

Violent Religious Extremism and its Chilling Effect on Religious Liberty: An International Criminal Law Perspective

Article by Jonathan Craig-Mendes

Throughout the world, violent religious extremism manifests itself in many ways. Some are overt, while others are more subversive. This article makes note of one way that such extremism may manifest—namely, in an extremist group’s subjugation of another religious group. Whether the dominating group uses force or merely intimidation to achieve its ends, the result is the same: the subjugated group becomes afraid to openly practice their religion for fear of retaliation by the extremist(s). This conduct attacks the personal identity and sense of self of the subjugated, and these abuses warrant international condemnation. Here, this article argues that such condemnation is best achieved through the prosecutorial function of the International Criminal Court (ICC)—specifically, in its jurisdiction over the crime against humanity of torture. Where the crime of “terrorism” is not formally defined in international law, the crime against humanity of “torture” is both defined and entails a jus cogens norm prohibiting the practice outright. Utilizing the broad definition of torture as an international crime, the ICC might be able to premise prosecutions on a new body of evidence related to that crime, thus tangibly expanding its influence and making a visible step toward its stated goal to “end impunity.”

I. Introduction	2
II. Survey of Violent Religious Extremist Groups by Religion	4
A. The “Christian Identity” Movement, White Nationalism, and the Proud Boys	5
B. Kahanism, Kahane Chai, “Kach,” and the Jewish Defense League (JDL)	11
C. The Palestinian Islamic Resistance Movement, A/K/A “Hamas”	16
II. The Extremism Problem: How and Why	20

A. Defining Violent Religious Extremism: Who to Police?	21
B. The Mechanisms of Religious Liberty Restriction by Violent Religious Extremism	26
III. A “Quasi-Preemptive” Approach to Prosecutions of Violent Religious Extremism Under International Criminal Law	29
1. Defining Torture in International Law	33
2. Applying Definitions of Torture in International Criminal Law Cases: Actus Reus and Mens Rea	38
3. Applying Definitions of Torture in International Criminal Law Cases: The Nexus	44
B. Individual and Joint Culpability of Violent Religious Extremists Under International Criminal Law	48
C. Considerations Pertaining to Universal Jurisdiction	53
IV. Lesser Preliminary Matters Concerning the ICC, and Defenses in Favor of the “Quasi-Preemptive” Approach	55
A. International Criminal Court Jurisdiction	55
B. Complementarity and “Quasi-Preemptive” Prosecution	57
C. The Gravity Threshold	58
V. Conclusion	62

I. INTRODUCTION

“Extremism” is a charged label. It conveys a strong negative association that “others” those associated with it. To be extreme is to fall outside of the established norms of a society, and this characterization is necessarily strong in instances where the extremist attacks or rebels against the mainstream through violence. As an identifier, religious extremism furthers the “othering” function by highlighting two differing features of the party characterized as extreme: their unique religiosity and their extreme belief or practice. Presently, no definition exists for the ideas of violent extremism nor terrorism in

international law,¹ though such frameworks have been proposed.²

Considering how charged the “extremist” label is, whether or not a negative “othering” is warranted might best be understood in the context of the actions of the group or individual religious. For example, where the views of a religious sect advocate extreme asceticism, as for some adherents of Jainism, that form of religious extremism is intentionally limited in effect to the individual religious. Because the effect is limited, though severe, characterizing ascetic Jains as religious extremists serves little legal or social utility, where extremism values an interactive comparative view between the extreme and the mainstream.³ In essence, if the conduct of the extremist doesn’t harm anyone else, there’s no legal need to label them an extremist, regardless of how fringe their self-harming practices are. There is similarly no social safety need to other that individual.

Towards this utility, and considering the legalistic and criminological orientation of this piece, this article will invoke the term “religious extremism” in the light of the political. Specifically, violent religious extremism here is defined as “comprising ideological beliefs about an obligation to bring back the political system to a form suggested by religious norms through violence.”⁴ As will be discussed in section II, violent religious extremism can further be understood as a culmination of a trajectory of

¹ Off. of the United Nations High Comm’r for Hum. Rts., *OHCHR and Terrorism and Violent Extremism*, <https://www.ohchr.org/en/terrorism> (last visited Nov. 26, 2023).

² See generally United Nations Sec. Council (UNSC) Res 1566 (8 October 2004) UN Doc S/RES/1566.

³ See generally Susilo Wibisono et al., *A Multidimensional Analysis of Religious Extremism*, 10 FRONTIERS IN PSYCHOL. (2019). This study examines multiple definitions of “extremism” in the religious context—all geared towards the intergroup relation between the extreme and the mainstream.

⁴ *Id.* at 2; citing Michael P. Arena & Bruce A. Arrigo, *Social Psychology, Terrorism, and Identity: A Preliminary ReExamination of Theory, Culture, Self, and Society* 23 BEHAV. SCI. & THE L. 485 (2005).

individual religious identity into group-based violence.⁵ While not necessarily identical, the terms “religious extremism” and “violent religious extremism” will be used interchangeably.⁶

This article seeks to examine current religious extremist groups and to advocate for a novel international criminal law (“ICL”) approach to the policing of these groups. Limiting its analysis to representative extremist organizations of the three major monotheistic Abrahamic religions (Christianity, Judaism, and Islam), this article attempts to both demonstrate the problem of violent religious extremism in the modern global plural context and underscore the need for international penal action in addressing that religious extremism problem.

II. SURVEY OF VIOLENT RELIGIOUS EXTREMIST GROUPS BY RELIGION

In examining religious extremism in the modern context, it is worth surveying the current landscape of extreme religious factions and subgroups. While no truly objective standard exists to aid in determining the level of

⁵ Wibisono and Jetten, *supra* note 3, at 2 (citing Mitchell Silber et al., *Radicalization in the West: The Homegrown Threat*, U.S. DEP’T OF JUST.: OFF. JUST. PROGRAMS, https://web.archive.org/web/20090203150509/http://www.nypdshield.org/public/SiteFiles/documents/NYPD_Report-Radicalization_in_the_West.pdf. (last visited Oct. 20, 2023)). 1-90.

