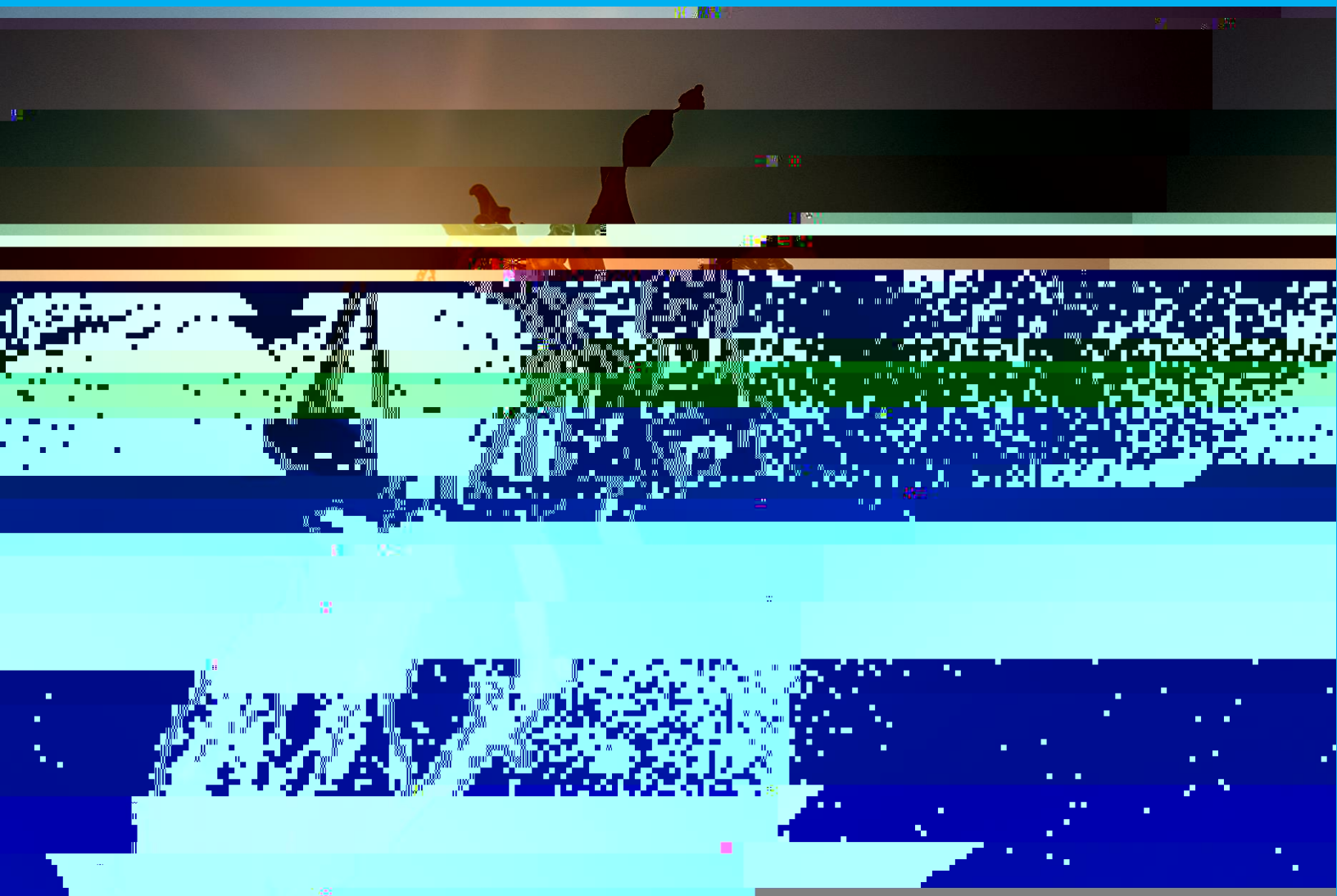


Towards Meaningful Accountability for Sexual and Gender-Based Violence Linked to Terrorism



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I. INTRODUCTION

Overview of the Study

Terrorism, in all its forms and manifestations, constitutes one of the most serious threats to international peace and security.¹ The United Nations Security Council has affirmed

violence in conflict and post-conflict situations committed for the purpose of supporting terrorism, and as a terrorist tactic.⁶

The objective of this study is to contribute to CTED's work in assisting the Counter-Terrorism Committee in supporting Member States' counter-terrorism efforts by identifying progress made, remaining shortfalls, and priority areas for technical assistance needs, including with respect to ensuring a gender-responsive and human rights compliant approach to countering terrorism.

The study is divided into four parts. The first, introductory part, entails this overview, the methodology and the concepts and definitions utilized throughout to further clarify the scope of the study. Part II provides an analysis of the relevant international counter-terrorism framework, and

gathered by CTED through its engagement with United Nations partners; international, regional, and subregional organizations; civil society organizations; and members of the

such actors as well, this study addresses conduct that would qualify as terrorism within the scope of the international counter-terrorism framework or relevant national legislation. Moreover, the study acknowledges reports of SGBV committed by actors involved in counter-terrorism and recognizes the importance of addressing such abuses, which violate individual human rights and ultimately undermine security.¹¹ This study, however, concentrates on criminal justice responses to SGBV committed by terrorist actors.

Existing misrepresentations of SGBV have important practical implications for the way in which accountability for SGBV linked to terrorism is understood and addressed. The first is the pervasive narrative which presents SGBV as primarily sexual in nature and mainly involving the crime of rape.

“SGBV”, “conflict-related sexual violence”, “trafficking in persons” and terrorism. The following definitions and explanations of key concepts are used in this report:

a. Sexual and Gender-Based Violence

SGBV is a collective term that comprises two overarching notions. The first is sexual violence, which is a form of gender-based violence. It includes any sexual act

These links between SGBV and terrorism have been documented in successive reports of the Secretary-General on conflict-related sexual violence and can be conceptualised across at least six dimensions.²⁵ The first dimension of SGBV linked to terrorism is where violent extremists and terrorist groups systematically commit SGBV in a manner that is integral to their operation. Examples include Al-Shabaab's use of abduction, rape, and forced marriage to subjugate those in areas under its control.²⁶ The deliberate use of SGBV to spread terror is the second dimension. The third dimension is where SGBV is used to finance and sustain terrorist activity. This dimension may include using SGBV as a form of compensation and reward to fighters as well as ransoming trafficked and abducted women and girls back to their families. With the fourth dimension, terrorist groups deliberately use SGBV as a means of persecuting a group based on its political, ethnic, or religious identity. This dimension is now understood also to include persecution on the basis of gender, and which can be illustrated by targeted attacks by ISIL on members of the LGBTQ+ community.²⁷

Terrorist groups have also adopted SGBV as part of a strategy for radicalization, recruitment, and retention of its members, and this constitutes the fifth dimension of SGBV linked to terrorism. According to one of the interlocutors, an illustration of this fifth dimension that may easily be overlooked is the use of gendered narratives to indoctrinate and radicalize female students into Boko Haram for use as suicide bombers.²⁸ Information collected for this study also suggests that human trafficking for the pueopsBT/F1 1248(a)

These six dimensions do not reflect a complete image of the motivations behind the commission of SGBV linked to terrorism.³¹ The community of practice is continually deepening its understanding of the crucial role that SGBV can play in the operations and conduct of terrorists and terrorist groups across the ideological spectrum. As terrorism itself evolves, additional links between SGBV and terrorism may emerge or become more apparent.

