



UNODC

United Nations Office on Drugs and Crime

Handbook on
GENDER DIMENSIONS
of criminal justice
responses to terrorism



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HANDBOOK ON GENDER DIMENSIONS OF CRIMINAL JUSTICE RESPONSES TO TERRORISM



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Introduction

The United Nations Office on Drugs and Crime (UNODC) is mandated to provide assistance to requesting countries on the legal and criminal justice aspects of countering terrorism.

UNODC sees equality, non-discrimination and respect for women's rights as key components of a robust criminal justice framework guided by the core principles of the rule of law, due process and protection of human rights. The present publication has been developed with the conviction that an effective criminal justice response to terrorism must include a gender perspective, adopt an approach based on gender mainstreaming and human rights, and take account of the multifaceted and distinct ways that women and men are involved in, and impacted by, terrorist acts.

Women and men, girls and boys are among the victims of acts of terrorism, such as hostage-taking, explosives attacks in public places, or aeroplane hijacking. Terrorist groups, however, also specifically target women through acts of sexual and gender-based violence – such as rape, sexual slavery and forced marriage – as a means of achieving tactical, strategic and ideological aims. Many terrorist groups encroach on women's human rights and impede their socioeconomic development, including by restricting their movement. In some contexts, women disproportionately experience internal displacement as a result of terrorist threats, and lose access to livelihoods owing to terrorist attacks. Women may also face gender-specific difficulties when attempting to access justice and seeking remedies as victims of terrorism.

Some women actively and voluntarily support terrorist groups, ideologically and operationally, and are involved in the commission of terrorism-related offences. The active participation of women in terrorist groups is not a new phenomenon. Women fulfilled frontline roles in, for example, the Euskadi Ta Askatasuna (ETA) and Partiya Karkerên Kurdistan (PKK), and leadership roles in the Liberation Tigers of Tamil Eelam (LTTE). The circumstances of women's association with contemporary terrorist and violent extremist groups, the roles they fulfil in these groups and the levels of violence with which they engage, however, differ from men in many contexts, and are often based on gender roles and stereotypes. In some conflicts, women become associated with these groups through coercion or abduction, and may commit terrorism-related offences while themselves being victims of violence by terrorist groups.

Despite these different impacts and associations, traditional analysis has often placed women on the periphery of terrorism and counter-terrorism discourses, being viewed either as victims or as unwilling or incidental associates of the primary terrorist actors. There has, however, been a discernible shift at the international level towards recognizing that women are associated with, and affected by, acts of terrorism in many different ways. The Security Council helped to shift international dialogue on these matters with the adoption of resolution 2242 (2015), in which the Council recognized the differential impact of terrorism on the human rights of women and girls, and called for the greater integration by Member States and the United Nations of their agendas on Women, Peace and Security; counter-terrorism; and countering violent extremism. In 2016, the General Assembly, in its resolution 70/148, urged States to ensure that gender equality and non-discrimination were taken into account when shaping, reviewing and implementing all counter-terrorism measures, and to promote the full and effective participation of women in those processes.

A corollary of this shift is an increased recognition of the need to examine how gendered experiences and practices should inform and shape the criminal justice response to terrorism. In 2017, the General Assembly, in its resolution 72/194, encouraged UNODC to assist Member States, upon request, in mainstreaming gender perspectives into criminal justice responses to terrorism, in full compliance with

human rights law, in order to prevent the recruitment of women and girls as terrorists and promote the full protection of women and girls from any form of exploitation or violence perpetrated by terrorists.

The present publication is designed to complement existing tools that UNODC has developed, some of which provide guidance on the ratification and implementation of the universal legal instruments against terrorism, and others that are focused on strengthening specific aspects of the criminal justice responses to terrorism, including from a human rights perspective. The publication also complements the broader work of UNODC in mainstreaming gender across all its programmes, practices and policies, as reflected in its *Guidance Note for UNODC Staff: Gender Mainstreaming in the Work of UNODC*, and the *Gender Equality Strategy for the United Nations Office on Drugs and Crime and the United Nations Office in Vienna (2018–2021)*.

The present handbook will be relevant to the work of judicial officials, prosecutors, law enforcement and corrections officers, and lawyers assisting suspects or victims of terrorism. It will also be useful to policymakers, lawmakers, and civil society organizations active in the fields of women's rights and counter-terrorism and the prevention of violent extremism.

Legal and policy recommendations are provided, based on international standards and promising practices of international, regional and selected national bodies, in order to assist the users in addressing some of the key gender issues arising in the criminal justice response to terrorism. The handbook follows a multidisciplinary approach, integrating best practice from the fields of counter-terrorism, criminal justice, promotion of women's rights and equality, and the elimination of violence against women.

The handbook contains a number of tools to enable readers to engage with the material in an in-depth manner. "Focus" boxes provide a deeper insight into specific concepts, and "example" boxes facilitate a comparative approach by supplying case studies that illustrate national and international practice and jurisprudence. Information on further reading is provided in order to direct readers to additional sources on specific topics. Finally, a summary of key points is included at the end of each chapter to provide a concise checklist of issues raised in that chapter.

The handbook consists of six chapters. Chapter 1 contains an examination of the concept of gender mainstreaming in counter-terrorism and in the criminal justice system. It also examines how this concept fits into the international human rights framework and the policy context of the Women, Peace and Security agenda and the Sustainable Development Goals.

Chapter 2 includes an exploration of the ways in which the criminalization of acts of terrorism may affect women differently than men. It begins with a brief review of the differing roles of women in contemporary terrorist groups. The chapter also includes a look, with a gender perspective, at selected terrorism-related offences, such as supporting acts of terrorism, financing of terrorism and offences related to foreign terrorist fighters. It also covers criminal justice responses to situations where an individual is alleged to have committed a terrorism-related offence while having been involuntarily associated with a terrorist group.

Chapter 3 is focused on gender perspectives and good practices regarding the investigation and prosecution of terrorism cases. It covers investigative methods and powers, interviewing, witness protection and the importance of strengthening the representation of women in law enforcement and the judicial system, including in specialized counter-terrorism units.

Gender-based vulnerabilities are often acute in the contexts of imprisonment and other forms of deprivation of liberty. As such, chapter 4 contains a discussion of vulnerabilities and good practices regarding the imprisonment of persons suspected, accused or convicted of having committed terrorism-related offences, and provides guidance on implementing gender-sensitive policies and practices, as well as the protection of women's rights in this regard. Chapter 4 also contains an examination of alternative measures and detention outside the criminal justice context.

Terrorist groups have targeted women, men, girls and boys through acts of sexual and gender-based violence to achieve tactical objectives and ideological aims. Chapter 5 contains a discussion of the legal frameworks that can be used to hold the perpetrators of these crimes accountable, including terrorism offences, trafficking in persons offences, and war crimes and crimes against humanity. The chapter also includes a discussion of the key challenges and good practices for investigation and prosecution, which is complemented by an analysis of international cooperation aspects.

Finally, chapter 6 includes an examination of the gender dimensions of challenges that victims of terrorism may experience in obtaining access to justice and remedies, and good practices to overcome these challenges. The chapter also contains an examination of access to justice and remedies for victims of sexual and gender-based violence and trafficking in persons perpetrated by terrorist groups. Lastly, it includes a discussion of the role of gender-sensitive transitional and traditional justice mechanisms as alternatives to criminal justice proceedings.



top: The Security Council Open Debate on Women and Peace and Security held on 27 October 2017. © UN Women/Ryan Brown

centre: In observance of International Women's Day, participants march from the centre of Monrovia to the Temple of Justice, home of the Liberian Supreme Court. © UN Photo/Eric Kanenstein

CRIMINAL JUSTICE AND COUNTER-TERRORISM IN THE CONTEXT OF THE INTERNATIONAL LEGAL AND POLICY FRAMEWORK FOR WOMEN'S RIGHTS AND GENDER EQUALITY

Chapter 1 contains an examination of women's rights and the gender dimensions of criminal justice responses as they relate to terrorism, as seen within the wider international policy context and the international human rights framework. The present chapter seeks to establish the importance of examining gender perspectives and making the issue of women's rights central to counter-terrorism efforts, in order to provide a framework for the discussions in the chapters that follow.

The topics addressed in chapter 1 are as follows:

- Section A contains an overview of the international and regional norms relating to gender, women's rights and criminal justice systems and includes a look at the role of the criminal justice system in upholding these rights.
- Section B contains an examination of the concepts of gender mainstreaming in counter-terrorism and in the criminal justice system.
- Section C includes a discussion on the policy impetus behind, and growing recognition of, the links between counter-terrorism efforts and the Women, Peace and Security Agenda, particularly in the light of widespread sexual and gender-based violence perpetrated by terrorist and violent extremist groups. The section also contains a look at the clear links between the 2030 Sustainable Development Goals and the integration of women's rights and gender dimensions into counter-terrorism efforts, and the emphasis on gender equality and human rights, peace, development, and the rule of law.
- Section D includes an overview of the special policy and legal framework for the protection of the girl child.

A. Non-discrimination, gender equality and women's rights

1. The right to equality and non-discrimination on the basis of sex

States parties to international human rights treaties are required to respect, protect and fulfil those human rights. This requires States to not only refrain from violating human rights and fundamental freedoms through its actors and those acting on behalf of the State, but also creates a positive

obligation for States to protect those under their jurisdiction against abuses by private persons or entities,¹ including terrorist groups. States parties are therefore required, under international law, to prevent, investigate and punish human rights violations by both State and non-State actors.

The right to equality and non-discrimination, including on the basis of sex, is one of the foundational principles of human rights law, and is essential for the effective protection of human rights and the rule of law. The international and regional human rights instruments contain two forms of protection that States are obligated, under international law, to provide in this regard.

First, the instruments guarantee equality and non-discrimination in the application of treaty rights. Article 2 of the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights prescribe that all rights contained therein must be ensured without discrimination on the basis of, *inter alia*, sex. In addition, article 3 of the International Covenant on Civil and Political Rights and article 3 of the International Covenant on Economic, Social and Cultural Rights emphasize gender equality by highlighting the equal right of men and women to enjoy all the rights set forth in those instruments.

The guarantee of non-discrimination in the protection of treaty rights, including on the basis of sex, is similarly reflected in regional instruments, including the following:

- Article 1 of the American Convention on Human Rights and article 3 of its Additional Protocol
- Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms
- Article 2 of the African Charter on Human and Peoples' Rights
- Article 3, paragraphs 2 and 3, of the Arab Charter on Human Rights (Arab Charter)

Second, the instruments guarantee equality before the law and/or a prohibition of discrimination in the application of any law. Such protection is reflected in article 26 of the International Covenant on Civil and Political Rights, which recognizes that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. The International Covenant prohibits discrimination in law or in fact in any field regulated and protected by public authorities.² Article 15, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women offers similar protection to women, according them equality with men before the law.

At the regional level, such protection is contained in the following instruments:

- Article 24 of the American Convention on Human Rights
- Article 1, paragraph 1, of Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms
- Article 3 of the African Charter on Human and Peoples' Rights and article 8 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)
- Article 11 of the Arab Charter
- Principles 2 and 3 of the Association of Southeast Asian Nations (ASEAN) Human Rights Declaration, which is a non-binding instrument

Although human rights treaties enable States to derogate from some of their guarantees in times of public emergencies that threaten the life of the nation, such derogations must not involve discrimination solely on a number of specified grounds, including sex (see art. 4, para. 1, of the International Covenant on Civil and Political Rights; art. 27, para. 1, of the American Convention on Human Rights; and art. 4, para. 1, of the Arab Charter).

¹Human Rights Committee, general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 8.

²Human Rights Committee, general comment No. 18 (1989) on non-discrimination, para. 12.

› FOCUS: THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS AND PROTECTING THE RIGHTS OF WOMEN IN COUNTER-TERRORISM EFFORTS

Part 1, paragraph (h), of the Principles and Guidelines on Human and Peoples' Rights While Countering Terrorism in Africa, adopted by the African Commission on Human and Peoples' Rights, underlines that:

States shall ensure that legislation, procedures, policies and practices are designed to respect and protect the rights and special status and distinct needs of women and children who are victims of terrorism or subject to counterterrorism measures, including but not limited to searches and investigations, all forms of detention, trials and sentencing.

2. Women's rights and gender equality, and protection from sexual and gender-based violence

The international human rights framework also contains instruments specific to women's rights and gender equality. The most comprehensive instrument is the Convention on the Elimination of All Forms of Discrimination against Women, the objective of which is to eliminate all forms of discrimination in law and practice against women on the basis of sex and gender.³ Pursuant to that goal, States parties are required to take all appropriate measures to guarantee women the equal recognition, enjoyment and exercise of all human rights and fundamental freedoms on a basis of equality with men.⁴ The Convention prescribes State obligations to address not only discriminatory laws, but also practices and customs, and discrimination against women by private actors.⁵

According to the Committee on the Elimination of Discrimination against Women, the body charged with monitoring the implementation of the Convention on the Elimination of All Forms of Discrimination against Women, article 2 of the Convention establishes that the overarching obligation of States parties is to pursue by all appropriate means and without delay, a policy of eliminating discrimination against women.⁶ As established in article 2, States are required to:

- Enforce gender equality through national law and adopt legislation prohibiting discrimination against women, including sanctions⁷
- Establish legal protection of the rights of women on an equal basis with men and to ensure effective protection through national redress mechanisms⁸
- Refrain from discriminating against women and to take action to eliminate discrimination against women by any person, organization or enterprise⁹
- Abolish existing laws and practices, and repeal national penal provisions, constituting discrimination against women¹⁰

³See also Committee on the Elimination of Discrimination against Women, general recommendation No. 28 (2010) on the core obligations of States parties under article 2 of the Convention, para. 5; and article 2 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, which requires States parties to combat all forms of discrimination against women through legislative, institutional and other measures.

⁴Convention on the Elimination of All Forms of Discrimination against Women (United Nations, *Treaty Series*, vol. 1249, No. 20378), art. 3.

⁵See also article 18 of the African Charter on Human and Peoples' Rights, which requires the State to ensure the elimination of every discrimination against women, and principle 4 of the Association of Southeast Asian Nations (ASEAN) Human Rights Declaration, which recognizes the rights of women as an inalienable part of human rights and fundamental freedoms.

⁶Committee on the Elimination of Discrimination against Women, general recommendation No. 35 (2017) on gender-based violence against women, updating general recommendation 19, para. 21.

⁷Convention on the Elimination of All Forms of Discrimination against Women, art. 2, paras. (a)–(b).

⁸*Ibid.*, art. 2, para. (c).

⁹*Ibid.*, art. 2, paras. (d)–(e).

¹⁰*Ibid.*, art. 2, paras. (f)–(g).

(i) Positive obligation of States to protect women from gender-based violence committed by terrorist groups

Faced with the devastating impact of terrorism on women, States have the obligation to put women's rights, gender equality and the prohibition of discrimination against women and gender-based violence against women at the centre of their response to terrorism and violent extremism. In the 2017 report of the Secretary-General on conflict-related sexual violence, it was noted that sexual violence had been used as a tactic of terrorism by a range of violent extremist groups as a means of achieving strategic objectives and generating revenue, as well as for operational purposes, with victims of sexual slavery used as human shields and suicide bombers. At the same time, certain counter-terrorism measures have also infringed upon women's rights and freedoms, with sexual violence also being used in the context of counter-insurgency operations.¹¹

The report of the Secretary-General on women and peace and security states that

Terrorist and violent extremist groups have continued to carry out attacks against civilians, with the subjugation and exploitation of women and girls a common element across the agendas of the various groups. Because of this, the advancement of gender equality is key to stemming abuse, exploitation and recruitment by violent extremist and terrorist groups.¹²

The Committee on the Elimination of Discrimination against Women defines gender-based violence against women as violence that is directed against a woman because she is a woman or that affects women disproportionately. As such, gender-based violence constitutes discrimination against women within the meaning of article 1 of the Convention on the Elimination of All Forms of Discrimination against Women and is a violation of women's human rights.¹³ It therefore engages all State obligations under article 2 of the Convention.¹⁴ These obligations are of an immediate nature, and delays cannot be justified on any grounds, including in periods of armed conflict or during states of emergency.¹⁵ In that respect, the Committee has noted that armed conflict and states of emergency have a deep impact on and broad consequences for the equal enjoyment and exercise by women of their fundamental rights.¹⁶

The prohibition on gender-based violence against women is also a principle of customary international law.¹⁷ A comprehensive definition of such violence and a commitment by States in respect of their responsibilities concerning the elimination of violence against women is set out in the Declaration on the Elimination of Violence against Women, adopted by the United Nations General Assembly in its resolution 48/104 in 1993.

There are two aspects of a State party's responsibility stemming from its obligation to pursue a policy of eliminating gender-based violence against women. First, the State is responsible for acts and omissions by its organs and agents that constitute gender-based violence against women, including acts by the executive, legislative and judicial branches.¹⁸

Second, States have an obligation of due diligence to address and prevent gender-based violence against women committed by non-State actors.¹⁹ Accordingly, States will be responsible if they fail to take all appropriate measures to prevent, as well as to investigate, prosecute, punish and provide reparations for, acts or omissions by non-State actors that result in gender-based violence against women.²⁰

¹¹S/2017/249, paras. 8–9.

¹²S/2017/861, para. 43.

¹³General recommendation No. 35, para. 1, updating general recommendation No. 19, para. 9.

¹⁴Ibid., para. 21.

¹⁵Ibid.

¹⁶CEDAW/C/GC/28, para. 11.

¹⁷General recommendation No. 35, para. 2.

¹⁸Ibid., para. 22.

¹⁹General recommendation No. 28, para. 13, and Declaration on the Elimination of Violence against Women, art. 4, para. (c).

²⁰General recommendation No. 35, para. 24; see also general recommendation No. 19, para. 9.

The Special Rapporteur on violence against women, its causes and consequences, has clarified that State responsibility to act with due diligence is both a systemic-level responsibility, i.e. the responsibility of States to create good and effective systems and structures that address the root causes and consequences of violence against women; and also an individual-level responsibility, i.e., the responsibility of States to provide each victim with effective measures of prevention, protection, punishment and reparation.²¹

› FOCUS: THE OBLIGATION OF STATES TO PROTECT THE RIGHTS TO LIFE AND PERSONAL SECURITY

The due diligence obligation to prevent gender-based violence against women committed by terrorist groups is an important aspect of the broader positive obligation of States under international human rights law to protect the rights to life and personal security. As explained by the Office of the United Nations High Commissioner for Human Rights (OHCHR) with regard to the terrorist threat against the right to life of all (women and men, girls and boys):

The protection of the right to life includes an obligation on States to take all appropriate and necessary steps to safeguard the lives of those within their jurisdiction. As part of this obligation, States must put in place effective criminal justice and law enforcement systems, such as measures to deter the commission of offences and investigate violations where they occur; ensure that those suspected of criminal acts are prosecuted; provide victims with effective remedies; and take other necessary steps to prevent a recurrence of violations. In addition, international and regional human rights law has recognized that, in specific circumstances, States have a positive obligation to take preventive operational measures to protect an individual or individuals whose life is known or suspected to be at risk from the criminal acts of another individual, which certainly includes terrorists. Also important to highlight is the obligation on States to ensure the personal security of individuals under their jurisdiction where a threat is known or suspected to exist. This, of course, includes terrorist threats.^a

^aOffice of the United Nations High Commissioner for Human Rights (OHCHR), *Human Rights, Terrorism and Counter-Terrorism*, Fact Sheet No. 32 (Geneva, 2008), p. 8.

States may also have obligations to protect against sexual and gender-based violence under regional human rights instruments.

- In the Inter-American regional system: article 3 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women entrenches the right of every woman to be free from violence in both the public and private spheres.
- In the African regional system: article 3 of the Maputo Protocol ensures the right to dignity of every woman, and places an obligation on States to implement appropriate measures to prohibit any exploitation or degradation of women, and to ensure the protection of every woman's right to respect for her dignity and protection of women from all forms of violence, particularly sexual and verbal violence. The International Conference on the Great Lakes Region Protocol on the Prevention and Suppression of Sexual Violence against Women and Children establishes a legal framework for the prosecution and punishment of sexual violence crimes.²² Further, the Guidelines on Combating Sexual Violence and its Consequences in Africa, adopted by the African Commission on Human and Peoples' Rights in May 2017, provides guidance to Member States of the African Union in implementing their commitments and obligations to combat sexual violence and its consequences.

²¹ A/HRC/23/49, para. 20.

²² It establishes a number of procedural protections for victims of sexual violence in article 6, including victim-sensitive measures for the prosecution of perpetrators, assistance with the rehabilitation and reintegration of victims, and for sensitizing criminal justice officials in handling sexual violence cases.

- In the European regional system: the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention) sets standards to prevent gender-based violence, protect victims of violence and punish perpetrators, and to contribute to the elimination of all forms of discrimination against women.²³
- In Asia: the Declaration on the Elimination of Violence against Women in the ASEAN Region further sets out the normative framework for States to eliminate violence against women through the punishment of perpetrators and the protection and support of victims.

(ii) Obligations of non-State actors

In specific circumstances, non-State actors have direct obligations under international human rights and humanitarian law. Where an armed group with an identifiable political structure exercises significant control over territory and population, non-State actors are obliged to respect international human rights.²⁴ Non-State armed groups that are a party to an armed conflict are also bound by international humanitarian law. Common article 3 of the four Geneva Conventions of 1949 establishes fundamental, non-derogable rules applicable to all parties in non-international armed conflicts, including to non-State actors. It requires all parties to refrain, with respect to all persons taking no active part in hostilities, from committing, inter alia, violence to life and person, including murder, cruel treatment and torture; the taking of hostages; and outrages upon personal dignity, in particular humiliating and degrading treatment.²⁵

3. Access to justice and remedies

There is a comprehensive international and regional human rights law framework establishing the right of women to equal access to and treatment within the criminal justice system. The frameworks for remedies and reparations for persons whose rights have been violated under these instruments, and the corresponding obligations of States to ensure access to such mechanisms, are discussed in chapter 4.

The International Covenant on Civil and Political Rights contains a number of provisions enshrining the rights of all women and men, on the basis of equality and non-discrimination, to judicial redress and remedies. Article 2, paragraph 3, of the International Covenant guarantees the right to effective remedies by competent judicial, administrative and legislative authorities to women and men whose rights under the Covenant have been violated, and to the enforcement of such remedies. Pursuant to article 2, paragraph 3, in addition to effective protection of Covenant rights, States parties must also ensure that individuals have accessible and effective remedies to vindicate those rights.²⁶ Article 14 addresses the administration of justice, guaranteeing women equality before courts and tribunals on the same basis as men without discrimination.

²³Article 49 requires States parties to implement necessary legislative or other measures, having regard for the gendered understanding of violence, in order to ensure the effective investigation and prosecution of offences established in accordance with the Convention.

²⁴Committee on the Elimination of Discrimination against Women, general recommendation No. 30 (2013) on women in conflict prevention, conflict and post-conflict situations, para. 16; and A/HRC/8/17, para. 9, and A/HRC/25/21, para. 11. The Security Council has addressed the human rights responsibilities of non-State actors in specific situations (see, for example, Council resolutions 1376 (2001), para. 5; 1417 (2002), para. 4; and 1906 (2009), para. 10).

²⁵Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, of 12 August 1949 (First Geneva Convention) (United Nations, *Treaty Series*, vol. 75, No. 970); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, of 12 August 1949 (Second Geneva Convention) (United Nations, *Treaty Series*, vol. 75, No. 971); Geneva Convention relative to the Treatment of Prisoners of War, of 12 August 1949 (Third Geneva Convention) (United Nations, *Treaty Series*, vol. 75, No. 972); and Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949 (Fourth Geneva Convention) (United Nations, *Treaty Series*, vol. 75, No. 973), art. 3, para. 1 (a)–(c).

²⁶General comment No. 31, para. 15.

The Committee on the Elimination of Discrimination against Women has stated that the right of access to justice for women and girls, on the basis of equality, encompasses justiciability, availability, accessibility, good quality and accountability of justice systems, and the provision of remedies for victims.²⁷ The Committee has emphasized that discrimination against women, based, *inter alia*, on gender stereotypes, stigma, and gender-based violence, adversely impacts women's ability to access justice on an equal basis with men.²⁸

Access to justice and remedies for human rights violations are also reflected in regional human rights instruments, including under those specifically relating to protection against sexual and gender-based violence:

- In the Inter-American regional system: article 25 of the American Convention on Human Rights guarantees the right of all persons to judicial recourse and remedies, and to the enforcement of such remedies. Article 4, subparagraph (f), of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence prescribes the right of every woman to equal protection before the law and of the law. In addition, article 7, subparagraphs (f) and (g), of the Convention place upon States the duty to establish fair and effective legal procedures for women who have been subjected to violence and to establish the necessary legal and administrative mechanisms to ensure that women subjected to violence have effective access to restitution, reparations or other just and effective remedies.
- In the African regional system: States parties are required to adopt measures addressing barriers to justice for acts of sexual and gender-based violence, which may amount to torture and other ill-treatment in violation of article 5 of the African Charter on Human and Peoples' Rights.²⁹ Further, article 8 of the Maputo Protocol requires States parties to take appropriate measures to ensure women's effective access to judicial and legal services, and to reform existing discriminatory laws and practices in order to protect women's rights. Notably, article 8, paragraph (d), requires law enforcement organs at all levels to be equipped to effectively interpret and enforce gender equality rights.
- In the European regional system: article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms enshrines the right to an effective remedy for everyone whose rights have been violated under the Convention. Article 5 of the Council of Europe Convention on preventing and combating violence against women and domestic violence requires States parties to take legislative and other due diligence measures to prevent, investigate, punish and provide reparation for acts of sexual and gender-based violence perpetrated by non-State actors. Further, article 49 of the Istanbul Convention requires States parties to ensure that investigations and judicial proceedings carried out pursuant to the Convention are executed without undue delay, and consider the victim's rights at all stages of the criminal proceedings.
- In the Arab regional system: article 12 of the Arab Charter requires States parties to guarantee all persons within their jurisdiction the right to seek a legal remedy before courts of all levels.

²⁷ Committee on the Elimination of Discrimination against Women, general recommendation No. 33 (2015) on women's access to justice (CEDAW/C/GC/33), para. 1.

²⁸ *Ibid.*, para. 8.

²⁹ African Commission on Human and Peoples' Rights, "General comment No. 4 on the African Charter on Human and Peoples' Rights: the right to redress for victims of torture and other cruel, inhuman or degrading punishment or treatment (article 5)" (Banjul, 2017), paras. 57–61.

B. Mainstreaming gender in counter-terrorism and criminal justice

One of the key strategies for promoting gender equality and women's rights, and eliminating all forms of discrimination against women on the basis of sex and gender, is gender mainstreaming. Gender mainstreaming emerged as an internationally agreed strategy for promoting gender equality at the Fourth International Conference on Women, held in Beijing, and was later adopted by the General Assembly in its resolution 50/203 as a United Nations system-wide policy. Gender mainstreaming promotes the human rights of women and the elimination of discrimination against women. It also contributes to ensuring that measures to prevent and counter violent extremism and terrorism are better informed and targeted, ultimately making those measures more effective.

› FOCUS: GENDER MAINSTREAMING CONCERNS BOTH WOMEN AND MEN

The integration of a gender perspective into policies, practices and programmes involves examining the needs and experiences of both women and men.

A gender-neutral approach, which does not differentiate between the impact of terrorism and counter-terrorism measures on women and men and assumes that they share the same experiences, needs and concerns, can be problematic because it may reflect the assumption that only men's experiences of terrorism and counter-terrorism are relevant. Because men typically dominate decision-making at the household and community levels, a gender-neutral approach may in fact largely reflect male priorities.

International responses to terrorism should consider and be shaped by the experiences of both men and women: experiences as perpetrators of acts of terrorism, as victims of terrorism, and as agents in State and non-State institutions (such as social movements) involved in countering terrorism.^a

It has been observed, however, that when gender has been considered in the context of counter-terrorism, little consideration has been given to "men" as a category. Instead, the term "gender" has been equated with "women" as a category. As a result, there has been little policy reflection on what elements of masculinity, male identity, male bonding and male status are implicated in radicalization, extremism and engagement in political violence.^b Considering the role of masculinities in terrorism can be critical to understanding motivations for engaging in violent extremism or terrorism, and the ways in which masculinities are employed in recruitment tactics:

... men who cannot meet traditional expectations of masculinity – such as breadwinner, respect and honor, wealth, access to sexual partners of choice – may precisely find that radical or extremist political mobilization offers a compelling substitute for regular masculinity authentication. It is therefore not accidental that terrorist/violent extremist groups manipulate gender stereotypes to recruit men and women, ISIS notably employs hypermasculine images to portray its fighters, as well as promised access to sexual gratification, marriage and guaranteed income as a reward for the glory of fighting. These motifs have proven indisputably alluring to marginalized men whose capacity to access any similar social capital or status in their own communities will be extremely limited.^c

While recognizing the importance of analysing the role of masculinities, the present publication looks predominantly at how women experience and are impacted by the justice system's response to terrorism. This focus is justified, given that a gender-neutral approach, which has characterized most criminal justice responses to terrorism to date, is premised on the implicit assumption that terrorists, victims of terrorism and counter-terrorism agents are primarily or exclusively male.

^aJayne Huckerby, "Gender, counter-terrorism and international law" in *Research Handbook on International Law and Terrorism*, Ben Saul, ed. (Cheltenham, United Kingdom, Edward Elgar Publishing Limited, 2014), p. 165.

^bFionnuala Ni Aoláin, "The complexity and challenges of addressing conditions conducive to terrorism", in *Using Human Rights to Counter Terrorism*, Manfred Nowak and Anne Charbord, eds. (Cheltenham, United Kingdom, Edward Elgar Publishing Limited, 2018), p. 187.

^cIbid., p. 190.

There exist two distinct policy priorities for mainstreaming gender, including one for measures to counter terrorism and prevent violent extremism and another covering the criminal justice system in general. The present publication is aimed at integrating these two perspectives in order to provide guidance on mainstreaming gender into criminal justice responses to terrorism.

1. Mainstreaming gender into counter-terrorism and preventing violent extremism

The widespread recognition of the need to account for gender considerations throughout the scope of the response to terrorism is a relatively new phenomenon. Such considerations range from the roles of women and girls involved in terrorist activities and in preventing violent extremism, as well as their needs as victims, to the effect that masculine gender constructs have on radicalization and the commission of terrorist acts against women. The global study on the implementation of Security Council resolution 1325 (2000) emphasized that the promotion of gender equality had been an afterthought in the response of the international community to terrorism and violent extremism,³⁰ which was a reflection of the gender-neutral lens through which counter-terrorism responses had largely been developed.

The United Nations Global Counter-Terrorism Strategy, which was adopted by the General Assembly in its resolution 60/288 and is reviewed every two years, represents the first time that Member States agreed upon a common strategic and operational approach to fighting terrorism. While women's rights were included under pillar IV, on the protection of human rights while combating terrorism, the Strategy did not specifically incorporate a gender perspective. In 2013, the Assembly, in its resolution 68/178 on the protection of human rights and fundamental freedoms while countering terrorism, called upon Member States to shape, review and implement all counter-terrorism measures in accordance with the principles of gender equality and non-discrimination. This shift towards considering gender dimensions in State responses to terrorism was further reflected in 2014, when the Assembly, in its resolution 68/276 on the United Nations Global Counter-Terrorism Strategy Review, encouraged Member States, United Nations entities and international and regional organizations to consider the participation of women in efforts to prevent and counter terrorism.³¹ More recently, in 2016, the Assembly, in its resolution 70/291 on the United Nations Global Counter-Terrorism Strategy Review, urged Member States and United Nations entities to integrate a gender analysis on the drivers of radicalization for women to terrorism, and to consider the impacts of counter-terrorism strategies on women's human rights and women's organizations when developing strategies to counter terrorism and violent extremism conducive to terrorism.³²

In its resolution 2178 (2014), which focused on the threat posed by foreign terrorist fighters, the Security Council recognized, for the first time, the need to empower women as a mitigating factor to the spread of violent extremism and radicalization. Further, the Counter-Terrorism Committee Executive Directorate, in its third report on the implementation of Security Council resolution 2178 (2014) by States affected by foreign terrorist fighters, noted specifically the growing phenomenon of women and girl foreign terrorist fighters, recommending that the design, implementation, monitoring and evaluation of strategies to counter violent extremism should include attention to the gender perspective and should engage women from civil society and the security sector.³³

³⁰United Nations Entity for Gender Equality and the Empowerment of Women (UN-Women), *Preventing Conflict, Transforming Justice, Securing the Peace: A Global Study of the Implementation of United Nations Security Council resolution 1325* (New York, 2015), p. 225.

³¹General Assembly resolution 68/276.

³²General Assembly resolution 70/291.

³³S/2015/975, para. 28.

› FOCUS: EMPOWERMENT OF WOMEN IN THE SECRETARY-GENERAL'S PLAN OF ACTION TO PREVENT VIOLENT EXTREMISM

In the report of the Secretary-General on the Plan of Action to Prevent Violent Extremism, it was emphasized that, in line with Security Council resolution 2242 (2015), “we must ensure that the protection and empowerment of women is a central consideration of strategies devised to counter terrorism and violent extremism”. In this regard, the Secretary-General recommended that Members States do the following:

- (a) Mainstream gender perspectives across efforts to prevent violent extremism;
- (b) Invest in gender-sensitive research and data collection on women's roles in violent extremism, including on identifying the drivers that lead women to join violent extremist groups, and on the impacts of counter-terrorism strategies on their lives, in order to develop targeted and evidence-based policy and programming responses;
- (c) Include women and other underrepresented groups in national law enforcement and security agencies, including as part of counter-terrorism prevention and response frameworks;
- (d) Build the capacity of women and their civil society groups to engage in prevention and response efforts related to violent extremism;
- (e) Ensure that a portion of all funds dedicated to addressing violent extremism are committed to projects that address women's specific needs or empower women.^a

^aA/70/674, para. 53.

The fact that women and girls are involved in and affected by terrorism and violent extremism in a spectrum of ways that is highly gendered and can differ substantially to the experience of men and boys, was also identified in the *Global Survey of the Implementation of Security Council Resolution 1373 (2001) by Member States*, compiled by the Counter-Terrorism Committee Executive Directorate in 2016. It noted in the survey that women played multiple roles in terrorism-related policy, including those of victims of terrorist violence, active fighters, sympathizers and mobilizers for terrorist groups, and of being agents of social change, helping to prevent acts of terrorism and violent extremism.³⁴ Accordingly, the survey called for Member States to develop criminal justice responses that assist in the rescue, disengagement, rehabilitation and reintegration of women as victims or perpetrators in order to take account of these different modes of involvement and the individual experience of women, requiring personalized and evidence-based approaches.

› FOCUS: GENDER MAINSTREAMING IN GOOD PRACTICES ON WOMEN AND COUNTERING VIOLENT EXTREMISM OF THE GLOBAL COUNTERTERRORISM FORUM

The Global Counterterrorism Forum has developed a guidance document entitled *Good Practices on Women and Countering Violent Extremism*, which contains good practices and focuses on women and gender aspects in the context of efforts to counter violent extremism. The Forum acknowledges the failure of past efforts aimed at countering violent extremism to mainstream gender, despite the participation of women and girls in violent extremism and terrorism, as well as their roles in prevention.

Good Practice 1 establishes the need to include women and girls and gender mainstreaming in the design, implementation, monitoring and evaluation of all policies, laws, procedures, programmes and practices related to countering violent extremism.

³⁴S/2016/49, annex, para. 26.

According to the Global Counterterrorism Forum, mainstreaming gender in countering violent extremism is based on the understanding that:

- Gender mainstreaming improves the design and implementation of efforts to counter violent extremism and ensures that such efforts account for the different ways that women and girls are involved in violent extremism.
- A comprehensive approach to countering violent extremism should integrate considerations of how violent extremism and counter-terrorism efforts impact women and girls differently than they impact men and boys.
- Efforts to counter violent extremism should take into account the way in which societal gender norms and expectations associated with belonging to a particular gender, shape people's lives in order to deliver more targeted interventions.

The document also underscores that the practical integration of women and girls into all aspects of programming related to countering violent extremism can only occur in the context of broader guarantees of the human rights of women and girls. In particular, such guarantees should include addressing the causes of gender inequality, such as the subordination of women and discrimination on the basis of sex, gender, age and other factors. The promotion and protection of women's rights and gender equality needs to underlie programmes and strategies to counter violent extremism. The human rights of women and girls, as with all human rights, should be promoted and protected at all times and not just as a means for countering violent extremism.

2. Mainstreaming gender into criminal justice

Criminal justice systems – most of which were developed by and based on the experience of men – are in many cases based on gender stereotypes about women and men who come into conflict with the law (see table 1). As a result, women may be discriminated against and disadvantaged at various points of contact with the system, including the following: crime prevention efforts; phase of initial contact with law enforcement; the investigation phase; before, during and after the trial; and during imprisonment.

Table 1

| ASPECT OF THE CRIMINAL JUSTICE SYSTEM | GENDER DIMENSION |
|---------------------------------------|---|
| The nature of victims and offenders | <ul style="list-style-type: none"> • There is a tendency in the criminal justice system to stereotype men's roles as perpetrators of violence and women as passive victims. • There are, however, differences in the nature and frequency of crimes committed against women compared with men, and which are driven by different risk factors. For example, men are more often victims of crime that occurs in the public sphere, and of homicides and assaults, while women are more likely to be affected by offences in the private sphere, and by sexual assaults.^a |
| Criminalization of offences | <ul style="list-style-type: none"> • Some criminal law frameworks may overtly be discriminatory or have entrenched gender-based inequalities. Others may be seen to operate equally with regards to women and men, but in practice have differential effects due to structural gender inequalities. • Some sexual crimes may be defined in an explicitly gendered way that precludes their equal application to both men and women. For example, in some jurisdictions, legal definitions of rape only recognize women as potential victims. • Offences penalizing adultery, sexual misconduct or prostitution, even when formulated in a gender-neutral manner, tend to disproportionately affect women. Women are in many contexts more liable to be punished for such "moral offences".^b • In some jurisdictions, forms of violence against women are normalized on the basis of culture, tradition and religion, and are not criminalized. As a result, victims of such crimes are not protected under the criminal law or able to obtain redress. |

Table 1 (continued)

| ASPECT OF THE CRIMINAL JUSTICE SYSTEM | GENDER DIMENSION |
|--|--|
| The administration of criminal justice, including gender-related barriers in accessing justice and responding to gender-based violence | <ul style="list-style-type: none"> • Harmful gender stereotypes may inform the bias of criminal justice personnel, including police, lawyers and judges. Such bias may manifest itself in sexual violence cases influenced by, for example, beliefs about victim behaviour or attitudes towards marital violence.^c • Women may face barriers in accessing justice because of lower socioeconomic and education status, and they may be less aware of their legal rights. • Legal aid may not be available to women and men on an equal basis; for example, women may not have equal access to the family income, which is often used as the basis to determine eligibility for legal aid. • Women are more likely to be victims of gender-based violence. Authorities may also hold certain views towards gender-based violence that prevent women from accessing justice. |
| Deprivation of liberty and alternatives to imprisonment | <ul style="list-style-type: none"> • Men may be more likely to be detained without trial. • Detention is used in some contexts as a form of “protection” for victims of rape, or for those who are at risk of becoming victims of honour crimes.^d • Women have a range of particular needs in detention that may not be considered in prison systems that were designed for male needs. Women in detention facilities, for example, are more likely to be subject to sexual abuse than male offenders. • Deprivation of liberty may also not take into account, for example, the roles as caregivers and mothers, which are usually attributed to women by society and communities. • Women may be disadvantaged in accessing alternatives to imprisonment. This may be the case where, for example, gender-neutral conditions are imposed, such as (a) bail conditions requiring regular reporting to authorities, which disadvantage women who are primary caregivers or who are only able to travel while accompanied by a male chaperone, or (b) cash bonds that women cannot afford because they do not have equal access to household resources. |

Source: Adapted from UNODC, *Guidance Note for UNODC Staff: Gender Mainstreaming in the Work of UNODC* (Vienna, 2013), pp. 69–73; and UN-Women and others, *A Practitioner's Toolkit on Women's Access to Justice Programming: Module 4—Women in Conflict with the Law* (New York, 2018), pp. 8–10.

^a *Guidance Note for UNODC Staff*, p. 69.

^b *Handbook on Women and Imprisonment*, Criminal Justice Handbook Series (United Nations publication, Sales No. E.14.IV.3), pp. 81–87.

^c *UNODC, Handbook on Effective Prosecution Responses to Violence against Women and Girls*, Criminal Justice Handbook Series (Vienna, 2014), pp. 29–37.

^d See, for example, A/HRC/4/33/Add.3, paras. 39 and 72.

In order to mainstream gender into criminal justice, one needs to take account of the differentiated impact of laws, policies and practices, and as well as of crimes, on women and men. In addition, one must analyse how issues pertaining to the rule of law, security and justice are sustained by social and power relations, question the biases built into such institutions and structures, and ensure that the experiences, needs, priorities and capacities of both women and men are taken into account in any criminal justice reform.³⁵

Mainstreaming gender is an essential step in strengthening the rule of law through the prevention of crime and the promotion of effective, human rights-compliant and accountable criminal justice systems.³⁶ Further, as underscored in the guidance note on gender mainstreaming in the work of UNODC, gender mainstreaming is vital to ensuring long-term sustainable criminal justice reform, as it identifies and uses opportunities for improving gender equality in projects and policies that would

³⁵ *Guidance Note for UNODC Staff*, p. 68.

³⁶ *Ibid.*

not have otherwise been considered gender issues.³⁷ It is also essential in order to avoid exacerbating inequalities in criminal justice systems and maximizing the practical effectiveness of the system. Given that the criminal justice system provides different experiences for women and men, who also possess different perspectives and experiences, gender mainstreaming provides an opportunity to understand those differences and inequalities, which can help identify needs, target assistance and ensure that all needs are met.³⁸

The right to equality and equal protection under the law requires the adoption of gender-responsive approaches in the practices, attitudes, skills and gender composition of personnel. In general, inequalities that occur in society at large – such as unequal gender power relations, gender stereotypes and the attribution of different status and value to the sexes – permeate the composition and work of public institutions. Personnel in criminal justice systems may consciously or subconsciously reinforce the pervasive unequal power relations that characterize wider societal patterns of relations between women and men.

FURTHER READING

- UNODC developed a tool entitled *Gender in the Criminal Justice System Assessment Tool* as part of its *Criminal Justice Assessment Toolkit*. The assessment tool provides practical guidance on how to comprehensively assess the role of gender in criminal justice systems, including the legal and regulatory framework, policing, accessing justice, custodial and non-custodial measures, and victim and witness protection.
- The Organization for Security and Cooperation in Europe has developed *Understanding Gender and Preventing and Countering Violent Extremism and Radicalization Leading to Terrorism: Good Practices for the Security Sector* (forthcoming).

C. Gender equality, the Women, Peace and Security Agenda and the Sustainable Development Goals: the nexus to counter-terrorism

1. Women, Peace and Security Agenda

The Women, Peace and Security Agenda is a policy framework that is aimed at promoting gender equality and enhancing the rights, participation and protection of women in conflict and post-conflict contexts, including with respect to conflict-related sexual and gender-based violence. The first Security Council resolution on women, peace and security was resolution 1325 (2000) which, in addition to resolutions 1889 (2009) and 2122 (2013), addresses broad themes such as the specific experience of women in conflict and their role in peacebuilding, peacekeeping and conflict resolution. Five subsequent resolutions also cover these issues, but focus more on conflict-related sexual violence. Those resolutions are resolutions 1820 (2009), 1888 (2009), 1960 (2010), 2106 (2013) and 2242 (2015).

The core notion underlying this agenda is that conflict affects women and girls differently from men and boys, and that comprehensive, effective engagement with women in conflict prevention and resolution

³⁷ Ibid., pp. 7–8.

³⁸ Ibid., p. 9.

is integral to long-term peace and security.³⁹ Resolution 1325 (2000) is commonly seen as comprising four pillars of engagement with issues concerning women in these contexts, namely, participation; prevention; protection; and relief and recovery, which includes peacebuilding and prosecution.

More recently, increasing international focus has centred on linking core principles of the Women, Peace and Security Agenda to countering terrorism and violent extremism, as a response to the developing understanding of the ways in which women and men are disparately affected by, and are involved in, terrorist activities.

In its resolution 2242 (2015), the Security Council recognized the differential impact on the human rights of women and girls of terrorism and violent extremism, including in the context of their health, education and participation in public life, and that they were often directly targeted by terrorist groups, and urged Member States and requested relevant United Nations entities to conduct and gather gender-sensitive research and data collection on the drivers of radicalization for women and the impacts of counter-terrorism strategies on women's rights. The resolution called for greater integration of the Women, Peace and Security Agenda into counter-terrorism measures, including by integrating women's participation, leadership and empowerment in developing strategies to counter terrorism and violent extremism.

Addressing conflict-related sexual and gender-based violence is a key component of the Women, Peace and Security Agenda, and investigating and prosecuting such offences committed by terrorist groups are examined in detail in chapter 5. In its resolution 1325 (2000), the Security Council called upon all parties to armed conflict to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse, and all other forms of violence in situations of armed conflict. A number of subsequent Council resolutions, including 1820 (2008), 1888 (2009), 1960 (2010) and 2106 (2013), have recognized sexual violence, when used as a strategy in conflict and committed systematically, as a fundamental threat to international peace and security that demands an effective State response.

In its resolutions 2331 (2016) and 2388 (2017), the Security Council recognized the connection between trafficking in persons, sexual violence, and armed conflict and terrorism, and also recognized that that connection could prolong and exacerbate conflict and instability or intensify its impact on civilian populations. In its resolutions 2253 (2015) and 2368 (2017), the Council further recognized the connection between trafficking in persons by ISIL, Al-Qaida, and associated individuals and groups, which may support such actors financially, and the perpetration of sexual violence by these actors.

The integral role of the criminal justice system in protecting women and girls from conflict-related sexual and gender-based violence has equally been emphasized. Pursuant to Security Council resolution 1325 (2000), special measures to protect women and girls from gender-based violence should guarantee the respect for human rights of women and girls, especially in the judicial system. In that resolution, the Council also urged States to prosecute crimes of sexual and other violence against women and girls and called on all actors involved to take into account the special needs of women and girls during rehabilitation, reintegration and post-conflict reconstruction. Similarly, the General Assembly, in resolution 65/228, underscored the implications of conflict-related sexual and gender-based violence for criminal justice responses to violence against women, recognizing the special needs of women and children in situations of armed conflict, and urging Member States to investigate, prosecute and punish all perpetrators, and to ensure that women have equal protection under the law and equal access to justice. Additionally, Council resolutions 1325 (2000), 1820 (2009) and 2106 (2013) stressed the need to exclude sexual violence crimes from amnesty provisions in the context of conflict resolution processes.

³⁹ See UN-Women, *UN-Women Sourcebook on Women, Peace and Security* (2012).

National action plans for the implementation of Security Council resolution 1325 (2000) should be developed by States in order to localize international commitments under the Women, Peace and Security resolutions.⁴⁰ Where relevant, national action plans should include means for integrating the Women, Peace and Security Agenda into national counter-terrorism measures. A number of States have introduced measures, through their national action plans, aimed at preventing and addressing conflict-related sexual and gender-based violence, with some having framed their plans in the context of ongoing security threats posed by, among others, terrorist groups. Regionally, the Economic Community of West African States (ECOWAS) and the African Union have introduced regional action plans aimed at encouraging Member States of those regional organizations to integrate strategic and operational measures to realize the Women, Peace and Security Agenda at the national level.⁴¹

› FOCUS: NATIONAL ACTION PLAN FOR NIGERIA FOR THE IMPLEMENTATION OF SECURITY COUNCIL RESOLUTION 1325 (2000)

In March 2017, the Federal Ministry of Women Affairs and Social Development of Nigeria published a national action plan for the implementation of Security Council resolution 1325 (2000) and related resolutions in Nigeria, which provided a national policy framework for the realization of Security Council resolution 1325 (2000) and Council resolutions related to the Women, Peace and Security Agenda. The national action plan revised the earlier plan of 2013, in accordance with the changing security context and emerging concerns related to terrorism, violent extremism and the developing humanitarian crisis.

It prescribed the roles of national bodies working with security, foreign policy, development and gender equality relevant to the needs of women before, during and after conflict according to the following five pillars:

1. *Prevention and disaster preparedness*: focused on the prevention of violations against women and girls, including sexual and gender-based violence, discriminatory practices, and exploitation during conflict and violence
2. *Participation and representation*: aimed at securing the full and equal participation of women at all levels of decision-making, including in relation to conflict prevention and peacebuilding
3. *Protection and prosecution*: focused on ensuring protection against and prosecution of violations of women and girls' rights during conflict
4. *Crisis management, early recovery and post-conflict reconstruction*: aimed at ensuring the specific relief and recovery needs of women and girls in crisis, recovery and post-conflict situations
5. *Partnerships coordination and management*: aimed at increasing capacity and resources to coordinate, implement, monitor and report on plans and programmes related to women, peace and security

Additionally, the national action plan provides for zonal action plans for six geopolitical zones in Nigeria in order to tailor policies to meet the specific needs of those regions.

2. Sustainable Development Goals

There is clear policy congruence between the integration of women's rights and gender dimensions into criminal justice responses to terrorism and the Sustainable Development Goals, which are grounded in gender equality and human rights, development, peace and the rule of law.⁴² Goals 5 and 16 are particularly relevant in the present context.

⁴⁰ Security Council, Presidential statements of 28 October 2004 (S/PRST/2004/40) and 27 October 2005 (S/PRST/2005/52).

⁴¹ See "ECOWAS plan of action for the implementation of United Nations Security Council resolutions 1325 and 1820" (2010), African Union, "Gender policy" (2009); and African Union Commission, *Implementation of the Women, Peace, and Security Agenda in Africa*, D. Bineta, J. B. Butera and S. Theophilus, eds. (Addis Ababa, 2016).

⁴² General Assembly resolution 70/1, preamble.

(i) Sustainable Development Goal 5

Sustainable Development Goal 5 (“Achieve gender equality and empower all women and girls”) is also a key goal of the gender mainstreaming approach adopted in the present publication (see table 2).

Table 2

| TARGET | | RELEVANCE OF GENDER-SENSITIVE CRIMINAL JUSTICE RESPONSES TO TERRORISM |
|--------|---|--|
| 5.1 | End all forms of discrimination against all women and girls everywhere | Eliminating discrimination against all women and girls requires addressing discrimination in justice systems (including the way in which those systems deal with women as victims, witnesses and perpetrators), in eliminating gender-discriminatory laws and in reducing discrimination in access to justice and remedies. |
| 5.2 | Eliminate all forms of violence against all women and girls in the public and private spheres, including trafficking and sexual and other types of exploitation | Recognizing victims of sexual violence and trafficking committed by terrorist groups as victims of terrorism, including for the purpose of obtaining redress and support, is a key criminal justice response to this form of violence. |
| 5.3 | Eliminate all harmful practices, such as child, early and forced marriage and female genital mutilation | Ensuring accountability for harmful practices perpetrated by terrorist groups, such as sexual enslavement, forced marriage and trafficking, is a key criminal justice measure aimed at eliminating these practices. |
| 5.5 | Ensure women’s full and effective participation and equal opportunities for leadership at all levels of decision-making in political, economic and public life | Full participation and representation of women in the criminal justice system, including in specialized counter-terrorism investigation and prosecution units, is an important aspect of realizing equal access to justice. Participation of women in conflict and post-conflict settings and peacebuilding initiatives also reflects a key principle of the Women, Peace and Security Agenda. |
| 5.c | Adopt and strengthen sound policies and enforceable legislation for the promotion of gender equality and the empowerment of all women and girls at all levels | Gender-sensitive criminal justice responses, including to terrorism, require legal frameworks and processes that are responsive to the experiences, realities and needs of women who interact with them as victims, witnesses and/or perpetrators. |

(ii) Sustainable Development Goal 16

Sustainable Development Goal 16 (“Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels”) contains principles that also inform robust and effective criminal justice responses to terrorism (see table 3).

Table 3

| TARGET | | RELEVANCE OF GENDER-SENSITIVE CRIMINAL JUSTICE RESPONSES TO TERRORISM |
|--------|---|---|
| 16.1 | Significantly reduce all forms of violence and related death rates everywhere | Fostering respect for women’s rights and integrating gender perspectives into criminal justice responses to terrorism, including accountability for sexual and gender-based violence, contributes to reducing violence. |
| 16.3 | Promote the rule of law at the national and international levels and ensure equal access to justice for all | Respect for women’s rights in the criminal justice responses to terrorism promotes the rule of law and contributes to equal access to justice for all, including victims of terrorism. |

| TARGET | | RELEVANCE OF GENDER-SENSITIVE CRIMINAL JUSTICE RESPONSES TO TERRORISM |
|--------|--|--|
| 16.a | Strengthen relevant national institutions, including through international cooperation, for building capacity at all levels, in particular in developing countries, to prevent violence and combat terrorism and crime | Building the capacity of criminal justice institutions to mainstream gender in their responses to terrorist crime is key in preventing violence and combating terrorism. It results in more effective approaches to the investigation and prosecution of such crimes, detention in these cases, and access to justice for victims. |
| 16.b | Promote and enforce non-discriminatory laws and policies for sustainable development | Mainstreaming gender contributes to criminal justice responses to terrorism that promote gender equality and non-discrimination and, in turn, contribute to sustainable development. |

D. The special policy and legal framework for the protection of the girl child

The increasing recruitment and use of boys and girls under the age of 18 for terrorism-related purposes requires a specialized response of the justice system that is grounded in international human rights law and the rule of law and that takes into account the specific international and regional legal and policy framework related to the protection of child rights.

The present publication does not provide a comprehensive examination of criminal justice responses to terrorism that are specific to children. Rather, the present section is aimed at canvassing, with a gender perspective, the main policy and legal principles relevant to this area.

› CROSS-REFERENCE

- For a more detailed discussion of gender dimensions of the treatment of children recruited and exploited by terrorist and violent extremist groups, please refer to the UNODC *Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups: the Role of the Justice System*.

1. The international policy framework for the protection of the girl child

The core policy documents referred to in chapter 1 overwhelmingly refer to both women and girls. Thus, the general principles established above also apply with respect to the girl child. In addition, there is a substantial international legal framework dealing specifically with children, including girls, who are in contact with the justice system, including as a result of involvement in armed conflict.

The first resolution adopted by the Security Council on the issue of children and armed conflict, resolution 1261 (1999), identified six grave violations during armed conflict affecting children's rights. Those violations included the killing and maiming of children, recruitment or use of children as soldiers, sexual violence against children, and abduction of children. In its resolution 1539 (2004), the Council requested the Secretary-General to devise a systematic and comprehensive monitoring and reporting system to provide timely information on children affected by armed conflict.

(i) Girls affected by the activities of terrorist groups

More recently, there has been a growing recognition of the specific ways in which children, and in particular girls, are affected by the activities of terrorist groups and the counter-terrorism response. Children are affected by terrorism in a number of ways, including as victims, perpetrators or sometimes both. Some have been forcibly recruited or abducted, while others have been led to join armed groups out of material necessity or as a result of familial association.

In Afghanistan, the Taliban has used children to act as informers, spies, human shields, foot soldiers, active combatants and even suicide bombers because they are readily available, cheap and useful, and can be manipulated and terrorized.⁴³ Boko Haram has used girls as suicide bombers, in part to avoid detection by security personnel, in support roles as cooks, messengers and lookouts, and as human shields to protect Boko Haram assets during military operations.⁴⁴ At other times, children are mobilized by State-allied militia and vigilante groups in support roles or as combatants.⁴⁵

In certain contexts, girls are targeted and subject to specific forms of violence as the result of the ideological opposition of certain extremist groups to the education of girls,⁴⁶ while in others, girls are subject to sexual and gender-based violence in order to terrorize, humiliate and weaken their communities.⁴⁷ Forms of sexual and gender-based violence, such as rape and forced marriage, commonly occur in the context of abductions of girls by terrorist groups.⁴⁸ The Secretary-General, in his 2017 report on children and armed conflict in Nigeria, reported that between January 2013 and December 2016, the United Nations verified 199 incidents of rape and other forms of sexual violence affecting 217 children committed by Boko Haram, and further discussed widespread allegations of rape, sexual violence and the sexual exploitation of displaced children by members of security forces throughout 2016.⁴⁹ A further consequence of sexual and gender-based violence is that children born to survivors of rape committed by terrorist groups may face a lifetime of marginalization and may themselves become victims of violence.⁵⁰

(ii) Trafficking in persons affecting girls

Situations of armed conflict and humanitarian crisis present a particular concern for the protection of girls from trafficking, including as the result of displacement.⁵¹ The Secretary-General observed in his 2017 report on conflict-related sexual violence that in the context of mass migration, women and children affected by conflict, displacement or violent extremism are particularly at risk of falling prey to traffickers owing to the collapse of protective political, legal, economic and social systems.⁵²

2. The international legal framework, criminal justice responses to terrorism, and protection of the girl child⁵³

While children enjoy the same human rights afforded to all persons under the international human rights instruments referenced above, including the Convention on the Elimination of All Forms of

⁴³S/AC.51/2016/1, annex.

⁴⁴A/HRC/34/44 (2016), para. 13, and S/2017/304, para. 32.

⁴⁵A/70/836-S/2016/360, paras. 13–14.

⁴⁶S/2015/203, para. 6.

⁴⁷A/HRC/34/44, para. 10.

⁴⁸See, for example, A/72/361-S/2017/821, paras. 138 and 179.

⁴⁹S/2017/304, paras. 54 and 58.

⁵⁰S/2017/249, para. 10.

⁵¹A/72/164, paras. 17–45.

⁵²S/2017/249, para. 8.

⁵³This section deals briefly with applicable international and regional human rights law. The international humanitarian and criminal law regimes discussed in chapter 5 may also be applicable.

Discrimination against Women and the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child provides the overarching international legal principles specifically relevant to children's rights. The rights contained in the Convention are based upon four guiding principles: non-discrimination (art. 2), the best interests of the child (art. 3), the right to life, survival and development (art. 6), and respect for the views of the child (art. 12). Other protections contained in the instrument that are particularly relevant in the context of the present publication include:

- Protection against all forms of physical and mental violence (art. 19)
- Protection against all forms of sexual exploitation and sexual abuse (art. 34)
- Protection against all other forms of exploitation prejudicial to any aspects of the child's welfare (art. 36)
- Right not to be detained unlawfully or arbitrarily, and the requirement to limit any deprivation of liberty of a child to a last resort and for the shortest period of time (art. 37)
- Provision of recovery and reintegration measures for child victims of neglect, exploitation, abuse, torture or other forms of cruel, inhuman or degrading treatment or punishment, or armed conflicts (art. 39)
- Article 40 further establishes an extensive set of principles pertaining to juvenile justice, based on the best interests of the child, participation, and the interest of promoting reintegration. The Convention requires the establishment of laws, procedures, authorities and institutions specifically applicable to child alleged offenders, and stresses the need to promote non-judicial measures, as well as alternatives to deprivation of liberty

As observed by the Committee on the Elimination of Discrimination against Women, special consideration must be given to the effects that discriminatory laws, procedures and practices in accessing justice have on girls in particular, given that the barriers women face are often magnified for girl children owing to a lack of social or legal standing.⁵⁴

The protection of children associated with armed groups is addressed in a number of instruments and guidelines.

- International humanitarian law provides broad protection for children in the event of armed conflict, principally through the Fourth Geneva Convention and Additional Protocols I and II.
- The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict prohibits the recruitment of persons below 18 by non-State armed groups and the compulsory recruitment of such persons by State armed forces. It establishes principles on the participation and protection of children involved in and affected by armed conflict.
- The Principles and Guidelines on Children Associated with Armed Forces or Armed Groups supplement these instruments, and provide specific guidance on the prevention, release, reintegration and protection of girls. There are a number of key considerations established by the Principles, notably:
 - The definition of a “child associated with an armed force or armed group” refers not only to those directly partaking in hostilities, but also those fulfilling support functions, and those being used for sexual purposes.

⁵⁴ CEDAW/C/GC/33, para. 24.

- The Principles call for proactive measures targeting the reintegration and provision of assistance to girls (principle 3.2), while principles 8.6–8.11 deal specifically with the treatment of children within justice mechanisms. Principle 8.7, for example, provides that children who have been associated with armed groups should not be prosecuted or punished, or threatened with such action, solely on the grounds of their association with the armed group.
- Children accused of crimes under international law committed while they were associated with armed groups should be considered primarily as victims and not as perpetrators.

Children's rights relevant to the present publication are further enshrined in a number of regional instruments, in addition to those discussed in section C of the present chapter. These instruments include the African Charter on the Rights and Welfare of the Child, which enshrines, *inter alia*, protection against discrimination, sexual exploitation, trafficking and abduction, child abuse and torture, and use in armed conflicts. The protections contained in the Maputo Protocol, discussed above, also extend to girls.

(i) Child victims of trafficking

The Convention on the Rights of the Child (art. 35), and its Optional Protocol on the sale of children, child prostitution and child pornography (2000) prohibits the sale or trafficking of children for any purpose or in any form.

In addition, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, applies equally to children, including girls. The purpose of the Protocol, as reflected in its article 2, is to prevent and combat trafficking in persons; to protect and assist such victims; and to promote cooperation among State Parties to achieve those aims. Pursuant to article 3, paragraph (c), of the Protocol, trafficking in children is to be considered as such even when it does not entail the threat or use of force or any other form of coercion. Protection measures and access to justice for child victims of trafficking are further addressed in the Guidelines on the Protection of Child Victims of Trafficking, developed by the United Nations Children's Fund, and the Recommended Principles and Guidelines on Human Rights and Human Trafficking,⁵⁵ in particular guideline 8 on child victims.

(ii) Criminal justice responses in the counter-terrorism context

Two aspects are key to ensuring the appropriate treatment of the girl child accused of terrorism-related offences. First, States have the responsibility to fulfil their obligations to both criminalize acts of terrorism and hold the perpetrators accountable, and to uphold children's rights and respect the principles of juvenile justice. Second, as has been the case in the past for child soldiers, the focus of media attention and government action tends to be on boys, who are more often represented as assuming active roles. Owing either to their smaller numbers or to the fact that they are perceived to play mere support roles, girls are more easily forgotten in the design and implementation of public policies, and are subsequently treated as women. While they have specific needs related to their gender, it is important to fully recognize the status of girls as children, and accordingly fulfil their specific rights.

There is a clear need for States to strengthen the protection of children associated with terrorist groups who are in contact with the criminal justice system, in line with the principles contained in the Convention on the Rights of the Child that relate to the best interests of the child and effective reintegration. In its resolution 70/291, entitled "The United Nations Global Counter-Terrorism Strategy Review", the General Assembly strongly condemned the systematic recruitment of children by

⁵⁵E/2002/68/Add.1.

terrorist groups; reiterated that Member States should consider the potential status of children as victims of terrorism as well as of other violations of international law, including in cases in which they were accused of terrorism-related offences; and noted that the treatment of children needed to be in line with relevant international law, including the Convention on the Rights of the Child.⁵⁶ As noted in the report of the Secretary-General on children and armed conflict, in Member States' response to violent extremism, children are often systematically treated as security threats rather than as victims, and are administratively detained or prosecuted for their alleged association.⁵⁷ These practices raise a number of serious concerns with regard to international norms for the protection of children in the juvenile justice system:

The type of court or judicial body. Military or special courts dealing with terrorism cases often fail to fully observe fair trial standards enshrined in the international instruments, particularly regarding access to legal assistance, and are ill-equipped to apply juvenile justice principles. Children may require additional support compared to adult suspects in order to understand the charges against them, and should be afforded special considerations in the court system, in line with international standards, commensurate with their status as minors.

The use of detention. In accordance with the Convention on the Rights of the Child, detention should only be used as a measure of last resort and for the shortest appropriate period of time, given that deprivation of liberty has long-term impacts on the child's physical and psychological development, and impedes education. Rather, emphasis should be placed on rehabilitation and reintegration programmes, which not only benefits the child, but also has wider benefits for addressing community grievances.

The use of screening procedures. Where screening procedures are used to assess children, they should be carried out by civilian actors with experience in child protection, in accordance with the principles established in the Convention on the Rights of the Child of detention as a last resort and for the shortest possible time.

Conditions of detention. Where detained, adults have often been held together with children, and boys together with girls, particularly exposing girls to an increased risk of sexual and gender-based violence, exploitation and associated health risks. The special needs of girls in detention must be borne in mind. Unless otherwise provided by specific international law provisions, children should be separated from the adult population, and likewise, girls should be kept in separate facilities.

› FOCUS: NEUCHÂTEL MEMORANDUM ON GOOD PRACTICES FOR JUVENILE JUSTICE IN A COUNTERTERRORISM CONTEXT

The Neuchâtel Memorandum on Good Practices for Juvenile Justice in a Counterterrorism Context, published in 2016 in the framework of the Global Counterterrorism Forum, provides guidance for state responses to the increasing involvement of children in terrorism, through selected good practices in line with international human rights standards. It addresses different aspects of criminal justice responses to terrorism, including prevention, investigation, prosecution, sentencing and reintegration.

⁵⁶ General Assembly resolution 70/291, para. 18.

⁵⁷ A/70/836-S/2016/360, para. 16.

FURTHER READING

- UNODC *Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups: The Role of the Criminal Justice System*.
- For international standards on the administration of juvenile justice generally, see the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules). The Beijing Rules deal with issues such as due process guarantees and alternatives to judicial proceedings, a number of which have been incorporated into the Convention on the Rights of the Child.
- For further reference on adequate prevention and responses to violence against children who are in contact with the justice system, see the United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice. The Model Strategies take into account the particular vulnerabilities of children when involved in the justice process, whether as victims or alleged offenders, and promote practical approaches to minimizing incidents of violence.
- For further reading on criminal justice systems and children following armed conflict, see *Working Paper No. 3: Children and Justice During and in the Aftermath of Armed Conflict*, produced by the Office of the Special Representative of the Secretary-General for Children and Armed Conflict.

SUMMARY OF KEY POINTS

- States have a positive obligation to protect those under their jurisdiction against abuses by non-State actors, including terrorist groups.
- States parties to international human rights treaties are also required to prevent, investigate and punish human rights violations by both State and non-State actors, including on the basis of non-discrimination.
- Gender-based violence against women is a form of discrimination against women, and is a violation of women's human rights. Each State party to the Convention on the Elimination of All Forms of Discrimination against Women is responsible not only for acts of its entities constituting gender-based violence against women, but also has an obligation of due diligence to prevent gender-based violence committed by non-State actors.
- The equal rights of women to access to justice and remedies for violations of their rights are well-established in international and regional human rights law.
- Gender mainstreaming is a key strategy for promoting gender equality and women's rights, and eliminating sex- and gender-based discrimination. Applying a gender-mainstreaming approach to activities related to countering terrorism and preventing violent extremism recognizes that women and girls are involved in and affected by terrorism and violent extremism in a spectrum of ways that is highly gendered, and which can differ substantially to the experience of men and boys. Likewise, gender should be mainstreamed into criminal justice responses to terrorism, considering the ways in which laws, policies and practices, and as well as terrorist crimes, have a differentiated impact on women and men.
- In countries affected by terrorism and armed conflict, integrating a gender-mainstreaming approach and women's rights into criminal justice responses to terrorism is a key measure to advance the Women, Peace and Security Agenda. It is also important to promote achievement of the Sustainable Development Goals, in particular, Goals 5 and 16.
- A special policy and legal framework exists for protection of children, girls and boys, affected by or associated with terrorist groups.

bottom: Wreckage of an Al-Shabaab suicide car bomb attack in Mogadishu, Somalia. © UN Photo/Stuart Price

centre: © unsplash.com/kaitlyn-baker



GENDER DIMENSIONS OF TERRORISM OFFENCES

Provisions of criminal law under which terrorism-related conduct is punishable are usually formulated in gender-neutral terms. Many types of conduct are criminalized under such provisions, such as killing, hostage-taking and the financing of acts of terrorism, without distinguishing between the gender of the alleged perpetrators or the different impacts that such criminalization has on women and men. The present chapter explores the impacts of these provisions and potential criminal justice responses by employing the gender mainstreaming approach introduced in chapter 1.