⁶ This lack of distinction is included for the sake of brevity and to avoid repetition. Importantly, it is not a commentary on any substantive legal or linguistic difference the two terms may present. A further note on semantics is that radicalism is not equivalent to extremism. Legally, radicalism is best understood as a precursor to extremism, because radicalism employs “political violence pragmatically and on a selective basis.” See Astrid Bötticher, *Towards Academic Consensus Definitions of Radicalism and Extremism*, 11 PERSP. ON TERRORISM 73, 75 (2017).

extremism of a given group,⁷ the organizations discussed here are arguably justified in being labelled as extremist for the following reasons: 1) the organizations have been labelled as such by third parties, and 2) the organizations have each engaged in violent acts in furtherance of a shared view, where that view is seen as extreme by the mainstream community. As discussed in Section II, *infra*, the classification of these groups as religiously extreme is also subject to debate and further inquiry. Importantly, this proposed metric attempts to qualify the discrepancy between countries who view one group through different contextual lenses.

A. The “Christian Identity” Movement, White Nationalism, and the Proud Boys

The Christian Identity (“CI”) movement began as a form of “British Israelism” in the late 19th century.⁸ Once imported into the United States, the identity took hold within the Ku Klux Klan, among other ideological factions.⁹ More recently, the Proud Boys adopted this

⁷ Some researchers and sovereigns have attempted to quantify the risk of individual extremist groups, to varying degrees of success. *See, e.g.*, RTI International, *Countering Violent Extremism: The Use of Assessment Tools for Measuring Violence Risk*, RTI Project No. 0214428.004, R-1 (Dept. of Homeland Sec., Sci. and Tech. Dir. Mar. 2017), <https://www.dhs.gov/publication/st-frg-countering-violent-extremism-useassessment-tools-measuring-violence-risk>.

⁸ *See Chapter 7: The Christian Identity Movement*, in *EXTREMISM IN AMERICA* 188-217 (George Michael & George Michael eds., Univ. Press of Florida Dec. 2013). *See also* ADL Staff, *Backgrounder: Christian Identity*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/resources/backgrounder/christian-identity> (last visited Oct. 20, 2023). “British Israelism” here refers to the creed that northwestern Europeans are the “true descendants of the ten lost tribes of Israel.”

⁹ *Id.*

ideological creed from their inception.¹⁰ The Proud Boys movement was founded as recently as September 15th, 2016, by Gavin McInnes. The group began as an all-male, far-right fraternal organization.¹¹ Since this initial establishment, the organization has “become more extremist.”¹² “The group’s official ideology includes allegiance to western culture and stresses elevating masculinity, opposing Islam, and defending its community from a perceived ‘war on whites.’”¹³

Because the Proud Boys are an American group, I approach them here in the American law context. In this context, domestic acts of terror pose an interesting problem insofar as they conflict with fundamental notions of due process and individualized criminal culpability.¹⁴ Through the American criminal law system, individual criminals are subjectivized in light of the context of their criminal acts.¹⁵ The US Government therefore avoids the issue of labelling internal domestic groups as “extremist,” because it is rare that said groups’ members act in perfect concert. In fact, “there is no legal mechanism in the United States to designate a domestic group as terrorist

¹⁰ Middlebury Inst. Int’l Stud. at Monterey, *Christian Identity’s New Role On The Extreme Right*, MIDDLEBURY INST. INT’L STUDIES, CTR. ON TERRORISM, EXTREMISM, AND COUNTERTERRORISM, <https://www.middlebury.edu/institute/academics/centersinitiatives/cte/c/ctepublications/christian-identitys-new-role-extreme-right> (last visited Oct. 20, 2023).

¹¹ *Proud Boys*, Stanford Univ. Ctr. for Int’l Sec. and Cooperation, MAPPING MILITANT ORGS., <https://cisac.fsi.stanford.edu/mappingmilitants/profiles/proud-boys> (last visited Oct. 20, 2023).

¹² *Id.*

¹³ Alan Feuer & Jeremy W. Peters, *Fringe Groups Revel as Protests Turn Violent*, N.Y. TIMES (June 3, 2017), <https://www.nytimes.com/2017/06/02/us/politics/white-nationalists-alt-knights-protestscolleges.html>.

¹⁴ Rashawn Ray, *Why is It so Hard for America to Designate Domestic Terrorism and Hate Crimes?*, BROOKINGS (Oct. 20, 2023), <https://www.brookings.edu/articles/why-is-it-so-hard-for-america-to-designate-domestic-terrorism-and-hate-crimes/>.

¹⁵ For representative internal guidance on this topic at the federal level, see U.S. Dep’t of Justice, *Principles of Fed. Prosecution*, JUST. MANUAL § 9-27.000, <https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution> (last visited Oct. 20, 2023).

or extremist.”¹⁶ Often, it is lone individuals committing violent acts in furtherance of a shared ideology.¹⁷ This choice on the part of the US Federal and State Governments to limit discussions to the individual criminal in each case indirectly suppresses inquiry into sociological aspects of groupthink so common in radicalization and extremism.¹⁸ Notwithstanding the lack of a domestic terrorist categorization within the United States, international entities have nonetheless labelled the Proud Boys as a terrorist organization.¹⁹

The Proud Boys, as a timely representative sample of adherents of the Christian Identity movement, justify their violent actions several ways. Chief among these is the movement’s conflation of religious and racial identity. Drawing from their British Israelism roots, the Proud Boys promote “accelerationist,”²⁰ “third positionalist” /

¹⁶ Stanford Univ. Ctr. for Int’l Sec. and Cooperation, *supra* note 11. See also Anna Meier, *What Does a “Terrorist” Designation Mean?*, LAWFARE, <https://www.lawfaremedia.org/article/what-does-terroristdesignation-mean> (last visited Oct. 20, 2023).