II. ANALYSIS OF THE RELEVANT LEGAL FRAMEWORKS TO INCREASE ACCOUNTABILITY FOR SGBV LINKED TO TERRORISM

Depending on the context, acts of SGBV linked to terrorism can be addressed under international humanitarian law, international criminal law, international human rights law, anti-trafficking law, and counter-terrorism legislation. In some cases, certain dimensions of SGBV linked to terrorism may be captured by general domestic criminal law addressing the underlying prohibited conduct such as rape, kidnapping, forced marriage, and other forms of SGBV. A deeper understanding of the intricate dynamics and multifaceted nature of SGBV linked to terrorism is a critical step towards comprehensively addressing these crimes through a range of complementary legal frameworks.

This section explores the opportunities offered by different legal frameworks for investigating, prosecuting, and punishing SGBV linked to terrorism. The study acknowledges that some Member States may have access to only some of these frameworks, and that the extent to which they can rely on a particular framework may depend on factors such as the domestication of international legal frameworks, the availability of evidence to support the elements of the crimes covered by a specific framework, and the challenges associated with its implementation, as discussed further below. Some Member States have the ability to bring cumulative charges by utilizing

International Counter-Terrorism Framework

A comprehensive international counter-terrorism framework exists to mandate, inter alia, the prevention,

victims of trafficking in persons in all its forms, and of sexual violence committed by terrorist groups, should be classified as victims of terrorism with the purpose of, inter alia, rendering them eligible for official support, recognition and redress available to victims to victims of terrorism and have access to national relief and reparations programmes.⁴⁴ In resolution 2482 (2019), the Council called upon States, where appropriate, “to review, amend and implement legislation, including for acts of sexual and gender-based violence, to ensure that all forms of trafficking in persons, including when it is committed in

SGBV as strategies to promote the ideology of the terrorist group and instil fear in communities has also entailed the exploitation of victims for the recruitment of terrorist fighters and deployment in military operations.⁵⁰ Therefore the overarching obligation to bring to justice, extradite or prosecute any person who supports, facilitates, participates, or attempts to participate in the direct or indirect financing of activities conducted by terrorists or terrorist groups necessarily applies in these cases.

Incitement to terrorism

Similarly, the prohibition of incitement to terrorism mandated in resolution 1624 (2005) is equally relevant to the development and implementation of criminal justice responses to SGBV linked to terrorism

(intent that a terrorist act be committed as a result) and an objective element (creation of a danger that this will in fact happen)".⁵⁷

It is essential, however, that the suppression of alleged acts of incitement comply with obligations under international law, in particular

Kidnapping and hostage-taking

Finally, depending on the context, resolutions that mandate criminal justice responses to terrorist tactics of kidnapping and hostage-taking for any purpose, including to finance their activities or gain political concessions,⁶⁶ are also applicable to accountability for SGBV linked to terrorism where terrorist groups have engaged in kidnappings to meet a broader range of objectives than those contained in the International Convention against the Taking of Hostages (1979). In these resolutions, the Security Council calls for international cooperation during incidents of kidnapping and hostage-taking committed by terrorist groups⁶⁷ and reaffirms the obligation to provide the “greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts”.⁶⁸

Relevance of International Humanitarian Law

An armed group's designation as a terrorist organization does not render international humanitarian law inapplicable to the group's conduct during an armed conflict. On the contrary, and as reiterated by the Security Council in multiple resolutions,⁶⁹ parties to an armed conflict are bound by the provisions of international humanitarian law, including the prohibition of attacks against civilians and persons not taking an active part in hostilities.⁷⁰

The applicability of the rules governing non-international armed conflicts, which are the contexts of most relevance for the purposes of this analysis, is determined by the following criteria: (1) the existence of a situation of violence of some degree of intensity^{01 37(t)ber}

War⁷⁸ and articles 4 and 13(2) of Additional Protocol II.⁷⁹ State practice has also established this rule as a norm of customary international law applicable in armed conflicts regardless of the classification.⁸⁰ There is neither an exhaustive list of the types of acts of violence that may be deployed to instil terror nor is there a limitation on the typology of violence.⁸¹ The actus reus element is satisfied by evidence that the means deployed by the terrorist group were acts or threats of violence, including violence of a sexual nature or violence perpetrated based on gender. The mens rea element is twofold, namely the specific intent to spread terror among a civilian population and the intent to make the civilian population the

opportunities for pursuing accountability for such crimes. Where the requirements are met, therefore, international humanitarian law can be relied upon by Member States to meet their responsibility to investigate and prosecute SGBV linked to terrorism.

Relevance of International Criminal Law

Under international criminal law, SGBV linked to terrorism can constitute war crimes (as discussed above), crimes against humanity, and genocide, where the evidence supports the legal contextual elements of each category of crimes. For instance, crimes against humanity require that the underlying crimes occur as part of a widespread or systematic attack against a civilian population and with knowledge of the attack, while the contextual element for war crimes requires that the conduct takes place and is associated with an armed conflict. Although not a contextual element, a distinguishing and essential element of the crime of genocide is the genocidal intent to destroy in whole or in part a national, ethnical, racial, or religious group.⁸⁶ Despite the distinct elements of each core international crime, depending on the circumstances of each case, the underlying conduct may concurrently amount to a crime against humanity, a war crime, and an act of genocide.

Rape, sexual slavery, forced prostitution, forced pregnancy, and forced sterilization are constitutive acts of crimes against humanity⁸⁷ and war crimes⁸⁸ under the Rome Statute. The Rome Statute also proscribes as a crime against humanity “any other form of sexual violence of comparable gravity,”⁸⁹ and “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”⁹⁰ Outrages upon personal dignity, in particular humiliating and degrading treatment⁹¹ and any other form of sexual violence as a serious violation of common article 3 of the four Geneva Conventions are war crimes within the body of international humanitarian law and international criminal law.⁹² These residual clauses in the Rome Statute on sexual violence demonstrate that the forms of sexual violence listed are not exhaustive but rather include violence of a sexual nature of comparable gravity.⁹³

⁸⁶ Article 6 of the Rome Statute of the International Criminal Court states committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group, or (e) Forcibly transferring children of the group to another group

⁸⁷ Rome Statute, art. 7(1)(g).

