

At the Crossroads: Evidential Challenges in the Investigation and Prosecution of Trafficking in Persons for Sexual Exploitation and Sexual Violence in Situations of Conflict

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Abstract

There is growing socio-political and legal recognition of the intersections between conflict-related trafficking in persons (TIP) for the purpose of sexual exploitation and conflict-related sexual violence. While on first glance, the elements of crimes for TIP and sexual slavery/enslavement as a crime against humanity/war crime are quite distinct and the type of law and choice of forum may vary, both sets of crimes have benefitted from a more expanded and nuanced interpretation of the core definitional terms of each, such as 'ownership', 'vulnerability' and 'consent'. Likewise, a closer examination of the key evidential challenges facing investigators and prosecutors within both legal frameworks reveals a number of striking similarities relating to the investigative context, lack of international cooperation, lack of witness protection, limited availability of sources of evidence, and challenges in the collection of victim-witness and linkage evidence, specifically for victims of sexual violence and child victims.

The author concludes that the two legal frameworks must be seen as complementary and mutually reinforcing. The fact that there are so many shared evidential challenges is an indication of the potential for increased cooperation between Member States (and those supporting national efforts such as international organizations) investigating and prosecuting transnational organized crime, and international justice mechanisms (the International Criminal Court (ICC) and ad-hoc, hybrid or other tribunals). The prosecution of TIP for sexual exploitation in conflict situations at the national level is an important step towards closing the impunity gap for SGBV as international crime.

I. Introduction

There has been a growing cognizance in recent years of the prevalence of trafficking in persons (TIP) in conflict situations, including as a

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form of sexual and gender-based violence (SGBV). From Security Council resolutions to jurisprudence from international courts, to national governmental and non-governmental action, these crimes have been at the centre of a number of important political and legal developments. Armed groups frequently commit SGBV crimes such as forced marriage, sexual slavery, enslavement and TIP as tactics of war, not only against women and girls but also against men, boys and transgender persons. Organized criminal groups are often fueled by ongoing war crimes/conflict situations, increasing their propensity to commit transnational organized crime including TIP. The United Nations Office on Drugs and Crime (UNODC)'s most recent Global Report on TIP furthermore confirmed the correlation between TIP and conflict.¹ The United Nations Special Rapporteur on TIP has also highlighted this nexus, explaining how TIP is a systematic component of conflict amounting in certain circumstances to war crimes and or crimes against humanity, wherein armed criminal groups 'take advantage of the rule of law to carry out the dirty business of trafficking in persons and become more powerful and dangerous.'²

In this article, the author 1) outlines the growing recognition of the intersections between TIP especially for the purpose of sexual exploitation and sexual violence in conflict, and then 2) considers the requirements for each under the legal frameworks of transnational criminal law and international criminal law; and 3) analyses the common evidential challenges in the investigation and prosecution of each. The basic premise is that while the elements of the crime and legal thresholds of the two legal frameworks may be different, and while the type of law and choice of forum will vary, there are a number of common evidential challenges stemming from the realities of the conflict and post-conflict settings. The author concludes that the two legal frameworks must be seen as complementary and mutually reinforcing. The fact that there are so many shared evidential challenges is an indication of the potential for increased cooperation between Member States (and those supporting national efforts such as international organizations) investigating and prosecuting transnational organized crime, and international justice mechanisms (the International Criminal Court (ICC) and ad-hoc, hybrid or other tribunals).

¹ United Nations Office on Drugs and Crime, *Global Report on Trafficking in Persons 2018* (Vienna, 2019), 11 and *Global Report on Trafficking in Persons 2016* (Vienna, 2016), 10.

² United Nations Special Rapporteur on Trafficking in Persons, M. Giammarinaro, 'Video Statement to the United Nations Security Council High Level Open Debate on Trafficking Persons in Conflict Situations', 21 November 2017.

2. Tracing the Nexus

On 20 December 2016, the United Nations (UN) Security Council convened a High Level Open Debate on TIP in Conflict Situations resulting in a historic, unanimous resolution, the first ever on TIP. Resolution 2331³ calls upon Member States to address ongoing conflict situations, in particular the vulnerability of women and children to TIP, as well as other sexual violence and transnational organized crime. In the subsequent Secretary-General's report on TIP in armed conflict situations, women and children were confirmed to be disproportionately affected by TIP in conflict situations, especially in cases of SGBV.⁴ Nearly one year later, the UN Security Council adopted Resolution 2388⁵ which calls upon Member States and the UN special political and peace-keeping missions to strengthen and support national investigations and prosecutions of TIP in armed conflict.

The heightened risk of TIP, especially for sexual exploitation, during situations of conflict, had been acknowledged much earlier of course. At the time of the negotiations of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (UN TIP Protocol)⁶, supplementing the United Nations Convention against Transnational Organized Crime, the conflict and post-conflict experience of Member States emerging from the ex-Yugoslav wars became an important backdrop. Much of the first wave of anti-trafficking efforts were thus directed to the Western Balkans, where it became clear that 'the Yugoslav wars and their aftermath intensified the scale of transnational crime and the levels at which criminal networks preyed on the population'⁷, especially for TIP. The International Criminal Tribunal for former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) would go on to successfully prosecute landmark cases of wartime sexual violence, as a war crime, a crime against humanity and genocide. Most notably, convictions were entered at the ICTY that held that rape could be a form of torture, and rape and sexual enslavement, a crime against humanity, while the ICTR found that rape and other forms of sexual violence could con-

³ UN Security Council, Security Council Resolution 2331(S/RES/2331), 20 December 2016.

⁴ UN Security Council, *Report of the Secretary-General on Trafficking in Persons in Armed Conflict Pursuant to Security Council Resolution 2331 (S/2017/939)*, 20 November 2017.

⁵ UN Security Council Resolution 2388 (S/RES/2388), 21 November 2017.

⁶ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, UN Doc. A/45/49 (Vol. I) (2001), adopted 15 November 2000, entered into force 25 December 2003.