¹⁷ See *FBI Most Wanted: Domestic Terrorism*, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/wanted/dt> (last visited Oct. 20, 2023). A cursory search will reveal no organizations, only individuals.

¹⁸ Eteri Tsintsadze-Maass & Richard W. Maass, *Groupthink and Terrorist Radicalization*, 26 *TERRORISM AND POL. VIOLENCE* 735 (Routledge Oct. 2014).

¹⁹ As of this writing, the Proud Boys are listed as a terrorist organization by the Canadian and New Zealand governments. See Emma Jacobs, *Proud Boys Named “Terrorist Entity” In Canada*, NPR (May 2021), <https://www.npr.org/2021/05/02/992846086/proud-boys-named-terrorist-entity-in-canada>. See also Nick Perry, *New Zealand Declares Proud Boys a Terrorist Organization*, PBS NEWSHOUR, <https://www.pbs.org/newshour/politics/new-zealand-declares-proud-boys-a-terrorist-organization> (last visited Nov. 26, 2023).

²⁰ The “accelerationist” ideology manifests “an active desire among [Christian Identity] adherents to expedite the Battle of Armageddon.” See Middlebury Inst. of Int’l Studies at Monterey, *supra* note 10.

“new right”²¹ rhetoric, while asserting quasi-religiosity partially in-line with the American Protestant Fundamentalist movement of the 1970’s.²²

The general Christian Identity movement, however, differs from fundamentalism in important ways:

Like British Israelites, all [Christian Identity] adherents consider Anglo-Saxons to be the descendants of the Lost Tribes of Israel. [Christian Identity] followers interpret the Bible literally and believe we are living in “The Last Days.” They also maintain that the Great Tribulation and the Battle of Armageddon, the latter of which will manifest as a racial holy war, is near.²³

The Christian Identity movement then began to distance itself from the British Israelite worldview in the 1970’s, accentuating racist and antisemitic motifs in lieu of pyramid studies.²⁴

In contrast to the early *modus operandi* of the Proud Boys, the group began acting in a more distinctly coordinated manner following the 2020 United States presidential election.²⁵ “The Proud Boys engaged in near-daily violent demonstrations in Portland during the summer of 2020, leading Oregon’s governor to declare a state of emergency in September. Proud Boys members

²¹ Chip Berlet, *What is the Third Position?*, POL. RSCH. ASSOCS., <https://politicalresearch.org/2016/12/19/what-third-position> (last visited Oct. 20, 2023). In brief, the “third position” ideology “seeks to overthrow existing governments and replace them with monocultural nation states built around the idea of supremacist racial nationalism and/or supremacist religious nationalism.” *Id.*

²² See Michael Barkun, *Christian Identity’s Millenarian Vision of History*, in RELIGION AND THE RACIST RIGHT: THE ORIGINS OF THE CHRISTIAN IDENTITY MOVEMENT 103 (U. N. Carolina Press 1997).

²³ Middlebury Inst. of Int’l Studies at Monterey, *supra* note 10. See also Tanya Telfair Sharpe, *The Identity Christian Movement: Ideology of Domestic Terrorism*, 30 J. BLACK STUD. 604, 607-10 (2000).

²⁴ See Barkun, *supra* note 22, at 104.

²⁵ Stanford Univ. Ctr. for Int’l Sec. and Cooperation, *supra* note 11.

were videoed using baseball bats and other weapons to assault opposing protestors.”²⁶

Following the 2020 presidential election, the Proud Boys engaged in the “Stop the Steal” campaign.²⁷ Video evidence shows members of the Proud Boys taking an active part in the January 6th, 2021, attack on the U.S. capitol building.²⁸ While the political aspects of the Proud Boys’ involvement in the January 6th, 2021, attack on the U.S. Capitol were widely reported, there was a co-incident religious animus that received less media attention.²⁹

On January 6, significant religious imagery, symbolism, and sounds accompanied the mob that stormed the Capitol building. Rioters waved flags glorifying Jesus and Trump, shouted prayers and sung hymns through megaphones, and wore “Armor of God” patches on their tactical gear.³⁰

²⁶ *Id.* See also Andrew Hay, *Oregon Governor “incredibly Worried” about Violence at Proud Boys Rally*, REUTERS (Sep. 25, 2020), <https://www.reuters.com/article/us-global-race-protests-portland-idUSKCN26G2YJ>; *Protesters Fight Using Pepper Spray, Baseball Bats in Portland on Saturday*, OREGON PUBLIC BROADCASTING (OPB) (Aug. 56, 2020), <https://www.opb.org/article/2020/08/22/conservative-protesters-plan-rallies-in-downtown-portland/>.

²⁷ Roudabeh Kishi et al., *The Future of ‘Stop the Steal’: Post-Election Trajectories for Right-Wing Mobilization in the United States*, ARMED CONFLICT LOCATION & EVENT DATA PROJECT, <https://acleddata.com/2020/12/10/thefuture-of-stop-the-steal-post-election-trajectories-for-right-wing-mobilization-in-the-us/> (last visited Oct. 20, 2023). Also, the “Stop the Steal” campaign was a “protest movement [centered] around the unsubstantiated idea of a ‘rigged’ [2020 presidential] election.” Marianna Spring, *“Stop the Steal”: The Deep Roots of Trump’s ‘voter Fraud’ Strategy*, BBC NEWS (Nov. 23, 2020), <https://www.bbc.com/news/blogstrending-55009950>.

²⁸ Stanford Univ. Ctr. for Int’l Sec. and Cooperation, *supra* note 11.

