

Women Strapped with Bombs: “Victim-Perpetrators” In The Boko Haram Insurgency – A Case of Gender Persecution

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ABSTRACT

The surge in the use of female suicide bombers by Boko Haram since 2014 has received heightened attention, particularly after the abduction of 276 girls in Chibok, Borno State, Nigeria on 14 April 2014. It is believed that the abducted schoolgirls are coerced along with many other women and young girls into being suicide bombers by Boko Haram for Boko Haram. This phenomenon, therefore, creates a binary status for many of these suicide bombers – ‘victim-perpetrators’ under International Criminal Law. As victims - a target group of gender persecution, as a crime against humanity. As perpetrators - unwilling cocoons in the Boko Haram insurgency. Because the International Criminal Court is saddled with the prosecution of those ‘most responsible’ for international crimes, it is doubtful that suicide bombers would be prosecuted at the International Criminal Court. This leaves prosecution of suicide bombers to domestic courts. But domestic prosecutions would have to look to International Criminal Law for the adoption of internationally recognized standards in prosecuting international crimes. This article is a modest contribution to the field of gender and International Criminal Law. This piece offers an analysis of the crime of gender persecution. It interrogates the question of criminal responsibility or lack thereof for the women coerced into being Personne Borne Improvised Explosive Devices (PBIEDs.)

Key Words:

Crimes against Humanity, Boko Haram, Gender, Rome Statute, Nigeria

Women Strapped with Bombs: Victim-Perpetrators” In the Boko Haram Insurgency – A Case of Gender Persecution

I. INTRODUCTION

A full beauty treatment – a thick paste of henna, straightened hair and then strapped with bombs
– Falmata.²

Kidnapped, some ruffle, some struggle, some drugs, numb and then strapped with bombs
- Nadia.³

Raped, dressed up, hair tied to the back and then strapped with bombs
- Fatima.⁴

The result of media interviews and NGO reports from females emancipated from Boko Haram confinement detail mounting evidence of deprivation of fundamental rights. Evidence suggests the coercion of these females into severely exploitative situations, leading to instrumentalization as Person-borne improvised explosive (PBIEDs); suicide bombers.⁵

Often after females are abducted,⁶ deported or forcibly transferred⁷ explosives are foisted on them, under threats of rape,⁸ and harm to lives of loved ones, they are then forced to embark on suicide missions,⁹ by strapping on explosives and blowing up crowded places believed to be inhabited by 'disbelievers.' As discussed below, the conscription of these Female Suicide Bombers (FSB) rises to the scale of a crime against humanity. Yet, when FSBs are on a mission they could also be viewed as perpetrators, who like other members further the organizational policy of Boko Haram in its attempt to institute an Islamic State in Northern Nigeria.

When suicide bombs are set off as part of a systemic attack targeted at a civilian population, it raises issues about crimes against humanity.¹⁰ Furthermore, it calls into question the scope of responsibility ascribable to these FSB under international criminal law (hereinafter ICL). Because suicide bombers launch attacks with the expectation of certain death,¹¹ the discussion of criminal responsibility for suicide bombers may seem moot after the detonation of explosives and so the question of prosecution becomes unrealistic. However, where a suicide bomber is apprehended or surrenders before detonating the bomb, several issues arise: Should

2 Vladimir Hernandez & Stephanie Hegarty, *Made-up to Look Beautiful, Sent Out to Die*, BBC NEWS, http://www.bbc.co.uk/news/resources/idt-sh/made_up_to_look_beautiful_sent_out_to_die.

3 Ruth Maclean, *Dressed for Death: The Women Boko Haram Sent to Blow Themselves Up*, THE GUARDIAN (May 5, 2017, 13: 55 BST), <https://www.theguardian.com/world/2017/may/05/dressed-for-death-the-women-boko-haram-sent-to-blow-themselves-up>.

4 *Id.*

5 Elizabeth Pearson, *Wilayat Shahidat: Boko Haram, the Islamic State, and the Question of the Female Suicide Bomber*, in BOKO HARAM BEYOND THE HEADLINES: ANALYSES OF AFRICA'S ENDURING INSURGENCY 33, 42-43, 43 n. 235 (Jacob Zenn Ed., 2018).

6 Isaac Abraak & Ruth Maclean, *'We are soldiers! We will save you': How Boko Haram Tricked Dapchi Schoolgirls*, THE GUARDIAN (Mar. 8, 2018 14:33 GMT) <https://www.theguardian.com/global-development/2018/mar/08/nigeria-we-are-soldiers-we-will-save-you-how-boko-haram-tricked-dapchi-schoolgirls>; Dionne Searcey and Ashley Gibertson, *Beneath Mask of Normal Nigerian Life, Young Lives Scarred by Boko Haram*, N.Y TIMES (Mar. 18, 2017) <https://www.nytimes.com/2017/03/18/world/africa/boko-haram-nigeria-child-soldiers.html>.

7 SAMER MUSCATI, HUMAN RIGHTS WATCH, THOSE TERRIBLE WEEKS IN THEIR CAMPS' BOKO HARAM VIOLENCE AGAINST FEMALES FEMALES IN NORTHEAST NIGERIA 31-46 (2014).

8 Pearson, *supra* note 5.

9 *Boko Haram Fact*, CNN, (last updated Sept.8, 2019) [hereinafter CNN], <https://www.cnn.com/2014/06/09/world/boko-haram-fast-facts/index.html>

10 A crime against humanity is determined by the contextual elements. See Rome Statute of International Criminal Court art. 7, ¶¶ 1 -2, Jul. 17, 1998, 2187 U.N.T.S. 92-93 [hereinafter Rome Statute].

11 Gregor Bruce, *Intrinsic and External Factors and Influences on the Motivation of Suicide Attackers*, 21 JMVFH 27, 27 (2013).

they be ascribed any criminal responsibility under ICL? To what degree are such responsibilities attributable? Can the necessary *mens rea* for criminal conducts be attributed to them? In such situations, what type of justice would effectuate the goals of ICL?

This study begins by conceptualizing the Boko Haram insurgency in Nigeria and highlights the operational tactics of Boko Haram. It proceeds to examine the use of female suicide-bombers within its ranks and crafts a case of crimes against humanity of gender-persecution against Boko Haram, for its use of these female suicide-bombers under ICL. It also juxtaposes the crux of duality of FSB, as victim-perpetrators within the Boko Haram Insurgency and unpacks what a domestic response to the Boko Haram insurgency should be under ICL by examining the *Crime against Humanity, War Crimes, Genocide, and Related Offences Bill* currently under negotiation and aimed at domesticating the provisions of the *Rome Statute*.

A. Contextualizing Gender Violence in The Boko Haram Insurgency

Boko Haram¹² emerged in the early 2000s in northeast Nigeria,¹³ mainly inhabiting Northern Nigeria, specifically, Yobe, Kano, Bauchi, and Kaduna States.¹⁴ Despite years of existence, the group shot to international prominence in 2014, after over 270 girls were abducted from a boarding school dormitory in Chibok, Borno State, Nigeria on April 14, 2014.¹⁵

Before the kidnapping of the Chibok girls, Yusuf Mohammed the erstwhile leader of the group reportedly stated that he and his group would stop at nothing until it had crushed the Government and members of opposing communities and stolen its women.¹⁶ In 2012, the extant leader of the group, Abubakar Shekau threatened the Nigerian Government that the group would exact retribution on the Nigerian authorities for the detention of the female relatives of members of the group.¹⁷ Stating:

"They're holding our brothers in prison. They've arrested them, tortured them, and subjected them to various forms of abuse. I'm not just talking about our religious leader—now, they've started to detain our women...Since you are seizing our women, you wait and see what will happen to your women."¹⁸

Following this declaration and the subsequent abduction of females in the context of the insurgency, Boko Haram activities have come under microscopic scrutiny. Particularly the examination of the overall policy of the group as it relates to its acts and impacts on women.

In the aftermath of the abduction of the Chibok girls, on June 7-8 2014, Boko Haram members abducted at least 20 young women in Grakin Fulani, a village in northeast Nigeria and only 8 kilometres from Chibok, where the 276 school girls had been kidnapped in April of

¹² In local Hausa dialect means "Western Education is Forbidden." It also refers to itself as Jama'atu Ahlis Sunna Lidda'awati Wal-Jihad, meaning "People Committed to the Propagation of the Prophet's Teachings and Jihad." see CNN, *supra* note 9. See Mohammed Aly Sergie & Toni Johnson, *Hour, Background Briefing: What is Boko Haram?* PBS NEWS, (Updated Feb. 26, 2014), <https://www.pbs.org/newshour/world/boko-haram>.

¹³ ALEXANDER THURSTON, BOKO HARAM: THE HISTORY OF AN AFRICAN JIHADIST MOVEMENT 333 (2017).

¹⁴ CNN, *supra* note 9.

¹⁵ Hilary Matfess, *Boko Haram: History and Context*, OXFORD RESEARCH ENCYCLOPEDIA OF AFRICAN HISTORY 1 (2017).

¹⁶ Muhammad Yusuf, "Open Letter to the Federal Government of Nigeria," June 12, 2009: Muhammad Bakur, "waazin shekh muhammad yusuf 1," YOUTUBE (Feb. 17, 2011), <https://www.youtube.com/watch?v=f89PvcpWSRg>.