The topics addressed in the present chapter are as follows:

- Section A contains a brief overview of women's and men's roles in terrorist groups and the degrees of agency and voluntariness with which women fulfil those roles. On the one hand, it is important to avoid stereotypes, such as those based on the assumption that women only fulfil auxiliary roles in terrorist groups or are associated with such groups solely as the result of coercion. On the other hand, it must be recognized that women's roles in terrorist groups and in the commission of terrorist acts often differ from those of men, and those differences are in many cases dictated by gender roles, norms and stereotypes of the group or of the society the group exploits. Developing a nuanced understanding of those differences is essential for the development of criminal justice responses to terrorism that are effective and comply with human rights.
- In order to promote such a nuanced understanding, section B includes an examination of ways in which the criminalization of both activities that support terrorist groups, as well as the planning and preparation of terrorist acts without direct participation in violent action, may affect women and men in different ways. Issues examined include offences related to the foreign terrorist fighter phenomenon, and the mental requirement – that is, the element of intention (*mens rea*) – of terrorism support offences, including financing of terrorism. Section B also contains a discussion of offences related to the sheltering of terrorism suspects and the gendered impacts of penalties incurred as a result of providing support for the commission of terrorist offences.

- Section C includes an examination of potential criminal justice responses to situations in which an individual who has been involuntarily associated with a terrorist group is alleged to have committed a terrorism-related offence. This is an important consideration in the light of the different forms of coercion, which disproportionately affect women.
- Section D contains a brief discussion of the other gendered impacts of measures designed to suppress the financing and support of terrorism.

A. Roles of women in terrorist groups

In the 2016 global survey on the implementation of resolution 1373 (2001), the Counter-Terrorism Committee Executive Directorate noted that the participation of women in acts of political violence and terrorism was not a new phenomenon. However, a noticeable escalation in the activities of prominent female members of terrorist groups and the number of female foreign terrorist fighters necessitated further exploration of the topic.⁵⁸

› EXAMPLE: STATISTICS ON WOMEN ARRESTED FOR TERRORISM OFFENCES IN THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND EUROPE

Between 2001/02 and 2016/17, men accounted for 91 per cent and women for 9 per cent of those arrested in the United Kingdom for terrorism-related offences.^a However, in the year ending 30 September 2017, 15 per cent of those arrested for terrorism-related offences were women. This is the largest proportion of women arrested for such offences on record in the United Kingdom, and continues the trend in which an increasing proportion of women have been arrested in recent years.^b

In the wider European context, the overall number of women arrested for terrorism-related offences almost doubled from 2014 to 2015, with 96 women arrested in 2014 compared with 171 in 2015. In comparison, the number of men arrested during the same period increased by roughly one third, from 678 in 2014 to 906 in 2015. An even sharper increase was noted in the number of women arrested for offences related to jihadist terrorism, from 6 in 2013 to 52 in 2014 and 128 in 2015.^c The proportion of women arrested for offences related to jihadist terrorism also increased from 18 per cent of all those arrested for such offences in 2015 to 26 per cent in 2016.^d These statistical trends may be due to both an increased number of women participating in terrorism-related activities and the increased awareness of law enforcement and criminal justice actors with respect to the role of women in terrorism.

^aUnited Kingdom of Great Britain and Northern Ireland, House of Commons Library, "Terrorism in Great Britain: the statistics", briefing paper No. CPB7613, 7 June 2018, p. 14.

^bUnited Kingdom, Home Office, *Operation of police powers under the Terrorism Act 2000 and subsequent legislation: Arrests, outcomes, and stop and search*, Great Britain, quarterly update to September 2017, Statistical Bulletin 24/17 (London, 2017), p. 13.

^cEuropean Law Enforcement Agency (Europol), *European Union Terrorism Situation and Trend Report 2016* (The Hague, 2016), pp. 10–11.

^dEuropol, *European Union Terrorism Situation and Trend Report 2017* (The Hague, 2017), p. 22.

An important preliminary consideration concerns voluntary and forced association with terrorist groups. Some individuals – including both women and men – become associated with terrorist groups of their own volition and contribute to the activities of those groups of their own accord. However, others become associated with terrorist groups as the result of coercion. Terrorist groups recruit women, men, girls and boys against their will in a variety of ways, including by abducting them; making threats

⁵⁸S/2016/49, annex, para. 33.

against them, their families or communities; or relying on spouses or other family members to coerce them. There is strong evidence, however, to suggest that, in some contexts, the rate of involuntary recruitment is much higher for women than for men. Such a contrast may be a manifestation of broader gender inequalities, including the existence of unequal power relations between women and men.

› **EXAMPLE: 2017 REPORT OF THE UNITED NATIONS DEVELOPMENT PROGRAMME – JOURNEY TO EXTREMISM IN AFRICA: DRIVERS, INCENTIVES AND THE TIPPING POINT FOR RECRUITMENT**

The report highlights the disproportionately high percentage of women who are coerced into joining terrorist or extremist organizations, including Boko Haram, Al-Shabaab and Islamic State in Iraq and the Levant (ISIL, also known as Da'esh). Participants were surveyed in Cameroon, Kenya, the Niger, Nigeria, Somalia and the Sudan, and responded as follows:

- 495 respondents indicated that they had voluntarily joined a violent extremist group, with women accounting for 12 per cent of those respondents.
- 78 respondents indicated that they had been recruited by force by a violent extremist group, with women accounting for 53 per cent of those respondents.

Women recruited by force are at risk of being subjected to sexual and gender-based violence and forms of exploitation, such as forced and early marriage, sexual slavery, rape or forced domestic labour, which clearly make them victims of crime. They may, however, also be forced to carry out duties such as carrying ammunition or participating in military operations, thereby becoming alleged terrorist offenders. Moreover, both women and men initially recruited against their will may subsequently be willing to commit acts of terrorism.

As reflected in some of the examples below, the distinction between voluntary and coerced recruitment for involvement in a terrorist group is not always clear. Economic dependency, traditional gender roles and the pressure of community expectations in many cases create a situation in which a woman's association with a terrorist group can neither be said to be entirely against her will, nor fully voluntary. In the context of women's participation in terrorist activities, the Center on Global Counterterrorism Cooperation notes that in many instances, women can be more vulnerable than men to being drugged, raped, physically coerced, and emotionally and socially blackmailed, especially in traditionally patriarchal societies where they have little recourse to alternative mechanisms of empowerment or independence.⁵⁹

1. Leadership and combat roles

The terrorist entities contained in the list established and maintained pursuant to Security Council resolutions 1267 (1999), 1989 (2011) and 2253 (2015) are dominated by men, who both hold the ideological and military leadership positions and, where these groups are engaged in armed conflicts, constitute a vast majority of the combatants. Women have, however, played active roles in numerous terrorist groups, acting as founders and leaders, and continue to occupy operational positions as combatants in some groups.

⁵⁹Naureen Chowdhury Fink, Rafia Barakat and Liat Shetret, "The roles of women in terrorism, conflict, and violent extremism: lessons for the United Nations and international actors", Policy Brief (Goshen, Indiana, Center on Global Counterterrorism Cooperation, 2013), p. 3.

› FOCUS: WOMEN IN LEADERSHIP ROLES IN TERRORIST GROUPS

Women have previously fulfilled leadership functions in a number of terrorist groups:

- From around 1968 to her death in 1976, Ulrike Meinhof was the ideological leader of the Red Army Faction, a terrorist group active in Germany.
- A number of women have assumed leadership positions in the Euskadi Ta Askatasuna (ETA) (Basque Homeland and Liberty). A woman, Iratxe Sorzabal Diaz, was also appointed its leader in 2009.
- The Japanese Red Army was formed and led by a woman, Fusakao Shigenobu.

In a recent study, it was stated that the Liberation Tigers of Tamil Elam (LTTE), which fought the Government of Sri Lanka and carried out numerous terrorist attacks from the 1980s to 2009, had a significant influence on the development of modern terrorism and the role of women within it. The success that LTTE had in assassinating significant military and political figures using female suicide bombers clearly influenced the thinking of many groups around the world. In addition to identifying as its main objective the right of self-determination for the Tamil people, LTTE, in its 1991 manifesto, also included among its primary objectives the dismantling of the caste and dowry system, equality for women and the protection of women against rape and sexual harassment.⁶⁰ In order to avoid offending the cultural values of Tamil society at large, the integration of women into the core of LTTE proceeded slowly. The women within LTTE were organized into their own special section and lived in separate camps.⁶¹ Women were invited to take part in tactical operations long after the group had begun its military operations, in order to supplement a lack of manpower. By some estimates, women were incorporated as combat troops over a decade after the group began operations. However, LTTE incorporated women faster than many other groups did, and in more thorough roles. That may have been as a result of the fact that LTTE was primarily an ethno-nationalist organization. While the group did exist within the patriarchal confines of the society of Sri Lanka, without religiously motivated patriarchy, limitations on women were likely more easily overcome.⁶²

Reports on contemporary terrorist groups demonstrate that their ideology substantially influences the extent to which women have leadership roles. Ideological and tactical considerations influence the extent to which women are involved in committing violent acts. In ISIL, deviation from domestic roles is permitted only in extreme cases, such as when under attack or when an imam issues a fatwa, or where there is a shortage of men fulfilling combat functions.⁶³ There have been reports of women receiving combat training. In fact, unmarried women or widows have been assigned more active, low-level professional functions designed to support the caliphate, such as becoming a member of the all-female Al-Khansaa security brigade.⁶⁴ Reports indicate that this brigade consists of single women between the ages of 18 and 25, who are provided with weapons training; enforce strict sharia laws applicable to women, including by committing acts of severe violence against other women; enforce dress codes; conduct stop and search activities of women; gather intelligence; and recruit female members.⁶⁵

In its manifesto, the Al-Khansaa brigade explained the ideological foundations for the roles assigned to men and women in ISIL. The brigade argued that the blurring of women's and men's roles in contemporary westernized societies and the rise in the number of emasculated men were to blame for many of the ills

⁶⁰Jessica Davis, *Women in Modern Terrorism: From Liberation Wars to Global Jihad and the Islamic State* (London, Rowman and Littlefield Publishing Group, 2017), p. 72.

⁶¹*Ibid.*, p. 77.

⁶²*Ibid.*, p. 78.

⁶³United States Institute for Peace, "Afghan women and violent extremism: colluding, perpetrating, or preventing?", Special Report No. 396, 30 November 2016, p. 4; and Amanda N. Spencer, "The hidden face of terrorism: an analysis of the women in Islamic State", *Journal of Strategic Security*, vol. 9, No. 3 (2016), p. 83.

⁶⁴Spencer, "The hidden face of terrorism", p. 83.

⁶⁵*Ibid.*, pp. 83–84; and Joana Cook and Gina Vale, *From Daesh to "Diaspora": Tracing the Women and Minors of Islamic State* (London, International Centre for the Study of Radicalization, 2018), p. 28.

afflicting the community of Muslims (*ummah*). It proposed a model of society in which men would again be “real men”, while adding that it would always be preferable for a woman to remain hidden and veiled, and to maintain society from behind that veil. Women’s participation in defensive jihad could be permissible in limited circumstances and when sanctioned by imams.⁶⁶ A recent study noted, however, that Islamic State had also shifted their position on the status of women in combat roles between 2014 and 2018, allowing women to take on increasingly more active roles, including stating that it was obligatory for women to take up arms.⁶⁷ With regard to Boko Haram, scholars have argued that ideological differences between various factions influenced the extent to which they relied on women for operational roles.⁶⁸

According to the 2017 Europol report on terrorism trends in the European Union, women and young adults, as well as children, are playing increasingly operational roles in committing terrorist activities in the European Union. In addition, those individuals are not only facilitating other operatives, but also acting independently in the attempted execution of terrorist attacks.⁶⁹ Several attacks in Europe have been planned by women. Three women were arrested in France in 2016 for plotting attacks in Paris, which was the first recorded arrest of a terrorist cell consisting solely of women. In October 2016, authorities in Morocco dismantled another such cell, which consisted of 10 women who were planning a series of attacks.⁷⁰

2. Female suicide bombers

The use of female suicide bombers has been a marked strategy of some terrorist groups since the late 1970s. In more recent years, the incidence of women committing suicide attacks has increased, and suicide attacks are becoming increasingly prevalent within some groups.⁷¹ Female suicide bombers are used by terrorist groups for many reasons, including:

- The use of women provides strategic and tactical advantages. Traditionally, women have been better able to evade the suspicion of and searches by security forces owing to gendered assumptions that women are less likely to engage in violent functions. Such assumptions enable terrorist groups to exploit gender stereotypes and expectations related to women’s nature – which is alleged to be inherently non-violent and passive – certain forms of dress, or apparent pregnancy, to avoid invasive searches by security forces.⁷²
- Using female suicide bombers enables terrorist groups to expand their recruitment base.
- Attacks by female suicide bombers garner media attention owing to their doubly “transgressive” nature. In addition to the transgression of sacrificial violence there is the gender-specific transgression, namely, the fact that women, who are usually seen as victims or peacemakers in times of war, can assume the role of perpetrators of political violence.⁷³ Attacks by female suicide bombers in Israel, Nigeria and the State of Palestine, as well as in Chechnya, have been the topic of high-profile media attention.

⁶⁶ Charlie Winter, “Women of the Islamic State: a manifesto on women by the Al-Khanssaa brigade”, Quilliam Foundation, February 2015. Available at <https://therinifoundation.files.wordpress.com/2015/01/women-of-the-islamic-state3.pdf>.

⁶⁷ Cook and Vale, *From Daesh to “Diaspora”*, p. 28.

⁶⁸ Rachel Bryson and Audu Bulama Bukarti, “Boko Haram’s split on women in combat”, Tony Blair Institute for Global Change, 17 September 2018. Available at <https://institute.global/insight/co-existence/boko-harams-split-women-combat>.

⁶⁹ *European Union Terrorism Situation and Trend Report 2017*, p. 7.

⁷⁰ Tanya Mehra, “Foreign terrorist fighters: trends, dynamics and policy responses” (The Hague, International Centre for Counter-Terrorism, 2016), pp. 11–12.

⁷¹ Jessica Davis, “Evolution of the global Jihad: female suicide bombers in Iraq”, *Studies in Conflict and Terrorism*, vol. 36, No. 4 (2013), p. 280; according to some academics, female suicide attacks accounted for approximately 15 per cent of all suicide attacks between 1985 and 2006.

⁷² Mia Bloom, “Bombshells: women and terror”, *Gender Issues*, vol. 28, Nos. 1–2 (2011), p. 3.

⁷³ Pénélope Larzillière, “On suicide bombings: questioning rationalist models and logics of gender”, *International Review of Sociology*, vol. 27, No. 1 (2017), p. 114.

The spectrum of women's involvement in such attacks, ranging from voluntary to coerced, also varies greatly between groups. As noted above, LTTE played a pioneering role in using female recruits to commit suicide bombings, including for high-profile assassinations.⁷⁴ Women have been particularly active in suicide terrorism in the Chechen conflict, with some studies suggesting that women were involved in 81 per cent of all suicide attacks between 2000 and 2005,⁷⁵ resulting largely from voluntary recruitment, although cases of coercion or deception by spouses and family members have been noted.⁷⁶

Terrorist groups active in Iraq have also used female suicide bombers, with 28 total attempted and achieved attacks between 2003 (when the first attack in Iraq by a woman was recorded) and 2008.⁷⁷ Reports further indicate that the majority of female suicide bombers in Iraq are relatives of male members of terrorist groups who were recruited by leveraging family loyalties to these groups.⁷⁸ According to one author, the majority of Iraqi female suicide bombers have been coerced, intimidated and often brainwashed into carrying out suicide operations. The terrorist groups target underage women who are living on the streets and have no men to protect them. At other times, the women are simply tricked. They are told that the packages they are transporting contain contraband, but their minders detonate the improvised explosive devices using remote controls without the women ever knowing they have volunteered for a mission.⁷⁹

Boko Haram has increasingly used female suicide bombers since 2011. Of the 434 suicide bombers deployed by the group between April 2011 and June 2017, 244 were positively identified as female.⁸⁰ The use of girls in suicide attacks also increased over the same period. Girls accounted for 75 per cent of all child suicide bombers between January 2014 and February 2016.⁸¹ A total of 55 girls were used in suicide attacks between January and August 2017 alone.⁸² The level of voluntariness with which these attacks are carried out also varies, with reports indicating that children were coerced into carrying out suicide bombings.⁸³ According to a report by the International Crisis Group, the youngest female bomb-carriers are often victims themselves, with little awareness, duped by relatives and possibly drugged. However, the older bombers appear to have been volunteers who were moved by commitment to jihad. Those individuals have apparently been indoctrinated over a long period, including with the promise of direct admission to *al-jannah* (paradise).⁸⁴

Al-Shabaab has mobilized women as suicide bombers, with three suicide attacks between 2007 and 2017 being carried out by women.⁸⁵

3. Women as recruiters

Women are prominent in mobilizing support and recruiting for terrorist groups. According to a 2015 report on the implementation of Security Council resolution 2178 (2014), a worrying development is the increase in female recruiters, who radicalize and recruit young women and girls to play more

⁷⁴Davis, *Women in Modern Terrorism*, p. 78.

⁷⁵Anne Speckhard and Khapta Ahkmedova, "The making of a martyr: Chechen suicide terrorism", *Studies in Conflict and Terrorism*, vol. 29, No. 5 (2006), p. 468.

⁷⁶Ibid., pp. 471–472.

⁷⁷Anne Speckhard, "Female suicide bombers in Iraq", *Democracy and Security*, vol. 5, No. 1 (2009), p. 26.

⁷⁸Mia Bloom, *Oxford Research Encyclopaedia of Politics*, "Women and terrorism", January 2017, p. 11.

⁷⁹Ibid., p. 12.

⁸⁰*Economist*, "Why Boko Haram uses female suicide-bombers", 23 October 2017.

⁸¹UNICEF, "Beyond Chibok: over 1.3 million children uprooted by Boko Haram violence" (April 2016).

⁸²UNICEF, "Use of children as 'human bombs' in north-east Nigeria", press release of 22 August 2017.

⁸³S/PRST/2015/4.

⁸⁴International Crisis Group, "Nigeria: women and the Boko Haram insurgency", Africa Report No. 242 (Brussels, 2016), p. 10.

⁸⁵Davis, *Women in Modern Terrorism*, p. 114.

active roles as producers, disseminators and supporters of violent messages and images on social media or as active supporters (such as fighters, recruiters, fundraisers, logisticians, messengers or spies) of Boko Haram and ISIL.⁸⁶

Mobilizing women to take part in recruitment roles fulfils a number of gender-related purposes. Female recruiters may be used to specifically encourage other women to join terrorist groups. Alternatively, by subverting gender roles, the use of women in recruitment may incentivize male recruitment, or mobilize male support through shaming men. The inclusion of women in its propaganda and recruitment measures has been a key component of the ISIL strategy, reflecting its recognition of the role of women in its long-term State-building goals.

A study on women's role in violent extremism in Kenya concludes with the assertion that women play a major role as recruiters for Al-Shabaab, but makes the following critical observations with regard to the way the role of women is viewed:

Respondents viewed women who played a role as recruiters through the lens of two age-old female stereotypes: mother and temptress. Those who used their influence in the home – as the familial “custodians of cultural, social and religious values” – were seen in their domestic role as mothers and wives; those who recruited in a context external to the home, such as in the refugee camps, were seen as temptresses “luring” young men with false promises.⁸⁷

In addition to women's active role as recruiters, the promise of wives and/or sex slaves has been instrumental to the recruitment of men by some terrorist groups (see chap. 5, sect. A.2).

4. Women in support roles

Women support terrorist groups in a number of capacities. In Nigeria, women have been sought out by Boko Haram to fulfil logistical tasks, such as smuggling munitions, arms and food, and acting as messengers and spies for the organization, because they are perceived to be less conspicuous than male militants.⁸⁸ Women also provide domestic labour for the male members of Boko Haram, such as by cooking, cleaning and performing general household duties. In Algeria, women in Al-Qaida in the Islamic Maghreb are responsible for providing support materials, including clothes, food and medicine.⁸⁹

The above-mentioned study on the role of women in violent extremism in Kenya concludes that women are far more actively involved in violent extremism in non-combative or indirect roles, and that they provide the invisible infrastructure for Al-Shabaab by enabling, supporting and facilitating violent extremism through a number of roles and activities.⁹⁰

Beyond its two female-only brigades, ISIL typically limits women's participation to the “honoured roles” as the wives and mothers of combatants,⁹¹ pursuant to the organization's al-Khansaa manifesto and its reading of Islamic law. Accordingly, marriage is promised to and expected of female recruits, and this is a key strategy in producing the next generation of ISIL combatants and entrenching its ideology.⁹²

⁸⁶ S/2015/975, para. 24; see also Edwin Bakker and Seran de Leede, “European female jihadists in Syria: exploring an under-researched topic”, background note for the International Centre for Counter-Terrorism, April 2015; and Marije Meines and others, *RAN Manual: Responses to Returnees–Foreign Terrorist Fighters and Their Families*, Nicola Davenport, ed., European Commission Radicalisation Awareness Network Issue and Policy Papers (July 2017), p. 21.

⁸⁷ Irene Ndung'u, Uyo Salifu and Romi Sigsworth, *Violent Extremism in Kenya: Why Women Are a Priority*, Monograph No. 197 (n.p., Institute for Security Studies, 2017), pp. 30–31.

⁸⁸ “Nigeria: women and the Boko Haram insurgency”, p. 10.

⁸⁹ Bloom, “Women and terrorism”, p. 9.

⁹⁰ Ndung'u, Salifu and Sigsworth, *Violent Extremism in Kenya*, p. 31.

⁹¹ “Afghan women and violent extremism”, p. 4.

⁹² Dallin Van Leuven, Dyan Mazurana and Rachel Gordon, “Analysing the recruitment and use of foreign men and women in ISIL through a gender perspective” in *Foreign Terrorist Fighters under International Law and Beyond*, Andrea de Guttery, Francesca Capone and Christophe Paulussen, eds. (The Hague, T.M.C Asser Press, 2016), pp. 111–113.

In their central roles as wives and mothers, women in ISIL primarily undertake domestic work and are expected to provide support and sustenance and to fill in positions men have vacated to take part in combat.⁹³ The ISIL manifesto does conditionally authorize women's employment outside of domestic duties in the home, including as doctors and teachers, to fulfil administrative and law enforcement roles and to work in hospitals and orphanages.⁹⁴

According to a 2016 report on women and violent extremism in Afghanistan, women often support the activities of terrorist groups as a result of the involvement of male relatives or spouses in such groups. The report also suggests that a lack of confidence, religious knowledge and social and family pressure or expectations may impede the ability of women to question the involvement of male family members with terrorist groups. The report further notes that the choice to support terrorist groups is generally less well informed for women than it is for men, reducing their agency in the participation of those acts. This includes, for example, male relatives arranging for women to transport arms without providing them with adequate knowledge about what they are doing.⁹⁵

5. The foreign terrorist fighter phenomenon

In Security Council resolution 2178 (2014), "foreign terrorist fighters" are defined as individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict. In its resolution 2396 (2017), the Council emphasizes that women and children associated with foreign terrorist fighters may have served in many different roles, including as supporters, facilitators or perpetrators of terrorist acts, but that they may also be victims of terrorism.

The majority of people who travelled to Iraq and the Syrian Arab Republic to join ISIL, the Al-Nusra Front and other terrorist groups were men. Women, however, did represent a sizeable proportion of total travellers. According to a United Nations report from 2016, a study of 77 Member States most affected by the foreign terrorist fighter phenomenon indicated that women constituted between 20 and 30 per cent of them.⁹⁶ In addition, an academic report compiling figures from over 80 countries found that among the adults who travelled to Iraq and the Syrian Arab Republic to join ISIL, the proportion of women varied significantly from one region of origin to another. Approximately half of the adults who travelled from China were women, while in the case of countries in the Middle East and North Africa, fewer than one in ten people who travelled to join ISIL were women, according to the data provided by Governments.⁹⁷

There are some observable trends regarding the foreign terrorist fighter phenomenon that mirror the more general points described above in relation to women's roles in terrorist groups.

Firstly, some women travel as a result of the involvement of their male relatives or spouses in such groups. It has been reported that many women from Western Europe who travel to Iraq and the Syrian Arab Republic marry upon arrival or just before departure.⁹⁸ In the case of Kosovo,⁹⁹ researchers report that none of the women who travelled to Iraq and the Syrian Arab Republic did so on her own; all of

⁹³"Afghan women and violent extremism", p. 4.

⁹⁴Spencer, "The hidden face of terrorism", pp. 86–87.

⁹⁵"Afghan women and violent extremism", pp. 10–11.

⁹⁶Security Council, Counter-Terrorism Committee Executive Directorate, *Implementation of Security Council resolution 2178 (2014) by States Affected by Foreign Terrorist Fighters: A Compilation of Three Reports (S/2015/338; S/2015/683; S/2015/975)*, p. 5.

⁹⁷Cook and Vale, *From Daesh to "Diaspora"*, pp. 16–19.

⁹⁸Mehra, "Foreign terrorist fighters", p. 11.

⁹⁹All references to Kosovo in the present publication should be understood to be in compliance with Security Council resolution 1244 (1999).

them were accompanying their husbands and families.¹⁰⁰ Field research conducted by the United Nations Entity for Gender Equality and the Empowerment of Women (UN-Women) between 2016 and 2017 on women from Central Asia and the Western Balkans who travelled to Iraq and the Syrian Arab Republic further illustrates the role that gender relations play in the travel of women to conflict zones, with varying degrees of agency.

›EXAMPLE: UN-WOMEN RESEARCH ON WOMEN TRAVELLING FROM CENTRAL ASIA
AND THE WESTERN BALKANS TO IRAQ AND THE SYRIAN ARAB REPUBLIC

According to the Government of Tajikistan, most of the approximately 200 female nationals of Tajikistan who had travelled to Iraq and the Syrian Arab Republic by the time the study was conducted had been encouraged to do so by their husbands. In several instances, they were accompanied by their children. Some of the wives were told that they were migrating to Turkey to work, and only realized later that they were already in the Syrian Arab Republic. This trend can be partially explained by women's lack of access to information and men's control over family resources and decision-making. According to the UN-Women study, those women are likely to have felt pressured by a mix of economic dependency, traditional family roles and community expectations dictating that they support and follow their husbands.^a

In Kyrgyzstan, women who travelled to the Syrian Arab Republic were depicted by police and intelligence officials as traditional wives who were obedient to their husbands, lacking any personal agency. Law enforcement and intelligence officials referred to the naiveté of the poor and rural populations of Kyrgyzstan, particularly women, stating that many were unaware of the armed conflicts in Iraq and the Syrian Arab Republic, the actualities of life under ISIL or even the geographical location of the Syrian Arab Republic. Pictures shared over the Internet and second-wave recruitment by trusted friends and relatives, which portray coming to ISIL as landing in paradise, persuaded some to travel with a very naive outlook on their journey towards the so-called caliphate.^b

The study also includes cases of women who openly acquiesced to the move, or even instigated it. These included women who travelled without a male partner with the clear intention of joining violent extremist groups fighting on the ground.^c

^aAnna Matveeva and Bahrom Faizullaev, "Women and violent extremism in Europe and Central Asia: women and violent extremism in Tajikistan" (United Nations Entity for Gender Equality and the Empowerment of Women (UN-Women), 2017), p. 7.

^bAnne Speckhard, Ardian Shajkovci and Chinara Esengul, "Women and violent extremism in Europe and Central Asia: the roles of women in supporting, joining, intervening in, and preventing violent extremism in Kyrgyzstan" (UN-Women, 2017), p. 10.

^cUN-Women, "Women and violent extremism in Europe and Central Asia: executive summary and recommendations" (2017), p. 5.

It is important, however, to recognize that some women make the decision to travel and join a terrorist group of their own volition, or may be the driving force behind a family's decision to do so. One such reported example was that of N.K., a 17-year-old teenager from Indonesia, who in 2015 encouraged 26 family members to travel to Raqqa, Syrian Arab Republic, which Islamic State had declared its capital. The stated reasons for her and her family's migration contradict the conventional cliché of aspiring foreign "jihadi brides". Instead, her pitch to her family centred on the ability to clear debts, the availability of employment opportunities and free health-care services, and the chance for her to train as a health-care practitioner and for her sister to continue her education in computer science.¹⁰¹

¹⁰⁰Rudinë Jakupi and Vesë Kelmendi, *Women in Violent Extremism: Lessons Learned from Kosovo* (Pristina, Kosovar Centre for Security Studies, January 2017), p. 21.

¹⁰¹Cook and Vale, *From Daesh to "Diaspora"*, p. 31.

Secondly, the roles that women assume in terrorist groups as foreign terrorist fighters take on gendered dimensions that are dictated in part by the ideology of the group. In line with the ISIL views of women as primarily caregivers, wives and mothers, some female foreign terrorist fighters receive a form of military training, but are not expected to actively partake in combat unless exceptionally called to do so by a jihad leader.¹⁰² Rather, they engage in recruitment activities, facilitate travel to conflict areas, raise funds and support the male fighters domestically, providing basic medical care and cooking.¹⁰³ In its 2016 global survey on the implementation of Security Council resolution 1373 (2001), the Counter-Terrorism Committee Executive Directorate noted that it is not always clear whether women travel to engage in terrorist acts, look for partners, or support their families, or whether entire families can be implicated in the crimes committed.¹⁰⁴

The 2016 global survey of the Counter-Terrorism Committee Executive Directorate drew attention to numerous cases of foreign women who have travelled to ISIL-held territory and used social media to promote the group and its State-formation project.¹⁰⁵ Some reports also indicate the existence of a quasi-official female media unit within the media wing of ISIL, leading social media recruiting campaigns, consisting primarily of Western recruits.¹⁰⁶ For example, one high profile female ISIL foreign terrorist fighter from the United Kingdom fostered a strong social media presence in order to disseminate information about ISIL ideology, employing the idea of an ISIL “sisterhood” as a recruitment strategy and giving logistical advice to prospective recruits, including advice on how to avoid detection by security agencies.¹⁰⁷

6. Conclusions

The information on women’s participation in terrorist groups and acts of terrorism reviewed in the present section reflects at least four broad trends relevant to a gender-based analysis of the criminalization, prosecution and punishment of terrorism-related conduct.

- The significant number of women involved in terrorism-related offences calls for gender-sensitive prevention strategies. Distinct programming that specifically addresses the needs of women and girls may be required to effectively target women and girls who may otherwise join or support terrorist organizations.¹⁰⁸
- Although women are increasingly performing operational roles to directly perpetrate terrorist violence in some groups, including as suicide bombers, they generally engage in acts of violence less frequently than men. Women still primarily fulfil non-violent roles in supporting the activities of terrorist groups, including by providing logistical support, financing and recruitment, and as spouses of men in operational roles. Women are therefore particularly affected by the criminalization of such conduct.
- Women often become associated with terrorist groups as a result of being married, intending to get married, or having a familial tie to a man associated with the group. In some cases, women commit terrorism-related offences primarily as a result of their relationship with their spouse or other family member. Examples include mothers transferring funds to their terrorist fighter sons, women concealing male family members from law enforcement authorities, and women travelling with their husbands as part of the foreign terrorist fighter phenomenon.

¹⁰² Edwin Bakker and Seran de Leede, “European female jihadists in Syria”, p. 8.

¹⁰³ Mehra, “Foreign terrorist fighters”, p. 11.

¹⁰⁴ S/2016/49, para. 407.

¹⁰⁵ Ibid., para. 34.

¹⁰⁶ Spencer, “The hidden face of terrorism”, p. 85.

¹⁰⁷ Erin Marie Saltman and Melanie Smith, “*Till Martyrdom Do Us Part*”: Gender and the ISIS Phenomenon (London, Institute for Strategic Dialogue 2015), p. 26.

¹⁰⁸ Global Counterterrorism Forum, “Good practices on women and countering violent extremism” (New York, 2015), good practice 2.

- Although both men and women can become involved with terrorist groups by means of coercion, women are disproportionately more likely to be coerced into participation. Appropriately determining the criminal responsibility for coerced involvement is therefore of particular importance when it comes to female alleged offenders.

B. The criminalization of “support roles”

It is important to emphasize that State obligations to bring perpetrators of acts of terrorism to justice applies equally to the conduct of women and men. Criminal justice actors should avoid perpetuating stereotypes suggesting that women are less culpable for committing these offences, or are incapable of acting of their own volition.

At the same time, it is important to recognize that women may be differently and disproportionately impacted by the criminalization of certain terrorism-related offences in ways that may not have been envisaged by legislators. This is particularly important, given that counter-terrorism laws written predominantly by men respond to what has conventionally been seen as a primarily male threat. As noted by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, women have been marginal to the conversations in which definitions of security are agreed and generally peripheral to the institutional settings in which security frameworks are implemented as policy and law.¹⁰⁹

An important trend in counter-terrorism legislation is the expanded use of offences criminalizing membership in terrorist groups, participation in preparatory acts, and other forms of support to terrorist groups that are far removed from the commission of a violent act of terrorism. This trend reflects a broad consensus that effective terrorism prevention requires a forward-looking, preventative criminal justice strategy against terrorist violence,¹¹⁰ which allows the criminal justice system to disrupt preparations and arrest individuals at the earliest possible stage before they can commit an offence, travel, or otherwise support an act of terrorist violence.¹¹¹

› FOCUS: USE OF THE TERM “SUPPORT ROLES”

The present publication uses the broad term “support roles” to refer to different forms of conduct contributing to terrorist activities that do not involve direct engagement in violence. It is not intended as a legal term. In legal terms, the criminalization of such conduct varies greatly across national jurisdictions. Some support roles are criminalized as autonomous offences, one such example being the financing of terrorism, in accordance with the International Convention for the Suppression of the Financing of Terrorism (1999). Other roles may be criminalized only as forms of complicity in the commission of a terrorist offence.

Criminalizing preparatory and support roles is also required by key international legal instruments against terrorism, such as Security Council resolution 1373 (2001), which requires Member States to ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice. Other such instruments include

¹⁰⁹ A/72/495, para. 29.

¹¹⁰ United Nations Office on Drugs and Crime (UNODC), Terrorism Prevention Branch, *Preventing Terrorist Acts: A Criminal Justice Strategy in Integrating Rule of Law Standards in Implementation of United Nations Anti-Terrorism Instruments – Technical Assistance Working Paper* (Vienna, 2006), para. 2.

¹¹¹ Global Counterterrorism Forum, “Recommendations on the effective use of appropriate alternative measures for terrorism-related offences”, p. 2.

Council resolutions 2178 (2014) and 2396 (2017), the International Convention for the Suppression of the Financing of Terrorism, and the Council of Europe Convention on the Prevention of Terrorism and its Additional Protocol.¹¹²

The early and broad criminalization of acts preparatory to terrorism is, on its face, a gender-neutral criminal justice measure. However, the effects of such measures particularly impact women (see section A.4 of the present chapter).

1. Principle of legality

The criminalization of terrorist acts and the criminalization of conduct in support of the perpetration of such acts seek to satisfy competing requirements. On the one hand, the objective is to broadly capture all types of support for terrorism, including those not foreseen at the time that the legislation is drafted, thereby reducing the scope for loopholes. On the other hand, laws must comply with the principle of legality.

The principle of legality (“no punishment without law”) is a fundamental principle of human rights and the rule of law, which is enshrined as a non-derogable right in article 15 of the International Covenant on Civil and Political Rights and other human rights treaties. That principle prohibits prosecution and punishment for conduct that is not proscribed as an offence at the time of its commission, and it requires that criminal law provisions must be written in a way that gives “fair notice” of what conduct is prohibited.¹¹³ The principle of legality therefore provides an essential safeguard against arbitrary prosecution and punishment.

Because counter-terrorism laws have been written based on assumptions about the way men participate in terrorism, they may not have the required level of clarity and predictability when applied to forms of women’s participation that are dictated by gender stereotypes.

Both the support conduct (facilitating, preparing, financing, providing material support) and the conduct supported (the violent act) must be defined in a way that complies with the principle of legality. In the context of criminalizing conduct in support of terrorism, a law that prohibits, for example, providing support or encouraging terrorism must:

- Provide sufficient detail to enable a person to understand what forms of support or means of encouragement fall within the scope of such an offence. One way of avoiding ambiguity in a law that generally criminalizes the provision of support for terrorist offences is by listing factual examples identifying common characteristics of the prohibited conduct.
- Clearly set out what elements of the crime make it a terrorist crime. If any offences are linked to “terrorist acts”, there must be a clear definition of what constitutes such acts.
- Prescribe the required mental element: for example, knowledge, intent, or reasonable cause to believe (see the discussion on mens rea tests for support offences in subsection 2 of this section).¹¹⁴

If prosecuting authorities are applying or interpreting legislation in ways not envisaged by legislators, the principle of legality also demands that such authorities provide clear guidance and “fair notice” of the conduct that is liable to prosecution.

¹¹²On the importance of criminalizing preparatory acts, conspiracy and criminal association offences, see Global Counterterrorism Forum, “Rabat Memorandum on Good Practices for Effective Counterterrorism Practice in the Criminal Justice Sector”, good practice 13.

¹¹³The principle of legality in the criminalization of terrorism offences is discussed in depth in UNODC, *Counter Terrorism Legal Training Curriculum; Module 4 – Human Rights and Criminal Justice Responses to Terrorism*, pp. 33–37 (see also E/CN.4/2006/98, para. 46).

¹¹⁴*Preventing Terrorist Acts*, para. 30; and E/CN.4/2006/98, para. 46.

As observed by the European Court of Human Rights, there is an inevitable element of judicial interpretation in any system of law to adapt to changing circumstances.¹¹⁵ However, legislation criminalizing support roles in terrorist organizations should give “fair notice” of what conduct is prohibited, cognizant of its gendered impact. In doing so, legislators should assess the implications of planned legislation for women and men, and draft provisions in a way that makes their application equally predictable for women and men.

› CROSS-REFERENCE: VAGUE DEFINITION OF OFFENCES AND DETENTION OF FAMILY MEMBERS

- Definitions of terrorism-related offences that are vague or overly broad can facilitate the arbitrary detention of family members in order to exert pressure on fugitive suspects to surrender or provide information to the authorities. (For a discussion of this issue, see chapter 4, sections D and E.)

2. Mens rea tests for support offences

One means of operationalizing these principles is through an appropriately gender-sensitive application of the mens rea tests for support offences.

Laws that initially appear to be gender-neutral, but which have been drafted with male perpetrators in mind, may make implicit assumptions about the levels of agency and autonomy with which a suspect has engaged in the proscribed conduct. Contrary to that assumption, women in some contexts have far less access to information about the full scope of behaviour of their spouse or family members, or may not be in a position to challenge that behaviour or refuse to assist. According to a 2016 report on women and violent extremism in Afghanistan, lack of information can also play into the reasons and motivations for women to provide support, or simply turn a blind eye, in other ways. For some women, their male relatives have been found to have involved them in actions that support violent extremist groups, but given them only limited information about what they were doing. This removes the choice of whether and how the woman wishes to express support, in essence, removing her agency while still utilizing her.¹¹⁶

The mens rea requirement of support offences must be clearly articulated so it does not encompass support provided unwittingly by a family member, who is not (a) aware of the purpose of the support being provided or (b) in possession of information that should have alerted her or him to that purpose. However, it should encompass the support provided in cases in which the person was reckless in the circumstances as to whether his or her conduct would support a terrorist organization or a terrorism-related offence. Whether recklessness is evaluated objectively or subjectively, it will still need to be applied with gender-sensitivity. Otherwise, it may be unrealistically assumed that women foresaw the consequences of their support (an overly harsh application of an objective test). Alternatively, it may be naively assumed – owing to gender stereotypes – that women did not foresee the consequences, despite circumstances that suggest that they should have foreseen them (an overly lenient application of a subjective test).

Mens rea requirements for financing of terrorism

Laws criminalizing the financing of terrorism have a demonstrated gendered impact, particularly in connection with the foreign terrorist fighter phenomenon and the association of female spouses or family members with male terrorist offenders.

¹¹⁵ European Court of Human Rights, *Del Río Prada v. Spain*, Application No. 42750/09, Judgment of 21 October 2013, para. 92.

¹¹⁶ “Afghan women and violent extremism, pp. 10–11.

Both Security Council resolution 1373 (2001) and the International Convention for the Suppression of the Financing of Terrorism require States to criminalize the provision of funds where the individual intended or knew that the funds would be used in order to carry out a terrorist act. In practice, some jurisdictions define the mental requirements more broadly than these international instruments, including also those who provide or collect funds when they act with reckless disregard for the possibility, or have reasonable cause to suspect, that the funds will be used for terrorism.¹¹⁷

The broadening of the mens rea element of financing of terrorism offences enables the prosecution and conviction of persons when it is difficult to prove that they personally knew or suspected the terrorist purpose of the funds. Such an approach may have a gendered impact in at least two respects:

- To the extent that women have lesser access to information about terrorist groups,¹¹⁸ they are more likely than men to be affected by provisions extending the offence to persons who should have known that their financial support would benefit a terrorist individual or organization, even if they cannot be proven to have intended or actually known that they were supporting terrorism.
- The broader scope of the offence favours the prosecution of persons who provide support to a family member engaged in terrorism, even where that support is provided out of a sense of family duty or loyalty, rather than for the purpose of supporting terrorist activities – another situation that would appear to disproportionately concern women.

It is also important to avoid stereotyping the provision of financial support to terrorism by women as resulting from innocent misconceptions or subservience to male family members. In one case, a female national of the United Kingdom was convicted for attempting to send 20,000 euros to her husband who was fighting for a terrorist group in the Syrian Arab Republic. She was found guilty of funding terrorism and sentenced to more than two years' imprisonment on the basis that she knew her husband was engaged in violence for extremist religious and ideological reasons and that she had attempted to send the money for that purpose.¹¹⁹ The judge added that he was convinced that the initiative for the offence must have come from the accused's husband, and that the woman committed it because she was infatuated with him and thought he might provide for her and her two children.

3. Women involved in the foreign terrorist fighter phenomenon

The challenges and ambiguities in applying criminal law to the foreign terrorist fighter phenomenon, particularly where women have been charged, highlight the gender dimension of respecting the principle of legality in the criminalization of support roles.

Security Council resolutions 2178 (2014) and 2396 (2017) require Member States to punish, as serious criminal offences, not only the act of travelling abroad (or attempting to do so) for the purposes defined in Council resolution 2178 (2014), but also those who organize, facilitate or finance the travel of foreign terrorist fighters.

In its resolution 2396 (2017), the Security Council called upon Member States to assess and investigate suspected foreign terrorist fighters, and distinguish them from other individuals, including their accompanying family members, who may not have been engaged in foreign terrorist fighter-related offences. The Council emphasized that women and children associated with foreign terrorist fighters returning or relocating to and from conflict may have served in many different roles, including as supporters, facilitators, or perpetrators of terrorist acts, and require special focus when developing

¹¹⁷ *Preventing Terrorist Acts*, para. 24; an example of this trend is the Criminal Code Act 1995 of Australia, sect. 102.7.

¹¹⁸ See the summary of findings in Matveeva and Faizullaev, "Women and violent extremism in Europe and Central Asia", p. 7.

¹¹⁹ Dominic Casciani, "Woman jailed for funding Syria jihad", 13 November 2014. Available at www.bbc.com/.

tailored prosecution, rehabilitation and reintegration strategies. In the same paragraph, however, the Council stressed the importance of assisting women associated with foreign terrorist fighters who may be victims of terrorism.

National responses to foreign terrorist fighters who return home have, in many instances, been influenced by stereotypes about women's and men's respective roles in terrorist groups, and in particular in ISIL. In many countries, criminal justice practitioners' understanding of the gender dimensions has, however, evolved in the last five years, as is illustrated by the examples of Belgium and France, as well as by cases in the Netherlands, Germany and Austria (listed in order of appearance), provided in boxes in this subsection.

› **EXAMPLE: CRIMINAL JUSTICE RESPONSE TO WOMEN RETURNING FROM IRAQ AND THE SYRIAN ARAB REPUBLIC TO BELGIUM AND FRANCE**

A 2018 report about returning foreign terrorist fighters includes the following observation with regard to Belgium:

The perception of the involvement of women in jihad has evolved considerably... During the first wave of returns, women were perceived as "victims" or as playing a limited logistical role and being overall harmless. As a result, they were never prosecuted. This has now changed entirely, following a more accurate, but also enlarged, understanding of the role played by women in conflict, as well as the broadening of the terrorist law to cover support activities. Since 2016, women are as likely to be prosecuted as men.^a

In France, a parliamentary commission of inquiry into the State's response to the terrorist threat reported that, following two failed terrorist attacks by women, the authorities had updated their assessment of the threat emanating from women who return to France following a stay in Iraq or the Syrian Arab Republic. Such a move justified that the policy of systematically opening a criminal case had been extended to women, which had previously been applied only to male returnees. Since 2015, the criminal justice system's response to returning women was the same as in the case of men (i.e., issuing of an indictment followed by remand imprisonment, unless there were proven elements of coercion).^b

^aThomas Renard and Rik Coolhaet, eds., *Returnees: Who Are They, Why Are They (Not) Coming Back and How Should We Deal with Them – Assessing Policies on Returning Foreign Terrorist Fighters in Belgium, Germany and the Netherlands*, Egmont Paper 101 (Brussels, Egmont Institute, 2018), p. 25.

^bSylvie Goy-Chavent and Sénat, *Rapport fait au nom de la commission d'enquête sur l'organisation et les moyens des services de l'État pour faire face à l'évolution de la menace terroriste après la chute de l'État islamique*, Les Rapports du Sénat No. 639 (4 July 2018), p. 53.

Emerging State practice in the prosecution of offences related to the foreign terrorist fighter phenomenon shows that, in many States, open questions remain about the scope of offences criminalizing conduct related to the phenomenon. Such questions include whether a terrorist offence is committed in the following cases:

- By persons travelling to the operational area of a terrorist organization in order to support the group by fulfilling a civilian role (e.g., as a nurse or teacher) within the group;
- By a woman accompanying and providing domestic support to her husband. A survey conducted by the Counter-Terrorism Committee Executive Directorate in 2016 questioned whether all family members commit an offence simply by travelling and whether they should be prosecuted even if, in some cultures, a woman must follow her husband;¹²⁰
- By a woman travelling to the operational area of a terrorist organization to support the organization by marrying a terrorist fighter and providing domestic support;

¹²⁰S/2016/49, para. 408.

- By a person calling on women to travel to the operational area of a terrorist organization in order to support the organization by marrying and giving birth to new generations of the terrorist organization;
- By a person transferring funds to a close relative who meets the definition of a foreign terrorist fighter, although no intention to support terrorist activity can be proven.

The three cases below, decided by courts in the Netherlands, Germany and Austria, illustrate the gender dimensions of the uncertainty that can surround the criminalization of foreign terrorist fighter-related conduct.

› **EXAMPLE: CASE IN THE NETHERLANDS CONCERNING THE RECRUITMENT OF WOMEN TO TRAVEL TO THE SYRIAN ARAB REPUBLIC^a**

In a 2014 case, the female defendant had convinced a number of women over a period of several months in 2013 to travel from the Netherlands to the Syrian Arab Republic for the purpose of jihad. The court examined whether the facts amounted to the offence of recruitment for military action with a terrorist group, which comprised the provision of immediate support to combatants, the searching of persons and vehicles, and the carrying out of terrorist attacks. Based on expert testimony that women travelling to the Syrian Arab Republic to join ISIL or the Al-Nusra Front were not, at that time, active on the battlefield, but providing financial support and care to male fighters, the court found the offence was not proven. Notably, the court found that “morally, ideologically or financially supporting the fight or fighters, marrying a fighter and/or caring for the possessions, the household and the children of a fighter” did not fall within the scope of the charged offences. Regarding the charges relating to recruiting two men to travel to the Syrian Arab Republic to join a terrorist group, the court held that, while the defendant had discussed these plans with the men, the men had decided on their own to do so.

As a result, the court found that, while there was no doubt that the defendant supported a “radical-Islamist ideology” and “fully identified with violent jihad”, she had not committed an offence and was acquitted of the charges against her.

In June 2018, the Supreme Court of the Netherlands upheld the judgment.

^aNetherlands, *Rechtbank Den Haag* (court of justice in the Hague), case No. 09/767193-13, Judgment of 1 December 2014, confirmed in last instance by *Hoge Raad* (supreme court), case No. 16/05491, Judgment of 12 June 2018.

› **EXAMPLE: GERMAN CASE OF A WOMAN TRAVELLING TO THE SYRIAN ARAB REPUBLIC TO MARRY AN AL-NUSRA FRONT FIGHTER^a**

In 2015, a woman travelled with her two small children from Germany to the Syrian Arab Republic in order to marry a fighter of the Al-Nusra Front, an Al-Qaida affiliated organization listed as a terrorist entity by the Security Council. She was aware of her new husband’s affiliation with the organization and admitted that she sympathized with the terrorist group.

The woman received weapons training from her husband while in the Syrian Arab Republic, but ultimately returned to Germany after five months. She was charged with abduction of minors (her children) and with preparation of a serious violent offence endangering the State (there was no offence specific to travel related to foreign terrorist fighters at the time in German law). The first instance court convicted her on both charges.

Upon appeal, however, the German supreme court acquitted her regarding the terrorism offence. The court found that, because the accused had not taken part in combat and her firearms training was for purposes of defence of the family (as she alleged), the intentional element of the terrorism-related offence was lacking. The court took into account the fact that the family had repeatedly moved within the Syrian Arab Republic to be away from combat zones and that sympathizing with the Al-Nusra Front was not an offence under German law.

^aGermany, *Bundesgerichtshof* (federal court of justice), Judgment 3 StR 218/15 of 27 October 2015.

›EXAMPLE: AUSTRIAN CASES OF WOMEN PLANNING TO TRAVEL TO THE SYRIAN ARAB REPUBLIC TO MARRY ISIL FIGHTERS^a

In two decisions of 2015 and 2016, the Austrian supreme court and an appellate court addressed the question of whether the act of marrying an ISIL fighter constitutes a terrorism offence.

The women and underage girls in these cases had established online contact with ISIL fighters in the Syrian Arab Republic and either already married them in a ceremony via Skype or made preparations to travel to the Syrian Arab Republic for this purpose. One group was arrested before they attempted to leave Austria, the other was stopped at a border crossing.

The courts in Austria found that by promising to the ISIL fighters that they would join them and fulfil their duties as wives, the women had provided psychological support to members of a terrorist group. They had thereby committed the offence of “terrorist association”.

^aAustria, *Oberster Gerichtshof* (supreme court), Judgment 12 Os 45/16h of 16 June 2016; and *Oberlandesgericht Linz* (appellate court in Linz), decision 8 Bs 15/15k of 12 February 2015.

These cases illustrate different types of judicial approaches towards women’s involvement in the foreign terrorist fighter phenomenon and the functions that women perform as a result. Stereotypes about women, including their roles in terrorist groups held by investigators, prosecutors or judges can reinforce this gendered impact. As a consequence of the offences being legislated primarily to target the violent conduct of (mainly male) terrorist operatives, the outcome of their judicial application in the case of female alleged offenders can be difficult to predict.

4. Offences concerning sheltering/harbours terrorism suspects

Numerous counter-terrorism laws make it an offence to shelter, harbour or conceal a terrorism offender. Under the Anti-Terrorism Law of 2005 of Iraq, a person is liable to life imprisonment for harbouring a terrorist for the purpose of concealment.¹²¹ Legislation in Nigeria criminalizes the act of knowingly harbouring or concealing a person knowing that the person has committed an act of terrorism or is a member of a terrorist group. The offence is punishable for a term of not less than twenty years.¹²² Under the Human Security Act of the Philippines,¹²³ a person who has knowledge of the crime of terrorism and harbours, conceals or assists in the escape of a principal or conspirator is liable for ten to twelve years of imprisonment.

Spouses and other family members of terrorism suspects can find themselves in dramatic conflicts between their loyalty to their fugitive relative and the legal sanction of acts supporting terrorism, reinforced by the threat of prosecution and imprisonment. This conflict can have strong gendered implication. This may be the case where the fugitive is (most commonly) a male family member or spouse, and the relative is a woman who may not be fully apprised of the information necessary to assess the wrongfulness of the conduct of the male family member.

The criminal law of many States takes this conflict of loyalties into account by providing that close family members do not commit an offence or shall not be punished if they shelter or assist a fugitive family member. In a number of States, the counter-terrorism legislation explicitly extends this non-punishment principle to those concealing or assisting a close family member suspected of terrorist offences.

¹²¹ Iraq, Anti-Terrorism Law No. 13 of 2005, art. 4.

¹²² Nigeria, Terrorism (Prevention) (Amendment) Act, 2013, sect. 6.

¹²³ Philippines, Human Security Act of 2007, Republic Act No. 9372, sect. 6.

In the Philippines, the Human Security Act provides for an exception in some cases, where that person is a spouse or close family member of a terrorist offender. Terrorism support offences in the Italian and Chilean Penal Codes provide for exceptions for conduct that would otherwise constitute support to a terrorist where that support is provided to close family members.¹²⁴ In Iraq, close relatives of a person having committed a national security offence are exempt from any punishment in the event that they provide the offender with assistance, sustenance or shelter.¹²⁵ In other legal systems, general provisions exempting close relatives from harbouring or supporting an offender may be applied also in terrorism cases.¹²⁶

› **EXAMPLE: NON-PUNISHMENT OF CLOSE RELATIVES PROVIDING SHELTER TO TERRORISM SUSPECTS IN IRAQ**

The Penal Code of Iraq provides that close relatives (spouse, ancestor, descendant, brother or sister) of a person having committed a national security offence are exempt from any punishment in the event that they provide the offender with assistance, sustenance or shelter. That exemption is not, however, restated in the counter-terrorism legislation. The Anti-Terrorism Law of 2005 (art. 4) provides that a person is liable for up to life imprisonment for harbouring a terrorist for the purpose of concealment.

As a result, two different views of the applicability of the exemption in terrorism cases have emerged in recent case law from Iraq concerning women who provided shelter to their spouses or close relatives who were alleged terrorists. While some judges have applied the exemption to such women, others have not, arguing that the provision was inapplicable for two reasons: (a) the exceptional gravity of terrorist offences, and (b) the omission of such a scenario in counter-terrorism legislation. Several women are currently serving prison sentences in Iraq on charges related to having concealed a close relative who is an alleged terrorist offender.

Note: The information provided in this example is based on exchanges between judges in Iraq and UNODC.

5. Penalties attached to support offences

In paragraph 2 (e) of its resolution 1373 (2001), the Security Council required States to ensure that any person who participated in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts were brought to justice. The Council also required States to ensure that such terrorist acts were established as serious criminal offences and that the punishment duly reflected the seriousness of such terrorist acts. As the international counter-terrorism instruments do not provide guidance on the appropriate punishment for terrorist offences, States retain the discretion to determine the penalties for such offences.

With regard to acts of terrorism that involve killing, kidnapping, the use of explosives and other grave acts of violence against life and physical integrity, a comparative review of legislation shows that States consistently consider these offences to be among the most serious and make them punishable with long terms of imprisonment, and in some cases, the death penalty.

In contrast, provisions criminalizing preparatory acts, financing, recruitment and other support roles are more variable. Some counter-terrorism laws make these offences punishable by penalties as severe or only slightly less severe than those applying to acts of terrorist violence. Legislation in Nigeria,

¹²⁴ Penal Code of Italy, sect. 270 ter; and the Chilean Criminal Code, art. 295 bis.

¹²⁵ Penal Code of Iraq, art. 183 (2).

¹²⁶ For example, art. 222 (2) of the Penal Code of Lebanon.

for example, punishes the solicitation or rendering of support to a terrorist group by imprisonment for a term of not less than 20 years.¹²⁷ Laws in other countries provide the same range of severe penalties (including capital punishment) for a person who incites, plans, finances or assists terrorists as for those who carry out terrorist attacks. International law prohibits the imposition of the death penalty for offences that do not involve intentional killing.¹²⁸

Other States make support offences punishable by penalties that are significantly lighter than those for acts of terrorist violence. Under the law of the United Kingdom, for instance, a person found guilty of inviting support for a terrorist organization (other than by providing money or other property) is liable on conviction to imprisonment for a term not exceeding 10 years, to a fine or to both.¹²⁹ Membership in a terrorist organization is punishable by imprisonment not exceeding 10 years.¹³⁰ In New Zealand, making property, or financial or related services available to a designated terrorist entity is punishable by imprisonment for a term not exceeding seven years.¹³¹ In such States, judges will have the flexibility to impose either an unconditional prison sentence or, where they consider that this serves the interests of justice better, a conditional sentence or an alternative to imprisonment.

On the one hand, criminal justice actors must be careful to avoid being influenced at the sentencing stage by stereotypes that view women involved in terrorism offences as inherently acting with less agency and being less culpable than men. Researchers who have reviewed case files of terrorism trials in Europe and the United States of America argue that women have been receiving more lenient sentences than men for comparable terrorism offences, and that the evidence suggests gender has unjustly affected formal responses to individuals involved in crimes motivated by violent extremism.¹³²

On the other hand, where legislation prescribes severe minimum terms of imprisonment for offences related to support roles, judges may lack the necessary flexibility to impose lesser penalties on offenders whose culpability is minor or where mitigating circumstances apply. Prosecutors and judges may find themselves unable to seek or impose punishment that would adequately reflect a number of circumstances that would justify reduced prison terms or even alternatives to detention. This includes first-time offenders who were not directly involved in any acts of violence, those who became associated with terrorist groups under various forms of duress, and those who – in spite of having been associated with a terrorist group – would actually pose a low risk to their communities if released. As explained in section A of the present chapter, such circumstances are more likely to apply to women than men. (For a more detailed discussion of alternatives to imprisonment for terrorism-related offences, see chapter 4, section F.)

C. Offences committed by persons involuntarily associated with a terrorist group

Women and men join terrorist groups and commit acts of terrorism with a broad range of expectations and motivations. Some contemporary terrorist groups, particularly ISIL and Boko Haram, have coerced large numbers of women, men, girls and boys into association with them and to carry out acts

¹²⁷ Nigeria, Terrorism (Prevention) (Amendment) Act, 2013, sect. 5.

¹²⁸ Article 6, para. 2, of the International Covenant on Civil and Political Rights; see UNODC, *Module 4: Human Rights and Criminal Justice Responses to Terrorism*, pp. 174–179.

¹²⁹ United Kingdom, Terrorism Act 2000, sect. 12.

¹³⁰ *Ibid.*, sect. 11.

¹³¹ New Zealand, Terrorism Suppression Act 2002, sect. 10.

¹³² Audrey Alexander and Rebecca Turkington, “Treatment of terrorists: how does gender affect justice?”, *CTC Sentinel*, vol. 1, No. 8 (September 2018), p. 24; and Ester Strømme, “Jihadi brides or female foreign fighters? Women in Da’esh – from recruitment to sentencing”, GPS Policy Brief 01/2017 (Oslo, Peace Research Institute, 2017), p. 3.

of terrorism. Such coercion takes many forms, including abduction, coerced recruitment in communities, and being “handed over” to the terrorist group by families. Persons forced into association with a terrorist group through abduction, trafficking in persons, or other coercive means are victims of terrorism.¹³³ In some instances, it may be difficult to determine whether a person has been associated with a terrorist group voluntarily or against their will, or at what point initial coercion transforms into voluntary acts of terrorism. Although women and men may voluntarily join terrorist groups or be coerced into them, women are more likely to become associated with a terrorist group against their will than men (see section A.6 of the present chapter).

Accordingly, criminal justice responses to offences committed by persons who were forced to join a terrorist group or forced to commit an act of terrorism¹³⁴ have a marked gender dimension. The present section explores these dimensions, including considerations that may be relevant before trial (exercise of discretion not to prosecute), at trial (the defence of duress), in sentencing (the presence of mitigating circumstances), and both before and after a decision to prosecute has been taken (the principle of non-punishment of victims of trafficking in persons).

1. Discretion not to prosecute

Criminal justice authorities may, in some circumstances, exercise discretion not to prosecute, or to withdraw charges for terrorism-related offences committed by persons who have become associated with a terrorist group through coercion. There are divergent practices across national jurisdictions: in some, opening a criminal case is, in principle, mandatory whenever the criminal justice authorities receive information that an offence has been committed; however, in others, prosecutors enjoy broad discretion to decide in which circumstances it is in the public interest to prosecute.¹³⁵ Developing a prosecutorial prioritization strategy – a tool to focus investigations, prosecutorial efforts and resource allocation – is one means to effectively ensure accountability for gross human rights violations and serious violations of international humanitarian law. Strategies may prioritize, for example, cases involving the most responsible alleged perpetrators, or the most serious crimes.¹³⁶

The discretion not to prosecute a person alleged to have committed a terrorism-related offence must take into account any State obligation under international law referred to above to bring those who support terrorist acts to justice and ensure the punishment is proportionate.¹³⁷

However, in paragraph 31 of its resolution 2396 (2017), the Security Council emphasizes that women associated with foreign terrorist fighters may have served in many different roles, including as supporters, facilitators, or perpetrators of terrorist acts, and may require special focus when developing tailored prosecution, rehabilitation and reintegration strategies. The Council also stresses the importance of assisting women associated with foreign terrorist fighters who may be victims of terrorism.¹³⁸

¹³³In paragraph 10 of Security Council resolution 2331 (2016), the Council affirmed that victims of trafficking in persons, and of sexual violence, committed by terrorist groups should be classified as victims of terrorism with the purpose of rendering them eligible for official support, reparations programmes, and rehabilitation and reintegration efforts.

¹³⁴Technically, a person forced to engage in conduct constituting the *actus reus* elements of an offence without the required culpability (because she is forced to engage in the conduct), may not be committing the offence, as the required *mens rea* may be missing.

¹³⁵UNODC and International Association of Prosecutors, *The Status and Role of Prosecutors: A United Nations Office on Drugs and Crime and International Association of Prosecutors Guide*, Criminal Justice Handbook Series (Vienna, 2014), pp. 8–9 and 44–47.

¹³⁶See A/HRC/27/S6.

¹³⁷Security Council resolution 1373 (2001), para. 2 (e); see also, among others, article 4, para. (b) of the International Convention for the Suppression of Terrorist Bombings.

¹³⁸See also Security Council resolutions 2178 (2014) and 2349 (2017).

The Secretary-General, in his report on women and peace and security of 2017, welcomed efforts by Member States to initiate human rights-based and gender-sensitive approaches to the rehabilitation and reintegration of returnees and victims, released prisoners “and suspects who qualify for alternatives to prosecution”.¹³⁹ These documents collectively acknowledge that it may be appropriate in some cases not to prosecute persons who have been associated with a terrorist group, but rather to rehabilitate them and prepare them for reintegration into their communities in “alternative settings” to the criminal justice system. (For further discussion of gender-sensitive alternative measures, including diversion from prosecution and pretrial detention, see chapter 4, section F.)

The Counter-Terrorism Committee Executive Directorate has recommended that States develop and implement strategies for dealing with specific categories of foreign terrorist fighter returnees, in particular minors, “women, family members, potentially vulnerable individuals,” providers of medical services and other humanitarian needs and disillusioned returnees who have committed less serious offences.¹⁴⁰ It has also recommended utilizing administrative measures and/or rehabilitation and reintegration programmes as preventive alternatives to prosecution in cases in which it would not be appropriate to bring terrorism-related charges.¹⁴¹ Such alternatives may be particularly relevant in cases involving women who accompanied spouses rather than initiated travel to join a terrorist organization (particularly from cultures requiring obedience to one’s husband), who have been sexually assaulted or abused on the basis of their gender, whose membership was coerced, or who attempted to leave the terrorist organization. It may also include female supporters who fall outside the scope of criminal law because of their lack of knowledge or intention around the purpose of the support they provided.

Where the competent authorities decide not to prosecute a person who has been associated with a terrorist group, it may be very important to engage family and community into the rehabilitation and reintegration process, and to engage in public outreach and awareness initiatives. Relevant authorities must take into account that the community may have legitimate safety concerns regarding a woman or man who was associated with a terrorist group, even if the decision not to prosecute the alleged offender has been carefully considered and is based on the ground that her or his association with the terrorist group was involuntary.¹⁴² Such persons may also be at risk of reprisal and, if they are potential witnesses, could require some form of protection (see chap. 3).

Concurrently, any public outreach and awareness campaign will have to take into account the right to privacy of the person to be reintegrated into the community and the risk of stigmatization and secondary victimization. This affects women in particular, as in many contexts women formerly associated with armed groups are more likely than men to be ostracized by the community. For example, monetary support will need to be calculated in anticipation that women may take longer to obtain paid work, may earn systematically less than men in the same position, and are more likely to have primary care responsibilities for children, who will also need to be reintegrated.

Chapter 6 contains a more detailed discussion of the gender dimensions of the rehabilitation and reintegration of persons formerly associated with terrorist groups.

¹³⁹ S/2017/861, para. 47.

¹⁴⁰ S/2015/975, annex, para. 155 (*d*).

¹⁴¹ *Ibid.*, para. 155 (*e*).

¹⁴² Recommendations 3 and 4 of the Global Counterterrorism Forum recommendations on the effective use of appropriate alternative measures for terrorism-related offences are also highly relevant in this context. They are discussed primarily in chapter 4 of the present publication.

2. Defence of duress

(i) Duress in domestic criminal law

The defence of duress exists in most domestic legal systems, and in the international criminal law regime, where it is derived from customary international law and comparative criminal law.¹⁴³ The defence operates to excuse a perpetrator for an act that would otherwise be criminal because of threats of immediate or imminent death or serious personal injury so great as to overbear the ordinary powers of human resistance.¹⁴⁴ For instance, a person accused of transporting explosives on behalf of a terrorist group could claim that he or she would have been killed by the terrorists if he or she had refused to do so.

The availability and applicability of the defence in each case depends on how it is defined in the domestic legal system of each State. On a very general level, it can be said that, in civil law systems, the defence usually acts as a complete defence for all crimes. These legal systems consider that an accused individual who proves that she or he was acting under duress commits no crime, or is not criminally responsible or shall not be punished.¹⁴⁵ In common law systems, duress as a complete defence is generally not available for serious crimes such as treason, murder or attempted murder but may be relevant as a mitigating circumstance (see the discussion on mitigating circumstances in subsection 3 of the present section).¹⁴⁶

The defence of duress has successfully been raised in the past in the United Kingdom for terrorist offences such as aircraft hijacking. In the case of Abdul-Hussain, the Court of Appeal accepted the defence of duress from a defendant who had hijacked a plane to travel to England to escape deportation from the Sudan to Iraq – and likely execution in Iraq – which the court found to be the imminent cause of the defendant's offence.¹⁴⁷ In the case of Safi, the defendant and others hijacked a plane in Afghanistan to travel to England for the purpose of, according to their defence, fleeing death or serious injury from the Taliban and Afghanistan. In allowing the defence of duress, the Court of Appeal found that there was no need for objective evidence of a threat, as long as the defendant reasonably believed that the threat existed.¹⁴⁸

(ii) Duress in international criminal law

The existence of duress as a defence is recognized also at the level of international criminal law.