⁷ H. Friman & S. Reich, *Human Trafficking and the Balkans* (Pittsburgh: University of Pittsburgh Press, 2007), 4.

stitute genocide.⁸ The investigation and prosecution of SGBV as an international crime continued in the Special Court for Sierra Leone (SCSL), most notably in the conviction of the former Liberian President, Charles Taylor, for rape, sexual slavery and other forms of sexual violence.⁹

However, it was not until the Rome Statute, the founding treaty of the ICC, that the first mention of TIP was explicitly included within the context of international criminal law, in the definition of enslavement as a crime against humanity.¹⁰ To this date, the Prosecutor has not brought charges of enslavement specifically mentioning TIP although there have been charges of sexual slavery, enslavement (without mention of TIP) and forced labor, the factual circumstances of which could have arguably fit the definition of TIP.¹¹ In early May 2017, the Prosecutor signaled the possibility of an investigation into migrant smuggling and TIP in the context of the Libya situation, should the jurisdictional requirements be met.¹²

While the Security Council met in November 2017 to renew international efforts to tackle TIP in conflict situations, political leaders condemned horrific slave trade footage broadcast by CNN allegedly from Libya, involving the apparent sale/slavery of vulnerable migrants (some who would have been trafficked) documented by investigative reporters¹³. A number of political leaders, including the President of France, decried the crimes allegedly confirmed in this footage as a crime against humanity.¹⁴ The Pontiff of the Roman Catholic Church, Pope Francis, has on several occasions expressed the same view.¹⁵ Thus, in addition to the legal developments increasingly opening the possibility of TIP in conflict times being considered as an international or 'atrocities' crime, there has also been growing socio-political awareness of these linkages.

⁸ *Prosecutor v. Jean-Paul Akayesu (Trial Judgement)*, ICTR-96-4-T, International Criminal Tribunal for Rwanda, 2 September 1998.

⁹ *Prosecutor v. Charles Ghankay Taylor (Judgement Summary)*, SCSL-03-1-T, Special Court of Sierra Leone, 26 April 2012.

¹⁰ UN General Assembly, Rome Statute of the International Criminal Court, 17 July 1998.

¹¹ See also *Special Issue – Slavery and the Limits of International Criminal Justice*, *Journal of International Criminal Justice* 14.2 (2016): 253-500.

¹² International Criminal Court, 'Statement of ICC Prosecutor to the UNSC on the Situation in Libya', 9 May 2017.

¹³ 'Migrants Being Sold as Slaves', *CNN*, 13 November 2017 and 'People for Sale', *CNN*, 13 November 2017.

¹⁴ 'Macron Calls Libya Slave Sales "Crimes against Humanity"', *The Independent*, 22 November 2017.

¹⁵ 'Human Trafficking is a Crime against Humanity', *Vatican News*, 12 February 2018.

3. Analysis of the Legal Elements

In his 2017 report to the Security Council on conflict-related TIP, the UN Secretary General stated that ‘[t]he collection of reliable evidence is of paramount importance to end the impunity of traffickers and abusers’.¹⁶ Given that the evidence is assessed against the elements of each crime, it is worthwhile to briefly review the thresholds established in the two legal frameworks.

A comparison of the elements of crimes of enslavement and sexual slavery (including TIP) as a crime against humanity and war crime in the Rome Statute, with the crime of TIP of the UN TIP Protocol, shows the distinct legal requirements for each, see Table 1.

Table 1. Comparison of the Elements of Crimes			
<i>Trafficking in Persons</i> Article 3(a), UN TIP Protocol ¹⁷	<i>Enslavement</i> Article 7(1)(c), <i>Crimes against Humanity</i> , Rome Statute of the ICC ¹⁸	<i>Sexual Slavery</i> Article 7(1)(g), <i>Crimes against Humanity</i> , Rome Statute of the ICC ¹⁹	<i>Sexual Slavery</i> Article 8 (2) (b) (xxii) <i>War Crime</i> , ²⁰ Rome Statute of the ICC ²¹
<i>The action of:</i> recruitment, transportation, transfer, harbouring or receipt of persons;	The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar	The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of	The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar

¹⁶ UNSC, *Report of the SG on CRSV* (2018), para. 5.
¹⁷ UN, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime. See also UNODC, *Legislative Guide for the Trafficking in Persons Protocol* (Vienna: 2008), 268.
²⁰ Ibid.
²¹ Ibid.
¹⁹ Ibid.
¹⁸ ICC, *Elements of Crimes* (The Hague: Official Journal of the International Criminal Court, 2011).

	deprivation of liberty [including TIP] ²²	liberty. [including TIP] ²³	deprivation of liberty. [including TIP] ²⁴
<i>By means of:</i> the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability, or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person;		The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.	The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.
<i>The purpose of exploitation,</i> which include, at a minimum: the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.	The conduct was committed as part of a widespread or systematic attack directed against a civilian population.	The conduct was committed as part of a widespread or systematic attack directed against a civilian population.	The conduct took place in the context of and was associated with an armed conflict not of an international character.

²² The ICC Elements of Crimes include this footnote: ‘It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.’

²⁴ Ibid.

²³ Ibid.

The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.	The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.	The perpetrator was aware of factual circumstances that established the existence of an armed conflict.
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It is important to note that the UN TIP Protocol has achieved one of the highest ratification rates in a relatively short period of time in the history of international law – currently 171 Member States have ratified the Protocol as of writing – and the vast majority have adopted criminal legislation in their own countries. These are strong indicators of the international consensus on the Protocol’s definition and approach as well as the imperative of addressing this crime.

The UN TIP Protocol’s definition of TIP has three core elements; act, means and purpose of exploitation. While the term ‘trafficking’ evokes the image of border-crossing, the Protocol does not require any movement at all, as the case could involve acts of harboring or receipt of trafficked persons. The Protocol includes both ‘hard’ and ‘soft’ means – from force or threat of force and abduction, to fraud, deception and abuse of a position of vulnerability. Emotional abuse and the humiliation of victims are two important psychological forms of control which the courts are increasingly recognizing as constitutive elements of trafficking cases.²⁵ Evidence to date suggests that traffickers are increasingly relying on more subtle means of control over their victims, increasingly taking advantage of ‘willing victims’ in dire circumstances. In a UNODC Issue Paper on the means of abuse of a position of vulnerability, it was noted by many practitioners that:

‘traffickers are becoming increasingly adept at recognizing and manipulating vulnerability to create dependencies, expectations and attachments. Indeed, the use of other more “tangible” or “direct” means such as force and violence was noted to have decreased in recent years, as more subtle strategies of abuse of vulnerability are refined.’²⁶

²⁵ UNODC, *Evidential Issues in Trafficking in Persons Cases: Case Digest* (Vienna, 2017), 67.

²⁶ UNODC, *Abuse of a Position of Vulnerability and Other Means within the Definition of Trafficking in Persons* (Vienna: 2013), 84.

