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***Abstract***

Sexual and gender-based violence (SGBV) is often intertwined with and nested within other violations of international criminal law (ICL) as part of a broader attack against a group. However, ICL is not giving enough visibility to this *nexus* of crimes rooted in the *intersection* of identities and discrimination that underpins SGBV during conflict. Intersectionality is a concept originated in feminism and progressively recognized by international human rights law (IHRL). It posits that SGBV is caused by gender ‘inextricably linked’ with other identities and factors that result in compounded discrimination and unique aggravated harms. Based on case studies, this paper argues that ICL should integrate an intersectional approach based on identity and discrimination to address the nexus between SGBV and broader international crimes. Intersectionality enables a better understanding of the causes, harms, and gravity of SGBV, and it provides consistency with an IHRL interpretation. The article begins setting out the foundations of intersectionality in feminism and in IHRL, and its applicability to ICL. It then applies intersectionality to two case studies that demonstrate the interlink of SGBV with broader violations of ICL: The *Revolutionary Front Case* *(RUF*) trial judgment of the Special Court for Sierra Leone (SCSL) concerning SGBV and the war crime committing acts of terrorism, and *Al Hassan*, prosecuted at the International Criminal Court (ICC), concerning SGBV and the crime against humanity of persecution. It concludes with final remarks on why and how ICL would benefit from integrating an intersectional approach to SGBV.

*Key words: sexual and gender-based violence, intersectionality, terrorism, identity, discrimination*

**Introduction**

SGBV crimes are often intertwined with and nested within other violations of ICL as part of a broader attack against a group. However, ICL is not giving enough visibility to this *nexus* of crimes that is rooted in the *intersection* of identities and discrimination that underpins SGBV during conflict. Intersectionality is a concept originated in feminism and progressively recognized by IHRL. It posits that SGBV is caused by gender ‘inextricably linked’ with other identities and factors that result in compounded discrimination and unique aggravated harms. This paper argues that ICL should integrate an intersectional approach based on identity and discrimination to address the nexus between SGBV and broader violations of ICL. The thesis is demonstrated with examples of the interlinkages of SGBV with the war crime committing acts of terrorism and the crime against humanity of persecution. An intersectional approach enables a better understanding of the causes, harms, and gravity of SGBV, and it provides consistency with an IHRL interpretation. This author recognizes the term ‘conflict-related sexual violence’ (CRSV) to denote “any act of sexual violence committed in the coercive circumstances of conflict”, including an armed conflict, an attack on a civilian population, and the intent to destroy a protected group.[[1]](#footnote-1) However, the term SGBV crimes is used in this paper to stress that gender permeates the causes and harms of SGBV that this paper seeks to explore.

The article begins setting out the theoretical foundations of intersectionality in feminism and IHRL and its applicability to ICL (section 1). It then applies intersectionality to two case studies to examine the interlink of SGBV with broader violations of ICL: The *Revolutionary Front Case* *(RUF*) trial judgment of the Special Court for Sierra Leone (SCSL) concerning the interconnection of SGBV and terrorism (section 2), [[2]](#footnote-2) and *Al Hassan*, on trial at the International Criminal Court (ICC) dealing with SGBV and persecution (section 3).[[3]](#footnote-3) The paper concludes recommending the integration of an intersectional approach to interpret SGBV crimes.

**1. An Intersectional Approach to SGBV: The Interconnection of Identities, Discrimination, and Crimes**

An intersectional approach seeks to unpack the complex causes and harms of SGBV by stressing the multi-layered nature of identity and discrimination. Such understanding of SGBV is applicable both during ‘peacetime’ and in conflict due to the interconnection of the concepts ‘identity, discrimination and crimes’ by which one flows into the other.

**1. 1 The Feminist Roots of Intersectionality**

Feminist legal scholars have emphasized that SGBV cannot be addressed using a narrow, single-axis approach to discrimination in the law because it ‘essentialises’ or limits the diversity and multiple layers of women´s identity obscuring their experiences of harm.[[4]](#footnote-4) Gender (the norms and expectations about masculinity and femininity) is a *social* construction, thereby, it is always interlinked and cannot exist without cultural factors that give it a meaning in a specific context (including identities such as class, ethnicity, religion, political opinion, etc.).[[5]](#footnote-5) Any analysis of SGBV must therefore consider gender intertwined with socially constructed factors. From this lens, feminism underscores *intersectionality* as a method to understand the way gender – a socialconstruct – is inseparable from other identities and factors that trigger compounded discrimination and, as a result, unique aggravated forms of harms.

The term and systematization intersectionality are attributed toKimberlé Crenshaw. Crenshaw claimed that Black American women of low economic class, due to their multiple identities, experience discrimination differently than White women or Black men in America.[[6]](#footnote-6) Therefore, only by tackling their sex/gender, ethnic *and* class identities *simultaneously*, as interlinked grounds of discrimination, would it be possible to understand the complex causes of violence and the unique harms they experience, which are critical for an effective remedy.[[7]](#footnote-7) A feminist approach to intersectionality, as championed by Crenshaw, thus tackles theinterrelationship of the concepts i) multi-layered identities (gender and other identities), ii) compounded discrimination, and iii) unique harms, as necessary elements for adequate access to justice for SGBV.[[8]](#footnote-8)

International legal scholars have argued the need to give visibility to the gendered nature of discrimination and harms of SGBV crimes that international law (IL) has traditionally overlooked. Gender has been historically relegated to the private (unregulated) sphere of domestic issues, precluding attention and understanding of the complex causes, harms and gravity of SGBV crimes.[[9]](#footnote-9) Examples of the marginalization of gender harms in IL include the misrecognition of rape as a grave breach of the Geneva Conventions, consideration of women´s harms as crimes of honour, or the `essentialization’ of women´s identity as mothers and victims of sexual violence. These and similar legal gaps have negatively affected ICL´s response to SGBV in armed conflict.[[10]](#footnote-10) Rhonda Copelon and Doris Buss are good representatives of this feminist critique to ICL´s exclusion of gender in the context of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and Rwanda (ICTR).[[11]](#footnote-11) They question ICL´s narrow (single-axis) approach to SGBV during ethnic conflict as crimes entailing only ‘ethnic’ discrimination and harms at the cost of eclipsing gender, urging to `surface´ gender discrimination and harms and to integrate them into the substance of ICL.[[12]](#footnote-12) As Buss puts it, while rape is understood as an attack on the ethnic community: Is it not possible to reflect *also* its nature as a crime committed against a woman as a woman, without the ethnic identity erasing the gender identity?[[13]](#footnote-13) New wars are wars of identity politics or against group identity. Therefore, as Chinkin and Kaldor note, SGBV in ‘wartime’ necessarily involves gender interplaying with other identities (ethnicity, religion, political identity, etc) that make SGBV a crime of intersectional discrimination *as well as* a political crime that furthers perpetrators´ broader attack.[[14]](#footnote-14) In those situations SGBV, especially when widespread or systematic, has a ‘communicative*’* value. It tells something about the criminal intent that reveals SGBV not only as a gender-based crime but simultaneously as a political crime used strategically by perpetrators to attack the target group.[[15]](#footnote-15)

**1.2 IHRL: An Intersectional Interpretation of SGBV**

IHRL, in line with feminism, is progressively acknowledging an intersectional approach to interpret SGBV. A rights-based approach to intersectionality, especially within the Committee on the Elimination of Discrimination against Women (CEDAW), recognizes that by understanding the way gender is ‘inextricably linked’ with other identities and factors that result in compounded discrimination is it possible to unpack the causes, harms and enhanced gravity of SGBV. Intersectionality is at the heart of the CEDAW´s gender analysis of violence against women. Acknowledging the interdependence between complex forms of gender discrimination, harms, and the gravity of SGBV, CEDAW´s General Recommendation 28 (2010) holds:

The discrimination of women based on sex and gender is *inextricably linked* with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity. Discrimination on the basis of sex or gender may affect women belonging to such groups to a *different degree or in different ways* to men. States parties must legally recognize such intersecting forms of discrimination and their *compounded negative impact* on the women concerned and prohibit them.[[16]](#footnote-16)

Intersectionality is not only a substantive trait of gender discrimination but is also a procedural approach to ensure access to justice without discrimination by properly unpacking the causes and harms of SGBV. According to the CEDAW, because intersectional discrimination places women at specific risk of violence and has more serious consequences, its identification by the judicial system is crucial to ensure a non-discriminatory treatment in access to justice. CEDAW´s General Recommendation 33 on Access to Justice (2015) holds that intersectional discrimination “makes it more difficult for women of those groups to gain access to justice,” including reporting violations and obtaining effective remedy, hence the duty of the judiciary to single out situations of intersectional discrimination and to “provide the possibility to lodge claims involving multiple and intersecting forms of discrimination”.[[17]](#footnote-17) Other regional IHRL mechanisms are aligning behind the CEDAW´s intersectional interpretation of SGBV and requiring the identification of compounded discrimination to ensure non-discrimination by the judicial system. Intersectionality is expressly recognized by the Inter-American Court of Human Rights (IACtHR),[[18]](#footnote-18) implicitly by the European Court of Human Rights (ECtHR) [[19]](#footnote-19)and, more limitedly, by the African Commission of Human and People´s Rights (ACHPR).[[20]](#footnote-20)