¹⁴³Geert-Jan Knoops, *Defenses in Contemporary International Criminal Law*, vol. 4, International and Comparative Criminal Law Series (Leiden, Netherlands, Brill and Nijhoff, 2001), p. 46.

¹⁴⁴Ireland, High Court of Ireland Decisions, *Attorney General v. Whelan* [1934] IR 518 (20 December 1933) and David Ormerod and Karl Laird, *Smith and Hogan's Criminal Law*, 14th ed. (Oxford, Oxford University Press, 2015), p. 389. This relates to the defence of duress by threats. In some legal systems, a person coerced to carry out an act of terrorism could also invoke the defence of necessity. While the distinction between duress and necessity varies between jurisdictions, the defence of necessity generally acts as a justification in circumstances in which a person responds to a non-human (or naturally caused) threat by committing a crime less serious than the harm that would be suffered by the person as a result of the threat (Antonio Cassese, *Cassese's International Criminal Law*, 3rd ed., Paola Gaeta and others, eds. (Oxford, Oxford University Press, 2013), p. 210). Not all legal systems, however, find it necessary to distinguish between these two concepts. Notably, article 31, para. 1 (d), of the Rome Statute of the International Criminal Court conflates the defences of duress and necessity.

¹⁴⁵International Tribunal for the Former Yugoslavia, *Prosecutor v. Drazen Erdemović*, Appeals Chamber, Case No. IT-96-22, Joint Separate Opinion of Judge McDonald and Judge Vohrah, Judgment of 7 October 1997, para. 59.

¹⁴⁶Ben Saul, *Defining Terrorism in International Law* (Oxford, Oxford University Press, 2008), p. 99. A leading common law authority on the elements of duress is *Regina v. Hasan* (Respondent) [2005] UKHL 22, Judgment of 17 March 2005, para. 21.

¹⁴⁷United Kingdom, England and Wales Court of Appeal, Criminal Division, *R v. Abdul-Hussain*, Case No. [1999] Crim LR 570 (17 December 1998).

¹⁴⁸*Ibid.*, *R v. Safi (Ali Ahmed) and others*, case No. [2003] EWCA Crim 1809 (6 June 2003).

► EXAMPLE: THE DURESS DEFENCE IN THE *ERDEMOVIĆ* CASE

In the *Erdemović* case, the defendant admitted to having taken part in a mass execution of prisoners, but claimed that he had been coerced by threats against his life and the lives of his family members. The Appeals Chamber of the International Tribunal for the Former Yugoslavia (in a 3-to-2 majority) found that duress for participation in executions of civilians because of threats to the lives of the accused and his family was not a complete defence for a crime against humanity and/or a war crime involving the killing of innocent human beings,^a although it may be relevant in mitigation for such crimes.

The minority found that customary international law did not exclude the applicability of the duress defence from these types of crimes. However, as the right to life is the most fundamental human right, the rule demands that the general requirements for duress be applied particularly strictly in the case of killing of innocent persons.^b Erdemović ultimately pleaded guilty and was sentenced to five years' imprisonment.

^aInternational Tribunal for the Former Yugoslavia, Appeals Chamber, *Prosecutor v. Drazen Erdemović*, (1997) case No. IT-96-22-A, Judgment of 7 October 1997, para. 19.

^b*Ibid.*, Separate and Dissenting Opinion of Judge Cassese, Judgment of 7 October 1997, para. 44.

The Rome Statute of the International Criminal Court follows the approach of the minority opinion in the *Erdemović* case: duress is available as a complete defence. Article 31, paragraph 1, of the Rome Statute states that a person shall not be criminally responsible if that person's conduct was caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

- (a) Made by other persons; or
- (b) Constituted by other circumstances beyond that person's control.

(iii) Issues of application

There are a number of issues concerning the application of the duress defence to be considered in the context of the present publication:

- *Limited applicability of the defence to certain type of offences.* Some legal systems exclude the defence of duress where the defendant is charged with having killed innocent persons, in particular where murder is charged.
- *Gravity threshold of the required harm.* The threatened harm must reach a threshold established by the law, which generally includes threatened death and serious or severe bodily harm or injury. The Court of Appeal in the United Kingdom has held that a threat of rape would be sufficient to meet the gravity threshold.¹⁴⁹ One gender dimension to consider is whether the gravity threshold is similarly high when the harm is threatened against a vulnerable relative, such as a child, in order to coerce the mother or father to comply.
- *Temporal requirements for the threat of harm.* Domestic law may prescribe a temporal requirement on the threat, usually expressed through language such as an imminent or immediate threat.
- *Proportionality issues.* Some jurisdictions require a proportionality assessment. The Penal Code of Italy, for example, requires that the acts committed under duress are proportionate to the threatened harm.¹⁵⁰ It has been argued that indiscriminate violence will very rarely, if ever, be

¹⁴⁹United Kingdom, England and Wales Court of Appeal, Criminal Division, *A v. R* [2012] EWCA Crim 434, case No. 2011/04321/B2, Judgment of 13 March 2012 and [2013] Crim LR 240, para. 63, in which the Lord Chief Justice stated that the requirement that there be a threat of death or serious injury would "no doubt" be satisfied by a threat to rape.

¹⁵⁰Penal Code of Italy (approved by Royal Decree No. 1398 of 19 October 1930), art. 54.

proportionate, since such killings were unlikely to alleviate the peril.¹⁵¹ One gender aspect of this issue is harm threatened to others, and the perceived level of threatened harm: female relatives are more likely to be exposed to this type of duress owing to the typical exploitation of gendered relationships.

- *Voluntary association exclusion.* The defence of duress may not be available to persons who have voluntarily associated themselves with a terrorist group, and subsequently become subject to duress. Duress cannot be invoked as an excuse where a person freely and knowingly chooses to become a member of a unit, organization or group institutionally intent upon actions contrary to international humanitarian law.¹⁵² Thus, in a case in England, duress was not a defence to a robbery committed as a result of threats from a terrorist organization – the Irish Republican Army (IRA) – because the defendant had freely and knowingly joined the IRA.¹⁵³ To the extent that women are more often coerced into association with a terrorist group, this exclusion factor is gendered.

3. Mitigating circumstances

Whereas complete defences justify or excuse what would otherwise constitute unlawful conduct, mitigating circumstances acknowledge the defendant's criminal responsibility for unlawful conduct, but lessen their culpability for such acts. Mitigating circumstances operate at the sentencing stage to reduce the severity of a punishment, and are therefore generally considered in the context of a formal trial.¹⁵⁴

Rule 145, paragraph 2, of the Rules of Procedure and Evidence of the International Criminal Court includes mitigating circumstances that may be taken into account by the court, namely:

- (a) The circumstances falling short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity or duress;
- (b) The convicted person's conduct after the act, including any efforts by the person to compensate the victims and any cooperation with the Court.

Rule 61 of the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) stipulates that when sentencing women offenders, courts shall have the power to consider mitigating factors such as lack of criminal history and relative non-severity and nature of the criminal conduct, in the light of women's caretaking responsibilities and typical backgrounds.

Where complete defences are not available, mitigating circumstances enable the Court to take into account the context in which the offence was committed, including the presence of coercive circumstances.

In the *Erdemović* case, the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia found that where duress has been rejected as a ground to completely exculpate the accused, or is not available as a defence because the requisite elements are not met, it may still be taken into account as a mitigating circumstance entailing a more lenient sentence.¹⁵⁵ This may be the case where, for example:

¹⁵¹ Saul, *Defining Terrorism in International Law*, p. 102.

¹⁵² Cassese, *Cassese's International Criminal Law*, p. 216.

¹⁵³ *R v. Fitzpatrick* [1977] NI 20.

¹⁵⁴ Elies van Sliedregt, *Individual Criminal Responsibility in International Law*, Oxford Monographs in International Law Series (Oxford, Oxford University Press, 2012), p. 216.

¹⁵⁵ International Tribunal for the Former Yugoslavia, Trial Chamber, *Prosecutor v. Drazen Erdemović*, case No. IT-96-22-T, Judgment of 29 November 1996, para. 54.

- The type of offence in question precludes the availability of the duress defence under national law.
- A sufficiently grave harm has been threatened to satisfy national law (such as rape), but the temporal requirement for the threat (such as imminent harm) has not been sufficiently established to satisfy national law. The coercive circumstances surrounding the threat of rape may still be taken into account in the sentencing process. Similarly, if the offence committed is considered disproportionately grave compared with the threat of harm so that duress is not proven, the threat itself is a mitigating circumstance when determining a criminal sentence.

Mitigating circumstances may also be relevant to reduce the severity of punishment in situations where, for example, a woman is compelled to harbour or shelter a relative known to have committed violent terrorist acts out of a sense of family loyalty, or did not have the ability to refuse owing to social custom.¹⁵⁶

4. Non-punishment of victims of trafficking in persons

Resolutions adopted by the Security Council, in particular resolutions 2331 (2016) and 2388 (2017), and documents such as the 2017 report of the Secretary-General on conflict-related sexual violence,¹⁵⁷ have highlighted the links between the abduction, enslavement and forced labour of women, girls and boys by armed groups, including terrorist groups, and trafficking in persons. The relationship between trafficking in persons offences and violence against women by terrorist groups is discussed in chapter 5.

In cases involving women who have committed terrorist offences, but who are themselves victims of trafficking by terrorist groups, one consideration that may be relevant for prosecuting authorities is the principle of non-punishment of victims of trafficking in persons.

This principle holds that such victims should not be punished or sanctioned for crimes committed as a consequence of, or in close connection to, their trafficking, including as a result of compulsion. It is key to an approach to trafficking that is centred on human rights and victims, in order to ensure that victims are recognized as victims, and are afforded the corollary protection and assistance. As recognized by the Special Rapporteur on trafficking in persons, criminalization and/or detention of victims of trafficking is incompatible with a rights-based approach to trafficking because it inevitably compounds the harm already experienced by trafficked persons and denies them the rights to which they are entitled.¹⁵⁸

In its resolution 2388 (2017), the Security Council invokes that principle with specific reference to the counter-terrorism context. In that resolution, the Council urged Member States thoroughly to assess the individual situation of persons released from the captivity of armed and terrorist groups so as to enable prompt identification of victims of trafficking, their treatment as victims of crime and to consider, in line with domestic legislation, “not prosecuting or punishing victims of trafficking for unlawful activities they committed as a direct result of having being subjected to trafficking”.

(i) Basis in international standards and guidance

The United Nations Convention against Transnational Organized Crime and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, do not contain an explicit obligation requiring States Parties to refrain from prosecuting victims of trafficking for crimes

¹⁵⁶ Preventing Terrorist Acts, para. 32.

¹⁵⁷ S/2017/249.

¹⁵⁸ A/HRC/20/18, para. 25.

committed during their period of victimization. However, the principle of non-punishment is well established in international standards and guidance.¹⁵⁹ The principle is in line with one of the main purposes of the Trafficking in Persons Protocol, as provided in article 2, paragraph (b), which is to protect and assist the victims of such trafficking, with full respect for their human rights. Further, the Working Group on Trafficking in Persons, which is tasked with advising and assisting the Conference of the Parties to the United Nations Convention against Transnational Organized Crime in improving the capacity of States parties to effectively implement the Protocol, has recommended that States:

(a) Establish appropriate procedures for identifying victims of trafficking in persons and for giving such victims support;

(b) Consider, in line with their domestic legislation, not punishing or prosecuting trafficked persons for unlawful acts committed by them as a direct consequence of their situation as trafficked persons or where they were compelled to commit such unlawful acts.¹⁶⁰

According to the background paper prepared by the Secretariat for the Working Group on Trafficking in Persons (CTOC/COP/WG.4/2010/4, para. 9), States should not prosecute or punish trafficked persons for crimes they may have committed in the course of trafficking. Similarly, the Recommended Principles on Human Rights and Human Trafficking of OHCHR (E/2002/68/Add.1) state that trafficked persons shall not be detained, charged or prosecuted for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.¹⁶¹

This principle is also reflected in regional practice. Article 26 of the Council of Europe Convention on Action against Trafficking in Human Beings provides that each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so. Article 4, paragraph 7, of the ASEAN Convention against Trafficking in Persons, Especially Women and Children, requires each State party, in appropriate cases, to consider not holding victims of trafficking in persons criminally or administratively liable for unlawful acts committed by them if such acts are directly related to the acts of trafficking.

(ii) Applicability of the principle to specific conduct

The non-punishment principle contained in the OHCHR Recommended Principles is not intended to confer blanket immunity on trafficked victims who may commit other non-status-related crimes with the requisite level of criminal intent.¹⁶²

Two different criteria may be used to determine the scope of conduct to which the non-punishment principle applies, which are as follows:

- Causation criteria: refers to whether the offence is directly related or connected to the trafficking, as reflected in, for example, Security Council resolution 2388 (2017) and the OHCHR Recommended Principles. A number of States have incorporated the causation-based model into domestic legislation.¹⁶³

¹⁵⁹ According to the Special Rapporteur on trafficking in persons, international bodies, including the Working Group on Trafficking in Persons, have confirmed non-prosecution of trafficked persons as the relevant international legal standard (A/HRC/20/18, para. 27).

¹⁶⁰ CTOC/COP/WG.4/2009/2, para. 12.

¹⁶¹ Office of the United Nations High Commissioner for Human Rights, *Recommended Principles on Human Rights and Human Trafficking: Commentary* (HR/PUB/10/2), annex, para. 7.

¹⁶² HR/PUB/10/2, pp. 132–133.

¹⁶³ See, for example, Argentina, Law No. 26.364 on the Prevention and Criminalization of Trafficking in Persons and Assistance to Victims of Trafficking of 2008, art. 5 (“Victims of trafficking in persons are not punishable for the commission of any crime that is the direct result of having been trafficked.”).

- Duress criteria: refers to offences that the trafficked person was compelled to commit, as reflected in, for example, article 26 of the Council of Europe Convention.

a. Application of the non-punishment principle to terrorism-related offences

The applicability of the non-punishment principle is determined by its basis in domestic law, and whether the applicable provisions contain any conditions for its applicability. The domestic law of some States provides for non-punishment of victims for any type of offence,¹⁶⁴ while others impose restrictions on the type of unlawful conduct covered by its application, such as offences relating to unlawful migration or prostitution, or when the overall circumstances are deemed appropriate.¹⁶⁵

In its resolution 2331 (2016), the Security Council called upon Member States to ensure that victims are treated as victims of crime and, “in line with domestic legislation, not penalized or stigmatized” for their involvement in “any unlawful activities” in which they have been compelled to engage. In a report of the Organization for Security and Cooperation in Europe (OSCE), it is stated that the duty of non-punishment applies to any offence so long as the necessary link with trafficking is established.¹⁶⁶

Where there is no specific domestic legislation providing for the non-punishment principle, victims of trafficking should be able to rely on general duress provisions or mitigating circumstances in order to avoid or limit liability.

b. The causal link between trafficking and the offence

An assessment must be made on a case-by-case basis as to whether the requisite causal link between the terrorism-related offence and trafficking exists. Making such a determination may involve examining whether the compulsion, or lack of voluntariness or autonomy, continues to exist, and assessing the individual’s level of criminal intent.

The OSCE Special Representative and Coordinator for Combating Trafficking in Human Beings has taken the view that compulsion, for the purposes of interpreting non-punishment provisions, should be aligned with the international definition of trafficking in persons (such as that provided in the Trafficking in Persons Protocol). As a result, compulsion will include the full array of factual circumstances in which victims of trafficking lose the possibility to act with free will¹⁶⁷ – not only use or threat of force, but also abduction, fraud, deception, abuse of a position of vulnerability.

(iii) Application beyond criminal justice measures

The non-punishment principle relates not only to non-attribution of criminal liability for offences, but also to the imposition of other measures which amount to penalties. Such measures include administrative penalties (e.g., pecuniary fines) and other forms of penalization (e.g., deportation, compulsory detention, administrative detention and incarceration).¹⁶⁸

Such an application is also reflected in the practice of some States. Anti-trafficking legislation in Azerbaijan and the Republic of Moldova, for example, provides for exemption of criminal, administrative and civil liability for victims of trafficking that otherwise meet the threshold of the provisions.¹⁶⁹

¹⁶⁴ See, for example, Tunisia, Law No. 2016-61 of 3 August 2016, art. 6; see also, Niger, Law No. 2010-86 of 16 December 2010 on Trafficking in Persons, art. 32.

¹⁶⁵ See, for example, the Trafficking in Persons (Prohibition), Law Enforcement and Administration Act of Nigeria, art. 62.

¹⁶⁶ Organization for Security and Cooperation in Europe (OSCE), Office of the Special Representative and Coordinator for Combating Trafficking in Human Beings, *Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking* (Vienna, 2013), p. 23.

¹⁶⁷ *Ibid.*, pp. 11–12.

¹⁶⁸ *Ibid.*, p. 32.

¹⁶⁹ Art. 17.7 of the Law of Azerbaijan on the Trafficking in Persons of 2005 and Law No. 241-XVI on Preventing and Combating Trafficking in Human Beings of 20 October 2005 of the Republic of Moldova, art. 32.

Applied to the counter-terrorism context, this means that any person who has become associated with a terrorist group as a result of trafficking should not be subjected to any administrative measures amounting to penalties.

D. Gendered impacts of measures against terrorism financing

The present publication is concerned with the gender dimensions of criminal justice responses to terrorism, and the present chapter has focused on ways in which the criminalization of terrorism offences affect female and male alleged offenders differently. Additionally, non-criminal justice measures aimed at suppressing support for terrorist groups also have a gendered impact. The present section highlights three areas in which measures aimed at suppressing terrorism financing risk may disproportionately impact women.

First, informal remittance systems, such as hawala-type transfer systems, are considered vulnerable to exploitation for terrorist-financing purposes, owing to limited regulatory oversight and the absence of customer identification systems.¹⁷⁰ As a result of financial exclusion from formal banking systems, including situations in which women are not permitted to deal directly with banks or financial agents, women in some contexts rely heavily on informal remittance systems.¹⁷¹ Therefore, measures to counter the financing of terrorism that target remittance systems may disproportionately affect women's access to financial resources, thereby exacerbating their financial exclusion.

Second, women have been affected by wide-reaching measures applied to their spouses as a result of asset-freezing regulations.

› EXAMPLE: CASE STUDY ON GENDERED IMPLICATIONS OF ASSET-FREEZING REGIMES

In *M and Others v. HM Treasury*, M's husband was designated under Security Council resolution 1267 (1999), and his assets were frozen.^a Some of M's welfare and social security benefits had been frozen pursuant to the same resolution, with the authorities in the United Kingdom considering that these payments were prohibited since they may have indirectly benefited a designated person, including through providing communal meals. The House of Lords described the asset-freezing regime applied to M as a "disproportionate and oppressive" measure amounting to an "extraordinary" invasion of privacy of someone who themselves was not a listed person.^b Upon referral by the House of Lords, the European Court of Justice found that the Regulation did not mandate such an intrusive regime against M. The Court found that it was hard to imagine how those funds could be turned into means that could be used to support terrorist activities, especially because the benefits at issue were fixed at a level intended to meet only the strictly vital needs of the persons concerned.^c

^a Council of the European Union Regulation (EC) No. 881/2002 prohibits making available, directly or indirectly, funds for the benefit of a person or group designated as being associated with listed individuals or terrorist groups, and enables the freezing of funds of such persons or groups.

^b *R(M) v. HM Treasury* [2008] 2 All ER 1097, paras. 15 and 61.

^c European Court of Justice, *M and Others v. HM Treasury*, Case No. C-340/08, Judgment of the Court (Fourth Chamber) of 29 April 2010, paras. 60–61.

¹⁷⁰ See Financial Action Task Force, *The Role of Hawala and Other Similar Service Providers in Money-Laundering and Terrorist Financing* (Paris, 2013), pp. 41–44.

¹⁷¹ Liat Shetret and others, *Tracking Progress: Anti-Money-Laundering and Countering the Financing of Terrorism in East Africa and the Greater Horn of Africa* (n.p., Global Centre on Cooperative Security, 2015), p. 78.

Third, measures to counter the financing of terrorism have resulted in restrictions on civil society funding, particularly when paired with overly broad definitions of material support to terrorism. Such laws have disproportionately affected the resources, funding and activities of organizations promoting gender equality and women's rights.¹⁷² A number of characteristics that such organizations often share include the following:

- They tend to be grass-roots organizations operating on a small scale, particularly when operating in politically unfavourable environments and where women face specific disadvantages.
- Such organizations may operate with a lower level of formal organization.
- They tend to be reliant on short-term funding, often from foreign sources (if they are located in conflict and post-conflict zones), rather than long-term, stable funding sources or domestic sources. This is one effect of the particular funding landscape facing women's rights organizations as well as the gendered patterns of financial exclusion in many country contexts, which point to gender-specific aspects.¹⁷³

Organizations sharing those characteristics face particular difficulties in obtaining funding, particularly from foreign donors that adopt more risk-averse funding priorities that favour large-scale, recognized and formally structured organizations that can comply with auditing and due diligence requirements imposed by some terrorist-financing regulations, driven by a fear of having their charitable donations stigmatized as financing of terrorism.¹⁷⁴

›EXAMPLE: IMPACTS OF MEASURES TO COUNTER THE FINANCING OF TERRORISM ON THE ACTIVITIES OF WOMEN'S RIGHTS ORGANIZATIONS

In a 2017 study of the impacts of measures to counter the financing of terrorism on gender equality and the activities of women's rights organizations, 48 per cent of women's organizations surveyed responded that counter-terrorism financing demands had impacted their access to funds, while 41 per cent responded that they had not applied for certain grants as a result of such demands.^a

^aDuke Law International Human Rights Clinic and Women Peacemakers Program, *Tightening the Purse Strings: What Countering Terrorism Financing Costs Gender Equality and Security* (2017), p. 65.

¹⁷²A/64/211, para. 42.

¹⁷³Duke Law International Human Rights Clinic and Women Peacemakers Program, *Tightening the Purse Strings: What Countering Terrorism Financing Costs Gender Equality and Security* (2017), p. 38.

¹⁷⁴A/HRC/33/29, para. 41, and A/64/211, para. 42.

SUMMARY OF KEY POINTS

- While men remain the predominant organizers and perpetrators of terrorist violence, women are involved in the activities of modern terrorist groups in a number of ways, ranging from fulfilling combat, security and leadership functions, to being used as suicide bombers. More women act as recruiters and mobilizers of support for terrorist groups, provide support functions, or fulfil traditional gender roles (e.g., as wives of foreign terrorist fighters).
- While some women join terrorist groups on their own volition, the association of other women with terrorist groups is through familial relationships, in particular marriage. In other cases, women (and men) are abducted and are forced to participate in acts of terrorism.
- The criminalization of supporting and assisting activities of terrorist groups is required by multiple international legal instruments against terrorism. In practice, the broad criminalization of support offences has a differential impact on women, given that women, compared with men, more commonly fulfil non-violent support roles, and with varying levels of knowledge and intent.
- The criminalization of support and preparatory conduct must always comply with the principle of legality. For example, offences must be defined in a way that gives “fair notice” as to what conduct is made punishable. Because counter-terrorism laws may have been based on assumptions about the way men participate in terrorism, those laws may lack the required level of clarity and predictability when applied to the participation of women in terrorism, when those roles are dictated by gender stereotypes.
- The present chapter has examined the need to apply a gender mainstreaming approach to selected terrorism-related offences related to foreign terrorist fighters, financing of terrorism, offences concerning the sheltering or harbouring of terrorism suspects, and sentencing for support offences.
- It is important to beware gender stereotypes portraying women associated with terrorist groups as generally lacking personal agency and being victims of coercion. However, research suggests that the number of women who become involuntarily associated with terrorist groups, and who commit offences as a result of that association, is higher than in the case of men. There are a number of criminal justice principles available to address this situation, including exercising the discretion not to prosecute, the defence of duress, or the application of mitigating circumstances at sentencing to reduce the severity of a punishment. Where the person in question is a victim of trafficking in persons, application of the principle of non-punishment of victims of trafficking in persons may be relevant.
- Non-criminal justice measures aimed at suppressing support for terrorist groups, in particular those measures aimed at the suppression of financial support, also have gendered impacts.



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INVESTIGATION AND PROSECUTION OF TERRORISM CASES

Investigations in cases involving terrorism and other complex crime require the use of many different investigation measures, including interviews with victims, witnesses and suspects, the interception of telephone, email and social media communications, and the exploitation of records on mobile phones and computers. They also require the use of various types of evidence, including forensic evidence from the crime scene and any items found there, information from public authorities and businesses, and the results of searches of persons, vehicles, homes and business premises.

Chapter 3 contains an examination of the key gender dimensions arising during investigations into and prosecution of terrorism offences. The topics addressed are outlined below:

- Section A: search powers, special investigative techniques and profiling practices
- Section B: good practices on the gender-sensitive interviewing of victims, suspects and witnesses
- Section C: gender aspects of witness protection
- Section D: importance of strengthening women's representation in law enforcement and the judicial system

The principles established in sections B and C are applicable to investigations and prosecutions concerning terrorist offences in general, and in cases in which the victims, witnesses or suspects have experienced sexual and gender-based violence.

The issues discussed are not unique to investigations in terrorism cases, but they are of particular relevance in the counter-terrorism context. A basic principle established in international human rights and counter-terrorism instruments is that criminal investigations and prosecutions related to terrorism must be conducted in accordance with international standards and the rule of law, human rights and fundamental freedoms. By using gender-sensitive procedures, investigators will increase investigatory compliance with human rights and are likely to be more effective than investigators who are unaware that the way they conduct investigations affects men and women differently.

› FOCUS: THE RIGHTS OF VICTIMS AND WITNESSES IN THE INVESTIGATION PHASE

In addition to respecting the rights of the suspect, States are under an obligation to respect the rights of victims and witnesses throughout the investigation and prosecution, given that their rights to life, security, physical and mental integrity, respect for private and family life, and protection of dignity and reputation may be at risk. Ensuring such rights requires an intersectional approach to engaging with female victims and witnesses, because effectively respecting those rights is not solely related to gender, but also to cultural, social, religious and economic characteristics.

In good practice 21 of its “Good practices on women and countering violent extremism”, the Global Counterterrorism Forum recognized the importance of integrating a gender perspective into relevant guidance materials and training, having female first responders and developing gender-sensitive investigative and prosecution procedures for female victims and witnesses, as key measures to enhance the rights of victims and witnesses.

A. Gender aspects of investigations

1. The need for a gender-sensitive approach to the investigation of terrorism cases

Compliance with human rights standards is essential to the effective, fair and impartial investigation of terrorism cases. It also strengthens accountability for terrorism offences, improves the relationship between the investigative authorities and the communities affected by terrorism, and assists in addressing the conditions conducive to the spread of terrorism.

During the course of counter-terrorism operations, investigating authorities exercise a range of powers which include searches of individuals and premises, special investigative techniques and profiling. While exercising those powers, however, authorities must comply with fundamental human rights standards, including the right to non-discrimination. Not every distinction in treatment is necessarily discriminatory. However, without an objective justification, the differential treatment of different groups of people in the use of investigative powers is likely to be incompatible with the principle of non-discrimination. While counter-terrorism investigations have given attention to discrimination on grounds such as race, religion and nationality, it is equally important to ensure that investigators do not discriminate on the grounds of sex or gender.

As established in chapter 1, criminal justice systems in many contexts disadvantage women at different stages: women’s initial contact with the system; throughout the criminal investigations; and before, during and after the trial. This is evident at the investigations stage in a number of ways:

- Men account for a large proportion of personnel in law enforcement and in the judicial system, and are generally not trained in gender-sensitive investigative and prosecution practices. This is significant given that the representation of women in these systems plays a key role in securing equality before the law and equal treatment in the criminal justice system, together with gender-sensitivity training for all women and men working in these areas.
- The differential impacts of investigative powers on women and men may not be overt and may arise from entrenched gender biases and stereotypes.
- Policies and procedures governing how such powers are exercised have, in most contexts, been developed in a gender-neutral manner.

Adopting a gender-sensitive approach to investigations is a key way of operationalizing the gender mainstreaming principles set out in chapter 1. It requires taking gender norms, roles and relations into account in order to assess the different impacts of investigative policies and practices on women, men,

girls and boys who come into contact with the criminal justice system in the course of terrorism investigations, including as suspects, victims or witnesses, and working to mitigate negative impacts arising in the course of investigations.

2. Search powers

(i) The impact of search powers

Governments in democratic societies have a responsibility to protect individuals and institutions in their jurisdiction from the threat posed by terrorism. A range of investigatory powers, including search powers, may be used to discharge this responsibility. Nevertheless, searches of persons and property by law enforcement personnel in the course of terrorism investigations may impinge upon a number of human rights, including the following:

- The prohibition of arbitrary or unlawful interference with privacy, family and home, and the prohibition of unlawful attacks on honour and reputation¹⁷⁵
- Where property is seized or trespassed, the right to peacefully enjoy property
- In the case of stop and searches, the right to freedom of movement
- In the case of the search of premises used for exercise of religion, the right to freedom of religion
- The right to freedom of expression, assembly and association – for example, when the premises of a political movement and/or a media organization are searched

The above-mentioned are so-called “non-absolute rights” that can be limited in certain circumstances, provided that any interference with those rights are prescribed by law, have a legitimate aim and are necessary and proportionate to the aim pursued.

Some States confer extraordinary counter-terrorism search and seizure powers on law enforcement personnel, in some cases without requiring a warrant and in other cases conferring power on the executive to broadly authorize search and seizure operations in designated areas without warrants. When those search powers are used in a disproportionate way, it may raise issues about respect for the dignity of the human person and of the prohibition of inhuman and degrading treatment. Search powers may also have particular gendered impacts (i.e., impacts that are different for men and women), which can be ameliorated only through the implementation of gender-sensitive practices.

(ii) Stop and search procedures in public spaces

Depending on the context of the search, the location where a search is conducted can have a different impact on women and men. With regard to public spaces, stop and search procedures may disproportionately affect men, among whom there is a higher incidence of public searches compared with women. Reports indicate that terrorist groups exploit the fact that women are less likely to be stopped and searched:

Because women were not considered a threat, female followers and forced conscripts could initially circulate in Government-controlled areas more easily, as spies, messengers, recruiters and smugglers. For the same reason, from mid-2014, Boko Haram turned to female suicide bombers.¹⁷⁶

¹⁷⁵ The Human Rights Committee has found that the unjustified inclusion of a person in the terrorism sanctions list of the Security Council Committee pursuant to resolutions 1267 (1999), 1989 (2011) and 2253 (2015) concerning Islamic State in Iraq and the Levant (Da'esh), Al-Qaida and associated individuals, groups, undertakings and entities amounted to a violation of article 17 of the International Covenant on Civil and Political Rights. It considered that the dissemination of personal information about the authors constituted an attack on their honour and reputations (see communication No. 1472/2006, *Sayadi and Vinck v. Belgium*, decision adopted on 22 October 2008, paras. 10.12 and 10.13).

¹⁷⁶ “Nigeria: women and the Boko Haram Insurgency”, pp. ii and 10.

On the other hand, in cultures where public spaces are traditionally occupied by men, the stigmatizing effects of these procedures may be more severe for women who are stopped and searched.

Stop and search procedures that impede on individual freedom of movement, family association, the ability to attend work or school, or the ability to obtain household resources may have a different impact on women and men. Women may already be discriminated against in accessing land, water and other natural resources, and girls may already face difficulties in attending school.¹⁷⁷ The impact of stop and search procedures could therefore exacerbate an already limited access to public spaces and the freedom of movement of women and girls.

(iii) Searches of homes

A search of the home breaches the private domestic domain and may cause destruction – both of a physical nature and a destructive atmosphere – that can lead to feelings of intimidation, vulnerability and a lack of security. When coupled with intimidating conduct by law enforcement personnel – sexualized verbal abuse, for example – the effect of such home searches is generally more acute for women than for men.¹⁷⁸ Such an effect may be compounded by the reduced visibility and accountability associated with home searches, as compared with counter-terrorism measures that take place in public spaces, and further complicated by patriarchal structures and attitudes that disempower women.

(iv) Good practices for using search powers

Stop and search procedures should not unduly limit or interfere with the following rights of the individual: movement to and from a residence, workplace or publicly accessible location; association with family members; access to land or water; or ability to attend full school and work days and access social services or medical treatment, in particular as pertains to emergency cases and pregnant women.¹⁷⁹

All stops and searches must be carried out with courtesy and respect, consistent with the dignity of the person who is being searched. Persons being subjected to a body search by State officials or medical personnel acting at the request of the State should be examined only by persons of the same sex.¹⁸⁰ Personnel carrying out the search should be aware of cultural sensitivities, which may be particularly challenging in contexts where the vast majority of police and security personnel are male (see section D of the present chapter).

Investigators should consider cultural and religious factors when executing search and seizure procedures in the home, such as whether there are areas of the home in which only women may be present.

¹⁷⁷ Counter-Terrorism Implementation Task Force, *Basic Human Rights Reference Guide: The Stopping and Searching of Persons in the Context of Countering Terrorism*, updated 2nd ed. (New York, March 2014), p. 20.

¹⁷⁸ Fionnuala Ni Aoláin, “Close encounters of the female kind in the land of counter-terrorism” in *Gender, National Security, and Counter-Terrorism: Human Rights Perspectives*, Margaret Satterthwaite and Jayne Huckerby, eds. (Abingdon, United Kingdom, Routledge, 2013) p. 243.

¹⁷⁹ “Basic human rights reference guide: the stopping and searching of persons in the context of countering terrorism”, 2nd ed. (New York, March 2014), p. 20.

¹⁸⁰ Human Rights Committee, general comment No. 16 on article 17 of the International Covenant on Civil and Political Rights on the right to respect of privacy, family, home and correspondence, and protection of honour and reputation (A/43/40), annex VI, para. 8.

›EXAMPLE: LONDON METROPOLITAN POLICE – STOP AND SEARCH OF PEOPLE OF DIFFERENT GENDER TO THE SEARCHING OFFICER

The London Metropolitan Police Service has made publicly available its position on stop and search procedures of people who are of different gender to the searching officer. The guidance states that:

It is legitimate for an officer of any sex to stop and search a person of any sex providing the search is in public and is restricted to a superficial examination of outer garments...

All stops and searches must be carried out with courtesy, consideration and respect for the person concerned. Every reasonable effort must be made to minimize embarrassment that a person being searched may experience. Therefore, where practicable, an officer of the same sex as the person to be searched should conduct these types of searches, unless an officer of the same sex is not readily available and waiting would unnecessarily prolong the length of time taken to conduct the encounter or frustrate the object of the search.

Any search involving the removal of more than an outer coat, jacket, gloves, headgear or footwear, or any other item concealing identity, may only be made by an officer of the same sex as the person searched and may not be made in the presence of anyone of the opposite sex unless the person being searched specifically requests it.

The cooperation of the person to be searched must be sought and, depending on the circumstances (including officer safety), officers should consider asking the person to be searched if they want the search to take place out of public view. Where there may be sensitivities (religious or other) about the removal of a head or face covering or other clothing, the officer should permit the item to be removed out of public view.

›EXAMPLE: SEARCH OF HOMES UNDER THE ADMINISTRATION OF CRIMINAL JUSTICE ACT OF NIGERIA

The Administration of Criminal Justice Act 2015 of Nigeria contains a number of provisions taking into account the gender aspects of criminal investigations. Those aspects include the practice of “purdā” in parts of Nigeria, which involves the seclusion of women from public observation by means of concealing clothing and the use of high-walled enclosures, screens and curtains within the home.

According to section 12 (3) of the Act, when a suspect enters a house occupied by a woman who by custom or religious practice does not appear in public, the person attempting to make the arrest shall:

- (a) Give notice to the woman that she is at liberty to withdraw (before entering the house or place);
- (b) Afford the woman every reasonable opportunity and facility for withdrawing.

The person attempting to make the arrest may then enter the house or place. If the person making the arrest is a woman, giving notice shall not be necessary.

3. Special investigative techniques

Detecting and disrupting the clandestine operations of terrorist organizations requires special investigation methods that enable law enforcement agencies to gather information without alerting the target. Such methods are often referred to as special investigative techniques.

›FOCUS: SPECIAL INVESTIGATIVE TECHNIQUES

There is no universally accepted definition or exhaustive list of special investigative techniques. The Council of Europe adopted a recommendation in 2005 providing guidance to Member States on how to respect privacy rights in intelligence-led policing, including in terrorism investigations, which codifies principles established in the jurisprudence of the European Court of Human Rights.

› FOCUS: SPECIAL INVESTIGATIVE TECHNIQUES (*continued*)

The recommendation gives the following definition:

“Special investigation techniques” means techniques applied by the competent authorities in the context of criminal investigations for the purpose of detecting and investigating serious crimes and suspects, aiming at gathering information in such a way as not to alert the target persons.¹⁸¹

Special investigative techniques commonly used in counter-terrorism investigations include:

- Use of undercover agents
- Use of informants
- Interception of telephone communications
- Interception of email communications
- Visual surveillance of suspects
- Audio surveillance of premises in which suspects live or meet
- Surveillance of social media accounts
- Placement of listening devices in a private residence
- Tracking of the movement of suspects with global positioning system (GPS) devices

¹⁸¹Recommendation Rec(2005)10 of the Committee of Ministers to member States on “special investigation techniques” in relation to serious crimes including acts of terrorism.

(i) Impacts of special investigative techniques

The purpose of special investigative techniques – to gather information on target persons without their knowledge – means that such techniques have far-reaching human rights impacts, interfering with the right to privacy and potentially with fundamental freedoms of expression, association and religion, as well as the prohibition of discrimination, and the right to a fair trial and respect for one’s private life.¹⁸¹

The gender aspects of the use of special investigative techniques may be less apparent than in the case of search powers. However, gender stereotypes relating to the roles of men and women in terrorist activities and organizations are likely to play a role in the deployment of surveillance measures. That fact is illustrated by the court decision regarding dragnet investigations in Germany (see the example in the box in subsection 4 of the present section): from the very beginning, investigators in those cases excluded women from their profile of a member of a terrorist “sleeper cell”.

Women may be perceived as secondary actors, for example as family members, as informants or in roles related to preventing and countering radicalization in the family environment. Even when they are not the primary target of an investigation, women remain affected by their associations with those who are targeted, including as family members or relatives. While counter-terrorism investigations tend to primarily target men, women have become implicated in that process when they are leveraged for purposes of inducing male family members to become informants, or as the result of being ostracized in their communities when a family member agrees to cooperate with the authorities.¹⁸²

One serious concern relates to the exploitation of intimate relationships in covert human intelligence operations, such as the use of undercover agents or informants to collect information on the activities of terrorist groups. That exploitation includes the use of women or men to develop intimate relationships with investigation targets as a means of infiltrating an organization and obtaining information. Such actions may have serious implications for the agents or the informants themselves and may cause trauma to the targeted persona, causing the individual to be ostracized.

¹⁸¹ UNODC, *Counter-Terrorism Legal Training: Module 4*, pp. 88–102.

¹⁸² Center for Human Rights and Global Justice, “A decade lost: locating gender in U.S. counter-terrorism” (New York, New York University School of Law, 2011), pp. 82 and 85.

► EXAMPLE: EXPLOITATION OF INTIMATE RELATIONSHIPS DURING UNDERCOVER OPERATIONS

In a 2013 case in the United Kingdom of Great Britain and Northern Ireland, the police infiltrated an animal rights group they suspected of committing violent crimes. One of the male undercover officers established intimate relationships with several of the female activists in order to strengthen his cover and obtain more information.^a When that fact came to light in the course of the criminal proceedings against the members of the group, it caused serious damage to the prosecution's case and to the reputation of the law enforcement agency. The suffering caused by the undercover police officer, both to the women and their children, was condemned as totally unacceptable.^b The case highlighted the importance of developing and applying stringent professional and ethical protocols regarding the conduct of undercover agents, informants and the agents handling them, including with regard to developing intimate relationships with suspects.

^aUnited Kingdom, Her Majesty's Inspectorate of Constabulary (United Kingdom), *A Review of National Police Units which Provide Intelligence on Criminality Associated with Protest* (2012), pp. 8 and 25; and Rob Evans and Paul Lewis, "Former lovers of undercover officers sue police over deceit", *Guardian*, 16 December 2011. Available at www.theguardian.com/uk.

^bReport of the Special Rapporteur on the rights to freedom of peaceful assembly and of association (A/HRC/23/39/Add.1), para. 25.

(ii) Good practices on the use of special investigative techniques

Thus, special investigative techniques have their own specific good practices:

- The use of special investigative techniques must be regulated and carefully supervised, including on a judicial level, in order to ensure that professional protocols and human rights are respected.
- A gender analysis should inform the design and application of special investigative techniques in order to assess their impact not only on the primary target but also on anyone else who could be affected.

4. Non-discrimination and terrorist profiling

The practice of profiling is used by many States in terrorism prevention activities and investigations in order to identify persons who are likely to have committed an offence or are preparing to commit one. Profiling can also inform the activities of law enforcement personnel with regard to identifying physical or behavioural characteristics to help determine, for example, whether to stop and search someone.

► FOCUS: PROFILING

"Profiling" is generally defined as the systematic association of sets of physical, behavioural or psychological characteristics with particular offences and their use as a basis for making law enforcement decisions. Profiles can be either descriptive (designed to identify persons likely to have committed a particular criminal act and thus reflecting the evidence investigators have gathered concerning the act) or predictive (designed to identify persons who may be involved in some future crime, or in a crime that has not yet been discovered).^a

^aReport of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (A/HRC/4/26), para. 33.

Profiling is, in principle, a permissible law enforcement activity. Detailed profiles based on factors that are statistically proven to correlate with certain criminal conduct ensure that limited law enforcement resources are effectively allocated.¹⁸³

¹⁸³Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (A/HRC/4/26), para. 33.

Not every differentiation of treatment in law enforcement measures constitutes discrimination. Key questions are whether the criteria used for differential treatment are reasonable and objective and whether they have a legitimate purpose.¹⁸⁴ Profiling practices based on broad generalizations and stereotypes, including those generalizations based on gender, run a substantial risk of violating the principle of non-discrimination. The General Assembly has therefore called upon States, in their efforts to counter terrorism, not to resort to profiling based on stereotypes founded on grounds of discrimination prohibited by international law, including discrimination on racial, ethnic and/or religious grounds.¹⁸⁵ Likewise, the Committee on the Elimination of Racial Discrimination has recommended that States ensure that such profiling measures do not discriminate on grounds of race, colour, descent or national or ethnic origin in purpose or effect.¹⁸⁶

Different aspects of an individual's identity, including gender, ethnic or national origin, and religion, can lead to a compounding of discrimination against that person. Such a situation can increase the chance of being the subject of profiling and may arise in the following cases:

- If law enforcement officials use broad profiles employing generalizations that are based on stereotypical assumptions – e.g., that males of a certain race, national or ethnic origin, or religion, are more likely to engage in terrorist activity – men belonging to such groups will be disproportionately affected¹⁸⁷
- If law enforcement officials use generalizations that are based on assumptions of gender inequality or about the scope of the role of women within certain groups
- If women are subjected to profiling on the basis of the religious affiliation indicated by their attire

› EXAMPLE: GERMAN CONSTITUTIONAL COURT DECISION REGARDING DRAGNET INVESTIGATIONS^o

Following the 11 September 2001 attacks on targets in the United States, the German police authorities launched a sweeping dragnet investigation aimed at the identification of terrorist “sleeper cells” in Germany. The police obtained data sets about several hundred thousand individuals from universities, colleges, immigration offices and other private and public entities holding such information. That information was then screened automatically using the following criteria: male, aged 18 to 40 years, Islamic religious affiliation, and country of origin with a predominantly Islamic population. The names of all the persons fulfilling those criteria were collected in a file (the so-called “sleeper” file). It is not known whether that effort revealed any potential terrorists or resulted in any charges against members of terrorist organizations.

In a subsequent complaint filed by a 28-year-old Moroccan man attending university in Germany, the Federal Constitutional Court noted that the covert collection of information and the use of stigmatizing criteria – the religious profiling resulted in the collection of information on only persons of the Islamic faith – required a very strong justification of a specific heightened threat of a terrorist attack. The Court found that the general situation of heightened threat in Germany following 11 September 2001 did not meet that threshold.

While the Court was particularly critical of the use of religion as one of the criteria for the profiling, it did not comment on the investigators' use of sex as a screening criterion (only men were entered in the so-called “sleeper” file). The case nevertheless illustrates how gender intersects with other aspects of an individual's identity, such as ethnicity, nationality and religious affiliation, to produce stereotypes.

^oGermany, Federal Constitutional Court, order 1 BvR 518/02 of 4 April 2006.

¹⁸⁴Human Rights Committee, general comment No. 18 (1989) on non-discrimination, para. 13.

¹⁸⁵General Assembly resolution 63/185, para. 7.

¹⁸⁶Committee on the Elimination of Racial Discrimination, general recommendation No. 30 (2004) on discrimination against non-citizens, para. 10 (see also the reports of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance (A/HRC/29/46), discussing the legal and policy frameworks prohibiting racial and ethnic profiling, and good practice for eliminating its use; and A/72/287, on combating racism in the context of counter-terrorism, also discussing profiling).

¹⁸⁷See A/HRC/4/26, paras. 34–46; and A/64/211, para. 37.

Discriminatory profiling not only violates human rights, it may also negatively impact the prevention and investigation of terrorism offences if it causes feelings of victimization, stigmatization and alienation among targeted groups and affects levels of trust between communities and law enforcement authorities.

Good practices for non-discrimination in terrorist profiling

In developing non-discriminatory profiling practices for use as a tool in counter-terrorism investigations, there are a number of factors that States should consider:

- Profiling to prevent terrorism should be based on behavioural characteristics, not characteristics such as gender, ethnic origin or religion. Further, those behavioural characteristics should be implemented neutrally, so as not to act as proxies for characteristics such as ethnicity and religion.¹⁸⁸ Pursuant to that aim, law enforcement agencies should develop clear criteria establishing which characteristics personnel may employ, and in what context, when carrying out profiling as a part of counter-terrorism efforts, and pursuant to the requirements established above.
- Law enforcement personnel should be trained on the lawful use of profiling practices. Training sessions should highlight which criteria can legally be used and should specifically address implications for human rights and non-discrimination.¹⁸⁹ In particular, training should be provided on avoiding gender-based discrimination and gender stereotyping in counter-terrorism investigations. Such training is integral to combating gender-based discrimination as it may occur as the result of entrenched and unconscious gender bias and stereotyping. As noted by the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, training helps to educate relevant actors on anti-discrimination law and unconscious biases, to raise awareness on the prevalence and consequences of discrimination and to identify methods for increasing trust between various stakeholders.¹⁹⁰
- Finally, independent systems of oversight should be established in order to ensure that those who profile on the basis of unlawful grounds are held accountable.¹⁹¹

FURTHER READING

- For a broader discussion of the human rights implications of special investigative techniques, see UNODC, *Counter-Terrorism Legal Training Curriculum: Module 4 – Human Rights and Criminal Justice Responses to Terrorism* (Vienna, 2014), pp. 88–102.

On search powers:

- Human Rights Committee, general comment No. 16 (1988) on the right to privacy (HRI/GEN/1/Rev.9 (Vol. I)), chap. II.
- Counter-Terrorism Implementation Task Force, *Basic Human Rights Reference Guide: The Stopping and Searching of Persons in the Context of Countering Terrorism*, updated 2nd ed. (New York, March 2014) (see, in particular, paragraph 34 on profiling practices).
- OHCHR and International Bar Association, “Human rights in the administration of justice: a manual on human rights for judges, prosecutors and lawyers”, chap. 13.

On electronic surveillance:

- *Current Practices in Electronic Surveillance in the Investigation of Serious and Organized Crime* (United Nations publication, Sales No. E.09.XI.19).

On special investigative techniques and foreign fighters:

- UNODC, *Foreign Terrorist Fighters: Manual for Judicial Training Institutes South-Eastern Europe* (Vienna, 2017), pp. 48–50.

¹⁸⁸ A/HRC/4/26, para. 60.

¹⁸⁹ Ibid., paras. 56–59.

¹⁹⁰ A/72/287, para. 82; see also European Union Agency for Fundamental Rights, *Fundamental Rights Report 2017*, p. 92.

¹⁹¹ A/HRC/4/26, para. 88.

B. Interviewing victims, witnesses and suspects

Interviewing¹⁹² victims, witnesses and suspects is a major part of investigations in terrorism cases, in particular in cases in which special investigative techniques, advanced forensic capabilities and other advanced technologies are not readily available. The questioning of suspects by law enforcement personnel is a specialist task that requires specific training in order to be performed successfully and in accordance with the highest standards of professionalism.¹⁹³

According to the investigative interviewing model, interviewers must seek to obtain accurate and reliable information in the pursuit of truth; gather all available evidence pertinent to a case before beginning interviews; prepare and plan interviews based on that evidence; maintain a professional, fair and respectful attitude during questioning; establish and maintain a rapport with the interviewee; allow the interviewee to give his or her free and uninterrupted account of the events; use open-ended questions and active listening; scrutinize the interviewee's account and analyse the information obtained against previously available information or evidence.¹⁹⁴

As the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has observed, the use of illegal interviewing tactics are in part based on the erroneous assumption that mistreatment and coercion are necessary to obtain confessions or elicit information. The Special Rapporteur has also noted that, in many countries, detainees are mistreated during the investigations of common crimes as the result of pressure from politicians, supervisors, judges and prosecutors to solve high volumes of cases and inadequate measures of police performance, which can also create perverse incentives for arrests and mistreatment.¹⁹⁵ In cases that cause the greatest alarm in society, such as those involving terrorism, such incentives can be enormous. As a result, such behaviour may manifest itself in the treatment of witnesses or victims who are perceived by investigators to be uncooperative.

In addition to avoiding coercive interviewing methods, investigators must avoid secondary victimization of the persons they deal with in the course of an investigation. The questioning of the victims and witnesses of violence, including sexual violence, caused by terrorist groups brings with it a high risk of secondary victimization.

› FOCUS: SECONDARY VICTIMIZATION

The cause of secondary victimization is not a direct result of the criminal act, but rather a result of how institutions and individuals engage with the victim in responding to the crime.

It may occur when those responsible for criminal justice procedures act without taking into account the perspective of the victim (e.g., as the result of intrusive or inappropriate conduct by police or other criminal justice personnel). In fact, the whole process of a criminal investigation and trial may cause secondary victimization: the investigation, the decision whether or not to prosecute, the trial itself and the sentencing of the offender, and the offender's eventual release.¹⁹⁶ Those risks are compounded by characteristics, including gender, of the victim or witness. For example, in patriarchal societies, owing to power imbalances compounded by gender inequality, male police officers may intentionally or unwittingly intimidate and revictimize female witnesses through aggressive questioning.

¹⁹⁶ UNODC, *Handbook on Justice for Victims: On the Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (1999), p. 9.

¹⁹² The terms "interviewing" and "questioning" are used synonymously here and are preferred to the term "interrogation", which is used in many jurisdictions to denote the questioning of suspects.

¹⁹³ Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (A/71/298), para. 56.

¹⁹⁴ Ibid., para. 48.

¹⁹⁵ Ibid., paras. 9–10; general human rights principles regarding the questioning of terrorism suspects, including the presumption of innocence, the right to remain silent and not to be compelled to testify against oneself or to confess guilt are examined in UNODC, *Counter-Terrorism Legal Training Curriculum: Module 4* (sects. 3.3–3.5).

With regard to violence, and in particular terrorism, approaching the issue with a sensitivity to gender can highlight a number of aspects in which the interviewing situation may differ for female and male victims, witnesses and suspects.

In some societies, women face discrimination in accessing education, and they may lack financial and legal resources. In such circumstances, female interviewees may be more likely than men to be intimidated by the interview situation, or may lack the confidence to speak openly. That sense of intimidation and vulnerability is compounded by their reduced access to legal assistance and redress compared with that available to men. In addition, owing to their lower economic and social status, and lack of or reduced access to education, many women are less aware of their rights.¹⁹⁶

The ability to establish and maintain rapport with the interviewee, and to allow the interviewee to give his or her free account of the events, may vary depending on the gender of interviewer and interviewee.

Male interviewers may create a greater sense of intimidation and vulnerability for female suspects compared with male suspects, in particular in contexts in which women have limited contact with men in public life. Such a situation may also create a perceived threat of sexual abuse for female suspects.

1. Interviewing suspects

When interviewing female terrorism suspects, it is important to note that, although there is a stereotype that women commit acts of terror for more emotional and less logical reasons than men do, women are in fact often driven by similar factors, including ideology, the desire to effect radical societal change, economic drivers, sociopolitical conditions, grief, and real or perceived humiliation.¹⁹⁷

In some cases, however, it may be difficult to separate the involvement of women with terrorist groups into categories of either “forced” or “voluntary” (see chap. 2). Additional considerations need to be taken into account when interviewing female suspects who may themselves have been victims of sexual violence or of trafficking in persons, making it more difficult and/or dangerous for them to cooperate with terrorism investigations. In such circumstances, although the interviewer may be dealing with a suspect, care must be taken to avoid revictimization. Where possible, the interviewers involved in such cases should have undergone training on working with vulnerable witnesses. Such an approach depends in part on the availability of effective victim identification methods, including for victims of trafficking.¹⁹⁸

Interviewers should be aware that female suspects associated with some terrorist groups are also more likely to face gendered social stigma arising from their links to the organization, putting themselves and their children at risk of being isolated and alienated.¹⁹⁹ That situation is likely to render female suspects and witnesses less likely to be forthcoming in the interview and to cooperate with the investigators, unless they can be assured of measures to protect them against stigmatization.

Women held in police custody are at a particular risk of sexual abuse and other forms of violence used to intimidate and coerce suspects into producing information or confessions (see chap. 4, sect. B).

While both male and female suspects are vulnerable to coercive or illegal methods of questioning and interrogation, they are vulnerable in different ways. Whether an interviewing style is coercive and constitutes a violation of the prohibition of cruel, inhuman or degrading treatment depends on the characteristics of the person being interviewed. Some of the factors mentioned above render female interviewees more vulnerable than men; in those cases, the threshold of when an aggressive interviewing style constitutes cruel, inhuman or degrading treatment may be lower.

¹⁹⁶ Penal Reform International and Association for the Prevention of Torture, *Women in Detention: A Guide to Gender-Sensitive Monitoring*, 2nd ed. (London, 2015), p. 9.

¹⁹⁷ Chowdhury Fink, Barakat and Shetret, “The roles of women in terrorism, conflict, and violent extremism”, p. 3.

¹⁹⁸ UNODC, *Anti-Human Trafficking Manual for Criminal Justice Practitioners: Module 8 – Interviewing Victims of Trafficking in Persons Who Are Potential Witnesses* (Vienna, 2009), p. 20.

¹⁹⁹ “Nigeria: women and the Boko Haram insurgency”, p. ii.

While it is recognized that the interviewing of female suspects by male personnel may have a dynamic of intimidation through the implicit threat of physical and sexual violence, gender-related tactics and gender bias have also been used against male terrorism suspects. In some countries, military and law enforcement personnel have degraded male suspects and detainees by exploiting perceived notions of male Muslim homophobia through the forced piling of naked male detainees and forced homosexual acts. In addition, attempts have been made to induce feelings of emasculation by forcing detainees to be naked or to wear women's underwear.²⁰⁰ Furthermore, the selection of male or female personnel may also carry gendered implications. Male personnel may be used to heighten the power imbalance and the humiliation caused by acts of sexual violence, while female personnel may use techniques to target the suspect's masculinity, seeking to evoke feelings of emasculation in detainees or suspected terrorists.²⁰¹

› FOCUS: ACCESS TO COUNSEL FOR TERRORISM SUSPECTS

The right to legal counsel of those suspected or accused of terrorism offences is a fundamental right in criminal proceedings, and is an essential component of the right to a fair trial and of access to justice. The right to counsel should be observed during all stages of criminal prosecution, including during the preliminary investigations where evidence is taken, meaning that suspects should have the right to have a lawyer present from the first interview with investigators.

Measures to strengthen women's access to counsel in contexts of imprisonment and other forms of deprivation of liberty are discussed in chapter 4 of the present publication. Gender considerations in improving access to justice, applicable to both victims and those accused or convicted of terrorism offences, are considered further in chapter 4.

2. Interviewing victims and witnesses

Treating witnesses with consideration, respect for human rights and in a gender-sensitive manner is required by international human rights standards. Such treatment has the added benefit of encouraging witnesses to come forward, provide information and cooperate throughout the investigative and prosecutorial process.

A fundamental principle is to do no harm. To adopt that approach means recognizing that many witnesses in terrorism cases are testifying about events that had a significantly negative and often traumatic impact on their lives and their communities, including the loss of loved ones or seeing them injured. Almost all witnesses suffer some degree of stress during or after their involvement in an investigation and prosecution of a terrorism case. That stress can be caused by the formal nature and particular demands of the proceedings, which are unfamiliar to most witnesses, and by the importance of the process. A female witness is likely to experience greater stress when the roles of women in the public sphere are restricted in her country, or in environments in which women are disadvantaged in terms of education and legal and economic status.

(i) General considerations

Victims and witnesses are likely to be more confident and helpful if they are assured of their safety prior to interviews or testimony. Failure to adequately protect victims and witnesses – or assure them of protection prior to, during, and after interviewing – may adversely affect the quality and quantity of evidence that is obtained, in particular in the case of female victims and witnesses, who may be at greater risk of reprisal (see also section C of the present chapter).

²⁰⁰ A/64/211, para. 44.

²⁰¹ Ibid., para. 45.

Investigators must also ensure that they supplement all witness and victim testimony with physical documentation of injuries or trauma, where available. At the same time, investigators should be mindful that the lack of availability of such evidence does not mean that the account of the witness is unfounded.

A key strategy for reducing the negative psychological (and possibly social) impact of being a witness and the risk of secondary victimization is to reduce the number of interviews a witness has to undergo. Careful preparation, including ensuring officer continuity, and recording of the interview will help to reduce the likelihood that the witness will have to be interviewed a second time by the investigators. For the reasons discussed above, such careful and thorough planning may be particularly important for female witnesses and victims of sexual violence.

Because of the complexity of terrorism cases, considerable time may elapse between the first time the investigators and the witness meet and the day the witness is required to give evidence at trial. A long waiting period increases the risk that the suspect and his or her associates will seek to unduly influence the witness. Prosecutors may explore legal means to obtain testimony from witnesses during the investigation and pretrial stages in a form that makes subsequent appearances at trial unnecessary, while respecting the defendant's right to examine witnesses against him.

›EXAMPLE: EXPEDITED VICTIM AND WITNESS TESTIMONY AT THE INTERNATIONAL CRIMINAL COURT

Pursuant to article 56 of the Rome Statute, the Pretrial Chamber of the International Criminal Court, upon request of the prosecutor, may decide to take testimony or a statement from a witness or examine, collect or test evidence which may not be available subsequently for the purposes of a trial. In such a case, the Chamber may take such measures as may be necessary to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defence.

In the case of *Prosecutor v. Dominic Ongwen*, the article 56 provision was successfully used to admit the testimony, obtained prior to the trial and played in the courtroom using a video link, of a number of victim-witnesses who had been subjected to pressure that might have impacted both their willingness to testify at trial and the content of the testimony. According to the charges against Ongwen, the witnesses were victims of sexual and gender-based crimes, including forced marriage, rape, sexual slavery and enslavement, among other crimes. The prosecution's application for such measures included the following arguments:

- *Possible witness intimidation/tampering.* The prosecution adduced an incident which, as they persuasively argued, constituted an attempt to intimidate the witnesses and might have resulted in witnesses being unwilling or unable to testify before the Court.
- *Ongoing societal pressures.* Recurring, similar attempts to dissuade witnesses from testifying or persuade them to change their testimony before the trial would increase the unwillingness of witnesses to testify.
- *Avoiding secondary victimization.* The prolonged delay between making a complaint of a crime involving sexual and gender-based violence and the eventual trial might in itself cause psychological harm or other distress to victims who are already likely to have been harmed by their abduction and treatment, a fact which would make the testimony of such witnesses at the eventual trial less likely to be complete and reliable.^a

Similar provisions exist in numerous national jurisdictions. In the case of victims of crimes involving sexual and gender-based violence, section 165 of the Austrian Code of Criminal Procedure permits the use of video testimony that has been given prior to trial, upon request of the victim or prosecutor. The Code of Criminal Procedure of the Netherlands also provides for testimony in advance on the grounds that, inter alia, the health or well-being of a witness will be endangered by in-court testimony.

In applying such provisions, great care must be taken not to unduly limit the right of accused individuals to prepare their defence and examine witnesses against them.

^aSee International Criminal Court, *Prosecutor v. Dominic Ongwen*, public redacted version of "Prosecution application for the Pre-Trial Chamber to preserve evidence and take measures under article 56 of the Rome Statute", 26 June 2015, ICC-02/04-01/15-256-Conf, case No. ICC-02/04-01/15-256-Red, 27 May 2016, para. 12; and *Prosecutor v. Dominic Ongwen*, "Decision on request to admit evidence preserved under article 56 of the Statute", case No. ICC-02/04-01/15-520, 10 August 2016.

(ii) Gender-specific considerations

Female victims and witnesses may require a greater level of physical and emotional safety before being able to cooperate fully. In the case of witnesses who are also victims, the presence of a psychologist or other mental health professional can be conducive to healthy and effective questioning.

Investigators should take into account the wishes of the interviewee to be interviewed by a person of the same gender, or to have a person of the same gender present when being interviewed.

(iii) Interviewing victims and witnesses of crimes involving sexual and gender-based violence

If not conducted correctly and in a sensitive manner, interviews of victims and witnesses of crimes involving sexual and gender-based violence may cause them to be retraumatized, place them at risk and compromise the reliability of the information provided. In addition to the general considerations of gender-sensitive interviewing listed above, interviewers should be sensitive to the following factors when interviewing victims and witnesses, in particular of crimes involving sexual and gender-based violence:

- *Location.* Interviews should not be conducted in public areas where privacy cannot be guaranteed or in the presence of others who could influence the interviewee, including other witnesses or victims, and other law enforcement officials who are not required to be present for the interview.
- *Individuals present at the interview.* Whenever possible, the preference of the victim or witness regarding the sex of the interviewer should be accommodated. Consider allowing the presence of support persons or friends during the interview, when requested by the witness.
- *Adopt a trauma-sensitive approach.* Retrieve any prior statements given by the victim or witness so as not to unnecessarily require the interviewee to recount traumatic experiences. Interviewers should remain conscious of the interviewee's emotional and physical needs by observing signs of distress and post-traumatic stress disorder, and should be prepared to provide information on or referrals to support services. It is also necessary to keep in mind that victims and witnesses may have difficulty responding to questioning if discussing sexual violence, if the use of certain terminology may be taboo, or if being a victim of sexual and gender-based violence could result in stigmatization.
- *Consent of the victim.* Interviewers should always obtain the informed consent of the interviewees, including consent for the interview, the use of recording devices, the taking of photographs, the conducting of physical examinations, possible subsequent uses of the information obtained and evidence collected, and the transfer of information to third parties if relevant, including other investigating agencies and the courts.²⁰² It is also required that victims and witnesses (but not suspects) be informed that they can withdraw consent and request to suspend the interview.
- *Content of questioning.* It is important to ask questions to obtain information that may be relevant in establishing the elements of crimes involving sexual and gender-based violence (see chap. 5, sect. B).
- *Use of interpreters.* Ensure that interpreters used in interviews are: (a) appropriately trained in working with victims and witnesses of sexual and gender-based violence; (b) sensitive to the cultural, religious and social context; and (c) comfortable with using the terminology of sexual and gender-based violence, in order to ensure that their personal views or discomfort do not affect interpretation.²⁰³ Whenever possible, both male and female interpreters should be available.

²⁰² United Kingdom, Foreign and Commonwealth Office, *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: Best Practices on the Documentation of Sexual Violence as a Crime or Violation of International Law*, 2nd ed. (London, 2017), annex 2.

²⁰³ *Ibid.*, p. 135.

The following measures can improve the integration of a gender perspective into the interviewing of suspects, witnesses and victims:

- Training all law enforcement officers and counter-terrorism practitioners on gender-sensitive interviewing techniques is necessary to raise awareness of the different needs and experiences of male and female interviewees. In addition, the recruitment, retention and training of female law enforcement officers and counter-terrorism practitioners is vital to ensuring that gender-sensitive interviewing practices can be implemented for female interviewees who request a female interviewer. In any case, the assessment of suitable interviewers should take into account cultural norms, gender roles and the sensitivity of disclosure for female and male survivors.
- Trained personnel should be present across the spectrum of national bodies involved in counter-terrorism investigations and not only in, for example, the sexual crimes division of law enforcement agencies.
- Expertise on gender-sensitive interviewing practices should be shared within and between authorities addressing terrorism crimes and also gender-based crimes.
- Training sessions could also be provided to sensitize personnel to intersecting issues – including the interaction of gender with social, cultural and religious factors – and discrimination, such as on the basis of race, ethnicity, religion and nationality.
- The presence of a psychologist or other mental health professional may be required during the interview process if the interviewee has experienced trauma. Interviewing authorities should also be prepared to refer to such professionals for follow-up care, if needed.

FURTHER READING

- The UNODC *Handbook on Effective Prosecution Responses to Violence against Women and Girls* provides advice on interviewing female victims, protecting and supporting them throughout the criminal justice process and preparing them for trial.
- UNODC, *Anti-Human Trafficking Manual for Criminal Justice Practitioners: Module 8 – Interviewing Victims of Trafficking in Persons Who are Potential Witnesses* (Vienna, 2009).
- Chapter 11 of the *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict* (2nd edition, 2017) provides comprehensive guidance on many aspects of interviewing victims of crime involving sexual and gender-based violence, including the location and structure of the interview, the use of interpreters and questioning techniques.

C. Witness protection

It is essential that victims and witnesses who interact with the justice process regarding terrorism crimes have confidence that their safety and security will be assured. It is likewise vital to support them and protect them from the intimidation and harm that others may seek to cause in order to discourage them from testifying, silence them or prevent them from otherwise contributing to the collection of evidence.

The State maintains the primary responsibility to protect the rights of all persons within its jurisdiction and ensure that victims and witnesses who engage in accountability processes for serious crimes and gross violations of human rights receive adequate support and protective measures. The Human Rights Council stated that the right to an effective remedy, as outlined in article 2 of the International Covenant on Civil and Political Rights, required the effective investigation and

punishment of the perpetrators, which provided a strong basis for the State to effectively protect witnesses.²⁰⁴ In addition, the Council noted that the protection of the life, physical and psychological integrity, privacy and reputation of those who agree to testify before courts was essential under the relevant provisions in the Covenant.²⁰⁵ In order to achieve those goals, a gender-sensitive assessment of the vulnerability and protection needs of victims and witnesses is fundamental and should be completed at the very beginning of criminal investigations in terrorism cases. Such an assessment should take into account the age, disabilities, and socioeconomic and cultural background of the individual.

› FOCUS: VICTIM AND WITNESS PROTECTION MEASURES IN INTERNATIONAL INSTRUMENTS

The obligation to protect victims and witnesses in the criminal justice system is also enshrined in other international human rights instruments, including the following:

- Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power^a
- Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment^b
- Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law^c (also a key component of the fight against impunity)^d

The United Nations Convention against Transnational Organized Crime also contains a number of obligations concerning the protection of witnesses (art. 24) and victims (art. 25). Those articles include measures for the physical protection of witnesses and their relatives and for alternative means of giving testimony, including video links, to ensure the safety of witnesses. In the case of victims, the Convention includes measures to protect against threats of retaliation or intimidation. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, requires States to consider the gender and special needs of victims of trafficking in persons when implementing their victim protection obligations under the Protocol.^e

A number of documents of the Global Counterterrorism Forum include specific recognition of the importance of witness and victim protection within the context of counter-terrorism, including the Rabat Memorandum on Good Practices for Effective Counterterrorism Practice in the Criminal Justice Sector (good practice 1), the Hague Memorandum on Good Practices for the Judiciary in Adjudicating Terrorism Offenses (good practice 4), and the Good Practices on Women and Countering Violent Extremism (good practice 21).

