NEIL BOISTER, AN INTRODUCTION TO TRANSNATIONAL CRIMINAL LAW 24–25 (2d ed. 2012).

Protocol).<sup>85</sup> The Trafficking Protocol represents the most comprehensive international instrument outlawing human trafficking to date. The definition of trafficking in Article 3(a) of the Trafficking Protocol can be broken down into three components: (i) the act of trafficking: recruiting, transporting, transferring, harboring, or receiving persons; (ii) the means of trafficking: threat or use of force or other type of coercion, abduction, fraud, deception, the abuse of a position of power or of a position of vulnerability, or giving or receiving payments or benefits; and (iii) the purpose of trafficking: exploitation by, *inter alia*, prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude, or organ removal.<sup>86</sup> Consent of the victim to being trafficked is irrelevant under the Trafficking Protocol.<sup>87</sup> Additionally, if one of the acts involves a child under the age of eighteen years,<sup>88</sup> this constitutes trafficking even if it does not involve any of the means set down in Article 3(a).<sup>89</sup> While Article 4 of the Trafficking Protocol provides that the definition shall only apply where offenses are transnational, this requirement is attributable to its status as a supplement to the Convention against Transnational Organized Crime, rather than an inherent and operable part of the definition of human trafficking more broadly.<sup>90</sup> This is seen in the exclusion of a transnational requirement from subsequent instruments such as the Council of Europe's 2005 Convention on Action against Trafficking in Human Beings—which otherwise imported the definition of human trafficking from the Trafficking Protocol unchanged.<sup>91</sup>

Given the relatively recent efforts to define human trafficking in international law, it is perhaps unsurprising that this offense has never been prosecuted as an international crime. However, two cases, one each from the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the European Court of Human Rights (ECtHR), have addressed human trafficking to some extent. In 2001, the ICTY Trial Chamber in the *Prosecutor v. Kunarac* case referred to human trafficking when discussing the definition of enslavement, holding that “indications of enslavement include exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution;

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85. G.A. Res. 55/25, Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime (Nov. 15, 2000) [hereinafter Trafficking Protocol].

86. *Id.* art. 3(a).

87. *Id.* art. 3(b) (“The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used[.]”).

88. *Id.* art. 3(d).

89. *Id.* art. 3(c).

90. Harmen van der Wilt, *Trafficking in Human Beings, Enslavement, Crimes Against Humanity: Unravelling the Concepts*, 13 CHINESE J. INT'L L. 297, 302 (2014).

91. Council of Europe Convention on Action Against Trafficking in Human Beings art. 4, May 16, 2005, C.E.T.S. 197.

and human trafficking.”<sup>92</sup> The ICTY Appeals Chamber approved the Trial Judgment’s pronouncement on the crime of enslavement, adding that: “[i]n the case of these various contemporary forms of slavery . . . there is some destruction of the juridical personality.”<sup>93</sup> In 2010, the ECtHR found that human trafficking—within the meaning of the Trafficking Protocol—“falls within the scope of Article 4 of the [European] Convention,”<sup>94</sup> despite trafficking not expressly appearing in the Convention. The ECtHR stated that:

trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership. It treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment, usually in the sex industry but also elsewhere. It implies close surveillance of the activities of victims, whose movements are often circumscribed. It involves the use of violence and threats against victims, who live and work under poor conditions.<sup>95</sup>

One thing that stands out from these pronouncements is that the precise relationship between slavery and human trafficking appears unclear.<sup>96</sup> The ECtHR did not clarify whether it considered trafficking as falling within the scope of “slavery,” “servitude,” or “forced and compulsory labour” under Article 4 of the Convention.<sup>97</sup> The ICTY, on the other hand, concluded that trafficking was a contemporary form of slavery.<sup>98</sup> Yet, the Trafficking Protocol’s definition of trafficking includes slavery or slavery like-practices as a form of exploitation within the broader context of trafficking.<sup>99</sup> This point aside, these cases reinforce that the Trafficking Protocol’s definition remains the core provision in international law. This is echoed by the OTP at the ICC acknowledging that the Trafficking Protocol may be used as interpretative guidance for the crime of human trafficking under Article 7 of the Rome Statute.<sup>100</sup>

With that in mind, human trafficking under Article 7(2)(c) of the Rome Statute could be defined as: (i) an *actus reus* requiring “the

92. Prosecutor v. Kunarac, Case No. IT-96-23-T, Trial Judgment, ¶ 542 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001).

93. Prosecutor v. Kunarac, Case No. IT-96-23-A, Appeals Judgment, ¶ 117 (Int’l Crim. Trib. for the Former Yugoslavia June 12, 2002).

94. Rantsev v. Cyprus, App. No. 25965/04, 2010 Eur. Ct. H.R. ¶ 282.

95. *Id.* at ¶ 281.

96. Van der Wilt, *supra* note 90, at 312.

97. Harmen van der Wilt, *Trafficking in Human Beings: A Modern Form of Slavery or a Transnational Crime?* 16 (Amsterdam Ctr. for Int’l Law, Working Paper No. 2014-07, 2014), [https://pure.uva.nl/ws/files/2406510/155748\\_442012.pdf](https://pure.uva.nl/ws/files/2406510/155748_442012.pdf) [<https://perma.cc/RWU5-A68T>] (archived Nov. 2, 2018) [hereinafter van der Wilt Working Paper].

98. Rantsev, 2010 Eur. Ct. H.R. ¶ 280.

99. Van der Wilt, *supra* note 90, at 303.

100. See OFFICE OF THE PROSECUTOR, INT’L CRIM. CT., POLICY ON CHILDREN 22 n.58 (2016), [https://www.icc-cpi.int/iccdocs/otp/20161115\\_OTP\\_ICC\\_Policy-on-Children\\_Eng.pdf](https://www.icc-cpi.int/iccdocs/otp/20161115_OTP_ICC_Policy-on-Children_Eng.pdf) [<https://perma.cc/GZ25-CUDH>] (archived Nov. 1, 2018) [hereinafter OFFICE OF THE PROSECUTOR POLICY].

exercise of any . . . of the powers attaching to the right of ownership,”<sup>101</sup> such as purchasing; selling; lending; bartering; recruiting; transporting; transferring; harboring; receiving; or other similar deprivations of the liberty of a person or persons; and (ii) a *mens rea* requiring that these acts be carried out with the intent to exploit or facilitate the exploitation of a person or persons through, *inter alia*, prostitution or sexual exploitation of any kind; forced labor or services; physical hardship; slavery or practices similar to slavery; servitude; or organ removal.<sup>102</sup> It is suggested here that the “means” element of the Trafficking Protocol outlined above, where present, should be assessed when considering whether the *actus reus* and/or *mens rea* are met, rather than forming an element of the crime to be proven in order to attribute responsibility.