¹⁷ Alex Thurston, *'The Disease is Unbelief': Boko Haram's Religious and Political Worldview*, 18-19 (The Brookings Projects on U.S Relations with The Islamic World Analysis Paper No. 2016-22, 2016).

¹⁸ Shekau, "Sako Zuwa Ga Duniya." *Id.* 19 n. 90.

Women Strapped with Bombs: Victim-Perpetrators” In the Boko Haram Insurgency – A Case of Gender Persecution

2014.¹⁹ On February 19, 2018, Boko Haram attacked the Government Science and Technical College in the town of Dapachi, Yobe State²⁰ and abducted 110 schoolgirls.

The abduction of schoolgirls by Boko Haram, particularly the Chibok girls, seems to have marked a watershed in the operational tactics of Boko Haram²¹ - the instrumentalization of women in its crusade to abolish western education and to impose an Islamic state in Northern Nigeria.

B. Contextualizing Crimes Against Humanity in the Boko Haram Insurgency

Like many insurgent groups, the systematicity and tactical, operational strategies deployed by Boko Haram in its reign of terror cannot be dismissed. Boko Haram has declared its goal as; the institution of an Islamic State in North-east Nigeria and the eradication of western education.²² Though the group has its headquarters in Nigeria, it continues to have an operational stronghold in Northern Cameroon, Niger, and Chad, ²³ where it entrenches an operational tactic somewhat of a 'flipped Robin hood.'²⁴ Thus, Boko Haram has carved out its place among African countries by devastating the finances²⁵ of poor citizens through ransom demands from families of kidnapped women and children of poor farmers,²⁶ while simultaneously crippling infrastructure, such as cell phone towers.²⁷

Boko Haram has also gained notoriety for its use of suicide bombers to carry out attacks in crowded places,²⁸ which have risen exponentially since the first attack in December 2010.²⁹ The whole gamut of its activities includes the targeting of civilians, private citizen and property, institutions of Government, religious figures and institutions, and military personnel. In Boko Haram's attempt to impose an Islamic state, it has executed a widespread attack in Northern Nigeria, the neighbouring countries of Niger, Cameroon and Chad since its emergence. Between January 2013 and March 2015, 356 reported cases left a toll of 8,000 dead civilians,³⁰with 20,000 civilian deaths from inception to 2017 and overall about 100,000 deaths since 2009.³¹

¹⁹ CNN, *supra* note 9; Aminu Abubakar, *Officials: At least 20 Women Kidnapped in Nigeria: Boko Haram Suspected*, CNN. (last updated Jun. 11, 2014 5:42 AM ET), <https://www.cnn.com/2014/06/09/world/africa/nigeria-women-kidnapped/index.html>.

²⁰ Laignee Barron, *Nigeria Confirms 110 School Girls Are Missing One Week After Suspected Boko Haram Attack*, TIMES (Feb. 26, 2018), <http://time.com/5174951/nigeria-girls-missing-boko-haram-attack/>.

²¹ CNN, *supra* note 9

²² *Id.*

²³ Thurston, *supra* note 17, at 22.

²⁴ Abubakar, *supra* note 20.

²⁵ Thurston, *supra* note 17, at 22.

²⁶ *Id.* at 8, 18, 22.

²⁷ Sam Olukoya, *The World, Islamist Group Claims Responsibility for Cell Phone Tower Attacks in Nigeria*, PRI (Sept. 07, 2012), <https://www.pri.org/stories/2012-09-07/islamist-group-claims-responsibility-cell-phone-tower-attacks-nigeria>.

²⁸ JASON WARNER & HILARY MATFESS, *EXPLODING STEREOTYPES: THE UNEXPECTED OPERATIONAL AND DEMOGRAPHIC CHARACTERISTICS OF BOKO HARAM'S SUICIDE BOMBERS STATUTE 2* (2017).

²⁹ CNN, *supra* note 9.

³⁰ Int'l Crim. Ct. [ICC] Office of the Prosecutor, *Report on Preliminary Examination Activities*, at ¶ 198 (Nov 12, 2015) [hereinafter *Report on Preliminary Examination Activities 2015*].

³¹ Abdulkareem Haruna, *Nigerian Soldiers Battle Boko Haram, Kill 15, Rescue 49 Women and Children*, PREMIUM TIMES, (May 17, 2018), <https://www.premiumtimesng.com/news/headlines/268734-nigerian-soldiers-battle-boko-haram-kill-15-rescue-49-women-children.html>.

As the scale of Boko Haram casualties continues to escalate, more civilians have been wounded and killed. These attacks, mainly targeted against civilians³² arguably rise to a scale so widespread in terms of its magnitude and geographical reach as to amount to the international crime of - crimes against humanity.³³

The Rome Statute robustly defines 'crime against humanity.'³⁴ According to art. 7(1) Rome Statute for conducts to rise to the level of crimes against humanity, it must amount to attacks '*against a civilian population with the intent or knowledge of the attack,*' which are '*widespread or systematic*' and in furtherance of or pursuant to a '*state or organizational policy.*' Placing the acts of Boko Haram within the sphere of crimes against humanity would imply creating a causal connection of Boko Haram's activities with the conjunctive requirements of '*widespread or systematic attacks against a civilian population*' carried out knowingly and in furtherance of the '*organization's policy.*'

Unmasking the organizational policy of Boko Haram has been a mean feat. The leader of the organization Abubakar Shekau has repeatedly and explicitly stated in public video messages the mission of the group - to launch widespread attacks on civilians perceived as 'disbelievers'.³⁵ Widespread attacks implicate attacks carried out on a 'multiplicity of victims'³⁶ in executing its policy of attacking the civilian population. Boko Haram attacks have undoubtedly affected a multiplicity of victims. According to the Global Terrorism Database,³⁷ Boko Haram is reputed to have carried out attacks over running 2,000 between 2009 and 2016,³⁸ with 1089 of the incidents targeted at civilians and private property,³⁹ leaving civilian victim casualties to well over 20,000.

In the case of *Prosecutor v. Jean-Pierre Bemba Gombo*,⁴⁰ the ICC⁴¹ held that a wide geographical reach would also satisfy the requirement to a widespread attack. Boko Haram's attack has spread through the landscape of North-East Nigeria in Borno Yobe, Kaduna, Bauchi, Gombe, Kano, Plateau states and the Federal Capital Territory Abuja.

Beyond widespread attacks, for acts to be deemed crimes against humanity, such criminal act and conducts against a 'multiplicity of victims' must conform to a coordinated, systematic and organized pattern of behaviour. In the case of *Prosecutor v. Kunarac*,⁴² the International Tribunal for the former Yugoslavia settled that 'patterns of crime – that is the non-accidental

³² Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08-424, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges, ¶¶ 75-89 (Jun. 15, 2009); Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06-36-Red, Decision on the Prosecutor's application under Article 58, ¶ 21 (Jul. 13, 2012).

³³ Rome Statute, *supra* note 10, at art. 7(1) (a-k).

³⁴ *Id.*

³⁵ *Report on Preliminary Examination Activities 2015*, *supra* note 31.

³⁶ Prosecutor v. Clément Kayishema and Obed Ruzindana, Case No. ICTR-95-1-T, Judgment, ¶ 123 (May 21, 1999); and Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 580 (Sept. 2, 1998).

³⁷ GLOBAL TERRORISM DATABASE, <https://www.start.umd.edu/gtd/search/Results.aspx?charttype=pie&chart=target&search=boko%20haram&count=100>.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Prosecutor v. Jean Piere Bemba Gombo, Case No. ICC-01/05-01/08 Judgment, ¶ 163 (Mar. 21, 2016) (citing to Bemba, Decision, 15 June 2009 (see note 41, at ¶ 83).

⁴¹ [hereinafter ICC]

⁴² Case No. IT-96-23 & IT-96-23/1-A, Judgment, ¶ 94 (Int'l Crim. Trib. for the Former Yugoslavia Jun. 12, 2002).

Women Strapped with Bombs: Victim-Perpetrators” In the Boko Haram Insurgency – A Case of Gender Persecution

repetition of similar criminal conducts on a regular basis – are common expressions of such systematic occurrence.’ In several attempts to occupy villages⁴³ and towns, there have been systematic, skilful and widespread massacres,⁴⁴ destruction of property, murder,⁴⁵ and kidnapping⁴⁶ targeted at the civilian population inhabiting these areas. These attacks exhibit characteristics of consistency and repetitive patterns in their execution.

Boko Haram has also as part of its policy of eradicating western education attacked educational institution,⁴⁷ and kidnapped students from institutions of learning. The deliberate, widespread and systematic targeting of female civilians in institutions of learning in furtherance of their organizational policy of eradicating western education is evident in numerous abduction and forcible transportation of young women. In the wake of Boko Haram's attacks on educational institutions, reports place the death toll of school teachers to at least, 2, 295 with more than 1,400 schools destroyed since the conflict began.⁴⁸ Boko Haram has publicly accepted responsibility for many of such attacks as part of its overall policy.