^aGeneral Assembly resolution 40/34, annex, para. 6 (d).

^bGeneral Assembly resolution 55/89, annex, para. 3 (b).

^cGeneral Assembly resolution 60/147, annex, para. 5.

^dSee E/CN.4/Sub.2/1997/20/Rev.1, annex II.

^eArticle 6 of the Trafficking in Persons Protocol. The UNODC *Toolkit to Combat Trafficking in Persons* provides information and guidance on the support and protection of victims of trafficking, including victims of gender-based violence.

The term “protection” in this context refers both to measures taken to prevent placing a cooperating person at risk (preventive) and to measures taken when such a person faces a threat or is subjected to reprisals (response).²⁰⁶ Such measures are aimed at:

- Minimizing the security risks facing victims and witnesses, while acknowledging that it may be impossible to eliminate those risks;

²⁰⁴A/HRC/12/19, para. 34.

²⁰⁵Ibid.

²⁰⁶OHCHR, *Manual on Human Rights Monitoring: Chapter 14 – Protection of Victims, Witnesses and Other Cooperating Persons* (HR/P/PT/7/Rev.1), p. 5.

- Reducing the trauma that may arise in the process of giving testimony and ensuring psychological well-being;
- Ensuring respect for the dignity and privacy of victims and witnesses.²⁰⁷

An important caveat to make, with specific regard to terrorist offences, is that “witness protection” and “victim protection” should not be confused with one another. Witnesses are not always necessarily victims. Not all victims can contribute to the production of incriminating evidence.²⁰⁸

While much of what is said in the subsections that follow can be applied to both victims and witnesses (and victim-witnesses), the specific focus is on witness protection. Chapter 4 deals with the provision of support to victims.

1. Fundamental principles for gender-sensitive witness protection measures

The increasing number of ways in which women are associated with and affected by the activities of terrorist groups, including as victims of crimes that specifically target women, demand that counter-terrorism investigators, prosecutors and judges pay attention to the rights and specific needs of female witnesses, in particular in assessing the threats faced by witnesses and in responding to those threats.

There are a number of important principles that need to be adhered to in order to ensure the efficacy of gender-sensitive witness protection programmes.

(i) Early determination of vulnerability and follow-up throughout involvement

An early determination of the levels of vulnerability and the capacities of female witnesses is critical to providing adequate support and protection throughout their involvement with the justice process. Effective protection of witnesses in many cases requires that measures be taken from the start of the investigation, when a witness first enters into contact with the investigators, and throughout the pretrial process. That approach is vital in the case of female witnesses who become involved in criminal investigations as a result of their relationships with suspects or suspect organizations, since they are at particular risk of being identified as assisting the authorities. The Office of the United Nations High Commissioner for Human Rights noted the following:

Measures taken during the first stages of investigation play a crucial role for the protection of witnesses. Failure to adopt effective measures to protect witnesses at the investigative stage and in prosecutorial arrangements, and thereby give them reason to trust that their safety will be ensured during the process, may result in many cases against perpetrators of human rights never reaching trial stage ... The effectiveness of witness protection methods should be ensured through the provision of adequate financial, technical and political support for programmes at the national level.²⁰⁹

Introducing protection measures at the investigation stage, including safeguarding against the disclosure of identities when investigative authorities are identifying potential witnesses, can increase both the likelihood of obtaining testimony at trial without requiring formal witness protection programmes and the willingness of witnesses to testify.²¹⁰

²⁰⁷ See, for example, General Assembly resolution 40/34, annex, para. 6 (d).

²⁰⁸ UNODC, *The Criminal Justice Response to Support Victims of Acts of Terrorism*, revised edition (2012), para. 228.

²⁰⁹ See A/HRC/15/33, paras. 66 and 71.

²¹⁰ Ibid., para. 20.

In addition to assessing the vulnerability of female witnesses, counter-terrorism investigators, prosecutors and judges should also consider the protection needs of the spouses and family members of male witnesses, who may face threats of reprisals. The absence of effective protection measures at an early stage, at which time the risk to family members is high, may deter witnesses from testifying in criminal proceedings.

Witness protection efforts during investigations may include:

- Consideration of how the investigators will initially approach the witness, taking into account that public association with authorities may put their security at risk and increase the risk of ostracism. Making contact may be particularly challenging in societies in which: (a) the presence of women in the public sphere, or the freedom of movement of women, is limited; (b) the interaction of women with men or public officials would come under heightened scrutiny; and (c) investigators are easily identified;
- Ensuring that witnesses are contacted in secure and confidential ways;²¹¹
- Undertaking an early vulnerability assessment, taking into consideration the physical and psychological state of the witness and their individual circumstances, such as age, gender, the nature of the crimes they witnessed or were a victim of, and their family circumstances;
- Undertaking a gender-sensitive risk assessment to determine the likelihood of the witness being put in physical danger, and implementing measures to reduce such a risk;
- Assessing whether psychosocial support is needed at an early stage (before interviews commence), which will be particularly relevant in many terrorism cases, in which victims and witnesses have suffered severe trauma or sexual and gender-based violence.

(ii) Confidentiality

Confidentiality is among the first and most critical tools for witness protection; aside from its importance in minimizing the physical risk to witnesses, it is also a key condition in ensuring the psychological protection of vulnerable witnesses. It covers the identity of the cooperating individual, the information provided, and the protection measures that have been applied.

In some contexts, women associated with terrorist groups face greater stigma and discrimination in their communities than men do, even if they were coerced into the group. That stigma may make them more reluctant to act as witnesses, and as a result, additional measures to protect their privacy and reputation are required for them to agree to cooperate with the justice system and testify.

(iii) Protection and support at the pretrial and trial stages

Protection measures by way of procedural orders at the pretrial and trial stages are generally subject to a formal application to the court justifying the basis for and nature of the measures sought. When considering the application of procedural measures, courts generally take into account the following factors:

- Nature of the crime (organized crime, sexual crime, family crime, etc.)
- Type of witness (victim of sexual assault, co-defendant, etc.)
- Relationship with the defendant (relative, defendant's subordinate in a criminal organization, etc.)
- Degree of fear and stress of the witness
- Importance of the testimony²¹²

²¹¹ OSCE, *Investigation Manual for War Crimes, Crimes against Humanity and Genocide in Bosnia and Herzegovina* (2013), p. 287.

²¹² UNODC, *Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime* (Vienna, 2008), p. 32.

Many witnesses require some level of support to assist them in testifying. For some, providing information on how the process works is sufficient, while others require extensive assistance and support throughout their involvement in the judicial process. Compared with men, women in some societies are rarely in contact with the justice system. In such cases, the need for information and support for female witnesses may be greater. A gender-sensitive approach to witness support should also take into account childcare responsibilities, obstacles to access to transport, and gendered repercussions for leaving paid work or family responsibilities and the home. Cooperation with the witness, including the provision of support and protection, should not be started if the required follow-up cannot be provided.

› FOCUS: FORMS OF PROCEDURAL PROTECTION MEASURES

The UNODC handbook entitled *The Criminal Justice Response to Support Victims of Acts of Terrorism* provides three general categories of procedural protection measures for victims and witnesses, noting that those measures vary to a great extent, and can be applied cumulatively:

- (a) Measures to reduce fear by avoiding face-to-face confrontation with the defendant, including the following measures:
 - (i) Use of pretrial statements (either written or recorded audio or audiovisual statements) as an alternative to in-court testimony;
 - (ii) Removal of the defendant from the courtroom;
 - (iii) Testimony via closed-circuit television or audiovisual links, such as videoconferencing;
- (b) Measures to make it difficult or impossible for the defendant to trace the identity of the witness, including the following measures:
 - (i) Shielded testimony through the use of a screen, curtain or two-way mirror;
 - (ii) Anonymous testimony;
- (c) Measures to limit the witness' exposure to the public and to psychological stress:
 - (i) Change of the trial venue or hearing date;
 - (ii) Removal of the public from the courtroom (in camera session);
 - (iii) Presence of an accompanying person as support for the witness.

(iv) Post-trial phase

While it may be the case that protective measures are no longer required following conclusion of the trial, it should not be assumed. Threat and risk assessments should be conducted to establish whether long-term support is needed, in particular if female witnesses have children who may be at risk without ongoing support and protection.

(v) Staffing requirements and training

As with interviewing procedures, all staff dealing with support and protection of vulnerable witnesses need to understand the concept of vulnerability and should be trained to be sensitive to the needs of witnesses, including needs that are gender-specific, and to respond to them.

Despite those observations, experience has shown that national authorities must pay due regard to the needs expressed by the witness, keeping in mind that instituting protective measures against the

will of the witness may be ineffective.²¹³ Moreover, it is stressed in the updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice that where the safety of the victim cannot be guaranteed, refusing to testify should not constitute a criminal or other offence.²¹⁴

2. Witness protection programmes

Formal witness protection programmes safeguard both the personal security of the witness and those close to them, as well as the integrity of the criminal investigation and trial. Programmes may include witness relocation, the provision of new identity documents, and limitations on disclosure of information about the witness. The form and duration of programmes is dictated by the resources available and the requirements of the investigation and the court proceedings. In some cases, such a programme may begin during the investigation phase and continue even after the trial, based on a continuing assessment of the threat to the witness.

UNODC published the *Guidance Note for UNODC Staff: Gender Mainstreaming in the Work of UNODC*, in which it made the following observation with regard to witness protection programmes in the context of organized crime proceedings (although they are equally applicable to proceedings concerning terrorism offences):

Appreciating how gender differences play out in obtaining the cooperation and compliance of protected witnesses can contribute to an effective investigation and prosecution of organized crime. A successful formal witness protection programme is designed to provide a full range of physical protection and psychological support to both male and female witnesses. Understanding the gender differences in populations of justice collaborators, victim-witnesses or other types of witnesses (innocent bystanders or expert witnesses), the gendered nature of the crime involved, how women and men experience the administrative process, whether there are gender differences in applying the requirements for admissibility into the programme, and whether the assessment considers the witness' family situation and the different roles men and women have in families are important factors when designing your programme. In some countries, women have a subordinate role in family decision-making processes. There might be situations where a female witness' decision to enter into a witness protection programme will require the agreement of her husband or father and be seen as a household decision rather than an individual decision.²¹⁵

Women may also face additional difficulties if their effective protection requires them to be (at least temporarily) removed from home and community, either by being hosted in a safe house or relocated to a different town or region. A woman's role as the primary caregiver in the family may limit her ability or willingness to leave the home, especially if there are vulnerable dependants. As already stated, in some societies, women may require the consent of male relatives or extended family before entering a protection programme.²¹⁶ In addition, fewer opportunities to find employment may limit a woman's ability and willingness to relocate as part of such a programme. In some jurisdictions, women not only struggle with increased vulnerability but their testimony is given lesser weight than the testimony of men. Given the reduced value to the prosecution of the testimony of women, their ability to participate in witness protection programmes may be limited.

²¹³ UNODC, *The Criminal Justice Response to Support Victims of Acts of Terrorism*, para. 228.

²¹⁴ General Assembly resolution 65/228, annex, para. 15 (c).

²¹⁵ UNODC, *Guidance Note for UNODC Staff: Gender Mainstreaming in the Work of UNODC* (Vienna, 2013), p. 48.

²¹⁶ *Ibid.*, p. 28.

3. Witness protection in cases involving sexual and gender-based violence

Effective witness protection measures are particularly important in investigating and prosecuting gender-based crimes, which are often associated with a societal pressure to remain silent or a risk of stigmatization and ostracism. Thus, in addition to considerations regarding exposure to serious danger, witness protection measures should also address low-level threats and community-wide forms of intimidation.

It is important to keep in mind that the ability of women to testify in relation to crimes involving sexual and gender-based violence might be impaired. They may face spousal, family or societal pressure not to testify, especially if they are victims of sexual violence, owing to related stigma and “honour” crimes. As highlighted in the report of the Secretary-General on conflict-related sexual violence, the stigma surrounding sexual violence has led to lethal retaliation, honour crimes against the victim and even economic exclusion and indignity.²¹⁷

Measures protecting the identities of witnesses may be particularly useful in mitigating the risk of being retraumatized or ostracized at a community level, and may increase the willingness of witnesses to cooperate throughout the investigation and prosecution process.

The provision of specialized support and protection services is integral to witness participation in criminal accountability processes and, therefore, to the successful prosecution of perpetrators. Survivors who are prevented from disclosing their abuses owing to safety concerns and a lack of available services have been found to suffer higher rates of post-traumatic stress and depression.²¹⁸ For those reasons, it is imperative that witnesses are treated with dignity and in a gender-sensitive manner, and that their safety is prioritized at all stages of the investigation as well as before, during and after the trial.

The national legal framework should also provide for special measures to be applied to victims and witnesses of crimes involving sexual and gender-based violence, which may mandate the witness protection agency to engage specialized personnel and establish specific procedural measures for vulnerable witnesses.²¹⁹

When conducting risk or threat assessments for victims and witnesses of crimes involving sexual and gender-based violence, the following questions may be relevant to consider:

- What are the historical patterns and current levels of sexual and gender-based violence in the country and/or community, and has the individual previously been a victim of such violence?
- Are there other conditions that could aggravate the vulnerability of the individual?
- Is the status of the individual as a victim or witness of sexual and gender-based violence a matter of public knowledge?
- Are there concerns about the safety of the individual in their family setting?
- Have there been previous occurrences of retaliatory attacks against victims and witnesses of crimes involving sexual and gender-based violence in the country and/or community?
- What is the level of influence of suspected perpetrators on the witnesses or their families?²²⁰

²¹⁷S/2017/249, para. 10.

²¹⁸S/2017/249, para. 10.

²¹⁹A/HRC/15/33, para. 62.

²²⁰International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, annex 2, p. xiii.

In addition to the general procedural protection measures discussed above, States may also consider the following in-court measures for witness testimony:²²¹

- *Procedural measures.* Prohibiting or limiting questions about the prior or subsequent sexual conduct of the witness; requiring corroboration of witness testimony only if required by domestic law; allowing the inference of non-consent when coercive circumstances have been established.
- *Witness support measures.* Limiting the frequency, manner and length of questioning; conducting the examination of the witness through an intermediary; and ensuring the availability of psychological and medical treatment and counselling.
- *Victim and witness unit expertise.* The Special Rapporteur on violence against women, its causes and consequences has called upon States to address the specific needs of victims of rape and other forms of sexual violence through the provision of a victim and witness unit that possesses expertise in handling trauma related to sexual violence.²²²

› EXAMPLE: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA AND PROTECTION AND CARE FOR VICTIMS AND WITNESSES OF SEXUAL VIOLENCE

Through its Witness and Victim Support Section, the International Criminal Tribunal for Rwanda provides the following:

- Specialized counselling and medical care to victims of sexual and gender-based violence through partnerships with national authorities and referrals for treatment;
- Impartial assistance and support to all witnesses for both the prosecution and the defence, including psychological counselling and access to medical care.

The Tribunal's Trust Fund made further resources available to hire a trained psychologist, gynaecologist and nurse-psychologist.

Potential witnesses for the prosecution received additional support from the Witness Management Team, located in the Office of the Prosecutor, which included licensed nurses trained in the treatment of victims of sexual violence.

Psychological care and counselling services were also made available to spouses or partners of sexual violence victims in order to enable them to provide more support to the victim and to assist in coping with secondary trauma.⁴

⁴International Criminal Tribunal for Rwanda, *Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions: Lessons Learned from the Office of the Prosecutor for the International Criminal Tribunal for Rwanda* (2014).

FURTHER READING

- UNODC produced a guide entitled *Good Practices for the Protection of Witnesses in Criminal Proceedings involving Organized Crime*, which is focused on investigations and prosecutions related to organized crime. The practices contained in that guide are also relevant to witnesses (and victim-witnesses) in criminal investigations and prosecutions related to terrorism.
- UNODC, *Counter-Terrorism Legal Training Curriculum: Module 4 – Human Rights and Criminal Justice Responses to Terrorism* (Vienna, 2014), pp. 157 – 160, includes a discussion on the relationship between witness protection measures and the accused person's right to a fair trial.

²²¹UNODC, *Handbook on Effective Prosecution Responses to Violence against Women and Girls*, Criminal Justice Handbook Series (Vienna, 2014), p. 119.

²²²E/CN.4/2002/83/Add.2 and E/CN.4/2005/72/Add.3.

- Updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention (General Assembly resolution 65/228, annex).
- OHCHR, *Manual on Human Rights Monitoring: Chapter 14 – Protection of Victims, Witnesses and Other Cooperating Persons* (HR/P/PT/7/Rev.1).
- Information on the extensive witness protection arrangements available at the International Criminal Court is discussed in the following report: International Bar Association, “Witnesses before the International Criminal Court: an International Bar Association International Criminal Court programme report on the ICC’s efforts and challenges to protect, support and ensure the rights of witnesses” (London, 2013).
- International Criminal Tribunal for Rwanda, *Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions: Lessons Learned from the Office of the Prosecutor for the International Criminal Tribunal for Rwanda* (2014).
- Recommendations No. R(97)13 concerning intimidation of witnesses and the rights of the defence and Rec(2005)9 on the protection of witnesses and collaborators of justice, adopted by the Committee of Ministers of the Council of Europe, provide useful guidance for the protection of the physical and psychological integrity of the victims.
- United Kingdom, Foreign and Commonwealth Office, *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: Best Practice on the Documentation of Sexual Violence as a Crime or Violation of International Law*, 2nd ed. (London, 2017), annex 2.

D. Strengthening women’s representation in law enforcement and the judicial system

In order to put into practice the principles considered in the present chapter, law enforcement agencies and judicial systems must provide training on techniques for gender-sensitive investigations and prosecutions to all personnel, both women and men.²²³

Operationalizing these principles and mainstreaming gender in law enforcement activities in terrorism cases also requires the effective representation of women, which should include those from underrepresented and minority ethnic, racial and religious groups; in law enforcement institutions; and in the judicial system.²²⁴ Such representation is reflected in recruitment, retention and advancement of women at all levels.

1. Women’s representation in law enforcement

(i) The rationale behind strengthening women’s participation in law enforcement

The increased participation of women is integral to achieving law enforcement bodies that are non-discriminatory, representative of the population and capable of effectively responding to the specific security needs of diverse groups.²²⁵ An improved gender balance has the following benefits:

- It capitalizes on the expertise, skill sets and perspectives of both male and female personnel in order to maximize operational effectiveness. Women tend to bring certain strengths to law enforcement work, such as the ability to defuse potentially violent situations, minimize the use of force and employ good communication skills.²²⁶

²²³ Beijing Declaration and Platform for Action (*Report of the Fourth World Conference on Women, Beijing, 4–15 September 1995* (United Nations publication, Sales No. E.96.IV.13), chap. I, resolution 1, annexes I and II), para. 124 (g).

²²⁴ See general recommendation No. 23 (1997) on women in political and public life (HRI/GEN/1/Rev.9 (Vol. II)), paras. 17 and 43.

²²⁵ A/62/659-S/2008/39, para. 37.

²²⁶ OSCE, “Gender and security sector reform toolkit: practice note 2”, 13 February 2008.

- It increases access by all members of the community to law enforcement services and ensures that women are also engaged at the community level.²²⁷
- It enhances the ability of law enforcement services to build trust at the community level and address security concerns that emerge in counter-terrorism contexts. Such efforts include responding to the needs of women who may be particularly affected by terrorist and counter-terrorism activities.
- It reduces discriminatory attitudes in law enforcement agencies that may prevent individuals from reporting certain crimes, such as those involving sexual and gender-based violence.²²⁸

Women's participation in law enforcement is also operationally necessary, as they may be better suited to carry out certain tasks as compared with their male counterparts. In some contexts, as identified earlier in the chapter, women may in fact be required to conduct certain tasks, including the following:

- Screening female terrorism suspects
- Executing certain intelligence-gathering functions
- Performing stop and searches of women, or search and seizures of dwellings where gender segregation is observed
- Investigating offences related to sexual and gender-based violence: women may be more comfortable reporting incidents of sexual and gender-based violence to a female police officer and, as highlighted above, it is a good practice for female law enforcement personnel to be present during investigations into such offences
- Interviewing female witnesses who express discomfort speaking to male personnel or a preference for speaking with a woman

It is therefore both beneficial and necessary to pursue a greater integration of women in law enforcement work generally, and in units which deal with crimes that particularly affect women (e.g., sex crime units). Strengthening the participation of women in law enforcement units that deal with the most serious forms of crime is especially important as a means of bringing unique strengths and a gender perspective to the investigation of terrorist crimes which, as discussed, affect men and women differently. The strengthening of the participation of women is therefore aimed at maximizing operational effectiveness and ensuring shared expertise and skill sets.

› EXAMPLE: PROJECT OF THE ORGANIZATION FOR SECURITY AND COOPERATION IN EUROPE TO SUPPORT THE ROLE OF FEMALE POLICE OFFICERS IN KOSOVO^a

In the light of the number of men and women who have travelled from Kosovo to join the ranks of ISIL, in particular during the period 2012–2015, there has been growing recognition in Kosovo of the necessity to establish gender-based initiatives aimed at addressing the differentiated needs, motivations and functions among women and men, in order to prevent terrorism and violent extremism and the radicalization that leads to terrorism.

The OSCE Mission in Kosovo has been working with the Kosovo Police and the Association of Women in Kosovo Police to strengthen the role of women in efforts to prevent terrorism and violent extremism and the radicalization that leads to terrorism. Based on the understanding of the role women play in family and community structures to access youth at risk of radicalization, their project is aimed at enhancing the ability of female police officers to understand, detect and address signs of radicalization towards violent extremism.

²²⁷ Department of Peacekeeping Operations and Department of Field Support, "Guidelines for integrating gender perspectives into the work of United Nations police in peacekeeping missions" (2008), p. 8.

²²⁸ OSCE, "Practice note 2: police reform and gender", p. 2.

A series of training workshops for female police officers were delivered by personnel from the security sector and from gender studies and religious scholars, with a focus on:

- Adopting a gender perspective in police work in order to better understand the different experiences of women and men, girls and boys with radicalization and extremism, and to reflect those experiences in strategies to prevent terrorism and violent extremism and the radicalization that leads to terrorism;
- Building skills of police officers in psychology and conflict management, in order to improve communications with individuals, including youth at risk of radicalization and victims of violence and abuse;
- Enhancing capacities to address individual cases of radicalization, including alternative online and offline messaging.

The training workshops for police officers were complemented by workshops aimed at empowering women and mothers in the community in their efforts to effectively interact with and influence individuals at risk of radicalization, and to improve communication between parents, elders and religious leaders to promote tolerance within and across communities, with a view to avoiding polarization, prejudice and discrimination.

The female police officers who participated in the training engaged frequently with religious leaders to consult on preventative interventions in individual cases, as well as relevant institutions. As a result, the Department of Women in the Islamic Community made a number of visits to offer assistance and to draw on good practices for future prevention strategies.

^aAll references to Kosovo in the present publication should be understood to be in compliance with Security Council resolution 1244 (1999).

(ii) Challenges

A range of challenges may prevent the representation of women in national law enforcement bodies, including the following:

- Women may be disadvantaged in accessing opportunities for employment with law enforcement owing to certain educational or physical requirements that disproportionately disadvantage women.
- Female recruitment may be difficult in contexts where there is a low level of trust in law enforcement, including where the police have been dismissive towards certain types of gender-based crimes, or where police officers have been the perpetrators of sexual and gender-based violence.
- Pervasive discrimination against and harassment of female personnel may dissuade other women from applying for those roles, and decrease rates of retention and promotion of female officers.
- In cases in which women's participation has conventionally been limited, gender stereotypes may mean that women face barriers to career advancement and are confined to undertaking administrative or low-ranking positions. Training systems necessary for advancement may discriminate against women, particularly in contexts where women are only represented in token numbers.

(iii) Good practices

Specific measures are generally necessary in order to overcome those challenges and improve the participation of women in law enforcement roles. Such measures include overall policies and measures related to recruitment, retention and advancement.

The overall policies are as follows:

- Ensuring that an overarching gender or equal opportunity policy aimed at achieving gender balance is in place.
- Conducting assessments, evaluations and consultations that focus on sex-disaggregated information, including female recruitment, retention and advancement in law enforcement roles, in addition to data on harassment and discrimination, in order to identify priority areas for reform.

- If appropriate, establishing targets for female recruitment and representation in leadership positions.
- Instituting workplace policies that accommodate flexible working hours, maternity and paternity leave.
- Ensuring that there is a gender discrimination, violence and sexual harassment policy; a corresponding complaints mechanism; and an appropriate sanctions system in place, with penalties for lack of enforcement.
- Adopting gender-sensitivity as a criterion for promotion.

Measures for recruitment, retention and advancement are as follows:

- Ensuring that all laws and personnel policies are merit-based, not gender-biased, and do not disproportionately disadvantage women, in particular with regard to recruitment criteria, promotional opportunities and access to training.
- Taking into consideration the use of alternative programmes that enable women to apply for law enforcement roles, in environments in which women are disadvantaged in accessing educational opportunities or face higher rates of illiteracy.
- Ensuring that both women and men are represented on selection and promotion boards.
- Providing support for career advancement, such as a women's mentor programme.²²⁹

› EXAMPLE: GENDER-SENSITIVE LAW ENFORCEMENT REFORM IN LIBERIA

Following the civil conflict, the Liberian National Police embarked on a process of internal reform with the assistance of the United Nations Mission in Liberia that included the following:

- Adopting a gender policy in 2005 aimed at addressing the gender imbalance in the Liberian National Police, promoting gender mainstreaming, increasing women's involvement in decision-making, and developing policies responsive to sexual and gender-based violence;
- Establishing the Women and Children Protection Section and the Gender Affairs Section to implement the policy;
- Integrating gender-sensitive training modules.^a

Two core objectives of those initiatives were to increase female representation in the Liberian National Police and to improve responsiveness to offences related to sexual and gender-based violence.

As a result of those efforts, the percentage of female officers in the Liberian National Police rose from 2 to 17 per cent between 2003 and 2013. An educational support programme for female candidates was developed by the United Nations Mission in Liberia and the United Nations Police in order to support female applicants between the ages of 18 and 35, who had completed a certain level of schooling but who had not obtained a high school degree, providing educational support to enable them to apply for positions with the Liberian National Police.^b

^aCecil Griffiths, *Mapping Study on Gender and Security Sector Reform Actors and Activities in Liberia*, Anike Doherty and Aiko Holvikivi, eds. (2011), p. 8.

^bLaura Bacon, "Liberia's gender-sensitive police reform: improving representation and responsiveness in a post-conflict setting", *International Peacekeeping*, vol. 22, No. 4 (2015), pp. 372 and 377.

²²⁹Tara Denham, "Police reform and gender" in *Gender and Security Sector Reform Toolkit*, Megan Bastick and Kristin Valasek, eds. (Geneva, OSCE/Office for Democratic Institutions and Human Rights, Geneva Centre for the Democratic Control of Armed Forces and International Research and Training Institute for the Advancement of Women, 2008), p. 6; and "Guidelines for integrating gender perspectives into the work of United Nations police in peacekeeping missions".

2. Women's representation in the judicial system

(i) The rationale behind strengthening women's participation in the judicial system

In the report of the Secretary-General on women and peace and security, a gender-responsive legal and judicial system is highlighted as one of the key building blocks of a resilient society and in delivering equal justice and equality before the law.²³⁰ A key component of gender-responsiveness is the increased participation of women. In addition:

- Higher numbers and greater visibility of female judicial officers can increase the willingness of women to seek justice and enforce their rights through the courts.
- Female judicial appointments, in particular at senior levels, can shift gender stereotypes, thereby changing attitudes and perceptions as to what are seen to be the conventional roles of men and women.²³¹
- More generally, women's visibility as judicial officers can pave the way for women's greater representation in other decision-making positions, such as in legislative and executive branches of government.

Of course, training for all judicial actors – both male and female – remains the second, equally important, aspect of ensuring that judicial proceedings are gender-sensitive.

(ii) Challenges

A number of obstacles continue to hinder the participation of women in the judicial system, including the following:

- Lack of transparency in the appointment processes of judges, prosecutors and lawyers, including informal consultation processes. Female legal professionals are often not informed about such openings, nor are they properly consulted during the selection process.
- In societies in which the option of a legal career for women is relatively new or restricted, the use of a limited number of criteria that favour years of experience or professional accolades will disadvantage women, unless alternative criteria are provided.
- Women are often restricted to working on “low-profile” cases or in lower courts, or to areas of the law traditionally associated with women, such as family law.²³²
- Appointment systems in which the power of judicial appointment is concentrated in a single person tend to have a negative impact on the inclusion of women.
- Prevailing gender stereotypes, roles and discriminatory patterns of power relations often play a significant role in preventing the full and equal participation of women in the judiciary, and restrict decision-making in public forums.

(iii) Good practices

The following measures can help address and overcome the above-mentioned challenges:

- Implementation of quota systems or affirmative action measures.
- Training programmes on gender discrimination and on gender, racial and cultural sensitivity.

²³⁰S/2017/861, para. 61.

²³¹See International Commission of Jurists, *Women and the Judiciary*, Geneva Forum Series No. 1 (Geneva, 2014), pp. 2–8; general recommendation No. 23 (1997) on women in political and public life (HRI/GEN/1/Rev.9 (Vol. II)); and Canadian Bar Association, *Touchstones for Change: Equality, Diversity and Accountability* (Ottawa, 1993).

²³²Note by the Secretary-General transmitting the interim report of the Special Rapporteur on the independence of judges and lawyers (A/66/289), paras. 23–24.

- Prioritization by Governments and the legal profession of full and equal representation of women within the judiciary.
- Improving the representation of women at senior levels and across different areas of law requires particular scrutiny and oversight of internal systems of judicial assignment and promotion, and is crucial to ensuring that that representation does not fall at more senior levels.

The representation of women does not in itself guarantee the mainstreaming of gender considerations at the law enforcement level or within the judicial system. It does, however, provide an opportunity for greater integration of gender perspectives and for the identification of the different impacts of law enforcement work on men and women. Such measures should complement a range of initiatives, including the following:

- Developing gender-sensitive law enforcement policies and procedures, including specific policies on the investigation, prosecution and support for victims of specific types of crime with gendered dimensions (e.g., trafficking in persons and offences involving sexual and gender-based violence) (see chap. 5).
- Providing training on the integration of gender-sensitive practices for all personnel, including on promoting and respecting women's rights, and interviewing female victims, suspects and witnesses.
- Oversight of law enforcement agencies to ensure compliance with gender-sensitive principles.

FURTHER READING

- United Nations Development Fund for Women (UNIFEM) and United Nations Development Programme (UNDP), "Policy brief paper: gender sensitive police reform in post conflict societies" (New York, 2007).
- The United Nations Department of Peacekeeping Operations and the Department of Field Support of the Secretariat have developed several resources on gender mainstreaming in police operations. The "Guidelines for integrating gender perspectives into the work of United Nations police in peacekeeping missions" provide practical guidance and checklists on issues such as achieving a more equitable composition of the police force, gender training courses and investigations concerning sexual and gender-based violence.
- The Organization for Security and Cooperation in Europe (OSCE) has developed *Understanding Gender and Preventing and Countering Violent Extremism and Radicalization Leading to Terrorism: Good Practices for the Security Sector* (forthcoming), which contains guidance on gender mainstreaming in security sector governance and reform.
- OSCE has also developed the Gender and Security Sector Reform toolkit, which contains best practices and recommendations for strengthening gender perspectives in security sector institutions, ranging from the police, military and judiciary.
- The Geneva Centre for the Democratic Control of Armed Forces has developed a range of materials on best practices in gender-sensitive security sector reform, including the *Gender Self-Assessment Guide for the Police, Armed Forces and Justice Sector*, and *Integrating Gender in Security Sector Reform and Governance* (Tool 8 of the *Toolkit for Security Sector Reform and Governance in West Africa*).

SUMMARY OF KEY POINTS

- Compliance with human rights standards throughout terrorism investigations and respect for the rights of suspects is essential to the effective investigation and prosecution of terrorism cases. Ensuring that investigators do not discriminate on the grounds of gender in the course of investigations is essential.
- Law enforcement personnel should adopt a gender-sensitive approach to terrorism investigations. Such an approach requires taking into account the ways in which aspects of investigations may affect women and men differently, or may be discriminatory. Vital issues to consider in that respect include search powers, special investigative techniques and profiling practices.
- Investigators should consider how to apply gender-sensitive practices when interviewing victims, witnesses and suspects, taking into account gender-specific vulnerabilities. Particular care should be taken when interviewing victims and witnesses of certain types of crime that disproportionately affect women, including offences involving sexual and gender-based violence, which requires particular expertise.
- States have the primary responsibility for ensuring that protective measures are in place for victims and witnesses who engage with justice and accountability processes for serious crimes and gross violations of human rights. Gender-sensitive witness protection measures and programmes should take into account a range of considerations, such as specific family obligations, the gendered nature of the crimes, and gender-based stigma that may be linked to associating with terrorist groups. Specific measures should be in place for victims of crimes involving sexual and gender-based violence.
- Increasing the representation of women, including those from underrepresented and minority ethnic, racial and religious groups, in law enforcement and judicial institutions, is a key way of implementing a gender perspective throughout all aspects of the investigation and prosecution of terrorist crimes, and in delivering equal justice and equality before the law.

bottom: Entrance to a Detention, Rehabilitation and Reintegration Center for Women and Girls in Bamako, Mali. © MINUSMA/Harandane Dicko

centre: © OHCHR/Alejandro Bolivar



IMPRISONMENT AND OTHER FORMS OF DEPRIVATION OF LIBERTY

The deprivation of liberty of persons who are suspected, accused or convicted of having committed terrorism-related offences is one of the key pillars of State criminal justice responses to terrorism. International law prohibits the arbitrary deprivation of liberty and dictates that all persons deprived of their liberty must in all circumstances – including in cases related to preventing and countering terrorism – be treated with due respect for their dignity and human rights. At the same time, there has been increasing recognition of the need to address the gender-specific needs and vulnerabilities of persons deprived of their liberty, particularly women.

The present chapter examines these gender-based vulnerabilities and provides guidance, in accordance with international standards, on developing and implementing gender-sensitive policies and practices concerning deprivation of liberty both within and beyond the criminal justice system. Section A provides an overview of the relevant international legal framework and standards for deprivation of liberty in relation to terrorism offences. Section B contains an examination of gender-sensitive conditions of imprisonment and prison management, including gender-sensitive management of violent extremist prisoners. With respect to violent extremist prisoners in particular, section C includes a discussion of prison-based disengagement, rehabilitation and social reintegration measures that are central to broader efforts to prevent and counter violent extremism.

Section D contains an examination of gender-sensitive considerations that are particularly important for preventing torture and other cruel, inhuman or degrading treatment, including in relation to security and disciplinary measures, health care and hygiene, prison personnel and training, as well as complaints, investigations and oversight mechanisms in relation to allegations of torture and ill-treatment. Section E includes a discussion on the detention of close family members in place of terrorism suspects, which is a practice with clear gender implications that has emerged in the context of counter-terrorism measures in some States. Section F provides a gender perspective on the availability and design of non-custodial measures in terrorism cases, and issues of “protective” custody. Section G contains an examination of the gender dimensions of deprivation of liberty outside the criminal justice system, looking at administrative detention in terrorism cases.

› FOCUS: SCOPE OF THE TERM “DEPRIVATION OF LIBERTY”

Chapter 4 of this publication provides guidance on ensuring gender-sensitive management of those deprived of liberty in connection with terrorism-related offences. The term “deprivation of liberty” encompasses situations in which persons are in police custody, in prison or in administrative detention.

Police custody

This term refers to the initial time that a person is held by the police or other law enforcement institutions, before the person is remanded into custody by court order.

Imprisonment

This term encompasses situations in which persons are in pretrial detention, detained throughout the course of a trial, and imprisoned as the result of a conviction and sentence. The terms “imprisonment” and “prisoner” are used in chapter 4 to refer to all of those situations. The term “detainee” is used when the legal status of a prisoner, who has not yet been convicted and sentenced, needs to be underlined.

Administrative detention

The Working Group on Arbitrary Detention has defined administrative detention as detention of individuals by State authorities outside the criminal law context: for example, for reasons of security, including terrorism, and as a form of preventive detention.^a

^aA/HRC/13/30, para. 77.

A. International legal framework and standards

International and regional human rights treaties, as well as customary international law, oblige all States not to resort to unlawful or arbitrary deprivation of liberty, and prescribe procedural rights and safeguards to prevent unlawful and arbitrary arrest or detention. International law also prohibits torture, inhuman and degrading treatment under all circumstances. Articles 7, 9 and 10 of the International Covenant on Civil and Political Rights are key provisions in this regard. International treaties against terrorism, as well as resolutions of the Security Council and the General Assembly, emphatically establish that these rights also apply to persons deprived of their liberty in relation to terrorism.²³³

The international human rights treaty provisions are supplemented by a substantial body of international standards, including:²³⁴

- The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), adopted by the General Assembly in its resolution 70/175, updating the Rules first adopted in 1955
- The United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), adopted by the Assembly in its resolution 65/229
- The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the Assembly in its resolution 43/173

²³³ For example, article 14 of the International Convention for the Suppression of Terrorist Bombings provides that: Any person who is taken into custody ... pursuant to this Convention shall be guaranteed fair treatment, including of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international law of human rights. On human rights aspects of the detention of terrorist offenders, see UNODC, *Counter-Terrorism Legal Training Curriculum: Module 4*, chap. 4.

²³⁴ Relevant regional standards also exist, including the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, approved by the Inter-American Commission on Human Rights in 2008; the revised European Prison Rules, Recommendation Rec (2006) 2, adopted by the Committee of Ministers of the Council of Europe on 11 January 2006; and the Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (Luanda Guidelines), adopted by the African Commission on Human and Peoples' Rights during its fifty-fifth ordinary session, held in Luanda from 28 April to 12 May 2014.

The Bangkok Rules were adopted in recognition of the need to respond to the particular needs of women prisoners and ensure the principle of non-discrimination. The Rules complement the general international instruments identified above in connection with the treatment of women prisoners, and recognize the need to implement a gender-sensitive approach to the management of women's prisons and the conditions of imprisonment.

Measures for the police custody or imprisonment of violent extremist prisoners – persons alleged as, accused of, or recognized as having committed violent extremist offences – must be implemented in line with these international standards and norms, as applicable.

In addition, where a situation of violence reaches the threshold of “armed conflict” in international law, international humanitarian law becomes applicable in conjunction with international human rights law to govern certain situations of detention of persons suspected of being engaged in terrorist activities. Relevant rules are contained in common article 3 to the Geneva Conventions and Protocol II, as well as customary international humanitarian law.

B. Gender-sensitive prison management, management of violent extremist prisoners and conditions of imprisonment

1. Foundational principles of non-discrimination and gender-sensitive prison management

Women are impacted by prison systems that are designed for men, who comprise the majority of the prison population. The fact that prisons are built for men is evident in their design, security procedures, health-care facilities, training and rehabilitation opportunities, and the arrangements for family contact. The Special Rapporteur on violence against women, its causes and consequences has remarked that

The prevalence of dire prison conditions with a lack of a gender focus is a global problem, and female prisoners often face conditions that are worse than those experienced by their male counterparts. It is argued that prisons were made with men in mind, and gender-neutral policies can have serious negative consequences for women prisoners.²³⁵

As identified in the UNODC *Handbook on Women and Imprisonment* and its accompanying *Training Curriculum*, there are a number of common factors leading to a heightened vulnerability of women prisoners.²³⁶ These may stem from structural factors or discrimination in a wider context, such as:

- The challenges they face in accessing justice on an equal basis with men in many countries
- The existence of offences, based on harmful stereotypes and discriminatory practices against women, and that are applied only or disproportionately to women, including “moral crimes” such as adultery, sexual misconduct, or “running away”
- Poverty and dependence on male family members for money and support
- The disproportionate victimization of women from sexual or physical abuse prior to imprisonment

²³⁵ A/68/340, para. 33.

²³⁶ *Handbook on Women and Imprisonment*, Criminal Justice Handbook Series, 2nd ed. (United Nations publication, Sales No. E.14.IV.3), p. 7; *Training Curriculum on Women and Imprisonment: Version 1.0*, Criminal Justice Handbook Series (Vienna, 2015), pp. 7–8.

- A high level of mental health-care needs, often as a result of domestic violence and sexual abuse
- A low level of education and a high rate of illiteracy
- The high likelihood of having caring responsibilities for their children, families and others

Other factors stem from the conditions of imprisonment themselves, such as:

- The extreme distress imprisonment causes to women, which often leads to mental health problems or exacerbates existing mental disabilities
- Sexual abuse and violence against women in prison
- Gender-specific hygiene and health-care needs that are not adequately met
- Lack of gender-appropriate vocational and rehabilitation programmes in prison
- Post-release stigmatization, victimization and abandonment by their families

While conditions of imprisonment may not outwardly discriminate against women prisoners, failing to take into account women's particular needs in a system designed principally for male prisoners results in imprisonment having a discriminatory impact on women. Rule 1 of the Bangkok Rules therefore requires the following:

In order for the principle of non-discrimination embodied in rule 6 of the Standard Minimum Rules for the Treatment of Prisoners to be put into practice, account shall be taken of the distinctive needs of women prisoners in the application of the Rules. Providing for such needs in order to accomplish substantial gender equality shall not be regarded as discriminatory.

Adhering to that rule requires that affirmative action is taken by prison administrators to ensure that women prisoners have equal access to all services and rights that male prisoners enjoy, as well as being accorded additional rights and given access to other services and facilities, which respond to their gender-specific needs.²³⁷

Gender-sensitive prison management

In order to effectively integrate the principles of non-discrimination in practice, the recognition of the different requirements of female and male prisoners must be reflected in the management of women's prisons. This entails adapting, inter alia, management practices, the treatment of pregnant women and women with children, the programmes offered, and the delivery of health-care services. As identified in the UNODC *Handbook on Women and Imprisonment*, the components of gender-sensitive prison management should include:

- Taking affirmative action to counter-balance discrimination encountered by women prisoners, owing to their small numbers, and taking into consideration intersecting discrimination on the basis of sex and ethnicity, race, nationality, sexual orientation, age or other "minority" status;
- Adopting gender-sensitive management practices, including the capacity and willingness of staff to communicate openly and in a less authoritarian manner with prisoners, and awareness of emotional dynamics;
- Recognizing the different needs of female prisoners, including those from different cultural backgrounds, and providing programmes and services that address those needs.²³⁸

²³⁷ *Handbook on Women and Imprisonment*, pp. 24–25.

²³⁸ *Ibid.*, pp. 26–27.

Gender-sensitive policies should be employed at all stages, including police custody; pretrial detention; allocation and admission to prison; and arrangements for release and post-release support.²³⁹ Gender-sensitive policies are equally important and can have added layers of complexity in cases involving the management of violent extremist prisoners.

EXAMPLE: MANAGING FEMALE VIOLENT EXTREMIST PRISONERS IN THE KENYA PRISONS SERVICE

Although female violent extremist prisoners account for a small number of prisoners in prisons in Kenya, the Kenya Prisons Service has implemented a number of gender-sensitive measures to respond to their specific needs, while ensuring their safe and secure custody.

Classification and separation of female violent extremist prisoners

The Kenya Prisons Service has faced challenges in classifying female violent extremist prisoners and separating them from the general prison population. The female incarceration facilities are not as large as some of the maximum-security prisons for male prisoners, fewer resources are available, and there is generally a smaller number of female prisoners and of female violent extremist prisoners. This means that in female incarceration facilities, it can be difficult to separate violent extremist prisoners from other prisoners, because there are often insufficient cells or blocks. Further, given that there are generally small numbers of female violent extremist prisoners in the same prison, separating them from other prisoners could result in de facto isolation. Given the shortage of facilities, juvenile and adult female violent extremist prisoners are sometimes kept together in order to prevent them from radicalizing other young prisoners at juvenile centres.

In one case, the Kenya Prisons Service decided to keep a convicted violent extremist prisoner with other prisoners to avoid isolation, but ensured careful monitoring of her actions to prevent her from radicalizing other prisoners. In a second case, the Service separated two sibling female violent extremist prisoners from the rest of the general prison population, as they were attempting to radicalize other prisoners. The sisters were kept together but separate from other prisoners.

Female violent extremist prisoners have access to imams

Female violent extremist prisoners have access to an imam to provide religious counselling. Despite the small number of such prisoners in prisons in Kenya, the Kenya Prisons Service ensures that their need for religious counselling is also met.

Female violent extremist prisoners have access to female hygiene and health care

As with other female prisoners, the Kenya Prisons Service ensures that female violent extremist prisoners are provided with soap and sanitary towels for their everyday hygiene in the prison. Additionally, non-governmental organizations in Kenya visit the prison on a regular basis to educate the women on the importance of hygiene and family planning, and offer Pap tests. Female violent extremist prisoners take part in all services provided by external partners and non-governmental organizations as well as the initiatives and services provided by the Kenya Prisons Service.

2. Admission and registration

(i) Admission

All prisoners feel vulnerable upon admission to prison. Women prisoners may feel particularly vulnerable owing to, for example: the trauma of separation from children and families; past victimization and fears for their safety, especially where they have been victims of sexual and gender-based violence; social stigma; and low educational and economic status.²⁴⁰

²³⁹ *Training Curriculum on Women and Imprisonment*, p. 12.

²⁴⁰ *Handbook on Women and Imprisonment*, p. 32.

All prisoners should be provided with facilities to contact their relatives. They should have access to legal advice and information about prison rules and regulations. Prisoners should be made of where to seek help in a language they understand, and they should have access to consular assistance (in the case of imprisonment of foreign nationals).²⁴¹ Women with children should be allowed to make arrangements for the care of those children, including the possibility of reasonable suspension of detention.²⁴² It is a good practice to provide prison staff with special training on how to deal with newly admitted women and their children.

(ii) Registration

Prison authorities should maintain an updated confidential register containing information about prisoner identity (which respects the self-perceived gender of the prisoner) and the details of their admission.²⁴³ In addition, authorities should confidentially record details of the children of each woman admitted to prison, including their names, ages and – if not accompanying the mother – their location and custody or guardianship status.²⁴⁴ These measures are integral to guarding against disappearances and ensuring that the needs of children in prison are met.

3. Allocation, separation and classification

(i) Allocation

Women prisoners should be allocated, to the extent possible, to prisons located close to their homes or their places of social rehabilitation, taking into account their caretaking responsibilities, the woman's preference, and the availability of appropriate programmes and services.²⁴⁵

Such considerations are important in maintaining family and community links necessary for social reintegration upon release. However, owing to the small proportion of women prisoners and limited number of women's prison facilities in most countries, women are often allocated far away from their homes, which limits contact with their families and their ability to maintain family relations, and can lead to feelings of social isolation.

› EXAMPLE: GENDER IMPACTS OF ALLOCATION SYSTEMS

Penal Reform International conducted a survey in 2013 of women prisoners held in a prison in a country in Central Asia. The facility was a one and a half hour drive from the closest town, with inadequate public transportation facilities. As a result, many women prisoners were located far from family and community networks, with only 20 per cent receiving regular visitors. The isolation also affected the ability of women prisoners to be supplied with warm clothing, medicine and toiletries, as prisoners often relied on family members to provide those items.^a

^aFrances Sheahan, "Who are women prisoners? Survey results from Kazakhstan and Kyrgyzstan" (London, Penal Reform International, 2014), pp. 21–22.

²⁴¹The Bangkok Rules, rule 2, para. 1.

²⁴²Ibid., rule 2, para. 2; see chapter 4, section F, on alternatives to imprisonment in terrorism cases.

²⁴³The Nelson Mandela Rules, rule 7, and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principle 12.

²⁴⁴The Bangkok Rules, rule 3.

²⁴⁵The Bangkok Rules, rule 4; with respect to all prisoners, see the Nelson Mandela Rules, rule 59, and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principle 20.

If prison authorities decide to allocate female violent extremist prisoners to a high security facility, or to separate them from the general prison population and concentrate them in one facility, allocation to prisons located close to their homes or places of social rehabilitation may become particularly challenging. In such cases, measures to ensure contact with the outside world, including family members, should be implemented (see subsection 5 of the present section).

States may consider establishing smaller facilities in a larger number of locations, allowing women to be located closer to their families.²⁴⁶ If this is not possible, a potential alternative would be to increase the number of women's sections in men's prisons, ensuring that these facilities comply with the other provisions of the Bangkok Rules.²⁴⁷

(ii) Separation

One measure that is integral to respecting the rights of women prisoners and minimizing the risk of violence is ensuring that women prisoners are appropriately separated according to their gender, legal status, and age. Women are particularly vulnerable to sexual violence and other forms of abuse in detention, which requires specific safety measures in response. Women also have differing physical and mental health needs compared with men. Research in some countries has found that mental disabilities among female prisoners are more common compared with male prisoners, and that women are much more likely than men to harm themselves or to attempt suicide.²⁴⁸

Male and female prisoners should be kept in separate institutions whenever possible; however, if a facility does house both men and women, women must be allocated to specific, separate premises.²⁴⁹ Prisoners who have not been tried must be kept separate from convicted prisoners.²⁵⁰ Where dormitory accommodation is provided, differentiation by age is likely to be beneficial in minimizing risks of older women abusing younger women housed in adult facilities, and vice versa.²⁵¹

Further, conditions of imprisonment and treatment of children must respect the special needs of the child. As such, juveniles should be separated from adult prisoners²⁵² and placed in appropriate facilities, excepting placements on the basis of the type of offence. Girls should also be separated from boys within juvenile facilities in order to ensure their needs are met and safety is ensured.²⁵³

Prison authorities dealing with violent extremist prisoners balance a number of factors in making decisions about whether these prisoners should be separated from the general prison population, dispersed across a small number of prisons, or integrated with the general prison population. Such factors include the size of the violent extremist prison population, prison infrastructure, staff capacity, and the risk posed by violent extremist prisoners of radicalizing others. The suitability of different approaches, such as separation, dispersal or integration, will depend on factors such as the availability of facilities and staff with requisite skills and training, as well as the size of the violent extremist prisoner population.²⁵⁴

²⁴⁶ *Handbook on Women and Imprisonment*, p. 30.

²⁴⁷ *Ibid.*

²⁴⁸ *Handbook for Prison Managers and Policymakers on Women and Imprisonment*, Criminal Justice Handbook Series (United Nations publication, Sales No. E.08.IV.4), pp. 8 and 10–11.

²⁴⁹ The Nelson Mandela Rules, rule 11, para. (a).

²⁵⁰ International Covenant on Civil and Political Rights, art. 10, para. 2 (a), and the Nelson Mandela Rules, rule 11, para. (b).

²⁵¹ *Handbook on Women and Imprisonment*, p. 38.

²⁵² International Covenant on Civil and Political Rights, art. 10, para. 2 (b), and the Nelson Mandela Rules, rule 11, para. (d).

²⁵³ Juvenile female prisoners are one of the most vulnerable groups in prison settings, due to their age, gender, and the fact that they comprise a small proportion of the prison population. They are also at high risk of abuse, including sexual violence (Penal Reform International and Thailand Institute of Justice, *Guidance Document on the United Nations Rules on the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules)* (London, 2013)), p. 96; see also United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules).

²⁵⁴ UNODC, *Handbook on the Management of Violent Extremist Prisoners and the Prevention of Radicalization to Violence in Prisons*, Criminal Justice Handbook Series (Vienna, 2016), p. 137.

Prison authorities should integrate gender perspectives into decisions on whether to separate violent extremist prisoners. Where there is a small number of female violent extremist prisoners, special consideration must be given to whether or not to separate these prisoners, and how to do so in order to avoid placing them into de facto isolation. Pursuant to rule 37 of the Nelson Mandela Rules, any form of involuntary separation from the general prison population, such as isolation or segregation, including for the maintenance of order and security, should be subject to authorization by law or by the regulation of the competent administrative authority.²⁵⁵

› **EXAMPLE: ALLOCATION AND SEPARATION OF FEMALE VIOLENT EXTREMIST OFFENDERS BY THE FRENCH PRISON SERVICE**

In France, the Tribunal de grande instance de Paris (High Court of Paris) has jurisdiction over terrorism cases originating in all parts of the country. As such, during the pretrial and trial phases, female violent extremist prisoners are held in one of three women's prisons in the Paris region (Fleury-Mérogis, Fresnes or Versailles). Following the trial, if convicted, they may be transferred to facilities outside the region in order to be closer to their families.

Women who are accused or convicted of terrorism offences are not separated from the general prison population unless the assessment conducted during admission indicates a risk of violence against other prisoners and the institution, and/or a risk of radicalizing other inmates.

(iii) Classification

A further key consideration is that prisoners are appropriately classified. Pursuant to rule 93 of the Nelson Mandela Rules, the purposes of classification must be to separate from others those prisoners who, by reason of their criminal records or characters, are likely to exercise a bad influence, and to divide the prisoners into classes in order to facilitate their treatment with a view to their social rehabilitation. As much as possible, separate prisons or separate sections of a prison must be used for the treatment of different classes of prisoners.

Key tools for the classification of prisoners are risk assessment tools. Risk assessment tools are most often developed for male offenders, without taking into account the gender-specific needs of women – an omission which frequently results in women being placed in higher security settings than appropriate to the level of risk they represent.²⁵⁶ In the case of violent extremist prisoners, given the complexity of women's involvement in violent extremism, risk assessments should fully explore the role that the female prisoner played in the violent extremist activity.²⁵⁷ In some countries, those convicted of violent extremist offences are automatically held in maximum or high security facilities on the basis of the nature of their conviction or sentence length, and not on the basis of an individualized assessment. Such a system may disproportionately disadvantage female violent extremist prisoners, who, for example, are more frequently convicted of support offences, which may still carry long prison sentences.²⁵⁸

Effective and gender-sensitive risk and needs assessments are central to ensuring that violent extremist prisoners are appropriately classified and categorized, and to identify those prisoners who are genuinely high risk. Individualized risk assessments usually indicate that women present a low risk. Very few women may be justifiably required to be held in high-security settings.²⁵⁹ Violent extremist prisoners, like other prisoners, should be held in the least restrictive setting necessary for their safe and secure custody.²⁶⁰

²⁵⁵ On solitary confinement of violent extremist prisoners, see *Counter-Terrorism Legal Training Curriculum: Module 4*, chap. 4.

²⁵⁶ UNODC, *Handbook on the Management of High-Risk Prisoners*, Criminal Justice Series Handbook (Vienna, 2016), p. 41.

²⁵⁷ *Handbook on the Management of Violent Extremist Prisoners*, p. 64.

²⁵⁸ See also the Bangkok Rules, rule 41, para. (a).

²⁵⁹ *Handbook on the Management of High-Risk Prisoners*, p. 41.

²⁶⁰ *Handbook on the Management of Violent Extremist Prisoners*, p. 137.

In accordance with the Bangkok Rules, prison authorities should develop classification methods addressing the gender-specific needs and circumstances of women prisoners to ensure appropriate planning for their early rehabilitation, treatment and reintegration into society.²⁶¹ Gender-sensitive risk assessments and classification of prisoners should:

- Be undertaken by specially trained staff upon admission and on an ongoing and regular basis
- Account for the generally lower risk that women pose to others, and the effects of high-security measures and increased levels of isolation on women
- Take into account women's backgrounds and caretaking responsibilities
- Ensure that sentence plans include gender-sensitive rehabilitative programmes (see section C of the present chapter)
- Ensure that those with mental health problems are not placed in higher security facilities solely on that basis²⁶²

➤ **FOCUS: ROME MEMORANDUM ON GOOD PRACTICES FOR REHABILITATION AND REINTEGRATION OF VIOLENT EXTREMIST OFFENDERS, ADOPTED BY THE GLOBAL COUNTERTERRORISM FORUM**

The Rome Memorandum on Good Practices for Rehabilitation and Reintegration of Violent Extremist Offenders emphasizes that an effective intake, assessment and classification system for violent extremist prisoners that takes into account their personal background, criminal history, personality traits, ideology and behaviour in prison is important for making sound classification decisions and in designing effective individual rehabilitation programmes.

4. Health care

The right to health of all prisoners is a fundamental right, and prison health policies should be aimed at the protection of their physical and mental health and well-being.²⁶³ The Special Rapporteur on violence against women, its causes and consequences has noted, however, that many prisons do not offer adequate mental or physical health care to women inmates and may actually provide less health care to female prisoners than to male prisoners. Women in prison are more prone to illness from infectious disease, digestive issues, respiratory ailments, injuries and other medical problems.²⁶⁴ Prison authorities should ensure that female violent extremist prisoners are not disadvantaged in medical accessing facilities and services.

Rules 24–35 of the Nelson Mandela Rules canvass health-care services to be provided for all prisoners, free of charge, and in close coordination with general public health administration to ensure continuity of care. They also govern prisoner access to urgent medical treatment and surgery, the provision of treatment, and monitoring of health-related aspects of prison conditions.

The Bangkok Rules provide additional guidance on providing gender-sensitive health-care services, including gender-specific needs:

- Health screening on admission (rules 6–9)
- Gender-specific health care (rules 10, 11 and 18)

²⁶¹ The Bangkok Rules, rule 40.

²⁶² Ibid., rule 41.

²⁶³ See article 12 of the International Covenant on Civil and Political Rights, article 12 of the Convention on the Elimination of All Forms of Discrimination against Women, and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principle 9.

²⁶⁴ A/68/340, paras. 44 and 46.

- Mental health care (rules 12, 13 and 16)
- HIV prevention, treatment, care and support (rule 14)
- Hygiene (rule 5)

The Bangkok Rules further recommend providing basic training to staff working in women's prisons on issues relating to:

- Women's health and children's development (in prisons where children are allowed to stay with their mothers) (rule 33)
- HIV prevention, treatment, care and support (rule 34)
- The detection of mental health-care needs, self-harm and suicide risks (rule 35)

5. Contact with the outside world, including family visits

All prisoners should be allowed, under necessary supervision, to communicate regularly with their family and friends, including by correspondence and in person.²⁶⁵ However, the imperatives of the fight against terrorism may nevertheless require that a person deprived of his or her liberty for terrorist activities be submitted to more severe restrictions than those applied to other prisoners.²⁶⁶

The contact of women prisoners with their families and children should be encouraged and facilitated by all reasonable means, and steps should be taken to counter-balance disadvantages faced by women detained in facilities far from their homes.²⁶⁷ Further, disciplinary sanctions should not entail prohibitions on family contact.²⁶⁸ Visits involving children should take place in an environment that is conducive to a positive visiting experience, and should allow open contact between mother and child. Visits involving extended contact with children should be encouraged, where possible.²⁶⁹

Adequate contact with the outside world, including with family members, is particularly important for ameliorating the harmful effects of imprisonment and assisting with social reintegration.²⁷⁰ Women, a large proportion of whom in the prison population are mothers, and who may be sole caregivers, are often disadvantaged in maintaining family links, given that they are often located far from their homes as the result of the limited number of female prisons.

Good practices in enabling women prisoners to maintain family links include assisting with transportation of family members; extending the length of visits where women are located more remotely; providing free overnight accommodation for families travelling long distances; and granting prison leave to the greatest extent possible on medical, educational, occupational and family grounds.²⁷¹ Where physical visits are limited owing to large distances between the woman's home and the prison, women prisoners should be granted more phone calls to facilitate communication.²⁷²

Where conjugal visits are allowed, women prisoners should be able to exercise this right on an equal basis with men.²⁷³ This can be an important means of maintaining close emotional bonds between partners and spouses, and the maintenance of family links.

²⁶⁵ The Nelson Mandela Rules, rule 58.

²⁶⁶ Council of Europe Guidelines on Human Rights and the Fight against Terrorism, adopted by the Committee of Ministers on 11 July 2002 at its 804th meeting, guideline XI, para. 2.

²⁶⁷ The Bangkok Rules, rule 26.

²⁶⁸ *Ibid.*, rule 23.

²⁶⁹ *Ibid.*, rule 28.

²⁷⁰ *Handbook on the Management of High-Risk Prisoners*, p. 74.

²⁷¹ *Ibid.*, p. 75.

²⁷² *Ibid.*

²⁷³ The Bangkok Rules, rule 27, and the Nelson Mandela Rules, rule 58, para. 2.

6. Access to legal counsel

The right of access to legal counsel is enshrined in all major international and regional human rights treaties²⁷⁴ and is integral to the principle of equality of arms and the right to a fair trial. Article 14, paragraph 3 (d), of the International Covenant on Civil and Political Rights provides that every person charged with an offence is entitled to defend themselves in person or through legal assistance of their own choosing and to be informed of the right to legal assistance. The right of access to a lawyer from the initial stage of custody is a fundamental safeguard against ill-treatment and is key to ensuring fundamental fairness and public trust in the criminal justice process.

The contact of women prisoners with legal representatives should be encouraged and facilitated by all reasonable means.²⁷⁵ As noted in the UNODC *Handbook on Women and Imprisonment*:

Prison authorities have a crucial role to play in reducing female prisoners' vulnerability in the criminal justice system by providing them with information about their legal rights, by enabling their access to lawyers or paralegal services, providing facilities for meetings with lawyers, and, if required, interpretation services.

These requirements apply both in pretrial detention and once women have been convicted, in order to assist them in lodging appeals or in gaining early conditional release.

In practice, women face a number of barriers in accessing justice and legal assistance, including legal aid, as the result of socioeconomic disadvantages, lack of awareness of their rights, and discriminatory laws and practices. Special measures should therefore be taken to ensure meaningful access for women, including by introducing an active policy of incorporating a gender perspective into all policies and laws relating to legal aid and gender equality.²⁷⁶

› FOCUS: ACCESS TO LEGAL AID

International law^a requires that:

- States must ensure that anyone who is arrested, detained, suspected of or charged with a criminal offence punishable by a term of imprisonment or the death penalty is entitled to legal aid at all stages of the criminal justice process.
- Legal aid should also be provided, regardless of the person's means, if the interests of justice so require (e.g., given the urgency or complexity of the case or the severity of the potential penalty). Considering the gravity of the charges, in terrorism cases the interests of justice will as a rule require that legal aid is provided.
- Availability of legal aid is essential to ensure access to justice for those suspected, accused or convicted of terrorism-related offences, including as a protection against arbitrary detention.

²⁷⁴ See the International Covenant on Civil and Political Rights, art. 14, para. 3 (d); the African Charter on Human and Peoples' Rights, art. 7, para. 1 (c); the European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6, para. 3 (c); and the American Convention on Human Rights, art. 8, para. 2 (d).

²⁷⁵ The Bangkok Rules, rule 26.

²⁷⁶ United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (General Assembly resolution 67/187, annex), principle 10 and guideline 9.

› FOCUS: ACCESS TO LEGAL AID (*continued*)

The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems recognize that certain groups are entitled to additional protection when involved with the criminal justice system, and include, among others, specific provisions for women. Guideline 9 concerns the implementation of the right of women to access legal aid. It provides that

States should take applicable and appropriate measures to ensure the right of women to access legal aid, including:

- (a) Introducing an active policy of incorporating a gender perspective into all policies, laws, procedures, programmes and practices relating to legal aid to ensure gender equality and equal and fair access to justice;
- (b) Taking active steps to ensure that, where possible, female lawyers are available to represent female defendants, accused and victims;
- (c) Providing legal aid, advice and court support services in all legal proceedings to female victims of violence in order to ensure access to justice and avoid secondary victimization and other such services, which may include the translation of legal documents where requested or required.

²⁷⁶International Covenant on Civil and Political Rights, art. 14, para. 3 (d); United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, principles 3 and 7; and the Nelson Mandela Rules, rule 61, para. 3, rule 119, para. 2, and rule 120.

7. Pregnant women and mothers with children in prison

Every effort should be made to ensure that pregnant women and women with children are not imprisoned unless absolutely necessary, taking into account the gravity of the offence, the risk posed by the offender and the best interests of the child.²⁷⁷ National legislation and sentencing guidelines should reflect this principle.

In cases where pregnant women and women with children are imprisoned, the Nelson Mandela Rules and the Bangkok Rules provide guidance on the type of support and facilities that should be made available for these categories of prisoners.²⁷⁸

(i) Pregnant women

- There should be special accommodation for necessary prenatal and postnatal care, and arrangements should be made for children to be born in a hospital outside prison, where practicable (the Nelson Mandela Rules, rule 28).
- Arrangements should be made to respond to the needs of pregnant women, nursing mothers and women with children, including with respect to their health-care needs and childcare facilities (the Bangkok Rules, rules 42 and 48).

²⁷⁷*Handbook on Women and Imprisonment*, p. 119; rule 64 of the Bangkok Rules provides that non-custodial sentences for pregnant women and women with dependent children should be preferred where possible and appropriate (see also the African Charter on the Rights and Welfare of the Child, art. 30).

²⁷⁸A number of other international standards are also relevant (see, for example, International Covenant on Economic, Social and Cultural Rights, art. 10; Convention on the Elimination of All Forms of Discrimination against Women, art. 12; Convention on the Rights of the Child, arts. 3 (para. 1), 6 (para. 2), 7 (para. 1) and 9 (para. 3); and Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principle 5 (para. 2)).

(ii) Mothers with children in prison

- A decision to allow the child to stay with his or her parent in prison should be based on the best interests of the child. Provisions should be made for internal or external childcare facilities, child-specific health-care services, and screening. Children are not to be treated as prisoners (the Nelson Mandela Rules, rule 29; and the Bangkok Rules, rules 49 and 51).
- Women prisoners should be provided with the maximum possible opportunities to spend time with their children (the Bangkok Rules, rule 50).
- The Bangkok Rules, rule 52, provides guidance on the removal of a child from prison.

8. Personnel and training

The recruitment, retention and promotion of women in prison administrations are important means of ensuring gender-sensitive prison management and preventing ill-treatment of female prisoners. Prison authorities should work towards mitigating gender imbalances in the recruitment of prison staff who possess the skills, experience and attributes required to work with all prisoners – including the difficult, dangerous and manipulative – in an even-handed, humane, just and gender-sensitive manner.²⁷⁹ While this may be less challenging in jurisdictions where violent extremist prisoners are held within the general prison population, specific efforts may be required to ensure the placement of female staff if such prisoners are held in separate facilities, or are dispersed within high-risk prisons.

Prison authorities should ensure that female staff members are provided with equal opportunities for training and development that would enable them to work with violent extremist prisoners and deliver gender-sensitive interventions. Such opportunities include providing equal access to training that allows staff to deal with the challenges of working with violent extremist providers. Appropriate topics include recognizing signs of radicalization to violence, anti-conditioning or manipulation training, assessment of intelligence and other information about violent extremist prisoners, and where offered by the prison, the delivery of disengagement programmes.²⁸⁰

In addition to prison staff, female religious leaders, teachers and community elders can play important roles in facilitating reintegration into mainstream society and by providing counselling, and education and training opportunities for women violent extremist prisoners.²⁸¹ Ways to provide access to such leaders should be considered even where women violent extremist prisoners only comprise a small proportion of the prison population.

FURTHER READING

UNODC has developed a number of publications providing guidance on adopting a gender-sensitive approach to prison management:

- *Handbook on Women and Imprisonment* (2nd ed.) (2014)
- *Handbook for Prison Managers and Policymakers on Women and Imprisonment* (2008)
- *Training Curriculum on Women and Imprisonment* (2015)
- UNODC and World Health Organization (WHO), *Women's Health in Prisons: Correcting Gender Inequality in Prison Health* (2009)

²⁷⁹ *Handbook on the Management of Violent Extremist Prisoners*, p. 27.