²⁹ Melissa Viola, *We Can’t Ignore the Role of Religion in the US Capitol Siege*, THE ASPEN INST., <https://www.aspeninstitute.org/blog-posts/we-cant-ignore-the-role-of-religion-in-the-us-capitol-siege/> (last visited Oct. 20, 2023).

³⁰ *Id.*

While outward expressions of faith seem to dominate accounts of group action by the Proud Boys, more insidious dogma pervades the group's internal guiding ethos:

Although few Proud Boys likely have studied it, Proud Boy anti-Semitism is rooted in a concept called Christian supersessionism. Supersessionism decries the religious openness of the Second Vatican Council (1962–1965), and especially its dictum of *Nostra Aetate*, which stipulates that Jews were and remain God's chosen people. Hard supersessionists claim that the Jews can no longer claim to be the chosen people because God has retracted the covenant of [chosenness] stemming from Abraham, and has chosen the Christians instead.³¹

Considering the religious tenets that underlie Proud Boys beliefs discussed above, in addition to the well-reported political ideologies of the group, it is evident that the group acts in service to both political and religious goals – a fact which does not rely on the group's own self-cognizance on the matter. In this light, the Proud Boys' violent actions demand their religious context, because such animus may bear on the culpability of the group on the world stage via the mechanism of International Criminal Law.³²

Within the U.S., the inquiry into the January 6th, 2021, attacks, and the resulting legal actions by the U.S.

³¹ Margo Kitts, *Proud Boys, Nationalism, and Religion*, 9 J. OF RELIGION AND VIOLENCE 12 (May 2021), <https://doi.org/10.5840/jrv2020102778>, Citing David Novak, *Supersessionism Hard and Soft*, FIRST THINGS, <https://www.firstthings.com/article/2019/02/supersessionism-hard-and-soft> (last visited Oct. 20, 2023).

³² Without a domestic mechanism to denote the Proud Boys' status as a terrorist organization, International Criminal Law may nonetheless be able to intervene in a complimentary manner to the domestic U.S. legal system by labelling and sanctioning the group via channels unavailable to the U.S. Government.

Department of Justice against the Proud Boys' membership who took part, is an ongoing process. Facts and commentary on the event will continue to come to light and drive academic discussions regarding the complex sociological, psychological, religious, and legal ramifications of this moment in history. It remains incumbent on the academy to remember this moment, to vilify this moment, and to shore up the fragile edges of democracy to ensure this form of antidemocratic assault can never recur.

B. Kahanism, Kahane Chai, “Kach,” and the Jewish Defense League (JDL)

Kahanism arose as a sort of “cult of personality” political faction and ideology around the organization’s leader, Meir Kahane. Mr. Kahane, “born Martin Kahane in Brooklyn in 1932, was an Orthodox rabbi”³³ whose ideals:

...[E]spoused violence^[34] and wanted to establish a theocratic Jewish state^[35] encompassing not just all of current Israel and the occupied Palestinian territories (the West Bank, East Jerusalem, Gaza), but large parts of neighboring Egypt, Jordan, Syria, Lebanon, and Iraq.”³⁶ (Internal citations added).

In addition to his political views concerning the establishment of a theocratic Jewish state,

³³ See IMEU Staff, *Fact Sheet: Meir Kahane & The Extremist Kahanist Movement*, INST. FOR MIDDLE E. UNDERSTANDING, <https://imeu.org/article/fact-sheet-meir-kahane-the-extremist-kahanist-movement> (last visited Oct. 21, 2023).

³⁴ Carla Hall, *The Message of Meir Kahane*, WASHINGTON POST (Sep. 11, 1984), <https://www.washingtonpost.com/archive/lifestyle/1984/09/11/the-message-of-meir-kahane/95a30f81-2e2e-431fb9fb-33c0ad43ca39/>.

³⁵ Raphael Mergui & Philippe Simonnot, *Chapter 2, in ISRAEL’S AYATOLLAHS: MEIR KAHANE AND THE FAR RIGHT IN ISRAEL* (Avraham Eliav ed., Saqi Books Feb. 2001)

³⁶ See IMEU Staff, *supra* note 33.

Kahane also “called for a strict separation of Jews and non-Jews and for the enslavement or expulsion of indigenous Palestinians.”³⁷ Multiple organizations arose because of so-called “Kahanism.”³⁸ This included the Jewish Defense League, which operates mainly in the United States and Canada³⁹, as well as Kahane Chai and “Kach.”⁴⁰

The Jewish Defense League was founded in New York City in 1968 by Kahane, “with the stated purpose of defending Jews from persecution in the US and abroad.”⁴¹

Between the late 1960s and as recently as 2017^[42], [Jewish Defense League] members carried out dozens of brutal beatings^[43],

³⁷ *Id.*

³⁸ *Id.*

³⁹ For a resource specifically addressing the Canadian faction of the Jewish Defense League, see Bridge Initiative Team, *Factsheet: Jewish Defense League of Canada*, BRIDGE, A GEORGETOWN UNIV. INITIATIVE, <https://bridge.georgetown.edu/research/factsheet-jewish-defense-league-of-canada/> (last visited Oct. 21, 2023).

⁴⁰ *Id.* See also Adam Lucente, *Explainer: Kahanism, Far-Right Ideology Linked to Netanyahu’s Election Win*, AL-MONITOR (Nov. 2, 2022), <https://www.al-monitor.com/originals/2022/11/explainer-kahanism-far-rightideology-linked-netanyahus-election-win>. See also, *Kach, Kahane Chai (Israel, Extremists)*, COUNCIL ON FOREIGN RELATIONS, <https://www.cfr.org/backgrounder/kach-kahane-chai-israel-extremists> (last visited Oct. 21, 2023).

⁴¹ IMEU Staff, *supra* note 33. See also *Profile: The Jewish Defense League*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/resources/profile/jewish-defense-league> (last visited Oct. 21, 2023).