Boko Haram has operationalized its aims and policy goals of attacking 'disbelievers' and attempting to impose an Islamic state in Northern-Nigeria in several ways. But one of its operational tactic, which has grown and is growing exponentially and of particular concern, is the use of explosives and suicide bombers – particularly FSB. According to the global terrorism database since 2011, Boko Haram has utilized explosives, dynamites and bombs in its operations 923 times.⁴⁹

II. THE CRUX OF DUALITY; QUESTIONS IN AGENCY, COERCION AND RESPONSIBILITY

FSB within the ranks of the Boko Haram Insurgency bestrides the threshold of criminality and victimhood. The coercion of females into roles as PBIEDs creates circumstances of instrumentalization and victimization, while simultaneously inferring perceptions of responsibility as direct perpetrators in the Boko Haram insurgency – a crux of duality. Under ICL, the crux of duality has been the bane in the trial of Dominic Ongwen,⁵⁰ which has generated legal and scholastic questions, including many justice issues at the international level. Much of

⁴³ Abdulkareem Haruna, *Gunmen Attack Village Near Maiduguri*, PREMIUM TIMES (May 2, 2018), <https://www.premiumtimesng.com/news/top-news/266981-breaking-gunmen-attack-village-near-maiduguri.html>.

⁴⁴ REUTERS, *At least 645 people Killed in Attack in Nigeria's Maiduguri*, (Jan 31, 2016), <https://www.reuters.com/article/us-nigeria-violence-idUSKCN0V90M8>.

⁴⁵ *Id.*

⁴⁶ Iro Dan Fulani, *Boko Haram Attacks Adamawa villages, Abducts Three*, PREMIUM TIMES (March 2, 2018), <https://www.premiumtimesng.com/regional/north-east/260376-boko-haram-attacks-adamawa-villages-abducts-three.html>.

⁴⁷ GLOBAL TERRORISM DATABASE, *supra* note 37.

⁴⁸ Bede Sheppard, *“They Set the Classroom on Fire” Attacks on Education in North East Nigeria*, HUMAN RIGHTS WATCH (2015), <https://www.hrw.org/report/2016/04/11/they-set-classrooms-fire/attacks-education-northeast-nigeria#page>.

⁴⁹ GLOBAL TERRORISM DATABASE, *supra* note 37.

⁵⁰ Dominic Ongwen is the ex-commander of the Lord's Resistance Army (LRA) was reportedly 10 years old when he was abducted by the LRA. He is presently facing 70 counts of crimes against humanity and war crimes allegedly committed in Northern Uganda. The trial has now entered its final stages with closing arguments heard from 10 – 12 March, 2020. Dominic Ongwen, presently in detention by the International Criminal Court awaiting the ICC's decision of acquittal or denial following art. 74 of the Rome Statute. Much of the argument of the accused was hinged on his status as a victim.

the controversy revolve around the question of criminal responsibility or the extent thereof of victim-perpetrators of acts amounting to international crimes as documented in the *Rome Statute*. These questions have remained mainly unsolved.

The dual status of FSB creates a double-pronged gender-differentiated situation. First, the use of FSB is a crime against humanity of gender persecution against the suicide bombers, by Boko Haram. Thus creating victim status for FSB as defined under the Rome Statute. Second, acts of or an assumed intent to detonate explosives implicate these FSB, as perpetrators of the crime against humanity against the civilian population attacked or to be attacked.

This situation surfaces crucial justice questions on agency and liability. In particular, the difficulty in addressing the questions of the degree of responsibility of victim-perpetrators under ICL, and what factors may serve to mitigate, aggravate or dismiss a criminal sentence.

A. *Victims and International Criminal Law*

International Criminal Tribunals have continually come under fierce attack for their seeming lack of responsiveness and or sensitivity to the rights and needs of victims.⁵¹ Particularly regarding the nominal role granted victims in 'adversarial proceeding,'⁵² arguing that lack of or inadequate victim participation created a circle of revictimization, leaving victims' powerless, voiceless and demoralized,⁵³ while simultaneously magnifying their sufferings.⁵⁴ In particular, the practice of the International Criminal Tribunal for former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) has been faulted for not rendering the tribunal closer to the people.⁵⁵

Following these agitations, articles 68, 75, and 79 were entrenched in the Rome Statute to increase the visibility of victims of international crimes in proceedings before the ICC, leading to what Bassiouni described as the recognition of victims of international crimes as subjects of international law.⁵⁶ The ICC also proffered a more elaborate definition of 'victim'⁵⁷ as characterized by the notion of harm in the criminal process thus removing the prior restrictive nexus between victims and crime; where only individuals who have been directly targeted are referred to as victims.

The ICC recognized this phenomenon of victimhood in a number of its proceedings,⁵⁸ and in some cases allowed for victim participation in the proceedings at the investigations stage, on the standard of proof of 'reasonable grounds to believe.' The standard of proof is met by establishing

⁵¹ Charles P. Trumbull IV, *The Victims of Victim Participation in International Criminal Proceedings*, 29 Mich. J. Int'l L. 777 (2008); David Donat-Cattin, *Article 68 Protection of the Victims and Witnesses and Their Participation in the Proceedings*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 869, 871 (Otto Triffterer ed., 1999) (stating that "the inclusion of norms on victims' participation in the Court's proceedings (cf Art. 68, ¶ 3) was the result of widespread and strong criticism against the lack of provisions of this kind in the Statutes and Rules of Procedure and Evidence of the ad hoc Tribunals").

⁵² Trumbull, *supra* note 51, at 781.

⁵³ *Id.* at 782.

⁵⁴ *Id.*; Erin O'Hara, *Victim Participation in the Criminal Process*, 13 J.L. & POL'Y 229, 243 (2005).

⁵⁵ David Donat-Cattin, *supra* note 51, at 1277.

⁵⁶ M. Cherif Bassiouni, *International Recognition of Victims' Rights*, 6 H. R. L. REV 203, 230 (2006); David Donat-Cattin, *supra* note 51, at 1277.

⁵⁷ ICC, Rules of Procedure and Evidence, r.85 ¶¶ a - b, Sept. 9, 2002 ICC-ASP/1/3, 31

⁵⁸ AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, WAR CRIMES RESEARCH OFFICE VICTIM PARTICIPATION BEFORE THE INTERNATIONAL CRIMINAL COURT, 5 (2007).

Women Strapped with Bombs: Victim-Perpetrators” In the Boko Haram Insurgency – A Case of Gender Persecution

that the individual claiming victim status incurred emotional and or physical suffering as a result of the crime under investigation.⁵⁹For example, during the investigation in the case of Mr Lubanga and the five leaders of the Lord's Resistance Army of Northern Uganda,⁶⁰ the relevant International Criminal Court chambers allowed some of the victims of the crimes alleged to participate in the proceedings on the standard of proof of ‘reasonable grounds to believe’. The implication of which is a demonstration that an individual who claims victim status shows that such individual incurred emotional and or physical suffering as a result of the crime under investigation.

The process of telling by victims of international crimes in international criminal prosecution marks a unique feature that allows for victim recognition within ICL.

i. Victimization: Female Suicide-Bombers Gender Stereotypes and Instrumentalization

"Boko-Haram treats women and girls differently from men and boys. The group prohibits female membership. Prescribing a more subservient role for women and girls, and considers abducted women and children to be part of the spoils of war to which its members are entitled."⁶¹

Gender stereotypes; functions of social norms and convention surface gender differences and similarities.⁶² Often, gender stereotypes are unhealthy, discriminatory and harmful.⁶³ International crimes overtly or covertly iterate discriminatory social norms,⁶⁴ which disproportionately affect women,⁶⁵ with the propensity to 'impair or nullify the recognition, enjoyment, or exercise by women' equality of fundamental rights and freedom.⁶⁶ Women's rights in this way are impaired by targeting members of the female gender for subjection to exploitation and unfair treatment because of the gender group, and the preconception of the characteristics, attributes and role of women in the society – roles which are subordinate and inferior to men.⁶⁷ The objectification of females, gender and sexual violence, in peacetime or wartime surfaces are some acts that exemplify discriminatory gender norms.

One of the ways of conceptualizing discriminatory stereotypes by the activities of Boko Haram is through an analysis of the tactic of the group in the abduction, deliberate deprivation of liberty and forcible recruitment of females into detonating explosives as suicide bombers. This

⁵⁹ David Donat-Cattin, *supra* note 51, at ¶ 37 1295; Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Pre-Trial Chamber I Decision on the Application for Participation in the Proceedings of a/0001/06, a/0002/06 and a/003/06 International Criminal Court (Jul. 28, 2006).

⁶⁰ David Donat-Cattin, *supra* note 51, at ¶ 22 at 1276. In the Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-172, Pre-Trial Chamber I Decision on the Application for Participation in the Proceedings International Criminal Court, ¶¶ 8-9 (Jun. 29, 2006), the court granted VPRS 1, VPRS 4 and VPRS 5 the right to participate, while also rejecting the right of VPRS 2, VPRS3 and VPRS6 from participating as witnesses on the ground that they had not demonstrated a causal connection between the harm suffered and the harms contained in Lubanga's arrest warrant.

⁶¹ Sheppard, *supra* note 48.

⁶² REBECCA J. COOK & SIMONE CUSACK; GENDER STEREOTYPE TRANSNATIONAL LEGAL PERSPECTIVES, 16 (2010).

⁶³ *Id.* at 12.

⁶⁴ NEHA JAIN, PERPERTRATORS AND ACCESSORIES IN INTERNATIONAL CRIMINAL LAW, INDIVIDUAL MODES OF RESPONSIBILITY FOR COLLECTIVE CRIMES 3 (2014).

⁶⁵ COOK & CUSACK *supra* note 62, at 104-130.

⁶⁶ *Id.* at 104-141.

⁶⁷ *Id.* at 12.

has been one of the modes of operation of the Boko Haram. Three phases categorize the Boko Haram evolution.⁶⁸ The use of FSB especially doubled down in the 3rd phase. In this phase, the use of female PBIEDs gradually developed as a strategic tool for effective implementation of the organization's policies.