Indeed, strategies of abusing vulnerability may also be at play together with the apparent consent of the victim to their exploitation by the trafficker. Here the language of the UN TIP Protocol could not be more clear: the consent of the victim is vitiated where any of the illicit means are in use.²⁷ And despite the clear text, a review of national courts' assessment of the role and impact of consent in leading TIP cases reveals that it is often still a key defense strategy, and not so infrequently, a winning one.²⁸ Nevertheless with time it seems that courts are willing to overlook the apparent consent of victims even in complex cases where there is no physical force, or where there was limited freedom of movement or a constellation of vulnerabilities.²⁹ The Protocol was forward-looking in that the definition of exploitation is open-ended and allows Member States to adapt their legislation to the national context.³⁰

Within the legal framework of international criminal law, SGBV crimes contain two components: the contextual requirements (crimes against humanity, war crimes or genocide) and the underlying act/s (e.g. rape, sexual slavery, forced pregnancy, enslavement, other forms of sexual violence). The underlying acts are thus 'embedded'³¹ in this contextual part.³² For the purposes of this analysis, in addition to the underlying acts (sexual slavery and or enslavement as TIP), the contextual requirements for a prohibited act to be considered a crime against humanity must also be satisfied: i) that it was an attack, meaning a course of conduct involving multiple commission of acts; ii) that it was pursuant to or in furtherance of a state or organizational policy; iii) that the attack was directed against a civilian population (the object of the attack) iv) that it was widespread and systematic (the character of the attack); v) that there was a nexus between the acts of the accused and the attack; and vi) that the accused had knowledge of the attack (*mens rea*).

What would these contextual elements look like in a possible case of enslavement as TIP in a conflict situation as per Article 7(1)(c) of the Rome Statute? Can we imagine an organized crime scenario that would meet these require-

²⁷ Supra note 7, Article 3(b): 'The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used.'

²⁸ UNODC, *The Role of Consent in the Trafficking in Persons Protocol* (Vienna: 2014), 8-9. For a case in which the defence succeeded on the issue of consent, see Provincial Court of British Columbia, *R. v. Ng*, (Vancouver), 21 June 2007.

²⁹ See discussion of *R. v. Urizar*, trial and appellate judgments from Canada in UNODC's, *Evidential Issues*, 144.

³⁰ Ibid., para. 64.

³¹ Centre for International Law Research and Policy, *International Criminal Law Guidelines: Legal Requirements of Sexual and Gender-Based Violence Crimes* (2017), 16-20.

³² P. Visser-Sellers, 'Wartime Female Slavery: Enslavement?', *Cornell International Law Journal* 44 (2011): 115-142.

ments?³³ It would certainly seem possible especially considering the evolution in judicial interpretation of these requirements. Unlike for war crimes, in the case of a crime against humanity, there is no requirement that the underlying crime should be committed as part of an armed conflict. There must be an attack which ‘denotes a course of conduct involving the multiple commission of acts’.³⁴ In the case of a crime against humanity, the term ‘attack’ is not restricted to the use of armed force but may also encompass mistreatment of the civilian population³⁵ or a series of violent acts.³⁶ While the attack must be a course of conduct pursuant to or in furtherance of a state or organizational policy, the plan does not need to be declared expressly or even stated clearly and precisely, according to the interpretation of international courts. It may be surmised from the occurrence of a series of events, or revealed through a variety of factors which taken together suggest the existence of a policy.³⁷ In the ICC’s *Katanga* judgment, the Trial Chamber found that a private group could be found to meet this threshold of organisation:

‘It therefore suffices that the organisation have a set of structures or mechanisms, whatever those may be, that are sufficiently efficient to ensure the co-ordination necessary to carry out an attack directed against a civilian population. Accordingly, as aforementioned, the organisation concerned must have sufficient means to promote or encourage the attack, with no further requirement necessary. Indeed, by no means can it be ruled out, particularly in view of modern asymmetric warfare, that an attack against a civilian population may also be the doing of a private entity consisting of a group of persons pursuing the objective of attacking a civilian population; in other words, of a group not necessarily endowed with a well-developed structure that could be described as quasi-State.’³⁸

International jurisprudence has also similarly expanded on the requirement of widespread and systematic – not requiring a formulaic calculation but allowing for more nuanced analysis.³⁹ There is no minimum number of civilians. The assessment of what constitutes widespread or systematic is to be conducted on

³³ See also K. Corrie, ‘Could the International Criminal Court Strategically Prosecute Modern Day Slavery?’, *Journal of International Criminal Justice*, 14:2 (2016): 285–303; H. van de Wilt, ‘Trafficking in Human Beings, Enslavement, Crimes Against Humanity: Unravelling the Concepts’, *Chinese Journal of International Law*, 13:2 (2014): 297–334.

³⁴ See most recently, *Prosecutor v. Bosco Ntaganda*, ‘Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda’, ICC-01/04-02/06-309, 9 June 2014, para. 23.

³⁵ See *Prosecutor v. Jadranko Prlić*, ‘Judgement’, IT-04-74, 29 May 2013, para. 35 and *Prosecutor v. Radovan Karadžić*, ‘Public Redacted Version of Judgement’, IT-95-5/18, 24 March 2016, para. 473.

³⁶ *Prosecutor v. Ndindiliyimana et al.*, ‘Judgement’, ICTR-00-56, 17 May 2011, para. 2087.

³⁷ *Prosecutor v. Blaskić*, ‘Judgement’, IT-95-14-T, 3 March 2000, para. 204.

³⁸ *Prosecutor v. Germain Katanga*, ‘Judgement Pursuant to Article 74 of the Statute’, ICC-01/04-01/07-3436-tENG, 7 March 2014, para. 1119.

³⁹ *Prosecutor v. Kunarac*, ‘Appeals Judgement’, IT-96-23 & 23/1, 12 June 2001, para. 95. See also *Prosecutor v. Stakić*, ‘Judgement’, IT-97-24-T, 31 July 2003, para. 625.

a 'case by case basis and may take into account the consequences of the attack upon the targeted population, the number of victims, the nature of the acts, the possible participation of officials or authorities, and any identifiable patterns of crimes'.⁴⁰ According to the Trial Chamber in *Taylor*, the pattern of mistreatment should not be 'isolated or random' but rather form 'part of a continuous campaign directed against civilians'.⁴¹ Lastly, the accused must have had known that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population. Depending on whether the accused is being held directly or indirectly responsible, the prosecution would have to prove at the very least the existence of a superior-subordinate relationship, that the superior had reason to know that the subordinate would commit the crime, and that the superior failed to take necessary and reasonable measures to prevent or punish the commission of crime by the subordinate. The burden of proof in this regard is often most challenging for prosecutors, especially when the accused has not been physically present at the crime scene.⁴²

Despite this evolution of the parameters of contextual requirements for crimes against humanity which would appear to show more flexibility, it is likely that the majority of TIP cases would not qualify as crimes against humanity for not fulfilling the contextual elements: imagine cases of TIP for domestic work for instance, or smaller scale TIP operations which could not be seen to constitute an attack, or to be in furtherance of a plan or policy. The clearest exception may be in the case of conflict, where in some cases, organized criminal groups engaging in TIP may commit crimes amounting to crimes against humanity and/or war crimes, where these additional elements are met.