⁸⁸ *Ibid.*, art. 8(2)(b)(xxii).

⁸⁹ *Ibid.*, art. 7(1)(g).

⁹⁰ *Ibid.*, art. 7(1)(k).

⁹¹ *Ibid.*, art. 8(2)(b)(xxi).

⁹² *Ibid.*, art. 8(e)(vi).

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prosecution of sexual violence in conflict: the importance of human rights as means of interpretation , n.d., United Nations Office of the High Commissioner, p. 13, available at www2.ohchr.org/english/issues/women/docs/paper_prosecution_of_sexual_violence.pdf.

Judicial interpretation by international courts and tribunals of provisions concerning crimes against humanity and war crimes has provided further clarity on specific forms of SGBV that have been employed by terrorist groups, which may be of relevance to national criminal justice practitioners. For example, forced pregnancy is recognized as a crime that is separate from rape and unlawful detention even where the latter crimes may have preceded and facilitated the enforced pregnancy. Forced pregnancy entails the loss of a woman's reproductive autonomy¹⁰² and on its own 7(u)-8(d)4(i)3(c)53(t)7(s)-c-9(n)-7(e)-9(t)7(i)3(c)

the commission of crimes that are not sexual¹¹⁶ and are perceived to be gender-neutral, such as murder or the destruction of aspects of cultural heritage.¹¹⁷ It is crucial to avoid making biased assumptions about the specific crimes that may underlie gender persecution.¹¹⁸ Unconscious biases about what gender persecution looks like may result in missing the role of gender in the design and commission of the crimes.¹¹⁹ A holistic approach is encouraged, which includes assessing the individual crimes contextually. For instance, “looking at a rape in isolation may lead to missing relevant facts demonstrating its commission as a form of torture, persecution or as an act of genocide”.¹²⁰ The recent efforts towards prosecution of gender-based persecution at the International Criminal Court¹²¹ and at the national level in Germany¹²² in a case against a former ISIL member for religious and gender persecution provide the groundwork for future prosecutions of this intersecting crime. Gender persecution charges can aid in capturing a broader spectrum of criminality than other charges and can help to close impunity gaps.¹²³ Understanding how gender-based persecution intersects with other forms of discrimination “not only helps to unearth the discriminatory intent that can drive such crimes or entire conflicts, it can also shed light on victims who are vulnerable because of

international human rights law is applicable at all times, including in contexts of armed conflict.¹²⁶ States obligations, in this regard, include inter alia exercising due diligence to prevent, investigate, and punish abuses (such as SGBV) by non-State actors, including proscribed groups, as well as ensuring adequate reparation and redress to victims.¹²⁷

Provisions relevant to the protection from SGBV are contained in a range of international and regional instruments for the protection of human rights.¹²⁸ There are several rights which may be implicated by SGBV linked to terrorism. Depending on the circumstances, these can include, but are not limited to: the right to life; freedom from discrimination (e.g., on the basis of sex and other proscribed grounds such as race and religion) and the guarantee of gender equality; the protection of physical integrity; the protection against arbitrary or unlawful interference with privacy, family and home; the right to health, and other economic, social and cultural rights (e.g. the right to education)¹²⁹; freedom of movement; the rights of protected categories of persons, including the rights of children to special protection¹³⁰; the right not to be subject to torture or to cruel, inhuman or

the extraterritorial application of international human rights law, the Human Rights Committee, the European Court of Human Rights (ECtHR), and the Inter-American Court of Human Rights (IACtHR) have determined the extraterritorial application of the respective human rights instruments. See General Comment No. 31 of the Human Rights Committee, which observes that a State Party's duty to ensure rights to all persons within its territory includes "anyone within the power or effective control of the State

power or effective control of the forces of the State Party acting outside its territo United Nations,

¹²⁶ The principle of *lex specialis* accords IHL priority in cases of conflict in the co-application of the two legal regimes. Regional and international human rights treaties provide for derogation from certain human rights obligations in times of public emergency threatening the life of the nation, including on terrorism-related grounds, in accordance with a specific regime of safeguards. Such derogations must be exceptional and temporary in nature, strictly necessary and proportionate to the threat, and not violate a number of non-derogable rights such as the right to life or the prohibition against torture. See for example International Covenant on Civil and Political Rights, art. 4, and European Convention on Human Rights, art. 15.

¹²⁷

also *Velasquez Rodriguez v Honduras*, Inter-American Court of Human Rights (Ser. C) No. 4, paras. 172 and 173, available at: http://hrlibrary.umn.edu/iachr/b_11_12d.htm

¹²⁸ See for example Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (2000); Council of Europe Convention on Action against Trafficking in Human Beings (2005); African Union Convention on Preventing and Combating Corruption (2003); Convention on the Elimination of All Forms of Discrimination against Women (1979); Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003); and Declaration on the Elimination of Violence against Women and Violence against Children in the Association of Southeast Asian Nations (2013).

¹²⁹ See also United Nations, General Assembly, *Negative Effects of Terrorism on the Enjoyment of Human Rights*, 9 August 2021, A/HRC/48/66, available at <https://reliefweb.int/report/world/negative-effects-terrorism-enjoyment-human-rights-report-human-rights-council-advisory>.

¹³⁰ See the Convention on the Rights of the Child (1989) and its Optional Protocols (2000/2012). Sexual violence against children during conflict is also one of the six grave violations identified and condemned by the UN Security Council. See Office of the Special Representative of the Secretary-General for Children and Armed Conflict, *The Six Grave Violations Against Children During Armed Conflict: The Legal*

degrading treatment or punishment; the prohibition on trafficking in persons; and the right to remedy for victims, including reparations. Finally, protecting the accused's right to a fair trial also impacts the rights of victims to the extent that the denial of the right to a fair trial may result in the denial of the victim's right to justice and truth.

A human rights-based approach to accountability for SGBV linked to terrorism takes into account the scope and interconnectedness of the rights impinged upon while placing attention equally on the development of measures for prevention, protection, and prosecution.¹³¹ It further acknowledges that these forms of violence occur on a spectrum that extends from peacetime to conflict and post-conflict situations.