Overall the analogy of Boko Haram's operational tactics of utilizing suicide bombing as an instrument of terror and political manoeuvring has been in no short supply. However, this operation follows a particularly interesting trend – the use of FSB. Boko Haram has deployed more FSB than any other terrorist group in history.⁶⁹ It is estimated that the overall percentage of FSB within Boko Haram is higher than the overall percentage of male suicide bombers.⁷⁰

Since its inception, Boko Haram has deployed at least 434 suicide bombers.⁷¹ Specifically, 2014 marked a pivotal year for Boko Haram, and its use of suicide bombers,⁷² which accounted for 50% of all suicide bombers deployed that year.⁷³ Having deployed 244 women suicide bombers between April 2011 and June 2017, Boko Haram instrumentalized more FSB than any other insurgencies in history,⁷⁴ using four times the number of females compared to males.⁷⁵ This threshold is the highest ever recorded for any insurgent group, only ever compared to the Tamil Tigers who deployed 44 FSB over ten years.⁷⁶

The nexus between gender and suicide bombing has been the constant object of many studies.⁷⁷ However, Boko Haram, in particular, has garnered much attention lately from its reputation for using 'FSB.' The rise in the deployment of FSB is linked to the state of emergency issued by the Nigerian Government in most parts of Northern Nigeria, and the inclination of other civilians and security operatives to consider women as innocent and non-threatening.⁷⁸ This tactic refers to a coordinated attempt at deploring 'diversion and subversive strategy.'⁷⁹

While Boko Haram is not particularly dependent on FSB in its operational arsenal,⁸⁰ it continues to use female suicide bombers as weapons or instruments utilized in the execution of a pre-anticipated plan of action of eliminating its target group. These females are viewed as cost-effective explosive devices in executing the group's reign of terror. In this way, Boko Haram

⁶⁸ Omar Mahomoud, *Local, Global, or in Between? Boko Haram's Messaging, Strategy, Membership, and Support Networks*, in *BOKO HARAM BEYOND THE HEADLINES: ANALYSES OF AFRICA'S ENDURING INSURGENCY* 87, 88-114 (Jacob Zenn Ed., 2018).

⁶⁹ WARNER & HILARY MATFESS, *supra* note 28, at iv.

⁷⁰ *Id.*

⁷¹ *Id.* at 29.

⁷² *Id.* at 30

⁷³ *Id.*

⁷⁴ *Id.* at 30.

⁷⁵ Robyn Kriel, *Boko Haram Favors Women, Children as Suicide Bombers, Study Reveals*, CNN (last updated Aug. 11, 2017), <https://www.cnn.com/2017/08/10/africa/boko-haram-women-children-suicide-bombers/index.html>.

⁷⁶ WARNER & MATFESS, *supra* note 28, at 29; Mia Bloom & Hilary Matfess, *Women as Symbols and Swords in Boko Haram's Terror*, 6 J. OF THE CENTER FOR COMPLEX OPERATIONS 105, 106 (2016).

⁷⁷ WARNER & MATFESS, *supra* note 28, at 3; Mia Bloom, *Female Suicide Bombers: A Global Trend*, 136 DAEDALUS 94–102 (2007); Claudia Brunner, *Occidentalism Meets the Female Suicide Bomber: A Critical Reflection on Recent Terrorism Debates*; 32 J. OF WOMEN IN CULTURE & SOC'Y 957-971 (2007).

⁷⁸ WARNER & MATFESS, *supra* note 28, at 28.

⁷⁹ Elizabeth Pearson, *Do Nigeria's Female Suicide Attackers Point to Desperation or High Ambition for Boko Haram?* AFRICAN ARGUMENTS, (Nov. 20, 2014).

⁸⁰ WARNER & MATFESS, *supra* note 28, at 4-5.

Women Strapped with Bombs: Victim-Perpetrators” In the Boko Haram Insurgency – A Case of Gender Persecution

utilizes an alternative technology that allows for the systematic mechanization of human beings as sophisticated weapons.⁸¹ Thus, the practice of using suicide bombers creates 'intelligent and inexpensive' weapons through the harmonization of people and 'material devices.'⁸²

In instrumentalization, females become preferred options for two reasons—first, the perceived expendability,⁸³ and fickleness of females. Gender stereotypes play to the assumption that through violence, brainwashing and false promise, women are readily exploited and easily manipulated.⁸⁴ In the same vein, stereotypes that portray women as vulnerable – 'a destructive, deadly curse', implicates women as always in need of intervention. For this group, catering to the stereotypical needs of women is perceived as detrimental to the organization's ability to effectively carrying out its overall mandate.⁸⁵ These stereotypes cumulatively allow the organization to save the 'unexpendable' men by strapping more women than men with bombs and coercing them into blowing themselves up.

Though Boko Haram has allegedly abducted about 10,000 young men between its inception and 2016,⁸⁶ the group never received as much media attention and international exposure as it did after the abduction of the 276 Chibok schoolgirls, an abduction which propelled the #bringbackourgirls campaign on and off social media. The attention received after the abduction of the Chibok girls and subsequent abduction of other females in Northeast Nigeria, surface gender stereotyping of females – subordinate to men in strength and agency, both in marriage, within the family, and the society at large.⁸⁷ Boko Haram leveraged this preexisting stereotype in the instrumentalization of females in the execution of its overall policy to attain heightened visibility, resulting in a more significant psychological effect.⁸⁸ Also, the non-violent stereotype associated with females, several advantages such as secrecy of attacks, and elements of surprise in detonating suicide-bombs.⁸⁹

The implication of this conscious shift to the use of FSB created zeal in the Government to forestall the activities of Boko Haram and a renewed sense of consciousness among security operatives. It triggered several state responses, which unfortunately iterated unhealthy stereotypes, and fostered the revictimization of many females in the context of the state's response to the Boko Haram insurgency. First, the Combined Joint Task Force (CJFT) intermittently instituted 'unofficial curfews' for women, preventing free movement within the city between 7 pm and 7 am.⁹⁰ The action of the CJFT in the constraining movement of 'women' as opposed to men revictimize women by assumptions of women's role as the principal threat in the use of explosives, irrespective of the fact that 50% of suicide bombers are men. Also, in Chad, in 2015, when the activities of Boko Haram were also rampant, the Government banned

⁸¹ Jeffery Williams, *The Human Use of Human Beings: A Brief History of Suicide Bombing, Origins*, ORIGINS (Apr. 7, 2013), <http://origins.osu.edu/article/human-use-human-beings-brief-history-suicide-bombing>.

⁸² *Id.*

⁸³ WARNER & MATFESS, *supra* note 28, at 29; Speckhard, *The Emergence of Female Suicide Terrorists*, 31 STUDIES IN CONFLICT & TERRORISM 995 -1023 (2008).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Drew Hinshaw and Joe Parkinson, *The 10,000 Kidnapped Boys of Boko Haram*, WALL STREET J., (Aug 12, 2016), <https://www.wsj.com/articles/the-kidnapped-boys-of-boko-haram-1471013062>.

⁸⁷ COOK & CUSACK *supra* note 62, at 12.

⁸⁸ Bruce, *supra* note 11.

⁸⁹ *Id.*

⁹⁰ WARNER & MATFESS, *supra* note 28, at 30.

Muslim women from the wearing of full-face veil in N'Djamena,⁹¹ impeding religious expression. The actions of the Chadian and Nigerian Government combine to circumscribe some of the fundamental rights of women affected in these areas. These actions create and heighten stereotypes within affected communities creating harmful and discriminatory conditions for females within these communities.

ii. Crafting a case of Gender Persecution

Persecution is not a crime per se in many legal systems expect it is the basis for the commission of other crimes.⁹² Under ICL, Persecution as a crime was first codified in the Charter of the IMT⁹³ and has developed through other international criminal ad-hoc tribunals.

In a successional trajectory, the Rome Statute expanded prohibited grounds of persecution to include groups targeted on cultural and gender grounds⁹⁴ causing the intentional and severe deprivation of fundamental rights based a group's identity or collectivity a crime against humanity.

Though gaining recognition, much of the focus of gender-based crimes have been on crimes of a sexual nature, leaving gendered crime of a non-sexualized nature rather unfledged.⁹⁵ Since inception, the ICC had made no conviction for the crime against humanity of gender persecution, consequently leading to a paucity of jurisprudence from the ICC to determine what would ground a conviction for the novel 'gender-based persecution.'⁹⁶ For a case of gender persecution, it is instructive to establish a causal link between the intentional acts of Boko Haram in deploying FSB and the resultant gender-differentiated harm.

The jurisprudence of the ICTY elucidates elements relevant in articulating the crime of gender-persecution. In the Kupreškić case, the ICTY stated that: "persecution is motivated by a discriminatory animus;"⁹⁷ in intent and action.⁹⁸ This discriminatory animus is targeted at a particular group *because of* such belonging. The discriminatory intent then manifests in a plurality of ways and actions.

This section argues that the coercive use of FSB by Boko Haram surfaces a pattern of widespread or systematic attacks targeted at females as a civilian population *because* of their gender and the perception and images they embody.

⁹¹ Thurston, *supra* note 17, at 22.

⁹² M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY; HISTORICAL EVOLUTION AND CONTEMPORARY APPLICATION 397 (2011).