Factors to be considered in assessing a potential organized criminal group's conduct as potentially that of sexual slavery/enslavement (TIP) as a crime against humanity could include whether the group is under a responsible command or has an established hierarchy; whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population; whether the group exercises control over part of a territory of a State; whether the group has criminal activities against the civilian population; whether the group articulates, explicitly or implicitly an intention to attack a civilian population; and whether the group is part of a larger group which fulfils some or all of the above criteria. Other factors of the crime pattern to be analyzed would include the number of criminal acts, the modus operandi of crime patterns, logistics and resources involved, the number of victims, the existence of public

⁴⁰ Karadžić, 'Public Redacted Version of Judgement', paras. 471-472, 477.

⁴¹ *Prosecutor v. Charles Ghankay Taylor*, 'Judgement', SCSL-03-01-A, 18 May 2012, para. 553.

⁴² ICTR, *Prosecution of Sexual Violence - Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions: Lessons Learned from the Office of the Prosecutor for the International Criminal Tribunal for Rwanda* (Tanzania, 2014), 31-34.

statements relating to the attacks, the means and methods used in the attacks and the timing of the attacks, among others.

Once the contextual requirements are established, the underlying act of sexual slavery/enslavement/TIP would need to be established. Here too has there been an important evolution in the international tribunals' jurisprudence on the concept of ownership – the crux of the elements of both enslavement and sexual slavery. In *Kunarac*⁴³ at the ICTY, the Appeals Chamber upheld a broader understanding of the concept of ownership. In the first case of enslavement before the ICTY, the defendants were charged for acts which included keeping two girls in a house for several months and treating them as personal property, requiring them to do household labour and subjecting them to sexual assault. The Trial Chamber found the abuse of power, the victim's position of vulnerability, psychological oppression or socioeconomic conditions to be relevant indicia of control and ownership.⁴⁴ In a subsequent ICTY case, *Krnjelac*⁴⁵, the Appeals Court considered whether the apparent consent of detainees was legally relevant to a determination on the charge of forced labour/enslavement. The Appeals Chamber reversed the Trial decision and convicted on the basis of a prevailing 'climate of fear' which made free consent impossible.⁴⁶ Important reasoning on the concept of ownership was advanced at the ICC in *Katanga*⁴⁷, although ultimately the charges of enslavement were acquitted (interestingly not for lack of evidence on the alleged acts but on the liability of the accused for the said acts). In *Katanga*, the Trial Chambers listed a number of factors which could be considered relevant to assessing ownership including vulnerability, mental coercion and socioeconomic conditions.⁴⁸ The Court in *Katanga* also highlighted the importance of the victim's perception of their situation as an indicator of their status – that is, 'the person's perception of his or her situation as well as his or her reasonable fear'⁴⁹.

The elements of crime for sexual slavery as a war crime, including TIP, have been less elaborated on in international jurisprudence than as a crime against humanity. The key contextual element which is different from sexual slavery as a crime against humanity is the requirement of a nexus between the crime and the international armed conflict. Armed conflict is found to exist 'whenever there is a resort to armed force between States or protracted violence between governmental authorities and organized armed groups or between such groups

43 Prosecutor v Kunarac et al., 'Trial Judgment', IT-96-23-T & IT-96-23/1-T, 22 February 2001 and Kunarac, 'Appeals Judgment', IT-96-23 & IT-96-23/1-A, 12 June 2002.

44 *Kunarac Trial Judgment*, para. 539.

45 Prosecutor v. Krnjelac, 'Appeals Chamber Judgment', IT-97-25-A, 17 September 2003.

46 Ibid. para. 194.

47 Katanga, 'Judgement Pursuant to Article 74 of the Statute', para. 975.

48 Ibid. para. 976.

49 Ibid. para. 977.

within a State'.⁵⁰ The crime may have been committed 'within the context' of the armed conflict⁵¹ and the armed conflict must have been international although an internal armed conflict may become international when an external State participates through proxies.⁵²

In sum, this brief look at the legal elements of the two legal frameworks – on the one hand, as TIP for sexual exploitation and on the other, as a crime against humanity (sexual slavery, enslavement) and/or as a war crime (sexual slavery) – reveals two distinct legal regimes, with separate elements of the crime, definitions of key legal terms, and the presence or not of contextual elements. Despite these differences, both frameworks have seen an evolution in the jurisprudence interpreting the limits of key terms such as 'consent' and 'ownership', towards an enlightened understanding of how victims fall under the control of their abusers, and how difficult it may be for them to leave or take advantage of opportunities to leave and how apparent willingness can be legally irrelevant if certain other conditions exist which negate that voluntariness.

4. Common Investigation and Evidential Challenges

Despite the different architecture of the two legal frameworks, it is asserted that in conflict situations, the commonalities in the investigation and prosecution of both crimes actually outweigh these differences.

4.1. Investigative Context

Investigating SGBV and TIP for sexual exploitation in situations of conflict will involve heightened risks for investigators, victim-witnesses, informants and all persons interviewed or even seen to be cooperating with the investigation. A thorough risk assessment would be even more of a necessity than in non-conflict TIP cases, although the overall reduced rule of law and lack of emergency response capacity of authorities will hinder that task. The investigator must be able to design a responsible evidence collection plan which takes into consideration the duty of care towards victim-witnesses and potential witnesses and elaborates tested risk mitigation strategies. National authorities in conflict countries are typically not able to provide initial response systems whereby witnesses can be removed from harm when faced with credible threats

⁵⁰ *Prosecutor v. Jadranko Prlić, 'Trial Judgment'*, IT-04-74, 29 May 2013, paras. 84-85, 92-96: see also *Prosecutor v. Tadić, 'Appeals Judgment'*, IT-94-1-A, 15 July 1999.

⁵¹ *Tadić, 'Appeals Judgment'*, para. 84.