⁴² Jewish Telegraphic Agency, *Two Charged with Hate Crime for Attack on Arab Teacher Outside AIPAC Conference*, THE TIMES OF ISRAEL (Mar. 27, 2017), <http://www.timesofisrael.com/two-charged-with-hate-crime-forattack-on-arab-teacher-outside-aipac-conference/>.

⁴³ Ron Csillag, *Canadian JDL Member Charged in D.C. Beating of Palestinian-American*, THE CANADIAN JEWISH NEWS, <https://thecjn.ca/news/canada/canadian-jdl-member-charged-d-c-beating-palestinian-american/> (last visited Oct. 21, 2023).

deadly shootings^[44] and bombings^[45], and other attacks in the US and Palestine/Israel, killing dozens of people and wounding hundreds of others.^[46] ... The FBI deemed the league a rightwing terrorist group in their report “Terrorism 2000/2001,”^[47] but its domestic influence has waned in the years since, and today the JDL has no active chapters in the U.S.⁴⁸

Espousing its religiosity in its name, the Jewish Defense League violently carries out actions aimed at furthering their Jewish supremacist worldview. The organization remains openly active today in Canada, where it has not yet been outlawed.⁴⁹ There, the group has targeted Palestinian Canadians⁵⁰ and their supporters⁵¹ with threats.

Following a 1971 criminal conviction⁵² in the United States, Kahane moved to Israel and established

⁴⁴ IMEU Staff, *Fact Sheet: The Ibrahimi Mosque Massacre*, INST. FOR MIDDLE E. UNDERSTANDING, <https://imeu.org/article/the-ibrahimi-mosque-massacre-20-years-later> (last visited Oct. 21, 2023).

⁴⁵ David Bird, *4 J.D.L. Members Held in Bombings*, N.Y. TIMES (June 17, 1972), <https://www.nytimes.com/1972/06/17/archives/4-jdl-members-held-in-bombings-4-jdl-members-held-inbombings.html>.

⁴⁶ IMEU Staff, *supra* note 33.

⁴⁷ FBI, File, *Terrorism Report - 2000-2001*, FED. BUREAU OF INVESTIGATION, https://www.fbi.gov/filerepository/stats-services-publications-terror-terror00_01.pdf/view (last visited Oct. 21, 2023).

⁴⁸ *Jewish Defense League*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremistfiles/group/jewish-defense-league> (last visited Oct. 21, 2023).

⁴⁹ IMEU Staff, *supra* note 33.

⁵⁰ Asa Winstanley, *Jewish Defense League in Canada Threaten to “Derail” Conference*, THE ELECTRONIC INTIFADA (Apr. 23, 2015), <https://electronicintifada.net/blogs/asa-winstanley/jewish-defense-league-canadathreaten-derail-conference>.

⁵¹ Yves Engler, *Jewish Defence League Supporters Threaten Pro-Palestine Toronto Business*, THE CANADA FILES (July 8, 2020), <https://www.thecanadafiles.com/articles/jdlhfb>.

⁵² Morris Kaplan, *Kahane Gets 5-Year Suspended Sentence in Bomb Plot*, N.Y. TIMES (July 24, 1971), <https://www.nytimes.com/1971/07/24/archives/kahane-gets-5year-suspended-sentence-in-bomb-plot.html>.

Kach. “The political party Kahane founded in Israel was named Kach and it espoused violent, overtly racist, and fascist policies. [Kahane] declared it would not be part of any government that did not expel Arabs from Palestine/Israel.”⁵³ In 1984, Kahane managed to win a seat⁵⁴ in the Knesset⁵⁵—the unicameral legislature of Israel.

The U.S. State Department listed [Kahane Chai and Kach] as ... terrorist organization[s] in 1994. Kach, as well as the splinter group Kahane Chai, condones violence as a viable method for establishing a religiously homogenous state. The group has not staged a large terrorist attack since 1994, although people affiliated with the groups have been arrested for “low-level attacks” since 2000, according to the State Department’s 2006 Country Report^[56].⁵⁷

The Kahanist movement openly resists the modern notion of pluralism, as it carries on the ideologies of its founder, Meir Kahane. More broadly, Kahanists oppose liberalism, which is seen as an open threat to the safety and survival of the Jewish people.⁵⁸ “While in the

⁵³ IMEU Staff, *supra* note 33.

⁵⁴ *Id.*

⁵⁵ *THE STATE: Legislature: The Knesset*, <https://embassies.gov.il/hague-en/aboutisrael/state/Pages/THE%20STATE-%20Legislature-%20The%20Knesset.aspx> (last visited Oct. 23, 2023).

⁵⁶ *See generally Country Reports on Terrorism 2006*, U.S. DEP’T OF STATE: ARCHIVED CONTENT, <https://2009-2017.state.gov/j/ct/rls/crt/2006/> (last visited Oct. 23, 2023).

⁵⁷ Kach, *supra* note 40.

⁵⁸ *Understanding Jewish Radical Meir Kahane: A Book Talk with Author Shaul Magid*, My Jewish Learning, at 6:40–7:09 (YOUTUBE, Oct. 2021), https://www.youtube.com/watch?v=Fw12HJZ79y4&ab_channel=myjewishlearning.

Knesset, Kahane introduced a set of proposed laws⁵⁹ calling for “slavery” or forcible deportation of indigenous Palestinian and other non-Jewish citizens of Israel, and the strict physical separation of Jews and Arabs.”⁶⁰

The organization “Kahane Chai,” roughly translating to “Kahane Lives,” was formed in the wake of Meir Kahane’s death-by-assassination.⁶¹ This splinter group was led by Meir Kahane’s son, Binyamin, until the son’s death at the hands of Palestinian militants in December 2000.⁶² Notable violent attacks in the name of Kahane Chai were carried throughout the 1990’s; in 1994, Kahane Chai member Baruch Goldstein massacre of 29 Palestinians as they prayed.⁶³ Following this, both Kach and Kahane Chai were banned by the Israeli government as terrorist organizations.⁶⁴ Kahane Chai was also designated a terrorist organization by the United States under the Immigration and Nationality Act (INA), but was relieved of that designation in May 2022.⁶⁵ While a thorough examination of the political complexities and ramifications of this “dिलisting” is warranted, especially in our 2023 context, such analysis exceeds the scope of this article.