⁹³ Valerie Oosterveld, Gender, *Persecution and the International Criminal Court: Refugee Law's Relevance to the Crime Against Humanity of Gender-Based Persecution*, 17 DUKE J. OF COMP. INT'L L. 49, 56 (2006); Charter of the IMT Art. 6 ¶ c, Aug. 8, 1945, 82 U.N.T.S. 288.

⁹⁴ Rome Statute, *supra* note 10, at art. 7.1 ¶ h.

⁹⁵ Valerie Oosterveld, *Gender Based Crimes Against Humanity*, in FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY 79. (Leila Nadya Sadat ed. 2011)..

⁹⁶ *Id.*

⁹⁷ Prosecutor v. Kupreškić et al., Case No. IT -95-16-T, Trial Judgment ¶ 598 (Jan. 14, 2000).

⁹⁸ Prosecutor v. Krnojelac, Case No. IT-97-25-T, Judgment, ¶ 431 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 15, 2002); Prosecutor v. Kordić, Case No. IT-95-14/2-A, Judgment, ¶ 101 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004) (quoting Blaskić, Case No. IT-95-14-A, ¶ 131); Widney Brown & Laura Grenfell, *The International Crime of Gender-Based Persecution and the Taliban*, MELB. J. OF INT'L L., Vol. 4 (2003),

Women Strapped with Bombs: Victim-Perpetrators” In the Boko Haram Insurgency – A Case of Gender Persecution

a. Gender-Based

Gender under the Rome Statute⁹⁹ refers 'to the two sexes; male and female.' The drafters meant to fit the definition within the societal context of gendered roles and norms of social construction. Thus the operational tactics of gender-based crimes would involve crimes committed against a person on the basis of gender, stemming from prevailing norms and underlying inequalities.¹⁰⁰

Unpacking the crime against humanity of gender-based persecution, evaluation of a causal connection to the perpetrator's targeting is paramount.¹⁰¹ Within the Boko Haram insurgency emphasis is placed on persecution occurring against women, not in their context 'as women' but 'because' of being a woman.¹⁰² The nuanced analysis of establishing the causal link between gender and the perpetrator's target is built mainly around the social construction of gender.¹⁰³

In establishing gender-based persecution, 'the construction of gender by the perpetrators as understood in the relevant culture at the time and place of the event must be taken into account.'¹⁰⁴ For example, the stereotypical assumptions associated with the feminine gender by both Jihadis and the West is that females embody a 'vision of moral order' as it pertains to their body and education.¹⁰⁵ Therefore for Boko Haram, targeting females on this assumption would greatly disintegrate the 'moral order' of the society and the 'western influence' that has pervaded the society. For the group, while women ultimately infer a 'moral order,' its perceptions of what constitutes that 'moral order' differs somewhat. The paradox lies in the interpretation of gender-based role, duties, and obligations. While the West does believe that females have a right to education and choice, Boko Haram, which abhors western education, prefers a traditional interpretation of females as wives¹⁰⁶ and homemakers, who are to be seen and not heard – ornaments to be had and used at the whips and caprice of men.

As a result of their perception and assumptions of the role of females in society, girls' education has come under a direct attack by Boko Haram repeatedly.¹⁰⁷ For example, the perceived gendered role of females in the Chibok community where the 276 schoolgirls were abducted is emblematic in the decision to by Boko Haram to abduct them. The erstwhile leader of the group, after the abduction of the Chibok girls, stated: 'I seized your young women. I will sell them in the market.'¹⁰⁸

The gender-responsive shift to the use of female PBIEDS (Person borne improvised explosive devices) became a tactical operation for one of two reasons; to reassert its construct of gender and gender role on society and to staff its operation with 'disposable objects' because Boko Haram's 'male supporters who were mostly voluntary staffed became uniquely vulnerable

⁹⁹ Rome Statute, *supra* note 10, at Art. 7 ¶ 3.

¹⁰⁰ Int'l Crim. Ct. [ICC] Office of the Prosecutor, *Policy Paper on Sexual and Gender Based Crimes* ¶ 20 (Jun., 2014).

¹⁰¹ Oosterveld, *supra* note 95, at 81.

¹⁰² *Id.* at 82.

¹⁰³ *Id.* at 85.

¹⁰⁴ *Id.* at 81.

¹⁰⁵ Thurston, *supra* note 17, at 18 -19.

¹⁰⁶ HILARY MATFESS, *WOMEN AND THE WAR ON BOKO HARAM: WIVES, WEAPONS, WITNESSES* (2017).

¹⁰⁷ Sherrie Russell-Brown, *Boko Haram's Violence Against Women and Girls Demand Justice*, COUNCIL ON FOREIGN RELATIONS (May 11, 2018),

¹⁰⁸ Thurston, *supra* note 17, at 18 -19.

to detention, particularly from the CJTF.¹⁰⁹ The victimization of women in this way surfaces a gender bias which exists because of the socially constructed underlying gender inequalities – creating a causal connection between the targeted act and the targeted group.¹¹⁰

Though Boko Haram has targeted both genders,¹¹¹ the targeting and impacts of this targeting are gender-differentiated in purpose, outcomes and impacts. The much-needed attention to the victimization of women is prominent in surfacing the escalating trend of abducted females who are, forcibly transferred and revictimized many times over. A cycle that perpetuates until these females are forced into ultimately giving up their humanness to be used as PBIEDs in fulfilling the agenda of the organization. Despite reports of abduction of young men into Boko Haram, there exists a broad base of voluntary male recruits. On the contrary, an overwhelming majority of females within the Boko Haram camps are involuntarily staffed as PBIEDS forcefully married and sexually abused by Boko Haram members. The deliberate targeting of females by Boko Haram surfaces a pattern of gender control through shaming, exploitation, disruption of changing social norms and reinforcing the organization's pre-determined assumptions of the feminine gender.

b. Deprivation of Fundamental Right Contrary to International Law

Another essential element in substantiating the crime of humanity is in establishing a causal link between discriminatory acts targeted at a population that contributed to the violation and enjoyment of the internationally recognized rights of victims.

Under the Rome Statute persecution as a crime against humanity occurs, where a group of persons belonging to a particular group are intentional discriminated against and have their fundamental rights violated. At a minimum, the Bill of Rights serves as a launchpad to determine the fundamental rights in question. In determining the fundamental rights in question, a holistic examination of facts and context¹¹² is apt. And International tribunal have contributed immensely in surfacing some of these contexts,¹¹³ to include;

"...rape and sexual assault, destruction of property or means of substance; attack or destruction of towns, villages and cities; use of hostages as human shields; destruction and damage of religious or educational institutions; unlawful detention, deportation or forcible transfer of civilians; harassment, humiliation and psychological abuse; murder, extermination, and torture; attacks on political, social or economic rights; and violations of the rights of the right to life, liberty and security and the person – not to be subjected to torture or cruel, inhuman or degrading treatment or punishment; and not to be subjected to arbitrary arrest, exile, or imprisonment."¹¹⁴

¹⁰⁹ Jacob Zenn and Elizabeth Pearson, *Women, Gender and Evolving Tactics of Boko Haram*, 5 J. OF TERRORISM RESEARCH 46, 50 (Feb, 2014).

¹¹⁰ *Id.*; COULTER, CHRIS, PERSSON, MARIAM AND UTAS, MATS, NORDISKA ZAFRIKAINSTITUTET: STOCKHOLM, YOUNG FEMALE FIGHTERS IN AFRICAN WARS, CONFLICT AND ITS CONSEQUENCES 10 (2008).

¹¹¹ Russell-Brown, *supra* note 107.

¹¹² Oosterveld, *supra* note 93, at 64.

¹¹³ *Id.*

¹¹⁴ *Id.* Examples of the deprivation of fundamental rights have been identified by the ICTY; see Prosecutor v. Kvočka, Case No. IT-98-30/1-T, Judgement ¶¶ 186, 190 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 2, 2001); Prosecutor v. Ruggiu, Case No. ICTR-97-32-I, Judgment & Sentence, ¶ 22 (June 1, 2000).

Women Strapped with Bombs: Victim-Perpetrators” In the Boko Haram Insurgency – A Case of Gender Persecution

According to the Rome Statute, the deprivation of these fundamental rights must occur in connection with acts referred to in art. 7 or any crime within the jurisdiction of the ICC.

With FSB within the Boko Haram insurgency, the conducts leading to the conscription and the coercion of these females to act as PBIEDs surfaces overwhelming depths of deprivation of fundamental human rights. For example, incidences of forcibly transferring females from the streets and educational institutions to the Boko Haram camps, as epitomized in the abduction of the Chibok girls is emblematic of these fundamental rights violations, closely followed by sexual slavery, forced marriages, ill-treatment and the subsequent violations of the right to life by 'successful' suicide bombers.

It, therefore, becomes visible that the use of FSB is part of an *intentional, widespread and systematic attack on a civilian population* in a dual-pronged approach. First an attack on the FSB themselves – a gender-specific act intent at disintegrating societies fitting notion of its 'moral order', reasserting the groups fitting roles of gender construct by using its mode of operation to attempt a redefinition of masculinity and femininity. Second, the instrumentalization of these females indirect attacks against other civilians – as acts of murder, *in furtherance of the organizational policy of Boko Haram to eradicate 'disbelievers'*. The double bind in which these females find themselves with the group comes at no surprise as Boko Haram has listed among its values, the opposition of rights and privileges of women.¹¹⁵

B. Perpetrators and International Criminal Law

The notion of individual criminal responsibility under ICL is a keen departure from the general norm of public international law, where only states possess any form of responsibility; benefits and obligations under international law.