### B. Sexual Violence and the Rome Statute

At the conference to establish the ICC, states agreed upon a number of provisions in the Rome Statute recognizing various forms of SGBV as “amongst the most serious crimes of concern to the international community.”<sup>103</sup> The Statute is the first international law instrument “to include an expansive list of sexual . . . crimes as war crimes [in the context of] both international and non-international armed conflict.”<sup>104</sup> It also expands the heretofore accepted list of sexual crimes as crimes against humanity beyond the crime of rape.<sup>105</sup>

The Rome Statute may be divided into two categories of sexual crimes: (i) those which are expressly prohibited as sexual crimes, and (ii) other enumerated crimes which may have a sexual element in their commission.<sup>106</sup> The first category encompasses the crimes of “rape,” “enforced prostitution,” and “sexual violence.” The crime of “sexual violence” (as a crime against humanity or war crime) under Articles 7(1)(g), 8(2)(b)(xxii), and 8(2)(e)(vi) requires that “[s]uch conduct was of a gravity comparable to the other [enumerated] offences.” The OTP has, for example, previously argued that acts of forcible circumcision and penile amputation amount to “sexual violence.”<sup>107</sup> The second category includes crimes such as torture, mutilation, other inhumane acts, and outrages upon personal dignity where there is a sexual and/or

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101. Rome Statute, *supra* note 80.

102. *See id.* art. 30(1).

103. OFFICE OF THE PROSECUTOR, INT’L CRIM. CT., POLICY PAPER ON SEXUAL AND GENDER-BASED CRIMES ¶ 1 (2014), <https://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes-June-2014.pdf> [<https://perma.cc/XUW9-WP5D>] (archived Nov. 2, 2018) [hereinafter OFFICE OF THE PROSECUTOR SEXUAL CRIMES]; *see* Rome Statute, *supra* note 80, arts. 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi).

104. OFFICE OF THE PROSECUTOR SEXUAL CRIMES, *supra* note 103, ¶ 1.

105. *Id.*

106. *See* Rome Statute, *supra* note 80.

107. *See* Prosecutor v. Kenyatta, ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶¶ 264–66 (Jan. 23, 2012).



gender element to their commission.<sup>108</sup> Crimes with a sexual element may also be prosecuted under the rubric of persecution or genocide—where committed with the requisite specific intent.<sup>109</sup> The prosecution of sexual violence within the context of crimes against humanity, war crimes, and genocide are addressed here in turn.

## 1. Sexual Crimes as Crimes against Humanity

Articles 7(1)(g) and (h) of the Rome Statute enumerate various sexual crimes, including rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, other forms of sexual violence of comparable gravity, and persecution on the grounds of gender.<sup>110</sup> While Article 7 necessarily requires that the crimes at issue be committed “as part of a widespread or systematic attack directed against civilian populations,” it is not required that each act, such as rape, be widespread or systematic, provided that the act forms part of a widespread or systematic attack against a civilian population.<sup>111</sup> Other crimes such as enslavement (under which the crime of human trafficking falls) as well as deportation or forcible transfer, torture, and murder may have a sexual element in their commission. Sexual crimes can also constitute other inhumane acts intentionally causing great suffering or serious injury to mental or physical health.<sup>112</sup>

### a. Persecution on the Grounds of Gender

The interlinked commission of the crimes of human trafficking, SGBV, and terrorism reveals the intersectionality of the racial, ethnic, religious, and gender identities of victims. While the commission of many international crimes often show a racial, ethnic, or religious focus in their targeting of particular victims, frequently the most common element targeted is gender.<sup>113</sup> However, the gender aspect in the commission of crimes is often overlooked in favor of the broader encapsulation of discrimination of a group. The instrumentalization of human trafficking, SGBV, and terrorism, as discussed above, evinces

108. See Rome Statute, *supra* note 80, arts. 7–8.

109. See OFFICE OF THE PROSECUTOR SEXUAL CRIMES, *supra* note 103, ¶ 25 (explaining that the ICC may exercise jurisdiction over sexual and gender-based crimes that constitute acts of genocide).

110. See Rome Statute, *supra* note 80, art. 7.

111. *Id.*

112. See, e.g., Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, Trial Judgment, ¶ 916 (Dec. 1, 2003) (“Other acts of sexual violence . . . may of course be prosecuted, and would be considered by the Chamber under other categories of crimes for which the Tribunal has jurisdiction, such as other inhumane acts.”).

113. See April 2017 Report, *supra* note 19, ¶ 8 (“For [violent extremist groups], sexual violence advances not only such objectives as incentivizing recruitment, terrorizing populations into compliance, displacing civilians from strategic areas, eliciting operational intelligence and forcing conversions through marriage, but also entrenches an ideology based on suppressing women’s rights and controlling their sexuality and reproduction.”)

the premeditated nature of the targeting and the use of women and girls within terror groups' overarching ideological perception of women and girls as "expendable resources in the machinery of terrorism."<sup>114</sup> These crimes disproportionately affect women and girls and are often aimed specifically at females from an opposing ideological group.<sup>115</sup> The differentiation in treatment between males and females within a racial, ethnic, or religious group demonstrates a supplementary animus against women based on the very fact that they are women. The open advocacy and instrumentalization of rape and sexual violence meets the requirement of specific intent to target females based on their gender. As such, the interconnected commission of these crimes could be prosecuted as persecution on the basis of gender under Article 7(1)(h) of the Rome Statute.<sup>116</sup> Despite the increased focus on prosecuting sexual crimes and the prevalence of sexual violence in cases at the ICC, gender persecution has only been charged once, in the *Prosecutor v. Mbarushimana* case—which did not go to trial.<sup>117</sup> In the most recent case to come before the court, Pre-Trial Chamber I issued an arrest warrant for Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud based, in part, on allegations of gender persecution.<sup>118</sup> There is, therefore, an increased recognition as to how crimes affect women and girls in particular, in addition to the collective groups from which they come, and that the additional victimization inherent in their targeting should be addressed.

## 2. Sexual Crimes as War Crimes

Article 8 of the Rome Statute prohibits "acts of rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and other forms of sexual violence also constituting a grave breach of the Geneva Conventions or a serious violation of Common Article 3" to the Geneva Conventions.<sup>119</sup> Other war crimes, such as intentionally directing attacks against the civilian population, torture, mutilation, outrages upon personal dignity, or the recruitment of child soldiers, may additionally involve sexual elements.<sup>120</sup> For example, torture as a war crime requires that the perpetrator inflicted pain or suffering for several purposes, including for reasons based on discrimination of any

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114. *Id.*

115. See Chertoff, *supra* note 39, at 1063.

116. See Rome Statute, *supra* note 80, art. 7(1)(h).

117. See *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-465-Red, Decision on the Confirmation of Charges, 116, ¶ 267 (Dec. 16, 2011) (majority of the court finding no substantial grounds to believe that the crimes against humanity alleged had been committed).