SGBV “manifests itself on a continuum of multiple, interrelated and recurring forms, in a range of settings, from private to public, [and] transcends national boundaries”.¹³² The Security Council has acknowledged the differential impact of terrorism and violent extremism on the human rights of women and girls.¹³³ In resolution 2467 (2019), the Security Council recognized this “continuum of interrelated and recurring forms of violence against women and girls”¹³⁴ and noted that sexual violence in conflict “exacerbates the frequency and brutality of other forms of gender-based violence”.¹³⁵ States bear national ownership of and responsibility for addressing the root causes of sexual violence in armed conflict and post-conflict situations.¹³⁶ In some circumstances, the commission of SGBV linked to terrorism is driven or enabled by pre-existing societal gender inequalities, and the experiences of the victims of such crimes relate to the more general experiences of women and girls in these societies.

In settings where cultural practices and harmful gender norms discourage victims from reporting the crimes and human rights violations they have suffered,¹³⁷ law enforcement and justice practitioners who

trafficking crimes may often go unprosecuted.¹³⁹ This, in turn, may result in a missed opportunity by Member States to investigate and prosecute terrorist groups for the full range of crimes committed and to comply with their obligations to bring perpetrators of terrorism, as well as of SGBV, to justice.

Relevance of Anti-Trafficking Frameworks

As previously noted, there has been consistent recognition, including by the Security Council, of the different connections between trafficking in persons and terrorism, including by mapping the trafficking-terrorism nexus specifically¹⁴⁰, condemning the use of sexual violence as a tactic of terrorism¹⁴¹; and acknowledging that SGBV is part of terrorists' use of trafficking in persons.

Under international anti-trafficking frameworks and relevant international human rights treaties, States are required to prevent trafficking, to investigate and prosecute perpetrators, to identify trafficked persons, to assist and protect victims including through the application of the non-punishment principle, and to ensure remedies for trafficked persons.¹⁴² This is also the case when the perpetrators are linked to terrorism.¹⁴³ International human rights law also contains special protections for child trafficking victims, including through the emphasis on the primacy of best interests of the child considerations.¹⁴⁴

Under international law, States have a "positive obligation to take protective operational measures of identification, protection and effective investigation"¹⁴⁵, an obligation under

¹³⁹ National prosecutor participating in the CTED/Team of Experts EGM, 10. 11 May 2023. In the human trafficking context, an *ad hoc* expert group of independent experts, including a former UN Special Representative on the issue of human trafficking, was established in 2017. The expert group's mandate was to provide technical assistance and advice to the UN Office of the High Commissioner for Human Rights (OHCHR) and the UN Office of the Special Representative on the issue of human trafficking (OSRIT) in order to improve the effectiveness of their work in the area of human trafficking. The expert group's report was published in 2020. See <https://www.ohchr.org/sites/default/files/Documents/Issues/Trafficking/Non-Punishment-Paper.pdf>

¹⁴⁰ See for example Security Council resolutions 2388(2017) and 2331 (2016).

¹⁴¹ Security Council resolution 2331(2016).

¹⁴² As noted by the former Special Rapporteur on Trafficking in Persons, allowing the broad application of the principle of non-

h the offence was committed. Maria Grazia Giammarinaro, Special Rapporteur on trafficking in persons, especially women and children, *The Importance of implementing the non-punishment provision: the obligation to protect victims*, Geneva (30 July 2020), para. 41.

<https://www.ohchr.org/sites/default/files/Documents/Issues/Trafficking/Non-Punishment-Paper.pdf>

¹⁴³ See United Nations, General Assembly, *Report of the Special Rapporteur on trafficking in persons, especially women and children, Siobhán Mullally, A/76/263*, 3 August 2021, paras. 17-20, 36-39; Office of the Special Representative and Coordinator for Combating Trafficking in Human Beings, *Trafficking in Human Beings and Terrorism: Where and How They Intersect Analysis and Recommendations for More Effective Policy Responses*, Vienna, 2021, paras. 32-51, 53.

¹⁴⁴ See Convention on the Rights of the Child, A In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or

¹⁴⁵ United Nations General Assembly, Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children Siobhán Mullally, *Implementation of the Non-punishment Principle*, A/HRC/47/34, May 17, 2021, para. 49

the United Nations Trafficking in Persons Protocol and human rights law to criminalize trafficking in persons¹⁴⁶, and “effectively investigate, prosecute and adjudicate trafficking, including its component acts and related conduct, whether committed by governmental or by non-State actors.”¹⁴⁷ In the context of SGBV linked to terrorism, this entails applying the internationally-accepted definition of trafficking in persons to assess whether an individual is trafficked and if SGBV is part of the trafficking.¹⁴⁸ For adult trafficking victims, this definition requires States to assess three elements—whether a

linked to terrorism.¹⁶⁰ The following section explores how Member States can apply national counter-terrorism legislation and general domestic criminal laws as additional complementary legal frameworks towards accountability for SGBV linked to terrorism.

Application and Relevance of National Counter-terrorism Legislation to Increase Accountability for SGBV Linked to Terrorism

At the national level, States have implemented the legislative obligation imposed in resolution 1373 (2001) in different ways, using widely varying approaches to the criminalization of “terrorist acts” and related offences. Most national counter-terrorism legislation and criminal codes do not include an express reference to SGBV linked to terrorism. Tunisia and the Gambia are two notable exceptions. Article 29 of Tunisia’s Organic Law No. 2015-26 of 7 August 2015 as amended in 2019 proscribes any assault of a sexual nature on a person of either sex and the intentional commission of the crime of rape as part of a terrorist offence.¹⁶¹ Section 2 of the Gambia’s Anti-Terrorism Act defines a terrorist act as involving or causing “attacks on the physical integrity of a person, including rape”.¹⁶² Spain is an example where the definition of a terrorist offence provided for in article 573(1) of the criminal code includes offences against “sexual freedom”, which can include acts of SGBV when committed with one of the specific purposes outlined therein.¹⁶³ However, it is worth noting that, while not explicitly referencing them as such, many domestic counter-terrorism laws already include provisions that would allow for investigating and prosecuting certain acts of SGBV linked to terrorism. In some national contexts, this can be essential in allowing victims to access certain support mechanisms and reparation programmes that may otherwise be unavailable to them. This section provides a demonstration of the potential approach to address such cases.

First, most national legislation refers to terrorist acts as involving or causing an attack against a person’s life or bodily injury. Rape, forced abortion, forced pregnancy, forced

¹⁶⁰ See also Global Counterterrorism Forum Criminal Justice and Rule of Law Working Group, *Memorandum on Criminal Justice Approaches to the Linkages between Terrorism and Core International Crimes, Sexual and Gender-based Violence Crimes, Human Trafficking, Migrant Smuggling, Slavery, and Crimes against Children*, (2021) para. 23, available at [https://www.thegctf.org/Portals/1/Documents/Links/Meetings/2021/19CC11MM/CJROL%20Memorandum/CJ-ROL_Memo-ENG.pdf?ver=BqP5OK_Txt0tY8JFGamBzw%3d%3dCJ-ROL_Memo-ENG.pdf%20\(thegctf.org\)](https://www.thegctf.org/Portals/1/Documents/Links/Meetings/2021/19CC11MM/CJROL%20Memorandum/CJ-ROL_Memo-ENG.pdf?ver=BqP5OK_Txt0tY8JFGamBzw%3d%3dCJ-ROL_Memo-ENG.pdf%20(thegctf.org)) In the Memorandum, States are recommended to assess how international humanitarian law and counter-terrorism legislation can be applied appropriately to ensure effective prosecution of alleged terrorists who have committed crimes, including those that may amount to core international crimes, in order to hold them accountable for the full ranges of crimes committed.