The jurisprudence of the ICC on perpetration has significantly advanced from that of the ad-hoc tribunals.¹¹⁶ Over time, the notion of individual criminal responsibility has allowed the tribunals to entertain suits and impose judgement on international humanitarian law issues.

Presently, the Rome Statute in recognizing individual criminal responsibility¹¹⁷ has developed more robustly the concept of criminal responsibility for individuals, and judiciously rephrased and supplemented modes of participation in ICL.¹¹⁸ The Rome Statute has also effectively expanded the jurisdiction of the ICC, allowing the court to entertain, alleged violations of international crimes within its jurisdiction that occurred in peacetime or in times of conflict. This progressive development allows for the ICC to look beyond acts committed in conflict situations. In this way, the Rome Statute has encapsulated detailed provisions on individual criminal responsibility and systematized multifarious modes of participation.¹¹⁹

Art 25 (3) (a) of the Rome Statute identifies and criminalizes three modes of criminal responsibility: direct, co-perpetration, and indirect perpetration. The direct perpetration includes acts that are intrinsic to the actual execution of the crime¹²⁰- the perpetrator conducts the physical

¹¹⁵ Zeen & Pearson, *supra* note 109, at 51; Zenn, Jacob, Boko Haram Recruitment Strategies, COUNCIL ON FOREIGN RELATIONS (Apr. 16, 2013).

¹¹⁶ NEHA, *supra* note 64, at 85.

¹¹⁷ Rome Statute, *supra* note 10, at art. 25.

¹¹⁸ *Id.*

¹¹⁹ Gerhard Werle, *Individual Criminal Responsibility in Article 25 ICC Statute*, 5 J. OF INT'L CRIM. JUST. 953, 956 (2007).

¹²⁰ Prosecutor v. Mathieu Ngudjolo Chui, Case No. ICC-01/04-02/12, Judgement pursuant to Article 74 of the Statute, Concurring Opinion of Judge Wyngaert, ¶¶43-48 (Dec. 18, 2012).

perpetration of acts amounting to international crimes by himself.¹²¹ The co-perpetrator instigates and acts in concert with at least one other person in agreement to plan and execute a criminal act.¹²² While, the indirect perpetrator, also a perpetrator by means, is 'used as an instrument or tool by the indirect perpetrator.'¹²³

Unlike the modes of commission under Art 25 (3) (a), responsibility under Article 25 (3) (d) imputes the furtherance of a common enterprise. Hence, the individual criminal responsibility must contribute intentionally in 'any other way' to the 'commission' or 'attempted commission' of the crime, in furtherance of a common enterprise.¹²⁴ In *Prosecutor v. Callixte Mbarushimana*,¹²⁵ the Pre-Trial Chamber of the ICC held that the contribution must attain a certain level of significance to input liability on an accused. The intentionality of purpose as elucidated in art. 25 (3) (d) presupposes a *mens rea* of 'knowing intent' along with the *actus reus* of 'commission' of or 'attempted commission' of an act that contributes to a crime by a group, which comes within the jurisdiction of the court.

Unpacking the requirement of 'intent,' the ICC held that the requirement of intentionality should be interpreted in the light of the provision of art. 30 of the Rome Statute.¹²⁶ The *criminally responsible* individual must, therefore, act in relation to a foreseeable and intended consequence¹²⁷ of an illegal act, while simultaneously aware of the illegality of the act and intends the consequences thereof. The accused should either '*mean to cause that consequence*' or '*be aware that it will occur in the ordinary course of events.*'

The question that then arises in regards to FSB is whether persons who though aware that their conducts would almost certainly trigger consequences which will occur in the ordinary course of events of the performed acts did not *mean to cause that consequence*?

C. Duality: Agency and Liability v. Coercion and Liability

'Abducted children are trained to be used as weapons. They are like guns. So when you capture a child soldier – how can you hold them accountable? Why would you punish the gun and not the hand that holds it?'¹²⁸

The determination of criminal responsibility hinges on the nature of complicity.¹²⁹ By weighing the *actus reus* against the *mens rea* degree of responsibility can be inferred.¹³⁰ Dual

¹²¹ Kai Ambos *Art 25*, in COMMENTARY ON THE *ROME STATUTE* OF THE INTERNATIONAL CRIMINAL COURT ¶ 7, 747 (Otto Triffterer ed., 2ND Edition)

¹²² *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges ¶ 318 (Jan. 29, 2007).

¹²³ See Kai, *supra* note 124, at ¶ 9, 750.

¹²⁴ *Prosecutor v. Ruto, Kosgey and Sang*, Case No. ICC-01/09-01/11-373, Decision of the Confirmation of Charges pursuant to Art. 61 (7) (a) and (b) of the Rome Statute, ¶¶ 351-353 (Jan. 23, 2012).

¹²⁵ Case No. ICC-01/04-01/10, Decision of the Confirmation of Charges, ¶¶ 276-277 (Dec. 16, 2011).

¹²⁶ *Prosecutor v. Callixte Mbarushimana*, Case. No ICC-01/04-01/10-465-Red, Decision of the Confirmation of Charges, ¶ 288 (Dec. 16, 2011); NEHA, *supra* note 64, at 84.

¹²⁷ Rome Statute, *supra* note 10, at art. 30 (2) (b)

¹²⁸ Stella Yarbrough, *From Amnesty or Accountability: The Fate of High Ranking Child Soldiers in Uganda's Lord's Resistance Army*, 47 VAND. J. OF TRANSNAT'L L. 531, 531 n*1 (2012) (citing McLeod Baker Ochola II, Retried Bishop of Kitgum Diocese, On the Future of Amnesty in Uganda, Statement at Forum in Gulu, Uganda (August 29, 2012).

¹²⁹ Pamela J. Stephens, *Collective Criminality and Individual Responsibility: The Constraints of Interpretation*, 37, FORDHAM INT'L L. J. 509 (2014).

¹³⁰ *Id.*

Women Strapped with Bombs: Victim-Perpetrators” In the Boko Haram Insurgency – A Case of Gender Persecution

status liability under ICL surfaced primarily following the activities of child soldiers in conflict zones. The borderline status of child soldiers as victim-perpetrators has been a source of concern to the entire international justice system. Following this agitation, the conscription and recruitment of child soldiers have been entrenched in the Rome Statute as a war crime¹³¹ and excludes the ICC from exerting jurisdiction over persons under the age of eighteen at the time of the alleged commission,¹³² acknowledging that child soldiers are not soldiers but children.¹³³

As with child soldiers, FSB used as PBIEDs are often instrumentalized as a type of military technology, controlled by an organization¹³⁴ - Boko Haram in this case. The group with a very rigid control mechanism of coercion, abuse of fundamental rights have used females as PBIEDs. The females in question lack the *intent* to contribute to the overall policy of the group or wish to further the organizational policy of a group that continues to ravage their homes and communities.

A combined reading of Arts. 25 (3) (a) and 30 of the Rome Statute of the ICC infers a conjunctive requirement of criminal responsibility. Criminal responsibility requires the presence of mental elements in conjunction with the *actus reus* before individuals alleged of committing international crimes can bear any individual criminal responsibility. The mental element requirement; *Mens Rea* is one of imputed intent. With regards to these FSB, the mental element would, therefore, entail that the acts of detonating or attempting to detonate explosives be carried out with the intent of furthering the emerging attacks.¹³⁵ Proving the existence of the necessary intent is, therefore, germane to establishing the mental element component.

Further, art. 25(3) (f) provides total exculpation where an individual abandons a crime on his or her own volition before the commission of the crime. It goes to say that, there would be no criminal liability where an accused may otherwise have been criminally liable, when an accused abandons the crime, prevents the completion of the crime and or voluntarily gives up the criminal purpose. In the Nigerian context, there are indications that for many females have been carted away to 'deradicalization centres' on failing to denote explosives for one of several reasons.

The practices in these holding facilities are shrouded in secrecy. Beyond the secrecy, these centres have received no legitimacy by the legislature. This arbitrary process, therefore, surfaces layers of heightened victimization for already victimized females by a process that further retraumatizes and revictimizes them.

Unfortunately, the fate of many of these females is sealed to death from the moment they are captured and taken to Boko Haram camps and eventually tasked with the role of strapping on explosives. As a survivor stated 'nobody told us what [the vest] was, but I knew it wasn't something good. I didn't look at it.'¹³⁶... 'when preparing someone for a "suicide" mission, Boko Haram members treat the bomber as if they are already dead, preparing the body as if for their funeral.'

¹³¹ Art. 8 (2) (b) (xxvi)

¹³² Rome Statute, *supra* note 10, at art. 26.

¹³³ Optional Protocol to the Convention on the Involvement of Children in Armed Conflict, May 25, 2000, 2173 U.N.T.S. 222; Protocol Additional to the Geneva Conventions of 12 August and Relating to the Protection of Victims of International Armed Conflict (Protocol I), art. 77 ¶ 2, Jun. 8, 1977, 1125 U.N.T.S. 3.

¹³⁴ Williams, *supra* note 81.

¹³⁵ International Criminal Court (ICC), Elements of Crimes, U. N. Doc. PCNICC/2000/1/Add.2 (2000).

¹³⁶ Maclean, *supra* note 3.