The Kahanist faction’s violent and extreme ideologies continue to influence Israeli politics in both

⁵⁹ See generally Gershon Baskin, *Who is Itamar Ben-Gvir, the Loyal Student of Meir Kahane? - Opinion*, THE JERUSALEM POST, <https://www.jpost.com/opinion/who-is-itamar-ben-gvir-the-loyal-student-of-meir-kahaneopinion-659310> (last visited Oct. 23, 2023).

⁶⁰ IMEU Staff, *supra* note 33.

⁶¹ *Id.*

⁶² See Kach, *supra* note 40.

⁶³ See IMEU Staff, *supra* note 44.

⁶⁴ Clyde Haberman, *Israel Votes Ban on Jewish Groups Linked to Kahane*, N.Y. TIMES, (Mar. 14, 1994), <https://www.nytimes.com/1994/03/14/world/israel-votes-ban-on-jewish-groups-linked-to-kahane.html> (last visited Oct. 23, 2023).

⁶⁵ Off. of the Spokesperson, *Revocation of Five Foreign Terrorist Organizations Designations and the Delisting of Six Deceased Individuals as Specially Designated Global Terrorists*, U.S. DEPT OF STATE, <https://www.state.gov/revocation-of-five-foreign-terrorist-organizations-designations-and-the-delisting-of-sixdeceased-individuals-as-specially-designated-global-terrorists/> (last visited Oct. 23, 2023).

overt and subversive ways.⁶⁶ The most notable of the modern-day Kahanists, Itamar Ben Gvir, seeks to succeed where his predecessors have failed: in “bringing Kahanism to the mainstream.”⁶⁷ In spring of 2021, Israeli Prime Minister Benjamin Netanyahu “pushed for a union between the settlers’ National Union party, the anti-LGBTQ party Noam, and Ben Gvir’s Otzma Yehudit [party]. The merger guaranteed that all three factions would enter the Knesset.”⁶⁸

At present, Israel is at war with Hamas, the de-facto government of Palestine,⁶⁹ following a brazen attack by the latter in early October 2023.⁷⁰ As tensions rise between Israel and Palestine, the mainstreaming of extreme ideology poses real and pressing concerns around the potential escalations to come in the Israel-Hamas conflict. The Kahanist worldview is likely mutually exclusive of a nuanced peace agreement between Hamas and Israel, and seems poised to further enflame the conflict around Gaza and the West Bank.

C. The Palestinian Islamic Resistance Movement, A/K/A “Hamas”

HAMAS, the acronym for “Harakat al-Muqawama al-Islamiya,” translated as the “Islamic Resistance Movement,” is “the largest and most capable militant group in the Palestinian territories and one of the territories’ two major political parties.”⁷¹ Mujama

⁶⁶ See Noam Sheizaf, *Kahanism’s Triumphant Makeover*, +972 MAGAZINE, <https://www.972mag.com/ben-gvir-kahanism-election/> (last visited Oct. 23, 2023).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Foreign Terrorist Organizations: Hamas*, U.S. OFFICE OF THE DIR. OF NAT’L INTELL. COUNTERTERRORISM GUIDE, https://www.dni.gov/nctc/ftos/hamas_fto.html (last visited Oct. 23, 2023).

⁷⁰ *Israel and Hamas October 2023 Conflict: Frequently Asked Questions (FAQs)* U.S. Cong. Rsch. Serv. Oct. 2023, <https://crsreports.congress.gov/product/pdf/R/R47754> (last visited Oct. 23, 2023).

⁷¹ *Supra* note 69.

alIslamiya transformed into the militant organization HAMAS at the outset of the First Intifada⁷² in 1987,⁷⁴ as “an outgrowth of the Muslim Brotherhood.”⁷⁵ From the outset, HAMAS advanced the position that Israel was an illegitimate state, and sought the “liberation of Palestinian territory from Israel control.”⁷⁶ “The group won a majority in the Palestinian Legislative Council in 2006 over the secular Fatah movement, which has generally had better relationships with Western actors.”⁷⁷ The Legislative Council was established to oversee Gaza, the West Bank, and Eastern Jerusalem, but a 2006 election resulted in a fight for power between HAMAS and Fatah that led to the latter’s defeat and expulsion from the Legislative Council.⁷⁸

The U.S. Department of State classified HAMAS as a Foreign Terrorist Organization on October 8, 1997, roughly ten years after HAMAS’s founding, “under section 219 of the Immigration and Nationality Act, as amended. Later, on October 31, 2001, the Department of State designated Hamas as a Specially Designated Global Terrorist pursuant to Executive Order 13224, as amended.”⁷⁹

⁷² See Zack Beauchamp, *What Were the Intifadas?*, VOX, <https://www.vox.com/11/20/18080066/israel-palestine-intifadas-first-second> (last visited Nov. 20, 2023). The First Intifada, or “first uprising,” was “a largely spontaneous series of Palestinian demonstrations, nonviolent actions like mass boycotts and Palestinians refusing to work jobs in Israel, and attacks (using rocks, Molotov cocktails, and occasionally firearms) on Israelis.” See also *Id.*

⁷⁴ VOX, *Gaza, Explained*, at 5:47–6:05 (YOUTUBE Oct. 2023), https://www.youtube.com/watch?v=lv1SpwwJEW8&ab_channel=Vox.