⁵² *Ibid.*

to their safety or that of their family.⁵³ There is also an increased overall risk of criminality and insecurity which can obstruct, delay or complicate movements or actions of investigators. A further issue which has arisen in conflict cases is that witnesses frequently lack identity documents or have multiple identity cards/documents with variable dates of birth and other basic information. This may be normal for countries in situations of conflict and/or post-conflict, but it can cause – and has caused – serious obstacles for investigators and prosecutors who need to confirm identity of witnesses, as well as their dates of birth. Most of the first cases brought to trial at the ICC have thus far had to address this challenge – in some cases more or less successfully. In the *Lubanga* trial, the date of birth of witnesses, in this case, allegedly former child soldiers, was the critical issue at stake since the Prosecution was required to prove that the children were under the age of 15 at the time of their conscription/enlistment with the armed group.⁵⁴ While the Prosecution brought forward other corroborating identity documents such as voter registration cards, baptismal certificates, and forensic evidence, in addition to the testimony of family or community members as well as the victim-witness testimony itself, the Chambers ultimately relied most upon video evidence of the accused in the presence of child soldiers.⁵⁵ In the *Taylor* judgment, the Trial Chamber noted the challenge of the lack of reliable official identity documents to confirm age, and expressed caution on relying on witness testimony as to the appearance of the age of children, for instance.⁵⁶

4.2. Witness Protection

The lack of adequate witness protection capacity is often a characteristic of countries in situations of conflict. Countries with a small land-size or population are also typically challenged to provide safe houses or temporary relocation services where local populations are highly aware of whom is moving where. Even where proceedings take place in another jurisdiction, perpetrators may manage to threaten victim-witnesses at trial through their extended families and community networks. The situation of conflict makes it more difficult for judicial authorities to determine what is a threat from a witness cooperation and what is a threat from a conflict situation or insecurity in the

⁵³ S. Arbia 'The International Criminal Court: Witness and Victim Protection and Support, Legal Aid and Family Visits,' *Commonwealth Law Bulletin* 36:3 (2010): 519-528.

⁵⁴ A. Comrie, 'The Investigation of International Crimes against or Affecting Children: Early Experience at the International Criminal Court' in *International Criminal Investigations: Law and Practice*, ed. A. Babington-Ashaye, A. Comrie & A. Adeniran (Eleven Legal Publishing: The Hague, 2018), 135-169.

⁵⁵ *Prosecutor v. Lubanga*, 'Judgement Pursuant to Article 74 of the Statute', ICC-01/04-01/06-2842, 14 March 2012, para. 1348.

⁵⁶ *Taylor*, 'Judgement Summary', para. 1361.

country of origin. Courts will frequently consider whether there has been an objective threat to the victim-witness before awarding protection measures, but by the time evidence is available to document and confirm this threat, the victim-witness has already been exposed. International courts have thus far addressed the issue of victim witness protection in a number of key cases, trying to find a balance between awarding protective measures including witness relocation and redactions to identifying details in sources of evidence, and protecting the accused's right to a fair trial. The Prosecution's appeal of the Trial Chamber's acquittal of *Ngudjolo* included a ground on the basis of witness interference and intimidation by the accused. The Prosecution submitted that there was evidence of contact between the accused, his defence counsel and defence witnesses, and furthermore that Mr. Ngudjolo had given instructions to locate and intimidate Prosecution victim witnesses and their family members in the DRC.⁵⁷

4.3. International Cooperation

International cooperation is one of the major challenges facing investigators and prosecutors of transnational organized crime, and this is even more so when countries experience conflict. Governments experiencing conflict may be more likely to not cooperate at all with international justice mechanisms if they are seen to be allied to another side of the conflict. Poor response times to mutual legal assistance requests, a challenge for all States, are even more of an obstacle for countries in situations of conflict. A further related challenge for investigators outside of the country where the crimes have occurred is how to secure and preserve crime scene evidence.⁵⁸ Lastly, in countries experiencing conflict, the role of corruption may be more marked than in non-conflict situations – it will be difficult to assess but may affect the criminal justice process from evidence collection to trial and sentencing.

Investigators of TIP and SGBV in conflict situations may not have access to the full array of available evidence. Investigations at the ICC thus far have struggled with access to territory – for example in the Prosecutor's investigation into alleged crimes committed in Darfur, upon referral of the Security Council, where the Government of Sudan was not cooperative, investigators had to focus their attention on evidence which was physically located outside of the country. Likewise in the Libya situation, the Prosecutor was not able to investigate or

⁵⁷ *Prosecutor v. Mathieu Ngudjolo Chui*, 'Third Public Redacted Version of "Prosecution's Document in Support of Appeal against the Jugement rendu en application de l'article 74 du Statut"', ICC-01/04-02/12-39-Red2, 19 March 2013, paras. 140-141.

⁵⁸ R. Rastan & P. Turlan, 'International Cooperation and Judicial Assistance', *International Criminal Investigations: Law and Practice*, ed. A. Babington-Ashaye, A. Comrie & A. Adeniran (Elsevier International Publishing: The Hague, 2018), 31-66.

access the territory due to security threats despite the Security Council referral.⁵⁹ In most of the ICC's investigations so far, the Prosecutor had to limit or delay contact with victim-witnesses out of concern for their safety, until appropriate measures were put in place, or declined where they could not be.⁶⁰ The Prosecutor's policy is only to interview victim-witnesses where there is an emergency response system put in place in case of any threats to the safety and security of witnesses.⁶¹ Investigators on transnational TIP cases may also need to overcome limited availability of evidence, in part linked to poor international cooperation. Attention is also needed to ensure that evidence collected outside of the jurisdiction is fully admissible in the home jurisdiction where the establishment of a joint investigation team has not been sought or is impossible.

4.4. Limited Access to Sources of Evidence

For all of the above reasons, investigators within these two legal frameworks may need to look to victim service providers, most often non-governmental organisations (NGOs), for access to victim-witnesses.⁶² SGBV crimes are characterized by low self-reporting, often linked to fear of social stigma, lack of trust in the criminal justice process and even the fear of being penalized/criminalized for having been a victim in the first place.⁶³ Likewise in TIP in conflict cases, victims have less reason to trust the authorities since there is likely to be a breakdown of the rule of law if they remain in the conflict zone. When victims are on the move, they are most likely in an irregular status – they may have turned to the services of smugglers, crossing a border irregularly to request asylum in a safe country. Fear of immigration status reprisals is one of the major inhibitors to TIP victims' self-identifying and self-reporting and traffickers regrettably are aware of this and use it as a means of further control over victims. Relying on NGOs to access victim-witness evidence in cases of sexual violence/TIP in conflict situations raises new complications, not only

⁵⁹ 'State Cooperation with International Criminal Court Vital to Ensure Justice for Victims of Atrocity Crimes in Libya, Prosecutor Tells Security Council', *UN News*, 8 May 2017.

⁶⁰ The ICC's Office of the Prosecutor's 2016-2018 Strategic Plan notes that: "almost all cases in the confirmation of charges and trial phases have been or are confronted with incidents of obstruction of justice - in particular witness tampering." See for instance, ICC cases, *The Prosecutor v. Thomas Lubanga Dyilo* and *The Prosecutor v. Germain Katanga* where issues of witness security, witness identity and confidentiality were issues of contention between all parties.