In many cases attempts to escape are revisited with recapture and worse forms of subjection.¹³⁷ These surrounding circumstance force many females to die by detonating the explosives rather than endure torture to themselves and their loved ones. Emphasizing a need for a nuanced understanding of the gender-differentiated dynamics in the forceful use of females as PBIEDs.

However, by reforming the justice regime and framing FSB as the 'criminals,' the Nigerian Government produces the idea that abducted females in this instance are to blame for the spate of attacks that have engulfed the northern region, reinforcing an inaccurate and inequitable narrative that assumes agency, depleting these females as free and rational actors. Therefore, it would be imperative in ascribing criminal responsibility to fully account for all the motivations in the commission or attempt of acts amounting to international crimes.¹³⁸

Undoubtedly the overarching aim of ICL is to promote an ICL regime that is both just and effective – maximizing the effectiveness of ICL in protecting humanity, while also respecting the humanity of those subject to the system.¹³⁹ In actualizing these goals, a system of justice requires basic principles that guarantee the protection of individuals and that penalties for violations are justified and correctly ascribed.¹⁴⁰ In meting justice, it is therefore essential to measure the individual's agency in the collective context and how collective action both expand individual agency in situations of social pressure or exercise of authority.¹⁴¹

III. Domestic Prosecution of International Crimes in Nigeria

The principle of complementarity¹⁴² is germane to the mandate of the ICC¹⁴³ because it aids efficiency in the adjudication of international crimes.¹⁴⁴ Complementarity allows for the gradual and definite harmonization and unification of the substantive and procedural norms of ICL into national systems, creating a unified ICL system.¹⁴⁵ Complementarity at its core protects a state's sovereignty and functioning judicial systems, while at the same time, ensuring that the ICC is not inundated with cases with ICL characteristics. Mainly because, the ICC would not, in fact 'be involved in cases that do not, address those bearing the most responsibility.'¹⁴⁶ Allowing national systems prosecute international crimes bridge jurisdictional vacuum in the exercise of international criminal justice,¹⁴⁷ create cross-fertilization in the adjudication of international crimes, and foster accountability as part of a nation's culture.¹⁴⁸ In this way, the Rome Statute

¹³⁷ Hernandez & Hegarty, *supra* note 2.

¹³⁸ NEHA, *supra* note 64, at 4.

¹³⁹ Darryl Robinson, *International Criminal Law as Justice; Criminal Theory and Extreme Cases*, 11 J. OF INT'L JUST. 711 (2013).

¹⁴⁰ *Id.* at 699.

¹⁴¹ *Id.* at 704.

¹⁴² Linda E. Carter, *The Principle of Complementarity and the International Criminal Court: The Role of Ne Bis in Idem*, 8 SANTA CLARA J. INT'L L. 165, 167 (2010).

¹⁴³ Rome Statue, *supra* note 10, at art. 1.

¹⁴⁴ PAUL SEILS, INTERNATIONAL CENTER FOR TRANSNATIONAL JUSTICE; HANDBOOK ON COMPLEMENTARITY: AN INTRODUCTION TO THE ROLE OF NATIONAL COURTS AND THE ICC IN PROSECUTING INTERNATIONAL CRIMES 6 (2016).

¹⁴⁵ M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW, 21 (INTERNATIONAL CRIMINAL LAW SERIES 1).

¹⁴⁶ SEILS, *supra* note 144, at 78.

¹⁴⁷ BASSIOUNI, *supra* note 145.

¹⁴⁸ NOUWEN, S. COMPLEMENTARITY IN THE LINE OF FIRE: THE CATALYSING EFFECT OF THE INTERNATIONAL CRIMINAL COURT IN UGANDA AND SUDAN (2014).

Women Strapped with Bombs: Victim-Perpetrators” In the Boko Haram Insurgency – A Case of Gender Persecution

chimes into national penal codes to ensure that perpetrators can be brought to justice at the national level.¹⁴⁹

With the rapid development of ICL over the years, several national systems have crafted multifarious ways of prosecuting international crimes in their national judicial systems,¹⁵⁰ solely or in conjunction with the United Nations.¹⁵¹ It is instructive to note the strides Nigeria has made in addressing prosecution of international crimes, mainly as they concern FSB, and draw inference for ways to proceed particularly in the light of the ongoing debates surrounding the *Crimes Against Humanity, War Crimes, Genocide and Related Offences Bill*.

A. A Crime Against Humanity Act in Nigeria Lessons from the Rome Statute

The Crimes Against Humanity, War Crimes, Genocide and Related Offences Bill [hereinafter The Bill] is a legislative attempt to domesticate the Rome Statute in Nigeria to ensure prosecution of international crimes in line with the complementarity principle.

The Bill was introduced and was approved by the Federal Executive Council in 2012. Though yet to be passed into law, the objectives of the Bill include fostering cooperation between Nigeria and the ICC in prosecuting international crimes, at the Federal High Court, and High Courts of the States, including the Federal Capital Territory.

Undeniably accountability mechanism for international crimes should be anchored on 'a solid legislative framework outlining its jurisdiction structure, mandate operationalization, and financing.' However, the gaps in substantive laws addressing international crimes in Nigeria have led the national system to rely on the *Administration of Criminal Justice Act 2015* and the *Terrorism Prevention Act 2011(TPA)* as the substantive and procedural basis for the prosecution of alleged international crimes by Boko Haram members. Moreover, these criminal proceedings for these crimes have been criticized widely for the lack of fair trial guarantees, arbitrary sentencing,¹⁵² and inattention to victims of international crimes.

Many FSB who fail to detonate the explosives strapped on them, for personal or technical reasons, run away into hiding for fear of being arrested by security operatives. Otherwise apprehended FSB are placed in 'deradicalization centres,'¹⁵³ and subsequently arraigned in civilian courts within military bases on charges of 'attempted terrorist attacks,'¹⁵⁴ under §4 TPA, and in secrecy, excluding the media and members of the public.¹⁵⁵

This lacuna can be addressed with the proposed Bill, drawing lessons from the Rome Statute while addressing the nuances of international crimes within the Boko Haram insurgency. For

¹⁴⁹ LOUISE CHAPPEL, *THE POLITICS OF GENDER JUSTICE AT THE INTERNATIONAL CRIMINAL COURT* 169 (2015).

¹⁵⁰ For example, International Crime Division of the Ugandan High Court.

¹⁵¹ Example, The Special Court of Sierra Leone; a treaty-based creation between the UN And Sierra Leone.

¹⁵² *Nigeria: Flawed Trials of Boko Haram Suspects Ensure Due Process, Victim Participation*, HUMAN RIGHTS WATCH, (Sept. 17, 2018), <https://www.hrw.org/news/2018/09/17/nigeria-flawed-trials-boko-haram-suspects>.

¹⁵³ *Id.*

¹⁵⁴ Jason Burke, *Secret Trials of Thousands of Boko Haram Suspects to Start in Nigeria*, THE GUARDIAN, (Oct. 9, 2017), <https://www.theguardian.com/world/2017/oct/09/nigeria-begin-secret-trials-thousands-boko-haram-suspects>.

¹⁵⁵ Press Briefing, Spokesperson for the UN High Commissioner for Human Rights; Rupert Colville, Notes on Azerbaijan, Egypt and Indonesia/LGBT and Boko Haram Trials in Nigeria (Oct. 13 2017), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22232&LangID=E>.

example, the Rome Statute includes provisions for protection to victims,¹⁵⁶ and reparation of victims of international crimes,¹⁵⁷ the Bill establishes the special victims' trust fund similar to art. 79 of the Rome Statute for victims of international crimes and their families, protection to victims for their participation in the criminal proceedings.¹⁵⁸

Referencing the context-specific nuances of the Boko Haram insurgency, the Bill ineffectively provides a gender-responsive approach to gender-differentiated crimes. The Bill fails to address specific gender crimes arising within the Boko Haram insurgency in Nigeria, for instance, the use of FSB by Boko Haram. Similarly, reference to 'gender' is gravely limited. For example 'gender' is mentioned only twice in the Bill,¹⁵⁹ only in defining crimes against humanity. Though gender-differentiated crimes within the insurgency are highly visible, the Bill fails to reference them and or provide an expansive definition of gender-related offences such as gender persecution unique to the Nigerian context.

Unlike the Rome Statute, that allows the ICC to *suo moto* or upon request grant restitution or compensation to victims of crimes, the provision art. 93 of the Bill required that victims of international crimes could only be granted reparation from the victim's trust fund upon the institution of a civil suit after the determination of the criminal proceeding.

The requirement of a civil trial as encapsulated by the Bill proves onerous by requiring victims to relieve in a civil suit the psychological trauma of sexual and gender-based violence they endured when the acts occurred and during the criminal trial.

The Rome Statute alludes to the importance of gender-sensitive appointees within the accountability mechanism; in the election of judges,¹⁶⁰ and prosecutor.¹⁶¹ In the same vein, the peculiarity of the types of gender-based crimes within the Boko Haram requires gender-sensitive legal experts and professionals within the accountability mechanism. Unfortunately, the Bill is silent on the appointment of gender-sensitive judges and prosecutors.

The Bill in question introduced in parliament in 2012 is yet to pass into law. While the debate continues, it is pivotal to point to the need of a gender-sensitive legislature that addresses the crime of gender-persecution within the Boko Haram insurgency.