¹⁶¹ Tunisia, Organic Law No. 2015-26 of 7 August 2015, on countering terrorism and money-laundering, available at <https://legislation-securite.tn/law/44992>.

¹⁶² The Gambia, Anti-Terrorism Act 2002 (as amended by the Anti-Terrorism Amendment Act, 2008) available at www.vertic.org/media/National%20Legislation/Gambia/GM_Anti-Terrorism_Act.pdf.

¹⁶³ Spain, Organic Law 2/2015 of 30 March, modifying the Criminal Code available at https://sherloc.unodc.org/cld/uploads/res/document/esp/ley-organica-2-2015--de-30-de-marzo.html/Spain_Law_2-2015_amendment_penal_code_terrorism_2015_es.pdf

sterilization, and sexual slavery are examples of SGBV of a physical nature that entail an attack on the physical integrity of a person or an attack against a person's life involving bodily harm or the risk of death. Many existing provisions, however, only address physical harm, which creates challenges in relying on counter-terrorism legislation to pursue accountability for non-physical types of SGBV.¹⁶⁴

Second, counter-terrorism provisions include kidnapping, which can address some of the abductions and forced displacements perpetrated by terrorist groups. Kidnapping may be a component of human trafficking as it may serve as an initial step in the trafficking process; however, kidnapping and human trafficking are distinct crimes, and a charge of kidnapping would not encompass the totality of exploitation and harm committed by human trafficking.

However, while certain acts of SGBV may fall under these provisions of counter-terrorism legislation, the specific mens rea element of the crime of terrorism must also be met. As noted above, this generally requires that the underlying acts are committed with terrorist intent. Most national legislation includes the requirement that the act was committed with the intent of terrorizing a civilian population or compelling a government or international organization to take or refrain from certain conduct. Some States only require that the act was committed with the intent to advance a political, religious, or ideological cause. Others combine the two elements requiring that the underlying act is committed with the intent to, inter alia, intimidate a civilian population or compel a government and, for, inter alia, an ideological objective.

For example, some States have defined terrorist activity as an act or omission committed in whole or in part for a political, religious, or ideological purpose and with the intention of intimidating the public or compelling a person, a government, or a domestic or an international organization to do or to refrain from doing any act

committed”.¹⁷³ However, the possible existence of alternative motives for acts of violence “does not in and of itself disprove that the primary purpose was to spread terror among the civilian population.”¹⁷⁴ Where additional evidence exists, such as targeting religious or ethnic minorities, charges of persecution as a crime against humanity could be founded based on evidence of SGBV against the group.¹⁷⁵ Evidence of the discriminatory mens rea component in persecution as a crime against humanity could also be evidence of terrorist intent. For example, documentary evidence exists of ISIL’s intent to discriminate against the Yazidi community and other religious minorities by targeting them for criminal acts, including sexual slavery and forced marriage.¹⁷⁶

Relevance of National Legal Provisions to Address SGBV Linked to Terrorism

National criminal codes could be employed to address the underlying crimes of SGBV linked to terrorism without relying on counter-terrorism laws or international legal frameworks. To illustrate, a national prosecutor noted that “with Al-Shabaab, there are cases of trafficking from Uganda to the Middle East, and in some of the cases, the girls died there. The cases are not prosecuted as trafficking linked to terrorism because there is no particular law that makes the connection. Kidnapping could be used; however, we need more training to raise awareness on the connection of these different crimes.”¹⁷⁷

In such an instance, charges of abduction and kidnapping could be brought to address the prohibited conduct. The fact that the crimes occurred within terrorist contexts could be noted as an aggravating factor if applicable within the criminal law procedures of the State. Doing so may contribute to the recognition of the gravity of the criminal act without reclassifying it as a different crime and ensure that the sentence is more commensurate to the gravity of the crime. This approach would enable the prosecution of substantive crimes without requiring the establishment of the elements of core international crimes, nor the additional specific intent requirement.

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III. CHALLENGES, EMERGING GOOD PRACTICES, AND OPPORTUNITIES FOR ACCOUNTABILITY FOR SGBV LINKED TO TERRORISM

Part III of the study provides an overview of some of the challenges affecting accountability for SGBV linked to terrorism and identifies emerging good practices that CTED has documented through its engagement with Member States and other stakeholders. The examples and trends presented here are not exhaustive and are based on the information available during the study's time frame. Member States are

participant in the study noted that, in their jurisdiction, while they may borrow investigators from the police force who have experience investigating SGBV, these investigators may not have the requisite expertise in core international crimes.¹⁸⁰

The detrimental impact of a siloed approach to accountability is considerable. According to a participant in the study, the differential approaches to a set of facts adopted because of different expertise can be problematic.¹⁸¹ To illustrate, she provided the example of a multidisciplinary working group meeting where the fact pattern in a trafficking case scenario elicited a securitized response from counter-terrorism practitioners who identified the lack of a passport as indicia of terrorist activity. In contrast, a victim and human rights-centred approach was adopted by practitioners with a human trafficking and human rights background who noted that the same evidence may be indicative of human trafficking. The consequential action, such as arresting the individual or providing victim-centred support, depended on which lens was adopted to analyse the information received.

Several interlocutors emphasized that the treatment of SGBV, human trafficking, and terrorism in a siloed manner is not

remains outside the realm of criminal justice accountability processes.¹⁸⁵ Without a comprehensive investigation into how terrorist groups like ISIL operate and instrumentalize SGBV for their strategic objectives, investigative progress at the national level beyond low-level members is inhibited. Engaging with low-level perpetrators of terrorist acts and offering incentives, where possible, such as reduced sentences, akin to successful approaches utilized in international criminal tribunals, was noted as a possible way to address this obstacle.¹⁸⁶

Prosecutors consulted for the study raised concerns about the pressure to bring cases against members of terrorist entities quickly and the lack of the opportunity for early intervention to support and develop in-depth investigative strategies that include SGBV linked to terrorism. In some jurisdictions, particularly those with ongoing conflicts, prosecutors often have to work with the evidence provided to them, leaving limited room for collaborative teamwork and analysis of the evidence to assess whether there are SGBV dimensions that could be litigated.