⁶¹ ICC Office of the Prosecutor, *Policy Paper on the Interests of Justice* (The Hague: 2007), 4. See also Rome Statute, Article 68(1).

⁶² Whiting A., 'The ICC OTP Cannot Do It Alone: New Institutions are Required to Support the Work of First Responders', *ICC Forum: How to Improve Cooperation of First Responders to Assist ICC Investigations of SGBV?*, 12 April 2016, <https://iccforum.com/sgbv>, accessed 31 October 2018.

⁶³ UNSC, *Report of the SG on CRSV* (2018), para. 5.

for victim-witnesses but also for the legal status and staff of the NGO. Should the parties to the conflict learn of the role of the NGO in facilitating contact with victims⁶⁴ for a criminal investigation, operating licenses or legal status can be lost which further endangers other victims of SGBV or human rights violations receiving crucial assistance and protection. Whereas international NGOs may cease operating temporarily or over the longer term, national NGOs will not have the benefit of removing their staff from the situation and their lives may be at risk.

A number of important lessons were learned at the ICC in the management of intermediaries by the prosecution/investigation teams in early cases.⁶⁵ Questions around the integrity, confidentiality and reliability of intermediaries were tested in early pre-trial jurisprudence, the result being that several intermediaries and victim-witnesses they had facilitated contact for, were deemed to be unreliable at trial due to lack of management oversight by the investigating team.⁶⁶

Given these challenges, an important prosecutorial strategy in international tribunals and national systems has been to reduce the overall number of victim-witnesses called to testify, in some cases relying on expert witnesses to corroborate the crime pattern.⁶⁷ Integrating sophisticated crime pattern analysis at the early investigative phase can be an effective way to develop a body of corroborating evidence which reduces the burden on victim testimony, including through secondary analysis of open sources.⁶⁸ This can include ‘macro’ witnesses, or witnesses who can provide statistical analysis using a social science, victim-interview sampling methodology.⁶⁹ Expert witnesses have been called upon to establish the nature of sexual violence trauma on victims, on the nature of memory recall,⁷⁰ and the nature and extent of the injuries endured, and on

⁶⁴ ICTR, *Prosecution of Sexual Violence - Best Practices Manual*, 35.

⁶⁵ ICC, *Guidelines Governing the Relations between the Court and Intermediaries for the Organs and Units of the Court and Counsel Working with Intermediaries* (The Hague: 2014).

⁶⁶ See A. Putt, ‘Legal Constraints on the Use of Intermediaries in International Criminal Investigations’ in *International Criminal Investigations: Law and Practice*, ed. A. Babington-Ashaye, A. Comrie & A. Adeniran (Eleven International Publishing: The Hague, 2018), 171-192.

⁶⁷ L. Baig et al., ‘Contextualizing Sexual Violence: Selection of Crimes’ in *Prosecuting Conflict-Related Sexual Violence at the ICTY*, eds. S. Brammertz & M. Jarvis (Oxford: Oxford University Press, 2016), 172-219.

⁶⁸ X. Agirre, ‘Sexual Violence beyond Reasonable Doubt: Using Pattern Evidence and Analysis for International Cases’, *Leiden Journal of International Law* 23.3 (2010): 609-627.

⁶⁹ J. Hagan, ‘The ICC Can Sustain a Conviction for the Underlying Crime of Mass Rape Without Testimony from Individual Victims of Mass Rapes, Basing its Proof Instead on Sample Survey Interviews Including Witness Reports of Mass Rapes and Sexual Victimization Gathered and Aggregated in Statistical Analyses by Social Scientists’, *ICC Forum on Mass Rape*, <https://iccforum.com/massrape#Hagan>, 26 June 2012, accessed 23 November 2018.

⁷⁰ See for instance *Prosecutor v. Bosco Ntaganda*, ‘Transcript of Dr. John Yuille, Expert Witness for the Prosecution’, ICC-01/04-02/06, 18 April 2016.

the cultural norms⁷¹ which may have mediated the trafficking/exploitation experience. Expert witnesses have also been needed in some cases to establish complex political, military and geographic contexts which shape conflict patterns or the rise and fall of armed and organized criminal groups. In TIP for sexual exploitation cases, expert witnesses have successfully explained the effects of control mechanisms used by perpetrators such that the victim did not feel that she or he had the opportunity to escape or could safely take advantage of such an opportunity.⁷²

4.5. Victim-Witness Evidence Collection

Despite all its challenges, victim-witness evidence is still often the crux of the prosecution's case in many TIP and SGBV in conflict cases. The continued reliance on victim testimony may be attributed to several factors, including the lack of other available evidence (or lack of efforts to obtain it), and the emotional or narrative power of the victim's story which prosecutors and/or judicial authorities feel important to secure a conviction. In many international and national jurisdictions, despite the lack of a requirement for corroboration,⁷³ there is still a judicial preference for corroborated witness testimony although some landmark cases have been won without the cooperation or participation of the victim.⁷⁴ As one practitioner noted, the absence of corroborating evidence should not diminish the testimonial evidence for sexual violence in conflict crimes.⁷⁵

In conflict situations, low-profile or undercover interviews are difficult to conduct – especially in towns or villages with a high degree of kinship/community ties. Not only do victims face threats to their safety, but they must also overcome the social stigma surrounding SGBV crimes. Victims may not wish to testify, which can at the very least, trigger their memory of the events, and

⁷¹ See for instance, E. Schauer, 'The Psychological Impact of Child Soldiering, Expert Witness Brief in support of the Prosecution in *Prosecutor v. Lubanga*', (2009).

⁷² High Court of Justice, Edo State of Nigeria, *Attorney General of the Federation v. Constance Omoruyi*, Charge No. B/31C/2004, 22 September 2006, as discussed in UNODC, *Evidential Issues in Trafficking in Persons Cases*, 154-156.

⁷³ ICC, *Rules of Evidence and Procedure*, Rule 63(4) states that: 'Without prejudice to article 66, paragraph 3, a Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular, crimes of sexual violence'.

⁷⁴ *Constance Omoruyi*, discussion of *Omoruyi* case, in UNODC, *Evidential Issues in Trafficking in Persons Cases*, 154-156.