IHRL introduces a legal basis for an intersectional approach to interpret violence in IL based on multi-layered identities and discrimination that may apply to ICL, thereby enabling harmonized interpretations of SGBV as a crime of gender discrimination both in ‘peace’ and in ‘conflict’ situations. Indeed, precluding fragmented interpretations of SGBV and a duty of consistency with IHRL interpretations constitutes a binding obligation at the ICC. [[21]](#footnote-21) Article 21(3) of the Rome Statute clearly provides that the interpretation and application of the law “must” be consistent with internationally recognized human rights, without any discrimination based on *gender* or other grounds or status.[[22]](#footnote-22)

The applicability of IHRL interpretations in ICL is however a contentious issue that requires the harmonization of ICL´s principle of legality and the duty of consistency. First and foremost, the principle of legality (spine of ICL) demands a strict interpretation of the definition of crimes.[[23]](#footnote-23) This excludes the possibility of interpreting criminal conducts directly under IHRL standards which risks distorting the system of individual criminal responsibility.[[24]](#footnote-24) Notwithstanding, although IHRL interpretations cannot be directly applied to ICL´s “legal propium”, under certain conditions they may indeed apply. This happens when IHRL provides a complementary interpretation that fills in a legal gap in ICL and when it concerns a norm with status of customary international law (CIL).[[25]](#footnote-25) In that case, CIL norms apply as a general source of law that do not threat ICL standards, thereby harmonizing ICL´s principle of legality and the duty of consistency.[[26]](#footnote-26) ICL practice seems to support this approach. In *Ntagand*a, the ICC Appeals Chamber based its jurisdiction over SGBV on the key finding that if aspects of international crimes evolve into CIL:

“the Court cannot be precluded from applying it to ensure *consistency* of the provision with international humanitarian law, irrespective of whether this requires ascribing to a term in the provision a particular interpretation or reading an additional element into it. This does not violate the principle of legality recognised in article 22 of the Statute”.[[27]](#footnote-27)

The Appeals Chamber´s recognition that norms of CIL do not breach the principle of legality is critical to consider an intersectional approach to SGBV in ICL. In this sense, recent legal practice recognizes that the prohibition of SGBV as a crime of gender discrimination has reached the status of CIL, including the CEDAW (GR º 35, 2017), backed by the ECtHR (*Volodina v Russia*, 2019).[[28]](#footnote-28) Critically, the recognition that SGBVis a crime of gender discrimination prohibited by CIL opens the door to interpret SGBV crimes in consistency with IHRL interpretations of gender discrimination – including the *intersection* of gender with other grounds of discrimination.

**1.3 Conceptualizing Intersectionaity in ICL**

An intersectional approach based on identity and discrimination should be integrated into ICL to unpack the nature of SGBV (its causes, harms, and gravity) because the concepts of identity, discrimination and crimes are interconnected. As feminism and IHRL stress (sections 1.1 and 1.2), individuals are discriminated against based on identity resulting in IHRL violations in `peacetime’ and international crimes in ‘wartime’. Indeed, discrimination based on identity in peace situations is exacerbated like a *continuum* of violence in times of conflict.[[29]](#footnote-29) International crimes, including SGBV, are the result of an accumulation of discrimination based on identity whose exacerbation in armed conflict reaches the threshold of grave violations of `criminal’ nature.[[30]](#footnote-30)The *Policy Paper on Sexual and Gender-Based Crimes* (SGBC Policy) of the ICC´s Office of the Prosecutor holds a similar understanding of the nature of SGBV in considering that the concepts of identity, discrimination, and sexual and gender-based crimes are intertwined. More specifically, the *SGBC Policy* recognizes that, pursuant to IHRL, the “intersection” of identities or status which “may give rise to multiple forms of discrimination and social inequality” are factors requiring consideration in the gender analysis of SGBV crimes.[[31]](#footnote-31)

ICL precedents recognize that SGBV is often interlinked with other international crimes as part of a broader attack based on group identity. In those situations, international courts have explained the nexus between SGBV and other crimes by unpacking intersectional discrimination, that is, the way gender identity and discrimination is ‘inextricably linked’ with the identity of the target group. Dealing with genocide, the ICTR in *Akayesu* demonstrated that mass rape was “an *integral part of* the process of destruction” not only targeting Tutsi women but seeking “the destruction of the Tutsi group as a whole”.[[32]](#footnote-32) As for crimes against humanity, the ICTY in *Kunarac* established that women and girls were sexually mistreated “because they were Muslims” and, in so doing, perpetrators “fully embraced the ethnicity-based aggression of the Serbs against the Muslim civilians, and all their criminal actions were *clearly part of* and had the effect of perpetuating the attack against the Muslim civilian population”.[[33]](#footnote-33) As explained in the next section, regarding war crimes, the SCSL in *RUF* found that SGBV was “committed with the *specific intent of* spreading fear amongst the civilian population as a whole, to break the will of the population ensuring their submission to AFRC/RUF control”.[[34]](#footnote-34)As these cases demonstrate, understanding how gender identity and discrimination intersect with the broader attack against a group sheds light on the real scope and gravity of SGBV. Intersectional discrimination reveals that, often, SGBV is not only a crime of gender discrimination but, simultaneously, a political crime central to perpetrators´ strategy and nested within the broader criminal campaign.

The intersection of identity and discrimination is the substratum of international crimes. This fact justifies conceptualizing a working definition of internationality in ICL and its integration in the interpretation of international crimes, including SGBV. Considering their interlink, a conceptualization of intersectionality in ICL requires integrating the concepts of identity, discrimination, and crimes/violations. It is suggested that intersectionality during conflict refers to the complex discrimination that individuals experience based on two or more identity grounds simultaneously and resulting in crimes or violations in conflict situations. Regarding SGBV crimes, intersectionality often implies that a sub-group of people are discriminated based on both their gender identity and their group identity, triggering as a result the interlink or nexus between SGBV and other violations of ICL. Such nexus is examined in the next sections concerning SGBV and the war crime committing acts of terrorism (*RUF* case) and the crime against humanity of persecution (*Al Hassan* case).

**2. The *RUF* Trial Judgment: Uncovering the Interlink between SGBV and Terrorism**

The *Revolutionary United Front* (*RUF*) trial judgment of the SCSL has recognized SGBV *as* the war crime committing acts of terrorism. The decision marks a break-through in the Court´s previous jurisprudence that had either discarded charges of SGBV (*CDF* TC 2007)[[35]](#footnote-35) or considered SGBV an opportunistic act, disconnected from the terrorist campaign (*AFRC* TC 2007).[[36]](#footnote-36) The purpose of this case study is to examine the reasoning of the trial judges unpacking the interlinkages or nexus between SGBV and the war crime committing acts of terrorism *from* an intersectional approach to intersectional identities and discrimination. Implicitly, intersectionality permeates the judgment decision throughout, from the Applicable Law to the Sentencing Judgment, demonstrating the value of this approach to interpret the interlinkages between SGBV and the broader (umbrella) crime of terrorism.

The *RUF* case (*The Prosecutor v Issa Hassan Sesay, Morris Kallon, Augustine Gbao*) situates in the context of an attack against the civilian population of Sierra Leone, opposing the *RUF* armed group to the legitimate Government, between November 1996 to September 2000.[[37]](#footnote-37) SGBV was widespread and particularly prevalent towards the end of the indicted period, including patterns of rape and the abduction of women and girls for sexual exploitation through forced marriage and sexual slavery[[38]](#footnote-38). Initially, the Prosecutor charged eight counts of war crimes (acts of terrorism and collective punishment, unlawful killings, outrages upon personal dignity, mutilations, pillage, and the taking of hostages) and eight counts of crimes against humanity (unlawful killings, sexual violence, physical violence, and enslavement).[[39]](#footnote-39) Charges of SGBV were included in the amended indictment for rape, sexual slavery, outrages against personal dignity, and other inhumane acts, including forced marriage.[[40]](#footnote-40) On 7 March 2009, the Accused were convicted as members of a joint criminal enterprise under Article 6(1) of the SCSL Statute,[[41]](#footnote-41) later upheld by the Appeals Chamber.[[42]](#footnote-42)

For clarification, terrorism in this case is considered a crime involving political discrimination. The RUF armed group inflicted terror throughout the conflict intending to weaken, topple, and obtain political gains from the legitimate Government by attacking the civilian population of Sierra Leone perceived as political opponents. Although there is no universally agreed definition of terrorism in IL, there is ample recognition that the specific intent to inflict terror makes terrorism an inherently political crime [[43]](#footnote-43)– no matter if addressed against groups defined by other identities such as ethnic, religious, gender, etc.