118. *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, ICC-01/12-01/18, Warrant of Arrest, ¶ 9 (Mar. 27, 2018) ("Al Hassan played a part in the policy of forced marriage which victimized the female population of Timbuktu and gave rise to repeated rapes and the sexual enslavement of women and girls.").

119. OFFICE OF THE PROSECUTOR SEXUAL CRIMES, *supra* note 103, ¶ 35.

120. *Id.*

kind.<sup>121</sup> The infliction of severe physical or mental pain or suffering based on “any” discriminatory grounds, thereby including gender, would therefore be open to charging as the war crime of torture.<sup>122</sup> Additionally, Pre-Trial Chamber I has accepted that acts with a sexual element, such as forcible nudity, are encompassed under the rubric of the crime of outrages upon personal dignity.<sup>123</sup>

### 3. Sexual Crimes as Genocide

All of the underlying genocidal acts in Article 6 of the Rome Statute, such as killings, causing serious bodily or mental harm, and imposing measures intended to prevent births within the group, may encompass a sexual element.<sup>124</sup> If such acts are committed with specific intent to destroy a national, ethnic, racial, or religious group, in whole or in part, then they may amount to genocide.<sup>125</sup> The ICTR, for example, held in *Prosecutor v. Jean-Paul Akayesu* that rape and sexual violence amounted to genocide provided they were committed with the requisite *dolus specialis*.<sup>126</sup> Given the serious bodily and/or mental harm (including, for example, social stigma) associated with rape and other forms of sexual violence, such acts can cause irrevocable damage to individual victims and their communities. Because of this, such acts are often an integral component of any attempt to destroy a particular group of people.<sup>127</sup>

#### C. Terrorism and the Rome Statute

Despite proposals from numerous states, no crime of terrorism was included in the Rome Statute,<sup>128</sup> with concerns that the addition of such a crime would unduly politicize the ICC.<sup>129</sup> However, while the ICC’s subject matter jurisdiction does not expressly include terrorism, terrorist acts may still come within the definitions of certain crimes falling within the court’s Statute. Acts of terror could, depending on the facts, be prosecuted either as war crimes or crimes against humanity.<sup>130</sup>

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121. See ELEMENTS OF CRIMES, *supra* note 81, arts. 8(2)(a)(ii), (c)(i).

122. OFFICE OF THE PROSECUTOR SEXUAL CRIMES, *supra* note 103, ¶ 35.

123. *Prosecutor v. Katanga*, ICC-01/04-01/07-717, Decision on the Confirmation of Charges, ¶¶ 570–72 (Sept. 30, 2008).

124. See Rome Statute, *supra* note 80, art. 6.

125. OFFICE OF THE PROSECUTOR SEXUAL CRIMES, *supra* note 103, ¶¶ 30–31.

126. *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR 96-4-T, Trial Judgment, ¶ 731 (Sept. 2, 1998).

127. OFFICE OF THE PROSECUTOR SEXUAL CRIMES, *supra* note 103, at ¶ 31.

128. See Andreas Zimmerman, *Article 5*, in *ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 113 (Otto Triffterer & Kai Ambos eds., 3d ed. 2016).

129. Preparatory Comm. on the Establishment of an Int’l Criminal Court, Summary of the Proceedings of the Preparatory Comm. During the Period 25 Mar.–12 Apr. 1996, ¶ 28, U.N. Doc A/AC.249/1 (May 7, 1996).

130. See Rome Statute, *supra* note 80, arts. 5(1), 7, 8.

## 1. Terrorist Acts as War Crimes

International humanitarian law has long prohibited forms of terrorism in both international<sup>131</sup> and non-international armed conflict.<sup>132</sup> In 1919, “systematic terrorism” was included in a list of customary crimes to the Preliminary Peace Conference after World War I.<sup>133</sup> “Terrorism” was subsequently prohibited in Article 33 of Geneva Convention IV<sup>134</sup> and, thereafter, in Article 51(2) of Protocol I, as well as Articles 4(2) and 13(2) of Protocol II to the Conventions.<sup>135</sup> Though undefined in the earlier texts, Additional Protocols I and II declared “[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”<sup>136</sup> Based on these provisions, the ICTY held— though terrorism is not an enumerated crime under the ICTY Statute—that “terrorizing [a] civilian population” is a war crime under customary international law.<sup>137</sup>

Despite the Rome Statute enumerating an extensive list of war crimes, it does not criminalize attacks specifically aimed at terrorizing civilians.<sup>138</sup> Under these various provisions, a terrorist attack could, for example, be prosecuted as an intentional attack directed against a civilian population or against civilians not taking a direct part in the hostilities.<sup>139</sup> However, such an approach would arguably diminish the culpable criminality inherent in the commission of attacks intentionally perpetrated to spread terror, as prohibited under customary international humanitarian law.

131. See Protocol Additional to the Geneva Conventions, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 51(2), June, 8 1977, 17512 U.N.T.S. 3 [hereinafter Protocol I].

132. See Protocol Additional to the Geneva Conventions, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 13(2), June 8, 1977, 17513 U.N.T.S. 609 [hereinafter Protocol II].

133. Comm’n on the Responsibility of the Authors of the War and on Enft of Penalties, *Report Presented to the Preliminary Peace Conference*, 14 AM. J. INT’L L. 95, 114 (1919).

134. Geneva Convention Relative to the Protection of Civilians in Time of War art. 33, Aug. 12 1949, 75 U.N.T.S. 287.

135. Cóman Kenny, *Prosecuting Crimes of International Concern: Islamic State at the ICC?*, 33 UTRECHT J. INT’L & EUR. L. 120, 131 (2017).

136. See Protocol I, *supra* note 131, art. 51(2); Protocol II, *supra* note 132, art. 13(2).

137. Prosecutor v. Galić, Case No. IT-98-29-A, Appeals Judgment, ¶¶ 87–98 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 30, 2006); Prosecutor v. Galić, Case No. IT-98-29-T, Trial Judgment, ¶ 138 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003); see also Prosecutor v. Blagojević, Case No. IT-02-60-T, Trial Judgment, ¶ 589 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 17, 2005)

138. See Rome Statute, *supra* note 80, art. 8(2).

139. *Id.* arts. 8(2)(b)(i) (referring to international armed conflicts), 8(2)(e)(i) (referring to non-international armed conflicts).