⁷⁵ I. Marcus, 'Positive (and Practical) Complementarity: Practical Tools for Peer Prosecutors and Investigators Bringing Atrocity Crimes Cases in National Jurisdictions' in *International Criminal Investigations: Law and Practice*, ed. A. Babington-Ashaye, A. Comrie & A. Adeniran (Eleven International Publishing: The Hague, 2018), 297.

at the very worst, expose themselves publicly as witnesses for the prosecution.⁷⁶ In addition, many victims of TIP and sexual violence may not want to self-identify as victims of these crimes, but may appear to be focused on material losses – such as loss of income, livestock or home, as much as the damage endured as a result of the sexual violence/exploitation. Attention to lost property, wages and household goods by victim-witnesses can be misread by investigators, prosecutors and judges but may also be an indication of the victim's desire for compensation and restoration of their rights,⁷⁷ or be an easier 'mistake' to speak about, in the words of one UK practitioner speaking about victims of TIP:

'Men often do not want to expose their physical or mental ill-treatment, fearing that they will be seen as weak, but are certainly willing to say that they have not been paid, as that is not a reflection of who they are but of what someone else has done wrong.'⁷⁸

4.6. Sexual Violence and Exploitation

The investigation of sexual violence and TIP for sexual exploitation in conflict clearly requires dedicated resources with specialized training on interviewing victims.⁷⁹ On the one hand, there is a need to reduce the number of interviews to reduce potential traumatization but yet it is important to establish rapport over time with the victim in order to nurture the victim's own readiness to elaborate testimony.⁸⁰ The likelihood of traumatization may be higher because of the added context of conflict which may include mass killings, torture, forced displacement, pillaging and other non-sexual forms of enslavement. The potentially high traumatization can affect all stages of the investigation, from first contact and free narrative account of the violence, to overall lack of detailed memory recall. Victim-witnesses may not be able to recall pertinent details in chronological order and in a consistent way.

Many victims of SGBV in conflict will not reveal the full details of their horrific experiences at the first interview, resulting in several interview statements which can be deemed 'inconsistent' to professionals who are not trained in the dynamics of traumatic memory recall. The victim may initially conceal

⁷⁶ M. Jarvis & K. Vigneswaran, 'Challenges to Successful Outcomes in Sexual Violence Cases' in *Prosecuting Conflict-Related Sexual Violence at the ICTY*, eds. S. Bammertz & M. Jarvis (Oxford: Oxford University Press, 2016), 42.

⁷⁷ Own practice.

⁷⁸ As cited in UNODC, *Evidential Issues in Trafficking in Persons Cases*, 19.

⁷⁹ D. Luping, 'Investigation and Prosecution of Sexual and Gender-Based Crimes before the International Criminal Court', *American University Journal of Gender, Social Policy & the Law* 17.2 (2009): 431-496.

⁸⁰ ICTR, *Prosecution of Sexual Violence - Best Practices Manual*, 50.

large parts of their narrative due to shame, stigma, or fear of the perpetrator.⁸¹ The victim may resort to euphemisms and show reluctance to discuss the actual acts of rape/penetration and requires specific training techniques on part of interviewer to elicit these in a respectful but comprehensive way. The victim will ideally benefit from psychosocial evaluation/intervention and support prior to interview, during and after the interview to ensure that consent to interview is freely and fairly given, to avoid re-traumatization and to support the victim's own survival/coping strategies. Victims may show exceptional fear for authority figures including law enforcement and international civil servants where police, military and staff of international organizations (including peacekeepers) have been perpetrators of SGBV.

A further challenge is posed by victim-witnesses who have endured repeated traumatic episodes, for example victims who endured in sexual slavery in conflict. A victim-witness who was raped by multiple combatants every day over a period of several months is unlikely to be able to recall the details of one specific episode when asked to distinguish one crime from another or focus on a particular instance unless that instance of sexual violence was different in some way from the other episodes. Victim-witnesses of sexual violence in conflict situations typically have difficulty in identifying perpetrators, who may be concealed from victims.⁸² Victims may only remember generic details such as – 'he wore an army camouflage', 'she spoke X language' – but may be unable to remember name, title, rank or other identifying features. Conversely though, in the case of sexual slavery and forced marriage, some victims have the most intimate and compelling evidence against high-level commanders, including detailed knowledge of the organized criminal group and command structure. Victim-witnesses may not behave as they are 'expected to' by prosecutors, defense attorneys and judges – they may not show emotion on cue, they may laugh at inappropriate times, in line with evolved understanding of trauma and impacts on memory recall.

Investigators will need to be prepared to deal with a number of practical health and logistic concerns including the presence of children born of rape, hungry or ill victim-witnesses, breastfeeding mothers, husbands/partners or family members who do not support the interview process because of the shame associated with violence or because of their alignment with a party to the conflict.

At trial, the issue of consent may be at the core of the victim's testimony, both for TIP for sexual exploitation (although it is explicitly deemed to be legally irrelevant, it often finds its way into the courtroom narrative, usually by the Defense) and in SGBV crimes, even where coercion renders the apparent con-

⁸¹ A. de Brouwer, 'The Importance of Understanding Sexual Violence in Conflict for Investigation and Prosecution Purposes', *Cornell International Law Journal* 48.3 (2015): 663-664.

⁸² ICTR, *Prosecution of Sexual Violence - Best Practices Manual*, 45.

sent invalid. Cultural/personal or other norms of judicial authorities can creep into the judicial assessment of consent and manifest itself commonly in questioning as to why victim did not fight back; considering as non-victim a victim who has 'agreed' to their sexual exploitation, who went back to their exploiter/perpetrator despite strong indicators of vulnerability, or victims who initially consented because they sought to better their life conditions. Regrettably it seems that there is a greater challenge to prove SGBV and TIP cases where there is a lack of violence or physical constraint, and when victim had some or limited mobility. A full and informed vulnerability assessment/presentation of will be of essence in showing the full nature of the coercive environment in which victims make decisions.

Protective measures at trial including having an accompanying support person, protective screens preventing the victim from making eye contact with the accused, measures to protect the identity of the victim from the broader public (redactions of any identifying details from public documents, usage of code number instead of names – although the accused will in most jurisdictions have a right to know the identity of the accuser), are all measures which should be requested by the prosecution team in order to protect the victim-witness of TIP for sexual exploitation and SGBV crimes.⁸³

In addition to interviewing victims of sexual violence, it is important that the investigative team mainstreams questioning and follow up actions on sexual violence within the broader spectrum of all the crime base, including mass killings, conscription and enlistment of child soldiers, forced labour and forced displacement – in order to ensure that sexual violence is not treated as a 'collateral' crime.⁸⁴ This may also involve overcoming the unease of investigators and prosecutors (as well as interpreters) in pursuing these investigations, compelling them to identify own biases.⁸⁵

4.7. Child-Victim Witnesses

Child victim-witnesses of SGBV in conflict will have additional needs and rights. Child victims may have been forced to assume various roles – from combatant to laborer to sexual slave, and may have been forced to commit crimes including very serious crimes (murder, rape, mutilations, pillaging). Age determination is complex, especially in the case of conflict, given the lack of identity papers and reliable institutions to preserve and record civil status documents. Medical examinations of child victims may not yield conclusive

⁸³ See ICC, *Policy Paper on Sexual and Gender-Based Crimes* (The Hague: 2014) and UK Foreign & Commonwealth Office, *International Protocol on Documenting and Investigating Sexual Violence in Conflict* (London, 2017).