**2.1 The Applicable Law: Acknowledging the Potential Interlink between SGBV and Terrorism**

From the beginning, considering the Applicable Law, the Trial Chamber (TC) demonstrated awareness of the potential nexus between SGBV and the ‘umbrella’ crime carrying out acts of terrorism.[[44]](#footnote-44) The Chamber defined the war crime committing acts of terrorism by referring to ICTY precedent *Galic* as “acts or threats of violence committed with the specific intent to spread terror among the civilian population”.[[45]](#footnote-45) Importantly, trial judges stressed that the principal intent to spread terror “may have coexisted *simultaneously* with other purposes”.[[46]](#footnote-46) Then, noting the “historically overlooked” gravity of SGBV, the Chamber stated “the particular nature of sexual violence that has been used, often with impunity, as *a tactic of war* to humiliate, dominate and instil fear in victims, their families and communities during armed conflict.”[[47]](#footnote-47) The passage reflects judicial sensitivity about the gravity of SGBV in armed conflict. In particular, it denotes recognition of the potential intertwining of SGBV with other international crimes by using SGBV strategically to further a broader attack, including its deliberate use aiming to inflict terror. This understanding of the meaning of SGBV was critical. It predisposed trial judges to examine the potential interconnections between SGBV and the broader terrorist campaign in interpretating the evidence and the law, paying attention to what patterns of SGBV may ‘communicate’ in armed conflict.[[48]](#footnote-48) x

**2.2. The Legal Findings: Interpreting Gender as a Social Construct**

The trial judges in *RUF* made the legal finding that SGBV constituted acts of terror, hence recognizing for the first time the *nexus* between SGBV and the war-crime committing acts of terrorism. The Chamber stated that rape, sexual slavery, forced marriages and outrages upon personal dignity “when committed against a civilian population with the specific intent to terrorise, amount to an act of terror … [and were] *part of* a campaign to terrorise the civilian population of Sierra Leone.”[[49]](#footnote-49) Although the finding did not expressly refer to intersectional discrimination, implicitly, the reasoning denotes sensitivity about the intersection of gender and perpetrators´ intent to destroy, rooted on political discrimination. As Oosterveld notes, an *intersectional* analysis was at the heart of *RUF*´s trial judgment and is arguably its most significant contribution because the finding demonstrated that an apparently gender-neutral crime (terrorism) was inherently gendered and played a central role in subjugating the civilian population.[[50]](#footnote-50)

The intersectional approach to SGBV by *RUF* trial judges relied on an interpretation of gender as a *social* construct, looking into the effects and meaning of gender-based violence in the context of the ongoing terrorist campaign. One by one, the Chamber examined the gendered effects of SGBV upon the target population. Regarding *rape*, the TC reminded its perpetration in regular patterns, its public nature and geographic and temporal proximity to other crimes.[[51]](#footnote-51) The judges noted that the general perception that soldiers who abductedcivilians had “a right to rape them and make them their wives” was indicative of an “atmosphere of terror”, inferring perpetrators´ aim to demonstrate that communities were “unable to protect their own wives, daughters, mothers and sisters … perpetuating a constant threat of insecurity that pervaded daily live and afflicted both men and women.”[[52]](#footnote-52) Addressing *forced**marriage* and *sexual slavery*, trial judges recalled the consistent pattern of capturing andabducing women of all ages and forcing them into prolonged relationships as bush wives.[[53]](#footnote-53) As a result, forced marriage and sexual slavery “stigmatise[d] women, who lived in shame and fear of returning to their communities after conflict”.[[54]](#footnote-54) Critically, judges found that “the use of the term “wife” by rebels was deliberate and *strategic*, with the aim of enslaving and psychologically manipulating the women and with the purpose of treating them like possessions.”[[55]](#footnote-55) The Chamber concluded that the patterns of sexual enslavement demonstrated its use as “a deliberate system intended to spread terror by the mass *abductions* of women.”[[56]](#footnote-56) The intersection of discrimination on gender and group (political) identity was at the heart of the judicial analysis of SGBV and triggered the interlink of the crimes of SGBV and terrorism. Confirming such dynamic the joint analysis of forced marriage and sexual slavery was key to prove the war crime of committing acts of terrorism by means of SGBV, especially the use of the term “wife” that not only provided access to women but also established a system of overarching control over the population.[[57]](#footnote-57)

The intersectional analysis reached its apex when trial judges considered, after a nuanced contextualization of the patterns of SGBV, the *overall effects* of gender-based violence. The legal reasoning denotes what Oosterveld has called a *patterns and effects* approach to understand the real nature of SGBV: First, conducting a nuanced examination of different SGBV crimes (patterns), and then constructing the bigger picture of the overall patterns and effects, better capturing the ways in which SGBV contributed to terrorize civilians.[[58]](#footnote-58) Indeed, consideration for the extended effects of gender-based violence in society was the cornerstone of the judicial reasoning, leading to the conclusion that SGBV amounted to acts of terror. Noting judicial sensitivity inferring the interlink of SGBV and terrorism through the social *effects* of gender, the Chamber held:

We note that the physical and psychological pain and fear inflicted on the women not only abused, debased and isolated the individual victim, but deliberately destroyed the existing family nucleus, thus undermining the cultural values and relationships which held the societies together. Victims of sexual violence were ostracised, husbands left their wives, and daughters and young girls were unable to marry within their community … The Chamber finds that these effects of sexual violence were so common that it is apparent they were calculated consequences of the perpetrators’ acts.[[59]](#footnote-59)

**2.3 Failure to Identify the Interlink between Trafficking, SGBV and Terrorism**

On the critical side, neither the *RUF* trial judges nor the prosecutor identified ‘trafficking’ as a crime interlinked with the crimes of SGBV and terrorism, despite evidence of patterns of trafficking for sexual exploitation during the terrorist campaign.[[60]](#footnote-60) Although trafficking is not an offence foreseen by the SCSL Statute, by silencing it the SCSL missed a two-fold opportunity. The Court failed to express the gravity of gender-discrimination and harms experienced by the women and girls of Sierra Leone, and to reflect the gravity of gender-based crimes as part of perpetrators´ broader strategy to spread terror.

Trafficking in persons required recognition by the *RUF´*s trial judgment given the gravity of this offence considered a contemporary form of slavery by many international instruments and jurisprudence.[[61]](#footnote-61) The Palermo Protocol defines trafficking in persons by three elements: the transfer or movement of people, the use of force or coercion, and the purpose of exploitation, including sexual exploitation.[[62]](#footnote-62) In *RUF*, the facts fitted these elements of crime revealing that trafficking was taking place. Trial judges themselves acknowledged the existence of patterns of trafficking by identifying: the widespread and systematic abduction of women and girls by the RUF (i.e. elements of transfer and force or coercion)[[63]](#footnote-63) followed by their sexual exploitation through rape, force marriages and sexual enslavement (i.e. exploitation element).[[64]](#footnote-64) However, the identification of trafficking patterns did not lead to its logical recognition by the law demonstrating the persistence of constrains in ICL to make gender-based harms, that mostly affect women and girls, visible.

Although the SCSL could not adjudicate on `trafficking’ because this crime was not foreseen by the Statute, by not recognizing – naming – this massive practice the Court erased these grave harms from the narrative of what truly happened that ICL is bound to investigate and condemn. As De Guzmán notes, ICL has among its functions to *express* condemnation for the breach of the values that it protects, in so doing, sending a message that contributes to craft the law with the potential to alter it.[[65]](#footnote-65)n *RUF,* recognizing the patterns of trafficking for sexual exploitation would have allowed to give a voice to the women and girls of Sierra Leone to express their real experiences of harm. Also, it would have sent the world a message of condemnation of the seriousness of those practices, important for future practice, especially domestic courts and institutions dealing with transitional justice in Sierra Leone.

More generally, the recognition of trafficking was important to give visibility to the *nexus* or interlinkages between the crimes of trafficking, SGBV and terrorism. This nexus has been recognized by the Security Council.[[66]](#footnote-66) Critically, trafficking is *the* crime that precedes and enables the system of sexual exploitation in the context of terrorism. Trafficking, as Malik and Kenny stress, is the gateway to sexual violence in the context of terrorism, facilitating the “interlink between the crimes of human trafficking, sexual violence and terrorism, in which each crime flows from the commission of the others”.[[67]](#footnote-67) Trafficking for sexual exploitation, a crime disproportionately affecting the women and girls of Sierra Leone, strengthened evidence of the gendered nature of the attack, contributing to engender the apparently gender-neutral crime of committing acts of terror.[[68]](#footnote-68) The combination of trafficking and sexual exploitation demonstrated the relevance of gender-based crimes as inherent to the *strategy* of the armed group, thereby revealing the gravity of SGBV not only as a crime of gender discrimination but, simultaneously, as a political crime, as a tool to inflict terror.

**2.4 The Sentencing Judgment: Expressing the Gravity of SGBV**

In theSentencing Judgment, *RUF* trial judges drew a relevant consequence of the interlink between SGBV and terrorism by concluding that SGBV as acts of terrorism have an enhanced gravity that must be considered for sentencing purposes. Indeed, an intersectional approach of the interplay of gender and the specific (political) intent to terrorize runs *throughout* the judicial assessment of the gravity. Addressing the nature, scale, brutality, number of victims and vulnerability dealing with SGBV the Chamber found: “[T]his practice by the rebels of *using* sexual violence to terrorise the civilian population increases the gravity of the underlying offence.”[[69]](#footnote-69) Concerning the impact of SGBV, the Chamber stressed not only individual harms (physical and mental pain, stigma, ostracization),[[70]](#footnote-70) but it drew from its interpretation of gender as a social construct and its extended effects on the target group to conclude the aggravated nature of SGBV. The Chamber found that “[I]n a society where cultural values greatly dictate the sacred manner in which any form of sexual acts take place” perpetrators were aware that SGBV “would have an adverse impact on the family as a whole and the society at large.”[[71]](#footnote-71) The Sentencing decision efficiently expresses the gravity of SGBV as a crime of compounded discrimination on gender *and* political grounds in perfect coherence with previous findings about the nexus of SGBV and terrorism.