²⁸⁰ *Ibid.*, p. 30.

²⁸¹ *Ibid.*, p. 28.

FURTHER READING (continued)

- The *Handbook on the Management of Violent Extremist Prisoners and the Prevention of Radicalization to Violence in Prisons* provides comprehensive guidance on the management of violent extremist prisoners generally, including assessment and classification systems, security procedures, staff training, human treatment, disengagement interventions and social reintegration and post-release support
- UNODC, *Handbook on the Management of High-Risk Prisoners* (2016), provides further guidance on conducting individualized risk assessments

See also:

- UN-Women, *Security Sector Reform (SSR): Rights and Needs of Women in Prisons* e-course
- OHCHR, *Manual on Human Rights Training for Prison Officials*
- Counter-Terrorism Implementation Task Force, *Basic Human Rights Reference Guide: Detention in the Context of Countering Terrorism* (2014)
- Report of the Special Rapporteur on violence against women, its causes and consequences, transmitted by the note by the Secretary-General on the pathways to, conditions and consequences of incarceration for women (A/68/340)
- Global Counterterrorism Forum, *Good Practices on Women and Countering Violent Extremism*

Penal Reform International and Thailand Institute of Justice:

- Guidance document on the Bangkok Rules (2013)
- Toolbox on the Bangkok Rules, including an index of implementation to assist States in assessing the extent to which the Bangkok Rules are reflected in their criminal justice systems, and to provide a basis for developing policies, strategies and action plans to improve implementation
- *Women in detention: putting the Bangkok Rules into practice*: e-course

C. Prison-based disengagement, rehabilitation and social reintegration measures for violent extremist prisoners

Appropriate prison-based interventions to assist violent extremist prisoners to disengage from violent extremism,²⁸² as well as rehabilitation and social reintegration measures to prepare prisoners for their release and re-entry into the community, are key elements in a strategy related to preventing and countering violent extremism.

Effective disengagement, rehabilitation and reintegration interventions should be targeted to address the specific needs of each such prisoner, the nature of the violent extremist group involved, and the environment into which the former violent extremist prisoner will be released.²⁸³

Disengagement, rehabilitation and reintegration programmes should therefore take into account gender-specific needs and experiences of violent extremist prisoners:

- An effective intake, assessment and classification system for new inmates is highly beneficial in designing disengagement, rehabilitation and reintegration measures. The form and aims of these measures will likely differ significantly based on whether the prisoner has been assessed as low-risk, which is more common for female violent extremist prisoners, and which may be more suited for engagement with external partners and fellow inmates, as opposed to for high-risk violent extremist prisoners, which demand a more controlled programme with less contact with third parties.²⁸⁴

²⁸² Generally, disengagement interventions include a variety of activities such as psychological counselling and support; cognitive-behavioural programmes; social work interventions; faith-based debate and dialogue; education; vocational training; creative therapies; physical therapies (e.g., yoga, sport, exercise); family activity; and social, cultural and recreation (*Handbook on the Management of Violent Extremist Prisoners*, p. 75).

²⁸³ *Handbook on the Management of Violent Extremist Prisoners*, p. 70.

²⁸⁴ Global Counterterrorism Forum's Rome Memorandum on Good Practices for Rehabilitation and Reintegration of Violent Extremist Offenders, good practice 3.

- Specific challenges exist with reintegrating women convicted of violent extremist offences, owing to, for example, the stigma surrounding this association, an assumption that women have been subjected to sexual violence, and the fear of potential retaliation.²⁸⁵
- Vocational training opportunities should take into account a diverse range of interests and skills of violent extremist prisoners, and not only those tailored to the majority male population of such prisoners. This is an important means of enabling former violent extremist prisoners to restore their livelihoods upon release, and is particularly important for women who have been rejected by their families and may have to become economically independent.
- Women, together with individuals with gender expertise, should participate in the design of interventions for female violent extremist prisoners in order to develop a gender-sensitive lens for programme development.²⁸⁶

› FOCUS: THE GLOBAL COUNTERTERRORISM FORUM AND GOOD PRACTICES ON WOMEN AND COUNTERING VIOLENT EXTREMISM

The need to develop gender-sensitive disengagement, rehabilitation and reintegration programmes that address the specific needs of women and girls on a path to terrorist radicalization or involved in violent extremism is underscored in good practice 10 of the Good Practices on Women and Countering Violent Extremism.

This recommendation is based on the understanding that:

- Women and girls within violent extremist and terrorist groups have different motivations, roles and experiences, both to one another and to men.
- The factors leading to the association of women and girls with terrorist groups, the levels of agency with which such association takes place, and their functions within these groups also differ.
- Violent extremist prisoners may have suffered forms of violence by terrorist groups, including sexual and gender-based violence.

To be effective, programmes for disengagement, rehabilitation and reintegration should be gender-sensitive and address those varying experiences, as well as the specific obstacles and challenges women and girls may face.

› EXAMPLE: DISENGAGEMENT AND REHABILITATION PROGRAMMES FOR FEMALE VIOLENT EXTREMIST PRISONERS IN THE FRENCH PENAL SYSTEM

French prison authorities are implementing a number of gender-sensitive counter-radicalization initiatives aimed at female violent extremist prisoners. Between September 2017 and May 2018, the women's prison in Fresnes implemented a programme for female prisoners aimed at encouraging disengagement from violence. The programme took into account risk and protection factors relevant to female violent extremist offenders, and covered issues such as memory and identity; social networks; gender-based violence; relationships between men and women and interculturalism; and law and justice. A religious mediation workshop was also implemented for several weeks. Some workshops consisted solely of female violent extremist offenders, while others also included women convicted of general criminal offences.

The programme complemented the individual supervision received in prison, which is the responsibility of two supporting professionals (an educator and a psychologist), an integration and probation officer, and prison staff. This supervision is conducted through regular individual meetings. Other professionals, such as psychiatrists, chaplains and prison visitors, can also take part in the process.

Similar initiatives are planned for the other prisons accommodating female violent extremist prisoners in France.

²⁸⁵ *Handbook on the Management of Violent Extremist Prisoners*, pp. 65, 125 and 126.

²⁸⁶ *Ibid.*, p. 64.

While this section focuses on the need for gender-sensitive disengagement, rehabilitation and social reintegration measures for female violent extremist prisoners, it is also necessary to consider gender dimensions concerning the imprisonment of male violent extremist offenders. One example could be to address in programmes for male violent extremist offenders those elements of masculinity, male identity, male bonding and male status that are implicated in radicalization, extremism and engagement in political violence.²⁸⁷

A further example is taking into account the impact gender roles may have on the wives and families of male violent extremist prisoners, and the specific vulnerability of their wives as a result of such gender roles, including the imprisoned husband's role as the family's breadwinner. Taking the impact of gender roles into account can be an important factor in supporting disengagement from and preventing re-engagement with terrorist groups of both the male prisoner and his wife and family.

› EXAMPLE: CREATING OPPORTUNITIES FOR WIVES OF VIOLENT EXTREMIST OFFENDERS IN INDONESIA

Between 2015 and 2017, the Police Research Centre at the University of Indonesia implemented a project aimed at supporting the wives of incarcerated violent extremist offenders. As part of the Entrepreneurship and Proselytization Empowerment Programme, eligible women are engaged as soon as possible following the arrest of their husbands and provided with counselling and business training to enable them to launch or enhance existing independent ventures while their husbands are serving prison sentences. The project seeks to reduce the risk that the women may see themselves forced to engage with the violent extremist network for financial assistance and support, and to empower women to start their own businesses, which in turn provide potential employment opportunities for the husband upon his release.^a

^aChristina Nemr and others, *It Takes a Village: An Action Agenda on the Role of Civil Society in the Rehabilitation and Reintegration of Those Associated With and Affected by Violent Extremism* (Washington, D.C., Global Center on Cooperative Security, 2018), p. 15.

D. Gender-specific aspects of preventing torture, inhuman and degrading treatment of people deprived of their liberty

1. Prohibition of torture, inhuman and degrading treatment

The prohibition of torture, inhuman and degrading treatment is reflected in all major international and regional human rights systems²⁸⁸ and is an absolute prohibition from which no derogation is permitted, including in times of public emergency.²⁸⁹

²⁸⁷ Fionnuala Ní Aoláin, "The complexity and challenges of addressing conditions conducive to terrorism" in *Using Human Rights to Counter Terrorism*, Manfred Nowak and Anne Charbord, eds. (Cheltenham, United Kingdom, Edward Elgar Publishing Limited, 2018).

²⁸⁸ The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment currently has 165 States parties. Torture is also prohibited in general human rights treaties, including the International Covenant on Civil and Political Rights (art. 7), the European Convention for the Protection of Human Rights and Fundamental Freedoms (art. 3), the American Convention on Human Rights (art. 5, para. 2), the African Charter on Human and Peoples' Rights (art. 5) and the Arab Charter (art. 8, para. 1).

²⁸⁹ See, for example, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2, para. 2: "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture".

While contexts of imprisonment and deprivation of liberty expose all individuals to a higher risk of mistreatment and abuse, gender plays a key factor in vulnerability to torture in such contexts. The Committee against Torture has stated that gender intersects with other identifying characteristics or status of the person, such as race, nationality, religion, sexual orientation, age and immigrant status, to determine the ways that women and girls are subject to or at risk of torture or ill-treatment.²⁹⁰ Women are at a particular risk of torture and ill-treatment when deprived of liberty, both within criminal justice systems and other, non-penal settings.²⁹¹ In addition, for women, the risk of torture and ill-treatment is generally higher immediately after arrest and in police custody than during the period of imprisonment.²⁹²

Torture and ill-treatment may arise in contexts of police custody or imprisonment not only directly from the conduct of police or prison staff, but also from other inmates. It is established that inter-prisoner violence can amount to torture or ill-treatment for which the authorities are responsible if the State fails to act with due diligence to prevent it.²⁹³

One of the gravest forms of violence to which persons deprived of their liberty are subject is sexual and gender-based violence. It is widely recognized, including in the jurisprudence of human rights bodies, that rape amounts to torture when public officials carry out, instigate, consent or acquiesce to such acts.²⁹⁴ The European Court of Human Rights held, in connection with a case concerning custodial rape of a female terrorism suspect, that rape of a detainee by an official of the State had to be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender could exploit the vulnerability and weakened resistance of the victim. The accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape to which she was subjected amounted to torture.²⁹⁵

Rape and other forms of gender-based violence are used as a form of torture against terrorism suspects of both sexes.²⁹⁶ In some countries, military and law enforcement personnel have degraded male prisoners by exploiting perceived notions of male Muslim homophobia and inducing feelings of emasculation in detainees, such as forced piling of naked male detainees, forced homosexual acts with other detainees, enforced nudity and forced wearing of women's underwear.²⁹⁷

The international human rights instruments do not define cruel, inhuman and degrading treatment. Ill-treatment must attain a minimum level of severity if it is to fall within the prohibition of cruel, inhuman and degrading treatment. The European Court of Human Rights has found that the assessment of that minimum depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the "sex, age and state of health of the victim".²⁹⁸

Cruel, inhuman and degrading treatment need not be inflicted deliberately or intentionally. Intimidation with threats of further violence, a restrictive visiting schedule,²⁹⁹ a lack of adequate bedding and insufficient sanitary conditions in the cell³⁰⁰ can amount to cruel, inhuman and degrading treatment. Whether prison conditions amount to degrading treatment will depend also on whether the object of establishing such conditions is to humiliate and debase the person deprived of liberty and

²⁹⁰ CAT/C/GC/2, para. 22.

²⁹¹ A/HRC/31/57, para. 13.

²⁹² Commentary to rule 6, para. (e), of the Bangkok Rules.

²⁹³ A/HRC/13/39/Add.3, para. 28.

²⁹⁴ A/HRC/7/3, para. 34.

²⁹⁵ European Court of Human Rights, *Aydin v. Turkey*, Case No. 57/1996/676/866, Judgment of 25 September 1997, paras. 83–86.

²⁹⁶ A/64/211, para. 44; see also Human Rights Watch, *Collective Punishment: War Crimes and Crimes against Humanity in the Ogaden area of Ethiopia's Somali Region* (June 2008).

²⁹⁷ A/64/211, para. 44.

²⁹⁸ European Court of Human Rights, *Ireland v. United Kingdom*, Application No. 5310/71, Judgment of 18 January 1978, para. 162. This definition was followed by the African Commission on Human and Peoples' Rights in *Huri-Laws v. Nigeria*, decision No. 225/98 of 6 November 2000, para. 41.

²⁹⁹ Inter-American Court of Human Rights, *Loayza-Tamayo v. Peru*, Judgment of 17 September 1997 (Merits), para. 58.

³⁰⁰ European Court of Human Rights, *Istratii and Others v. Moldova*, Application Nos. 8721/05, 8705/05 and 8742/05, Judgment of 27 March 2007, para. 71.

whether those conditions adversely affect his or her personality in a manner incompatible with the prohibition of cruel, inhuman and degrading treatment.³⁰¹ In some circumstances, lack of attention to women's gender-specific needs can amount to inhuman or degrading treatment or punishment.³⁰²

2. State obligations with respect to torture and other cruel, inhuman or degrading treatment or punishment

States have a number of obligations in connection with the prohibition on torture and other cruel, inhuman or degrading treatment or punishment. Under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, States parties are required to:

- Prevent torture, inhuman and degrading treatment, including through legislative, judicial and other measures (art. 2, para. 1). This requires a range of measures including the training of public officials, safeguards in detention, criminalization of torture and the prompt investigation of allegations of torture or inhuman and degrading treatment.
- Criminalize torture in domestic legislation and render it punishable by appropriate penalties (art. 4). The criminalization of torture has to encompass sexual and gender-based violence in places of detention. The criminalization of sexual and gender-based violence is discussed further in chapter 5 of the present publication.
- Investigate alleged acts of torture in a prompt and impartial manner (art. 12), and ensure that persons who have been subject to torture have the right to complain to competent authorities.
- Prosecute or extradite those responsible for perpetrating torture (art. 7).
- Establish an enforceable right to fair and adequate compensation and rehabilitation for victims of torture or their dependents (art. 14).

The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has underscored that States must apply the Convention against Torture in a gender-sensitive manner, which is integral to ensuring that violations entrenched in discriminatory norms around gender and sexuality are recognized and remedied.³⁰³

3. Gender-based risks of torture and inhuman and degrading treatment, and related safeguards

Adopting a gender-sensitive approach, which takes into account the special protection needs of women deprived of their liberty, is key to safeguarding against torture and ill-treatment. This involves assessing key risk factors for prisoner safety in places of imprisonment, examining prison policies and management, implementing and maintaining oversight and monitoring mechanisms, and ensuring that an effective complaint and investigation system for allegations of mistreatment is in place. The subsection that follows contains an examination of the key areas in which the risk of torture or ill-treatment may arise and of gender-sensitive safeguards for mitigating this risk.

³⁰¹ European Court of Human Rights, *Öcalan v. Turkey*, Application No. 46221/99, Judgment of 12 May 2005, para. 181.

³⁰² Penal Reform International and Association for the Prevention of Torture, *Women in Detention: A Guide to Gender-sensitive Monitoring* (London, 2013), p. 4.

³⁰³ A/HRC/31/57, para. 6.

(i) Security and disciplinary measures

a. Separation

Female prisoners face higher risks of violence and ill-treatment when they are held in facilities with male inmates.³⁰⁴ Even where they are held in separate facilities, abuses can occur when women's access to such basic necessities as fresh water is circumscribed by their exclusive availability in male quarters.³⁰⁵

Separating prisoners according to legal status, gender and age, in line with international standards (discussed in section A of the present chapter), is a key safeguard against abuse.

b. Supervision

The risk of sexual and gender-based violence is also higher where women are supervised by male personnel, including during transportation.³⁰⁶ Male staff working in positions that enable contact with women prisoners sometimes abuse their authority, inappropriately touching the prisoner during frisks or body searches, engaging in threats of rape, or watching female prisoners in intimate moments (e.g., while they are dressing or showering).³⁰⁷ As underscored by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment:

- Physical violence can entail rapes of women detainees, but the abuse of women by male staff can also be more subtly disguised. For instance, they may offer women special privileges or goods otherwise hard to obtain. Equally, they may threaten to deny them access to their entitlements. It is crucial to bear in mind that under such circumstances it can never be argued that a woman has “consented” to a sexual relationship.³⁰⁸
- Following international standards on staffing and supervision of female prisoners is integral to preventing these forms of abuse. Rule 81 of the Nelson Mandela Rules requires that:
 - In a prison for both men and women, the part of the prison set aside for women shall be under the authority of a responsible woman staff member, who shall have custody of the keys for that part of the prison;
 - Male staff should not enter the women's part of a prison unless accompanied by a female staff member;
 - Women prisoners should be supervised only by women staff, without precluding male staff members, particularly doctors and teachers, from carrying out their duties in the women's part of a prison.
- Adequate safeguards should also be in place to protect prisoners during transit, for example, by ensuring that female prisoners are escorted by female staff and by ensuring effective surveillance of transit.³⁰⁹

c. Personal searches

Personal searches, including invasive body and strip searches, present a risk of ill-treatment for all prisoners, especially when conducted on an arbitrary or routine basis, or where the dignity and privacy of the prisoner is not respected. Such searches can have a disproportionately humiliating or traumatizing effect on women, even more so when searches are conducted by the opposite sex. That effect may be compounded further if such a search takes place in contexts where contact between men and women is ordinarily restricted. Strip and invasive body searches that lead to severe pain or

³⁰⁴ A/HRC/31/S7, para. 20.

³⁰⁵ *Ibid.*, para. 19.

³⁰⁶ *Ibid.*, para. 20.

³⁰⁷ A/HRC/31/S7, para. 19, and A/HRC/7/3, para. 42.

³⁰⁸ A/HRC/7/3, para. 42.

³⁰⁹ *Handbook on Women and Imprisonment*, 2014, p. 40.

suffering – and that are conducted for a prohibited purpose or on a discriminatory basis – constitute a form of torture.³¹⁰ The European Court of Human Rights held in one case that strip-searching of a male prisoner in the presence of a female prison officer amounted to degrading treatment.³¹¹

The Nelson Mandela Rules (rule 52) and the Bangkok Rules (rules 19 and 20) provide guidance on strip and body cavity searches.

d. Disciplinary segregation and confinement

The harmful psychological and physical effects of segregation and confinement are well-documented. For juveniles or persons with mental disabilities, the use of solitary confinement can amount to torture or cruel, inhuman or degrading treatment or punishment where used as a punishment, during pretrial detention, or indefinitely or for a prolonged period.³¹² As noted by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, female prisoners subjected to solitary confinement suffer particularly grave consequences as it tends to retraumatize victims of abuse and women suffering from mental health problems. It places women at greater risk of physical and sexual abuse by prison staff and severely limits family visits.³¹³ It also carries serious risks for pregnant women and their children, and women who have recently given birth.³¹⁴

- The Nelson Mandela Rules (rules 43–45) establish general principles with regard to the use of solitary confinement.
- Punishment by close confinement or disciplinary segregation should not be applied to pregnant women, women with infants and breastfeeding mothers in prison.³¹⁵

e. Use of restraints

The use of restraints is humiliating to all prisoners. To mitigate their use, the Nelson Mandela Rules place a number of limitations on the types of and circumstances in which instruments of restraint can be used.³¹⁶ The use of restraints on pregnant women during transfers to hospitals, gynaecological examinations, labour and immediately after childbirth, can amount to inhuman or degrading treatment.³¹⁷

- Instruments of restraint should never be used on women during labour, during birth and immediately after birth.³¹⁸

(ii) Health care and hygiene

a. Medical examinations

Health screening on admission to prison (discussed in section A of the present chapter) is an important factor in detecting ill-treatment and torture that has occurred while in custody. It is also necessary in assessing gender-specific health-care needs. Female prisoners have been subject to virginity testing during this process. This is a prohibited, gross form of discrimination against women and is

³¹⁰ A/HRC/31/57, para. 23.

³¹¹ European Court of Human Rights, *Valašinas v. Lithuania*, Application No. 44558/98, Judgment of 24 July 2001, paras. 114–118.

³¹² A/66/268, para. 81.

³¹³ A/HRC/31/57, para. 22.

³¹⁴ *Women in Detention: A Guide to Gender-sensitive Monitoring*, p. 14.

³¹⁵ The Bangkok Rules, rule 22.

³¹⁶ The Nelson Mandela Rules, rules 47–49.

³¹⁷ A/HRC/31/57, para. 21; see also the Commentary to the Bangkok Rules, rule 24, and Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Punishment, *CPT Standards: "Substantive" Sections of the CPT's General Reports (CPT/Inf/E (2002) 1 (Rev. 2006))*, chap. VII, para. 27.

³¹⁸ The Bangkok Rules, rule 24, and the Nelson Mandela Rules, rule 48, para. 2.

considered to be a form of custodial violence against women.³¹⁹ The Inter-American Court of Human Rights has also held that a finger vaginal “examination” constituted sexual rape that, owing to its effects, constituted torture.³²⁰

b. Gender-specific health care and hygiene

As discussed in section B of the present chapter, many prison health services and facilities are not designed to meet women’s physical and psychological health-care needs, such as a lack of specialist care, including access to gynaecologists and obstetric health-care professionals; discriminatory access to services like harm-reduction programmes, and a lack of private spaces for medical examinations and confidentiality.³²¹ Conducting medical examinations and providing tailored physical and mental health services in line with international standards is essential to meeting the gender-specific needs of prisoners and preventing mistreatment. Training should be provided to staff on identifying and addressing women’s health-care and hygiene needs.³²² According to the Special Rapporteur on torture, the absence of gender-specific health care in detention can amount to ill-treatment or, when imposed intentionally and for a prohibited purpose, to torture. The failure of States to ensure adequate hygiene and sanitation and to provide appropriate facilities and materials can also amount to ill-treatment or even torture.³²³

(iii) Personnel and training

Prison staff fulfil integral roles in establishing and maintaining a secure, safe, well ordered and humane prison, with a regime conducive to the rehabilitation of prisoners.³²⁴ In many prison systems, however, the particular needs of women as explored in the present chapter are not reflected in staff composition and training.

Providing capacity-building to staff employed in female prisons, and in particular female staff, is necessary to enable staff to meet the gender-specific needs of female prisoners. As established in the Bangkok Rules, the following points are of particular importance:

- Capacity-building measures for staff employed in female prisons should improve their ability to manage safe and rehabilitative facilities, and address the special social integration requirements for women. This includes improving access for women to senior positions with responsibility for developing gender-sensitive policies (rule 29).
- Clear staff policies and regulations should be in place to protect women prisoners from abuse and gender-based physical, verbal and sexual harassment (rule 31).
- Training activities on the gender-specific needs and human rights of women prisoners should be provided on an equal basis to all staff (rules 32 and 33). Management staff should be trained on sensitivity and prohibition of discrimination and sexual harassment (rule 32).

(iv) Complaint and oversight mechanisms

The existence of effective and independent complaint and oversight mechanisms for all places of deprivation of liberty is a key requirement to respect and fulfil the non-derogable obligation to prevent

³¹⁹ A/HRC/7/3, para. 34.

³²⁰ Inter-American Court of Human Rights, *Miguel Castro-Castro Prison v. Peru*, Judgment of 25 November 2006, para. 312.

³²¹ A/HRC/31/57, para. 26.

³²² *Ibid.*

³²³ *Ibid.*

³²⁴ *Handbook on Women and Imprisonment*, p. 28.

torture and inhuman and degrading treatment. There must therefore be no exception to effective and independent oversight of places of deprivation of liberty on grounds of national security, or of the persons held being suspected, accused or convicted of terrorism-related offences.³²⁵

a. Complaint systems and investigations

Access to prompt and impartial complaint and oversight systems is integral for the protection of prisoners who are at risk of, or subject to, torture and ill-treatment. In practice, complaint and oversight systems are often lacking in independence. In addition, the fear of reprisals prevents prisoners from reporting abuse, and barriers to legal assistance prevent access to redress.³²⁶ In many cases, the vulnerability and isolation of women and girls is compounded by limited access to legal advice, legal representation and legal aid; inability to pay fees or bail as a result of poverty; dependence on male relatives for financial support; and fewer family visits, compared with men.

The stigma associated with reporting sexual violence and other humiliating practices discourages victims, not only women and girls, but also men and boys, as well as lesbian, gay, bisexual and transgender persons from reporting. Compliance with international standards regarding the confidentiality and independence of complaint and oversight mechanisms is therefore particularly important for the prevention of and accountability for sexual and gender-based violence in places of custody.

› FOCUS: GENDER-SENSITIVE COMPLAINT AND INVESTIGATION MECHANISMS FOR ALLEGATIONS OF ILL-TREATMENT IN CUSTODY

Rules 56 and 57 of the Nelson Mandela Rules establish basic principles regarding mechanisms through which prisoners should be entitled to make complaints about their treatment to the prison administration and to the judicial and other competent authorities.

The Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, commonly known as the Istanbul Protocol, establishes a number of gender-sensitive principles for investigations:

- The investigative team should preferably contain male and female specialists. In selecting a person as the primary investigator, special consideration should be given to, inter alia, the victim's preference for a person of the same gender (paras. 90 and 154). Where there is a male victim of sexual abuse, the situation may be complex because he too will have been sexually abused mostly or entirely by men. Some men would, therefore, prefer to describe their experiences to women because their fear of other men is so great; however, others would not want to discuss such personal matters in front of a woman (para. 155).
- In evaluating oral testimony and credibility of witnesses, the commission of inquiry should take into account cultural and gender issues that affect demeanour (para. 117).
- The victim should, wherever possible, be able to choose the gender of the physician involved in physical examinations and, where used, of the interpreter (para. 173). If the victim is being examined after a recent assault, and the physician is of a different gender from the victim, he or she should be offered the opportunity of having a chaperone of the same gender in the room (para. 220).
- For specific considerations regarding physical examinations of the genital region, see paragraphs 227–232; for the genito-urinary system, see paragraph 185.

³²⁵ Counter-Terrorism Implementation Task Force, *Basic Human Rights Reference Guide: Detention in the Context of Countering Terrorism* (New York, 2014), paras. 45–50.

³²⁶ A/HRC/31/57, para. 38.

b. Oversight

An effective monitoring and oversight mechanism is essential to ensure that a well-functioning complaints system is in place, that allegations of ill-treatment and torture are investigated, and that perpetrators are brought to justice. Monitoring and oversight mechanisms should be gender-sensitive, too:

- Inspectors should have the authority to receive and investigate the complaints of prisoners and to visit the premises in order to monitor, among other things, all forms of violence in custody, including sexual violence against both men and women, and all forms of inter-prisoner violence, including proxy violence that occurs with the acquiescence of officials within the prison system.³²⁷ This includes the authority to access information relevant to the treatment of prisoners and the conditions of detention, and to conduct private interviews with prisoners.³²⁸
- Such mechanisms should include women members.³²⁹
- Forensic doctors and female inspectors trained in detecting torture and ill-treatment should be present during such inspections.³³⁰
- Independent inspection bodies should implement gender-sensitive measures to protect at-risk prisoners, such as units of officers trained in handling complaints involving sexual and gender-based violence, and inspections by non-governmental organizations or national preventive mechanisms.³³¹

FURTHER READING

- [Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment \(Istanbul Protocol\)](#).

E. Detention of close family members of suspects

The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has observed that women (and children) not suspected of terrorism-related offences are unlawfully detained and ill-treated to either gain information about male family members or to compel male terrorism suspects to provide information or confessions.³³²

Although the arbitrary arrest and detention of close family members of terrorism suspects to exert pressure on the suspect does not exclusively involve the arrest of women to exert pressure on male family members, gender stereotypes often play a role in this context. The authorities in the two cases below appear to have relied on ideas of female vulnerability and male honour, as well as the role of the husband as protector of his wife, as a means of obtaining the surrender of the suspect.

³²⁷ CAT/C/51/4, para. 57.

³²⁸ Ibid., para. 60.

³²⁹ The Bangkok Rules, rule 25, para. 3.

³³⁰ CAT/C/51/4, para. 58.

³³¹ Ibid., para. 59.

³³² A/64/211, para. 31.

› **EXAMPLE: TWO CASES OF DETENTION OF A WOMAN IN LIEU OF HER HUSBAND**

Case of Ms. A.A.S. and Mr. Al-Gh.^a

In 2003, Mr. Al-Gh.'s name appeared on a list of fugitive terrorism suspects. In reaction to these allegations, Mr. Al-Gh. issued a statement asserting his innocence, but did not surrender. Thereafter, the authorities arrested Ms. A.A.S., Mr. Al-Gh.'s wife, and eight other family members, without charging them with any offence. Mr. Al-Gh. was informed that his family members would be released if he were to turn himself in. Fearing for the fate of his relatives, Mr. Al-Gh. decided to surrender and solicited the help of a respected cleric to negotiate the terms. Mr. Al-Gh. subsequently turned himself in having received a promise that he would be subject to legal proceedings and receive a fair trial, that all his family members would be released, and that he would not be tortured following his arrest.

Case of A.M.^b

A.M., who was pregnant, was travelling with her two children, aged seven and 10 years, through an area where a terrorist group was very active. She was stopped at a military checkpoint for what appeared to be a routine check. The soldiers enquired about the purpose of her travel and she informed them that she was moving to join her husband in a different part of the country. The soldiers used A.M.'s mobile phone to place a call to her husband. They told him that unless he came to the checkpoint to pick up his wife and children, he would be deemed a member of the terrorist group. A.M.'s husband did not go to the checkpoint or make further contact.

A.M. and her children were detained and held in military barracks for several months on suspicion that she was married to a member of a terrorist group. During that time she gave birth to her third child. She was then transferred to the custody of the prisons service where she was held for approximately two years. However, the prisons service refused to accept her older children, who were taken to a children's home.

The local chapter of the International Federation of Women Lawyers (FIDA) filed an application to court on behalf of A.M. and her children for the enforcement of their fundamental rights. The court declared the detention unlawful, ordered the release of A.M. and her youngest child from prison and of the two older children from the children's home, and awarded compensation for the unlawful detention.

^aA/HRC/WGAD/2011/18, paras. 4–5.

^b*Adama Mustapha and 3 others v. Nigerian Army and Nigerian Prisons Service and 2 others*, FHC/YL/CS/22/2016.

As stated by the Human Rights Committee, detaining family members of an alleged criminal who are not themselves accused of any wrongdoing is an egregious example of arbitrary detention.³³³ It is a fundamental principle of international human rights law that only persons who have committed a crime may be held criminally responsible for that crime, a principle that is also reflected in regional human rights treaties. Article 7, paragraph 2, of the African Charter on Human and Peoples' Rights provides for the personal scope of punishment for offences for which an individual has been convicted, which can be imposed only on the offender. Article 5, paragraph 3, of the American Convention on Human Rights states that punishment shall not be extended to any other person other than the criminal.

In the two cases above, the wives of terrorism suspects were arrested and detained to apply pressure on their husbands without being personally charged with an offence. In other cases, close family members have been charged with offences, including supporting terrorist activities, failing to report information related to a terrorism offence, or concealing a terrorism suspect. In such cases, which are closely related to the gender dimensions of offences criminalizing support roles in terrorist groups, the boundary between genuine charges for a form of complicity in terrorist activity and the arbitrary detention of an innocent person to exert pressure on a suspect may be difficult to draw.

³³³Human Rights Committee, general comment No. 35 (2014) on liberty and security of person (CCPR/C/GC/35), para. 16.

The United Nations Working Group on Arbitrary Detention, in its opinion on the case of Ms. A.A.S. and Mr. Al-Gh. summarized above, drew attention to the link between the vague and overly broad definition of terrorism offences, which is in violation of the principle of legality discussed in chapter 2, and the misuse of such provisions to justify the arbitrary detention of the relatives of terrorism suspects as a means of inducing the arrest of the suspect. The Working Group made the following observation:

Such laws, both per se or in their application, by using an extremely vague and broad definition of terrorism, bring within their fold the innocent and the suspect alike, and thereby increase the risk of arbitrary detention, disproportionately reducing the level of guarantees enjoyed by ordinary persons in normal circumstances.³³⁴

A related dimension of this issue is the detention and ill-treatment of female family members of disappeared persons. Women are most often at the forefront of the struggle to resolve the disappearances of members of their family, making them susceptible to intimidation, persecution and reprisals.³³⁵ Such practices have emerged where female relatives have called for the release of male family members held in custody on terrorism charges. Fear of reprisals and deprivation of liberty may also prevent victims' families from pursuing remedies.

F. Alternatives to imprisonment in terrorism cases

1. International standards on alternatives to imprisonment

With regard to pretrial detention, article 9, paragraph 3, of the International Covenant on Civil and Political Rights affirms that it shall not be the general rule that persons awaiting trial shall be detained in custody.

Alternatives to imprisonment, however, can be applied, not only at the pretrial stage or during trial, but also in place of a custodial sentence.

The United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules), adopted by the General Assembly in its resolution 45/110, contain the basic principles relating to the use of non-custodial measures and minimum safeguards for persons subject to alternatives to imprisonment. The Bangkok Rules complement the Tokyo Rules with regard to the alternatives to imprisonment for women offenders. Rules 57–66 of the Bangkok Rules relate to non-custodial measures for women offenders which are applicable to the pretrial, sentencing and post-sentencing stages. Principle 39 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and the basic principles on the use of restorative justice programmes in criminal matters, adopted by the Economic and Social Council in its resolution 2002/12, are also relevant.

2. The scope for alternative measures in terrorism cases

States have conventionally given limited or no consideration to alternatives to imprisonment for those accused or convicted of terrorism offences. This is understandable, considering the threat posed by terrorism to societies; the alarm raised by acts of terrorism; the long sentences available for terrorism offences upon conviction; and the perception that terrorist offenders are always dangerous and fanatical.

³³⁴ A/HRC/WGAD/2011/18, para. 20.

³³⁵ A/HRC/10/9, para. 455.

There is, however, growing recognition of the need to also consider, in appropriate cases, alternatives to imprisonment for those accused or convicted of having committed terrorism-related offences. That recognition is the result of both practical considerations – including the overcrowding of prisons, the negative impact on human rights and social cohesion, and the expense involved in incarceration – and the realization that alternatives are often more effective than imprisonment in reducing recidivism.³³⁶

In 2015, the Global Counterterrorism Forum adopted a set of recommendations on the effective use of appropriate alternative measures for terrorism-related offences to provide guidance on a range of measures for alternatives to imprisonment, including post-conviction incarceration for individuals charged with, or convicted of, terrorism-related offences. As such, the recommendations are in line with and build upon the Tokyo Rules and the other international standards and norms referenced above.

As identified in the recommendations of the Global Counterterrorism Forum, there could be a need to consider such measures in appropriate cases because of the broadening of some Government counter-terrorism strategies to include efforts to prevent and counter violent extremism.³³⁷ Alternatives should be considered, in particular, in the light of:

- Laws enabling the arrest of individuals at the earliest possible stage before they can travel, commit or otherwise directly support an act of violence, through the expanded use of inchoate offences and offences criminalizing preparatory acts (see chap. 2)
- An increased presence of first-time offenders among those radicalized to violence
- Concern about individuals becoming radicalized, or radicalizing others, to violence while in detention centres or prisons³³⁸

The availability of alternatives to imprisonment in terrorism cases vary greatly between States. In some States, procedural mechanisms exist which enable criminal justice authorities not to pursue charges against a person suspected of having committed a terrorism-related offence. In other States, there is no scope in domestic law to allow prosecutors and judges to discontinue prosecution or impose alternatives to pretrial detention where an individual is suspected of committing a terrorist offence. In sentencing, judges may be restricted in their ability to impose lesser sentences owing to long-term, minimum terms of imprisonment. Such an approach can lead to disproportionate sentences, in particular for:

- Offenders with reduced culpability
- Certain categories of offenders, such as first-time offenders who were not directly involved in any acts of violence
- Individuals who became associated with terrorist groups under various forms of coercion
- Individuals who would pose a low risk to their communities if released

Recommendation 8 of the recommendations of the Global Counterterrorism Forum recognizes that more emphasis should be placed on ensuring that vulnerable individuals are not victimized by imprisonment if viable alternatives are available and appropriate.³³⁹ Such an approach is in line with the general rule that States shall develop the legal basis for non-custodial measures and provide them to

³³⁶ See, for example, UNODC, *Handbook on Strategies to Reduce Overcrowding in Prisons*, Criminal Justice Handbook Series (Vienna, 2013), p. 109; and *Handbook of Basic Principles and Promising Practices on Alternatives to Imprisonment* (United Nations publication, Sales No. E.07.XI.2), pp. 3–7.

³³⁷ Global Counterterrorism Forum, “Recommendations on the effective use of appropriate alternative measures for terrorism-related offences”, p. 2.

³³⁸ Ibid.

³³⁹ Ibid., recommendation 8.

avoid unnecessary use of imprisonment, rationalize criminal justice policies and provide greater flexibility consistent with the nature and gravity of the offence, with the personality and background of the offender and with the protection of society, taking into account the observance of human rights, the requirements of social justice and the rehabilitation needs of the offender.³⁴⁰

Alternatives to imprisonment may be particularly appropriate for certain categories of offenders including juveniles, first-time offenders and people suffering from diminished mental capacity.³⁴¹ Alternative measures are also particularly appropriate for women offenders, in certain circumstances, as they are often more likely than men to be first-time, low-risk offenders who acted in non-violent support roles (see chap. 2). Further, the disproportionately severe effects of women's imprisonment require additional efforts in finding alternatives to imprisonment at all stages of the criminal justice process.³⁴²

3. General principles for alternative measures

The criminal justice system should provide for a wide range of non-custodial sentences ranging from pretrial to post-sentencing dispositions, while taking into account the need for consistent sentencing, in order to provide greater flexibility consistent with the individual circumstances of the offender and the case.³⁴³

Additionally, the Tokyo Rules further provide for a range of legal safeguards to be implemented in connection with alternative measures:³⁴⁴

- The dignity of the offender should be protected at all times, as should his or her privacy and confidentiality, and the privacy of his or her family.
- Alternative measures should not inflict physical or psychological harm on the offender.
- The introduction, definition and application of non-custodial measures should be prescribed by law, and discretion by judicial or other authorities should be exercised in accordance with the rule of law.
- The consent of the offender should be sought where alternative measures impose an obligation on that individual, especially at the pretrial stage, when the presumption of innocence applies.
- Alternative measures should not restrict the offender's rights further than what was authorized by the competent authority that issued the original decision.
- Decisions on alternative measures should be subject to review, upon application of the offender.
- Mechanisms should be in place to enable the offender to make a complaint if alternative measures affect his or her rights.

Further, the selection of alternative measures should be based on an assessment according to criteria relating to the nature and gravity of the offence, the personality and background of the offender, the purposes of sentencing and the rights of victims.³⁴⁵

³⁴⁰ The Tokyo Rules, rules 1.5 and 2.3.

³⁴¹ Global Counterterrorism Forum, "Recommendations on the effective use of appropriate alternative measures for terrorism-related offences", recommendation 8.

³⁴² *Handbook of Basic Principles and Promising Practices*, p. 70.

³⁴³ The Tokyo Rules, rule 2.3.

³⁴⁴ *Ibid.*, rule 3.

³⁴⁵ *Ibid.*, rule 3.2.

Potential criteria to be taken into account for assessing alternative measures for those charged with or convicted of having committed terrorism-related offences, as suggested in the Recommendations on Alternative Measures,³⁴⁶ include:

- The severity of the offence charged
- The level of radicalization to violence and commitment to violent extremism
- The offender's receptiveness to intervention and treatment
- The likelihood of the person re-offending

4. Gender-sensitive alternative measures at different stages of the criminal justice system

Women may be disadvantaged, however, in accessing such alternatives in a number of ways. Most States do not offer gender-specific alternatives to imprisonment that are tailored to meet the specific requirements of women offenders, in order to reduce the gender-specific risks of recidivism.³⁴⁷ Designed and implemented with the majority of male suspects and offenders in mind, these alternatives may not be equally accessible to women offenders.

States should therefore consider developing and implementing a range of gender-sensitive alternatives for women offenders applicable at different stages of the criminal justice system, taking into account the history of victimization of many women offenders and their caretaking responsibilities.³⁴⁸

(i) Diversion from prosecution

Diversory measures should be implemented by the police, prosecution service or other agencies dealing with criminal cases for women offenders wherever appropriate and possible, in accordance with criteria developed within each legal system.³⁴⁹ Such a decision should take into account the protection of society, crime prevention, the promotion of respect for the law and the rights of the victim.³⁵⁰ Decisions on diversory measures should take into account that depriving women with caretaking responsibilities of their liberty also has a harmful impact on children and other family members within their care.³⁵¹

(ii) Avoidance of pretrial detention

Alternatives to pretrial detention should be employed as early as possible,³⁵² and may include measures such as bail, house arrest, electronic monitoring, conditional release that may require checking in with law enforcement or other criminal justice authorities, and diversion.³⁵³ It has been observed that decisions on alternatives, both pretrial and at the sentencing stage, often overlook the typical background of women offenders, their caring responsibilities and the typically lower risk they pose to society.³⁵⁴ The availability of alternatives should, therefore, take into account the implications

³⁴⁶Global Counterterrorism Forum, "Recommendations on the effective use of appropriate alternative measures for terrorism-related offences", recommendation 6.

³⁴⁷UNODC, "Information note for criminal justice practitioners" on non-custodial measures for women offenders" (n.p.), p. 2.

³⁴⁸The Bangkok Rules, rule 57.

³⁴⁹The Tokyo Rules, rule 5.1, and the Bangkok Rules, rule 58.

³⁵⁰The Tokyo Rules, rule 5.1.

³⁵¹UNODC, "Information note for criminal justice practitioners", p. 6; see also the Bangkok Rules, rule 58.

³⁵²The Tokyo Rules, rule 6.2.

³⁵³"Recommendations on the effective use of appropriate alternative measures for terrorism-related offences", footnote 2.

³⁵⁴Helmut Kury, Slawomir Redo and Evelyn Shea, eds., *Women and Children as Victims and Offenders: Background, Prevention, Reintegration – Suggestions for Succeeding Generations*, vol. 2 (n.p., Springer, 2016), p. 41.

for employment, accommodation and child custody that may disproportionately affect women, especially in a female-headed household, and also the fact that women may be less aware of their legal rights and their entitlement to free legal aid, if applicable, as discussed above and in chapter 6.³⁵⁵

The forms and conditions of alternative measures to pretrial detention, as with all other forms of alternatives, must be gender-sensitive. Mechanisms determining fines and bail amounts may fail to account for the economic disadvantage and lack of financial autonomy that women face in many contexts. Further, women may be disadvantaged by gender-neutral conditions set by authorities, such as bail conditions requiring regular reporting to authorities. Women may be at a particular disadvantage in situations where women cannot leave home without being accompanied by male relatives, because transport to the respective police station is not affordable, or feasible, or because reporting times would jeopardize caretaking responsibilities.³⁵⁶

In determining the conditions to be observed by the offender in connection with the alternative measures, the Tokyo Rules provide that the competent authority should take into account both the needs of society and the needs and rights of the offender and the victim. The conditions to be observed shall be practical, precise and as few as possible, and be aimed at reducing the likelihood of an offender relapsing into criminal behaviour and of increasing the offender's chances of social integration, taking into account the needs of the victim.³⁵⁷

(iii) Trial and sentencing stage

A number of alternatives to imprisonment exist at the sentencing stage, including warnings, conditional discharges, status penalties, pecuniary fines, compensation orders, suspended sentences, probation and judicial supervision, community service, house arrest or non-institutional treatment.³⁵⁸ In considering the alternative measures to imprisonment at the trial and sentencing stages, the judicial authority should take into account the rehabilitative needs of the offender, the protection of society and the interests of the victim.³⁵⁹ Social inquiry reports on the offender's pattern of offending and current offences should also be taken into account, if they exist.³⁶⁰

Women offenders may face similar barriers in accessing alternatives to imprisonment at the trial and sentencing stages to those defined above with regards to diversionary measures and pretrial detention, including an inability to pay fines, which are frequently used as an alternative to imprisonment for non-violent crimes.³⁶¹

Rule 61 of the Bangkok Rules provides that when sentencing women offenders, courts shall have the power to consider mitigating factors such as lack of criminal history and relative non-severity and nature of the criminal conduct, in the light of women's caretaking responsibilities and typical background. Further, gender-specific options for sentencing alternatives should take into account the history of victimization of many women offenders and their caretaking responsibilities.³⁶² Mandatory minimum sentences for offences, however, as discussed above, impede the exercise of judicial discretion, even in cases of non-violent, first-time offenders in which mitigating circumstances could otherwise apply.

³⁵⁵ UNODC, "Information note for criminal justice practitioners", p. 8.

³⁵⁶ Kury, Redo and Shea, eds., *Women and Children as Victims and Offenders*, p. 41.

³⁵⁷ The Tokyo Rules, rules 12.1–12.2.

³⁵⁸ *Ibid.*, rule 8.2.

³⁵⁹ *Ibid.*, rule 8.1.

³⁶⁰ *Ibid.*, rule 7.1.

³⁶¹ Kury, Redo and Shea, eds., *Women and Children as Victims and Offenders*, p. 41.

³⁶² The Bangkok Rules, rule 57.

Further, non-custodial sentences for pregnant women and women with dependent children should be preferred where possible and appropriate.³⁶³ Pursuant to the Bangkok Rules, custodial offences for women in these positions should only be considered in the case of violent offences or where the woman represents a continuing danger, taking into account the best interests of the child.³⁶⁴

(iv) Post-sentencing stage

The Tokyo Rules envisage a number of post-sentencing dispositions to assist reintegration of offenders into society, which should be considered at the earliest possible stage, and should be subject to judicial review.³⁶⁵ Such dispositions include work or education release, parole, remission and pardon.³⁶⁶ Decisions regarding early conditional release (parole) shall favourably take into account the caretaking responsibilities of women prisoners, as well as their specific social reintegration needs.³⁶⁷

5. “Protective” custody

Authorities have detained individuals who have been associated with terrorist groups for “protective purposes”. Authorities may perceive such individuals to be at a particular risk of retaliation by the terrorist group they have or are thought to have been associated with, or by community members, owing to the stigma attached to such an association, even when the person may be a victim. Persons have also been detained under the guise of “protection” for the purpose of eliciting information on their presumed associates. In other contexts, women suspected of being victims of trafficking or sexual violence are taken into “protective” custody, often against their will, to protect them from further harm.³⁶⁸

Such “protective” detention can amount to unlawful deprivation of liberty and violate the prohibition of arbitrary detention. Further, prolonged detention for the purposes of “protection” can in some circumstances constitute inhuman treatment.³⁶⁹

Human rights treaty bodies have called upon States to cease the practice of protective custody for women at risk of violence. The Committee against Torture has urged States to transfer all women currently held in “protective custody” to other safe and rehabilitative shelters.³⁷⁰ The Committee on the Elimination of Discrimination against Women has called on States to repeal all legal provisions that discriminate against women, including procedures allowing for women’s deprivation of liberty to protect them from violence, as well as all laws that prevent or deter women from reporting gender-based violence, and the practice of “protective custody”.³⁷¹

³⁶³ The Bangkok Rules, rule 64.

³⁶⁴ Ibid.

³⁶⁵ The Tokyo Rules, rules 9.1, 9.3 and 9.4.

³⁶⁶ Ibid., rule 9.2.

³⁶⁷ The Bangkok Rules, rule 63.

³⁶⁸ An academic expert on trafficking in human beings highlights, in this respect, that the practice of trafficking victim detention is often highly gendered in a way that negatively affects both women and men. For example, the overwhelming majority of trafficked persons detained in welfare shelters are female. Women and girls are more likely to be identified through official channels. Female victims of trafficking are widely considered to need this protection much more than their male counterparts (Anne T. Gallagher, *The International Law of Human Trafficking* (Cambridge, Cambridge University Press, 2010), pp. 293–294).

³⁶⁹ A/HRC/7/3, para. 42, and A/HRC/4/33/Add.3, para. 39.

³⁷⁰ A/65/44, p. 106.

³⁷¹ Committee on the Elimination of Discrimination against Women, general recommendation No. 35 (2017) on gender-based violence against women, updating general recommendation No. 19 (CEDAW/C/GC/35), para. 31 (b)–(c).

While temporary forms of custody may be justified on an exceptional basis where no appropriate alternative exists, non-custodial forms of protection must be developed to avoid resorting to such a practice.³⁷² Suggested measures in that regard include the following:

- Forms of custody to “protect” a woman should only be used when they are necessary and expressly requested by the woman concerned. They must be temporary measures and not imposed against her will. Such measures should also be supervised by judicial and other competent authorities.³⁷³ Women detained should have access to legal counsel in the process of making such decisions.
- Where, in exceptional circumstances, detention facilities are used to protect women at risk of violence, such women should not be treated as prisoners and should be free to leave the detention facility when they wish.³⁷⁴
- Women held in custody for such reasons should be transferred, as soon as possible and where necessary, to more appropriate facilities, such as shelters, safe houses and other community services.³⁷⁵

FURTHER READING

UNODC has developed a number of publications on alternatives to imprisonment for women offenders, including:

- *Handbook of Basic Principles and Promising Practices on Alternatives to Imprisonment* (2007)
- Information note for criminal justice practitioners on non-custodial measures for women offenders, available at www.unodc.org
- *Criminal Justice Assessment Toolkit: Alternatives to Incarceration* (2006)
- E-learning course on alternatives to imprisonment for women offenders

G. Administrative detention of persons associated with terrorist groups

1. Administrative detention outside the criminal justice context

The Working Group on Arbitrary Detention has defined administrative detention as the arrest and detention of individuals by State authorities outside the criminal law context (e.g., for reasons of security, including terrorism) and as a form of preventive detention.³⁷⁶ Administrative detention therefore occurs where it is not imposed in connection with, or with a view to proceedings within the criminal justice system for, a particular crime.

In some States, persons suspected of being associated with a terrorist group are deprived of their liberty for prolonged periods of time by military or other security authorities outside the criminal justice system for security purposes. Such events occur where, for example, military authorities “screen” large groups of people apprehended in the course of counter-terrorism operations, or who have surrendered to the authorities, in order to determine whether they can be released back into the community on the ground that they present a low risk.

³⁷²The Bangkok Rules, rule 59.

³⁷³International Covenant on Civil and Political Rights, art. 9, para. 4, and the Bangkok Rules, rule 59.

³⁷⁴Penal Reform International and Thailand Institute of Justice, *Guidance Document on the United Nations Rules on the Treatment of Women Prisoners*, p. 18.

³⁷⁵The Bangkok Rules, rule 59.

³⁷⁶A/HRC/13/30, para. 77.

Administrative detention also occurs where persons associated with a terrorist group are not charged with an offence, but are held by the authorities for the purpose of being subjected to de-radicalization programmes. Irrespective of the way the authorities designate such programmes, such detention will amount to deprivation of liberty where participation in such programmes is compulsory and participants are not free to leave. Deprivation of liberty will also occur where participation is initially voluntary, but participants are subsequently prevented from leaving.

In addition, persons may find themselves *de facto* deprived of freedom of movement in camps for internally displaced persons. Women and children in such camps have faced severe restrictions on their freedom of movement by camp authorities on the basis of their family members' purported involvement in the activities of terrorist groups, while themselves having not been accused of such involvement. In some cases, camp authorities have prevented them from leaving, have confiscated their identity cards (which are required to pass checkpoints beyond those camps), or required special approval in order to travel outside of the camp to nearby hospitals. These restrictions have been applied to camp residents by governmental security forces, and also by Government-aligned militias in charge of camps. While it is important to distinguish between deprivation of freedom of movement and deprivation of liberty, the boundary is not always clear, and deprivation of freedom of movement may be so severe as to amount to a *de-facto* administrative deprivation of liberty.

Deprivation of liberty outside the context of criminal proceedings is permissible under international human rights law under certain conditions, to be applied restrictively. However, the Human Rights Committee has warned that forms of administrative detention present severe risks of arbitrary deprivation of liberty.³⁷⁷ Where individuals are deprived of their liberty through administrative detention on national security grounds, including for the purposes of screening or de-radicalization, States must comply with strict guarantees enshrined in article 9 of the International Covenant on Civil and Political Rights.³⁷⁸ This means that:

- Such detention must be based on grounds and procedures clearly established in domestic law.
- The detainee must have access to an effective means to challenge the lawfulness of his or her detention, including access to a lawyer.
- A judicial or other independent and impartial body must decide without delay on challenges to the lawfulness of detention and periodically review the continuing lawfulness and necessity of detention.
- A person who has been unlawfully detained should have an enforceable right to compensation.

Situations of detention outside the criminal justice system are often governed by less detailed rules and surrounded by lesser safeguards. Separation between men and women, adults and children may be enforced less strictly. Oversight and access to legal assistance and to complaint mechanisms are often weaker than in settings governed by well-established rules, such as the corrections system, a fact that is likely to have a particular impact on women and girls. The Committee on the Elimination of Discrimination against Women has highlighted the need for States to ensure that all appropriate measures, "including effective legal aid and procedures," are in place to enable women to challenge the legality of their detention; ensure regular reviews of such detention in the presence of the detainee; and ensure that the "conditions of administrative detention comply with relevant international standards for the protection of the rights of women deprived of their liberty".³⁷⁹

³⁷⁷ CCPR/C/GC/35, para. 15.

³⁷⁸ Except for part of article 9, paragraph 2, and all of article 9, paragraph 3, which concern only persons charged with an offence.

³⁷⁹ CEDAW/C/GC/33, para. 53 (c).

Authorities in charge of screening or de-radicalization programmes must also be particularly careful to avoid making decisions based on gender stereotypes. On the one hand, in some countries there is a tendency to consider women's association with terrorist groups as generally involuntary or innocent, and to therefore allow them to return to civilian life without undergoing thorough screening procedures. As a result, it is primarily, if not exclusively, men who are subject to prolonged administrative detention for the purposes of determining their "profile", and in order to make a first determination as to the likelihood of their involvement in acts of terrorism and whether they pose a significant security risk. On the other hand, while women are often not considered for prosecution owing to gender stereotypes, they are often deemed to have been indoctrinated or brainwashed, therefore requiring de-radicalization, even when the coercive nature of their association with the terrorist group is undisputed. In its resolution 2396 (2017), the Security Council called upon Member States to employ – for both terrorism suspects and their accompanying family members – evidence-based risk assessments, screening procedures, in accordance with domestic and international law, without resorting to profiling based on any discriminatory ground prohibited by international law.

2. Detention in the context of armed conflicts

Where persons associated with a non-State armed group (including those designated as terrorist groups) are detained in the context of an armed conflict, the international humanitarian law rules regarding deprivation of liberty become applicable and complement the rules of international human rights law. In non-international armed conflicts and as regards deprivation of liberty, international humanitarian law affords women and men the same protection – be they civilians or fighters – but also requires that the specific protection, health and assistance needs of women affected by armed conflict must be respected.

› FOCUS: NON-INTERNATIONAL ARMED CONFLICTS

Most armed conflicts today are non-international in nature. Non-international armed conflicts denote armed conflicts between Governments and organized armed groups, or conflicts that take place among such groups themselves. The intervention of a foreign State in a non-international armed conflict on the side of the Government, such as the intervention of other States in support of Iraq in the conflict against ISIL, does not change the classification of that conflict.

Assessed on a case-by-case basis, such hostilities must reach a minimum level of intensity, and the non-governmental armed forces must be organized such that there is a command structure and the capacity to sustain military operations.^a

For instance, the United Nations High Commissioner for Human Rights, the International Committee of the Red Cross and the International Criminal Court confirmed the existence of a non-international armed conflict in northern Nigeria between the security forces of Nigeria and Boko Haram. Key factors in that determination were the nature and intensity of the armed violence, its protracted nature, and the level of organization of Boko Haram as an armed group.^b

^aSee the International Committee of the Red Cross casebook on non-international armed conflict. Available at <https://casebook.icrc.org/glossary/non-international-armed-conflict>.

^bA/HRC/30/67, para. 19; International Committee of the Red Cross, *Annual Report 2013*, vol. I (Geneva, 2014), p. 183; and International Criminal Court, Office of the Prosecutor, "Report on preliminary examination activities 2013" (November 2013), para. 218.

While international humanitarian law is understood to provide an inherent power to detain individuals during armed conflicts, the treaty rules of international humanitarian law applicable to non-international armed conflicts do not define grounds and procedures for internment (administrative detention). Such grounds and procedures need to be defined elsewhere, normally in national law. International humanitarian law provides important rules about the conditions of detention and treatment of detainees.

Common article 3 to the Geneva Conventions provides protections for persons not participating or no longer participating in hostilities, including as the result of detention in non-international armed conflict. This applies to any form of detention related to armed conflict and requires humane treatment without any adverse distinction. Examples of prohibited behaviour are violence to life and person, cruel treatment and torture, and outrages upon personal dignity.

Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) also contains protections for persons detained in the context of non-international armed conflicts (see arts. 4–6). Its protections cover both persons being detained in connection with criminal proceedings, and those detained for security reasons outside criminal prosecution (internment); however, the deprivation of liberty must be for reasons related to the armed conflict.³⁸⁰ Protocol II only applies where it has been ratified by the State and its scope is narrower than that of common article 3.

Customary international humanitarian law applicable in non-international armed conflicts supplements the treaty provisions in common article 3 and Protocol II. Customary international humanitarian law contains a number of elementary rules on the treatment of detainees, conditions of detention and judicial guarantees.³⁸¹ Regarding the protection of family life, women and children, customary international humanitarian law requires the following:

- The family life of detained persons must be respected as far as possible. This requires, to the degree possible, the maintenance of family unity, contact between family members and the provision of information on the whereabouts of family members.³⁸²
- Except when men and women of the same family are accommodated together, women shall be held in quarters that are separate from those of men and under the immediate supervision of women.³⁸³
- The specific protection, health and assistance needs of women affected by armed conflict must be respected.³⁸⁴ This applies also in contexts of detention.

³⁸⁰ Claude Pilloud and others, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Yves Sandoz, Christophe Swinarski and Bruno Zimmermann, eds. (Geneva, International Committee of the Red Cross, 1987), para. 4568.

³⁸¹ See Jean-Marie Henckaerts, “Study on customary international humanitarian law: a contribution to the understanding and respect for the rule of law in armed conflict”, *International Review of the Red Cross*, vol. 87, No. 857 (March 2005), in particular rules 87–105 and 118–128.

³⁸² See Henckaerts, “Study on customary international humanitarian law”, rules 105, 125 and 126.

³⁸³ *Ibid.*, rule 119; and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 5, paras. 2 (a) and (d).

³⁸⁴ Henckaerts, “Study on customary international humanitarian law”, rule 134.

SUMMARY OF KEY POINTS

- International law prohibits arbitrary deprivation of liberty and dictates that all persons deprived of their liberty must in all circumstances be treated with due respect for their human dignity and human rights. This includes deprivation of liberty related to preventing and countering terrorism.
- Those suspected, accused or convicted of terrorism-related offences have a range of gender-specific needs and vulnerabilities in contexts where they are imprisoned or deprived of their liberty. Women in particular are impacted by prison systems that are designed for men, who comprise the majority of the prison population.
- Women have particular needs in contexts of imprisonment. As such, gender considerations should inform admission and registration procedures; decisions on allocation, separation and classification; access to health care; measures for contact with the outside world, including family visits; access to legal counsel; measures to accommodate pregnant women and women with children; and selection and training of prison staff.
- Disengagement, rehabilitation and reintegration programmes should take into account gender-specific needs and experiences of violent extremist prisoners.
- While contexts of imprisonment and deprivation of liberty expose all individuals to a higher risk of mistreatment and abuse, gender plays a key factor in vulnerability to torture in these contexts. Taking into account the special protection needs of women deprived of their liberty is key to safeguarding against torture and ill-treatment. This is particularly important with respect to: security and disciplinary measures; access to health care and hygiene; personnel and training; and the availability of complaint and oversight mechanisms.
- In some contexts, women are arrested and deprived of their liberty within the criminal justice system solely as the result of their familial relationship to terrorism suspects in order to compel suspects to surrender or confess. Such deprivation of liberty may amount to arbitrary detention, which is a violation of the principle enshrined in international and regional human rights law that only persons who have committed a crime may be held criminally responsible for that crime.
- Women are often disadvantaged in accessing alternative measures to imprisonment, which are generally not designed to meet the specific requirements of women offenders. States should consider developing and implementing a range of gender-sensitive alternatives for women offenders applicable at different stages of the criminal justice system.
- In some cases, persons associated with terrorist groups are administratively detained outside the criminal justice system, including for the purposes of “screening” or mandatory participation in de-radicalization programmes. In other cases, family members of persons with a perceived association to terrorist groups may be held in camps for internally displaced persons and subject to limitations on their freedom of movement. Deprivation of liberty outside the context of criminal proceedings is only permissible under international human rights law under certain restrictive conditions.
- Where persons associated with a non-State armed group (including those designated as terrorist groups) are detained in the context of an armed conflict, the international humanitarian law rules regarding deprivation of liberty become applicable and complement the rules of international human rights law.



top: A Yazidi woman who was kidnapped by ISIL and later released sits in the abandoned building where she lives in Bozan, northern Iraq.
© UNHCR/Andrew McConnell

centre: © AAP/Darren England

CRIMINAL INVESTIGATIONS AND PROSECUTIONS OF SEXUAL AND GENDER-BASED VIOLENCE PERPETRATED BY TERRORIST GROUPS

Terrorist groups engage in many forms of sexual and gender-based violence. The tactical use of this type of violence by terrorist groups such as ISIL, Boko Haram, Al-Shabaab, Ansar Eddine, the Taliban and Al-Qaida is documented by reports of the United Nations.³⁸⁵ The use of sexual and gender-based violence by terrorist groups includes rape and other forms of sexual assault, forced marriage and forced abortion. Gender-based violence also includes the infliction of violence against women who do not conform to rules regarding gender roles that terrorist groups seek to enforce, as well as the use of violence against men and women accused of homosexuality.

Section A contains an examination of the forms and drivers of sexual and gender-based violence perpetrated by terrorist groups and the nexus between these forms of violence and trafficking in persons. Section A also highlights States obligations to ensure accountability for sexual and gender-based violence committed by terrorist groups. Section B includes an examination of the various legal frameworks through which individual criminal accountability for sexual and gender-based violence committed by terrorist groups may be achieved, while section C is focused on forms of this type of violence that can be prosecuted as international crimes under the Rome Statute.

The gender aspects of investigating and prosecuting terrorism cases discussed in chapter 3 apply across all criminal cases, including those involving sexual and gender-based violence that are discussed in the present chapter. Section D builds upon the gender-based principles concerning interviewing and victim and witness protection established in chapter 3, in order to look at issues specific to the investigation and prosecution of cases involving sexual and gender-based violence. The chapter concludes with section E, which contains an exploration of the various frameworks for international cooperation that may be used to more effectively investigate and prosecute sexual crimes committed by terrorist groups.

³⁸⁵ S/2016/361/Rev.1, para. 21.

A. Sexual and gender-based violence perpetrated by terrorist groups

As established in chapter 1, significant attention in conflict and protection responses has been directed at understanding the drivers of sexual and gender-based violence, including through the framework of the Women, Peace and Security Agenda. However, international recognition of the use of sexual and gender-based violence as a tactic of terrorism in many regions of the world is a more recent development. The reports of the Secretary-General on conflict-related sexual violence affirm that:

- Sexual violence is not incidental, but integrally linked with the strategic objectives, ideology and funding of extremist groups.
- Sexual violence is used to achieve tactical objectives. Those objectives include increasing recruitment; terrorizing populations into compliance; forcibly displacing persons from strategic areas; generating revenue through human trafficking, the slave trade, ransoms and the control of natural resources; generating intelligence by means of torture; achieving conversion through forced marriage; and altering the composition of targeted communities. Women and girls, abducted for sexual slavery purposes, are used as human shields and suicide bombers by terrorist organizations.
- The use of sexual violence entrenches an ideology based on suppressing women's rights and controlling their sexuality and reproduction. In some contexts, women and girls are seen as the "wages of war", or as a form of compensation or salary to armed elements.
- Efforts to prevent and address sexual violence are closely aligned with efforts to prevent violent extremism.³⁸⁶

In its resolution 2242 (2015), the Security Council urged Member States to strengthen access to justice for women in conflict and post-conflict situations, including through the prompt investigation, prosecution and punishment of perpetrators of sexual and gender-based violence, as well as reparation for victims as appropriate. The Secretary-General, in his 2016 report on conflict-related sexual violence, underscored the importance of integrating the protection and empowerment of women into counter-terrorism strategies and formally recognizing victims of sexual violence as victims of terrorism in order to build counter-narratives and counter-strategies and pave the way for reparations and redress.³⁸⁷

› EXAMPLE: THE GOVERNMENT OF IRAQ – UNITED NATIONS JOINT COMMUNIQUÉ ON THE PREVENTION OF AND RESPONSE TO CONFLICT-RELATED SEXUAL VIOLENCE

In its resolution 1888 (2009), the Security Council established the Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict. The Office has a mandate that encompasses conflict-related sexual and gender-based violence committed by terrorists and supports the capacity of national criminal justice actors to ensure accountability for conflict-related sexual violence.

In September 2016, the United Nations – through the Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict – signed a joint communiqué with the Government of Iraq on the prevention of and response to conflict-related sexual violence, covering six priority areas: legislative and policy reform; accountability; services and reparations; engaging religious and tribal leaders, civil society

³⁸⁶ S/2015/203 and S/2017/249.

³⁸⁷ S/2016/361/Rev.1, paras. 19 and 21.

and women's groups; integrating gender considerations into counter-terrorism measures; and awareness-raising. In particular, the joint communiqué highlighted future areas of cooperation between the United Nations and the Government of Iraq to:

- Support legislative and policy reform to strengthen protection from and service response for sexual violence crimes;
- Ensure accountability for sexual violence through strengthening the capacity of national and regional authorities, including the Kurdistan Genocide Committee, to document, investigate and prosecute such crimes, according to applicable national laws.

› FOCUS: GENDER-BASED VIOLENCE

Gender-based violence is a broad concept referring to any harmful act directed against, or which disproportionately affects, individuals or groups of individuals on the basis of their gender (see the glossary of the present publication).^a

The Committee on the Elimination of Discrimination against Women defines gender-based violence against women as “violence directed against a woman because she is a woman or that affects women disproportionately”.^b

Examples of gender-based violence include:

- Acts or omissions intended or likely to cause or result in death or physical, sexual, psychological or economic harm or suffering to women, threats of such acts, harassment, coercion and arbitrary deprivation of liberty;^c
- Violence inflicted against women as punishment for transgressing gender norms (including acid attacks and honour killings);
- The use of women as human shields;
- Violence committed against lesbian, gay, bisexual, transgender and intersex (LGBTI) persons on the basis of their sexual orientation and gender identity. Such violence falls within the scope of this term because it targets those seen as defying gender norms;
- Sexual violence, as defined in the glossary, including sexual violence in the form of forced or coerced sexual exploitation.

Accordingly, while sexual violence is a form of gender-based violence, gender-based violence is a broader category of crime and may be perpetrated through non-sexual acts, including physical, psychological or economic harm.

^aOHCHR, “Sexual and gender-based violence in the context of transitional justice” (October 2014).

^bCommittee on the Elimination of Discrimination against Women, general recommendation No. 19 (1992) on violence against women, para. 6.

^cCommittee on the Elimination of Discrimination against Women, general recommendation No. 35 (2017) on violence against women, updating general recommendation No. 19, para. 14.