Formulating investigative and prosecutorial strategies which identify SGBV as a priority element for case selection is also key. These strategies should consider how various legal frameworks, individually or in combination, can help to bridge the impunity gap for SGBV linked to terrorism in compliance with Member States' obligations to bring terrorists to justice. Investigating SGBV linked to terrorism should be approached similarly to other types of investigations. This should entail gathering evidence similar to that used in other terrorism cases, such as documentary evidence, survivor testimonies, telephone data retrieval, and financial transaction records linked to the activities of these groups.

Failure to pri.

Evidentiary challenges

A number of evidentiary challenges may arise with the prosecution of SGBV linked to terrorism, particularly with respect to prosecuting crimes that did not take place within the forum State.¹⁸⁸ Another significant challenge may be the existence of domestic evidentiary standards and practices that may impede justice and accountability. For instance, certain jurisdictions may require evidence of physical resistance, injury or force to demonstrate lack of consent or coercion for certain crimes such as rape, though the jurisprudence of international courts and tribunals demonstrates that consent is automatically vitiated where the crimes occur in the context of a coercive environment.¹⁸⁹ Lack of consent does not require force, and force is not an element of the crime of rape under international criminal law. A narrow focus on “force or threat of force could permit perpetrators to evade liability for sexual activity to which the other party had not consented by taking advantage of coercive circumstances without relying on physical force.”¹⁹⁰ Furthermore, even though corroborative evidence of sexual violence is not required in international courts and tribunals,¹⁹¹ some national prosecutors may face challenges in applying this standard in domestic courts.

Finally, there appear to be biases and presumptions among criminal justice practitioners regarding the applicable evidentiary standards for SGBV, notably that higher evidentiary requirements for gravity and systematicity are required for SGBV to be considered international crimes. These biases permeate both international¹⁹² and national jurisdictions.¹⁹³ These presumptions negatively impact the ability to conduct

¹⁸⁸ On this issue, see also CTED, *Guidelines to facilitate the use and admissibility as evidence in national criminal courts of information collected, handled, preserved and shared by the military to prosecute terrorist* [redacted], 2019, available at

www.un.org/securitycouncil/ctc/sites/www.un.org.securitycouncil.ctc/files/battlefield_evidence_final.pdf.

¹⁸⁹ See for example, *Kunarac, Appeal Judgment*, para. 129. A participant in the CTED/Team of Experts EGM noted that in his jurisdiction, prosecutors would be required to provide medical evidence in support of a rape charge, even where the crime occurred in the context of terrorism or conflict. According to a national prosecutor, in her jurisdiction, it is expected to have a medical examination report in an SGBV classifying the

a national senior prosecutor, Office of the Director of Public Prosecutions, 4 April 2023. In the Democratic Republic of the Congo, the Mukwege Foundation now assists in providing medical certificates to support the prosecution of conflict-related sexual violence that would otherwise fail because of the requirement of medical corroboration. See Dr. Denis Mukwege Foundation, *Handbook: Holistic Care for Survivors of Sexual Violence in Conflict* (2019), p. 20, available at <https://mukwegefoundation.org/>.

¹⁹⁰ *Kunarac, Appeal Judgment*, para. 129.

¹⁹¹ See for example, International Criminal Court, Rules of Procedure and Evidence, rule 63(4).

¹⁹² *Arimatsu et al., Amici Curiae Observations on Duress and the Standards Applicable to Assessing Evidence of Sexual Violence before the International Criminal Court in The Prosecutor v. Dominic Ongwen*, 22 December 2021, No. ICC-02/04-01/15 A A2, available at www.icc-cpi.int/CourtRecords/CR2021_11902.PDF.

¹⁹³ Interview with United Nations

comprehensive investigations of SGBV linked to terrorism and present unnecessary evidentiary hurdles. Basic principles of evidence concerning the admissibility, credibility, and reliability of evidence are equally applicable to evidence of SGBV¹⁹⁴ and should govern the investigation, prosecution, and adjudication of SGBV linked to terrorism. Evidence of SGBV should not be subjected to differential evidentiary requirements. Instead, the evidentiary standards should be reviewed contextually and through a gender lens to ensure the non-application of discriminatory presumptions,¹⁹⁵ such as that SGBV is less serious than other international crimes and consequently has less probative value in establishing international crimes.¹⁹⁶

Difficulty of prosecuting perpetrators outside the State's jurisdiction and ensuring victims' participation and engagement throughout the criminal justice process

Some prosecutors shared the challenges of conducting investigations without witnesses willing to participate in the process and without the perpetrators within their jurisdiction.¹⁹⁷ Although some Member States allow trials in absentia, many require the presence of the perpetrator on their territory for investigations and subsequent prosecutions. Members of civil society organizations providing support to survivor networks expressed frustration that, as a result of the lack of victim-centred institutional capacity and support, victims were unwilling to participate in investigations, especially victims of human trafficking, for fear of being depo

where possible, with victims connected to

specifically address SGBV or explore the potential involvement of the perpetrator within their jurisdiction in committing SGBV offences.²⁰² This highlights the imperative for a more inclusive and comprehensive approach to integrating SGBV considerations into the overall justice process to maximize the type of assistance mechanisms such as the IIM and UNITAD can offer Member States.

The IIM's mandate to only support requests for evidence related to core international crimes has prompted more States to explore such crimes alongside their terrorist cases.²⁰³ Meanwhile, UNITAD is restricted in sharing evidence with Iraq due to, inter alia, the existence of the death penalty as a possible punishment for terrorist offences and lack of codification of core international crimes within its domestic legal framework. Consequently, UNITAD faces challenges in fully assisting accountability efforts in Iraq, which is the primary intended recipient of its support.²⁰⁴

An additional challenge affecting international cooperation in the investigation of terrorist crimes, which has an impact on SGBV linked to terrorism, is the need to foster trust among relevant counterparts. While formal communication channels exist, bridging the trust gap is necessary as some prosecutors are careful about the information they share with counterparts in the requested State about pending cases to avoid compromising the investigation or endangering the lives of witnesses and their families.²⁰⁵

Furthermore, in certain regions, international cooperation and mutual legal assistance in terrorist cases, including SGBV linked to terrorism, could be affected by the absence of

the crime to the perpetrator, the result is a State-sanctioned continuation of the violence perpetrated with additional and ongoing harm to the survivor.