## 2. Terrorist Acts as Crimes against Humanity

While the composite acts resulting in the intentional spreading of terror could, depending on the facts, be prosecuted under the various crimes against humanity prohibited by Article 7(1) of the Rome Statute, such prosecutions would not capture the intent to terrorize a civilian population.<sup>140</sup> A possible way to ensure that any prosecution for crimes against humanity captures the entirety of the culpable elements of terrorist acts is through the offense of other inhumane acts in Article 7(1)(k).<sup>141</sup> Other inhumane acts prohibits inhumane conduct not otherwise covered by enumerated crimes under Article 7 and has been included as a residual category of crimes against humanity from post-World War II statutes and texts, through to the practice of the *ad hoc* tribunals.<sup>142</sup> Other inhumane acts has two requirements: that the impugned act (i) be “of a similar character” to any other act contained in Article 7(1); and (ii) “intentionally caus[e] great suffering, or serious injury to body or to mental or physical health.”<sup>143</sup> Though enumerated acts under Article 7 such as rape or torture could be categorized as constituent acts of terror, the additional element of intentionally spreading terror in a civilian population distinguishes terrorism as a materially distinct crime.<sup>144</sup> Therefore, terrorist actions may be considered at once “of sufficiently similar character to other acts in Article 7 in terms of gravity yet also distinct enough as not to be subsumed therein.”<sup>145</sup> Proceeding with punishing terrorist acts in this manner does not engage the principle of legality,<sup>146</sup> as the conduct in question is “intentionally causing great suffering, or serious injury to body or to mental or physical health” (i.e., the elements of other inhumane acts).<sup>147</sup> It is not a requirement of Article 7(1)(k) that the act(s) which amount to such intentional suffering or injury are themselves criminal at the time of commission.<sup>148</sup> Equally, prosecuting terrorist acts as another inhumane act would not infringe on Article

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140. *Id.* art. 7(1).

141. *Id.* art. 7(1)(k).

142. Statute of the Special Court for Sierra Leone art. 2(i), Jan. 16, 2002, 2178 U.N.T.S. 138; Updated Statute of the International Criminal Tribunal for the Former Yugoslavia art. 5(i), May 25, 1993, U.N. Doc. S/RES/827; Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and the Charter of the International Military Tribunal art. 6(c), Aug. 8, 1945, 82 U.N.T.S. 279; S.C. Res. 955, annex art. 3(i), Statute of the International Tribunal for Rwanda (Nov. 8, 1994); Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, with Inclusion of Amendments as Promulgated on 27 October 2004, NS/RKM/1004/006, art. 5 (ECCC Aug. 10, 2001).

143. Rome Statute, *supra* note 80, art. 7(1)(k).

144. Kenny, *supra* note 135, at 133–34.

145. *Id.* at 134.

146. Rome Statute, *supra* note 80, art. 22(1).

147. *Id.* art. 7(1)(k); Kenny, *supra* note 135, at 134.

148. See Prosecutor v. Nuon Chea & Khieu Samphan, Case No. 002/19-09-2007-ECCC/SC, Appeal Judgment, ¶ 584 (Nov. 23, 2016), [https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-in-tz%5D/F36\\_EN\\_0.pdf](https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-in-tz%5D/F36_EN_0.pdf).

22(2), which requires strict interpretation of the definitions of crimes under the Statute.<sup>149</sup> What is being suggested is not punishing terrorism as a separate and distinct offense *per se*, but punishing acts of terror amounting to the crime of other inhumane acts, the definition of which is clear.

In terms of defining the parameters of the conduct to be captured as an other inhumane act of terrorism, two options are proposed here. The first option is to define it in line with the elements common to the prohibition of terrorism-related offenses in international instruments. These can be characterized as: (i) acts of violence usually criminalized under a domestic legal system that are (ii) intended to create or spread fear in a civilian population or to coerce a state to take some action, and (iii) done in order to attain an ideological aim.<sup>150</sup>

The second option, favored here, is to prosecute terrorism as it is defined in international humanitarian law under the rubric of other inhumane acts. This definition prohibits acts of violence, the primary purpose of which is to spread terror among a civilian population.<sup>151</sup> The benefit of this approach is clear: it is a simpler definition than that normally propounded in international law instruments addressing terrorism outside the laws of armed conflict. For example, this would remove the controversial requirement that acts of terror be undertaken with an ideological aim or to coerce a state authority, thereby avoiding perceived judgment calls on the legitimacy of national liberation movements. Additionally, because this definition is deemed to be customary international law—albeit in the context of its perpetration during armed conflict—adopting this approach may cause less concern for states parties over the precedential effect of a prosecution of terrorist acts through the rubric of other inhumane acts as a crime against humanity, particularly those who spoke out against the inclusion in the Rome Statute of terrorism as a distinct offense.<sup>152</sup> As this definition is rooted in the Geneva Conventions—which are nearly universally ratified—states have already accepted that deliberately spreading terror in a civilian population is prohibited in the context of international law, at least during war time. Transposing this existing and accepted definition from international humanitarian law would lessen concerns that the ICC is legislating and would serve to properly expand the protection afforded to individuals under the crimes against humanity legal regime—therefore covering situations of state-sponsored terror committed against a state's own population.

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149. Rome Statute, *supra* note 80, art. 22(1).

150. See Antonio Cassese, *The Multifaceted Criminal Notion of Terrorism in International Law*, 4 J. INT'L CRIM. JUST. 933, 936–40 (2006); Hans-Peter Gasser, *Acts of Terror, "Terrorism" and International Humanitarian Law*, 84 INT'L REV. RED CROSS 547, 553 (2002).

151. See Protocol I, *supra* note 131, art. 51(2); Protocol II, *supra* note 132, art. 13(2).

152. See U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Official Records*, U.N. Doc. A/CONF.183/13 (Vol. 1) (2002).

### D. Genocide and the Rome Statute

The interlinked crimes discussed here could, depending on the facts at issue, be characterized as genocidal acts. Some criminal actions committed against victims of human trafficking by terror groups, such as imposing measures intended to prevent births within a targeted group,<sup>153</sup> would clearly come within the parameters of the crime of genocide. However, the definition of genocide arguably remains open to interpretation in one key respect.<sup>154</sup> That is, whether the applicable *mens rea* for genocide—the specific intent to destroy the group—requires that the intent is to biologically destroy the group as opposed to other forms of nonphysical destruction.