The Sentence enabled ICL to perform its expressivist function, conveying the idea that using SGBV to terrorize to further the strategy of inflicting terror must be acknowledged and sanctioned. As Ní Aoláin suggests, certain acts of SGBV are “distinct” not because they are experienced by women but because they are “encoded” with political/military purposes that make SGBV “organically linked” to the central plan or policy of destroying the carriers of the community.[[72]](#footnote-72) By integrating at the sentencing stage the interplaybetween the specific (political) intent to terrorize and the effects of gender-based harms, intersectionality reached the core of access to justice. In the cogent words of an author: “[I]t is imperative that we identify the intent that underlies the action in the first place and factor it into the identification of the harm itself, the sanction that applies to it, and the remedy that is offered to the victim.”[[73]](#footnote-73)

**3. *Al Hassan*: Reflections on the Interlink of SGBV and Persecution**

The case study *Al Hassan*, prosecuted at the ICC at the time of writing, shares some legal parallels with the *RUF* case in that in both cases SGBV was interlinked with other international crimes as part of a broader attack against a group. *Al Hassan* could therefore benefit from insights of *RUF*´s treatment of SGBV interconnected with other violations *from* an intersectional approach to gender discrimination and identity. Although, in *RUF*, SGBV was charged as an act of terrorism (a war crime) and in *Al Hassan* as an act of persecution (a crime against humanity), both exemplify that SGBV intertwined with broader violations amounts not only to a crime of gender discrimination but also to a crime central to implement perpetrators´ organizational policy (a political crime) deliberately used to further the attack against the target group. From this lens, the case study first addresses the strategic use of SGBV in *Al Hassan* as inseparable from the persecutory attack. Then, drawing from the *RUF* analysis,the case explores the potential of intersectionality to unpack the nexus between SGBV and other violations (here persecution) in the situation in Mali.

*Al Hassan* deals with the crimes committed in Timbuktu (Mali) by terrorist groups Ansar Dine and AQIM (the Organization) in the context of a widespread attack against the civilian population not adhering to their religious views, and especially targeting women and girls, from April 2012 to January 2013.[[74]](#footnote-74) According to the Prosecutor, Al Hassan was a high-ranking officer of the Islamic police who ensured compliance with the Organization´s religious norms[[75]](#footnote-75) and played an administrative and coordination role as interface between the population and the leaders of the Organization.[[76]](#footnote-76) The Prosecutor brought charges under Article 25 (a-d) of the Rome Statute. On 30 September 2019, the Pre-Trial Chamber (PTC) limited Al Hassan’s criminal responsibility to article 25-3(d), contribution, and confirmed the following charges for trial: the war crimes of torture, cruel treatment, outrages against personal dignity, the passing of sentences and executions without judicial guarantees, and directing attacks against religious and historical buildings; and for the crimes against humanity of torture and other inhumane acts. [[77]](#footnote-77) As for SGBV, the PTC confirmed charges for: the crimes against humanity of other inhumane acts in the framework of forced marriages, sexual slavery, rape and persecution, and for the war crimes of sexual slavery and rape.[[78]](#footnote-78)

**3.1 The Strategic Use of SGBV: The Intersection of Gender and Religious Discrimination**

The facts in *Al Hassan* coincide with many of the factors that the U.N. Security Council and Secretary-General consider a strategic use of SGBV by religious extremism based on a discriminatory ideology against women and girls. These indices are important because they reveal that discrimination on gender *and* religious grounds may intersect and underpin the deliberate use of SGBV by extremist groups as a tool to further their broader criminal aims. According to the Secretary-General, SGBV may be used as a *recruitment* strategyto attract terrorist fighters by offering them access to wives and sex slaves and may even lead to creating marriage ‘bureaux.’[[79]](#footnote-79) SGBV is also a tactic to advance the*ideology* of terrorist groups that arises, as everywhere else, from discrimination “on gender, sexual orientation, ethnic and political or religious identity, in particular the subordination of women and girls.” [[80]](#footnote-80) The Security Council recognizes that these views on gender relations result in “the suppression of women’s rights and the use of religious justification to codify and institutionalize sexual slavery and to exert control over women’s bodies and reproduction.”[[81]](#footnote-81) The targeting of women and girls is often justified on consideration of the other as “infidel”, resulting in punishment for attempting to escape or refusing to abide by extremist rules, including situations of confinement, torture, humiliation, separation from or killing of their children.[[82]](#footnote-82) Also, according to the UN, terrorists may use SGBV to advance their *military strategy* by targeting people on religious, ethnic or political lines that mirror the conflict.[[83]](#footnote-83) Due to its gendered effects causing stigma and ostracization, SGBV destroys the social fabric of “family and kinship ties that hold communities together.”[[84]](#footnote-84) It instils terror among the population,[[85]](#footnote-85) resulting in subjugation or forced displacement that helps extremists to entrench control over strategic territory and population.[[86]](#footnote-86) Due to aspirations of statehood among these groups “the control of women’s reproductive capacity is vital to nation building and to raising a generation in their own image.”[[87]](#footnote-87) These considerations on the strategic use of SGBV are underpinned by the idea that gender and the religious ideology of armed groups intersect.

These strategic ‘uses’ of SGBV resonate with much of the evidence submitted by the Prosecutor in *Al Hassan,* pointing at the intersection of gender and religious discrimination beyond the ideology and strategy of AQIM and Ansar Dine. Indeed, the facts revealed that gender and religion were inseparable matters and compounded the *policy* of SGBV of the armed groups, namely, that forced marriages and SGBV were a central tool to recruitfighters, to spread the religious ideology, and to achieve the military aims of controlling civilians and acquiring statehood. In this regard, the DCC submitted that the leaders encouraged the “temporary marriages” of fighters and that actually most “jihadist” marriages in Timbuktu fell within this category.[[88]](#footnote-88) In this spirit “the hierarchy of the Organization had established a fund that could be used for the payment of dots.”[[89]](#footnote-89) The obligation to satisfy sexual relations, always “in the respect of religion”, justified those compulsory marriages, providing fighters with access to women[[90]](#footnote-90) and allowing leaders to impose their own discriminatory views of women.[[91]](#footnote-91) According to the Prosecutor, forced marriage was a “passerelle” crime for the perpetration of rape, sexual slavery and the persecution of women on the basis of their gender.[[92]](#footnote-92) This ideology was enforced. An Islamic Tribunal, an Islamic Police, and a mores brigade controlled and imposed religious norms on sexual relations, including by punishing adultery, mediation in conjugal conflicts and supporting the forced marriages of fighters.[[93]](#footnote-93)Simultaneously, this organized system of sexual exploitation was key to consolidate control over the city, region and its population, including the creation of a “new generation of jihadists” to integrate with the local population.[[94]](#footnote-94) According to witness evidence, “there was nothing better than marriage when we talk about social integration” to merge with the population to ensure control and a new generation of jihadists.[[95]](#footnote-95)

Overall, evidence in *Al Hassan* revealed strong indices that an organized system of SGBV was inextricably linked with the strategy of the armed group to recruit fighters, consolidate religious-based ideology and military strategy. *Al Hassan* presents an opportunity for the ICC to uncover the interlink between SGBV and the crime of persecution from the perspective of intersectional discrimination on gender and religious grounds.

**3.2 Intersectional Discrimination Underpinning the Persecutory Attack**

The insights of the *RUF* trial Judgment addressing the *nexus* between SGBV and terrorism are applicable to *Al Hassan*. From *RUF* we learn that considering the intersection of discrimination on gender and group identity helps to unpack the way SGBV is nested within the broader attack, revealing the strategic and aggravated nature of SGBV. Similarly, in *Al Hassan*, unpacking the intersection of discrimination on gender and religious grounds matters to understand the interconnection of SGBV with the persecutory attack, thereby revealing the real scope and gravity of SGBV.