B. Conclusion: Towards The Charge Of Dispensing Justice

Nigeria, as a party to the Rome Statute, is under an obligation to ensure that its domestic affairs support its international obligation of addressing international crimes wholly.

Under the principle of complementarity, Nigeria can ensure that its international obligations are fulfilled in good faith by prosecuting perpetrators of international crimes in its national courts. For these prosecutions, the Rome Statute and the jurisprudence of the ICC provide blueprints.

Because the ICC prosecutes individuals that bear the most responsibility for international crimes, it is left to the national courts to prosecute individuals who though have committed international crimes do not bear the most responsibility. FSB; not bearing the most responsibility in the Boko Haram insurgency, would therefore not likely stand trial at the ICC. Leaving prosecution of FSB to the national courts.

¹⁵⁶ Rome Statute, *supra* note 10, at art 68.

¹⁵⁷ *Id.*, art.75.

¹⁵⁸ *Id.* arts. 44 & 94

¹⁵⁹ Art. 5 of the Bill.

¹⁶⁰ Rome Statute, *supra* note 10, at art. 36 (8) (b).

¹⁶¹ *Id.*, at art. 42 (9).

Women Strapped with Bombs: Victim-Perpetrators” In the Boko Haram Insurgency – A Case of Gender Persecution

However, the peculiar status of these females creates status at criminal law that bestrides the victim-perpetrator threshold; a dual status. For dual-status persons under ICL such as the female PBIEDs, the jurisprudence of the ICC offers guidance to national criminal proceedings on the analysis of criminal responsibility. Mainly providing nuisance analysis of questions on who can be prosecuted, and factors imperative in mitigating or aggravating sentencing as perpetrators, or in the determination of suitability for reparations as victims. These insights beyond providing clarity in criminal proceedings also offer clarity on the lived realities and experiences of these female PssBIEs, serving as a buffer for the inclusion of gender-responsive strategies within the criminal justice system that accounts for the realities of female PBIEDs who like a pendulum, swing to and fro the differentiated and somewhat intertwined binary of victim-perpetrator.

At the onset of this study, several questions arose for determination, in interrogating the scope of responsibility of female PBIEDs. First, *should they be ascribed any criminal liability under ICL?* The analysis that has preceded surfaces the lack of 'intent' and 'knowledge' in their activities. Undoubtedly, these females have acted or purported to act unwillingly due to mounting levels of coercion, deprivation and threat to their life and liberty and that of loved ones. Yet, while FSB may be aware of the activities conducted or to be conducted, they do not *mean* to engage in such conducts.

Secondly, *what type of justice would then effectuate the goals of ICL?* Under ICL, for a crime to exist, the *actus reus* and *mens rea* elements have to co-exist. The preceding analysis has argued that FSB in their *actus reus* lack the *mens rea* leaving a mental element gap. The implication, therefore, is that though the conducts of these women contribute to the commission of international crimes, their conducts do not rise to the scale of crimes specifically attuned at furthering organizational policies of Boko Haram. A system of justice would necessarily examine the scope of the FSB victimization, and provide gender-responsive access to justice mechanism that reintegrates these 'victim-perpetrators' into society while simultaneously providing succour to families that the actions of these FSB may have caused direct harm.

The Nigerian legislature is presently in the process of passing the **Bill** into law. It behoves on legislators to fully understand how gender-based persecution is entrenched in the group's use of FSB and encapsulate gender-responsive provisions that specifically address the use of female PBIEDs. Beyond a mention of gender-persecution as a crime against humanity, this act should holistically 'reflect a range of gender-based prohibited acts,'¹⁶² especially a reflection of the nature of the use of FSB as a form of gender persecution.

For FSB as victims, beyond retribution, fair treatment and respect, as well as obtaining economic and emotional redress should be a paramount consideration for the justice system. Applying this understanding to the situation in the Nigerian context, when such female PBIEDs give up their assigned missions, are apprehended before detonation they should be given protection under the law, rather than arrested and carted away to 'deradicalization' centres without due process of the law.

To attenuate the dictates of justice and fairness, the Bill should address some crucial issues:

Incorporate a definition of 'deradicalization centres'

Security operatives and courts in Nigeria have ordered that alleged members of Boko Haram, including FSB such as have been discussed above be sent to deradicalization centres. The arbitrariness of the activities of the deradicalization centres and the lack of adequate substantive, procedural and precise legal provisions to deal with the criminal responsibility of

¹⁶² Oosterveld, *supra* note 95, at 100.

these FSB within the ongoing insurgency create a very peculiar case of revictimization of already victimized females. The Bill should guide against arbitrariness and revictimization of already victimized females. In one way, the Bill should define deradicalization, deradicalization centres, allowing for provisions on setting up, maintenance, conditions for institutionalization and institutions that determine the scope of the 'deradicalization' process.

Provide Rehabilitation Programmes

The Rome Statute has been applauded as one of a kind, for one particular reason. It crafts an excellent blend of substantive and procedural laws in one piece of legal document. It also addresses psychological and gender-related rehabilitative needs of victims in criminal proceedings. In the same vein, the Bill should include provisions for rehabilitative programmes. These programmes should have an excellent blend of state-issued community-based integration and reparation program for communities. Boko Haram activities move beyond the impacting individuals to creating segregation and interfering with communal bonds. For instance, many females, taken into Boko Haram camps, become perceived as pariahs upon return. These programmes should embody the standards of the Rome Statute in the appointment of gender and psychological advisers. However, more elaborately, these advisers should go beyond individual victim assistance, recognize the victimization of communities and culture. In this way, FSB and members of the community would be psychologically equipped to handle and negotiate societal challenges and demands of reintegrating into society. In another twist of fate, these females who somehow make it back into society become ostracized from their immediate society. They are tagged 'annoba.'¹⁶³ In this way 'communities tend to look at the act, rather than the girl.'¹⁶⁴

Expanding the scope of reparation

ICL, as it stands today, is very victim-centred. One of the ways ICL has emerged is in the establishment of a reparations system under the ICC for victims of international crimes.¹⁶⁵ The integration of a reparation provision within the Bill would be laudable and in keeping with the emergence of ICL in the 21st Century. Undoubtedly, the majority of these FSB who have been away from their communities, away from any source of livelihood, would profit and benefit immensely from financial recompense for the trauma experienced.

Training and Capacity building

Provision should be made for compulsory training and capacity building programmes for judges, prosecutors and security operatives on the gender impact on the deployment of suicide bombers. This programme is particularly important given the fact that the trend of deployment of FSB by Boko Haram is the largest in the history of insurgencies in the world.

While this paper by no means has all the answers to questions asked, these insights open up conversations on the challenges ahead and surface difficult questions that remain to be unanswered in gauging the response of ICL to gender and sexual-based violence, not only in the international realm but also at national and perhaps regional levels. The analysis carries with it some propositions and a plethora of questions, that legislators, prosecutors, judges, scholars and the defence attorneys need to address in order to protect females.

Without a doubt addressing this complex social problem would entail attentiveness on the part of the prosecutors, judges and defence attorneys on the peculiarity of the lived experiences of these females. The legislature is also duty-bound to enact laws that favour a smoother

¹⁶³ Meaning 'epidemic.' Hernandez & Hegarty, *supra* note 2.

¹⁶⁴ *Id.*

¹⁶⁵ Rome Statute, *supra* note, Art 75; CHRISTINE EVANS, THE RIGHT TO REPARATIONS IN INTERNATIONAL LAW FOR VICTIMS OF ARMED CONFLICT (2012).

Women Strapped with Bombs: Victim-Perpetrators” In the Boko Haram Insurgency – A Case of Gender Persecution

integration of these women into society, and a rehabilitation process that is not marred by arbitrariness. But then:

1. How much does the notion of duress and sexual harassment, threat and intimidation of family members play in vitiating the mens rea or mitigating criminal responsibility of these women?
2. How much duress is enough duress?
3. What does true justice look like for these women, who are in limbo, not entirely accepted by the community and yet not members of the insurgent groups?

The peculiarity of the experiences of these FSB can be surfaced a lot more, as the visibility of gender and sexual-based violence gains momentum. These categories of victims arguably have greater difficulty reintegrating into society. They are perceived as *pariahs*, '*annoba*.'

A theory of punishment is valid only where it elevates the criminal to "the position of a free and self-determined being-"¹⁶⁶with clarity and permanence of agency. When instrumentalized by their captors, how can the "victim-perpetrator" be said to attempt acts of crime? Accountability should, therefore, be accurately contextualized. It is doubtful that deterrence as an outcome in this case of criminal justice would be a compelling argument. The most persuasive case as a victim-perpetrator would be an outcome that focuses on rehabilitation. However, a significant drawback to rehabilitation is that of reacceptance.¹⁶⁷

'FSBs are complex social individuals, carrying a dual, yet distinct individual status as victims and perpetrators. In the discus surrounding gender and sexual-based violence in ICL, much emphasis is focused on "*victims*," "*victim-witnesses*,"¹⁶⁸ maybe not enough emphasis is placed on "*victim-perpetrators*." Oh yes! They exist!

¹⁶⁶ Leveau Fanny, *Liability of Child Soldiers Under International Criminal Law*, 4 OSGODE HALL REV. OF L. & POL'Y 44 (2014).

¹⁶⁷ *Id.*, at 49.

¹⁶⁸ ICC-BD/05-01-09 r. 36-47 (2009) (Regulations of the Office of the Prosecutor. This provides robust guarantees for victims and victim-witnesses).