The ICTR and ICTY, mirroring the interpretation adopted by the International Law Commission (ILC), have repeatedly held that the term “destroy” was to be understood as “the material destruction of a group either by physical and biological means and not the destruction of the national, linguistic, religious, cultural or other identity of a particular group.”<sup>155</sup> For example, the *Prosecutor v. Radislav Krstić* Appeal Judgment approved the Trial Chamber’s holding that “[c]ustomary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group.”<sup>156</sup> The *Krstić* Appeal Chamber relied solely on the ILC and one academic work for its declaration that this interpretation was customary law.<sup>157</sup> This holding was not unanimous on the point, with Judge Shahabuddeen noting in his dissent that “it is not apparent why an intent to destroy a group in a non-physical or biological way should be outside the ordinary reach of the Convention.”<sup>158</sup> Judge Shahabuddeen argued that while some genocidal acts require or imply an intent to materially destroy, that others do not.<sup>159</sup>

To date, no ICC chamber has made a definitive ruling on the definition of the *mens rea* of genocide. The only instance in which genocide allegations have been addressed was the Pre-Trial Chamber’s nonunanimous decision on the issuance of an arrest warrant for

153. Rome Statute, *supra* note 80, art. 6(d).

154. See Florian Jeßberger, *The Definition and the Elements of the Crime of Genocide, in THE UN GENOCIDE CONVENTION: A COMMENTARY* 87, 107–08 (2009).

155. See *Prosecutor v. Muhimana*, Case No. ICTR-95-1B-T, Judgment and Sentence, ¶ 497 (Apr. 28, 2005) (all similarly defining “destroy” and “destruction of group”); *Prosecutor v. Gacumbitsi*, Case No. ICTR-2001-64-T, Judgment, ¶ 253 (June 17, 2004); *Prosecutor v. Kamuhanda*, Case No. ICTR-95-54A-T, Judgment and Sentence, ¶ 627 (Jan. 22, 2004); *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Judgment and Sentence, ¶ 315 (May 15, 2003); see also Int’l Law Comm’n, Rep. on the Work of Its Forty-Eighth Session, at 45–56, U.N. Doc A/51/10 (1996) [hereinafter Int’l Law Comm’n Forty-Eighth Session] (interpreting “destruction” based on the preparatory work for the Convention on the Prevention and Punishment of the Crime of Genocide).

156. *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgment, ¶ 25 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004) (quoting *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgment, ¶ 580 (Int’l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001)).

157. *Id.* ¶ 25 n.39.

158. *Id.* ¶ 49 (Shahabuddeen, J., dissenting in part).

159. *Id.* ¶ 48.

Sudanese President Omar Al-Bashir.<sup>160</sup> There, the majority of the Pre-Trial Chamber emphasized the distinction between genocidal intent and persecutory intent in the circumstances of the facts at issue, where allegations of forcible transfer and/or deportation of members of the targeted group were a central component.<sup>161</sup> In this context, the majority quoted the International Court of Justice's judgment in the *Bosnia Genocide* case—which in turn quoted from the *Krstić* Trial Judgment at the ICTY—to the effect that “while there are obvious similarities between a genocidal policy and the policy commonly known as ‘ethnic cleansing’ . . . [a] clear distinction must be drawn between physical destruction and mere dissolution of a group. The expulsion of a group or part of a group does not in itself suffice for genocide.”<sup>162</sup> The Pre-Trial Chamber majority in *Al-Bashir* then stated that “[n]evertheless . . . this does not mean that the practice of ethnic cleansing . . . can never result in the commission of the crime of genocide,” holding that ethnic cleaning “may result in genocide if it brings about the commission of the objective elements of genocide provided for in article 6 of the Statute and the Elements of Crimes with the *dolus specialis*/specific intent to destroy in whole or in part the targeted group.”<sup>163</sup> This does not appear to definitively settle the question of whether the requisite intent necessitates an intent to materially destroy as opposed to an intent to destroy by non-physical or biological means.

Indeed, Judge Ušacka, in her dissent, noted that international jurisprudence showed “disagreement over the question of whether . . . it must be shown that the accused intended to cause the physical or biological destruction of the intended group,” as well as a “lack of consensus regarding what constitutes the physical destruction of the group.”<sup>164</sup> Judge Ušacka expressly “adopt[ed] the more expansive approach outlined by Judge Shahabuddeen” in the *Krstić* Appeal Judgment, “[i]n order to preserve the choice for a later Trial Chamber to determine which approach it will follow at trial.”<sup>165</sup>

Necessitating an intent to destroy, in the sense of material destruction, in order to prove genocide is problematic for a number of reasons. First, as Judge Shahabuddeen noted, the requirement that specifically intended acts of destruction of a group must be physical or biological is not supported by a plain reading of the Genocide Convention—the substantive elements of which are reproduced in the

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160. See *Prosecutor v. Al Bashir*, Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (Mar. 4, 2009).

161. *Id.* ¶ 143.

162. *Id.* ¶ 144 (quoting Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment, I.C.J. Rep. 2007, ¶ 190, at 84).

163. *Id.* ¶ 145.

164. *Id.* ¶ 57 (Ušacka, J., dissenting in part).

165. *Id.* ¶ 62.



Rome Statute.<sup>166</sup> Acts such as “forcibly transferring children of the group to another group”<sup>167</sup> or “[c]ausing serious bodily or mental harm to members of the group”<sup>168</sup> do not necessarily involve physical or biological destruction.

Second, the ILC’s definitive conclusion that intent to destroy requires physical or biological destruction, relied on in the *Krstić* Appeal Judgment, is unconvincing. The ILC declared that the underlying offenses contained in subparagraphs (a) through (c) of Article II of the Genocide Convention relate to physical destruction and that subparagraphs (d) and (e) relate to biological destruction.<sup>169</sup> However, the ILC provides no explanation as to how serious mental harm—a genocidal act under subparagraph (b)—could constitute physical destruction.<sup>170</sup>

Third, international jurisprudence has emphasized that targeting prominent members of a group is indicative of the requisite intent to destroy a substantial part of a group.<sup>171</sup> Arguably, however, this supports the contention that the intended destruction need not be physical or biological. For instance, would the killing of the Pope be more likely to result in the material destruction of Catholics in, for example, Vatican City—or would it more reasonably be considered as likely to precipitate the nonmaterial destruction of the group through Catholics in the Vatican abandoning the faith due to fear or lack of leadership?

Fourth, some authorities suggest that the definition of destruction as requiring intent to materially destroy serves to preserve a meaningful distinction between crimes such as ethnic cleansing and genocide.<sup>172</sup> However, this view of destruction does not account for the reality that the outcome of a group no longer existing can be reached by means other than killing members or preventing their ability to reproduce. For example, a child member of a particular religion forcibly transferred away from the group—which is one of the accepted means through which genocide can take place under the Genocide Convention—could reconstitute the group by sustaining his/her faith

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166. Rome Statute, *supra* note 80, art. 6.