**3.2.1 An Intersectional Attack on Gender and Religious Grounds**

Despite evidence in *Al Hassan* that the intersection of gender and religious discrimination underpinned perpetrators´ policy, the Prosecutor failed to reflect the importance of gender in the articulation of the ‘attack’ against the civilian population, which obscured the nexus of SGBV within other crimes. The Document Containing the Charges (DCC) adopted a *narrow* approach to discrimination that emphasized the religious nature of the attack but overlooked the way the religious ideology was dependent and co-constructed upon a discriminatory view of gender, especially against women and girls. For instance, even if the DCC noted that women and girls were “particularly” targeted and most of the acts listed as part of the attack involved discrimination against women and girls (e.g. daily harassment, deprivation of liberty, an organised system of forced marriage leading to sexual slavery and rape),[[96]](#footnote-96) gender discrimination was eclipsed by religious discrimination in the substantiation of the attack. Similarly, gender discrimination was absent referring to the ‘organizational policy’, only mentioning that leaderssought to “impose their authority and a new *religious* order in the city”.[[97]](#footnote-97) A narrow approach to discrimination (religious excluding gender grounds) is also appreciated in other statements regarding the attack. For instance, the DCC submits that the attack involved acts of “persecution against the civilian population not adhering to their own ideological and religious views”,[[98]](#footnote-98) and considers the attack as “persecution against the population not adhering to their own ideological and religious views.”[[99]](#footnote-99)

ICL precedents have recognized that SGBV may be nested within a broader attack concerning different categories of international crimes. Invariably, these decisions identify such interlink of crimes by unveiling gender discrimination ‘inextricably linked’ with discrimination against the target group, even if intersectionality is not mentioned. Regarding genocide, in *Akayesu,* the ICTR TC found that “Sexual violence was an *integral part of* the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.”[[100]](#footnote-100) Concerning crimes against humanity, in *Kunarac* the TC found, addressing the contextual element `attack´ that, through SGBV “They [perpetrators] fully embraced the ethnicity-based aggression of the Serbs against the Muslim civilians, and all their criminal actions were clearly *part of* and had the *effect of perpetuating the attack* against the Muslim civilian population”.[[101]](#footnote-101) As explained, dealing with the war crime of terrorism, *RUF* trial judges found that, by breaking the family nucleus and cultural values SGBV “effectively disempowered the civilian population and had the direct effect of instilling fear”, it was therefore deliberately used with the intent to terrorise.[[102]](#footnote-102)

Uncovering the nexusbetween SGBV and the broader ‘attack’ in *Al Hassan* requires articulating the intersectionof religious and gender discrimination, explaining why SGBV was strategic to further the attack and how this was mirrored in the facts. The task would benefit from substantiating the element ‘attack’ against the civilian population around the intertwining of religious and gender discrimination, bringing to the fore the deliberate use of SGBV under the religious veil to operationalize the organizational policy. Critical in this regard is deconstructing the meaning of the organized system of forced marriages (wisely qualified by the Prosecutor as a “passerelle” to SGBV including rape and sexual slavery)[[103]](#footnote-103) as the cornerstone of perpetrators´ strategy, explaining how this system contributed to the criminal aims. The facts in *Al Hassan* allowed inferring multiple *linkages* between the organized system of SGBV and the broader attack. These linkages resonate with strategic uses of SGBV in the context of religious extremism and have been mentioned above (section 3.1) including: using SGBV to impose a religious ideology, to recruit fighters, to entrench military control, and to achieve statehood. These strategic uses of SGBV required articulation to uncover the real nature and gravity of SGBV.

**3.2.2. Persecution: Intersectional *versus* Cumulative Discrimination**

*Al Hassan*´sbroader attack against civilians has been confirmed by the PTC as involving the crime against humanity of persecution, an umbrella crime whose specific discriminatory intent is well-suited to integrate the intersection of different grounds of discrimination.[[104]](#footnote-104) ICL has already recognized that persecution may involve intersectional discrimination, although international courts and tribunals have never adjudicated persecution on gender grounds even in those attacks where women and girls were particularly targeted. In the *Media* case, ICTR trial judges were not allowed to adjudicate on gender-based persecution because this ground was not recognized by the ICTR Statute.[[105]](#footnote-105) Although the trial judges acknowledged that the persecutory intent “*merged* political and ethnic identity”, it was silent on gender identity and discrimination despite noting that “Tutsi women, in particular, were targeted for persecution.”[[106]](#footnote-106) Another example of how the gender grounds of persecution is obscured is *Mbarushimana.* The ICC Prosecutor requested an arrest warrant alleging a persecutory attack on gender and political grounds, stressing that SGBV was a “particularly efficient” manner to create an humanitarian catastrophe considering its effects “to provoke the ostracisation of those violated, to break down communities, and to spread disease.”[[107]](#footnote-107) However, when bringing the charges, the Prosecutor dropped gender as a persecution ground despite patterns of SGBV pointing at its strategic use by perpetrators. The PTC did not confirm the charges arguing the absence of substantial evidence of the existence of an organizational policy.[[108]](#footnote-108)

*Al Hassan* presents an opportunity to articulate, for the first time in ICL, persecution as a crime where gender intersects with other grounds of discrimination, unpacking the role of SGBV in furthering the attack, and ending the historical silencing of gender-based persecution. *Al Hassan*´s DCC charged persecution on religious *and* gender grounds. However, these grounds where analysed separately, overlooking the way gender and religion interplayed and co-constructed one another. Accordingly, the DCC charged the two grounds of persecution in a cumulative (non-intersectional) manner that did not account for the real nature of discrimination.[[109]](#footnote-109)

It is important that the Court does not lose sight of the real nature of discrimination. First, the discrimination of the persecutory intent in *Al Hassan* should reflect the discriminatory nature of the ‘attack’ against the civilian population. As explained above, there were strong indices that gender discrimination (through the system forced marriages and sexual exploitation) was at the centre of the organizational policy and the attack led by the religious ideology. SGBV was strategically used to impose religious ideology, to recruit fighters and to achieve military strategy by controlling the population and melting with it to ensure a new generation of fighters.[[110]](#footnote-110) It is then logical that the intersection of discrimination underpinning the organizational policy and the attack be reflected in the articulation of the criminal intent of persecution. The organizational policy and the criminal intent are communicating glasses. As the ICTY Appeals Chamber noted in *Kvocka*, “the intent to contribute to the joint criminal enterprise [i.e. plan or policy] and discriminatory intent is one and the same thing”.[[111]](#footnote-111) Second, charging persecution on gender and religion as intersecting grounds better reflects the gravity of SGBV. While cumulative grounds of persecution only explain SGBV as a conduct involving gender discrimination, an intersectional lens conveys that discrimination was multi-layered, hence of a graver nature. This consideration has repercussions for sentencing purposes dealing with SGBV. It allows considering that the aggravating factor “any motive involving discrimination” provided by the Rome Statute was *compounded* by gender and religious grounds, better acknowledging the seriousness of SGBV as a political crime key to implement the policy of the armed group. Thirdly, addressing the intersection of discrimination in persecution charges improves understanding of the unique harms of victims, whose gender and religious identities were targeted. This sensitivity is crucial in view of providing effective reparations based on a more complete picture of victims´ experiences and needs.[[112]](#footnote-112)

**3.3 Uncovering the Interlink between Trafficking, Sexual Violence and Persecution**

The facts in *Al Hassan* revealed strong indices that ‘trafficking’ in women and girls had taken place and was interconnected with the crimes of SGBV and persecution. Trafficking in women and girls in the context of religious extremism is recognized by the UN Security Council who considers trafficking “part of the strategic objectives and ideology of, and used as a tactic” for incentivizing recruitment, destroying, punishing, subjugating, or controlling communities.[[113]](#footnote-113) In this regard, *Al Hassan* could benefit from the insights of the *RUF* case study where the facts fitted the elements of trafficking for sexual exploitation interconnected with other international crimes.

The facts submitted in *Al Hassan*`s DCCthat the armed group had established an organized system of “recruitment” for forced marriage and sexual exploitation matched the elements of the crime of trafficking. According to the DCC, the system of forced recruitment involved actions such as: the active search for women house by house, exerting pressure over families, not toleration of families who refused handing in women and girls, the establishment of a fund to pay dots, mediators that facilitated the forced unions, and deprivation of movement of the women and girls recruited.[[114]](#footnote-114) These facts can be subsumed under the elements of trafficking provided by the Palermo Protocol, namely, the movement of persons by force or coercion for the purpose of exploitation, including sexual exploitation. What is more, the Palermo Protocol expressly considers “recruitment” as a trafficking conduct when accompanied by force and for the purpose of exploitation.[[115]](#footnote-115)

The establishment of an organizedsystem of forced recruitment *for* sexual exploitation is a critical conduct demonstrating the interlinkages between the crimes of trafficking, SGBV and the persecutory attack. As the Prosecutor submitted, the purpose of *recruiting* women and girls for marriage was to allow fighters access to sex according to religious commands within a system that, in practice, enabled sexual exploitation, and to consolidate control over the city by merging with the population.[[116]](#footnote-116) These actions clearly reflect the interlink between trafficking, SGBV and the broader attack aiming to consolidate statehood and ideology for which purpose the control over the sexuality was crucial.[[117]](#footnote-117) In other words, the organized recruitment of women and girls for forced marriage and access to sex in compliance with religious views (i.e. trafficking for sexual exploitation) clearly conveys the intersection of gender and religious discrimination running through the organizational policy of the armed group*.* As the *RUF* precedent demonstrates, tackling the intersection of discrimination on gender and the identity of the target group can be a useful technique to shed light on the interlinkages of SGBV and its gravity as a political crime, at the centre of perpetrators´ strategy.

**4. Conclusion**

This paper has explained that SGBV is often interconnected with other violations of ICL as part of a broader attack on group identity, and that the reason for that interlink is the fact that gender (a social construct) intersects with other identities, normally those of the target group. Uncovering this dynamic *‘intersectional discrimination leading to interlinked offences´* helps understanding the real nature of SGBV: SGBV crimes are revealed not only as crimes of gender discrimination but ‘simultaneously’as crimes that are key to perpetrators´ strategy to achieve the criminal aims. This dynamic has been examined with regard to two case studies: the SCSL *RUF* trial judgment dealing with the interlink of SGBV and the war crime carrying out acts of terrorism, and the ICC *Al Hassan* case dealing with the interlink of SGBV and the crime against humanity of persecution. Based on the above, this paper argues that ICL would benefit from integrating an intersectional approach to the gender analysis of SGBV where any conceptualization of intersectionality must consider the interplay of the categories ‘identity (including gender), discrimination, and crime’ because these underpin SGBV in ‘peacetime’ and reinforce one another during ‘conflict.’