In addition, prosecuting victims of SGBV linked to terrorism as perpetrators is another area which affects access to justice. The limited or inconsistent application of the principle of non-punishment of victims of human trafficking linked to terrorism may result in prosecutions or administrative decisions such as deprivation of citizenship that may be violative of the victim's human rights and the States' obligation to protect. The prosecutions of individuals, including female ISIL members, who have facilitated or supported the commission of SGBV linked to terrorism are laudable as it ensures accountability across the board.²¹² Nevertheless, when the primary perpetrator of the crime remains at large, victims are denied access to justice. One source shared the account of a Yazidi survivor who acknowledged the importance of prosecuting the wife of an ISIL fighter for her involvement but stressed that she was not the one who inflicted the beatings and rapes.²¹³ The practical challenge Member States engaged in the prosecution of FTFs face arises from the fact that many male ISIL members have either been killed or are untraceable. Meanwhile, known individuals in detention centres and camps are not repatriated.

Finally, the adoption of de jure or de facto amnesties can further hinder victims' rights and access to justice in terrorist contexts. According to the United Nations Human Rights Committee in general comment No. 20 on article

intersectional approach would aid the understanding of multifaceted criminal conduct and the appropriate legal regimes for accountability and inform remedies for victims.

Advancing meaningful accountability beyond criminal justice measures

Although this study primarily focuses on criminal justice responses to SGBV linked to terrorism, it is important to underscore the value of an integrated approach to accountability.

a. Transitional Justice Processes and Mechanisms

The general absence of other essential transitional justice measures, such as reparations, for survivors of SGBV linked to terrorism may significantly impact efforts to ensure meaningful accountability. Transitional justice processes and mechanisms are typically implemented in situations where the number of victims and perpetrators exceeds the justice system's capacity and may be especially relevant in terrorist contexts affected by protracted conflict.²²⁷ The field of transitional justice overall may offer relevant insights and lessons for the development of context-sensitive accountability processes centred on the needs and rights of victims and of measures addressing underlying conditions that drive the commission of these violations, or are conducive to the spread of terrorism.

The four core elements of transitional justice, namely criminal justice, truth-seeking, reparations, and guarantees of non-recurrence, when implemented as part of an integrated and coordinated approach, can contribute towards more comprehensive accountability for SGBV linked to terrorism. Victims and affected communities should be recognized as partners, stakeholders, and agents of change in determining accountability responses to their unique experiences and be consulted in the development of relevant transitional justice measures and initiatives.²²⁸

²²⁷ Interview with United Nations transitional justice adviser, 5 April 2023; on the transitional justice process in Colombia and its contribution to justice and accountability, with justice, the Colombian experience with transitional justice, *The Brookings Institute*, July 2019, available at www.brookings.edu/wp-content/uploads/2019/06/fp_20190708_colombia.pdf; Andrés Bermúdez earns the respect of sceptical victims, *JusticeInfo.Net*, Vol. 12, January 2023, available at www.justiceinfo.net/en/111069-how-colombia-jep-earns-respect-sceptical-victims.html; Mary de la Libertad Diaz Marquez, *Justice Rapid Response*, 10 June 2021, available at www.justicerapidresponse.org/opinion-why-colombia-is-a-pioneer-in-restorative-justice/.

²²⁸ Interview with United Nations transitional justice adviser, 5 April 2023.

Transitional Justice

The United Nations defines transitional justice the full range of processes and mechanisms

terms with a legacy of large-scale past conflict, repression, violations and abuses, in order to ensure accountability, serve justice and achieve reconciliation (S/2004/616)

Transitional justice consists of both judicial and non-judicial processes and mechanisms, ranging across its four pillars: criminal justice, truth-seeking, reparations, and guarantees of non-repetition.

b. Reparations for Victims of SGBV Linked to Terrorism

As previously noted, the Security Council has repeatedly reaffirmed that victims of trafficking in persons in all its forms, and of sexual violence committed by terrorist groups, should be classified as victims of terrorism with the purpose of, inter alia, rendering them eligible for official support, recognition and redress available to victims of terrorism and have access to national relief and reparations programmes, contribute

of 18, and Yazidi, Turkmen and Shaback survivors of “mass killings and mass elimination carried out by ISIS in their areas”.²³⁵

Key provisions include the acknowledgement that crimes committed by ISIL against these minority groups constitute genocide and crimes against humanity, formal recognition of various forms of SGBV committed by ISIL, and a set of individual and collective, material and symbolic reparation measures.²³⁶ Despite these laudable achievements, also driven by the efforts of civil society organizations, the law does not recognize all categories of victims, including men, boys, and members of the LGBTQ+ community who were also victims of SGBV by ISIL.

The implementation of the reparations programme also raises concerns, particularly with respect to the imposition of an eligibility standard requiring survivors to submit a criminal complaint, in contravention to international standards relating to administrative reparations programmes which call for flexible evidentiary standards to avoid the potential re-traumatization of victims and placing undue burden on victims.²³⁷

Consistent with the United Nations Secretary-General's recommendations on reparations for conflict-related sexual violence, it is essential that these schemes aim for transformative outcomes throughout their design, implementation, and impact.²³⁸ Active participation of affected communities and civil society organizations is crucial to ensure that the process is victim-centred, minimizing burdens for claimants and reducing potential risks. Adequate funding is also vital, either through dedicated budget allocation within national budgets or through donor support, to ensure the sustainability of the reparations programme. Effective

²³⁵ *Ibid.*, art. 2.

²³⁶ *Ibid.*, arts. 1, 6. 8. These include individual reparations such as the provision of a monthly salary not less than the minimum pension and a plot of land with a real estate loan or a free housing unit, and communal reparations in the form of memorialization initiatives, such as monuments and exhibits.

²³⁷ *Ibid.*, art. 10. Implementation of the Yazidi survivors Law .

At the national level, in June 2023, the United States designated two ISIL leaders as Specially Designated Global Terrorists for their involvement in the commission of SGBV against Yazidi women and girls, which involved abduction and sexual slavery.²⁴⁵ This marks the first known sanctions designation against a member of a terrorist group for SGBV and is an encouraging step.