1. The nexus between sexual and gender-based violence, terrorism and trafficking

The nexus between trafficking and sexual and gender-based violence in the context of the activities of terrorist groups was recognized in Security Council resolution 2195 (2014), in which the Council expressed concern that terrorist groups in some regions engage in trafficking in persons as a form of transnational organized crime. In 2015, the first statement by the President of the Security Council on

the subject of trafficking in persons affirmed this nexus, acknowledging that groups such as ISIL and Boko Haram engage in human trafficking, for the purpose of sexual slavery, sexual exploitation and forced labour, which may contribute to the funding and sustainment of such groups.³⁸⁸

In its resolution 2331 (2016), the Security Council recognized the connection between trafficking in persons, sexual and gender-based violence, and terrorism, and underscored that trafficking of women and girls by certain terrorist groups constitutes a significant driver of revenue and recruitment. It also stated that victims of all forms of trafficking in persons and of sexual violence committed by terrorist groups should be classified as victims of terrorism. Pursuant to that finding, the Council urged all States to ensure that their domestic laws and regulations establish serious criminal offences sufficient to provide the ability to prosecute and penalize in a manner duly reflecting the seriousness of the offence of trafficking in persons committed with the purpose of supporting terrorist organizations or individual terrorists, including through the financing of and recruitment for the commission of terrorist acts.

In its resolutions 2331 (2016) and 2388 (2017), the Security Council further condemned acts of trafficking undertaken by ISIL, particularly the sale or trade of persons including the Yazidis and other minorities, and of other trafficking offences and abuses committed by Boko Haram, Al-Shabaab and the Lord's Resistance Army for the purposes of sexual slavery, sexual exploitation and forced labour.

The nexus has likewise been recognized within the global framework combating trafficking in persons. The political declaration on the implementation of the United Nations Global Plan of Action to Combat Trafficking in Persons, adopted in 2017 by the General Assembly in its resolution 72/1, reinforced the concern of Member States about the practice of trafficking in persons by terrorist groups, involving the coercion of women and girls into marriage or sexual slavery, and men and boys into forced labour or to act as combatants.³⁸⁹

2. Forms and drivers of sexual and gender-based violence perpetrated by terrorist groups, and the gendered implications

There are a multitude of United Nations resolutions and reports documenting the forms of sexual and gender-based violence that have been observed in particular regions, and by specific terrorist and violent extremist groups. These reports have firmly established the use of sexual and gender-based violence as a tactic of terrorist and violent extremist groups such as ISIL, Boko Haram, Al-Shabaab, Ansar Eddine, the Taliban, Al-Qaida, Al Qaida in the Islamic Maghreb, and Hay'at Tahrir al-Sham (formerly Nusra Front).³⁹⁰ Documented egregious forms of sexual and gender-based violence include rape and other forms of sexual assault of women and girls, as well as men and boys; forced marriage, including forced child marriage; sexual slavery; forced pregnancy; and forced abortion. Women have also been victims of gender-based killings, subjected to violence for failing to conform to discriminatory gender roles, and used as human shields or suicide bombers. Many practices with respect to women and girls are linked to kidnapping, abductions and trafficking of persons for the purpose of sexual slavery, forced marriages and forced labour.

³⁸⁸ S/PRST/2015/25.

³⁸⁹ General Assembly resolution 72/1, para. 21.

³⁹⁰ See, for example, Security Council resolutions 2331 (2016), 2349 (2017), 2379 (2017) and 2388 (2017); see also S/2016/361/Rev.1, S/2017/249, S/2018/250 and A/HRC/28/18.

The drivers behind the use of sexual and gender-based violence are likewise varied. As identified by the Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict, prolific drivers include:

- *Economic drivers.* The use of sexual and gender-based violence comprises a key part of the “political economy of terrorism”. Such violence is used to generate revenue through the trafficking in and ransoming of women and girls – for example, the use of women and girls in sexual slavery and enforced prostitution. Women and girls have also been “gifted” to fighters in lieu of compensation.³⁹¹
- *Recruitment drivers.* The promise of wives and/or sex slaves has been instrumental to the recruitment efforts of terror groups, providing incentives for the recruitment of combatants, including younger, economically marginalized men in conservative societies and foreign terrorist fighters.³⁹²
- *Ideological drivers.* Sexual slavery is closely linked to the ideology of ISIL.³⁹³ Forced pregnancies of women in forced marriages have been used to perpetuate the extremist ideology across generations. They have also been used to displace certain targeted minorities and to bring about their physical destruction, including by preventing births.³⁹⁴ Forced marriages have preceded forced religious conversions, which are used to spread group ideology.³⁹⁵
- *Strategic drivers.* Linked to the ideological drivers, sexual and gender-based violence has been threatened and used in order to extend territorial control and to vacate strategically important territory.³⁹⁶

(i) Gendered dimension of sexual and gender-based violence perpetrated by terrorist groups against women and girls

The use of sexual and gender-based violence is deeply entrenched in gendered norms and stereotypes, as well as the conception of gendered roles held by the terrorist or violent extremist group. It is a manifestation of systemic gender-based discrimination against women and other forms of subordination, as well as of the unequal power relations between women and men reflected in public and private life.³⁹⁷ It is also often intrinsically linked to the strategic objectives of terrorist groups and should not be viewed in isolation, but rather in the broader context of gender inequality, and its political, social and economic dimensions.³⁹⁸ This requires specific sensitivity to the heightened vulnerabilities of women and girls in contexts where gender discrimination is pervasive, and to the obstacles they experience in accessing justice. For example:

- Sexual and gender-based violence disproportionately affects women and girls, who are often targeted as the repositories of cultural identity, the relatives of perceived fighters or the bearers of future generations who will populate disputed territories.³⁹⁹
- Sexual and gender-based violence are often justified by the terrorist group’s conception of the role of women and girls in society.⁴⁰⁰ Such forms of violence are used to inflict an ideology predicated on the suppression of women’s rights, removal of autonomy and control of their sexuality and reproduction.

³⁹¹ S/2017/249, para. 8, and S/2016/1090, p. 7.

³⁹² Nelly Lahoud, *Empowerment or Subjugation: A Gendered Analysis of ISIL Messaging* (UN-Women, 2018), p. 3.

³⁹³ S/2016/1090, p. 5; see also Lahoud, *Empowerment or Subjugation*, pp. 14–16.

³⁹⁴ S/2016/1090, annex, and S/2016/49, para. 27.

³⁹⁵ A/HRC/30/67, paras. 29 and 38.

³⁹⁶ S/2016/1090, p. 5.

³⁹⁷ A/61/122/Add.1, para. 65; see also the Beijing Declaration and Platform for Action.

³⁹⁸ As recognized in general recommendation 35 (2017) of the Committee on the Elimination of Discrimination against Women, gender-based violence against women, in particular, “is affected and often exacerbated by cultural, economic, ideological, technological, political, religious, social and environmental factors, as evidenced, among other things, in the contexts of ... violent extremism and terrorism”.

³⁹⁹ S/2016/361/Rev.1, para. 21.

⁴⁰⁰ A/HRC/30/67, para. 38.

- Sexual and gender-based violence is often used to exploit gendered vulnerabilities exacerbated by the destruction of socioeconomic, family and community structures that often characterize conflict. For example, displacement spurred by conflict also increases the vulnerability of women and girls to trafficking.
- Female sexuality is instrumentalized by terrorist groups, who provide women and girls as wives and slaves to combatants as “spoils of conflict”.
- On the basis of their gender, women and girls are targeted by groups who take them as hostages, for purposes of ransom and for use in exchanges.⁴⁰¹
- The abduction of women and girls for purposes of sexual slavery or forced domestic labour and the abduction of men and boys for use as combatants reinforce gender stereotypes.
- The use of different forms of sexual and gender-based violence as part of retaliation or punishment strategies by terrorist groups against communities.

A gender-sensitive approach acknowledges that women and men may be specifically targeted in acts of sexual and gender-based violence for the purposes identified above. Additionally, there are gender dimensions of outwardly gender-neutral crimes. One example is the use of civilians as human shields by armed groups, including terrorist groups: as a gender-neutral crime, both men and women civilians may be used as human shields. However, the use by ISIL of Alawite women as human shields highlights how gender and religion intersect in the targeting of certain individuals in perpetrating certain crimes.

While women and girls are disproportionately affected by sexual and gender-based violence perpetrated by terrorist groups, they are not the sole targets. Sexual and gender-based violence has also been inflicted by terrorist groups against men and boys, and against individuals on the basis of gender identity and sexual orientation.

(ii) Sexual and gender-based violence against men and boys

In its resolution 2106 (2013), the Security Council noted that sexual violence in armed conflict and post-conflict situations disproportionately affects women and girls, while also affecting men and boys. Several United Nations reports have documented geographically diverse perpetration of premeditated, planned and systematic conflict-related sexual violence against men and boys,⁴⁰² and the threat of sexual violence as a form of torture. Reports indicate that men and boys have been abducted, forcibly recruited for the purposes of fulfilling combat roles, and subsequently subjected to sexual and gender-based violence.⁴⁰³ This type of violence has also been inflicted against men and boys from targeted populations.⁴⁰⁴

Sexual and gender-based violence targeting men and boys also carries gendered implications, although these generally differ from those affecting women. In men, it is often used as a tool of subjugation, for the purposes of evoking feelings of emasculation, and to reinforce gender norms of masculinity and femininity. Likewise, sexual and gender-based violence committed against men and boys may result in gender-specific consequences for victims, such as torture and killings on the basis of accused homosexuality.⁴⁰⁵ The main challenges to determining the scale and scope include: deep stigma,

⁴⁰¹ A/HRC/27/60, para. 79, and Amnesty International, *Our Job Is to Shoot, Slaughter and Kill: Boko Haram's Reign of Terror in North-East Nigeria* (2015), pp. 5 and 63.

⁴⁰² See Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict, “Report of workshop on conflict-related sexual violence against men and boys in conflict situations, 25–26 July 2013: report and recommendations”; and Sarah Chynoweth, *“We Keep It in Our Heart”: Sexual Violence against Men and Boys in the Syria Crisis* (Geneva, Office of the United Nations High Commissioner for Refugees, 2017).

⁴⁰³ S/2016/361, para. 43, and S/2017/249, para. 16.

⁴⁰⁴ Reports indicate that ISIL has used sexual violence against teenage Yazidi boys, and new recruits (Chynoweth, *“We Keep It in Our Heart”*, pp. 14–15).

⁴⁰⁵ Human Rights Watch, *World Report 2017, Events of 2016* (New York, 2017), p. 575.

the failure of national legislation in many instances to recognize sexual violence against men and boys as a crime, the inadequacy of services specifically for male victims based on the lack of experience and awareness of some service-providers, and the lack of access to legal services.⁴⁰⁶ Further, when national laws criminalize homosexuality, male victims of sexual crimes are less likely to report their experiences to the authorities because of the risk they will be prosecuted and punished for homosexuality.⁴⁰⁷

(iii) Forms of gender-based violence perpetrated on the basis of gender identity and sexual orientation

Terrorists have targeted persons on the basis of their actual or perceived sexual orientation and gender identity for punishment, including killings.⁴⁰⁸ Individuals singled out for such abuse include those accused of homosexual acts, and those who are victims of so-called “honour” killings, carried out against individuals seen by family or community members as having brought shame on a family, often for transgressing gender norms or for sexual behaviour, including actual or assumed homosexual conduct.⁴⁰⁹ The ideology of ISIL, for example, is grounded on a systematic discrimination against persons on the basis of gender and gender expression, which has included torturing and killing those they deem not in conformity with their understanding of gender roles.⁴¹⁰

(iv) Sexual and gender-based violence perpetrated by authorities

Sexual and gender-based violence is also frequently committed by government authorities, State armed forces and Government-aligned armed groups in counter-terrorism and counter-insurgency operations. Documented examples include subjecting the wives and female relatives of alleged members of terrorist groups to collective punishments, including sexual violence, in order to induce the surrender of actual or perceived suspects, and subjecting women and men to sexual and gender-based violence during arrest and detention, and at checkpoints.⁴¹¹ Some reports have established the systematic sexual torture of men in detention centres. In some cases, female relatives were also arrested and forced to witness the torture.⁴¹² As mentioned in chapter 4, authorities have also subjected the relatives and wives of suspected terrorists to collective punishment, arbitrary detention and sexual violence, including in an effort to coerce male spouses or relatives to surrender to authorities.⁴¹³

3. Obligation to ensure accountability for sexual and gender-based violence committed by terrorist groups

States have firm obligations under international law to ensure that individuals belonging to terrorist groups who commit sexual and gender-based offences are held criminally responsible for those crimes. Those obligations require States to protect individuals from sexual violence, punish the perpetrators of such crimes, and provide remedies to victims, as enshrined in Security Council resolutions, and international human rights and humanitarian law.⁴¹⁴

⁴⁰⁶ S/2014/181, para. 7, and S/2016/361/Rev.1, para. 7.

⁴⁰⁷ See also “Report of workshop on sexual violence against men and boys in conflict situations”, and Institute for International Criminal Investigations, “Guidelines for investigating conflict-related sexual and gender-based violence against men and boys” (The Hague, 2016).

⁴⁰⁸ A/HRC/29/23, para. 29, and CRC/C/IRQ/CO/2-4, paras. 27–28.

⁴⁰⁹ A/HRC/29/23, paras. 29–30.

⁴¹⁰ A/HRC/35/23, para. 47.

⁴¹¹ S/2017/249, paras. 9, 12, 56 and 62.

⁴¹² S/2016/361, para. 68.

⁴¹³ S/2017/249, para. 56.

⁴¹⁴ See also S/2009/362, para. 5.

One challenge in meeting those obligations is that domestic counter-terrorism legislation often fails to recognize deliberate acts of sexual and gender-based violence used by terrorist organizations as a method and means of terrorism. As highlighted by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, this means in practice that those victims of terrorism are ignored, stigmatized and marginalized, excluding them from the redress and support recognized as vital for victims of terrorism.⁴¹⁵

Sexual and gender-based crimes committed by terrorist groups should not be seen as ancillary or incidental to terrorism crimes, but in the context of the overall criminality of terrorist groups. Accordingly, in his 2017 report on women and peace and security, the Secretary-General called upon national justice systems to investigate and prosecute such crimes consistent with international standards and in compliance with the principles of non-discrimination. Moreover, in the prosecution of members of terrorist and violent extremist groups, “consideration must be given to the gender-related nature of crimes” and indeed the full body of international criminal law, including crimes against humanity and genocide, and “not be limited to only the terrorist crimes themselves”.⁴¹⁶

› FOCUS: SECURITY COUNCIL RESOLUTIONS CALLING FOR STATES TO ENSURE ACCOUNTABILITY FOR ACTS OF SEXUAL AND GENDER-BASED VIOLENCE

Through the Women, Peace and Security Agenda:

- In its resolution 1325 (2000), the Security Council called on States to fully implement international humanitarian and human rights law to protect the rights of women and girls during and after conflicts, and to take special measures to protect women and girls from gender-based violence.
- In its resolutions 1820 (2008), 1888 (2009), 1889 (2009) and 2122 (2013), as well as in its resolution 1325 (2000), the Council emphasized that it is the responsibility of all States to end impunity for sexual and gender-based violence and to investigate and prosecute those responsible for violence against women in armed conflict, including sexual violence and including those responsible for genocide, crimes against humanity and war crimes.

Sexual and gender-based violence connected to the activities of terrorist groups:

- In its resolution 2242 (2015), the Security Council recognized the use of sexual and gender-based violence as a tactic of terrorism and urged States to strengthen access to justice for women, including through the prompt investigation, prosecution and punishment of perpetrators of such violence.
- In its resolution 2331 (2016), the Council reaffirmed the responsibility of States to end impunity and to prosecute those responsible for genocide, crimes against humanity, war crimes and other crimes. The Council urged States to ensure that domestic legal frameworks enabled the prosecution and penalization of those responsible for trafficking in persons committed with the purpose of supporting terrorist groups.
- In its resolution 2349 (2017), the Council reiterated the primary responsibility of States under international law to protect their civilian population, and called for those responsible for sexual and gender-based violence committed by Boko Haram and ISIL in the Lake Chad Basin region to be held accountable.
- In its resolution 2379 (2017), the Council condemned the commission of acts by ISIL including forced marriage, trafficking in persons, rape, sexual slavery and other forms of sexual violence, and established an investigative team to support Iraqi efforts to hold ISIL accountable by collecting evidence of acts amounting to war crimes, crimes against humanity and genocide.
- In its resolution 2388 (2017), the Council called on States to hold perpetrators of trafficking in persons in armed conflict, sexual violence and abductions accountable and emphasized the importance of collecting and preserving evidence for doing so.

⁴¹⁵ A/72/495, para. 29.

⁴¹⁶ S/2017/861, para. 61.

(i) Obligation to ensure accountability for sexual and gender-based violence under international human rights law

As established in chapter 1 of the present publication, States are required under international law to prevent, investigate, punish and provide reparation for human rights violations by both State and non-State actors, including terrorist groups.

Those requirements includes the obligations under the Convention on the Elimination of All Forms of Discrimination against Women to take all appropriate measures to prevent and investigate, prosecute, punish and provide reparation for acts or omissions by State and non-State actors, which result in gender-based violence against women.⁴¹⁷ In addition, specific human rights that may be violated in the context of the present publication include rights to the following: life, security of the person; health; non-discrimination, as established in chapter 1, including on the grounds of gender⁴¹⁸ and race;⁴¹⁹ and equal protection of the law. Forms of sexual and gender-based violence, including rape, may also constitute torture,⁴²⁰ while other forms of sexual and gender-based violence may also amount to cruel, inhuman and degrading treatment.

Two key State duties arise in relation to gross violations of international human rights law, namely the following:

- The duty to investigate human rights violations, which arises from the State duty to protect human rights and provide an effective remedy for violations. The duty to investigate human rights violations is also contained in a number of human rights treaties, such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (article 12).⁴²¹
- The duty to prosecute, which arises from human rights violations constituting crimes under national or international criminal law. The duty to prosecute is also referred to in the Genocide Convention (arts. I and IV) and the Convention against Torture (arts. 4 and 7); and the Human Rights Committee (general comment No. 31).

➤ FOCUS: THE UPDATED MODEL STRATEGIES AND PRACTICAL MEASURES ON THE ELIMINATION OF VIOLENCE AGAINST WOMEN IN THE FIELD OF CRIME PREVENTION AND CRIMINAL JUSTICE^a

The updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice are underpinned by the notion of State responsibility to act with due diligence in the prevention, protection and prosecution of all forms of violence against women in a criminal justice system. According to the Model Strategies, States are responsible for creating a legal and policy framework in which everyone's human rights can be enjoyed and exercised, including protecting women from such violence and treating them with dignity and respect throughout the criminal justice process as well as ensuring a defendant's right to a fair trial.^b

⁴¹⁷ General recommendation No. 19 (1992) on violence against women, para. 9, and general recommendation No. 35 (2017) on violence against women, para. 24 (see also article 4, para. (c), of the Declaration on the Elimination of Violence against Women, which acknowledges a similar obligation).

⁴¹⁸ General recommendation No. 35 (2017) on violence against women, para. 1, reaffirming the relevance of general recommendation No. 19 (1992) on violence against women, para. 9.

⁴¹⁹ Committee on the Elimination of Racial Discrimination, general recommendation No. 25 (2000) on gender-related dimensions of racial discrimination, para. 2.

⁴²⁰ See, for example, A/HRC/7/3, para. 34, and E/CN.4/1995/34, para. 19; both the Inter-American Commission of Human Rights and the European Court of Human Rights have found that rape constitutes torture (see Inter-American Commission of Human Rights, *Raquel Martín de Mejía v. Peru*, Case No. 10.970, Report No. 5/96, 1 March 1996, *Inter-American Yearbook on Human Rights* 1996, pp. 1174–1178, and European Court of Human Rights, *Aydın v. Turkey*, Judgment of 25 September 1997, sects. 82 and 86).

⁴²¹ States have the responsibility to exercise due diligence to prevent, investigate, prosecute and punish non-State and private actors, in line with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, where the State knows or has reasonable grounds to believe that acts of torture or ill-treatment are being committed by such persons (see, for example, Committee against Torture, general comment No. 2 (2007) on the implementation of article 2, para. 18; and A/HRC/7/3, paras. 31–32).

› FOCUS: THE UPDATED MODEL STRATEGIES AND PRACTICAL MEASURES ON THE ELIMINATION OF VIOLENCE AGAINST WOMEN IN THE FIELD OF CRIME PREVENTION AND CRIMINAL JUSTICE^A
(continued)

Accordingly, Member States are urged to be guided by the overall principle that effective crime prevention and criminal justice responses to violence against women are human rights-based, manage risk and promote victim safety and empowerment while ensuring offender accountability.^c

^aGeneral Assembly resolution 65/228, annex.

^bUnited Nations Office on Drugs and Crime (UNODC), “Blueprint for action: an implementation plan for criminal justice systems to prevent and respond to violence against women” in *Strengthening Crime Prevention and Criminal Justice Responses to Violence against Women*, part two, sect. A (2014), p. 34.

^cGeneral Assembly resolution 65/228, annex, para. 13 (a).

(ii) Obligation to ensure accountability for sexual and gender-based violence under international humanitarian law

States also have obligations to ensure accountability for sexual and gender-based violence under international humanitarian law. In non-international armed conflict, the obligations to ensure accountability for sexual and gender-based violence encompass breaches of common article 3 of the Geneva Conventions and acts recognized as serious violations of international humanitarian law in non-international armed conflict under customary international law. Those violations are now typically prosecuted as war crimes. The conduct that States are legally obliged to investigate, prosecute and punish varies depending on whether the conflict constitutes an international or non-international armed conflict.

As discussed in chapter 4, section G, the present publication addresses only legal norms concerning non-international armed conflicts, given that international armed conflicts exclusively concern conflicts between two or more States (or States and national liberation movements) and generally exclude situations in which terrorist groups meet the threshold required to be considered a “party” to the conflict.

Acts prosecutable as war crimes in non-international armed conflict include violence to life and person, cruel treatment and torture, and outrages upon personal dignity (common art. 3), as well as sexual violence, in particular, rape, sexual slavery, enforced prostitution, enforced sterilization and enforced pregnancy (customary international humanitarian law).⁴²² Under customary international humanitarian law, States must investigate war crimes allegedly committed in the course of non-international armed conflicts by their nationals or armed forces, on their territory (or on territory over which they have jurisdiction) and, if appropriate, prosecute the suspects.⁴²³ Third-party States may also prosecute grave violations of international humanitarian law.⁴²⁴

⁴²²Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol. I, *Rules* (Cambridge, Cambridge University Press, 2009), rule 156.

⁴²³*Ibid.*, rule 158.

⁴²⁴Xavier Philippe, “Sanctions for violations of international humanitarian law: the problem of the division of competences between national authorities and between national and international authorities”, *International Review of the Red Cross*, vol. 90, No. 870 (2008), p. 360. “Grave violations” include those specified as grave breaches under the four Geneva Conventions of 1949 (arts. 50, 51, 130 and 147 of Conventions I, II, III and IV, respectively), applicable in international armed conflicts, as well as those specified in the first Additional Protocol of 1977 (arts. 11 and 85), applicable in non-international armed conflicts. These definitions of grave breaches are also reflected in customary international humanitarian law. The grave breaches specified in these instruments are reflected in the Rome Statute (art. 8, para. 2 (a)) as war crimes in international armed conflicts over which the International Criminal Court has jurisdiction.

B. Legal accountability frameworks for sexual and gender-based crimes and associated trafficking in persons offences committed by terrorist groups

There is a range of legal frameworks through which, by means of criminal prosecution, States can fulfil their obligations to ensure accountability for sexual and gender-based crimes committed by terrorist groups. This section examines prosecuting sexual and gender-based crimes as terrorism offences, as violations of the domestic general criminal law, as trafficking offences, and as international crimes.

1. Sexual and gender-based crimes as terrorism offences

In most countries, terrorism-related offences – whether contained in special counter-terrorism legislation or incorporated into the criminal code – constitute the main avenue to bring terrorists to justice. Very few domestic counter-terrorism laws, however, explicitly criminalize offences relating to sexual and gender-based violence. One rare example is the 2015 counter-terrorism law of Tunisia, which makes it a separate serious offence to commit rape or indecent assault in the course of the commission of a terrorist offence.⁴²⁵

Many domestic counter-terrorism laws criminalize attacks on the physical integrity of persons as a terrorist offence when committed with a terrorist purpose. The French criminal code, for instance, states that wilful attacks on the physical integrity of the person, abduction and kidnapping shall constitute acts of terrorism if they are connected with an individual or collective enterprise aimed at seriously disrupting law and order through intimidation and terror.⁴²⁶ Similarly, the Prevention of Terrorism Act of Kenya defines “terrorist act” to include “an act or threat of action which involves the use of violence against a person” when it is carried out with the aim of causing fear among members of the public, intimidating or compelling the Government or an international organization to do, or refrain from any act, destabilizing the institutions of a country.⁴²⁷ Such provisions, though not specific to sexual and gender-based violence, could be used to prosecute as terrorist offences some forms of sexual and gender-based violence that are committed by terrorist groups.

The international conventions and protocols against terrorism define terrorism-related offences and oblige States parties to incorporate those offences into domestic criminal law. None of the 19 international treaties against terrorism requires States to criminalize offences related to sexual and gender-based violence. The International Convention against the Taking of Hostages may be relevant to some forms of sexual and gender-based violence committed by terrorist groups. It requires State parties to criminalize hostage-taking and sets out what constitutes such an offence in article 1:

Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the “hostage”) in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages (“hostage-taking”) within the meaning of this Convention.

⁴²⁵ Tunisia, Loi organique No. 2015-26 du 7 août 2015, relative à la lutte contre le terrorisme et à la répression du blanchiment d’argent, art. 29.

⁴²⁶ French Penal Code, article 421-1, as modified by Law No. 2011-266 of 14 March 2011.

⁴²⁷ Kenya, Prevention of Terrorism Act No. 30 of 2012, sect. 2.

The Secretary-General has noted that sexual violence is integrally linked with the funding of extremist groups and is used to advance such tactical imperatives as generating revenue through sex trafficking, the slave trade and ransoms.⁴²⁸ Where the link between sexual and gender-based violence and the funding of terrorism can be proven, financing of terrorism offences may provide a tool to bring those responsible to justice.

According to article 2, paragraph 1, of the International Convention for the Suppression of the Financing of Terrorism, “any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out” an act of terrorism, as defined in subparagraphs (a) and (b) of this paragraph.

As stated in article 2, paragraph 3, of the Convention, the funds need not actually be used to carry out such an offence.

Members of terrorist groups who engage in sexual and gender-based violence (e.g., trafficking or abduction for the purpose of being sold into sexual slavery) as a way of generating revenue in order to carry out acts as defined in article 2, paragraph 1, may in some circumstances be prosecuted for offences under the Convention. In cases where terrorist groups finance their activities through profits from trafficking in persons (e.g., through trafficking for the purpose of collecting ransoms or selling them into sexual or other forms of exploitation), the trafficking offence may also amount to a terrorism-related offence under the Convention.

An important provision under the Convention, as under other counter-terrorism treaties and Security Council resolutions, is that States are required to also make it an offence to:

- Participate as an accomplice
- Organize or direct others to commit such an offence
- Contribute to such an offence committed by a group acting either with a common purpose aiming to further the criminal purpose of the group, or with the knowledge of the intention of the group to commit the offence⁴²⁹
- Incite the commission of an act of terrorism⁴³⁰

States are therefore required to bring to justice those who, in a leadership position within a terrorist group, organize or direct the generation of revenue for the group through sexual and gender-based violence. As discussed below in the present chapter, the obligation to hold criminally responsible military or civilian superiors who order or fail to prevent offences related to sexual and gender-based offences committed by their subordinates is a key requirement of international criminal law.

2. Sexual and gender-based crimes as violations of general domestic criminal law

Where sexual and gender-based crimes are not explicitly recognized in domestic counter-terrorism laws, and are difficult to prosecute under other terrorism offences, States may prosecute these crimes committed by terrorist groups as an offence under their general domestic criminal law. Relevant domestic laws may include:

- Those penalizing forms of sexual violence such as rape, sexual assault and grievous bodily harm;

⁴²⁸ S/2015/203, para. 83.

⁴²⁹ See article 2, paragraphs 4–5, of the International Convention for the Suppression of the Financing of Terrorism.

⁴³⁰ Security Council resolution 1624 (2005).

- Those penalizing offences that are more general and which capture gender-based violence or targeting, such as domestic violence, kidnapping or abduction, or forced labour. In some jurisdictions, gender-related killings of women and girls are a specific offence, or gender-related elements are included in the definition of aggravated homicide.

On the one hand, prosecuting sexual and gender-based crimes committed by terrorist groups through general domestic criminal law may have a number of advantages, including:

- Familiarity of investigators, prosecutors and judges with the elements of the offence and the means to prove them, and well-established case law reducing legal uncertainty surrounding the offences;
- No need to prove contextual elements of the offence, such as the sexual and gender-based violence having been committed for a terrorist purpose or in the context of the actions of a terrorist group, or the existence of an armed conflict (as in the case of war crimes), or of a widespread attack against a civilian population (as in the case of crimes against humanity);
- Lesser factual and legal complexity may favour more expeditious justice. Prosecuting these crimes under the general criminal law may be preferable when prosecutions under other serious crimes (such as trafficking) are too complex (e.g., where the constituent elements of trafficking are difficult to prove).

On the other hand, prosecuting sexual and gender-based crimes committed by terrorist groups through general domestic criminal law may involve a number of challenges:

- *Definition and scope of offences under domestic law.* In many countries, offences involving sexual and gender-based violence are defined in more restrictive terms than under international law. Offences such as rape and indecent assault may be defined narrowly. The definition of rape, in the statutory law or in the practice of the courts, may fail to take into account the existence of coercive circumstances in which there has been no freely given consent to sexual intercourse.⁴³¹ Other conduct, such as gender-related killing, may not be fully covered by existing criminal offences. Some domestic criminal laws focus on rape as the main form of sexual and gender-based violence, and fail to account for the full scope of sexual violations experienced by victims.
- *Criminal procedure.* Evidentiary rules in some jurisdictions make successful prosecutions for these crimes exceedingly difficult. Such rules may also subject victims of sexual and gender-based violence to further harm (e.g., by permitting examination of prior sexual conduct). Further obstacles are provisions that exculpate a perpetrator of violence if he subsequently marries the victim, and a lack of measures to guarantee the privacy, dignity and safety of victims and avoid secondary victimization when testifying or at other stages of criminal proceedings.
- *Recognition of the gravity of the crime.* Sexual and gender-based violence may be defined under general domestic criminal law in a manner that does not capture the gravity of the organized, sustained and/or tactical acts of such violence committed for terrorist purposes (identified in section A of the present chapter).
- *Limited modes of liability.* As reflected in the respective international treaties, responsibility for terrorism and trafficking offences and international crimes has been extended to include not only those who directly participate in or commit the offence, but also those who assist, plan, instigate or

⁴³¹ States parties to the Convention on the Elimination of All Forms of Discrimination against Women are under an obligation to harmonize domestic legislation with Convention standards, including the criminalization of all forms of gender-based violence against women which amount to a violation of their physical, sexual or psychological integrity, and to ensure that the definition of sexual crimes, including marital and acquaintance or date rape, is based on lack of freely given consent, and takes account of coercive circumstances (Committee on the Elimination of Discrimination against Women, general recommendation No. 35 (2017) on violence against women, para. 29 (e)).

order the crime. Liability has also been extended to include those who could have prevented the crime or punished offenders. However, general domestic criminal law in some jurisdictions restricts criminal liability to those who physically perpetrate acts of sexual and gender-based violence, so that those responsible for instigating or ordering large-scale abuses cannot be prosecuted.

- *Competence among investigation and prosecution bodies.* In legal systems where specialized investigating and prosecuting bodies have exclusive competence for terrorism-related offences, there may be reluctance on the part of investigators, prosecutors and judges not belonging to these specialized bodies to take up these cases, even under the general domestic criminal law. Where these bodies do proceed with such cases, they may lack the capacity to adopt gender-sensitive approaches to investigations and prosecutions (see section D of the present chapter).
- *Limited recognition as victims of terrorism or trafficking.* Prosecuting acts of sexual and gender-based violence committed by terrorist groups as a general domestic crime also limits victim access to the full range of remedies and support available to victims of terrorism or trafficking, as the case may be (see chap. 6).
- *International cooperation.* Proceedings under the general domestic criminal law may not benefit from the comprehensive frameworks for extradition and mutual legal assistance established by the international conventions against terrorism and the United Nations Convention against Transnational Organized Crime (see section E, subsection 2 (ii), of the present chapter). This may be an important limitation in contexts where a State is prosecuting cases of sexual and gender-based violence where the suspects, evidence, victims or witnesses are not located within the prosecuting State's jurisdiction. Moreover, the definitions and scope of offences involving sexual and gender-based violence in domestic general criminal law may differ substantially between jurisdictions.

› EXAMPLE: DEFINITIONS OF RAPE IN DOMESTIC LAW IN NIGERIA

Definitions of rape under many domestic laws are limited in scope, focusing on proof of penetration, requiring use of force or violence, or a lack of consent, or excluding marital rape.^a

For example, prior to 2015, the scope of existing laws criminalizing rape in Nigeria were restricted to protect only females in relation to vaginal penetration without consent or in circumstances that preclude meaningful consent.^b Further, both the Penal Code (which applies in northern Nigeria, including the north-eastern states where Boko Haram has been the most active) and the Criminal Code (applicable to the southern states) preclude the application of this offence to sexual intercourse between a man and his wife.^c

The Violence against Persons (Prohibition) Act, 2015 (applicable in the Federal Capital Territory, Abuja) expands this definition, bringing it more into line with international standards. It broadens the definition and expands the scope of the offence of rape to protect male victims and to include anal and oral penetration with any part of the body or with an object.^d It also contains provisions to protect the identity of rape victims, grant protection orders and compensation for victims of violence (sects. 28 and 30 of the Act). Notably, section 1(3) extends liability to those who incite, aid, abet or counsel another person to commit rape.

^aSee also *Handbook for Legislation on Violence against Women* (United Nations publication, Sales No. E.10.IV.2), pp. 24–25.

^bSee Nigeria, Criminal Code Act (Chapter C38), chap. 30, sect. 357, and Penal Code (Northern States) Federal Provisions Act (No. 25 of 1960), chap. XVIII, sect. 282.

^cNigeria, Criminal Code Act (Chapter C38), chap. 1, sect. 6, and Penal Code (Northern States) Federal Provisions Act (No. 25 of 1960), chap. XVIII, sect. 282 (2). Under the Penal Code, sexual intercourse between a man and his wife does not amount to rape if she has attained the age of puberty.

^dNigeria, Violence against Persons (Prohibition) Act, 2015, sect. 1.

3. Sexual and gender-based crimes as trafficking offences

Sexual and gender-based crimes may also be prosecuted as trafficking offences in cases where the nexus between these crimes and trafficking exists, and where States parties to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, have adopted legislation criminalizing trafficking in persons in line with their treaty obligations.

The Trafficking in Persons Protocol establishes State obligations to prevent, investigate and prosecute trafficking in persons offences, and to ensure victim protection and assistance. The Protocol provides an internationally agreed definition of “trafficking in persons”, which includes all three of the following elements (in art. 3):

- An action (recruitment, transportation, transfer, harbouring or receipt of persons)
- The use of certain means (the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person)
- An exploitative purpose

States parties to the Trafficking in Persons Protocol are required to criminalize trafficking in their domestic legal systems. Pursuant to its parent instrument, the Organized Crime Convention, incorporation of trafficking as a domestic offence is to be independent of its transnational nature or the involvement of an organized criminal group.⁴³²

The Trafficking in Persons Protocol requires States parties to criminalize conduct beyond direct participation in trafficking in persons. Notably, article 5 requires States parties to adopt such legislative and other measures as may be necessary to establish as criminal offences:

- The conduct established in article 3 (including the recruitment, transportation, transfer, harbouring or receipt of persons for the means and exploitative purpose defined in article 3) (art. 5, para. 1)
- Attempts to commit such offences as established in article 5, paragraph 1
- Participating as an accomplice in an offence established in accordance with article 5, paragraph 1
- Organizing or directing other persons to commit an offence established in accordance with article 5, paragraph 1

States parties are further required to adopt or strengthen legislative or other measures to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking (art. 9).

The activities of terrorist groups may, in some contexts, have strong links to trafficking in persons, and some dimensions of exploitative acts committed by terrorist groups may amount to exploitation under the Trafficking in Persons Protocol.

⁴³² See article 34, paragraph 2, of the Organized Crime Convention, in conjunction with article 1, paragraph 3, of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.

› EXAMPLE: THE STORY OF AMINA (NOT HER REAL NAME)^a

The following experience of a woman from Kenya, as told to researchers of women and violent extremism in Kenya, provides an example of the links between the association of women with terrorist groups, sexual and gender-based violence, and trafficking in persons:

“One day, my husband suddenly left for Somalia and I have never seen him again. After he left, some of his friends tried to convince me to join him, saying I would get a job if I went. So I decided to go to Somalia to join him and work. I left my six children behind with my family. Unfortunately, I did not meet up with him. When I got to Somalia, I was held as a prisoner in a dark room and repeatedly sexually abused by up to six masked men. We were all forced to use drugs by Al-Shabaab.

“My job at the Al-Shabaab camp was to cook, wash clothes and have sexual intercourse with the fighters. I was beaten whenever the fighters did not like something I cooked. The fighters would threaten to kill you if you ever refused to have sex with them. Sometimes the men who sexually abused me used condoms and other times they did not. I never became pregnant while there because I was given contraceptives. But other women who became pregnant were given something to cause an abortion.

“Some other women were taught to use weapons but this was dependent on your physique. There were a few women in the camp who were leaders. These women were brutal. They would beat us and give orders. Most of the women in my camp were Somali but I do not know how many. Women who were captives were very rarely allowed to interact with one another. I used leaves for sanitary towels. I secretly escaped one day and hid in the forest for nine days until I found a boat to Lamu and then a lift home. When I arrived home, my family was very happy to see me because they thought I had died. I was very ill as I had contracted HIV while in the camp and had several bruises from the beatings I had endured. I had to be taken to the hospital.

“I have not communicated with any of the people from my camp since then. The militants do not know where I am. Life after being in Somalia has not been easy. I take treatment for HIV and tuberculosis, and have serious problems with my memory. I try to work doing odd jobs, like washing people’s clothes, when I can but because I am often ill, I cannot always work, and rely on my brothers. Nowadays, I live with my children and my sister’s three children in a rented place. I cry constantly and live in fear that Al-Shabaab will come looking for me. I would never consider recruiting people to join the group. I instead like to join groups to help educate people about Al-Shabaab. I have not seen any government initiatives in the community but I rely on good Samaritans and non-governmental organizations for assistance and counselling but these have been too short-term to help. I think the Government should not use force in dealing with violent extremism. A softer approach is preferable. I am not aware of the government amnesty programme. I think there is also no point in the Government pursuing the returnees, as it puts them in a difficult position.

“Returnee women need to be heard. More should be done to raise awareness in communities to prevent people from joining Al-Shabaab and the Government should also help people returning from Somalia to set up businesses.”

^aIrene Ndung’u, Uyo Salifu and Romi Sigsworth, *Violent Extremism in Kenya: Why Women Are a Priority*, Monograph No. 197 (n.p., Institute for Security Studies, 2017), pp. 42–43.

Where States have adopted legislation criminalizing trafficking in persons in line with their obligations under the Trafficking in Persons Protocol, forms of exploitation reflected in domestic definitions of trafficking, such as exploitation to commit criminal activities, could be used to prosecute terrorist groups that engage in trafficking in persons. Whether trafficking offences can be applied to the activities of terrorist groups will depend on if and how the State in question has incorporated the Protocol provisions in its domestic laws, and the activities of the terrorist group in question. For example, the

legislation of some States may apply only to certain categories of victim (such as women and children) or to specific types of exploitation. Some jurisdictions have adopted more restrictive or expansive approaches compared with the Protocol.⁴³³

In its resolution 2388 (2017), the Security Council called upon Member States to review, amend and implement anti-trafficking and related legislation to ensure that all forms of trafficking in persons, including when it is committed in situations of armed conflict or by armed and terrorist groups are addressed, and to consider establishing jurisdiction to end the impunity of offenders in line with article 15 of the Organized Crime Convention.

›EXAMPLE: RECOGNIZING THE NEXUS BETWEEN TRAFFICKING IN PERSONS AND TERRORIST ACTIVITY IN NATIONAL LEGISLATION

Under Law No. 164 of Lebanon, on the Punishment for the Crime of Trafficking in Persons of 2011, forcing or compelling a person's involvement in terrorist acts, sexual exploitation, and slavery (or practices that resemble slavery), among others, are considered to be a form of exploitation for the purposes of trafficking (art. 586.1).

In Tajikistan, under its 2004 Law on the Fight Against Human Trafficking, the Ministry of the Interior is tasked, in cooperation with its territorial offices, with examining the connection between human trafficking, terrorist organizations and organized criminal groups as means through which to prevent and suppress trafficking crimes (art. 8(2)).

4. Sexual and gender-based crimes as offences under international criminal law

Sexual and gender-based violence by terrorist groups may give rise to individual criminal responsibility as war crimes, crimes against humanity or acts of genocide. State obligations to guarantee accountability for these crimes derives from several sources of international law. The Rome Statute of the International Criminal Court is the most recent and progressive instrument defining international crimes, and many forms of sexual and gender-based violence fall within the scope of the Rome Statute offences of war crimes, crimes against humanity and genocide. Section C of the present chapter provides a discussion of different ways in which jurisdiction over crimes contained in the Rome Statute can be exercised and of the components of those crimes. The present subsection provides an overview of sources of international criminal law relevant to crimes involving sexual and gender-based violence other than the Rome Statute.

(i) Sexual and gender-based violence as a war crime

Rape and other forms of sexual violence committed in the context of international and non-international armed conflict constitute violations of international humanitarian law, provided that such acts have a requisite nexus to an armed conflict. The Geneva Conventions of 1949 do not contain any specific reference to sexual violence. However, the Protocol additional to the Geneva Conventions of 12 August 1949 (Protocol II), which applies exclusively to non-international armed conflicts, proscribes outrages upon personal dignity, in particular, humiliating and degrading treatment, rape,

⁴³³Where sexual and gender-based crimes are prosecuted as trafficking offences, factors such as the gender of the victim, pregnancy and the use of sexual violence may be taken into account as aggravating circumstances in the determination of penalties (see, for example, directive 2011/36/EU of the European Parliament and of the Council of the European Union on preventing and combating trafficking in human beings and protecting its victims, para. 12).

enforced prostitution and any form of indecent assault for those persons who are no longer participating in hostilities, by choice or circumstance (persons *hors de combat*, or “outside the fight”), without distinction between women and men.⁴³⁴ Accordingly, the reference in common article 3 of the Geneva Conventions to outrages upon personal dignity, in particular, humiliating and degrading treatment has been interpreted to include sexual crimes. The conduct constituting sexual crimes has largely been developed through statutes and jurisprudence of international criminal tribunals, and international human rights law.⁴³⁵

Sexual violence against civilians and persons *hors de combat* is also prohibited under customary international humanitarian law in both international and non-international armed conflicts. This prohibition applies to women, girls, boys and men, and includes torture and cruel, inhuman or degrading treatment, rape and other forms of sexual violence, and slavery and slave trade.⁴³⁶

As discussed in chapter 1, international humanitarian law binds all parties to an armed conflict, and therefore binds non-State actors that meet the threshold definition of parties to an armed conflict. International humanitarian law also provides that persons can be held individually criminally responsible for grave breaches of the Geneva Conventions, and for serious violations of international humanitarian law, both in international and non-international armed conflicts.⁴³⁷

(ii) Sexual and gender-based violence as an act of genocide

The Genocide Convention obliges States parties to enact legislation to provide effective penalties for persons guilty of genocide,⁴³⁸ and to try individuals charged with acts of genocide before a competent tribunal of the State in the territory where the acts were committed, or ensure that it is done by an international tribunal.⁴³⁹ However, that obligation is now recognized to extend beyond the States parties to the Convention, as a specific obligation towards the international community as a whole (a so-called *erga omnes* obligation on all States).⁴⁴⁰

The definition of genocide in article II of the Genocide Convention includes imposing measures intended to prevent births within a group, which has been interpreted by the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994 to encompass sexual mutilation, sterilization, forced birth control, separation of the sexes and prohibition of marriage.⁴⁴¹ To prove genocide, the acts must be committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such.

⁴³⁴Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 4, para. 2.

⁴³⁵Gloria Gaggioli, “Sexual violence in armed conflicts: a violation of international humanitarian law and human rights law”, *International Review of the Red Cross*, vol. 96, No. 894 (2014), pp. 505–510.

⁴³⁶Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, rules 90, 93 and 94.

⁴³⁷International Committee of the Red Cross, *The Domestic Implementation of International Humanitarian Law: A Manual* (Geneva, 2015), p. 16.

⁴³⁸Convention on the Prevention and Punishment of the Crime of Genocide, art. V.

⁴³⁹*Ibid.*, art. VI.

⁴⁴⁰*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. Reports 2007, para. 162; and *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. Reports 1996, para. 31.

⁴⁴¹*Prosecutor v. Jean-Paul Akayesu*, case No. ICTR-96-4-T, Judgment, International Criminal Tribunal for Rwanda, 2 September 1998, para. 507.

EXAMPLE: VIOLATIONS OF INTERNATIONAL CRIMINAL LAW COMMITTED BY ISIL AGAINST THE YAZIDIS

The Independent International Commission of Inquiry on the Syrian Arab Republic submitted a report to the Human Rights Council in June 2016 on the violations of international criminal law committed by ISIL against the Yazidis, which established a number of findings relevant to the present publication.

Elements constituting genocide

- The Yazidis are considered a protected group for the purposes of the Genocide Convention.
- ISIL has committed prohibited acts against the members of the Yazidi group constituting all forms of genocide specified in the Rome Statute, all of which were found to have a sexual or gender-based element.
 - The forms of genocide include killing; causing serious bodily or mental harm to members of the group (including rape and sexual violence, sexual slavery, enslavement, torture and inhuman and degrading treatment, and forcible transfer); deliberately inflicting conditions designed to bring physical destruction upon the group; imposing measures intended to prevent births; and forcibly transferring children of the group to another group.
- These acts were committed with the intent to destroy, in whole or in part, the Yazidis:
 - The serious physical and mental harm caused by the sexual violence committed by ISIL against the Yazidis is a clear step in the process of destruction of the group: destruction of the spirit, of the will to live, and of life itself.^a
 - Rape and sexual violence, when committed against women and girls as part of a genocide, is a crime against a wider protected group, but it is equally a crime committed against a female, as an individual, on the basis of her sex.^b

Findings in relation to deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part

- Yazidi women and girls, captured by ISIL and registered and sold in Iraq and the Syrian Arab Republic, are subjected to organized sexual violence on a massive scale occurring in the context of their sexual enslavement. ISIL and its fighters deliberately impose these conditions in a calculated awareness that such conditions, particularly when inflicted continuously over a long period of time, would cause the deaths of Yazidi women and children.

Findings in relation to measures imposed to prevent births within the group

- Measures intended to prevent births within the group include rape; sexual mutilation; the practice of sterilization; forced birth control; separation of the sexes; prohibition of marriages; impregnation of a woman to deprive group identity; and mental trauma resulting in a reluctance to procreate.^c

Crimes against humanity

- In its killing of Yazidi men, women and children, ISIL has committed the crime against humanity of murder and extermination. In its sexual enslavement, enslavement and beating of Yazidi women and girls, ISIL has committed the crimes against humanity of sexual slavery, rape, sexual violence, enslavement, torture, other inhumane acts and severe deprivation of liberty.^d
- These crimes were committed against the Yazidis on discriminatory grounds on the basis of their religion, and as such they can be considered to amount to the crime against humanity of persecution.^e

^aSee, for example, *Prosecutor v. Jean-Paul Akayesu*, case No. ICTR-96-4-T, Judgment, International Criminal Tribunal for Rwanda, 2 September 1998, para. 732; see also Catharine A. MacKinnon, "Rape, genocide, and women's human rights", *Harvard Women's Law Journal*, No. 17 (1994), pp.11–12, which reads, in part, "It is a rape to drive a wedge through a community, to shatter a society, to destroy a people. It is rape as genocide."

^bSee, for example, Beth Van Schaak, "Engendering genocide: the Akayesu case before the International Criminal Tribunal for Rwanda", Legal Studies Research Paper Series, Working Paper No. 08-55 (Santa Clara, California, Santa Clara University School of Law, July 2008); and Sherrie L. Russell-Brown, "Rape as an act of genocide", *Berkeley Journal of International Law*, vol. 21, No. 2 (2003).

^cSee, for example, *Prosecutor v. Jean-Paul Akayesu*, paras. 507–508; see also *Prosecutor v. George Rutaganda*, case No. ICTR-96-3, Judgment and Sentence, International Criminal Tribunal for Rwanda, 6 December 1999, para. 53.

^dSee, for example, *Prosecutor v. Duško Tadić*, case No. IT-94-1-T, Opinion and Judgment of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, 7 May 1997, paras. 704–710; and *Prosecutor v. Kupreškić*, case No. IT-95-16-T, Judgment, 14 January 2000, para. 594.

^eSee, for example, *Prosecutor v. Duško Tadić*, paras. 704–710; and *Prosecutor v. Kupreškić*, para. 594.

(iii) Sexual and gender-based violence as a crime against humanity

There is no comparable treaty listing conduct constituting a crime against humanity. The International Law Commission completed a set of draft treaty articles on crimes against humanity in June 2017.⁴⁴²

C. Sexual and gender-based violence as international crimes under the Rome Statute

1. Exercising jurisdiction over sexual and gender-based crimes under the Rome Statute

The obligations deriving from the Rome Statute of the International Criminal Court regarding the criminalization, investigation and prosecution of sexual and gender-based violence as war crimes, crimes against humanity and acts of genocide explained in this section, bind the States parties to the Rome Statute (which currently number 123) in two ways. First, the definitions of international crimes contained in the Rome Statute are considered to represent current international criminal law. Second, a situation that involves a State that is not party to the Rome Statute may be referred by the Security Council to the International Criminal Court.

The Rome Statute does not create the State obligations to investigate and, where sufficient evidence exists, to prosecute the person allegedly responsible for crimes under international law. As stated in the Preamble of the Rome Statute, there is a pre-existing primary duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.⁴⁴³ Accordingly:

- States parties to the Rome Statute must ensure that they have in place domestic legislation to enable domestic courts to exercise jurisdiction over war crimes, crimes against humanity and acts of genocide, in accordance with their international obligations. In addition to subordinate documents, such as *Elements of Crimes*, that further define the offences, the Rome Statute provides important guidance on the scope and elements of international crimes under current international law.
- In addition to enacting legislation criminalizing the conduct proscribed as war crimes, crimes against humanity and acts of genocide under the Rome Statute, it is important that States parties incorporate other general legal principles established by the Statute, such as excluding the availability of certain defences (e.g., as superior orders) and enabling courts to hold military commanders and non-military superiors accountable under appropriate circumstances (see section D, subsection 2 (iii), of the present chapter).
- States parties should also adopt or amend internal legislation to enable their courts to exercise universal jurisdiction over serious crimes under international law, including extraterritorially, where required by international law, and comply with any obligations to institute criminal proceedings where persons present on their territory are suspected of having committed such crimes (see also section E of the present chapter).

The subject-matter jurisdiction of the International Criminal Court is currently restricted to war crimes, crimes against humanity and genocide (art. 5 of the Rome Statute) committed after 1 July 2002 or after the State with jurisdiction has ratified the Rome Statute (art. 11). Thus, acts of sexual and

⁴⁴² A/CN.4/L.892 and A/CN.4/L.892/Add.1

⁴⁴³ Rome Statute, sixth preambular paragraph.

gender-based violence committed by terrorist groups may be prosecuted by the International Criminal Court if they constitute a war crime, crime against humanity, or an act of genocide as defined by the Rome Statute, and if other preconditions for admissibility are met, including the complementarity principle discussed in the next paragraph. The Rome Statute articulates three avenues – State party referral, Security Council referral, or Prosecutor-initiated investigation – by which the International Criminal Court may have jurisdiction over an international crime (art. 13).

The Rome Statute, however, establishes the International Criminal Court as a court of last resort in order to enforce State obligations to achieve individual criminal accountability for international crimes. Thus, the International Criminal Court is complementary to national criminal jurisdictions (art. 1), and may exercise jurisdiction only under certain circumstances. States continue to have a duty under international law to establish and exercise their criminal jurisdiction over acts that constitute a war crime, crime against humanity or genocide. The International Criminal Court is only competent when the State with jurisdiction over the subject conduct is inactive, unwilling or unable to investigate and/or prosecute it (art. 17, paras. 1 (a)–(b), of the Rome Statute). If the State is willing and able to investigate and/or prosecute the case, it would be inadmissible before the International Criminal Court.

Note that the Rome Statute does not require the State with jurisdiction to prosecute the conduct as a war crime, a crime against humanity or an act of genocide. Investigation and prosecution as a domestic offence is sufficient, as long as none of the factors suggesting a lack of genuine intent to bring the person to justice is present (art. 17, para. 2).

2. Prosecuting sexual and gender-based violence under the Rome Statute

Three constituent components of each crime must be proved in order to successfully prosecute an individual for sexual and gender-based violence committed as a war crime, crime against humanity or genocide, which will be addressed in this section:

- Specific elements of the crime (acts constituting crimes include rape, sexual slavery and forced pregnancy). This section will consider both specific sexual and gender-based crimes, and other crimes which are *prima facie* gender-neutral, but can be committed through acts of sexual and gender-based violence.
- Common elements of the category of crime. Such elements may include contextual elements that demonstrate that the crime constitutes a war crime, crime against humanity or genocide.
- Modes of liability that demonstrate how an individual took part in the conduct and is criminally responsible for a crime under international law. For example, direct perpetration, the ordering of the commission of the crime, or the failure to prevent the crime as a supervisor.⁴⁴⁴

(i) Relevant sexual and gender-based crimes

a. Sexual and gender-based crimes

The Rome Statute designates a number of sexual and gender-based crimes as underlying acts of war crimes, crimes against humanity or genocide (see table 4).

⁴⁴⁴ *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict*, p. 43.

Table 4. Sexual and gender-based offences constituting underlying acts of war crimes, crimes against humanity or genocide

| | WAR CRIMES (APPLICABLE TO NON-INTERNATIONAL ARMED CONFLICTS) | CRIMES AGAINST HUMANITY | GENOCIDE |
|---|--|--|--|
| Relevant criminal conduct | Acts committed in the context of and associated with an armed conflict (art. 8) | Acts committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack (art. 7) | Acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group (art. 6) |
| Is a nexus to an armed conflict required? | Yes | No | No |
| Charges within the scope of the crime that involve acts of sexual and gender-based violence | Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, other forms of sexual violence constituting a serious violation of common article 3 of the four Geneva Conventions (art. 8, para. 2 (e) (vi)) | Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, any other form of sexual violence of comparable gravity (art. 7, para. 1 (g)) | Imposing measures to prevent births within the group (art. 6, para. (d)) |

- The Rome Statute employs gender-neutral definitions of rape and other forms of sexual violence,⁴⁴⁵ meaning that – with the exception of forced pregnancy – women, men, girls and boys may be considered equally as possible victims and perpetrators of these crimes.
- The Rome Statute does not explicitly include forced marriage as a crime within the jurisdiction of the International Criminal Court. While earlier pretrial chamber jurisprudence of the International Criminal Court suggested that forced marriage may be subsumed by the charge of sexual slavery, more recently it has found that forcing another person to serve as a conjugal partner may be considered as a crime against humanity under the category of “other inhumane acts” (art. 7, para. 1 (k)) of a character similar to the acts established in article 7, paragraph 1, intentionally causing great suffering or serious injury to body or to mental or physical health.⁴⁴⁶

b. Other crimes that may be perpetrated with a sexual and/or gender element

Crimes that are not explicitly sexual and gender-based crimes may also be perpetrated using sexual violence or perpetrated on the basis of gender (see table 5).

Table 5. Other forms of war crimes, crimes against humanity, or genocide that may be perpetrated using sexual violence or on the basis of gender

| WAR CRIMES (APPLICABLE TO NON-INTERNATIONAL ARMED CONFLICTS) | CRIMES AGAINST HUMANITY | GENOCIDE |
|---|--|--|
| <ul style="list-style-type: none"> • Violence to life and person, including murder, cruel treatment and torture (art. 8, para. 2 (c)(i)) | <ul style="list-style-type: none"> • Murder (art. 7, para. 1 (a)) | <ul style="list-style-type: none"> • Killing members of the group (art. 6, para. (a)) |

⁴⁴⁵ See, for example, International Criminal Court, Trial Chamber III, *Prosecutor v. Jean-Pierre Bemba Gombo*, case No. ICC-01/05-01/08-3343, Judgment pursuant to article 74 of the Statute, 21 March 2016, para. 100; and International Criminal Court, *Elements of Crimes* (The Hague, 2011), p. 28, footnote 50.

⁴⁴⁶ International Criminal Court, Pre-Trial Chamber II, *Prosecutor v. Dominic Ongwen*, case No. ICC-02/04-01/15-422-Red, decision on the confirmation of charges against Dominic Ongwen, 23 March 2016, para. 91.

| WAR CRIMES (APPLICABLE TO NON-INTERNATIONAL ARMED CONFLICTS) | CRIMES AGAINST HUMANITY | GENOCIDE |
|--|---|--|
| <ul style="list-style-type: none"> • Outrages on personal dignity, including humiliating or degrading treatment (art. 8, para. 2 (c)(ii)) | <ul style="list-style-type: none"> • Torture (art. 7, para. 1 (f)) | <ul style="list-style-type: none"> • Causing serious bodily or mental harm (art. 6, para. (b))^a |
| <ul style="list-style-type: none"> • Taking of hostages (art. 8, para. 2 (c)(iii)) | <ul style="list-style-type: none"> • Persecution (art. 7, para. 1 (h)) | <ul style="list-style-type: none"> • Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part (art. 6, para. (c)) |
| <ul style="list-style-type: none"> • Intentionally directing attacks against the civilian population (art. 8, para. 2 (e)(i)) | <ul style="list-style-type: none"> • Other inhumane acts (art. 7, para. 1 (k)) | |
| | <ul style="list-style-type: none"> • Enslavement (art. 7, para. 1 (c)) • Imprisonment (art. 7, para. 1 (e)) | |

^aConduct constituting “serious bodily or mental harm” for the purpose of article 6, para. (b), may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment (*Elements of Crimes*), footnote 3.

- Rape may amount to a form of torture.⁴⁴⁷
- Abductions of women and men (which may, for example, fall within the scope of enslavement, sexual slavery, imprisonment or hostage-taking) may be committed with gendered dimensions where one sex is being targeted for a specific purpose. This may be the case where women are abducted in order to provide forced domestic labour, for the purposes of sexual slavery, to be used as human shields, or when boys and men are abducted for use as combatants in terrorist groups.
- Sex-selective killings may also be construed as gender-based violence, for example, when men of fighting age are targeted.
- The acts discussed above may also constitute the crime against humanity of persecution when carried out in a manner that targets persons on political, racial, national, ethnic, cultural, religious, gender or other grounds. For example, the International Tribunal for the Former Yugoslavia found that cruel or inhumane treatment, including rape⁴⁴⁸ and sexual violence (e.g., forced assaults by family members against each other)⁴⁴⁹ constituted persecution. The International Tribunal also found that the following acts infringe upon fundamental rights and all fall within the scope of persecution: the right to life, liberty and security of person, as well as the right to not be held in slavery or servitude, or subjected to torture, or to cruel, inhuman or degrading treatment or punishment.⁴⁵⁰

The crime against humanity of persecution on the grounds of gender may be particularly important for achieving accountability where persons are targeted on the basis of their gender. As affirmed by the International Criminal Court in the Office of the Prosecutor’s 2014 policy paper on sexual and gender-based crimes, the crime against humanity of persecution will help confront the issue of impunity for systematic persecutions on the basis of gender or “other grounds” that are universally recognized as impermissible under international law. Investigations into sexual and gender-based crimes undertaken by the Office of the Prosecutor will take into consideration various indicia, “including discriminatory policies, violent acts selectively targeting a particular gender, gender-related propaganda, relevant utterances issued by the direct perpetrators, elements of an individual suspect’s background, and prior conduct that are indicative of relevant intent and adverse gender biases” in the response of suspected groups or authorities to the crimes.⁴⁵¹

⁴⁴⁷*Prosecutor v. Jean-Paul Akayesu*, para. 687; and International Tribunal for the Former Yugoslavia, *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, case No. IT-96-23 and IT-96-23/1-A, 12 June 2002, para. 151.

⁴⁴⁸International Tribunal for the Former Yugoslavia, *Prosecutor v. Krstić*, case No. IT-98-33-T, 2 August 2001, paras. 45–46.

⁴⁴⁹*Ibid.*, *Prosecutor v. Biljana Plavšić*, case No. IT-00-39 and 40/1-S, 27 February 2003, para. 29.

⁴⁵⁰*Ibid.*, *Prosecutor v. Thomir Blaškić*, case No. IT-95-14-T, 3 March 2000, para. 220.

⁴⁵¹International Criminal Court, Office of the Prosecutor, “Policy paper on sexual and gender-based crimes” (The Hague, 2014), paras. 33 and 67.

› EXAMPLE: PERSECUTION ON THE GROUNDS OF GENDER BY THE TALIBAN IN AFGHANISTAN

The Office of the Prosecutor of the International Criminal Court made the following findings in its preliminary examination of the situation in Afghanistan:⁴

- There is a reasonable basis to believe that the Taliban and their affiliates have committed the crime against humanity of persecution against any identifiable group or collectively on gender grounds.
- In particular, women and girls have been deliberately attacked by the Taliban and their affiliates to prevent them from studying, teaching, working or participating in public affairs, through intimidation, death threats, abductions and killings.
- The alleged violent acts amounting to the crime against humanity of persecution on gender grounds have had a particularly broad and severe impact on the lives of women and girls. Girls' education has come under sustained attack, thereby depriving thousands of girls of their right of access to education. Women who were left as sole income providers for their households after the death or injury of their husbands experienced long-lasting social and economic consequences, with poverty forcing many women to give their daughters in marriage in exchange for debts to be forgiven or to take their children out of school often to work. Widowed women were often particularly vulnerable to other forms of violence and abuse from family and community members.

⁴International Criminal Court, *Report on Preliminary Examination Activities 2016*, paras. 206 and 227, and *Report on Preliminary Examination Activities 2017*, para. 248.

(ii) Common elements of the category of crime

To prosecute a sexual or gender-based crime as a war crime, crime against humanity or genocide, certain contextual elements below also must be proven (see table 6). These contextual elements are set forth in the *Elements of Crimes*.

Table 6. Common elements that must be proved when prosecuting war crimes, crimes against humanity or genocide

| | |
|--------------------------------|---|
| WAR CRIMES | <p>The conduct took place in the context of and was associated with an international or non-international armed conflict</p> <p>The perpetrator was aware of factual circumstances that established the existence of an armed conflict</p> |
| CRIMES AGAINST HUMANITY | <p>The crimes were committed as part of a widespread or systematic attack directed against a civilian population</p> <p>Acts of sexual and gender-based violence themselves do not have to be widespread or systematic if committed as part of a widespread or systematic attack</p> <p>“Attack directed against any civilian population” means a course of conduct involving the multiple commission of acts referred to in article 7, paragraph 1, of the Rome Statute against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack</p> <p>The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population</p> |
| GENOCIDE | <p>Commission of an underlying act contained in article 6, with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such</p> <p>The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction</p> |

› **EXAMPLE: THE INTERNATIONAL CRIMINAL COURT AND PRELIMINARY EXAMINATION OF SEXUAL AND GENDER-BASED CRIMES IN NIGERIA**

Since 2010, the Office of the Prosecutor of the International Criminal Court has been conducting a preliminary examination of alleged crimes against humanity and war crimes committed in the context of the conflict between Boko Haram and the Nigerian security forces, principally in north-eastern Nigeria. In its *Report on Preliminary Examination Activities 2015*, the Office of the Prosecutor analysed Boko Haram's attacks against women and girls, including (a) abductions, (b) forced marriages, rapes, sexual slavery and sexual violence, (c) use of women and girls for operational tasks such as suicide attacks, and (d) murders, in order to assess whether such conduct targeted females because of their sex and/or socially constructed gender roles, so as to qualify as gender-based crimes.

The situation in Nigeria remains at the preliminary examination stage at the time of publication. The Office of the Prosecutor is continuing to assess admissibility on the basis of the ability and willingness of the State to investigate and prosecute international crimes committed within its jurisdiction.

(iii) **Modes of liability**

The third component is establishing the so-called “mode of liability”: in other words, the conduct through which individual criminal responsibility for the crimes above can be attributed to a suspect. In addition to directly having perpetrated an act of sexual and gender-based violence, this includes having ordered or solicited the commission of the act of sexual and gender-based violence, or having failed to prevent the commission of the offence by one's subordinates. International criminal law places great emphasis on ensuring accountability not only for the (often low-level) direct perpetrators of sexual violence as a war crime or crime against humanity, but also on those who solicit, order or fail to prevent and punish the commission of these offences by their subordinates. It is worth noting that the international conventions and protocols against terrorism also require States to bring to justice not only direct perpetrators, but also those who participate as accomplices, order or direct the commission of offences, or contribute to the commission of the offence by a group of persons.⁴⁵²

The law regarding modes of liability differs across customary international law, the ad hoc international criminal courts and tribunals, the International Criminal Court and domestic law. Often States may have incorporated international crimes as listed in the Rome Statute into their national legislation, but not the Rome Statute provisions on modes of liability. Accordingly, national laws on modes of criminal responsibility generally determine which terrorists may be prosecuted for sexual and gender-based violence committed as an international crime: these laws vary widely, including differences between national laws compared with military laws and practices.

This section provides an overview of the two forms of criminal responsibility recognized by the Rome Statute: direct individual responsibility, and command or superior responsibility.⁴⁵³

a. *Direct individual responsibility (art. 25)*

“Committing” an act under article 25, paragraph 3 (a), amounts to principal liability, while acts under article 25, paragraph 3 (b)–(d), amount to accessorial liability.⁴⁵⁴

⁴⁵² International Convention for the Suppression of the Financing of Terrorism (1999), art. 5.

⁴⁵³ See also Women's Initiatives for Gender Justice, *Modes of Liability: A Review of the International Criminal Court's Current Jurisprudence and Practice*, Expert paper No. 1 (November 2013); and Centre for International Law Research and Policy, Case Matrix Network, Knowledge Hub, *Commentary on the Law of the International Criminal Court*, Part 3. Available at www.casematrixnetwork.org/.

⁴⁵⁴ International Criminal Court, Pre-Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, case No. ICC-01/04-01/06, 29 January 2007, paras. 320 and 332; and Barbara Goy, “Individual criminal responsibility before the International Criminal Court: a comparison with the *Ad Hoc* Tribunals”, *International Criminal Law Review*, vol. 12, No. 1 (2012), p. 40.

A person may be principally liable under article 25, paragraph 3 (a), where they commit a crime directly (“as an individual”), as a co-perpetrator (“jointly with another”), or indirectly (“through another person”), regardless of whether that other person is criminally responsible. This form of liability may therefore be attributed not only to those who physically carry out an offence as an individual or jointly with another, but also to those who are involved in controlling whether and how the offence is carried out, despite not physically being involved in its commission.