1. K Campbell, ‘Producing Knowledge in the Field of Sexual Violence in Armed Conflict Research: Objects, Methods, Politics and Gender Justice Methodology’ (2018) 25:1 Social Politics 481. [↑](#footnote-ref-1)
2. *The Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (Trial Judgment) SCSL-04-15-T ‘RUF Case’ (2 March 2009). [↑](#footnote-ref-2)
3. *The Procureur c Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* (Pre-Trial Chamber) Version publique expurgée de la “Version amendée et corrigée du Document contenant les charges” ICC-01/12-01/18 ‘Al-Hassan Document Containing the Charges’ (2 July 2019). References to Al Hassan’s Document Containing the Charges have been freely translated from the French by the author. [↑](#footnote-ref-3)
4. J Butler, ‘Subjects of Sex/gender/Desire’ in A Phillips (eds), *Feminism & Politics* (OUP 1998). Butler questions an “essentialist” (reductionist) interpretation of gender by feminism, asking and answering the question: Is gender constructed with variation or does it imply determinism that forecloses agency and undercuts feminist goals? C Smart, ‘Law´s Power, the Sexed Body, and Feminist Discourse’ (1990) 17 Journal of Law and Society. Building on the essentialist critique, Smart notes that assuming women as inherently gendered identifies them with a ‘sexed body’ and vulnerability, fragmenting their identity and depriving them of agency. [↑](#footnote-ref-4)
5. UN Women, Gender Mainstreaming ‘Concepts and definitions’ <<https://www.un.org/womenwatch/osagi/conceptsandefinitions.htm> > accessed 18 May 2020. More generally, stressing gender as a social construction and subject to variation, see, V Oosterveld, ‘The Definition of “Gender” in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?’ (2005) 18 Harvard Human Rights Journal67. World Bank, ‘Engendering Development Through Gender Equality in Rights, Resources and Voice, A World Bank Policy Research Report’ (2001) 2 < <http://documents.worldbank.org/curated/en/512911468327401785/pdf/multi-page.pdf> > accessed 18 June 2020. World Health Organization, ‘Gender and Health’ others <<https://www.who.int/health-topics/gender>> accessed 18 June 2020: ‘Gender-based discrimination intersects with other factors of discrimination, such as ethnicity, socioeconomic status, disability, age, geographic location, gender identity and sexual orientation, among others. This is referred to as intersectionality’. [↑](#footnote-ref-5)
6. K Crenshaw, ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine Feminist Theory and Antiracist Politics’ (1989) 1 University of Chicago Legal Forum.