167. *Id.* art. 6(e).

168. *Id.* art. 6(b).

169. Int’l Law Comm’n Forty-Eighth Session, *supra* note 155, at 46.

170. See GIDEON BOAS ET AL., INTERNATIONAL CRIMINAL LAW PRACTITIONER LIBRARY: ELEMENTS OF CRIMES UNDER INTERNATIONAL LAW 164 (2008).

171. See Prosecutor v. Tolimir, Case No. IT-05-88/2-A, Judgment, ¶¶ 261–62 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 8, 2015); Prosecutor v. Krstić, Case No. IT-98-33-A, ¶ 12 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004); Prosecutor v. Sikirica, Case No. IT-95-8-T, Judgment on Defence Motions to Acquit, ¶ 80 (Int’l Crim. Trib. for the Former Yugoslavia Sept. 3, 2001) (focusing on leadership status and prominence of targets).

172. WILLIAM SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES 270–73 (Cambridge Univ. Press, 2d ed. 2009); Larissa Van den Herik, *The Meaning of the Word “Destroy” and its Implications for the Wider Understanding of the Concept of Genocide*, in THE GENOCIDE CONVENTION: THE LEGACY OF 60 YEARS 51, 52 (Harmen Wilt et al. eds., 2012).

and subsequently inculcating a new generation in the ways and traditions of that belief system.<sup>173</sup>

Finally, and more broadly, notions of nationality, race, and religion are constructs whose fluidity over time and in jurisprudence (for example, the ICTR Appeals Chamber's willingness to view ethnicity as encompassed within the concept of race for the purposes of the crime of persecution<sup>174</sup>) make the requirement of intending the biological or physical destruction of members of any such group inherently questionable—as these distinguishing characteristics are neither innate nor immutable and therefore cannot, by definition, be biologically or physically eradicated.<sup>175</sup>

The argument as to the definition of “destroy” for the purposes of genocide is not merely theoretical in the present context, as it is particularly pertinent in relation to the treatment of minorities targeted for human trafficking and SGBV by terror groups. For example, the Independent Commission of Inquiry for Syria (the Independent Commission) has declared that “[t]he genocide committed against the Yazidis has not primarily been accomplished through killings, though mass killings of men and women have occurred.”<sup>176</sup> Rather, the alleged genocide has included acts such as sexual slavery, enslavement, forcible transfer, and forced conversions.<sup>177</sup> Such actions have, in the view of the Independent Commission, had the effect of “cutting [Yazidis] off from beliefs and practices of their own religious community, and erasing their identity as Yazidis.”<sup>178</sup> Taking a “convert or die” policy as an example, this strategy, which is used by IS,<sup>179</sup> may result in the physical survival of members of a targeted religious group, but their enforced disavowal of the group's faith could successfully destroy the group as a religious group. Through this lens, trafficking members of a group and terrorizing the group by subjecting members

173. See, e.g., William Schabas, *Article 6, in ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 127, 140 (Otto Triffterer & Kai Ambos eds., 3d ed. 2016) (noting that “the fifth act of genocide obviously refers to the transfer of children that result in a loss of their original identity as a group”).

174. See *Prosecutor v. Nahimana*, Case No. ICTR-99-52-A, Judgment, ¶¶ 986–88 (Nov. 28, 2007) (finding that hate speech targeting population on the basis of ethnicity violates the right to respect for the dignity of the members of the targeted group as human beings); see also *Prosecutor v. Nyiramasuhuko*, Case No. ICTR-98-42-T, Judgment and Sentence, ¶¶ 6096–97 (June 24, 2011) (noting that, under *Nahimana*, “discrimination on ethnic grounds could constitute persecution if the accompanying violation of rights was sufficiently serious”); *Prosecutor v. Bagosora*, Case No. ICTR-98-41-T, Judgment and Sentence, ¶ 2209 (Dec. 18, 2008).

175. See Rep. of the Int'l Comm'n of Inquiry on Darfur to the U.N. Secretary-General, ¶ 499 (Jan. 25, 2005), [http://www.un.org/news/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/news/dh/sudan/com_inq_darfur.pdf) [<https://perma.cc/YA5P-LKGC>] (archived Nov. 20, 2018) (“[C]ollective identities, and in particular ethnicity, are by their very nature social constructs, ‘imagined’ identities entirely dependent on variable and contingent perceptions[.]” (internal quotations omitted)).

176. ISIS Crimes Against the Yazidis, *supra* note 57, ¶ 202.

177. *Id.*

178. *Id.*

179. *Id.*

to SGBV isolates and separates individuals from their communities and arguably falls within the definition of a genocidal act under Article 6(b) of the Rome Statute (“causing serious bodily or mental harm to members of the group”), when committed with the specific intent to destroy.

#### IV. ISSUES FACING ACCOUNTABILITY EFFORTS FOR THESE INTERCONNECTED CRIMES

Beyond the potential substantive criminal law issues to be examined when framing a case involving the crimes of human trafficking, SGBV, and terrorism, there are practical concerns to be considered when building a case involving these crimes.

##### *A. The Potential Difficulties Facing the Investigation of These Crimes*

Crucial to any prosecution is the quality of the investigation supporting it. Investigating international crimes entails various challenges. If occurring within the context of ongoing conflict, investigations are likely to face noncooperation from authorities in the territory in which the crimes occurred. As the ICC has no enforcement arm, it is, therefore, at the mercy of national cooperation.<sup>180</sup> Other major challenges include getting individuals to cooperate and ensuring the safety, physical and psychological well-being, dignity, and privacy of any individuals who choose to do so.<sup>181</sup> Crimes involving children add an additional level of complexity to investigations.<sup>182</sup> Sexual crimes present further challenges, such as under or nonreporting because of societal, cultural, or religious factors; stigma for victims; paucity of evidence due to limited domestic investigations; the absence of support services at the domestic level; and the absence of forensic or other documentary evidence where there is a passage of time.<sup>183</sup>

Additionally, and with regard to the crimes of groups like IS, there is a clear challenge in positively identifying perpetrators. For example, militants often use *noms de guerre*<sup>184</sup> and are known to change their pseudonyms to confuse victims and protect their identities.<sup>185</sup> Additionally, evidence suggests that women who dared to look directly at IS fighters would be beaten and brutalized, thus reducing the ability to make conclusive identifications.<sup>186</sup> Trafficking victims are also often subject to numerous transfers and may not share a common language with perpetrators, placing them in a constant state of upheaval and

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180. See OFFICE OF THE PROSECUTOR SEX CRIMES, *supra* note 103, ¶ 50.