Accessory liability may be attributed to those who order, solicit or induce the commission or attempted commission of a crime (art. 25, para. 3 (b)); those who facilitate, aid, abet or otherwise assist with the commission or attempted commission of a crime (art. 25, para. 3 (c)); and those who intentionally contribute in any other way to the commission or attempted commission of a crime by a group of persons acting with a common purpose (art. 25, para. 3 (d)). This contribution must be made with the aim of furthering the criminal activity or criminal purpose of the group or with the knowledge of the intention of the group to commit the crime.

b. Command and superior responsibility (art. 28)

Military or civilian superiors can also be held criminally responsible for failing to prevent or punish offences committed by their subordinates through the doctrine of command or superior responsibility. Article 28 of the Rome Statute distinguishes between the responsibility of (a) military commanders, or those effectively acting as military commanders, and (b) superiors who do not fall within the scope of (a). Contrary to direct individual responsibility, command or superior responsibility derives from the responsibility held by superiors given the powers of control they exercise over their subordinates.⁴⁵⁵

The doctrine of command or superior responsibility is particularly important in prosecuting sexual and gender-based crimes, which are often physically committed by those who are at lower levels within the organizational chain of command. It enables recognition that sexual and gender-based violence may be perpetrated as a strategic tool of terrorist violence and not merely incidentally to terrorist activity. It seeks to ensure accountability and end impunity for higher-level superiors who mandate, encourage and/or accept such violence committed by others.⁴⁵⁶ In its resolution 2379 (2017), therefore, the Security Council called on Member States to hold ISIL members accountable, particularly those who bear the greatest responsibility, including in terms of leadership, which can include regional or mid-level commanders, and the ordering and commission of crimes for acts which may amount to war crimes, crimes against humanity, or genocide, including forms of sexual and gender-based violence perpetrated as a tactic of terrorism.⁴⁵⁷

c. Applicability of the doctrine to terrorist groups

The applicability of the doctrine of command responsibility to terrorist groups is based on the specific facts of the case. It will depend on whether the group has a chain of command through which its leaders are able to exercise over its members the sort of authority that is relevant to that doctrine.⁴⁵⁸ It is also relevant to note that while the chain of command may be either formal or informal, the

⁴⁵⁵ *Prosecutor v. Jean-Pierre Bemba Gombo*, para. 172. Note that the doctrine exists in international humanitarian law (through which it imposes penal responsibility and disciplinary action) for war crimes, and in customary international law (Guénaél Mettraux, *The Law of Command Responsibility* (Oxford, Oxford University Press, 2009), p. 21).

⁴⁵⁶ Alexa Koenig, Ryan Lincoln and Lauren Groth, “The jurisprudence of sexual violence”, Sexual Violence and Accountability Project Working Paper Series (Berkeley, California, University of California, Human Rights Center, 2011).

⁴⁵⁷ See also Security Council resolution 1820 (2008), paragraphs 3–4, in which the Council demanded that all parties to armed conflict immediately take appropriate measures to protect women and girls from all forms of sexual violence, including by upholding the principle of command responsibility, and that Member States comply with their obligations for prosecuting persons responsible for such acts.

⁴⁵⁸ Mettraux, *The Law of Command Responsibility*, pp. 114–115.

International Tribunal for the Former Yugoslavia has held that only those superiors with the actual power to control or punish the acts of subordinates may incur criminal responsibility.⁴⁵⁹

Command or superior responsibility links that leader to crimes committed by members of that group without the need to prove the leader's direct or personal involvement in or planning of these crimes.⁴⁶⁰ It may also provide a means to target multiple levels of culpability within a single chain of authority or command.⁴⁶¹ These advantages are particularly relevant to crimes involving sexual and gender-based violence, which have typically been characterized by a culture of acceptance or tolerance among leaders.

One of the challenges in establishing this mode of liability in this context, however, is that it may be difficult to link the activities of subordinates to the overall authority or control of a superior where a terrorist organization lacks a formal command and control structure, or where there is a decentralized decision-making system.⁴⁶² This raises further questions as to proof of the mens rea element – there may be difficulties in proving knowledge of the crimes where there are disrupted information flows or where the organization's activities are compartmentalized to preserve secrecy.⁴⁶³

›EXAMPLE: COMMAND RESPONSIBILITY FOR SEXUAL CRIMES IN COURTS IN GUATEMALA

Sepur Zarco case^a

In 2016, a tribunal in Guatemala convicted two senior military leaders, through the mode of command responsibility, of crimes against humanity (including rape, and sexual and domestic enslavement) that were committed by soldiers under their command during Guatemala's 36-year civil war.^b The tribunal found a former commander of a military base and a military commissioner responsible for the area in which the base was located, criminally responsible for acts of sexual violence perpetrated by soldiers on the basis of support, awareness and failure to prevent the offences (in the case of the base commander). In rejecting the defendants' claims of ignorance, the tribunal found that the frequency of the acts over a period of time made such behaviour impossible to ignore by those responsible for the base. The tribunal further held that in any case, the defendants would still remain responsible for those acts due to their negligence and failure to exercise necessary control over their subordinates. This judgment was upheld on appeal.

^aGuatemala, High Risk Tribunal, *Guatemala v. Estelmer Francisco Reyes Girón and Heriberto Valdez Asig*, Case No. C-01076-2012-00021, 26 February 2016.

^bGuatemala has incorporated crimes against humanity as a domestic offence in its Penal Code.

›EXAMPLE: MODES OF LIABILITY IN THE ONGWEN CASE BEFORE THE INTERNATIONAL CRIMINAL COURT

Dominic Ongwen was a commander in the Lord's Resistance Army, an armed group active in Uganda and neighbouring countries. In *Prosecutor v. Dominic Ongwen* (currently being tried before the Trial Chamber of the International Criminal Court), the Prosecutor of the International Criminal Court brought approximately 70 charges of war crimes and crimes against humanity against Ongwen, covering attacks against camps of internally displaced persons, including murder, torture, sexual violence and the conscription of child soldiers.

Regarding the alleged sexual and gender-based crimes, the prosecution charged Ongwen as "direct perpetrator", as "indirect perpetrator", and as military commander responsible for the conduct of his subordinates:

- The "direct perpetration" charges concern crimes Ongwen allegedly committed against seven girls and women allocated to him as "forced wives", including forced marriage, rape, sexual slavery, torture and forced pregnancy.

⁴⁵⁹International Criminal Court, *Prosecutor v. Dario Kordić and Mario Čerkez*, case No. IT-95-14/2-T, Judgment of 26 February 2001, para. 416.

⁴⁶⁰Mettraux, *The Law of Command Responsibility*, p. 117.

⁴⁶¹*Ibid.*, p. 122.

⁴⁶²*Ibid.*, p. 118.

⁴⁶³*Ibid.*, p. 120.

›EXAMPLE: MODES OF LIABILITY IN THE ONGWEN CASE BEFORE THE INTERNATIONAL CRIMINAL COURT
(continued)

- The prosecution also charged Ongwen as an “indirect co-perpetrator” for crimes against women abducted and assigned as sexual partners to officers in his brigade. The prosecution argued that the Lord’s Resistance Army adhered to a system of abducting and enslaving women and girls, both to build its ranks and to provide sexual partners for its officers, which amounted to a “common plan” to commit sexual and gender-based violence. The prosecution alleged that Ongwen was an essential contributor to the common plan, because he supervised and ordered the abduction and distribution of women; further, his own abuse of his direct victims served as an endorsement that his subordinates were allowed to perpetrate sexual and gender-based crimes.
- Finally, the prosecution alleged that Ongwen, as a military commander, was liable for the sexual and gender-based violence crimes committed by his subordinates, because he knew or should have known about them, and failed to exercise control properly.

FURTHER READING

- For further discussion of the crime against humanity of persecution on gender grounds, and of charging strategies in connection with these types of crime, see the policy paper of the Office of the Prosecutor of the International Criminal Court on sexual and gender-based crimes (2014).

D. Enhancing investigations and prosecutions of sexual and gender-based crimes committed by terrorist groups

1. Key approaches to investigating and prosecuting cases involving sexual and gender-based violence

The stigma faced by victims of sexual and gender-based violence, owing to societal, religious or cultural reasons, both at the family and community level, as well as from national authorities, is a major factor leading to the underreporting or non-reporting of these crimes, and may lead to a sense of mistrust in the criminal justice system. According to the Secretary-General’s 2017 report on conflict-related sexual violence:

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 communities together... 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.⁴⁶⁴

⁴⁶⁴S/2017/249, para. 10.

The risk of stigmatization affects both women and men who are victims of sexual and gender-based violence. The risk of underreporting or non-reporting may be higher for men in some contexts, particularly where same-sex acts are criminalized, owing to taboos attached to homosexuality, and discrimination inflicted by authorities and service providers. In addition, insecurity and fear of retaliation impede reporting of sexual and gender-based violence by victims and witnesses.

To minimize the risk of stigma, or exclusion from family and community networks, and to ensure the physical safety of the victims, it is necessary to employ human rights-based and victim-centred approaches to sexual and gender-based violence investigations and prosecutions. The updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice, together with other key United Nations resources,⁴⁶⁵ provides guidance relevant to the investigation and prosecutions of crimes involving sexual and gender-based violence, including those committed by terrorist groups.

(i) Adopt a human rights-based and victim-centred approach⁴⁶⁶

A human rights-based approach recognizes sexual and gender-based violence as a manifestation of gender inequality and discrimination against women. It also reflects the obligation of States to exercise due diligence in preventing, protecting against and prosecuting all forms of violence against women in a criminal justice system, and treating victims with dignity and respect throughout the criminal justice process.⁴⁶⁷

A victim-centred approach is key to respecting the principle of “doing no harm” which, together with victim well-being, empowerment and safety, are the key objectives of criminal justice responses to sexual and gender-based violence. The criminal justice system should seek to restore the sense of control, autonomy, self-respect and personal privacy that are eroded by acts of sexual and gender-based violence.⁴⁶⁸ A victim-centred approach also benefits operational effectiveness, given that victims and witnesses are also more likely to cooperate if they feel secure and that their needs are being effectively addressed.

Investigators and prosecutors should take account of the different experiences and needs of victims of sexual and gender-based violence, different forms of intersecting discrimination that victims may face, and the diverse forms of such types of violence.⁴⁶⁹ A victim-centred approach should be guided by the general principles of:

- Respect for the rights of the victim, including access to justice and legal advice (considered in chapter 6), right to information and privacy
- Voluntary and informed consent at all stages of an investigation
- Confidentiality, including about the identity of the victim and nature of the investigation
- Ensuring the physical safety and welfare of the victim, including through the provision of medical assistance to meet immediate health-care needs by first responders
- Non-discrimination, by treating all victims of sexual and gender-based violence on an equal basis

This principle requires authorities to assess and minimize the potential negative impacts of cooperation of the victim with investigative and prosecutorial authorities, and the risk of secondary victimization during criminal investigations, prosecutions and trials. One of the key means of minimizing this risk is by implementing the interviewing and protection measures discussed in chapter 3.⁴⁷⁰

⁴⁶⁵ See, in particular, UNODC, “Recommendations for action against gender-related killing of women and girls” (2015); UNODC, *Handbook on Effective Prosecution Responses to Violence against Women and Girls*; UNODC, *Good Practices in Supporting Victims of Terrorism within the Criminal Justice Framework* (2015); and United Nations Police, *United Nations Police Gender Toolkit: Standardized Best Practices on Gender Mainstreaming in Peacekeeping* (2015), module 3, lesson 4.

⁴⁶⁶ See General Assembly resolution 65/228, annex, principles 13 (a), 15 and 16.

⁴⁶⁷ UNODC, *Strengthening Crime Prevention and Criminal Justice Responses to Violence against Women* (Vienna, 2014), p. 34.

⁴⁶⁸ *Handbook on Effective Prosecution Responses to Violence against Women and Girls*, p. 25.

⁴⁶⁹ General recommendation No. 35 (2017) on violence against women, para. 38 (b).

⁴⁷⁰ *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict*, p. 85.

(ii) Use a multidisciplinary, coordinated and gender-sensitive approach⁴⁷¹

Coherence, coordination and consistency in approaches between investigative and prosecutorial authorities are imperative for the effective prosecution of crimes involving sexual and gender-based violence, particularly when terrorist groups are involved in their commission.

The use of a multidisciplinary and coordinated approach to the investigation and prosecution of offences involving sexual and gender-based violence requires the promotion and institutionalization of cooperation and information-sharing among authorities involved in the investigation and prosecution of terrorist crimes and crimes involving sexual and gender-based violence.

A coordinated and cooperative approach is particularly important in identifying and investigating the links between different types of crime. For example, coordination with those agencies with expertise in trafficking in persons is critical for trafficking cases. Early identification of trafficking is central to fulfilling State obligations to provide adequate protection and assistance to victims of trafficking. It is also important in cases where a victim may have also committed offences in the course of trafficking (discussed in chapter 2). The involvement of broader Government and civil society should also be considered in ensuring a comprehensive response to the needs of victims, including agencies providing legal, medical and psychosocial support.

A gender-sensitive approach among all criminal justice actors requires an understanding of the impact of gender bias and stereotypes that contribute to sexual and gender-based violence, and the basis of gender inequalities between men and women that lead to specific vulnerabilities that impact on the willingness of victims to cooperate with criminal justice systems.⁴⁷²

Investigators should ensure an integrated approach to the investigation of terrorism offences and offences involving sexual and gender-based violence. It is important that offences involving sexual and gender-based violence be considered at each stage of the investigative process, in order to ensure that they are not perceived as merely incidental to the terrorism investigation. This requires close coordination between charging and investigative strategies in order to clarify an integrated, common approach to the offences being pursued, and the evidence required to support the charges. The forms of evidence relevant to sexual and gender-based violence and terrorism may differ substantially, which will in turn influence the investigative approaches adopted. States may also wish to develop and implement specific policies for the prosecution of crimes involving sexual and gender-based violence to achieve a uniform approach.

› **EXAMPLE: THE INTERNATIONAL CRIMINAL COURT AND ITS APPROACH TO THE INVESTIGATION OF SEXUAL AND GENDER-BASED CRIMES**

In its policy paper on sexual and gender-based crimes, the Office of the Prosecutor of the International Criminal Court outlines its approach for developing a comprehensive, coordinated investigative and prosecutorial strategy for sexual and gender-based crimes. Notably, this involves:

- Integrating a gender perspective in all aspects of its work, including through comprehensive evidence collection
- Applying a gender analysis to all of the crimes within its jurisdiction, taking into account structural differences and inequalities between women and men, girls and boys which shape gender roles and give rise to gender stereotypes
- Ensuring that staff have the skills, knowledge and sensitivity necessary to fulfil their functions in relation to sexual and gender-based crimes

⁴⁷¹ See General Assembly resolution 65/228, annex, principle 16 (b) and (d).

⁴⁷² General recommendation No. 35 (2017) on violence against women, para. 30 (e)(i).

2. Operational techniques for effective investigations of sexual and gender-based crimes

(i) Develop expertise and build capacity⁴⁷³

A number of challenges may derive from the lack of legislative recognition of sexual and gender-based violence as a terrorist offence. Even where parts of the criminal law cover sexual and gender-based crimes committed by terrorist groups, the prevalent or exclusive competence of specialized counter-terrorism investigators and prosecutors to deal with offences by terrorist groups can result in failure to address these offences where they are not criminalized in anti-terrorism laws.

As a consequence, a major challenge in investigating the use of sexual and gender-based violence as a tactic of terrorist groups is that members of counter-terrorism investigation teams may not have specialized training in investigating offences involving this type of violence, or the legal expertise in investigating and prosecuting crimes of that nature. Personnel may thus not be sensitized to issues specific to these offences. Effective investigations and prosecutions of offences involving sexual and gender-based violence require specialized expertise in interviewing victims and witnesses and in victim and witness protection measures (discussed in chapter 3) and with handling different forms of evidence from sites of violations, and ensuring that such evidence is not overlooked in wider counter-terrorism investigations (discussed further below). These challenges may be overcome by:

- *Provision of training.* Personnel involved in the investigation and prosecution of offences involving sexual and gender-based violence that have been committed by terrorist groups should be appropriately trained to both effectively investigate and prosecute these crimes (e.g., through an awareness of the evidentiary considerations and legal elements of international crimes); and to respond to the specific vulnerabilities and needs of victims of sexual and gender-based violence (applicable to both criminal justice personnel, as well as, for example, support staff and interpreters). Effective training may require the development and delivery of specialized training, manuals and policies to ensure an awareness of the gendered nature of violence and standardized practices.
 - Providing training to law enforcement personnel (and also those in detention facilities) in identifying victims or potential victims of trafficking is also necessary.
 - In addition to training those responsible for terrorism investigations, exchanging expertise with other State agencies involved in the investigation and prosecution of terrorism and sexual and gender-based crimes is a key component in building capacity to hold perpetrators accountable.
- *Creation of specialized units.* States may wish to consider establishing, where appropriate, specialized police and prosecutorial units with specific experience and resources, and encourage judicial actors to develop special expertise in the adjudication of these crimes. Owing to the specific nature of both crimes involving sexual and gender-based violence and terrorist crimes, specialized units may lead to:
 - Increased confidence of victims in reporting such crime
 - Improved service delivery, and reduced revictimization
 - A coordinated approach to ensuring accountability⁴⁷⁴
- *Coordination between different service providers.* Coordinate across the criminal justice, health and social service sectors to ensure that victims have timely access to essential services, while protecting the privacy of victims. This includes victim advocacy and support services, material and financial aid, safe accommodation, and physical and mental health services (see also chap. 6).⁴⁷⁵

⁴⁷³ See General Assembly resolution 65/228, annex, para. 16 (c).

⁴⁷⁴ *United Nations Police Gender Toolkit*, module 3, lesson 5, p. 11.

⁴⁷⁵ See also UN-Women and others, “Module 5: coordination and governance coordination” in *Essential Services Package for Women and Girls Subject to Violence: Core Elements and Quality Guidelines* (2015).

(ii) Strategic and comprehensive evidence collection

The absence of an interdisciplinary and strategic approach to evidence collection may result in missed opportunities to collect evidence owing to the use of an inappropriate methodology, failure to identify relevant elements of the crime for which evidence is required, mistakes that result in charges being dropped, or failure to charge crimes for which there is evidence. This includes failing to collect evidence necessary to establish the contextual elements of a war crime, crime against humanity or a genocidal act (discussed in section C.2 of the present chapter), or evidence necessary to establish modes of liability.

While testimonial evidence is an integral form of evidence for the prosecution of sexual and gender-based crimes, adopting a strategy encompassing collection of different types of evidence – some of which may not normally be employed in investigations of other criminal offences – strengthens prosecution cases, and improves the likelihood of convictions. Table 7 includes forms of evidence that may be relevant, as identified in the *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: Best Practices on the Documentation of Sexual Violence as a Crime or Violation of International Law*.

Table 7. Forms of potentially relevant evidence

| | |
|-----------------------------|--|
| DOCUMENTARY EVIDENCE | <p>Physical material recording information in a written or documentary format</p> <p>This can include official evidence (e.g., military reports, medical certificates, prisoner lists, identity and registration documents), and unofficial evidence (e.g., psychological reports, reports of international organizations, newspaper articles and evidence-based surveys)</p> <p>Can be highly useful in assisting to establish the pattern, frequency and intensity of reported sexual violence, the identity of perpetrators and superiors, and the existence of a plan or strategy and modes of liability</p> |
| DIGITAL EVIDENCE | <p>Any probative information or data that are stored on, received or transmitted by an electronic device.</p> <p>Relevant types of digital evidence for proving guilt in crimes involving sexual and gender-based violence may include electronic health records, photos and videos, location data, emails, text messages and metadata.</p> <p>Digital evidence may assist in establishing the perpetrators' intent, location, and relationship with other suspects, patterns of movement of the alleged perpetrator, and corroboration of witness testimony.</p> <p>There are risks in handling digital evidence, which often requires forensic digital experts to ensure proper collection, storage and interpretation.</p> |
| PHYSICAL EVIDENCE | <p>Any physical objects or matter that can provide relevant information to help establish that sexual and gender-based violence took place, or provide a link between a crime and its victim or between a crime and its perpetrator.</p> <p>Relevant physical evidence for investigations of sexual and gender-based violence may include, physical material (such as clothing), weapons, biological or forensic material, physical injuries, impressions, sites of violations and documents for analysis.</p> <p><i>Transfer and associative evidence</i> may provide information about contact between the victim and the suspect, the victim and the crime scene, and the suspect and the crime scene, as well as the nature of the contact. <i>Identification evidence</i> can provide data about the source of a piece of evidence, including the physical injuries sustained.^a</p> <p>Where there are indications that drugs may have been used to facilitate sexual violence, evidence of exposure to drugs should be collected from the victim and crime scene as soon as possible.</p> |

Source: Adapted from United Kingdom, Foreign and Commonwealth Office, *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: Best Practice on the Documentation of Sexual Violence as a Crime or Violation of International Law*, 2nd ed. (London, 2017).

^a *Handbook on Effective Prosecution Responses to Violence against Women and Girls*, p. 104.

While it is important to consider the relevance of a wide range of evidence for the prosecution of crimes involving sexual and gender-based violence, a number of challenges may arise in its collection.

- There may be limited or no evidence to collect owing to elapsed time between commission of the offence and the investigation, or because of evidence deterioration or tampering.
- There may be significant difficulties in accessing forensic examinations owing to the scarcity of medical facilities capable of collecting such evidence, or the complexity of the system for ordering such examinations. Where delays occur, forensic evidence is likely to be compromised.
- Forensic evidence relevant to other offences committed by terrorist groups, such as sexual and gender-based violence, may be overlooked or contaminated in the scheme of the broader terrorism investigation. This risk is magnified where there is limited expertise in crimes involving sexual and gender-based violence within investigating teams, or limited coordination between agencies with expertise.

Investigators should consider the value of different types of evidence to prove sexual and gender-based crimes committed by terrorist groups; the importance of contextual elements to establish international crimes; and the full range of crimes that evidence should be collected in relation to (not restricted to sexual violence), as well as other crimes that may be committed through sexual and gender-based violence, such as torture and persecution. Evidence indicating other types of non-sexual and gender-based crimes may be necessary to establish, for example, that the attack was part of a widespread or systematic attack against a civilian population.

Evidence regarding perpetrators should encompass not only the role of the direct, physical perpetrator alleged to have carried out the act of sexual and gender-based violence, but also evidence concerning hierarchies, chains of command or levels of oversight that may assist in establishing command responsibility for an act or omission by one or more alleged perpetrators.⁴⁷⁶ This could include information indicating a chain of command or hierarchy, reporting procedures or communications. Such evidence is critical in establishing criminal responsibility for higher-level leaders responsible for ordering, tolerating and/or failing to prevent sexual and gender-based violence committed by their subordinates.

Service providers interacting with victims, such as health-care and mental health professionals, may also require training in the collection of criminal evidence for cases involving sexual and gender-based crimes.

FURTHER READING

UNODC has produced a number of publications on the topic of investigating and prosecuting sexual and gender-based violence:

- *Handbook on Effective Prosecution Responses to Violence against Women and Girls*
- *Handbook on Effective Police Responses to Violence against Women*
- The joint UNODC, World Health Organization and United Nations Action against Sexual Violence in Conflict, *Toolkit on Strengthening the Medico-Legal Response to Sexual Violence*
- For more information on the investigation of drug-facilitated sexual crimes, see *Forensic Analysis of Drugs Facilitating Sexual Assault and Other Criminal Acts*
- The joint UNODC, World Health Organization, United Nations Development Programme, UN-Women and United Nations Population Fund publication entitled *Essential Services Package for Women and Girls Subject to Violence* provides guidance on improving multisectoral services for all women and girls who have experienced sexual and gender-based violence

⁴⁷⁶Ibid., pp. 53–55.

FURTHER READING (*continued*)

Other resources:

- *The International Protocol on the Documentation and Investigation of Sexual Violence in Conflict* provides specific guidance and training tools for the investigation of sexual and gender-based violence
- International Criminal Court, Office of the Prosecutor, “Policy paper on sexual and gender-based crimes” (The Hague, 2014)
- International Criminal Tribunal for Rwanda, *Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions*
- UN-Women, *Handbook for Legislation on Violence against Women*

E. Extraterritorial jurisdiction and international cooperation regarding sexual and gender-based crimes committed by terrorist groups

States have obligations to afford one another the greatest measure of assistance in connection with criminal proceedings in relation to terrorism cases,⁴⁷⁷ including by providing assistance in obtaining evidence in their possession that is necessary for the proceedings, and, in accordance with their obligations under international law, to bring to justice, extradite or prosecute any person who supports, facilitates, participates or attempts to participate in acts of terrorism. These obligations also apply in relation to acts of sexual and gender-based violence committed by terrorist groups. Further, States have the obligation to deny a safe haven to those who are alleged to have committed such acts. This requires domestic laws that enable the criminal justice authorities to assert jurisdiction and to cooperate effectively with other countries.

1. Grounds for the assertion of jurisdiction by national courts

Bases of jurisdiction

The base form of jurisdiction is territorial jurisdiction, which is invoked to try persons for crimes committed in the territory of the State or on board vessels flying the flag or aircraft registered in the State.

In addition, there are a number of means through which extraterritorial jurisdiction may be established, enabling national courts to try persons for offences that were not committed on its territory. The most relevant forms of extraterritorial jurisdiction in this context include:

- Active personality jurisdiction extends jurisdiction to crimes committed by a State’s nationals, irrespective of where the relevant acts occurred. In some States, this includes both nationals and aliens resident in their territory.⁴⁷⁸ This ground of jurisdiction would, for instance, allow a State to exercise jurisdiction over offences committed abroad by a suspected foreign terrorist fighter who is a national of that State.
- Passive personality jurisdiction extends jurisdiction to crimes committed against a State’s nationals, irrespective of the location of the national, the crime, and the nationality of the suspect.

⁴⁷⁷ See, for example, Security Council resolution 2322 (2016), para. 8, and the Terrorism Financing Convention, art. 12.

⁴⁷⁸ See, for example, United Kingdom, International Criminal Court Act 2001.

The international conventions and protocols against terrorism and the Organized Crime Convention (which governs the bases of jurisdiction applicable to offences under the Trafficking in Persons Protocol) also require or permit States parties to establish particular modes of extraterritorial jurisdiction over the offences contained therein. Recourse must always be had to domestic implementing legislation, which may prescribe or limit the forms of jurisdiction applicable in that State.

In addition to the grounds discussed above, these international treaties require States to take measures necessary to establish jurisdiction where the suspect is present in its territory and the State does not extradite him or her.⁴⁷⁹ This is known as the “extradite or prosecute” principle (*aut dedere aut judicare*).

› FOCUS: EXTRADITE OR PROSECUTE

Under the “extradite or prosecute” principle, States must exercise jurisdiction over certain offences if they refuse to extradite a suspect. The principle is stated in the following terms in the International Convention for the Suppression of the Financing of Terrorism (art. 10): “The State Party in the territory of which the alleged offender is present shall, in cases to which article 7 applies, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution...”

The principle is reflected in a number of international treaties, and with respect to specific violations of international law, including:

- The International Convention Against the Taking of Hostages (arts. 5 and 8) and the International Convention for the Suppression of the Financing of Terrorism (arts. 7 and 10)
- Torture under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment^a
- The Organized Crime Convention requires States parties to prosecute those suspected of having committed trafficking offences under the Protocol where States parties have declined to extradite such persons to requesting States.^b

In practice, discharging the obligation to extradite or prosecute requires effective mechanisms for international cooperation in cases which are not based on territorial or personality jurisdiction.

^a Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, arts. 5–7; note that the International Court of Justice held in the case of *Belgium v. Senegal* that the obligation to prosecute under article 7, paragraph 1, of the Convention is independent from extradition, which becomes an alternative option if requested (*Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012, p. 422).

^b Organized Crime Convention, art. 15, para. 3, and art. 16, para. 10.

The Rome Statute reaffirms that States hold the primary responsibility for bringing perpetrators of crimes under the Rome Statute to justice on the bases of territorial, active or passive personality jurisdiction, as described above.

A State’s domestic law may also enable its courts to exercise jurisdiction over international crimes, such as genocide, crimes against humanity, war crimes, torture and slavery on the ground of universal jurisdiction (where there is no link between the State and the perpetrator, victim or location of the crime).

This principle is not applied in a uniform manner. In some cases, domestic law may circumscribe the application of universal jurisdiction (conditional universal jurisdiction), by requiring, for example, that the suspect be present on the territory of the State in order to initiate prosecution, or that there was no extradition request or a request had been denied, or according to the principle of double criminality.⁴⁸⁰

⁴⁷⁹ See, for instance, International Convention for the Suppression of the Financing of Terrorism, art. 7, para. 4; and United Nations Convention against Transnational Organized Crime, art. 15, paras. 3–4.

⁴⁸⁰ A/65/181, paras. 74–86.

States may also enable their courts to exercise universal jurisdiction over general domestic crimes, allowing these courts to try persons based on elements of conduct under general criminal law, such as rape or abduction, which could amount to crimes under international law. This is mostly relevant where States have not domesticated international crimes.⁴⁸¹

› **EXAMPLE: EXERCISING UNIVERSAL JURISDICTION TO SEEK ACCOUNTABILITY FOR SEXUAL AND GENDER-BASED CRIMES PERPETRATED BY TERRORIST GROUPS**

Since 2011, Germany has accepted more asylum seekers from the Syrian Arab Republic than any other country in Europe. Counted among the large number of individuals currently present in Germany are numerous victims (as well as potential perpetrators) of crimes committed in the context of the armed conflict in the Syrian Arab Republic.

The German Federal Police and the Federal Prosecutor's Office have initiated investigations into crimes allegedly committed by multiple parties to the conflict in the Syrian Arab Republic. With regard to crimes under international law (war crimes, crimes against humanity and genocide), German law enshrines the principle of universal jurisdiction, whereby an investigation can be opened even if there is no link between the alleged criminal conduct and Germany. Authorities of Germany, however, are asserting competence for offences committed in the Syrian Arab Republic and Iraq based on the presence of victims and of potential perpetrators in Germany.

Depending on the nature of the crime itself as well as the context in which it was committed, atrocities committed by individuals linked to ISIL and other terrorist groups can be prosecuted as terrorism-related offences or as international law crimes. While the majority of cases against members of ISIL are brought on charges of terrorism, the War Crimes Unit of the Federal Public Prosecutor of Germany is investigating offences committed by ISIL against Yazidi women and girls as international law crimes. The counter-terrorism unit of the Federal Public Prosecutor's office is cooperating closely in the investigation. Regular meetings and processes for sharing information between the two units have been institutionalized. The War Crimes Unit has also recruited additional female prosecutors to strengthen its ability to deal with the investigation and prosecution of sexual violence cases.

2. International cooperation

(i) International cooperation under the international legal instruments against terrorism

International cooperation is a central element of effective investigations and prosecutions of crimes against members of terrorist groups suspected of perpetrating sexual and gender-based violence where the suspects, evidence, victims or witnesses are not located within the prosecuting State's jurisdiction.

International cooperation is integral to preventing impunity for terrorist acts and is a key part of the criminal justice approach to combating terrorism. As a means of securing accountability for terrorist acts, violations of international humanitarian law and human rights abuses, in its resolution 2322 (2016), the Security Council emphasized the importance of strengthening international cooperation, including by investigators, prosecutors and judges, in order to prevent, investigate and prosecute terrorist acts. It called upon States to take a number of steps to strengthen international cooperation through extradition and mutual legal assistance arrangements. In its resolution 70/291, the General Assembly recalled that all States needed to cooperate fully in the fight against terrorism on the basis of mutual legal assistance and the principle of extradite or prosecute.

⁴⁸¹ See Amnesty International, "Universal jurisdiction: a preliminary survey of legislation around the world–2012 update", 9 October 2012.

Extradition and mutual legal assistance arrangements may be contained in specific bilateral or multilateral extradition or mutual legal assistance treaties. In addition, there are frameworks for international cooperation created by the international conventions against terrorism. Those frameworks commit States parties to afford the greatest measure of assistance in connection with criminal investigations or criminal or extradition proceedings.

(ii) Cooperation frameworks established by the Organized Crime Convention and the Trafficking in Persons Protocol

The Organized Crime Convention, as the parent instrument of the Trafficking in Persons Protocol, provides a comprehensive framework for international cooperation through extradition and mutual legal assistance, law enforcement cooperation and information-sharing in relation to transnational trafficking offences. For this framework to apply, the trafficking offences must involve an organized criminal group.⁴⁸² In addition, with the exception of those provisions on extradition, the Organized Crime Convention requires that the crime must be transnational in nature.⁴⁸³ These cooperation frameworks may apply to cases in which terrorist groups commit crimes covered by the Organized Crime Convention or Trafficking in Persons Protocol that meet this definition, in order to obtain direct or indirect financial or other material benefits.⁴⁸⁴ Security Council resolution 2331 (2016) contains a reference to the importance of collecting evidence relating to trafficking in persons in armed conflict, including as committed by terrorist groups, for the investigation and prosecution of these crimes.

A detailed legal framework for the facilitation of extradition for offences under the Trafficking in Persons Protocol is established under article 16 of the Organized Crime Convention. Ratification of the Convention and the Trafficking in Persons Protocol results in the inclusion of trafficking in persons offences in extant extradition treaties, requires States parties to include these as extraditable offences in future extradition treaties, and provides a basis to enable extradition where the parties in question do not have an extradition treaty. It further provides that extradition proceedings should be expedited.

Article 18 of the Organized Crime Convention contains a detailed legal and procedural framework for mutual legal assistance, and requires States parties to afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings. Article 18, paragraph 3, prescribes a number of purposes for which mutual legal assistance can be requested, including for the purposes of taking evidence or statements, executing searches and seizures, and facilitating the voluntary appearance of persons in the requesting State party.

(iii) War crimes, crimes against humanity and genocide

The Rome Statute establishes a general duty of States parties to cooperate fully with the International Criminal Court in its investigation and prosecution of crimes, and sets out a number of specific areas of cooperation in articles 87–102. However, these provisions relate only to cooperation between States and the Court. International cooperation for the domestic investigation and prosecution of crimes against humanity, war crimes and genocide is not regulated in the Rome Statute.

⁴⁸² “Organized criminal group” is defined in article 2 of the Organized Crime Convention as a “structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit”. A “transnational” crime is defined in article 3, paragraph 2, of the Convention.

⁴⁸³ A “transnational” crime is defined in article 3, paragraph 2, of the Convention. According to article 16, the obligation to extradite also applies in cases in which the offences involve an organized criminal group and the person whose extradition is requested is simply located in the territory of the requested State, without a need for the transnational nature of the criminal conduct to be established (UNODC, *Manual on Mutual Legal Assistance and Extradition*, para. 59).

⁴⁸⁴ As discussed earlier in the present chapter, the Security Council has repeatedly recognized the link between transnational organized criminal activities (including trafficking in persons) and acts of terrorism (see, for example, Council resolutions 2395 (2017), 2388 (2017), 2331 (2016) and 2242 (2015), as well as General Assembly resolution 55/25).

› FOCUS: INITIATIVES TO STRENGTHEN INTERNATIONAL COOPERATION FOR THE PROSECUTION OF ATROCITY CRIMES

The General Assembly has adopted two sets of principles relevant to promoting international cooperation regarding bringing individuals accused of war crimes and crimes against humanity to justice, and in relation to remedy and reparation for serious violations of international humanitarian law.

Rule 161 of the rules of customary international humanitarian law of the International Committee of the Red Cross establishes that States must make every effort to cooperate, to the extent possible, with each other in order to facilitate the investigation of war crimes and the prosecution of the suspects.

The International Law Commission developed – and in May 2017, provisionally adopted – a set of 15 draft articles on crimes against humanity, containing principles on the prevention and punishment of that crime. Draft articles 7 [6], para. 2, and 10 [9] provide for the obligation to prosecute or extradite, while draft articles 13 and 14 establish a comprehensive framework for extradition and mutual legal assistance to facilitate the investigation and prosecution of crimes against humanity.

⁴Principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity (General Assembly resolution 3074 (XXVIII)), principles 3–6; and Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Assembly resolution 60/147, annex), principle 5.

(iv) International cooperation in cases concerning crimes involving sexual and gender-based violence committed by terrorist groups

There are a number of issues which should be considered by officials making a request for international cooperation through extradition or mutual legal assistance in connection with domestic prosecutions of crimes involving sexual and gender-based violence that are committed by terrorist groups.

- *Dual criminality requirement.* Where an offence is not criminalized in a comparable way in the requesting and receiving States, the request for extradition or mutual legal assistance may be unsuccessful. Given the diversity of offences under which charges can be brought for acts of sexual and gender-based violence committed by terrorist groups, officials dealing with mutual legal assistance and extradition requests should pay particular attention to the implications the dual criminality requirement may have for the request.
- *Identification of treaties through which to facilitate international cooperation.* As established in the present chapter, there are a range of different treaties under which international cooperation regarding crimes involving sexual and gender-based violence that are committed by terrorist groups can be sought. The treaty framework through which a cooperation request is made has particular implications. For example, conventions and protocols against terrorism establish that none of the offences covered by them may be deemed to be a political offence or an offence with political motives for the purposes of rejecting a mutual legal assistance or extradition request. The Terrorism Financing Convention further provides that mutual legal assistance requests cannot be refused on the grounds of bank secrecy.
- *Difficulties in obtaining evidence through mutual legal assistance owing to the nature of the offence.* Similar challenges to those discussed above may arise in attempting to obtain evidence for crimes involving sexual and gender-based violence, owing to victim fear of stigma arising from societal, religious or cultural factors, or from physical insecurity.

➤ FOCUS: INTERNATIONAL COOPERATION TO COMBAT VIOLENCE AGAINST WOMEN

The need for States to cooperate in the investigation and prosecution of violence against women is emphasized in the updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice, annexed to General Assembly resolution 65/228. In paragraph 25 (b) of the Model Strategies and Practical Measures, Member States are urged to “cooperate and collaborate at the bilateral, regional and international levels with relevant entities to prevent violence against women...and to promote measures to effectively bring perpetrators to justice, through strengthened mechanisms of international cooperation and mutual legal assistance.”

FURTHER READING

- UNODC, *Manual on Mutual Legal Assistance and Extradition*
- UNODC, *Counter-terrorism Legal Training Curriculum Module 3 – International Cooperation in Criminal Matters: Counter-terrorism*
- UNODC, *Manual on International Cooperation in Criminal Matters related to Terrorism*
- UNODC, *Criminal justice assessment toolkit: International Cooperation*

SUMMARY OF KEY POINTS

- Sexual and gender-based violence has been widely recognized as part of the strategic objectives and ideology of some terrorist groups. It is used as an incentive for recruitment, as a strategic driver, and as a means through which some terrorist groups fund their activities.
- Sexual and gender-based violence disproportionately affects women and girls, but it is also perpetrated against men and boys, as well as on the basis of gender identity and sexual orientation.
- Victims of trafficking in persons and of sexual violence committed by terrorist groups should be recognized as victims of terrorism.
- States have obligations under international law to ensure accountability for sexual and gender-based violence perpetrated by terrorist groups; fully implement international humanitarian and human rights law to protect the rights of women and girls; and protect them from sexual and gender-based violence.
- There are a number of legal frameworks through which States can secure legal accountability for such crimes, depending on their legal system. It may be possible to prosecute such acts as terrorism offences, as violations of the general domestic criminal law, or as trafficking in persons offences. Additionally, such acts may be prosecuted as international crimes (war crimes, crimes against humanity or genocide) in national courts, pursuant to national laws that incorporate the Rome Statute.
- When investigating and prosecuting sexual and gender-based crimes committed by terrorist groups, investigative and prosecutorial teams should adopt a human rights-based and victim-centred approach; use a multidisciplinary, coordinated and gender-sensitive approach; and focus on offender accountability. Operationally, these teams should aim to develop expertise and build capacity in the investigation and prosecution of sexual and gender-based violence as a tactic in terrorist activities, and focus on strategic and comprehensive evidence collection.

SUMMARY OF KEY POINTS (*continued*)

- National courts may assert jurisdiction over national criminal offences in line with domestic legislation that enables the extraterritorial application of domestic criminal law, or through treaty-based extraterritorial jurisdiction. It may also be possible for a State to exercise jurisdiction over international crimes, based on their gravity, on the ground of universal jurisdiction.
- International cooperation is a central element of effective investigations and prosecutions of crimes where the suspects, evidence, victims or witnesses are not located within the prosecuting State's jurisdiction. Extradition and mutual legal assistance – two main forms of international cooperation in the investigation and prosecution of crimes – may be carried out on the basis of bilateral or multilateral treaties, or may be governed by specific frameworks of cooperation through international treaties (particularly the international conventions and protocols against terrorism and the Organized Crime Convention).



top: Mother displaced by Boko Haram in Northern Cameroon with her child. © OCHA/Ivo Brandau

centre: Federal High Court of Nigeria, Abuja Division © Stefanie Tholand

ACCESS TO JUSTICE AND REMEDIES FOR VICTIMS

Facilitating equal and effective access to justice through fair and impartial mechanisms is an essential part of a robust criminal justice response to terrorism. Access to justice is a means to providing redress for victims for violations of their rights, and it plays an important role in preventing future violations. Access to justice also encompasses the availability and accessibility of legal counsel for those suspected, accused or convicted of terrorism-related offences, and the ability of justice mechanisms to adjudicate cases in a fair and impartial manner and to enforce decisions. In addition, recognition of the suffering of victims of terrorist acts and their right to seek remedy is an integral part of a comprehensive strategy for combating terrorism, and is key to strengthening the effectiveness of the criminal justice systems in responding to the needs of victims of terrorism as a whole. The importance of such recognition is reflected in the plan of action of the United Nations Global Counter-Terrorism Strategy (annexed to General Assembly resolution 60/288), which, under section IV, entitled “Measures to ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism”, underscores the need to promote and protect the rights of victims of terrorism.⁴⁸⁵

A gender mainstreaming approach is applied in the present chapter to consider the way in which gender considerations affect the ability of victims and those suspected, accused or convicted of terrorism-related offences to access justice, as well as remedies for victims. Section A contains an examination of the gender dimensions of barriers impeding access to justice through the judicial system and good practice in supporting such access, while section B includes a discussion on the right to effective remedies for victims of terrorism. In the context of this general framework, section C contains an examination of gender considerations in remedies and reparations. Section D includes an exploration of specific considerations for victims of sexual and gender-based violence and trafficking in persons perpetrated by terrorist groups. Finally, section E contains a discussion on the role of gender-sensitive transitional and traditional justice mechanisms as an alternate means of accessing justice.

⁴⁸⁵ In the plan of action annexed to General Assembly resolution 60/288, the dehumanization of victims of terrorism in all its forms and manifestations is identified as one of the conditions conducive to the spread of terrorism. The United Nations Global Counter-Terrorism Strategy Review also emphasizes the importance of developing and implementing programmes of assistance and support for victims of terrorism (Assembly resolution 70/291, para. 23).

While measures to strengthen assistance to victims and access to justice must be tailored to the structures of the legal and social system of the relevant State, the present chapter offers international good practice to provide guidance on ensuring that these mechanisms are gender-sensitive.

A. Gender dimensions of access to justice through the judicial system

1. Gender dimensions of access to justice

Access to justice is based on the right to equality before the law, the right to non-discriminatory protection of the law, and the right to effective access to remedies. These are fundamental rights recognized in international and regional human rights instruments, as established in chapter 1. Access to justice is also integral to the realization and protection of all other rights, including those contained in the Convention on the Elimination of All Forms of Discrimination against Women, and is inextricably linked to the rule of law. It is important for holding the perpetrator accountable, while respecting the rights of persons detained, arrested or imprisoned, suspected or accused of, or charged with a criminal offence, as well as for meeting the victim's needs, including access to remedies and reparations.

Access to justice refers to the ability of all people to seek and obtain redress for harms suffered, through formal or informal justice mechanisms, in compliance with human rights standards. It extends across a spectrum, from when the harm occurs until such redress is provided. As such, it involves a number of elements, ranging from:

- Recognition of the grievance in the domestic justice and legal systems (requiring a legal framework that acknowledges the grievances experienced)
- Awareness of the existence of remedies and the way in which to obtain them
- Availability of legal assistance and representation for both those suspected, accused or convicted, and for victims
- Adjudication through formal or informal justice systems that are accessible, timely, objective and affordable, and which are empowered to dispense remedies, and are in conformity with international human rights standards
- Effective delivery and enforcement of remedies⁴⁸⁶

› FOCUS: DETERMINING VICTIM STATUS

Determining victim status is a prerequisite for the purpose of determining participation in trial proceedings, providing protection and determining the availability of remedies.

The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power extends to situations in which people are victimized as the result of criminal offences committed by terrorist groups. The Declaration, in its definition of the term “victims”, includes the following:

- Persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power;

⁴⁸⁶See, for example, United Nations Development Programme (UNDP), *Programming for Justice: Access for All – A Practitioners Guide to a Human Rights-Based Approach to Access to Justice* (Bangkok, 2005), p. 6.

- Where appropriate, the immediate family or dependants of the direct victim, as well as persons who have suffered harm in intervening to assist victims in distress or to prevent victimization. This category of victims is often referred to as “indirect victims”;
- All persons falling within the above categories regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim.^a

The issues explored in the Declaration are further developed, within more specific contexts, in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.^b

It is noted in paragraph 4 of the Nairobi Declaration on Women’s and Girls’ Right to a Remedy and Reparation that, in order to effectively incorporate the perspectives of victims and their advocates in reparations processes, the notion of “victim” must be broadly defined within the context of women’s and girls’ experiences and their right to reparation.

^aGeneral Assembly resolution 40/34, annex, paras. 1–2.

^bGeneral Assembly resolution 60/147, annex.

Women may face several, often interconnected, barriers in accessing justice that are the result of social, economic and cultural practices that entrench structural gender inequality. Barriers can be institutional and legal in nature, deriving from a legal framework that either fails to adequately protect women’s rights or that contains laws and judicial procedures that discriminate against women. Social and economic conditions may prevent women from accessing justice: for example, where women are unable to afford legal representation and an effective legal aid system is not in place.

Some of these barriers are not gender-specific – for example, a lack of awareness of one’s rights, socioeconomic disadvantages or illiteracy can affect both genders – but they disproportionately affect women. This is especially true when these factors intersect with gender-specific factors, such as gender stereotyping or discrimination by criminal justice practitioners, discriminatory laws or stigma surrounding certain types of offences. Further, as the result of gender norms, women may be affected by barriers to education and access to information, a lack of autonomy over decision-making and economic resources, and a fear of stigma for seeking redress for certain crimes. Whether women are victims or witnesses to, or suspects of, terrorism-related or other offences – or have been convicted of such a crime – a host of measures are necessary to counter the barriers that they may face, many of which necessitate deep social change or institutional reform, depending on the context.

In its general recommendation No. 33 on women’s access to justice, the Committee on the Elimination of Discrimination against Women, identified a number of elements necessary to ensure access to justice, particularly with respect to women – justiciability, availability, accessibility, good quality, accountability and the provision of remedies⁴⁸⁷ – which will be examined in further detail below.

(i) Justiciability

Justiciability requires that women have unhindered access to justice, and also requires the ability and empowerment of women to claim their rights as legal entitlements, including under the Convention for the Elimination of All Forms of Discrimination against Women as well as other instruments.

⁴⁸⁷Committee on the Elimination of Discrimination against Women, general recommendation No. 33 (2015) on women’s access to justice, para. 14.

As noted by OHCHR, justice systems reflect society's power imbalances, including those that disadvantage women.⁴⁸⁸ Harms that disproportionately affect women, such as forms of sexual and gender-based violence, may not be reflected in national legislation and may therefore not be justiciable. Evidentiary rules may disadvantage women by demanding a higher burden of proof in order to establish gender-based offences. Women may also face gender stereotyping and gender discrimination in the criminal justice and judicial systems, which may pervade decision-making.⁴⁸⁹ Accordingly, achieving justiciability requires incorporating women's rights and protections into national legislation; training justice system professionals, including members of law enforcement, judges and lawyers, to handle cases in a gender-sensitive manner; and ensuring women are well represented in justice institutions.

An integral part of ensuring that women are empowered to seek justice is that they have access to information on their rights as victims (and how to access those rights), their role in the criminal justice process and the remedies they can seek. Information should also be shared about the availability of services to which victims are entitled or from which they can benefit, including legal, administrative, social, psychological and medical services. The responsibility of disseminating that information should be shared across criminal justice practitioners who interface with victims, including law enforcement personnel, prosecutors, legal counsel and judges.

Those measures should be directed towards the public as a whole, and to victims, in particular. As confirmed by the Committee on the Elimination of Discrimination against Women, States parties to the Convention on the Elimination of All Forms of Discrimination against Women have treaty-based obligations to ensure that all women have access to education and information about their rights, available remedies and the means to accessing them.⁴⁹⁰ The provision of information on rights, remedies and victim support services available to victims of violence against women is also a treaty-based obligation on States parties to the Convention on the Elimination of All Forms of Discrimination against Women,⁴⁹¹ the Istanbul Convention⁴⁹² and the Maputo Protocol.⁴⁹³

Gender considerations should inform the way in which those measures are delivered, keeping in mind that the Committee on the Elimination of Discrimination against Women observed, especially during consideration of periodic reports submitted by States parties, that such measures often fail to guarantee that women have equal access to education, information and legal literacy programmes.⁴⁹⁴ Measures to consider include:

- Developing outreach activities that are targeted at women, and which provide information about judicial mechanisms, remedies and support units
- Considering, where appropriate, the creation of women-specific assistance services, in consultation with relevant women's organizations
- Providing information in a range of formats, in a manner that is easy to understand and in relevant community languages, taking into account ethnic and social diversity

⁴⁸⁸ *Women's Rights Are Human Rights* (United Nations publication, Sales No. E.14.XIV.5), p. 110.

⁴⁸⁹ In paragraph 8 of its general recommendation No. 33 (2015) on access to justice, the Committee on the Elimination of Discrimination against Women notes that discrimination against women, based on gender stereotypes, stigma, harmful and patriarchal cultural norms – which particularly affect women – have an adverse impact on the ability of women to gain access to justice on an equal basis with men. In addition, discrimination against women is compounded by intersecting factors that affect some women to a different degree or in different ways than men and other women. The Committee also notes that grounds for intersectional or compounded discrimination may include ethnicity or race, indigenous or minority status, colour, religion or belief, political opinion, national origin, and urban or rural location.

⁴⁹⁰ General recommendation No. 33 (2015) on women's access to justice, para. 11.

⁴⁹¹ General recommendation No. 35 (2017) on gender-based violence against women, updating general recommendation No. 19, paras. 30 (b)(ii) and 31 (d).

⁴⁹² Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (*Council of Europe Treaty Series*, No. 120), art. 56, para. 1.

⁴⁹³ Art. 4, para. 2 (f), of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, adopted in Maputo on 11 July 2003; see also the updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice (General Assembly resolution 65/228, annex), para. 18 (a).

⁴⁹⁴ General recommendation No. 33 (2015) on women's access to justice, para. 32.

In addition, the Committee on the Elimination of Discrimination against Women has recommended establishing justice access centres such as one-stop centres, which include a range of legal and social services, in order to reduce the number of steps that a woman has to take to gain access to justice.⁴⁹⁵ It is particularly important to make such centres accessible to women living in poverty and/or in rural and remote areas.

(ii) Availability and accessibility

Availability refers to the availability, maintenance and funding of courts and other bodies in urban, rural and remote areas, and accessibility is the affordability and physical accessibility of justice systems.

Women are often notably affected by the non-availability of judicial and quasi-judicial institutions, particularly in rural and remote locations. This lack of access may be attributable to socio-economic gendered inequalities – including the inability to travel long distances to attend court hearings, owing to primary carer responsibilities or the cost of transport – and is more likely to be an issue in systems where only a very restricted number of courts have competence to hear terrorism-related cases.

In some cases, it may be necessary to develop interim approaches to justice delivery. Such approaches could include the development of mobile courts, mobile legal aid clinics and remote help desks, as well as the use of information and communication technology to improve access for women living in remote or rural areas. One-stop centres that offer a range of services, including access to police investigators and legal assistance, as well as medical and psychological care, are also beneficial to improving availability and accessibility.

In a report on gender, the judiciary, and access to justice, the Special Rapporteur on the independence of judges and lawyers noted that deep economic inequalities were a common obstacle to women's access to justice. Socioeconomic conditions and sometimes stereotyping are obstacles faced by the great majority of women around the globe when attempting to enforce their rights.⁴⁹⁶ Such inequalities are often reflected in a lack of awareness among women of their legal rights. In addition, women may lack the resources to learn about those rights – owing to high rates of illiteracy among women in many contexts – and the resources to cover the costs involved with formal judicial processes, including those associated with legal representation. These factors are discussed elsewhere in this section. A lack of economic independence and a reliance on male relatives for resources and assistance may lead to a denial of autonomy to make decisions regarding legal processes. Women may also be unable to participate in justice processes as the result of household duties, particularly if women have the added responsibility of being the head of the household.

Availability is also critically important for women in conflict with the law because as rights-holders, they must be protected and respected throughout the justice chain. Their rights and needs include legal services (e.g., access to legal counsel, legal aid and representation in court); access to education; reproductive and other health services; training and rehabilitation programmes; counselling, including for situations where women have had prior experience of violence and abuse; and prison facilities that are suitable for housing women together with their children. Lack of services may result in the violation of the due process rights of women and the severe underreporting of ill-treatment while in detention or in prison.⁴⁹⁷

Key measures to overcoming economic barriers include providing free or low-charge interpretative assistance, reducing the costs associated with court filing for women with low incomes,⁴⁹⁸ and ensuring

⁴⁹⁵ General recommendation No. 33 (2015) on women's access to justice, para. 17 (f).

⁴⁹⁶ A/HRC/17/30, paras. 20–36.

⁴⁹⁷ See UN-Women and others, *A Practitioner's Toolkit on Women's Access to Justice Programming* (2018), pp. 285–286.

⁴⁹⁸ General recommendation No. 33 (2015) on women's access to justice, para. 17 (a).

effective access to legal assistance and representation. The Human Rights Committee has underscored that the availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way,⁴⁹⁹ thereby directly affecting access to justice.

Legal assistance and representation is particularly important to helping women to overcome the structural and cultural barriers they face in accessing justice in many contexts, which may be accompanied by a lack of awareness of their legal rights, as identified above. States parties to the Convention on the Elimination of All Forms of Discrimination against Women have an obligation to ensure that women have recourse to affordable, accessible and timely remedies, with legal aid and assistance as necessary, to be settled in a fair hearing by a competent and independent court or tribunal, where appropriate.⁵⁰⁰ Effective legal assistance and representation is also key in overcoming prevailing gender stereotypes and biases within criminal justice systems that limit the credibility of women, both as parties to a case and as witnesses.⁵⁰¹

In its resolution 65/228, on strengthening crime prevention and criminal justice responses to violence against women, the General Assembly highlighted the importance of ensuring that female victims of violence, in particular, have access to both adequate legal representation, in order to make informed legal decisions, and to the civil and criminal justice systems.⁵⁰² The Committee on the Elimination of Discrimination against Women also calls for States parties to ensure access to financial aid and free or low-cost, high-quality legal aid for victims of violence against women.⁵⁰³

Legal aid

The availability of free or low-cost legal aid, advice and representation in quasi-judicial and judicial processes is critical in ensuring that victims and witnesses can obtain legal advice and fully participate in the criminal justice process and that the rights of offenders are respected. It is the core means through which some of the economic barriers to justice for women can be removed. As also noted by the Committee on the Elimination of Discrimination against Women, the lack of access to quality, gender-competent legal advice, including legal aid, is one of the critical challenges preventing women from accessing justice.⁵⁰⁴ According to the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, legal aid should ideally cover legal advice, assistance and representation, at no cost, for those without sufficient means or when the interests of justice so require, and should specifically cover the following individuals:

- Persons detained, arrested or imprisoned, suspected or accused of, or charged with a criminal offence
- Victims and witnesses in the criminal justice process⁵⁰⁵

According to the joint UNODC/UNDP *Global Study on Legal Aid: Global Report*, only 61 per cent of Member State respondents indicated that legal advice and court services were provided in all legal proceedings to female victims of violence, including victims of sexual and gender-based violence. In addition, legal aid services to female victims of violence were noticeably less accessible in

⁴⁹⁹Human Rights Committee, general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 10.

⁵⁰⁰Committee on the Elimination of Discrimination against Women, general recommendation No. 28 (2010) on the core obligations of States parties under article 2 of the Convention, para. 34.

⁵⁰¹General recommendation No. 33 (2015) on women's access to justice, para. 26.

⁵⁰²General Assembly resolution 65/228, para. 12.

⁵⁰³General recommendation No. 35 (2017) on gender-based violence against women, updating general recommendation No. 19, para. 31 (a)(iii).

⁵⁰⁴General recommendation No. 33 (2015) on women's access to justice, para. 13.

⁵⁰⁵General Assembly resolution 67/187, annex, para. 8.

lower-income countries (50 per cent) than in higher-income countries (68 per cent).⁵⁰⁶ The study noted that the central obstacles women face in accessing legal aid included:

- Lack of specialized legal aid services for women
- Lack of awareness about the availability of legal aid services at little or no cost
- Lack of awareness about where to obtain legal assistance
- Perception that it is not socially acceptable for women to seek legal aid

The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, and the Committee on the Elimination of Discrimination against Women provide guidance and recommendations on accessible legal aid services for women in criminal justice systems:

- *Legal aid should be provided on the basis of non-discrimination.* Ensure that legal aid is provided to all persons who are entitled to it, including victims of crime and witnesses of crime on the basis of non-discrimination, regardless of, inter alia, age, race, colour, gender, language, religion or belief (principles 3–6).
- *Inform women of their entitlements to legal aid.* Conduct information and awareness-raising programmes about the availability of legal aid, including eligibility for legal aid and social services that interface with legal systems.⁵⁰⁷
- *Special measures.* States may need to take special measures to ensure meaningful access to legal aid for women (principle 10).
- *Gender-sensitive administration of legal aid systems.* Introduce a gender perspective into all policies, laws, procedures, programmes and practices relating to legal aid to ensure gender equality and equal and fair access to justice (principle 10 and guideline 9).
 - Legal aid should be provided in a timely, continuous and effective manner at all stages of judicial or quasi-judicial proceedings, including alternative dispute resolution mechanisms and restorative justice processes (principle 3 and guideline 10).⁵⁰⁸
 - Where a woman lacks equal access to family income, means testing used to determine eligibility for legal aid should be based on the disposable assets of the woman, not that of the family.⁵⁰⁹
- *Training and gender representation in legal aid systems.* Ensure that legal aid providers possess the relevant training, skills and experience to enable them to meet the rights and needs of women. Where possible, female lawyers should be available to represent female defendants, accused and victims (principle 13 and guideline 9). Also ensure that legal aid and public defence providers are competent and gender-sensitive, respect confidentiality and are granted adequate time to defend their clients,⁵¹⁰ and are subject to regulation and oversight mechanisms (guideline 15).
- *Legal aid for female victims of violence.* Ensure that female victims of violence can access legal aid, advice, court support and other services, to ensure access to justice and to avoid secondary victimization (guideline 9).

(iii) Good quality and accountable justice mechanisms

Good quality and accountable justice mechanisms are those that are gender-sensitive and that adhere to international standards of competence, efficiency, independence and impartiality, and accountability.

⁵⁰⁶ UNODC and UNDP, *Global Study on Legal Aid: Global Report* (New York, 2016), p. 78.

⁵⁰⁷ General recommendation No. 33 (2015) on women's access to justice, paras. 33 (b) and 37 (c).

⁵⁰⁸ *Ibid.*, para. 37 (a).

⁵⁰⁹ *Ibid.*, para. 64 (e).

⁵¹⁰ *Ibid.*, para. 37 (b).

Achieving adherence to these standards will vary, depending on national context. Efforts may include training justice system professionals in gender sensitivity and countering gender stereotypes, providing measures to overcome language barriers and ensuring female representation in justice institutions.

Female victims may be impeded from claiming their rights through judicial processes as a result of the fear of stigmatization of victims and fear of reprisals or social ostracism, especially for victims of sexual and gender-based violence. Female victims may also abandon efforts to claim those rights out of fear of being associated with a terrorist group or prosecuted for terrorism-related acts. The keys to overcoming these barriers include the provision of victim protection measures (see chap. 3); the allocation of psychosocial and medical support for victims; and the additional allocation of community and family support.

An accountable and inclusive justice system requires the effective monitoring, not only of mechanisms, to ensure consistency with these principles, but also of justice system professionals and their legal responsibility in cases in which they violate the law.

(iv) Provision of remedies

Provision of remedies means the ability of women to receive viable protection and meaningful redress.

The provision of gender-sensitive remedies is essential to meeting the specific needs of victims, and enabling them to access justice, and is discussed in detail below.

2. Improving access to justice for victims of terrorism

Measures to ensure access to justice through formal judicial mechanisms for all victims of terrorist crime were identified in two UNODC publications: the *Handbook on Criminal Justice Responses to Terrorism* and *The Criminal Justice Response to Support Victims of Acts of Terrorism*. Those measures include:

- Informing victims of their role in the criminal justice process, the nature and timing of proceedings, and the extent of required cooperation
- Ensuring the availability of legal aid mechanisms to facilitate legal representation
- Allowing for the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant procedures of the national criminal justice system
- Informing victims of their rights in seeking redress through available judicial or administrative mechanisms
- Protecting victims from potential intimidation and retaliation, and protecting their privacy (see chap. 3)
- Avoiding unnecessary delay in the disposition of cases and the execution of orders granting awards to victims
- Offering victims the necessary material, medical, psychological and social assistance through governmental, voluntary and community-based means (considered below)
- Offering victims access to restitution and compensation (considered below)⁵¹¹

While these considerations remain applicable, identifying the gender dimensions that may operate to impede women's access to justice as victims of terrorist crimes is crucial to ensuring that the needs of female victims are also met.

⁵¹¹ *Handbook on Criminal Justice Responses to Terrorism*, Criminal Justice Handbook Series (United Nations publication, Sales No. E.09.IV.2), pp. 109–110; and UNODC, *The Criminal Justice Response to Support Victims of Acts of Terrorism*, pp. 32–35.

3. Access to justice for victims of sexual and gender-based violence

Providing access to justice for victims of sexual and gender-based violence perpetrated by terrorist groups, in line with the principles established in section A of the present chapter, is integral to victim protection and assistance. States also have a number of obligations to provide such access. The Committee on the Elimination of Discrimination against Women has called upon States parties, in its recommendation No. 35, on gender-based violence against women, to ensure that legal systems, including plural legal systems, protect victims and survivors of gender-based violence against women and ensure they have access to justice and to an effective remedy in line with the guidance provided in the Committee's general recommendation No. 33 (2015).

Enhancing access to justice for women whose rights have been violated is also a key tenet of the Women, Peace and Security Agenda. In paragraph 4 of its resolution 1820 (2008), the Security Council called upon Member States to ensure that all victims of sexual violence, particularly women and girls, had equal protection under the law and equal access to justice, and stressed the importance of ending impunity for such acts as part of a comprehensive approach to seeking sustainable peace, justice, truth and national reconciliation.

In attempting to access justice, victims of sexual and gender-based violence may face additional barriers to those examined above. Those barriers will require a targeted response. Social stigma surrounding sexual violence and gender stereotypes may be manifested in different parts of the criminal justice system, and impede an effective investigative and judicial process. In a case on gender stereotypes in judicial decisions on sexual violence, the Committee on the Elimination of Discrimination against Women established that stereotyping affects the rights of women to a fair and just trial and that the judiciary must take caution not to create inflexible standards of what women or girls should be or what they should have done when confronted with a situation of rape, based merely on preconceived notions of what defines a rape victim or a victim of gender-based violence.⁵¹²

FURTHER READING

UNODC has developed a number of publications providing guidance on access to justice, including:

- UN-Women and others, *A Practitioner's Toolkit on Women's Access to Justice Programming*
- *The Model Law on Legal Aid in Criminal Justice System with Commentaries*, which provides guidance to States on the administration, funding and organization of a national legal aid mechanism, in line with the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (see, in particular, model article 5 on non-discrimination in legal aid systems).
- *The Criminal Justice Response to Support Victims of Acts of Terrorism*
- *Good Practices in Supporting Victims of Terrorism within the Criminal Justice Framework*

B. Access to remedies and reparations for victims of terrorist crime

1. The right to an effective remedy for victims of terrorism

The provision of remedies is integral to a victim-centred approach, and is a key part of facilitating equal and effective access to justice for victims. The right to an effective remedy for victims of crime and

⁵¹² CEDAW/C/46/D/18/2008, para. 8.4.

violations of international human rights and humanitarian law – including those committed by members of terrorist groups – is well entrenched in international norms and standards.⁵¹³

Where the perpetrators responsible for inflicting harm have not been identified or apprehended, or where they are not solvent, it is the responsibility of States to provide remedies for harm suffered by their nationals. In many cases, States fulfil this responsibility by establishing national compensation schemes. This is reflected in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power:

12. When compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to:
 - (a) Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes;
 - (b) The family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization.
13. The establishment, strengthening and expansion of national funds for compensation to victims should be encouraged. Where appropriate, other funds may also be established for this purpose, including in those cases where the State of which the victim is a national is not in a position to compensate the victim for the harm.⁵¹⁴

The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has confirmed that the duty to protect the rights of victims of terrorism rests primarily with States.⁵¹⁵ The Special Rapporteur wrote that States were bound by an international human rights obligation to provide for such assistance to victims of terrorism, including their families. That obligation includes the duty to provide pecuniary compensation, including for moral damages sustained; rehabilitation; provision of health care; and psychosocial and legal assistance.⁵¹⁶

The form and extent of the remedy required will depend on the circumstances of each case, as well as the nature of the State's primary obligation.

2. Access to remedies through judicial mechanisms and administrative schemes

Victims of terrorist crime may seek remedies in a number of ways, depending on domestic legislation, and the nature of the legal system.

- Victims may obtain remedies through judicial mechanisms, including by bringing individual civil claims against perpetrators. Where provided for in national law, victims may pursue compensation or restitution in criminal proceedings.⁵¹⁷
- Remedies and other forms of support may be offered through administrative schemes, such as national compensation funds.

⁵¹³See Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (General Assembly resolution 40/34, annex), paras. 8–13; and Basic Principles and Guidelines of the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (General Assembly resolution 60/147, annex), paras. 3 (d) and 16.

⁵¹⁴For an example of such a measure, see the Protocol on the Prevention and Suppression of Sexual Violence against Women and Children of the Pact on Security, Stability and Development in the Great Lakes Region, art. 6, paras. 6 and 8.

⁵¹⁵A/66/310, para. 23.

⁵¹⁶Ibid., paras. 20 and 24.

⁵¹⁷In some jurisdictions, civil action and criminal prosecution can be sought concurrently. In others, a criminal conviction may be required for civil action, while in some contexts, criminal courts will consider civil claims in the course of the same case.

States may elect to establish administrative programmes for reparations and assistance as an alternative or to supplement individual remedies through judicial processes, where large-scale violations have occurred or where perpetrators are unwilling or unable to meet their obligations pursuant to court-ordered remedies.⁵¹⁸ The Committee against Torture, for example, has recommended implementing accessible mechanisms for victims of torture and ill-treatment, such as national funds that include special measures to facilitate access to reparations, in particular for victims who have been marginalized or made vulnerable.⁵¹⁹ Administrative schemes, such as national compensation funds, are particularly relevant for victims of terrorism, in the light of the large numbers of victims and large-scale damage often caused by terrorist acts, and the fact that the perpetrators may be unidentifiable or deceased, and in most cases lack the necessary means to meet their obligations for court-ordered remedies.