⁸⁴ ICTR, *Prosecution of Sexual Violence - Best Practices Manual*, 29-30.

⁸⁵ Baig et al., 'Contextualizing Sexual Violence: Selection of Crimes', 172–219.

answers to the question of the age of the victim, which can be a critical issue in child conscription and enlistment cases. Concepts such as age, childhood, victim and wife are also subject to cross-cultural misinterpretation and may require additional attention from the investigator.

Children may have developed coping mechanisms hostile to successful witness testimony, and they may also struggle to tell linear narratives of their victimization. Despite protections in international criminal law for child victim-witnesses, international courts have thus judged child victim-witnesses very harshly.⁸⁶ The UN TIP Protocol does contain additional language to the benefit of child victims to the essence that no child can ever consent to their exploitation.⁸⁷ A challenge that is frequently reported in TIP cases involving child victims is that children frequently go ‘missing’ from foster or state care institutions before the trial ever begins. Children fleeing conflict or on the move trying to reunite with lost family members are particularly vulnerable and would be susceptible to returning to a perpetrator if they were made to believe that this would help them achieve their goal of finding their family members. The potential complicity of parents is an additional factor – parents may have ‘sold’ children in TIP cases or ‘agreed’ to have their child ‘married’. In other instances, parents have testified to counter the testimony of child victim-witnesses, as was the case in the *Lubanga* and *Katanga* cases at the ICC.

4.8. Linkage Evidence

Insider or suspect testimony can be especially persuasive but requires an investment of significant investigative resources, as well as long term and proactive investigative techniques. The difficulty in establishing linkage evidence between perpetrators directly committing the crimes and those higher level perpetrators directing/commanding the criminal conduct is one of the most well-known challenges facing investigators of international crimes.⁸⁸ In the *Katanga* case at the ICC, the Court ultimately acquitted the accused of the sexual slavery and enslavement charges, although the Chambers made efforts to note that they found the three female victim-witnesses who were kidnapped and sexually enslaved at the attackers’ camp to be credible and that the alleged crimes had occurred.⁸⁹ Nevertheless, the Court was not convinced of the liability of the accused – of his link as the commander of the armed group who committed the attack – to the persons who committed the sexual violence.⁹⁰

⁸⁶ Comrie, ‘The Investigation of International Crimes against or Affecting Children’.

⁸⁷ See *UN Trafficking in Persons Protocol*, Article 3(c).

⁸⁸ de Brouwer, ‘The Importance of Understanding Sexual Violence in Conflict for Investigation and Prosecution Purposes’, 662-663.

⁸⁹ *Katanga*, ‘Judgement Pursuant to Article 74 of the Statute’, para. 1664.

⁹⁰ *Ibid.*

In TIP cases, there is a tendency for prosecutors to charge lesser crimes such as prostitution or pimping, facilitating illegal stay – rather than TIP for sexual exploitation which requires act, means, and purpose of exploitation. What is clear for both crime sets is the need for greater investigative resources, advanced investigative techniques and advanced intelligence and analysis in order to identify crime patterns, modus operandi, and the commanders or persons most responsible for the organized criminal groups.⁹¹

5. Conclusion

Whether a particular case should best be pursued as a sexual violence in conflict crime within international criminal law or as TIP for sexual exploitation within national/transnational criminal law will inevitably need to be evaluated on a case by case basis. Not all cases of TIP for sexual exploitation will amount to a crime against humanity or a war crime. Both represent the gravest human rights violations and violate the dignity of victims and require a rights-based approach. An important first step is to ensure that domestic legislative frameworks are fully harmonized and comprehensive of both TIP and international crimes, including provisions on international cooperation. Whether for the purposes of advancing national prosecutions, or as a last resort, international prosecutions, the existence of comprehensive national legislation helps to facilitate joint investigation and mutual legal assistance. Victims of sexual violence and TIP in conflict should moreover access the full array of assistance and protection measures available to them in national and international law.

While on first glance, the elements of crimes for TIP and sexual slavery/enslavement as a crime against humanity/war crime are quite distinct, both crimes have benefitted from a more expanded and nuanced interpretation of the core definitional terms of each, such as ‘ownership’, ‘vulnerability’ and ‘consent’. Likewise, a closer examination of the key evidential challenges facing investigators and prosecutors within both legal frameworks reveals a number of striking similarities. Despite the legal irrelevance of consent to TIP for sexual exploitation in the presence of illicit means, and to rape or sexual violence in the presence of coercion or other vitiating factors, it would seem that there remains an important risk that victims will be judged upon whether they were willing participants to their suffering, to whether they act/speak/display ‘appropriate’ emotional reactions, whether they recall dates and events in chronological order and whether they have identity or other official documents available. In-

⁹¹ See also more generally, ‘ICC Forum: Do Individual Victims of Mass Rape Have to Testify?’, <https://iccforum.com/massrape>, 26 June 2012.

investigators of both sets of crimes would want to avoid relying on victim witness testimony, fully aware of the valid reasons why a victim witness may decline to testify, but may nevertheless face limited sources of evidence due to lack of cooperation across borders, lack of available documentary, forensic, financial or crime scene evidence, in part due to the conflict. And perhaps most crucially, investigators of each crime set will struggle to link the underlying or individual crime with the higher level command of the organized/armed group or leader.

What is clear is that the effective investigation and prosecution of transnational organized crime, including human trafficking, is a key strategy in promoting complementarity and ending the impunity gap for sexual violence in conflict at the international level.

One of the key conclusions of the UN Secretary-General's 2017 Report on TIP in conflict situations is that Member States should 'enhance cross government coordination against trafficking in persons and consider deploying teams of specialized professionals in areas affected by conflict to strengthen the collection of evidence, investigation and identification of victims'.⁹²

The development of specialized capacity which could address the full spectrum of evidence and issues in both frameworks throughout the investigation and prosecution chain would be a critical factor in the success of cases brought on either charge. It would also be a step towards improved international cooperation on mutually relevant cases since investigations of both crime sets will likely confront significant and common evidential challenges.

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⁹² UNSC, *Report of the SG on CRSV* (2018), para. 71.

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