181. *Id.* ¶ 60.

182. OFFICE OF THE PROSECUTOR POLICY, *supra* note 100, ¶ 4.

183. See OFFICE OF THE PROSECUTOR SEX CRIMES, *supra* note 103, ¶ 50.

184. Secretary-General December 2016 Letter, *supra* note 10, at 9.

185. *Id.*

186. *Id.*

making them unable to convey to investigators statements they overheard during captivity.<sup>187</sup>

### B. *The Potential Difficulties of Bringing a Case to Trial*

Beyond the challenges faced at the investigation stage, any prosecution of the interlinked crimes of human trafficking, SGBV, and terrorism would need to meet the jurisdictional hurdles under the ICC Statute, namely the (i) gravity threshold of cases, and (ii) the chapeau requirements under Article 7 for crimes against humanity.<sup>188</sup>

First, gravity of a case may be examined from both a quantitative and qualitative viewpoint,<sup>189</sup> with relevant factors including:

- (i) the scale of the alleged crimes (including assessment of geographical and temporal intensity); (ii) the nature of the unlawful behaviour or of the crimes allegedly committed; (iii) the employed means for the execution of the crimes (i.e., the manner of their commission); and (iv) the impact of the crimes and the harm caused to victims and their families.<sup>190</sup>

Second, Article 7 of the Rome Statute necessitates that crimes be committed “as part of a widespread or systematic attack directed against any civilian population”—meaning “the multiple commission of acts . . . pursuant to or in furtherance of a State or organizational policy to commit such attack.”<sup>191</sup> According to the ICC’s Elements of Crimes, the “‘policy to commit such attack’ requires that the State or organization ‘actively promote or encourage such an attack against a civilian population,’”<sup>192</sup> with the Pre-Trial Chamber II confirming that nonstate actors may qualify as an organization for the purpose of Article 7(2)(a).<sup>193</sup>

With regard to human trafficking, SGBV, and terrorism, the significance of pursuing these interlinked crimes together is manifest, not only in terms of their connected commission in practice, but in terms of meeting the jurisdictional thresholds under the Rome Statute. Otherwise, taken individually, the crimes at issue may not be considered sufficiently grave to proceed with at the ICC. For example,

187. *Id.*

188. Rome Statute, *supra* note 80, arts 7, 17(1)(d).

189. Situation in Georgia, Case No. ICC-01/15-12, Decision on the Prosecutor’s Request for Authorization of an Investigation, ¶ 51 (Jan. 27, 2016).

190. Prosecutor v. Muthaura, Case No. ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶ 50 (Jan. 26, 2012); Situation in the Republic of Kenya, Case No. ICC-01/09-19, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ¶ 62 (Mar. 31, 2010).

191. Rome Statute, *supra* note 80, arts. 7(1)–(2)(a).

192. ELEMENTS OF CRIMES, *supra* note 81, at 5.

193. See Situation in the Republic of Kenya, Case No. ICC-01/09-19, at ¶ 92; Prosecutor v. Ruto, Case No. ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶¶ 184–85 (Jan. 23, 2012) (“[O]rganizations not linked to a State may . . . carry out a policy to commit an attack against a civilian population.”).

while extremely serious in and of itself, the crime of human trafficking would unlikely reach the gravity threshold required to activate the ICC's jurisdiction.<sup>194</sup> Consequently, it is possible that human trafficking will not come before the ICC unless it is in conjunction with other violations of international law, as is precisely the situation outlined here with the interlinked crimes of human trafficking, SGBV, and terrorism. Likewise, though sexual violence crimes are steadily receiving greater attention in international case law, it is questionable whether a prosecution would be built solely on such offenses. Lastly, given the potential political controversy surrounding the prosecution of terrorism, the chances of a case being brought against members of a terrorist group solely for terrorist offenses is remote. Considered together, however, the scale of criminality in the combined commission of human trafficking, SGBV, and terrorism; their effects; and the frequently widespread nature of their commission to further ideological and military aims of terror groups—for whom these crimes are methodically woven into their *modus operandi*<sup>195</sup>—it is asserted that the criminal results of the interlinked commission of these acts could meet the gravity and chapeau requirements at the ICC.<sup>196</sup>

## V. WHY THESE INTERCONNECTED CRIMES SHOULD BE PROSECUTED

Having addressed the difficulties inherent in the building of a case involving the crimes of human trafficking, SGBV, and terrorism, the rationale behind pursuing their prosecution—beyond the obviously egregious harm which these crimes cause—will now be addressed.

### A. *The Crimes Come within the OTP's Strategies and Policies*

As previously discussed, neither human trafficking nor terrorism have been part of any prosecution at the ICC to date. Therefore, the prosecution of these crimes would break new ground for the court and for international criminal law more generally. In relation to SGBV, though progress has been made in integrating sexual crimes into international criminal law, justice continues to elude many victims. This is exemplified by the acquittal of Jean Pierre Bemba by the ICC

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194. See Prosecutor v. Lubanga, Case No. ICC-01/04-01/06 (OA4), Judgment on Jurisdiction Appeal, ¶ 23 (Dec. 14, 2006) (noting the statutory barriers relating to the gravity of the offense under article 17(1)(d)).

195. See Secretary-General December 2016 Letter, *supra* note 10, at 5 (“[S]exual violence is among the core military, political, economic and ideological strategies or tactics employed by ISIL[.]”).

196. Additionally, prosecution of these related crimes together could ameliorate the unease of states parties regarding the contentious question of prosecuting terrorism at the international level.

Appeals Chamber, overturning the first and only conviction for sexual crimes at the court to date.<sup>197</sup>

In addition to this context, addressing the links between these crimes would fit within the stated policies of the OTP in a number of ways. First, the office's 2014 policy paper on sexual violence "recognis[ed] that sexual and gender-based crimes are amongst the gravest under the Statute"<sup>198</sup> and vowed to ensure that charges for sexual and gender-based crimes are brought wherever there is sufficient evidence to support such charges.<sup>199</sup> The same policy paper stated that the OTP would bring charges for SGBV crimes as standalone crimes, in addition to including such acts within charges for broader criminal conduct.<sup>200</sup> Part of the OTP's stated strategic goals is to "enhance the integration of a gender perspective in all areas of [its] work and continue to pay particular attention to sexual and gender-based crimes and crimes against children."<sup>201</sup> Not only would prosecuting the interlinked ways in which the crimes of human trafficking, SGBV, and terrorism occur fit within this goal, but seeking to prosecute crimes such as gender persecution would undoubtedly conform to, and reinforce, the OTP's propounded policies.