The guidance note of the Secretary-General on reparations for conflict-related sexual violence, issued in 2014, defines an administrative reparations programme as an out-of-court process used by States to provide reparation to massive numbers of victims of gross violations of international human rights law and/or serious violations of international humanitarian law. In such programmes, States identify the violations and the victims to be redressed and provide them with reparation through an established procedure. Reparation can also be ordered by national or international courts against a State or against the perpetrator of the crime, as applicable.

› FOCUS: ADMINISTRATIVE REPARATIONS PROGRAMMES

There are a number of considerations to take into account with respect to administrative reparations schemes:

- Administrative programmes have the potential of being more inclusive and accessible than courts. Such programmes are in fact capable of reaching a larger number of victims and are more victim-friendly because their procedures are more flexible, and evidentiary standards and costs are considerably lower.^a
- Administrative programmes may offer a more prompt and confidential way to access reparations and support that can minimize the risk of secondary victimization and stigma.
- The availability of such schemes should not affect the ability of victims to obtain judicial remedies, including adequate, prompt and full reparation for the harm suffered, and courts should take into account reparations awarded through these schemes when deciding on remedies.^b
- These schemes should be developed in consultation with victims, taking into account their needs and priorities.
- Information should be available to those who are potentially eligible about how to apply for/access these schemes, and the application period should be open for a reasonable period of time.

^a“Guidance note of the Secretary-General on reparations for conflict-related sexual violence” (2014), p. 6.

^bIbid., p. 6; and general comment No. 3 (2012) on the implementation of article 14, para. 20.

C. Gender-sensitive remedies and reparations

Reparations mechanisms have conventionally disregarded gender perspectives, priorities and differences in their design and administration, which has undermined effective access to reparations for women. The need to integrate gender perspectives into reparations schemes for victims of

⁵¹⁸Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (General Assembly resolution 60/147, annex), para. 16.

⁵¹⁹Committee against Torture, general comment No. 3 (2012) on the implementation of article 14, para. 29.

terrorism has, however, become increasingly recognized in recent years.⁵²⁰ The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has stated that reparation schemes should aim at full restitution and foresee individual and collective reparation for both victims of counter-terrorism measures by the State and victims of terrorist acts, and follow a participatory approach. National reparation mechanisms must be independent and provide for adequate, effective and prompt reparation, “which includes their being readily accessible and their taking a gender perspective into account”. Compensation must never become a substitute for bringing perpetrators to justice or for revealing the truth in compliance with applicable international human rights obligations.⁵²¹

The following considerations should be taken into account in implementing gender-sensitive reparations programmes.

1. General principles

- *All facets of reparations programmes should be based on the principles of equality and non-discrimination.*⁵²² Programmes should be designed to recognize and support all victims, and implemented without discrimination, including on the basis of sex, ethnicity, social class and economic standing, while ensuring that assistance is appropriately tailored to the needs of victims.⁵²³ Further, they must be designed in a manner that avoids reinforcing norms and practices that disadvantage and marginalize women, or which further existing deficits in women’s legal, political, social or economic agency, to the extent possible.⁵²⁴

Equality and non-discrimination should underpin the entire reparations process, from the investigations and fact-finding stage, to outreach, registration mechanisms, design of the form and distribution of reparations, and decision-making. In addition to these basic principles, reparations processes generally should prioritize the agency, wishes and decisions, safety, dignity and integrity of the victim or survivor, and should avoid revictimization.⁵²⁵

- *The design, implementation and monitoring of the reparation process should be a victim- and gender-inclusive process.* Meaningful engagement with a wide range of stakeholders, including women, ensures that a full understanding of the needs of victims can be captured, and signals an official acknowledgement of the differentiated experiences of victims, which is an important step in restoring their dignity. Such engagement is necessary given that in contexts where decision-making on financial, educational or legal matters is male-dominated, women may be constrained from benefitting from reparations.

As noted in the report of OHCHR on the analytical study focusing on gender-based and sexual violence in relation to transitional justice, victims know their needs and priorities best, and are uniquely placed to address concerns about the modalities and distribution of reparations, including with regard to ensuring that benefits are accessible, equitable and effective. In Uganda, OHCHR and the Uganda

⁵²⁰“Guidance note of the Secretary-General on reparations for conflict-related sexual violence”; and A/HRC/27/21, para. 45.

⁵²¹A/66/310, para. 25.

⁵²²Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, para. 25.

⁵²³UNODC, *The Criminal Justice Response to Support Victims of Acts of Terrorism*, p. 71.

⁵²⁴Margaret Urban Walker, “Transformative reparations? A critical look at a current trend in thinking about gender-just reparations”, *International Journal of Transitional Justice*, vol. 10, No. 1 (2016), p. 121.

⁵²⁵General recommendation No. 35 (2017) on gender-based violence against women, updating general recommendation No. 19, paras. 32 (b) and 33 (b).

Human Rights Commission have been conducting training since 2008 to build awareness of reparations, while simultaneously conducting research on the views of conflict-affected communities.⁵²⁶

Further, victims have differing conceptions of justice, priorities and assistance needs for themselves, their families and their communities, which may reflect gendered disparities.⁵²⁷ Some victims may prioritize service delivery to meet basic needs, while others may prioritize pecuniary compensation. Engaging inclusively with victims through consultations is required, both to gauge these priorities and to manage victim expectations about what can reasonably be expected from the programme.

Many women consulted in the aftermath of conflict or authoritarianism about the form of redress that they would favour expressed preference for services to meet their basic needs and those of their family members over restitution of lost property or monetary compensation in proportion to harm or for lost opportunities. For instance, common demands of women include services for their medical and psychological rehabilitation and that of their families, as well as education for their children and housing-related assistance.⁵²⁸

- *The participation of women in reparations processes should be actively encouraged.* Encouraging the participation of women in community processes such as consultations may require educational initiatives, especially where women's participation in public life is limited.⁵²⁹

Given the obstacles to effective victim participation, adopting structural incentives to encourage gender-sensitive outreach and procedures should be encouraged. In Timor-Leste, the Commission for Reception, Truth and Reconciliation recommended that 50 per cent of reparations resources be earmarked for women to ensure that the implementing mechanism would make a sufficiently strong effort to reach women and girls.⁵³⁰

Decentralized consultations are useful, where possible, to reach a broad range of victims, noting that the needs of victims may vary substantially depending on factors such as location.⁵³¹

- *Gender considerations should inform the types of harms falling within the scope of the programme.* Reparations programmes should follow a "harms-based" approach in assessing the types of harms to be included in the scope of the programme, taking into account direct victims, beneficiaries and vulnerable dependents. A gender analysis of the effects of the harm suffered and its differential impacts on women, men, boys and girls, as well as any explicitly gendered harms – including sexual and gender-based violence, the loss of reproductive capacity or forced pregnancy (see section D.2 of the present chapter) – should also be conducted.⁵³² This avoids a gender bias in determining priorities and assessing what constitutes harm requiring reparations.⁵³³

⁵²⁶ A/HRC/27/21, paras. 46–47; and Uganda Human Rights Commission and Office of the United Nations High Commissioner for Human Rights (OHCHR), *"The Dust Has Not Yet Settled": Victims' Views on the Right to Remedy and Reparation – A Report from the Greater North of Uganda* (Kampala, 2011), pp. 26–27.

⁵²⁷ UN-Women and UNDP, "Reparations, development and gender: report of the Kampala workshop – 1–2 December 2010" (2010), p. 14.

⁵²⁸ Ruth Rubio-Marín, "The gender of reparations: setting the agenda" in *What Happened to the Women? Gender and Reparations for Human Rights Violations*, Ruth Rubio-Marín, ed., Advancing Transitional Justice Series (New York, Social Science Research Council, 2006), p. 29.

⁵²⁹ "Reparations, development and gender", p. 14.

⁵³⁰ A/HRC/27/21, para. 50; see also Galuh Wandita, Karen Campbell-Nelson and Manuela Leong Pereira, "Learning to engender reparations in Timor-Leste: reaching out to female victims", in *What Happened to the Women?*, Rubio-Marín, ed., p. 308.

⁵³¹ "Guidance note of the Secretary-General on reparations", pp. 11–12.

⁵³² "Reparations, development and gender", p. 16.

⁵³³ Fionnuala Ní Aoláin, Dina Francesca Haynes and Naomi Cahn, *On the Frontlines: Gender, War, and the Post-Conflict Process* (New York, Oxford University Press, 2011), pp. 190 and 216.

- *Victim support and rehabilitation programmes must be designed and delivered in a gender-sensitive manner.* Effective victim support also requires, beyond criminal justice proceedings, that the necessary material, medical, psychological and social assistance, including information on available health and social services, is available at the national level. The criminal justice system and its role in supporting victims of acts of terrorism should be part of a broader action for assistance and support to victims in all aspects.⁵³⁴

These forms of support provide victims of terrorism with the assistance required for their social rehabilitation.⁵³⁵ However, in many contexts, the ability to successfully claim these forms of reparation is intricately linked to concerns regarding women's access to public and social services generally. Where, for example, women's needs are not adequately represented in decision-making forums, access to priority health-care and psychological services for gendered harms may not be recognized, or benefits may be distributed unequally.

2. Procedural and administrative considerations

- *Programmes should take into account and ameliorate the barriers to equal participation.* Like the points raised in section A of the present chapter with regard to access to justice, the process for registering for reparations programmes must take into account physical, social, cultural and economic barriers to participation, especially for socioeconomically disadvantaged women and those in rural areas. Specific outreach initiatives to circulate information about the availability of programmes, eligibility requirements and the implications of registering may be required, taking into account literacy and language considerations.⁵³⁶ The physical accessibility of the programme should also be taken into account, particularly for those located in rural areas. Further, the criteria and procedures for accessing reparations must be gender-sensitive. The imposition of strict application deadlines or closed-list systems, whether linked to participation in truth commissions or otherwise, is likely to exclude some victims.⁵³⁷ The Committee on the Elimination of Discrimination against Women has recommended that States create women-specific funds to ensure that women receive adequate reparation in situations in which the individuals or entities responsible for violating their human rights are unable or unwilling to provide such reparation, including for victims of sexual and gender-based violence.⁵³⁸
- *Staff involved in the administration of reparations programmes should be trained in the gendered dimensions of reparations processes.* In order to avoid revictimization, such training should address issues that include engaging with victims in a gender-sensitive way and understanding different types of harm. In addition, training courses should stress the importance of including both men and women among the staff involved in taking statements.
- *The evidentiary requirements for victim registration should take into account the need to provide prompt and accessible remedies.* As highlighted by UN-Women and UNDP, stringent documentation and evidentiary requirements, including the demand for death certificates, land titles or medical documentation proving sexual violations, need to be considered thoughtfully, taking into account

⁵³⁴ UNODC, *The Criminal Justice Response to Support Victims of Acts of Terrorism*, para. 47.

⁵³⁵ A/HRC/20/14, para. 62.

⁵³⁶ Beth Goldblatt, "Evaluating the gender content of reparations: lessons from South Africa" in *What Happened to the Women?* Rubio-Marín, ed., p. 74.

⁵³⁷ A/HRC/27/21, para. 48.

⁵³⁸ General recommendation No. 33 (2015) on women's access to justice, para. 19 (d); and general recommendation No. 35 (2017) on gender-based violence against women, updating general recommendation No. 19, para. 47.

the context of the programme and the extent to which victims can realistically access such evidence,⁵³⁹ both in terms of the time and expense incurred in obtaining such documentation.

- *Reparations awards should be dispersed in a gender-sensitive manner, taking into account, where appropriate, the differing needs of victims.* Experience from past reparations programmes has shown that, when awarding compensation, disbursing standard, lump-sum benefits to all victims fails to take into account gendered vulnerabilities, such as where a family has lost a male breadwinner, given that female-headed households tend to be less financially stable than male-headed ones. This financial inequality is due in part to the fact that women tend to earn less than male counterparts, and also can be the result of the role of women in some societies as caregivers to a range of dependants.⁵⁴⁰ Further, programmes must be sensitive to the difficulties women and children face in complying with formal requirements, such as providing official documentation or holding a bank account.⁵⁴¹
- *The form of reparations should not reinforce gender-based legal, social or economic barriers to redress.* For example, women may face barriers in accessing compensation in contexts where they have limited autonomy over financial resources. The Nairobi Declaration reinforces that reparations should seek to have a transformative impact. Principle 3 provides that Reparation must drive post-conflict transformation of sociocultural injustices, and political and structural inequalities that shape the lives of women and girls; that reintegration and restitution by themselves are not sufficient goals of reparation, since the origins of violations of the human rights of women and girls predate the conflict situation.

Transformative reparations are discussed further below in the context of victims of sexual and gender-based violence.

› EXAMPLE: REPARATIONS AND VICTIM SUPPORT AND THE TRUST FUND FOR VICTIMS

The Trust Fund for Victims supports victims of crimes that fall under the jurisdiction of the International Criminal Court.

The Strategic Plan for 2014–2017 of the Trust Fund for Victims contains eight programmatic principles identified as guiding its work. The first of these principles is aimed at supporting the advancement of the human rights of women as well as increasing the participation of women and incorporating gender perspectives. This includes addressing disparities and the impact of sexual and gender-based violence, in line with the Convention on the Elimination of All Forms of Discrimination against Women and the Security Council resolutions on women, peace and security.^a

To this end, the Trust Fund aims to mainstream gender across its activities, specifically targeting victims of sexual and gender-based violence, and to pursue a “structured inclusion” of gender issues into its needs assessment and project planning. Doing so will indicate additional areas of intervention, such as the provision of care and support to both female and male survivors of sexual and gender-based violence, an increase in the number of tailored interventions to support the reintegration of child mothers and girls associated with armed groups, and a wider array of vocational and livelihood options.^b

^aTrust Fund for Victims, “TFV Strategic Plan 2014–2017” (The Hague, August 2014), p. 15. Available at www.trustfundforvictims.org/sites/default/files/imce/1408%20TFV%20Strategic%20Plan%202014-2017%20Final%20ENG.pdf.

^bIbid., p. 21.

⁵³⁹“Reparations, development and gender”, p. 17.

⁵⁴⁰Goldblatt, “Evaluating the gender content of reparations” in *What Happened to the Women?*, Rubio-Marín, ed., pp. 75 and 215.

⁵⁴¹A/HRC/27/21, para. 48.

FURTHER READING

- The UNODC *Handbook on Justice for Victims: On the Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* serves as a guide for States implementing the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. The handbook outlines basic steps for developing comprehensive assistance services for victims of crime, as well as victim-sensitive policies, procedures and protocols for criminal justice. An updated version of the handbook is currently under development.
- The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has dedicated a report to the development of framework principles for securing the human rights of victims of terrorism (A/HRC/20/14).
- The OHCHR publication *Rule-of-Law Tools for Post-conflict States: Reparations Programmes* provides guidance on the design and implementation of reparations initiatives generally and includes a section on gender-sensitive reparations.

D. Remedies for victims of sexual and gender-based violence and trafficking in persons perpetrated by terrorist groups

1. Right to remedies

One of the integral components of the responsibility of States to effectively respond to sexual and gender-based violence is the provision of just and effective remedies to victims of such acts.⁵⁴² The Committee on the Elimination of Discrimination against Women has recognized that States are specifically required to provide effective reparation to women who are victims or survivors of gender-based violence. Reparation should include different measures, such as monetary compensation; the provision of legal, social and health services, including sexual, reproductive and mental health, for a complete recovery; and satisfaction and guarantees of non-repetition. Such reparations should be adequate, promptly attributed, holistic and proportionate to the gravity of the harm suffered.⁵⁴³

The need to provide reparations and official support to victims has been similarly recognized in numerous Security Council resolutions, including resolutions 2242 (2015), 2331 (2016), 2349 (2017) and 2388 (2017).

In its resolution 2331 (2016), the Security Council affirmed that victims of sexual violence and trafficking in persons, perpetrated by terrorist groups, should be classified as victims of terrorism, with the purpose of rendering them eligible for the official support, recognition and redress available to such victims, and that they should have access to national relief and reparations programmes, as a way of facilitating rehabilitation and reintegration efforts. To that end, victims of sexual violence and trafficking should benefit from relief and recovery programmes, including health care, psychosocial care, safe shelter livelihood support and legal aid, and services should include provision for women with children born as a result of wartime rape, as well as men and boys who may have been victims of sexual violence in conflict, including when it is associated with trafficking in persons in armed conflict.

⁵⁴² See general recommendation No. 28 (2010) on the core obligations of States parties under article 2 of the Convention, paras. 32–36; the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, art. 7, para. (g); the Declaration on the Elimination of Violence against Women, art. 4, para. (d); the Beijing Declaration and Platform for Action adopted at the Fourth World Conference on Women, paras. 124 (d) and (h); and the Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation.

⁵⁴³ General recommendation No. 35 (2017) on gender-based violence against women, updating general recommendation No. 19, para. 33 (a).

2. Remedies for victims of sexual and gender-based violence

In addition to the general principles of gender-sensitive reparations programmes discussed in section C of the present chapter, there are a number of considerations with respect to victims of sexual and gender-based violence and trafficking in persons in particular that should be taken into account. These good practices have largely emerged from previous experience with reparations for conflict-related sexual violence.

These principles apply equally to female and male victims, who both suffer from the physical and psychological, social and economic effects of victimization, while recognizing that their needs and appropriate responses can differ substantially, depending on the context.

(i) General principles

- *Criminal justice systems have a crucial role to play.* Member States should ensure that women subjected to violence have access to prompt and fair redress for the harm that they have suffered as a result of violence, including the right to seek restitution from the offender or compensation from the State.⁵⁴⁴ Sentencing policies and procedures should not only denounce, deter and stop violent behaviour but also provide reparations for harm caused as a result of the violence.⁵⁴⁵
- *Reparations programmes must fully recognize harms caused by sexual and gender-based violence.* Conventionally, post-conflict reparations programmes have failed to systematically include gender issues in their design and implementation, focusing on what was perceived to be the most “serious” rights violations (e.g., murder, torture or violations of physical integrity resulting in permanent impairments). In some cases, a “hierarchy of violations” was created, in which harms related to sexual and gender-based violence were marginalized or seen as less serious, non-permanent harms.⁵⁴⁶ Such a hierarchy fails to recognize the gravity of harms related to sexual and gender-based violence, which disproportionately affects women, and reveals an extraordinary masculine bias in the assessment of what constitutes irreparable harms and how those harms play out over a lifetime, particularly in societies where women are valued for their childbearing capacity as well as their perceived purity.⁵⁴⁷

There has been a positive shift towards acknowledging these harms, as reflected by civil society initiatives. The first such initiative was the Nairobi Declaration on Women’s and Girls’ Right to a Remedy and Reparation, which develops principles on gender-sensitive reparation, particularly for victims of sexual violence. This shift was also signalled by the work of the Special Rapporteur on violence against women, its causes and consequences, advocating for gender-sensitive reparations,⁵⁴⁸ and the guidance note of the Secretary-General on reparations for conflict-related sexual violence, developed in 2014.

Recognition of harms related to sexual and gender-based violence must be reflected in the identification of the forms of harm eligible for reparations; in the definition of “beneficiaries” as those persons eligible to benefit from reparations, and in the forms of reparations made available.⁵⁴⁹

Concerning the forms of harm related to sexual and gender-based violence eligible for reparations, recognition of victimization should not be limited to forms of physical violence such as rape, but the range of harms discussed in chapter 5. Those forms include the effects of rape, forced pregnancies,

⁵⁴⁴ Updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Practice, para. 18 (d).

⁵⁴⁵ Ibid., para. 17 (a).

⁵⁴⁶ Ni Aoláin, Haynes and Cahn, *On the Frontlines*, pp. 189–190.

⁵⁴⁷ Ibid., p. 190.

⁵⁴⁸ See A/HRC/14/22, paras. 30–85.

⁵⁴⁹ Ibid., para. 41.

forced abortions and sterilization, and more “domestic” forms of enslavement, such as forced marriage.⁵⁵⁰ Even where harms related to sexual and gender-based violence are acknowledged, reparations processes should endeavour to fully understand the gendered nature and impacts of such harms. They not only constitute physical violations, but impair social, economic and emotional capacities that can fuel wider discrimination against women, and heightened social and economic vulnerabilities.⁵⁵¹

With regard to the scope of beneficiaries, processes should adopt an inclusive approach towards identifying beneficiaries, keeping in mind the above-mentioned general principles for defining victims and entitlements to support of family members. A good practice is to define the entitlements of children born out of rape, who face being ostracized by their communities and families in many contexts. Such entitlements may entail enabling those caring for children born out of rape to claim reparations on their behalf. As noted in the guidance note of the Secretary-General on reparations for conflict-related sexual violence, in Peru, the Reparations Plan recognized children born of rape as a distinct category of beneficiary, noting they should be entitled to economic compensation up to the age of 18 and should be eligible for preferential access to education services.⁵⁵²

Identification of the forms of reparations made available should be one of the main outcomes of an inclusive consultations process in order to identify needs and priorities. Reparations programmes should be comprehensive and not limited only to compensation or immediate forms of rehabilitation.

- *Reparations programmes should adopt a flexible approach to the categorization of harms.* Without prejudice to the importance of recognizing harms specific to sexual and gender-based violence, it is also necessary to enable victims, if they wish, to present their claims under other forms of harm, owing to the stigma associated with sexual and gender-based violence in some contexts. The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, has noted that victims of sexual violence in Guatemala have reported feeling more protected from social stigmatization when the crime is defined as torture rather than rape, forced impregnation or sexual slavery.⁵⁵³ Gauging the views of victims on this point should be one of the aims of consultations. In Timor-Leste, the Commission for Reception, Truth and Reconciliation recommended the inclusion of non-harm-based categories, such as single mothers and children affected by the conflict, in addition to victims of sexual and gender-based violence.⁵⁵⁴
- *Urgent interim reparations, in particular rehabilitation measures, should be made available to meet the immediate needs of victims.* These measures must be designed to respond to the particular harms suffered by women and men, girls and boys who are immediate victims, as well as children born of rape.⁵⁵⁵ Such measures are particularly important for victims of sexual and gender-based violence, given the nature of the physical and psychological trauma they have sustained, and potential sexual and reproductive health complications. Urgent measures should include access to health services, including sexual, reproductive and psychosocial services; medication; and housing for displaced persons and those who have been marginalized by their families. Urgent interim reparations measures may be ordered by transitional justice mechanisms, where they are empowered to administer funds; by courts; or by administrative programmes.

⁵⁵⁰ See A/HRC/14/22, para. 44.

⁵⁵¹ Ní Aoláin, Haynes and Cahn, *On the Frontlines*, p. 192.

⁵⁵² “Guidance note of the Secretary-General on reparations”, p. 15.

⁵⁵³ A/HRC/7/3, para. 66.

⁵⁵⁴ A/HRC/27/21, para. 48.

⁵⁵⁵ “Guidance note of the Secretary-General on reparations”, p. 13.

► EXAMPLE: URGENT INTERIM REPARATIONS FOR VICTIMS OF SEXUAL VIOLENCE IN SIERRA LEONE

In Sierra Leone, an urgent reparations scheme was established by the State through its National Commission for Social Action, with support from international partners and donors, in order to implement recommendations issued by the Truth and Reconciliation Commission. This scheme included support for victims of sexual violence, who formed one of the five categories of victims identified as priority recipients of urgent interim assistance. Victims of sexual violence were screened and provided with financial assistance for the purposes of addressing gynaecological issues and for fistula surgeries.^a

^aJeanne Ward and UN-Women, *Violence against Women in Conflict, Post-conflict and Emergency Settings* (2013), pp. 342–343; and United Nations, *Mid-Term Review of the UN Joint Vision for Sierra Leone 2009–2010* (2011), p. 31.

- *Reparations programmes should endeavour to have a transformative impact.* The understanding that reparations should seek to have a transformative effect on the pre-existing structural inequalities and discrimination that caused or contributed to the commission of acts of sexual and gender-based violence has emerged as a leading principle in the context of post-conflict reparations programmes. According to the Special Rapporteur on violence against women, its causes and consequences, this implies that reparations should aspire, to the extent possible, to subvert instead of reinforce pre-existing patterns of cross-cutting structural subordination, gender hierarchies, systemic marginalization and structural inequalities that may be at the root cause of the violence that women experience before, during and after the conflict.⁵⁵⁶

This entails a multidimensional process, addressing not only legal, political and economic structures, but also local cultural and societal structures, which have discriminatory effects.

► EXAMPLE: TRANSFORMATIVE REPARATIONS AT THE INTER-AMERICAN COURT OF HUMAN RIGHTS

The Inter-American Court of Human Rights case of *González et al. ("Cotton Field") v. Mexico* (2009) provides an illustration of transformative reparations in a judicial context. In this case, the Court found the State had failed to exercise due diligence in investigating the disappearances of three women who were subsequently found to have been sexually assaulted and murdered. The Court found a violation of the right to life, right to humane treatment and right to liberty enshrined in the American Convention on Human Rights, as well as a violation of the State's obligation to prevent, punish and eradicate violence against women contained in the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women. The Court noted in particular the ineffective responses and the indifferent attitudes that have been documented in relation to the investigation of these crimes, because they appear to have permitted the perpetuation of the violence against women in Ciudad Juárez. Murders with characteristics of sexual violence present higher levels of impunity.^a

In awarding reparations, the Court held that reparations for the violations that had occurred should take into account the context of structural discrimination surrounding their commission, aiming not only to provide restitution, but to rectify such discrimination.^b The Court ordered Mexico to take a number of affirmative measures with respect to the investigation of the case itself, and to introduce measures to improve its investigative and protection responses to cases involving sexual and gender-based violence generally. Among other things, the Court ordered Mexico to do the following:

- Conduct effective criminal proceedings related to the deaths of the three women, involving officials experienced in dealing with victims of discrimination and gender-based violence, taking into account a gender perspective, and undertaking specific lines of inquiry concerning sexual violence

⁵⁵⁶A/HRC/14/22, para. 85; see also general recommendation No. 30 (2013) on women in conflict prevention, conflict and post-conflict situations, paras. 77 and 79, and the Nairobi Declaration on the Right of Women and Girls to a Remedy and Reparation, para. 3.

› **EXAMPLE: TRANSFORMATIVE REPARATIONS AT THE INTER-AMERICAN COURT OF HUMAN RIGHTS**
(continued)

- Continue standardizing all its protocols, manuals, prosecutorial investigation criteria, expert services and services to provide justice that are used to investigate all the crimes relating to the disappearance, sexual abuse and murders of women, based on a gender perspective and international standards, including the Istanbul Protocol
- Continue implementing permanent training programmes for public officials on human rights and gender to ensure due diligence in conducting preliminary inquiries and judicial proceedings concerning sexual and gender-based violence
- Provide medical and psychological treatment free of charge and reparations to the families of victims, as established in the judgment^c

^aInter-American Court of Human Rights, *González et al. ("Cotton Field") v. Mexico*, Judgment of 16 November 2009 (Preliminary Objection, Merits, Reparations and Costs), para. 164.

^b*Ibid.*, para. 450.

^c*Ibid.*, pp. 147–149.

(ii) **Procedural and administrative considerations**

- *Reparations processes must respect victim privacy and confidentiality.* Such an approach is integral at all stages of the process as a means of protecting victims of sexual and gender-based violence, encouraging their participation and avoiding stigma. Public reparations processes requiring proof of harm can disadvantage women, who are disproportionately affected by sexual and gender-based violence, owing to the stigma attached to such harms. This may directly impede access to reparations. Confidentiality must be prioritized throughout the entire reparations process, including the registration process. UNDP and UN-Women have observed that public registration processes that openly categorize violations were likely to exclude many victims of sexual violence. By utilizing locations where women and girls already gathered to receive information and services, such as local health clinics and women's organizations, reparations processes could ensure greater levels of confidentiality and avoid further stigmatization of victims.⁵⁵⁷

Administrative mechanisms allow for a greater degree of flexibility in implementing measures to protect confidentiality, such as by enabling victims to provide evidence by proxy, in private or with the assistance of a support person, provided that such measures were not inconsistent with national law. In the context of judicial proceedings, alternative, victim-sensitive means of providing testimony should also be considered to the greatest extent possible (see chap. 3).

- *Reparations programmes should not be unduly time restricted.* Time limits for the registration process should take account of the fact that victims of sexual and gender-based violence may suffer from trauma symptoms affecting their willingness to come forward.⁵⁵⁸ To mitigate that issue, the Commission for Reception, Truth and Reconciliation in Timor-Leste recommended a two-year time period for other potential beneficiaries to be identified, in addition to those victims who had appeared before the Commission.⁵⁵⁹

⁵⁵⁷"Reparations, development and gender", p. 16.

⁵⁵⁸Council of Europe, Directorate General of Human Rights and Legal Affairs, *Non-Criminal Remedies for Crime Victims* (Strasbourg, 2009), p. 27.

⁵⁵⁹Ní Aoláin, Haynes and Cahn, *On the Frontlines*, p. 190.

- *Evidentiary rules should, where possible, reflect the specific nature of sexual and gender-based violence.* Specific evidentiary rules in judicial and administrative proceedings may need to be adopted for cases involving sexual and gender-based violence.⁵⁶⁰ Victims may encounter significant challenges in meeting stringent evidentiary requirements, including in cases in which acts of sexual and gender-based violence are committed in armed conflict or in territory controlled by a terrorist group, or as a result of the time that has passed since the commission of the crime and the destruction of evidence. These concerns should be taken into account when establishing the required standard of proof, without prejudice to the rights of the accused.

Bodies processing claims for reparation could consider expanding the scope of evidence accepted for acts of sexual and gender-based violence to include testimony given by other witnesses and experts.⁵⁶¹ Another option would be to adopt a standard of proof that is lower than that required in criminal proceedings. The Appeals Chamber of the International Criminal Court, in the amended order for reparations for the Lubanga case, made the following stipulations:

In the reparation proceedings, the applicant shall provide sufficient proof of the causal link between the crime and the harm suffered, based on the specific circumstances of the case. Given the fundamentally different nature of reparations proceedings, a standard less exacting than that for trial, where the prosecution must establish the relevant facts to the standard of “beyond a reasonable doubt”, should apply. In determining the appropriate standard of proof in reparation proceedings, various factors specific to the case should be considered, including the difficulty victims may face in obtaining evidence in support of their claim due to the destruction or unavailability of evidence.⁵⁶²

- *States should consider allocating specific funds for victims of sexual and gender-based violence.* Where large-scale violations involving sexual and gender-based violence have occurred, fund allocation may be done through reparations funds aimed solely at this category of victims. Alternatively, funds could be allocated within existing programmes, while taking care to avoid stigmatizing victims of this form of crime or putting them at risk for revictimization.⁵⁶³

3. Reintegration programmes for victims of sexual and gender-based violence

The design and implementation of gender-responsive disarmament, demobilization and reintegration programmes has emerged as a key international norm, as reflected in Security Council resolution 1325 (2000), which encourages all those involved in the planning for disarmament, demobilization and reintegration to consider the different needs of female and male ex-combatants and to take into account the needs of their dependants.

Exploring the challenges and good practice that have emerged from disarmament, demobilization and reintegration programmes that have previously been implemented for women and girls formerly associated with armed groups in the context of armed conflict can therefore provide guidance for the design and implementation of similar programmes for individuals who have been associated with terrorist groups, including those who are victims of sexual and gender-based violence.

⁵⁶⁰ “Guidance note of the Secretary-General on reparations”, p. 13.

⁵⁶¹ *Ibid.*, pp. 13–14.

⁵⁶² International Criminal Court, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals against the “Decision establishing the principles and procedures to be applied to reparations” of 7 August 2012 with amended order for reparations (annex A) and public annexes 1 and 2, case No. ICC-01/04-01/06-3129, 3 March 2015, annex A, para. 22.

⁵⁶³ A/HRC/27/21, para. 47.

It is important to highlight that challenges faced in particular communities will be context-specific. Reintegration programmes must thus be responsive to a number of variables, including social and cultural norms, gender roles and relations, community experiences of terrorist violence and armed conflict, and the incidence of different forms of violence.

(i) General considerations

- The fear of association with a terrorist group – even in instances in which women were associated against their will – and insufficient attention to the needs of victims of sexual and gender-based violence are two key challenges of reintegration programmes in this context.⁵⁶⁴
- A number of principles identified in the present chapter pertain also to reintegration programmes for victims of sexual and gender-based violence. These include the need for programmes based on the principles of equality and non-discrimination; the amelioration of barriers to participation; the provision of services to meet the immediate needs of victims; and the inclusion of both female and male personnel who possess an understanding of gender issues. Likewise, an understanding of the specific needs of victims of sexual and gender-based violence in reintegration processes must inform programme design, planning and implementation. Such an approach is necessary to ensure the recognition of different forms of victimization and the needs of different beneficiaries, including victims with children born from sexual violence.
- Reintegration programmes should adopt a gender-mainstreaming approach and take gender-specific vulnerabilities into consideration. Victims of sexual and gender-based violence, as opposed to other participants in reintegration programmes, face particular challenges arising from social stigma attached to this form of harm, in addition to the stigma derived from being associated with a terrorist group.
- The reintegration process should integrate measures supporting access to justice for victims of sexual and gender-based violence participating in integration programmes, particularly the provision of information on legal rights and remedies.⁵⁶⁵

(ii) Fostering community and family acceptance

- With regard to women who have been subjected to sexual and gender-based violence by terrorist groups, specific challenges exist upon returning to their homes, communities or camps for internally displaced persons. They may face marginalization, discrimination and rejection by their communities and families owing to their perceived association with these groups, as a result of social attitudes towards sexual and gender-based violence, or out of fear that they have been radicalized. This fear has been heightened by the increasing use of women in terrorist groups, including as suicide bombers. Further, children born as the result of sexual violence are at a particular risk of marginalization, may confront issues arising from a lack of official identity documents and may be at risk of becoming stateless.
- Reintegration programmes should make family and community acceptance of victims of sexual and gender-based violence by terrorist groups a priority, because that acceptance builds the foundation for further reintegration activities. Engaging in community-level dialogue is integral to raising awareness of and sensitizing communities to the needs of victims of sexual and gender-based

⁵⁶⁴ See, in the context of post-conflict disarmament, demobilization and reintegration, United Nations, *Operational Guide to the Integrated Disarmament, Demobilization and Reintegration Standards* (2014), p. 206; and Inter-Agency Working Group on Disarmament, Demobilization and Reintegration and others, *How-To Guide: Gender-Responsive Disarmament, Demobilization and Reintegration* (2012), p. 13.

⁵⁶⁵ Inter-Agency Working Group on Disarmament, Demobilization and Reintegration, *How-To Guide*, p. 65.

violence and children born of sexual violence. Working with community leaders and committees in the design and implementation of reintegration programmes, where possible, is important in sharing an understanding of the experiences and needs of victims.

- Public information and awareness-raising campaigns in communities of return can reduce stigma and encourage both female and male victims of sexual and gender-based violence to access care.⁵⁶⁶

(iii) Access to medical and psychosocial assistance

- Victims of sexual and gender-based violence participating in reintegration programmes must be aware of and have access to comprehensive medical and psychosocial assistance. This includes access to comprehensive clinical services, including emergency contraception and post-exposure prophylaxis to prevent HIV infection.⁵⁶⁷ While access to special services may be required for victims of sexual and gender-based violence, care should be taken not to make public information about such services. Otherwise, victims may be exposed to stigma in order to access assistance.
- Gender-responsive screening for physical and mental health issues, including exposure to sexual and gender-based violence, should be integrated into the beginning of reintegration programmes.⁵⁶⁸
- A related good practice is to enable family members to access psychosocial support. This can be a key means of sensitizing families to the needs of returning victims and to mitigate the risk of rejection.⁵⁶⁹

4. Assistance and reparations for victims of trafficking in persons

(i) Access to assistance

Victims of trafficking in persons are entitled to specific protection and assistance under international instruments and, increasingly, in national law.⁵⁷⁰ As discussed above, Security Council resolution 2331 (2016) affirms that victims of trafficking in persons committed by terrorist groups should be classified as victims of terrorism so as to enable them to access official support, recognition and redress available to victims of terrorism.

States parties to the Trafficking in Persons Protocol, which know (or should know) that an individual within their jurisdiction is a victim of trafficking, are required to:

- Endeavour to provide for the physical safety of victims of trafficking in persons while they are within its territory (art. 6, para. 5)
- Take into account the age, gender and special needs of victims of trafficking in persons (art. 6, para. 4)
- Consider implementing measures to provide for physical, psychological and social assistance and support. This includes the following types of support: medical, psychological and material assistance; housing; counselling and information, including with regard to legal rights, and assistance with language and translation to understand this information; and employment, educational and training opportunities (art. 6, para. 3). These services should be provided in a comprehensive and integrated way⁵⁷¹

⁵⁶⁶ UNDP and Inter-Agency Working Group on Disarmament, Demobilization and Reintegration, *Blame it on the War? The Gender Dimensions of Violence in Disarmament, Demobilization and Reintegration* (2012) p. 44.

⁵⁶⁷ International Alert and United Nations Children's Fund, *"Bad Blood": Perceptions of Children born of Conflict-related Sexual Violence and Women and Girls associated with Boko Haram in Northeast Nigeria* – research summary (London, 2016), p. 22.

⁵⁶⁸ UNDP and Inter-Agency Working Group on Disarmament, Demobilization and Reintegration, *Blame It on the War?*, p. 39.

⁵⁶⁹ International Alert and United Nations Children's Fund, *"Bad Blood"*, p. 23.

⁵⁷⁰ As of May 2018, there were 173 States parties to the Trafficking in Persons Protocol. As of August 2016, a total of 88 per cent of States had laws that criminalized most or all forms of trafficking in persons in line with the definition contained in the Trafficking in Persons Protocol (*Global Report on Trafficking in Persons 2016*, p. 12).

⁵⁷¹ See also guideline 6 of the Recommended Principles and Guidelines on Human Rights and Human Trafficking (E/2002/68/Add.1).

In addition, States parties to the Trafficking in Persons Protocol are required under article 6, paragraph 2, to provide information to victims on relevant court and administrative proceedings, and to provide assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence.

Access to justice may include the provision of legal aid. According to principle 10 of the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, meaningful access needs to be granted to, inter alia, foreign citizens. As many of the trafficking victims are seeking justice in countries other than the one of their nationality, legal aid can be an important tool to support them in realizing their rights.

In practice, the scope of these measures will depend on the needs of the victims and the circumstances in which the trafficking occurred.

› FOCUS: PROTECTION AND ASSISTANCE FOR VICTIMS OF TRAFFICKING IN PERSONS IN CONFLICT AND POST-CONFLICT SITUATIONS – SECURITY COUNCIL RESOLUTIONS 2331 (2016) AND 2388 (2017)

In its resolutions 2331 (2016) and 2388 (2017), the Security Council highlighted key priorities for the protection and assistance of victims of trafficking in persons in the context of conflict and post-conflict situations, including as a result of the activities of terrorist groups.

Based on an understanding of the extreme trauma experienced by the victims of trafficking in persons in armed conflict and post-conflict situations and the need to prevent further victimization, the resolutions underscore the need to implement mechanisms for the identification of individuals who are or may be victims, and to provide protection and assistance for such persons, extending to their physical, psychological and social recovery, as well as rehabilitation and reintegration.

In its resolution 2331 (2016), the Council called upon Member States to address the needs of victims comprehensively, including the provision of or access to medical, psychosocial assistance and legal aid, as well as ensure that victims were treated as victims of crime (para. 2 (d)). Further, with regard to victims of such crimes, the Council noted that different forms of sexual violence in conflict might require tailored programmatic responses, including specialized medical and psychosocial assistance (para. 9).

Both resolutions underscore the principle of non-criminalization of trafficking victims for unlawful activities in which they have been compelled to engage (see chap. 2). In its resolution 2388 (2017), the Council called upon Member States to enhance the capabilities of professionals interacting with persons forcibly displaced by armed conflict, including refugees, to identify victims or persons vulnerable to trafficking, to adopt gender and age sensitive assistance, including adequate psychosocial support and health services, regardless of their participation in criminal investigations and proceedings (para. 13).

(ii) Access to remedies

Trafficking victims are also entitled to different forms of remedies. The duty of the State – which may include countries of origin, transit and destination – to provide remedies to all victims of trafficking under its jurisdiction, both citizen and non-citizen, arises in instances where:

- Violations result from an act or omission of the State
- Violations are committed by non-State actors but with the acquiescence or knowledge of the State

- A State has failed to exercise due diligence to prevent, investigate or prosecute a violation by private actors.⁵⁷² A State may therefore be obliged to provide remedies to victims if it fails to take reasonable steps to prevent human trafficking and protect potential or actual victims of trafficking, to the required standard of due diligence⁵⁷³

Article 6, paragraph 6, of the Trafficking in Persons Protocol requires States parties to ensure that their domestic legal systems contain measures that offer victims of trafficking the possibility of obtaining compensation. Similarly, article 25, paragraph 2, of the Organized Crime Convention requires States parties to establish appropriate procedures to provide access to compensation and restitution for victims of offences covered by the Convention. As recognized by the Special Rapporteur on trafficking in persons, especially women and children, the international community clearly recognizes that trafficked persons, as victims of human rights violations, have the right to adequate and appropriate remedies, which goes beyond the right to the possibility of obtaining compensation.⁵⁷⁴

The basic principles on the right to an effective remedy for victims of trafficking in persons is a product of cooperation between the Special Rapporteur on trafficking in persons, especially women and children; OHCHR; Member States; intergovernmental bodies; and civil society organizations. The principles provide a framework of guidance and good practice in meeting State obligations to provide remedies,⁵⁷⁵ including the following:

- Victim identification is a precondition for realizing the right to a remedy. The basic principles emphasize the importance of prompt and accurate victim identification, requiring adequate procedures and appropriate training for State officials and cooperation between authorities and non-governmental organizations (para. 7 (b)).
- Victims must be fully and promptly informed, in a language they understand, of their legal rights and access to remedies, and procedures to access these (para. 7 (c)).
- Victims should be provided with a reflection and recovery period, whether as identified or presumed victims, with access to physical, psychological and social assistance as contained in article 6, paragraph 3, of the Trafficking in Persons Protocol. This is particularly important for victims who have irregular immigration status. Following this period, the victim should be afforded the residence status necessary to exercise his or her right to remain during proceedings or as a form of restitution (para. 7 (d)).
- Assistance should be provided to enable victims to access remedies, regardless of their immigration status, including medical, psychological, social, administrative and qualified linguistic and legal assistance, such as free legal aid (para. 7 (e)).
- Victims should not be detained, charged or prosecuted for activities consequential to their situation as a victim of trafficking in persons, and should have the right to remain in the country in which the remedy is being sought for the duration of proceedings (paras. 7 (f) and (g)).
- Victims should have equal access to remedies. This requires, inter alia, that investigations, prosecutions and other mechanisms are gender-sensitive, account for the different protection needs of women, men, girls and boys, address sexual and gender-based violence, prevent discriminatory evidentiary rules, and avoid trauma, re-victimization and stigmatization (para. 7 (h)).

⁵⁷² A/HRC/26/18, para. 7; see also E/2002/68/Add.1.

⁵⁷³ Inter-Agency Coordination Group against Trafficking in Persons, "Providing effective remedies for victims of trafficking in persons: issue paper" (2016), p. 4.

⁵⁷⁴ A/HRC/17/35, para. 16.

⁵⁷⁵ A/HRC/26/18, annex.

- Access to remedies should not be predicated on willingness to cooperate in legal proceedings and they should have their rights to safety, privacy and confidentiality protected before, during and after proceedings (paras. 7 (i) and (j)).
- Effective cooperation at the national and international levels, with regards to mutual legal assistance and victim care, is necessary to ensure that victims are identified and are able to access recovery, rehabilitation and reintegration measures (para. 6).⁵⁷⁶

The UNODC Model Law against Trafficking in Persons also contains provisions relating to remedies. In particular, article 27 provides that a victim of trafficking in persons shall have the right to initiate civil proceedings to claim material and non-material damages suffered, while articles 28 and 29 refer to compensation for victims of trafficking in persons.

FURTHER READING

- With respect to victims of sexual and gender-based violence in particular:
- For operational guidance on tailoring different forms of reparations to meet the needs of victims of sexual and gender-based violence, see the guidance note of the Secretary-General on reparations for conflict-related sexual violence, pp. 15–20.
- The International Commission of Jurists' publication *Women's Access to Justice for Gender-Based Violence: A Practitioner's Guide* contains a section on providing effective remedies and reparations for violence against women, including in post-conflict contexts, as part of realizing women's broader access to justice.
- Concerning gender-sensitive reintegration programmes for victims of sexual and gender-based violence:
- Inter-Agency Working Group on Disarmament, Demobilization and Reintegration, *How-To Guide: Gender-Responsive Disarmament, Demobilization and Reintegration*
- UNDP, *Blame It on the War? The Gender Dimensions of Violence in Disarmament, Demobilization and Reintegration*
- United Nations, *Operational Guide to the Integrated Disarmament, Demobilization and Reintegration Standards*, Section 5.10: Women, Gender, and DDR
- With respect to victims of trafficking in particular:
- The UNODC *Toolkit to Combat Trafficking in Persons*, Tool 8, provides comprehensive guidance and good practice on the delivery of victim assistance, including language and translation assistance, medical assistance, psychological assistance, material assistance, shelter programmes, rehabilitation, skills training and education, and access to information and legal representation.
- Guidance on tailoring specific forms of reparations (restitution, rehabilitation, compensation, satisfaction and guarantees of non-repetition) to the needs of victims of trafficking in persons is provided in the basic principles on the right to an effective remedy for victims of trafficking in persons (principles 8–17), and in the report of the Special Rapporteur on trafficking in persons, especially women and children (A/HRC/17/35, paras. 20–41).
- International Organization for Migration, *Handbook on Direct Assistance for Victims of Trafficking*
- Report of the Special Rapporteur on trafficking in persons, especially women and children, contains a thematic analysis of the right to an effective remedy for trafficked person (A/HRC/17/35, sect. III).
- Inter-Agency Coordination Group against Trafficking in Persons, *Providing Effective Remedies for Victims of Trafficking in Persons*

⁵⁷⁶ A/HRC/26/18, para. 17.

E. Transitional and traditional justice mechanisms

In addition, or as an alternative, to pursuing accountability for offences committed by terrorist groups through criminal justice proceedings, informal and non-judicial mechanisms can provide an important, socially legitimate means to providing accountability for such crimes, in particular for sexual and gender-based violence. They may also offer more accessibility, particularly for disadvantaged women, who may never have the opportunity to access the formal justice system in conflict-affected or fragile contexts. These mechanisms may also provide a means to bolster reform for women's rights and greater leadership opportunities, and may assist in addressing underlying discrimination that perpetuates sexual and gender-based violence.

1. Transitional justice

Given the often overlapping contexts of terrorism and conflict it is helpful to consider the mechanisms adopted in transitional contexts following conflict or widespread human rights violations. Many gender-specific best practices and lessons learned across transitional justice mechanisms apply equally to gender-based challenges experienced by victims of terrorism and trafficking, including victims of sexual and gender-based violence in these contexts.

› FOCUS: DEFINING TRANSITIONAL JUSTICE

According to the United Nations, transitional justice is the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.^a Transitional justice includes judicial and non-judicial processes, including one or a combination of:

- Prosecution initiatives (considered in chapter 5 of this publication)
- Reparations programmes
- Truth-seeking mechanisms
- Institutional reform
- Comprehensive national consultations with those whose rights have been violated^b

^aUnited Nations, Guidance note of the Secretary-General: United Nations Approach to Transitional Justice (2010), p. 3 (see also S/2004/616).

^bIbid.; and A/HRC/27/21, para. 6.

As described by the Secretary-General, transitional justice can provide an opportunity to transform both inadequate laws and harmful social norms, by ensuring that the gravity of sexual violence is registered on the historical record and in the public memory.⁵⁷⁷

Effective participation in transitional justice processes can be central to realizing the goals of the Women, Peace and Security Agenda, particularly under Security Council resolutions 1325 (2000) and 2122 (2013), which identify the need to include women in post-conflict reconstruction and peace-building. Those resolutions also present an opportunity, in accordance with Council resolution 1820 (2008), to end impunity for sexual violence as part of a comprehensive approach to seeking sustainable peace, justice, truth and national reconciliation.

⁵⁷⁷S/2017/249, para. 11.

(i) Key principles of gender-sensitive transitional justice

Transitional justice mechanisms must respect and reinforce women's rights, be based on principles of inclusivity and consultation with victims, and take steps to mitigate the barriers to justice identified in section A of the present chapter, some of which remain prevalent outside the judicial context.

The design of these mechanisms should be guided by the following principles:

- *Rights-based approach.* Transitional justice processes should comply with international norms and standards and reinforce the right to justice, the right to truth, the right to reparations and guarantees of non-recurrence of violations.⁵⁷⁸
- *A mandate to address sexual and gender-based violence.* It is recommended that a mandate to address crimes involving sexual and gender-based violence is specifically identified during the establishment of the mechanism. This may be complemented, where appropriate, by specialized gender units providing victim and witness support.⁵⁷⁹
- *National consultations.* These are a critical element of the human rights-based approach to transitional justice and to ensure that processes do not solely reflect the experiences and priorities of men.⁵⁸⁰ Consultations require meaningful engagement with women and girls on the priorities, design and implementation of mechanisms, including the terms of engagement and working methods.⁵⁸¹ Consultations with groups that have been conventionally marginalized can, in themselves, achieve a sense of recognition and empowerment for victims. Consultations should be confidential and conducted separately from those with men.
- *Victim-centred processes.* While transitional justice mechanisms strive to achieve accountability, victims should be empowered and remain central in the design and implementation of processes, including through the availability of support services and protection.
- *Removal of physical and economic barriers for participation.* The design of mechanisms must account for factors that may impede the participation of women, such as lower literacy levels, language barriers, location and the costs of participation.
- *Representation of women as leaders or commissioners, and as staff.* According to OHCHR, experience shows that appointing commissioners and staff who understand and are committed to addressing the gendered dimensions of conflict is vital to maintaining a proactive focus on gender-based and sexual violence. Some commissions have used quotas to ensure the representation of women as commissioners, at expert levels and as staff.⁵⁸²
- *Provision of gender-sensitivity training.* Training should be provided on working with victims of gender-based and sexual violence to those facilitating consultations, staff and adjudicators. Truth commissions in Ghana, Liberia, Sierra Leone and Timor-Leste included gender training for their staff on subjects including international norms on sexual and gender-based violence, gender-sensitive interviewing practices, the collection of gender disaggregated data and the mainstreaming of gender in report writing.⁵⁸³
- *Evaluation and benchmarking.* Assessments should be undertaken to evaluate the gender sensitivity of mechanisms and improve future processes.⁵⁸⁴

⁵⁷⁸ Guidance note of the Secretary-General on transitional justice, pp. 3–4.

⁵⁷⁹ A/HRC/27/21, para. 21.

⁵⁸⁰ Ibid., para. 9.

⁵⁸¹ Ní Aoláin, Haynes and Cahn, *On the Frontlines*, p. 185.

⁵⁸² A/HRC/27/21, para. 24.

⁵⁸³ Ibid., para. 25.

⁵⁸⁴ Ní Aoláin, Haynes and Cahn, *On the Frontlines*, p. 186.

(ii) Truth and reconciliation commissions

Truth and reconciliation commissions may be well-placed to seek accountability for wide-scale sexual and gender-based violence, including as a tactic of conflict and terrorism, and – where a gender perspective is effectively integrated – in breaking down stigma attached to victims of such violence. Truth and reconciliation commissions can have the symbolic, institutional and structural capacity to articulate women’s experience of sexual and gender-based violence, to define such experiences in the language of human rights, and to create the moral and legal basis to require redress in measures such as reparations that often follow truth processes.⁵⁸⁵ As opposed to criminal trials, which are generally aimed at delivering accountability at an individual level, the aim of truth commissions is to provide victims with a safe space to share their experiences, identify the causes and consequences of human rights violations and create an accurate record of a society’s past in order to prevent recurrence.⁵⁸⁶

› EXAMPLE: INTEGRATION OF GENDER PERSPECTIVES IN THE WORK OF PAST TRUTH AND RECONCILIATION COMMISSIONS

In its report on the analytical study focusing on gender-based and sexual violence in relation to transitional justice, OHCHR identified a number of instances in which truth and reconciliation commissions had successfully integrated gender perspectives into their work:

- In Peru, the truth commission established to examine human rights violations committed in the conflict between the Government and Shining Path, an armed group designated as a terrorist organization by several Governments; established a specific gender unit as a focal point to address sexual and gender-based violence; and dedicated two chapters of its final report to gender issues, including gender-based and sexual violence. Some experts recommend both establishing a gender unit and taking a cross-cutting approach, as was done by the commission in Timor-Leste.
- The report of the truth commission of Kenya includes a long chapter on sexual violence, and another on gender and gross violations of human rights, in which the commission explored patterns of discrimination and displacement, as well as the record of women’s political participation and their historical role in peacemaking.
- In Sierra Leone, the truth commission addressed violations of economic, social, cultural, civil and political rights and looked at linkages between pre-existing gender inequality and the gender-based and sexual violence that was prevalent during that country’s civil war.^a

^a A/HRC/27/21, paras. 17–18, 20 and 22.

⁵⁸⁵ Ni Aoláin, Haynes and Cahn, *On the Frontlines*, p. 185.

⁵⁸⁶ *Ibid.*, p. 178.

› EXAMPLE: INTEGRATION OF WOMEN INTO CONFLICT RESOLUTION PROCESSES – THE PARTICIPATION OF WOMEN IN THE PEACE PROCESS IN COLOMBIA

In 2016, the Government of Colombia and the Revolutionary Armed Forces of Colombia (FARC), which is designated by the Governments of Colombia and several other States as a terrorist organization, signed a peace accord, ending more than 50 years of civil war between these, and several other, armed entities.

The inclusion of women before and during the negotiations and in the peace accords has been described as setting a new norm in the participation of women in transitional justice. This process was headed by the victims unit, the members of which were mostly women, including the highest-ranking members. The Gender Sub-Commission was also a party to the negotiations, and was tasked with reviewing the final agreement and prior agreements reached, and with guaranteeing that they had an adequate gender focus. In addition, the representation of victim delegations was covered by a gender quota.

Notably, the peace accord expressly prohibits any form of amnesty or pardon for crimes against humanity, genocide, serious war crimes or sexual violence committed during the conflict. The peace agreement in Colombia is the first of its kind to include such an explicit prohibition.

2. Traditional and customary processes

Traditional or customary processes can play a key role in securing justice, particularly where the formal justice system has been weakened by conflict. In some countries, the customary justice forums hear a vast majority of all disputes. While forms of traditional or customary processes vary greatly, they may provide greater accessibility to justice, contain forms of dispute resolution that are more expeditious, and yield decisions that enjoy greater community legitimacy.⁵⁸⁷ They may, however, reinforce traditional gender roles, and be dominated by men who apply a male-biased interpretation of customary law.⁵⁸⁸ OHCHR made the following observation:

Previous patterns of gender discrimination of such mechanisms make resolving gender-based and sexual violence cases through them extremely problematic. Efforts should be made to transform customary justice systems in gender-sensitive ways, and to ensure their compatibility with international human rights standards, while not allowing this to substitute for formal justice sector reform. For instance, in Uganda, the local council courts are now required to ensure that a minimum of one third of their judges are women. In South Africa, the Law Reform Commission has made recommendations for harmonization of customary law with that country's Constitution.⁵⁸⁹

Specific efforts must be directed towards ensuring that customary and traditional processes integrate gender-sensitive practices into traditional justice systems. For example, the Gacaca courts of Rwanda, which were traditionally used to settle civil disputes but adapted to hear cases following the 1994 genocide, initially failed to provide victim support measures or training to facilitators in handling cases involving sexual and gender-based violence. Laws adopted in 2004, however, enhance protection for victims of sexual and gender-based violence during stages of reporting and testifying, offering alternatives for the provision of testimony.⁵⁹⁰

Traditional justice mechanisms may offer greater accessibility to forms of redress and accountability, and they may be the only justice mechanism available. However, the use of informal and non-judicial mechanisms to address cases of sexual and gender-based violence can lead to further violations of

⁵⁸⁷ Shelby Quast, "Justice reform and gender" in *Gender and Security Sector Reform Toolkit*, Megan Bastick and Kristin Valacek, eds. (Geneva, Geneva Centre for the Democratic Control of Armed Forces, OSCE/Office for Democratic Institutions and Human Rights and International Research and Training Institute for the Advancement of Women, 2008), p. 13.

⁵⁸⁸ Quast, "Justice reform and gender", p. 13; and A/HRC/27/21, para. 36.

⁵⁸⁹ A/HRC/27/21, para. 36.

⁵⁹⁰ Ni Aoláin, Haynes and Cahn, *On the Frontlines*, p. 171.

women's rights and a culture of impunity where such mechanisms are informed by patriarchal values and not designed in a gender-sensitive manner.⁵⁹¹ The use of informal and non-judicial mechanisms, when not designed in a gender-sensitive manner, increases the risk of revictimization in violence cases since it removes such cases from judicial scrutiny, and may reduce offender accountability. It can also compound the sense of disempowerment of victims if their views are not taken into consideration in deciding the reparation or remedy. International instruments and standards therefore provide for a number of fundamental safeguards and minimum requirements concerning issues such as the informed consent of the victim or survivor, the need for risk assessments and safety measures, or the importance of accepting responsibility for violence as a wrongful act.⁵⁹²

› FOCUS: TRADITIONAL JUSTICE MECHANISMS IN NORTHERN UGANDA

Transitional justice mechanisms were widely used to address violations perpetrated by the Lord's Resistance Army, which has been designated by the Government of Uganda and the African Union as a terrorist organization, in the course of its conflict with the Government of Uganda. Many of these mechanisms focused on reconciliatory measures of forgiveness for offenders and traditional reparations that did not take into account the full scope of gender-related harms, including sexual and gender-based crimes. Cleansing rituals were used as a means of reconciliation and reintegration; however, in some communities, they did not reflect the gravity of sexual and gender-based crimes, owing to the exclusion of offences such as rape or abduction. In other communities, these processes shifted the focus away from the perpetrator's responsibility and exclusively towards the "cleansing" of the victim as a form of justice.^a

UN-Women, the International Federation of Women Lawyers (FIDA) Uganda, and Ker Kwaro Acholi (the traditional chieftaincy body) have been making concerted efforts to build the capacity of traditional and informal adjudicatory mechanisms to administer gender-sensitive dispute resolution. This approach includes the development of the Acholi Gender Principles, which are used by cultural and community leaders when handling cases involving women, including with respect to sexual and gender-based violence. The chieftaincy has also appointed a Minister with responsibilities over gender issues, including monitoring women's access to justice.

^a Vahlda Nalnar, *In the Multiple Systems of Justice in Uganda, Whither Justice for Women?* (Kampala, Uganda Association of Women Lawyers, 2011), pp. 33–34; and Laura Nyirinkindi, "Access to justice for victims of sexual violence in post conflict situations in Africa", *East African Journal of Peace and Human Rights*, vol. 19, No. 2 (2013), p. 232.

FURTHER READING

- For a detailed discussion of women's substantive and procedural rights to access informal justice systems, see the joint publication of UN-Women, UNICEF and UNDP, *Informal Justice Systems: Charting a Course for Human Rights-based Engagement*
- The International Centre for Transitional Justice has developed a gender justice programme aimed at improving accountability for gender-based atrocities, and has published a number of research reports on the issue. On the issue of truth commissions, see *Truth Commissions and Gender: Principles, Policies, and Procedures*
- Report of OHCHR on the analytical study focusing on gender-based and sexual violence in relation to transitional justice (A/HRC/27/21)
- Guidance note of the Secretary-General on the United Nations approach to transitional justice
- UN-Women and others, *A Practitioner's Toolkit on Women's Access to Justice Programming*, Module 3

⁵⁹¹ See UN-Women and others, *A Practitioner's Toolkit on Women's Access to Justice Programming*, pp. 232–234.

⁵⁹² See basic principles on the use of restorative justice programmes in criminal matters (Economic and Social Council resolution 2002/12, annex); UN-Women and others, *Essential Services Package for Women and Girls Subject to Violence, Core Elements and Quality Guidelines* (2015); and UNODC, *Strengthening Crime Prevention and Criminal Justice Responses to Violence against Women* (2014), p. 77.

SUMMARY OF KEY POINTS

- Equal and effective access to justice through fair and impartial mechanisms is an essential part of a robust criminal justice response to terrorism.
- Access to justice encompasses access to redress for victims for violations of their rights; the availability and accessibility of legal counsel for those suspected, accused or convicted of terrorism-related offences; and the ability of justice mechanisms both to adjudicate cases in a fair and impartial manner and to enforce decisions.
- Women face a number of barriers in accessing justice created by social, economic and cultural practices that entrench structural gender inequality. The present chapter reinforces the idea that measures aimed at improving women's access to justice must target six key areas: justiciability, availability, accessibility, good quality, accountability and the provision of remedies.
- Victims of crime and violations of international human rights and humanitarian law, including when perpetrated by members of terrorist groups, are entitled to remedies for the harms suffered. Victims of sexual and gender-based violence and trafficking in persons perpetrated by terrorist groups are also entitled to just and effective remedies.
- Mechanisms for remedies and reparations have conventionally disregarded gender perspectives in their design and administration, which has undermined effective access to reparations for women. The present chapter contains an examination of a number of considerations necessary to develop gender-sensitive reparations programmes, which support equal access to reparations and non-discrimination, recognize gender perspectives when determining the types of harm covered by the programme, and which respond to the needs of victims in a gender-sensitive manner.
- The present chapter includes key principles for remedies for victims of sexual and gender-based violence, which should be fully recognized in reparations programmes. Gender considerations should also be reflected in reintegration programmes for these victims.
- Victims of trafficking in persons are entitled to specific protection, assistance and remedies under international instruments and, increasingly, in national law.
- Transitional and traditional justice mechanisms can provide an important means to achieving accountability for crimes committed by terrorist groups, in particular, for victims of sexual and gender-based violence. Transitional justice mechanisms must respect and reinforce women's rights, be based on principles of inclusivity and consultations with victims, and take steps to mitigate the barriers to justice identified in the present chapter. Specific efforts must be directed towards ensuring that traditional and customary processes integrate gender-sensitive practices into traditional justice systems.

GLOSSARY⁵⁹³

Child. In the present publication, the term “child” refers to a human being below the age of 18 years, in accordance with article 1 of the Convention on the Rights of the Child.

Gender. The term “gender” refers to the roles, behaviours, activities and attributes that a given society at a given time considers appropriate for men and women. In addition to the social attributes and opportunities associated with being male and female and the relationships between women and men and girls and boys, gender also refers to the relations among women and those among men. These attributes, opportunities and relationships are socially constructed and are learned through socialization processes. They are context- and time-specific, as well as changeable. Gender determines what is expected, allowed and valued in a woman or a man in a given context. In most societies there are differences and inequalities between women and men in responsibilities assigned, activities undertaken, access to and control over resources, as well as decision-making opportunities. Gender is part of the broader sociocultural context, as are other important criteria for sociocultural analysis including class, race, poverty level, ethnic group, sexual orientation and age.

Gender mainstreaming. Gender mainstreaming is the chosen approach of the United Nations system and international community toward realizing progress on the rights of women and girls, as a subset of the human rights to which the United Nations is dedicated. Gender mainstreaming is not a goal or objective on its own; it is a strategy for achieving equality for women and girls in relation to men and boys.

Mainstreaming a gender perspective is the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels. It is a way to make women’s as well as men’s concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality.

⁵⁹³ The definitions in the glossary are based on those contained in Economic and Social Council agreed conclusions 1997/2, general recommendations of the Committee on the Elimination of Discrimination against Women, publications and resources of the Office of the United Nations High Commissioner for Human Rights, the Strategy for Gender Equality and the Empowerment of Women (2018–2021) of the United Nations Office at Vienna and the United Nations Office on Drugs and Crime, and reports of the Secretary-General on conflict-related sexual violence.

Gender-based discrimination against women. This refers to any distinction, exclusion or restriction which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women of human rights and fundamental freedoms, even where discrimination was not intended. Direct discrimination against women constitutes different treatment explicitly based on grounds of sex and gender differences. Indirect discrimination against women occurs when a law, policy, programme or practice appears to be neutral in so far as it relates to men and women, but has a discriminatory effect in practice on women because pre-existing inequalities are not addressed by the apparently neutral measure.

Gender-sensitive approach. A gender-sensitive approach uses a gender perspective to understand differences in status, power, roles and needs between males and females, and the impact of gender on people's opportunities and interactions.

Gender stereotype. A gender stereotype is a generalized view or preconception about attributes or characteristics that are or ought to be possessed by, or the roles that are or should be performed by, women and men.

- *Wrongful gender stereotyping.* This is the practice of ascribing to an individual woman or man specific attributes, characteristics or roles by reason only of her or his membership in the social group of women or men, which results in a violation or violations of human rights and fundamental freedoms. The harm is caused by the application of a stereotypical belief to an individual (e.g., through a State enforcing a gender stereotype into a law) in such a way as to negatively affect the recognition, exercise or enjoyment of their rights and freedoms.

Intersectionality. The term "intersectionality" refers to the way in which gender interacts with social, cultural, religious and other factors that may form the basis of discrimination (such as race, ethnicity, religion and nationality) to structure the experiences of, in particular, women.

Sex. This refers to biological sex: in other words, the physical and biological characteristics that distinguish males and females.

Sexual and gender-based violence. This refers to any harmful act that is perpetrated against one person's will and that is based on socially ascribed (gender) differences between males and females. It includes acts that inflict physical, mental, or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty, whether occurring in public or in private life. Sexual and gender-based violence entails widespread human rights violations, and is often linked to unequal gender relations within communities and abuses of power. Acts of sexual and gender-based violence are not restricted to one gender, but rather, may be inflicted upon women, men, girls and boys.

It comprises the following two notions:

- *Sexual violence*, which encompasses any sexual act, attempt to obtain a sexual act or acts otherwise directed against a person's sexuality using coercion, by any person regardless of their relationship to the victim, in any setting. Sexual violence takes multiple forms and includes rape, sexual abuse, forced pregnancy, forced sterilization, forced abortion, forced prostitution, sexual enslavement, forced circumcision, castration and forced nudity.
- *Gender-based violence*, which is considered to be any harmful act directed against individuals or groups of individuals on the basis of their gender. Other forms can include acts of physical violence, domestic violence and harmful traditional practices. Accordingly, while sexual violence is a form of gender-based violence, gender-based violence is a broader category of crime and may be perpetrated through non-sexual acts (e.g., physical violence).

Conflict-related sexual violence. This term refers to incidents or patterns of sexual violence, that is rape, sexual slavery, forced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity against women, men or children. Such incidents or patterns occur in conflict or post-conflict settings or other situations of concern (e.g., political strife). They also have a direct or indirect nexus with the conflict or political strife itself, that is, a temporal, geographical and/or causal link. In addition to the international character of the suspected crimes (which can, depending on the circumstances, constitute war crimes, crimes against humanity, acts of genocide or other gross violations of human rights), the link with conflict may be evident in the profile and motivation of the perpetrator(or perpetrators), the profile of the victim(or victims), the climate of impunity/State collapse, cross-border dimensions and/or the fact that they violate the terms of a ceasefire agreement.

Terrorism. There is currently no universally accepted, comprehensive definition of “terrorism”. As noted in the Secretary-General’s Plan of Action to Prevent Violent Extremism, the definition of “terrorism” is the prerogative of Member States and must be consistent with their obligations under international law, in particular international human rights law.

Terrorist group. For the purposes of the present publication, the term “terrorist group” encompasses at least the entities designated by the Security Council on the ISIL (Da’esh) and Al-Qaida Sanctions List and the Taliban sanctions list, as well as Al-Shabaab. It may also include other groups that resort to acts proscribed by the universal counter-terrorism conventions and protocols, as well as groups designated as terrorist groups at the national or regional level.





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