⁷⁵ *Harakat Al-Muqawama Al-Islamiya (HAMAS) – Rewards For Justice*, <https://rewardsforjustice.net/rewards/harakat-al-muqawama-al-islamiya-hamas/>.

⁷⁶ *Id.*

⁷⁷ Nicole Narea, *Hamas, the Militant Group that Attacked Israel, Explained*, VOX, <https://www.vox.com/politics/2023/10/10/23911661/hamas-israel-war-gaza-palestine-explainer> (last visited Nov. 20, 2023).

⁷⁸ *Id.*

⁷⁹ Rewards for Justice, *supra* note 75.

The 1988 Covenant of the Islamic Resistance Movement expressed, in no uncertain terms, the stance of the organization as a violent reaction to the Israeli state. Specifically, the Covenant rejects negotiated peace settlements between the Palestinian and Israeli states, declares an exclusive Muslim right to the geographic areas at issue, and calls on all Muslims to engage in Jihad⁸⁰ in response to Israeli “usurpation” of Palestinian land.⁸¹

More recently, HAMAS issued “A Document of General Principles & Policies” in 2017.⁸² In this document’s Preamble, the organization expresses that “Palestine symbolizes the resistance that shall continue until liberation is accomplished, until the return is fulfilled and until a fully sovereign state is established with Jerusalem as its capital.”⁸³

It is worth noting that the General Principles document expressly rejects “all forms of religious, ethnic or sectarian extremism and bigotry.”⁸⁴ The Document goes to great lengths to disavow the notion that the Palestinian struggle is with the Israeli population as a Jewish religious or ethnic people. Paradoxically, HAMAS

⁸⁰ Sometimes referred to as the “Sixth Pillar” of Islam, Jihad—meaning “exertion” or “struggle”—can take two forms: lesser Jihad (physical confrontation and war), and greater Jihad (the non-violent “struggle against one’s ego, selfishness, greed, and evil”). See, John Esposito, *Jihad: Holy or Unholy War?*, UNITED NATIONS ALLIANCE OF CIVILIZATIONS, <https://www.unaoc.org/repository/8412Jihad,%20Holy%20or%20Unholy%20War,%20J.%20Esposito.pdf>. See John L. Esposito, *Unholy War: Terror in the Name of Islam* (Oxford University Press 1st edition ed. Nov. 2003). See also John L. Esposito, *What Everyone Needs to Know about Islam* (Oxford Univ. Press 2nd edition ed. Jul. 2011).

⁸¹ *The Covenant of the Hamas Main-Point*, FED’N OF AM. SCIENTISTS INTELL. RES. PROGRAM, <https://irp.fas.org/world/para/docs/880818a.htm> (last visited Nov. 21, 2023).

⁸² See *A Document of General Principles & Policies*, FED’N OF AM. SCIENTISTS INTELL. RES. PROGRAM, <https://irp.fas.org/world/para/docs/hamas-2017.pdf> (last visited Nov. 21, 2023).

⁸³ *Id.*

⁸⁴ *Id.* at ¶ 9.

deliberately characterizes the goals of the so-called “Zionist Project” (a HAMAS term for Israel) as incompatible with the Islamic Resistance Movement.⁸⁵ That HAMAS both internally and outwardly characterizes its actions against the Israeli people as based purely on the sovereign control exercised by the latter to the detriment of the former may be of little utility in strict liability culpability analyses under International Criminal Law, as discussed in section II(A), *infra*.

The ideological pronouncements of HAMAS’s motivations must be viewed in the context of the group’s actions, lest the organization be afforded undue favor under international law. Since the Oslo Accords,⁸⁶ HAMAS has carried out hundreds of attacks against Israel, both at the individual and group levels. Cumulatively, these attacks have taken the lives of over 2,800 Israelis, with a further 1300 Israelis murdered by the organization.⁸⁷ These figures do not reflect the unknown death toll of the October 7th, 2023, surprise attack⁸⁸ perpetrated by HAMAS against Israel along the Israeli side of the Gaza boarder.

HAMAS’s claims to legitimacy—as 1) a governing entity, and 2) representative of a repressed populace seeking self-determination—are founded on a fundamental assertion both religious and ethnic in character: that Jerusalem can only be rightly controlled by Arabic Muslim people who trace their lineage to the Palestinian geographic region before the establishment of

⁸⁵ *Id.* at ¶ 17.

⁸⁶ *Milestones: 1993–2000 - The Oslo Accords and the Arab-Israeli Peace Process*, U.S. DEP’T OF STATE: OFF. OF THE HISTORIAN, <https://history.state.gov/milestones/1993-2000/oslo> (last visited Nov. 21, 2023).

⁸⁷ *Comprehensive Listing of Terrorism Victims in Israel*, JEWISH VIRTUAL LIBR., <https://www.jewishvirtuallibrary.org/comprehensive-listing-of-terrorism-victims-in-israel> (last visited Nov. 21, 2023).

⁸⁸ Josef Federman & Issam Adwan, *Hamas Surprise Attack out of Gaza Stuns Israel and Leaves Hundreds Dead in Fighting, Retaliation*, AP NEWS, <https://apnews.com/article/israel-palestinians-gaza-hamas-rockets-airstrikes-telaviv-11fb98655c256d54ecb5329284fc37d2> (last visited Nov. 21, 2023).

Israel as a state.⁸⁹ The 2017 Document further claims that Jerusalem has specific religious significance to the Palestinian people and, by extension, the “Arab and Islamic Ummah.”⁹⁰⁹¹ Such significance, it claims, make a pluralistic or multi-state solution untenable in the Palestine-Israel context. Because of this undeniably religious orthodoxy, HAMAS’s motivations cannot be classified as simply secular. Rather, HAMAS exhibits an important dual motivation: seeking legitimacy on the world stage under the model of self-determinism and advancing religious motivations concerning sovereign control over contested holy lands.