Second, the OTP has highlighted the crime of human trafficking in its strategic goals, both with regard to its focus on SGBV and its focus on crimes affecting children.<sup>202</sup> It has, in particular, stated that it will "highlight the gender-related aspects of other crimes within its jurisdiction—for example, in the recruitment of child soldiers and enslavement, and, in the case of the latter, their manifestation as trafficking in persons, in particular women and children."<sup>203</sup> The OTP has also declared that it will seek to include charges for crimes such as "trafficking in children as a form of the crime against humanity of enslavement or sexual slavery,"<sup>204</sup> demonstrating how the overlap in these crimes is recognized as something that needs attention in prosecutorial policy.

Third, given the ICC's status as the only permanent international criminal court, there is an accompanying emphasis on the importance of its case law. Ancillary to this are the expectations for the future of international criminal law, which have been recognized by the OTP in its stated objective to "[c]ontribute . . . to the ongoing development of international jurisprudence."<sup>205</sup> Achieving this goal would, arguably, be enhanced by pursuing charges for crimes intentionally designed to

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197. See *Prosecutor v. Bemba*, Case No. ICC-01/05-01/08 A, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo Against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", ¶ 4 (June 8, 2018).

198. OFFICE OF THE PROSECUTOR SEX CRIMES, *supra* note 103, at 5.

199. *Id.* at 6.

200. *Id.*

201. *Id.* ¶ 37.

202. *Id.* ¶ 5; OFFICE OF THE PROSECUTOR POLICY, *supra* note 100, ¶ 7.

203. OFFICE OF THE PROSECUTOR SEX CRIMES, *supra* note 103, at 6.

204. *Id.* ¶ 19.

205. *Id.* ¶ 9.

cause and spread terror. Indeed, this would represent an acknowledgement that prosecutorial solutions must be sought for developing criminal threats of the like that terror groups have come to represent in recent years. More generally, the ICC as the sole international court with broad or possible—courtesy of the Security Council—universal criminal reach, should be tackling issues of criminality which are of universal concern. The UN has declared a number of times how tactics of war designed to terrorize, such as SGBV and trafficking conducted in a widespread or systematic way against civilian populations, can significantly exacerbate situations of armed conflict and can impede the restoration of international peace and security.<sup>206</sup> The interlinked crimes of human trafficking, SGBV, and terrorism should not be considered a localized or conflict-specific phenomenon. Interviews with survivors of IS conducted by the UN Special Representative on Sexual Violence in Conflict identified fighters “involved in rape, sale or trade of women and girls from approximately 20 different countries,” demonstrating how pervasive the acceptance of trafficking in sexual violence for terrorist means is, and how wide and receptive an audience of perpetrators it has.<sup>207</sup>

From the victim’s perspective, addressing the interlinked crimes of human trafficking, SGBV, and terrorism in terms of the totality of the criminality that these offenses occasion would recognize the various ways that victims have been affected. The UN Secretary General has “reinforced the view that counterterrorism and counterextremism efforts should be coupled with the fight against sexual violence”,<sup>208</sup> arguing that sexual violence victims should be considered as victims of terrorism “in order to build counter-narratives and counter-strategies and pave the way for reparations and redress.”<sup>209</sup> Such a counternarrative is key for another reason, as, for example, national laws on sexual violence within states where extremist groups are present—Syria, Iraq, Libya, and Nigeria in particular—“allow rapists to marry their victims to avoid prosecution and punishment, placing the burden of shame and stigmatisation on [victims] rather than on perpetrators.”<sup>210</sup> Shining a light on these crimes would reveal the suffering and victimization caused and could contribute to the creation of a greater platform for survivors of trafficking and SGBV by terror groups.

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206. See, e.g., S.C. Res. 1888, ¶ 1 (Sept. 30, 2009); S.C. Res. 1820, ¶ 1 (June 19, 2008).

207. Secretary-General December 2016 Letter, *supra* note 10, at 9.

208. MALIK, *supra* note 15, at 18.

209. Secretary-General June 2016 Letter, *supra* note 26, ¶ 22.

210. MALIK, *supra* note 15, at 18; SEGUN, *supra* note 22, at 3.

### *B. The Unlikelihood of These Crimes Being Addressed in Another Forum*

Given the frequently transnational nature of the commission of these interlinked crimes, the power and reach of the terror groups who perpetrate them, the usually weakened domestic judiciary in the states in which these terror groups operate, and the substantial number of militants responsible for these mass atrocities, there are considerable obstacles to a single national forum being capable of bringing justice to the commission of these interlinked crimes. A prosecution at the international level would, arguably, be better positioned to address these issues, as well express an international commitment to tackling crimes that are of global concern and combating gender-based atrocities to the fullest extent possible.

## VI. CONCLUSION

It is clear that the crimes of human trafficking, SGBV, and terrorism each cause severe adverse effects, as well as mass victimization. When committed in a coordinated manner, these crimes are a toxic combination of criminality intended to devastate targeted individuals and communities. The commission of these interlinked crimes often receives less attention than atrocities such as mass killings committed by nonstate actors in times of conflict, potentially due to the less visible nature of the crimes and the diminished focus traditionally placed on issues like trafficking and SGBV in conflict reporting. However, the bureaucratization and institutionalization of trafficking for sexual and terroristic aims must be highlighted and confronted at the level of international accountability. While these crimes are either under- or entirely unexplored in international criminal law, the totality of the damage and the criminality of war tactics and terror strategies that disproportionately affect women and children and encompass some of the gravest crimes imaginable must no longer be overlooked. Moreover, these interlinked crimes must be dealt with as standalone offenses, and not solely as constituent elements of umbrella crimes, in order to fully address the true extent of the criminality perpetrated and recognize victim suffering in all its various forms. It is submitted that the Rome Statute provides an avenue through which these interconnected crimes can be fully adjudicated despite the impediments to launching such investigations and prosecutions, such as noncooperation from states in which the crimes occurred, protecting victims and witnesses, underreporting due to stigma, and the reluctance to pursue—as yet—underdeveloped crimes at the international level. Doing so would greatly develop international criminal law as well as demonstrate that this corpus of law and particularly the ICC, as its sole permanent enforcer, can effectively address evolving criminal strategies that represent legitimate concerns to the international community. On this basis, it is



hoped that if the OTP does pursue charges against perpetrators of human trafficking in Libya, that they fully uncover the ways in which SGBV and terrorism have become integral to the criminal strategies pursued by the terror groups engaged in human trafficking. Otherwise, an opportunity to demonstrate the willingness and ability of international criminal law to adapt and react to the commission of the most heinous offenses imaginable might well be missed.