K Crenshaw, ‘Mapping the Margins: Intersectionaltiy, Identity Politics, and Violence against Women of Color’ (1991) 43:6 Stanford Law Review. [↑](#footnote-ref-6)
7. ibid [↑](#footnote-ref-7)
8. ibid*.* E Rooney and F Nı´Aoláin, ‘Transitional Justice from the Margins: Intersections of Identities, Power and Human Rights’ (2018) 12 International Journal of Transitional Justice. [↑](#footnote-ref-8)
9. H Charlesworth and C Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press 2000) 60, 308. The authors question the objectivity of IL for excluding women from its substance, methodologies, and processes. They argue that a feminist analysis of IL should have two roles: ‘deconstructing’ values not inclusive of women, and ‘reconstructing’ IL in ways that include and support women. [↑](#footnote-ref-9)
10. J Gardam, ‘The Challenges in the Rules that Regulate Women During Times of Armed Conflict’ in F Ní Aoláin, N Cahn, DF Haynes, N Valji (eds), *The Oxford Handbook of Gender and Conflict* (OUP 2018) 35-47. [↑](#footnote-ref-10)
11. R Copelon, ‘Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law’ (2000) 46 McGill L. J. 217,228, 239. Copelon stresses that there is not such a difference between sexual violence in war and in everyday life. Both are rooted in gender discrimination, hence the need to continually make the connection between gender violence in armed conflict and the small places close to home, 228,239. D Buss, ‘Knowing Women: Translating Patriarchy in Inter­national Criminal Law?’ (2014) 23:1 Social & Legal Studies 73-75. Buss posits that courts must convey official knowledge about the experiences of harm of men and women in conflict, which is critical to address their harms in transition. [↑](#footnote-ref-11)
12. R Copelon, ‘Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law’ (1994) 5:2 Hastings Women´s Law Journal. M Jarvis and E Martin Salgado, ‘Future Challenges to Prosecuting Sexual Violence under International Law: Insights from ICTY Practice’ in Anne-Marie de Brouwer et al. (eds), *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Intersentia 2013) 113. [↑](#footnote-ref-12)
13. D Buss, ‘Performing Legal Order: Some Feminist Thoughts on International Criminal Law’ (2011) 11 International Criminal Law Review417-418. [↑](#footnote-ref-13)
14. C Chinkin and M Kaldor, ‘Gender and New Wars’ (2013) 67:1 Journal of International Affairs171. [↑](#footnote-ref-14)
15. S SáCouto, ‘Advances and Missed Opportunities in the International Prosecution of Gender-Based Crimes’ (2006-2007) 10: 1 Gonz. J. Int´L 51. [↑](#footnote-ref-15)
16. CEDAW, ‘General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women’ (16 December 2010) CEDAW/C/GC/28 para 18. Also, CEDAW, ‘General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19’ (14 July 2017) CEDAW/C/GC/35 para 12. [↑](#footnote-ref-16)
17. CEDAW, ‘General recommendation on women’s access to justice’ (23 July 2015) CEDAW/C/GC/33 paras 3, 8,60 (c). [↑](#footnote-ref-17)
18. *Gonzales Lluy et al v Ecuador* (Judgment) IACtHR (1 September 2015) para 290. The IACtHR expressly adjudicated based on “intersectional discrimination” the violations of the Convention concerning the treatment of the applicant, a girl with HIV and low economic status, considered a violation of articles 1 (prohibition of discrimination) and 25 (access to justice). Concurring Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot para. 11. In his Concurrent Opinion, Judge Eduardo Ferrer Mac-Gregor Poisot explained that intersectionality is “important because it underscores the particularities of the discrimination sufferedby groups that, historically, have been discriminated against for more than one of the prohibited reasons”. The Judge noted that intersectionality has two salient characteristics: “analytically inseparable” factors because the experience of discrimination cannot be disaggregated, and “different qualitative experiences” for those affected than for those subject to only one form of discrimination. [↑](#footnote-ref-18)
19. *Carvalho Pinto de Sousa Morais v. Portugal* (Judgment) ECtHR 17484/15 (27 October 2017) paras 52- 53. The Court found discriminatory on gender ‘and’ age grounds that domestic judges reduced the amount of compensation of the applicant, who claimed disability for sexual relations after a failed surgery. The Court held that “*age and sex* appear to have been decisive factors in the final decision,introducing a difference of treatment based on those grounds.” Backing the intersectional approach of the Court in this case see, L Peroni, ‘Age and Gender Discrimination: Laudable Anti-Stereotyping Reasoning in Carvalho Pinto v Portugal’ (Strasbourg Observers 2017) < <https://strasbourgobservers.com/2017/09/28/age-and-gender-discrimination-laudable-anti-stereotyping-reasoning-in-carvalho-pinto-v-portugal/>> accessed 14 May 2020. G Senem, ‘Challenging Gender Stereotyping before the ECtHR: Case of Carvalho Pinto v Portugal’ (EJIL:Talk! 21 September2017) < <https://www.ejiltalk.org/challenging-gender-stereotyping-before-the-ecthr-case-of-carvalho-pinto-v-portugal/>> accessed 14 May 2020. Also, reflecting an intersectional understanding of discrimination see *B.S. v Spain* (Judgment) ECtHR 47159/08 (24 July 2012) paras 58, 62-63. The ECtHR considered a breach of article 14 (prohibition of discrimination) in conjunction with article 3 (prohibition of torture) that domestic authorities had not investigated potential discrimination by the police against the applicant. According to the ECtHR “[T]he decisions made by the domestic courts failed to take account of the applicant’s particular *vulnerability* *inherent in her position* *as an African woman working as a prostitute*. The authorities failed to comply with their duty under Article 14 [prohibition of discrimination] of the Convention taken in conjunction with Article 3 [prohibition of torture]to take all possible steps to ascertain whether or not a discriminatory attitude might have played a role in the events” (emphasis added). [↑](#footnote-ref-19)
20. *Egyptian Initiative for Personal Rights and Interrights v Egypt* (Communication n 323/2006) ACHPR 85 (16 December 2011) paras 152, 165 - 167. The African Commission of Human and People´s Rights (ACHPR) relied on an intersectional approach dealing with the sexual assault of Arab Muslim women by the police. The Commission stressed the social and political dimensions of gender discrimination by deliberately targeting the virtue of Arab Muslim women in the context of the Egyptian society, “to deter their activism in political affairs”. It found a breach of articles 2 (prohibition of discrimination) and 18(3)(elimination of discrimination against women). [↑](#footnote-ref-20)
21. WA Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2010) 385. R Young, ‘Internationally Recognized Human Rights Before the International Criminal Court’ (2011) 60 ICLQ 193. Young notes that while article 21 paragraphs (1) and (2) of the Rome Statute establish the applicable law, a plain reading of article 21(3) recognizes its role as an overriding, mandatory, general rule of interpretation of all sources under the Statute. [↑](#footnote-ref-21)
22. Rome Statute of the International Criminal Court (1998) A/CONF.183/9, Art 21(3) states: “The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status”. [↑](#footnote-ref-22)
23. ibid Art 22(2): “The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.” [↑](#footnote-ref-23)
24. D Robinson, ‘The Identity of International Criminal Law’ (2008) 21 Leiden Journal of International Law. Robinson is critical that the import of IHRL and IHL standards directly into ICL has overlooked the different telos of these branches of law resulted in the erosion of individual criminal responsibility. [↑](#footnote-ref-24)
25. P Pinto Soares `Tangling Human Rights and International Criminal Law: The Practice of International Tribunals and the Call for Rationalized Legal Pluralism’ (2012) 23 Criminal Law Forum 186-187. L Grover ‘A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court’ (2010) 21:3 *EJIL*. [↑](#footnote-ref-25)
26. Grover (n 25). [↑](#footnote-ref-26)
27. *The Prosecutor v Bosco Ntaganda* (Appeal Judgment) ICC-01/04-02/06 OA5 (15 June 2017) Key finding (emphasis added). [↑](#footnote-ref-27)
28. CEDAW GR 35 (n. 16) para 2: “The opinio juris and State practice suggest that the prohibition of gender-based violence against women has evolved into a principle of customary international law. general recommendation No. 19 has been a key catalyst for this process”. *Volodina v. Russia* (Judgment) ECtHR [41261/17](https://hudoc.echr.coe.int/eng#{%22appno%22:[%2241261/17%22]}) (9 July 2019) para 55: “In 2017, the CEDAW Committee adopted General recommendation No. 35 on gender-based violence against women, updating General recommendation No. 19. It noted that the interpretation of discrimination given in the former recommendation had been affirmed by all States and that the opinio juris and State practice suggested that the prohibition of gender-based violence against women had evolved into a principle of customary international law”. [↑](#footnote-ref-28)
29. CEDAW, General recommendation No. 30on women in conflict prevention, conflict, and post-conflict situations’(1 November 2013) CEDAW/C/GC/30 para 34. A Swaine and C O’Rourke, ‘Guidebook on CEDAW General Recommendation no. 30 and the UN Security Council resolutions on Women, Peace and Security, UN Women (2015) 12. CEDAW GR 28 (n 16) para 18. CEDAW GR 35 (n 16) para 12. [↑](#footnote-ref-29)
30. C Lingaas, *The Concept of Race in International Criminal Law* (Routledge 2020) 3. The author defends that for crimes such as genocide, apartheid, and persecution, the victims´ racial group membership is “inherently linked” to processes of discrimination, stigmatisation, inferiorisation and “othering” that perpetrators perceive as a threat to their dominant position as a group. [↑](#footnote-ref-30)
31. OTP, ‘Policy Paper on Sexual and Gender-Based Crimes’ (June 2014) para 27. [↑](#footnote-ref-31)
32. *The Prosecutor v Jean Paul Akayesu* (Trial Judgment) ICTR-96-4-T (2 September 1998) para 731 (emphasis added). [↑](#footnote-ref-32)
33. *The Prosecutor v Dragoljub Kunarac, Radomir Kovac, and Zoran Vukovic* (Trial Judgment) IT-96-23 & IT-96-23/1-T (22 February 2001) paras 587, 591, 592 (emphasis added). SáCouto (n 15). [↑](#footnote-ref-33)
34. *The Prosecutor v. Issa Hassan Sesay, Morris Kallon, Augustine Gbao* (Trial Judgement) SCSL-04-15-T (8 April 2009) paras 1347-1352. [↑](#footnote-ref-34)
35. *The Prosecutor v Sam Hinga Norman, Moinina Fofana and Allieu Kondewa* (Decision on the Admissibility of Evidence)SCSL-04-14-PT (24 May 2005)Separate Concurring Opinion of Hon. Justice Benjamin Mutanga Itoe; Dissenting Opinion of Justice Pierre Boutet. The Prosecutor requested to amend the indictment to introduce evidence of sexual violence. The Trial Chamber dismissed the request because it had not been introduced in a timely manner. The Appeals Chamber concluded that “evidence of sexual violence was relevant to charges in the Indictment and that the Trial Chamber was in error in prospectively denying the admittance of such evidence”, see *The Prosecutor v Moinina Fofana and Allieu Kondewa* (Appeals Judgment) SCSL-04-14-A (28 May 2008) para 445 [↑](#footnote-ref-35)
36. *The Prosecutor Against Alex Tamba Brima, Ibrahim Bazzi Kamara and Santigie Borbor Kanu* (Trial Judgment) SCSL-04-16-T (20 June 2007). Referring to sexual slavery, the Chamber found that it “was committed by the AFRC troops to take advantage of the spoils of war, by treating women as property and using them to satisfy their sexual desires and to fulfil other conjugal needs” para 1459 [↑](#footnote-ref-36)
37. *RUF* (Corrected Amended Consolidated Indictment) SCSL-04-15-PT (2 August 2006) paras 945-947. The attack developed three stages: the mistreatment of civilians in the diamond-rich Kailahun District (November 1996 - May 1997); the brutal suppression of perceived opposition during the joint AFRC/RUF Junta (May 1997 - February 1998), and large-scale military action in multiple locations (February 1998 - January 2000). [↑](#footnote-ref-37)
38. ibid para 947. [↑](#footnote-ref-38)
39. *RUF* (Corrected Amended Consolidated Indictment) SCSL-2004-15-PT (2 March 2009). [↑](#footnote-ref-39)
40. ibid. [↑](#footnote-ref-40)
41. *RUF,* ‘Trial Judgment’ (n 2) Disposition, 676-687. [↑](#footnote-ref-41)
42. *RUF* (Appeals Judgement) SCSL-04-15-A (26 October 2009). [↑](#footnote-ref-42)
43. P Chalk, ‘The Nature of Contemporary Terrorism: Problems of Definition’ in West European Terrorism and Counter-Terrorism (Macmillan 1996) 9, 10. Noting that most definitions of terrorism consider it “political acts of violence carried out by non-state actors” and stressing terrorism as a “symbolic and invariably indiscriminate form of psychological political communication”. D E Georges-Abeyie, ‘Political Crime and Terrorism – Toward an Understanding’ (1980) NCJRS 71075, including the study of guerrilla warfare in internal conflicts, the author stresses the political purpose of the specific intent of terrorism, namely, to change a governmental policy through an illegal act or threat of violence. S Shukla, ‘Emerging New Trends of Terrorism: Challenges Before the United Nations’ (2006) 67:1 The Indian Journal of Political Science 166, outlining a literature review supporting the political nature of terrorism. [↑](#footnote-ref-43)
44. *RUF*, ‘Trial Judgment’ (n 2) paras 112, 121, 149, 161. [↑](#footnote-ref-44)
45. ibidpara 116. *The Prosecutor v Stanislav Galic* (Appeals Judgment) IT-98-29-A (30 November 2006) para 102. [↑](#footnote-ref-45)
46. *RUF*, ‘Trial Judgment’ (n 2) paras 121. *Galic,* ‘Appeal Judgment’ (n 45) para 104 (emphasis added). [↑](#footnote-ref-46)
47. *RUF*, ‘Trial Judgment’ (n 2) para 156. [↑](#footnote-ref-47)
48. SáCouto (n 15). [↑](#footnote-ref-48)
49. *RUF*, ‘Trial Judgment’ (n 2) para 1352. [↑](#footnote-ref-49)
50. V Oosterveld, ‘The Gender Jurisprudence of the Special Court for Sierra Leone: Progress in the Revolutionary United Front Judgments’ 44 (2011) Cornell International Law Journal 66,73, 75. [↑](#footnote-ref-50)
51. *RUF,* ‘Trial Judgment’ (n 2) paras 1353-1355. [↑](#footnote-ref-51)
52. ibid para 1350. Also, regarding the gendered effects of rape upon the community, see para 1602: “The deliberate and concerted campaign to rape women constitutes an extension of the battlefield to the women’s bodies, a degrading treatment that inflicts physical, mental and sexual suffering to the victims and to their community. “ [↑](#footnote-ref-52)
53. ibid paras 1351, 1356. [↑](#footnote-ref-53)
54. ibid para 1351. [↑](#footnote-ref-54)
55. ibid para 1466 (emphasis added). [↑](#footnote-ref-55)
56. ibidpara 1351. [↑](#footnote-ref-56)
57. Oosterveld (n 50) 66, 73. [↑](#footnote-ref-57)
58. ibid 74. [↑](#footnote-ref-58)
59. *RUF*, ‘Trial Judgment’ (n 2) para 1349. [↑](#footnote-ref-59)
60. ibid paras 1155, 1178, 1211-1214, 1580. [↑](#footnote-ref-60)
61. *The Prosecutor v Dragoljub Kunarac, Radomir Kovac, and Zoran Vukovic* (Appeals Judgment) IT-96-23 & IT-96-23/1-A (12 June 2002) paras 117-119. Rome Statute (n 22) Art 7(2)(c) provides "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children”. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (adopted 30 April 1956, entry into force 30 April 1957) 266 UNTS 3, Art3. [↑](#footnote-ref-61)
62. United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319 (Palermo Protocol) Art 3 (a). [↑](#footnote-ref-62)
63. *RUF*, ‘Trial Judgment’ (n 2) paras 1155, 1178, 1211-1214, 1580. [↑](#footnote-ref-63)
64. ibid paras 1406 -1408. [↑](#footnote-ref-64)
65. M De Guzmán, ‘Choosing to Prosecute: Expressive Selection at the International Criminal Court’ (2012) 33:2 Michigan Journal of International Law 313. [↑](#footnote-ref-65)
66. UNSC Res 2331 (20 December 2016) UN Doc/S/RES/2331 (2016) OP 8. [↑](#footnote-ref-66)
67. C Kenny and N Malik, ‘Trafficking Terror and Sexual Violence: Accountability for Human Trafficking and Sexual and Gender-Based Violence by Terrorist Groups under the Rome Statute’ (2019*)* 43:52 Vanderbilt Journal of Transnatlantic Law 43. [↑](#footnote-ref-67)
68. Oosterveld (n 50) 66, 73,75. [↑](#footnote-ref-68)
69. *RUF* Case (Sentencing Judgement) SCSL-04-15-T (8 April 2009) paras. 129, 131 (emphasis added). [↑](#footnote-ref-69)
70. ibid para 132. [↑](#footnote-ref-70)
71. ibid para 133. [↑](#footnote-ref-71)
72. F Ní Aoláin, ‘Sex-Based Violence and the Holocaust – A Revaluation of Harms and Rights in International Law’ (2000) 12:43 Yale Journal of Law and Feminism 57. [↑](#footnote-ref-72)
73. ibid 61 [↑](#footnote-ref-73)
74. *Al Hassan* Case (Decision on the Prosecutor’s Application for the Issuance of a Warrant of Arrest) ICC-01/12-01/18 (22 May 2018) para 90. [↑](#footnote-ref-74)
75. *Al Hassan* ‘Document Containing the Charges’ (n 3) para 153. [↑](#footnote-ref-75)
76. ibid para 155. [↑](#footnote-ref-76)
77. *Al Hassan* Case, ‘Rectificatif à la Décision relative à la confirmation des charges’ ICC-01/12-01/18 (30 September 2019). [↑](#footnote-ref-77)
78. ibid. [↑](#footnote-ref-78)
79. UNSC, ‘Letter from the Secretary-General addressed to the President of the Security Council annexing the Special Report of the Office of the Special Representative of the Secretary General on Sexual Violence in Conflict’ UN Doc. S/2016/1090, 21 December 2016, 7. [↑](#footnote-ref-79)
80. UNSC, ‘Report of the Secretary-General on Conflict-Related Sexual Violence’ UN Doc. S/2015/203, 23 March 2015 para 84. [↑](#footnote-ref-80)
81. UNSC Res 2331 (n 66). UNSC, ‘Report of the Secretary-General on Conflict-Related Sexual Violence’ UN Doc. S/2017/249, 15 April 2017 para 8. [↑](#footnote-ref-81)
82. UNSC ‘Letter from the Secretary-General, Annex’ (n 91) 5-6. [↑](#footnote-ref-82)
83. UN Secretary-General, Conflict Related Sexual Violence, UN. Doc. S/2017/249 (15 April 2017) para 8. [↑](#footnote-ref-83)
84. ibid para 10. [↑](#footnote-ref-84)
85. ibid. [↑](#footnote-ref-85)
86. UNSC Res 2331 (2016) (n 66). [↑](#footnote-ref-86)
87. UNSC Doc. S/2015/203 (n 80) para 84. [↑](#footnote-ref-87)
88. *Al Hassan*, ‘Document Containing the Charges’ (n 3) para 766. [↑](#footnote-ref-88)
89. ibid para 790. [↑](#footnote-ref-89)
90. ibid para 766. [↑](#footnote-ref-90)
91. ibidpara 826. [↑](#footnote-ref-91)
92. ibid para 792. [↑](#footnote-ref-92)
93. ibid paras180, 825. [↑](#footnote-ref-93)
94. ibid paras 767, 790. [↑](#footnote-ref-94)
95. ibid para 767. [↑](#footnote-ref-95)
96. *Al Hassan* ‘Document Containing the Charges’ (n 3) paras 168-170. [↑](#footnote-ref-96)
97. ibid para 185. [↑](#footnote-ref-97)
98. ibid paras 180, 185, 195. [↑](#footnote-ref-98)
99. ibid para 195. [↑](#footnote-ref-99)
100. *Akayesu* `Trial Judgment’ (n 32) para 731 (emphasis added). [↑](#footnote-ref-100)
101. *Kunarac* ‘Trial Judgment’ (n 33) paras 583, 592 (emphasis added). [↑](#footnote-ref-101)
102. *RUF*, ‘Trial Judgment’ (n 2) paras 1348, 1352. [↑](#footnote-ref-102)
103. *Al Hassan* ‘Document Containing the Charges’ (n 3) paras 170, 750, 754, 792, 834. [↑](#footnote-ref-103)
104. Rome Statute (n 22) Art 7(1)(h). The specific criminal intent of persecutionrequires that:

(a) the perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such, and (b) such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law. [↑](#footnote-ref-104)
105. ‘Statute of the International Criminal Tribunal for Rwanda’ established pursuant to UNSC Res 955(1994) of 8 November 1994, Art.3 (h) recognizes jurisdiction for persecution on political, racial, and religious grounds. [↑](#footnote-ref-105)
106. *The Prosecutor v Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze* (Trial Judgment and Sentence) ICTR-99-52-T (3 December 2003) para 1071. The Trial Chamber stressed the communicative value of SGBV noting “The portrayal of the Tursi woman as a *femme fatale* and the message that Tursi women were seductive agents of the enemy was conveyed repeatedly” para 1079. [↑](#footnote-ref-106)
107. *The Prosecutor v. Callixte Mbarushimana* (Prosecution´s Application under Article 58) ICC-01/04 ‘Mbarushimana Case’ (20 August 2010) para 97. In Count 11, the Prosecutor alleged the perpetration of persecution “by intentionally and in a discriminatory manner targeting women and men seen to be affiliated with the FARDC on the basis of their gender.” [↑](#footnote-ref-107)
108. ‘*Mbarushimana* Case, ‘Document de notification des charges présenté par l Áccusation en application de l´article 61-3’ ICC-01/04-01/10 -AnxA (15 juillet 2011); *Mbarushimana* Case, ‘Pre-Trial Chamber I, Decision on the Confirmation of Charges’ ICC-01/04-01/10 (16 December 2011) para 264. [↑](#footnote-ref-108)
109. *Al Hassan* ‘Document Containing the Charges’ (n 3) para 878. Also, for the separate charging of persecution grounds refer to points 8.6.2 (religious grounds) and 8.6.3 (gender grounds). [↑](#footnote-ref-109)
110. Ibid paras 766-767,790 [↑](#footnote-ref-110)
111. *The Prosecutor v. Miroslav Kvocka, Dragoljub Prcac, Milojica Kos, Mlado Radic, Zoran Zigic* (Appeals Judgement) IT-98-30/1-A (28 February 2005) para 347. Addressing SGBV in the context of persecution, the Appeals Chamber stated: “the Trial Chamber did not err when it found, based on the evidence before it, that Kvoka had the intent to contribute to the joint criminal enterprise of the Omarska camp. The Appeals Chamber is of the opinion that, in the context of the case, *the intent to contribute to the joint criminal enterprise and discriminatory intent is one and the same thing*” (emphasis added). [↑](#footnote-ref-111)
112. The intersection of gender and religious identities shaped the harms of SGBV in *Al Hassan,* which is important in view of reparations. One may ask, for instance: How did religious extremism shape women´s ostracization? How did it affect women´s emotional and family harms such as motherhood or raising children in a religious extremist environment? How did religious fundamentalism break family relations and communities? How did victims´ experiences of SGBV in the context of religious extremism affect their economic well-being? See F Ní Aoláin, DF Haynes and N Cahn, ‘Criminal Justice for Gendered Violence and Beyond’ (2011) 11 *International Criminal Law Review.* The authors stress the `capture gap´ of gender harms in ICL and the need to consider, in addition to physical harms, other such as family, emotional and socio-economic harms. [↑](#footnote-ref-112)
113. UNSC Res 2331 (2016) (n 66). [↑](#footnote-ref-113)
114. *Al Hassan* ‘Document Containing the Charges’ (n 3) paras 763, 766, 767, 789, 790. [↑](#footnote-ref-114)
115. Palermo Protocol (n 62) Art 3(a). [↑](#footnote-ref-115)
116. ibid. [↑](#footnote-ref-116)
117. *Al Hassan* ‘Document Containing the Charges’ (n 3) paras. 767, 790. [↑](#footnote-ref-117)