Emerging Good Practices and Opportunities

The above challenges notwithstanding, there are also examples of promising practices being developed, which offer potential lessons learned and pathways to advancing accountability. Examples include international cooperation, structural investigations, inter-agency cooperation and civil society participation.

a. International Cooperation

With respect to international cooperation, a number of initiatives have emerged that are of relevance to the investigation and prosecution of SGBV in terrorist contexts. Through mutual legal assistance arrangements, Canadian investigative and prosecution teams are actively cooperating with German authorities to facilitate knowledge-sharing and establish victim-centred approaches at the onset of their investigations into ISIL crimes against the Yazidi community.²⁴⁶ Furthermore, in 2022, the European Union Agency for Criminal Justice Cooperation (Eurojust) played a vital role in facilitating the creation of a joint investigation team (JIT) consisting of the judicial authorities of Sweden and France.²⁴⁷ The primary objective of this JIT is to support legal proceedings concerning core international crimes committed by FTFs against the Yazidi community in the Syrian Arab Republic and Iraq. The formation of this JIT fosters ongoing coordination of the investigations and enhan03 Tm0 g42 Tm0 gn411 Tm0 g0n Tm0 nBT/F1 12 Tf1 0 0 1 252.82 396.6

Nigerian liaisons to Italy and Spain to strengthen international judicial collaboration and mutual legal assistance between the countries of origin and the destination countries in cases related to human trafficking and other relevant crimes.²⁴⁹ The benefits of this Initiative include a streamlined communication channel between jurisdictions, improved understanding of the different legal, institutional, and procedural frameworks, and fostering trust and cooperation between criminal justice practitioners from the participating countries.²⁵⁰

b. Structural Investigations

Structural investigations have also been an instrumental tool in advancing accountability efforts for crimes committed by terrorist groups. First commenced in Germany and then adopted in other European countries, including Sweden and France, structural investigations are a means to collect evidence about the entity in question, particularly where “potential perpetrators have not yet been definitively identified”.²⁵¹ Where permitted under national law, the benefits of such investigations include the ability to collect and preserve evidence earlier in the process to gain a comprehensive understanding of the functioning of the terrorist group without the pressure to commence a case against a specific perpetrator.

c. Inter-agency Collaboration

Given the persistence of silos, which was identified as a key challenge in this study, emerging examples of collaboration between national agencies and specialized units are encouraging and have the potential to foster more comprehensive investigations and prosecutions of terrorist acts as core international crimes. For example, the Dutch war crimes and counter-terrorism units are working collaboratively to file joint charges for terrorist acts against a specific

in 2019 incorporated its international crimes unit under the umbrella of the National Anti-Terrorism Prosecutor's Office (*Parquet National Anti-Terroriste*, or PNAT), is also an important development which can facilitate the sharing of relevant expertise towards more comprehensive accountability efforts.²⁵³

It is also noteworthy that, in some jurisdictions, judges are becoming more sensitized to the interlinkages between human trafficking and terrorism. In a Norwegian case, a young woman faced prosecution for joining ISIL in the Syrian Arab Republic.²⁵⁴ After her husband's death, she was forced into another marriage and could not leave as she desired. While acknowledging her voluntary involvement with ISIL, which constituted a terrorism-related offence in Norway, the court also recognized the shift in her circumstances from voluntary to involuntary. The judge concluded that her situation turned into human trafficking, with her being coerced to stay in the Syrian Arab Republic. Despite being convicted of a terrorist crime, the judge applied the non-punishment principle as a mitigating factor,²⁵⁵ demonstrating a willingness to consider the victim's circumstances and apply anti-human trafficking laws to the terrorist context.

d. Role of Civil Society Organizations

Concerning reparations, civil society initiatives, like the Global Survivors Fund (GSF), play a crucial role in assisting victims of CRSV, including SGBV linked to terrorism, with interim reparative measures when States are unable to fulfil their responsibilities to provide reparations to victims of terrorism. While States remain duty bearers, such initiatives aid in envisioning and implementing effective reparative programmes, and the GSF offers technical assistance to States to develop their own reparations programmes.²⁵⁶ GSF adopts a survivor-centric approach, collaborating with survivors and partners to conceptualize, design, implement, monitor, and evaluate programmes that uphold their right to reparation.²⁵⁷

Finally, advancements in accountability for SGBV linked to terrorism can be attained through a collaborative approach with civil society and affected communities. In Mali, six human rights and wC

strategies, international cooperation, and civil society participation. The study's analysis and findings provide a nuanced understanding of SGBV linked to terrorism and the criminal justice measures that can be implemented to foster accountability. By acknowledging the gendered nature of terrorist crimes and the exploitation of SGBV as a tactic by terrorist groups, the study emphasizes the need for gender-sensitive counter-terrorism strategies that address the underlying structural inequalities that terrorist groups exploit, as well as the structural inequalities and gendered notions of terrorism within the counter-terrorism and criminal justice system.

To continue to support the Counter-

Engagement with civil society organizations

Continue, in line with its existing mandate, to engage with civil society organizations and consult with women and women's organizations to inform its work on the issue, including with respect to the provision of survivor-centred and trauma-informed support and addressing stigma within communities

Facilitation of technical assistance

Continue to facilitate the delivery of technical assistance to strengthen the capacity and expertise within Member States to conduct investigations and prosecutions of SGBV linked to terrorism

Ensure follow-up with Member States regarding the implementation of recommendations to strengthen criminal justice responses to SGBV linked to terrorism which require technical assistance and capacity development support

Continue its close collaboration with relevant United Nations entities, including UNOCT and UNODC, to address priority areas for technical assistance and support the mainstreaming of recommendations in relevant projects through the United Nations Global Counter-Terrorism Coordination Compact

As a member of United Nations Action against Sexual Violence in Conflict, continue to engage and share information with other members of the network to support collective United Nations efforts to address conflict-related sexual violence, including in terrorist contexts.

Through its engagement with Member States and relevant stakeholders on behalf of the Counter-Terrorism Committee, and the analysis and exchanges undertaken in the context of this study, CTED has identified the following promising practices adopted by different Member States with a view to advancing more comprehensive accountability for SGBV linked to terrorism:

Legal frameworks

Adopting and/or amending legislation to ensure that SGBV is defined in line with international standards, including with respect to the elements of crime and use of gender-neutral definitions. For example, force is not an element of rape under international law and establishing the existence of a coercive circumstance can prove the absence of consent

Reviewing criminal procedural and evidentiary rules and practices to avoid placing undue burden on victims and remove procedural impediments to justice, in line with international standards. Examples of such procedural and evidentiary impediments include restrictive limitation periods for filing claims, corroboration requirements discriminating against victims as witnesses and complainants and a lack of facilities for closed hearings, as well as the requirement of medical corroboration

Reviewing and amending legislation or policies that contain restrictive interpretations of the double criminality principle, which may have an impact on the exercise of jurisdictions, extradition of suspects, and other international cooperation and assistance in legal proceedings for terrorist cases, including those concerning SGBV linked to terrorism

Adopting or amending existing legislation to enable the exercise of universal jurisdiction for core crimes under international law

Investigation and prosecution

Developing investigative and prosecutorial strategies, based on available legal frameworks, including counter-terrorism legislation, which can support the identification of broader patterns of criminality and chains of command

Establishing legal and regulatory frameworks to enable the sharing of information domestically and internationally to facilitate the investigation and prosecution of individuals responsible for SGBV linked to terrorism

Establishing multidisciplinary investigative units, participating in inter-State joint investigative teams, and enhancing intragovernmental cooperation between relevant units to strengthen evidence collection efforts and investigative strategies, and limit the potential re-traumatization of victims

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