II. THE EXTREMISM PROBLEM: HOW AND WHY

For a problem under international criminal law to be addressable, it is prudent to understand both what the problem is and how it impacts victims. In undertaking that definitional process, lines can be drawn that delineate the metes and bounds of what constitutes the conduct or practice at issue. Here, sociological sources may possess real utility in defining: 1) when an organization is appropriately violent and religiously-motivated to warrant international criminal law intervention, and 2) how that religiously-motivated violence creates an effect on its victims.

⁸⁹ See *A Document of General Principles & Policies*, *supra* note 82, at ¶ 4 and 10.

⁹⁰ “When the term ummah appears in the Qur’ān, it usually refers to human community in a religious sense, to ‘ethnical, linguistic or religious bodies of people who are objects of the divine plan of salvation.” Frederick Mathewson Denny, *The Meaning of “Ummah” in the Qur’ān*, *History of Religions* (Univ. of Chicago Press Aug. 1975), (citing Rudi Paret, “Ummah,” in *The Shorter Encyclopedia of Islam*) (ed. H. A. R. Gibb and J. H.)). Kramers (Leiden: E. J. Brill, 1954).

⁹¹ See *A Document of General Principles & Policies*, *supra* note 82, at 10.

A. Defining Violent Religious Extremism: Who to Police?

The first issue to address within the policing of extremism is definitional: how do we define when (and what) religiously-motivated extreme action warrants the specific condemnation of international criminal law? As with other sub-disciplines of international law, intent matters in the criminal context also. I posit that a thorough understanding of an organization's character as violent and religious is a necessary component of the subsequent international criminal law analysis.

A 1993 Report in the RAND Corporation Paper Series highlighted the discrepancies that exist between secular and religiously-motivated terror, stating:

What is particularly striking about holy terror compared to purely secular terror, however, is the radically different value systems, mechanisms of legitimization and justification, concepts of morality, and Manichean world view that the holy terrorist embraces. For the religious terrorist, violence first and foremost is a sacramental act or divine duty executed in direct response to some theological demand or imperative. Terrorism assumes a transcendental dimension, and its perpetrators are thereby unconstrained by the political, moral, or practical constraints that seem to affect other terrorists. Whereas secular terrorists generally consider indiscriminate violence to be immoral and counterproductive, religious terrorists regard such violence not only as morally justified but as a necessary expedient for the attainment of their goals. Thus, religion serves as a legitimizing force-conveyed by sacred text or imparted via clerical authorities claiming to speak for the

divine.⁹² (Internal citations omitted)
(emphasis added).

Of particular note in this definition is the lack of consideration that violent religious extremist groups give to international legal norms. The idea of “religiously-justified necessary expediency” that foregoes the tenets of IHL⁹³, IHRL⁹⁴, and/or ICL⁹⁵ necessarily runs in direct opposition to those established international norms. International law, further, does not consider such religious justification as legitimate in defense of international crime.⁹⁶

Understanding the sacred-secular distinction in terroristic motive becomes necessary insofar as the consequences of violence that amount to torture, as discussed in Section III, *infra*, underlie a specific-intent crime.⁹⁷ In practice, motive bears on both evidence (in asserting the existence of conduct amounting to torture) and sentencing (in valuing the rehabilitative or retributive aim of punishment), though this varies depending on which jurisdiction underlies the international criminal law proceeding.

⁹² Bruce Hoffman, “*Holy Terror*”: *The Implications of Terrorism Motivated by a Religious Imperative* (Jan. 1993), <https://www.rand.org/pubs/papers/P7834.html>.

⁹³ *See generally* International Humanitarian Law.

⁹⁴ *See generally* International Human Rights Law.

⁹⁵ *See generally* International Criminal Law.

⁹⁶ *Religion Can Never Justify Terrorism or Killing of Innocents, General Assembly Declares*, U.N. NEWS, <https://news.un.org/en/story/2008/11/281632> (last visited Nov. 22, 2023). *See also* U.N. Dep’t of Public Information, *Adopting Consensus Resolution, General Assembly Affirms Mutual Understanding, Interreligious Dialogue as Important Dimensions of Culture of Peace*, UNITED NATIONS MEETINGS COVERAGE AND PRESS RELEASES, <https://press.un.org/en/2008/ga10784.doc.htm> (last visited Nov. 22, 2023).

⁹⁷ Johan Van der Vyver, *The International Criminal Court and the Concept of Mens Rea in International Criminal Law*, 12 U. MIAMI INT’L & COMPAR. L. REV. 57, 100 (June 2004).

Hoffman proceeds to tease out the sacred-secular distinction regarding the ends and means of terror, stating:

...[W]here the aims of secular political terrorists can be described as utilitarian—seeking to bring about changes to achieve the greatest benefits for the greatest number—the aims of religious political terrorists are more accurately defined as the attainment of the greatest possible benefits for themselves and their coreligionists only. This further engenders a tremendous disparity between ends and means. Where the secular terrorist sees violence primarily as a means to an end, the religious terrorist tends to view violence as an end in itself.⁹⁸ (Emphasis added).

In light of the Hoffman definition, religious violent extremism, through the vehicle of terror, can best be understood as: 1) violence that asserts legitimacy on behalf of, or in pursuit of, some religious goal, and 2) where that violence is carried out without regard for international norms concerning human rights or armed conflict.

Applying the Hoffman criteria in the instance of the Christian Identity Movement, the religiously-aligned goal concerns partaking in a holy race war grounded in post-millennialism and pre-Adamic theology that the group sees as elevating the white race above all others.⁹⁹ That same post-millennial, British-Israelite theology also underlies the groups apathy towards international and domestic legal norms. The Anti-Defamation League summarizes this theology as such:

Because they believe in the imminent collapse of worldly institutions, Identity adherents tend to devalue and distrust secular

⁹⁸ Hoffman, *supra* note 92, at 3.

⁹⁹ See ADL Staff, *supra* note 8.

institutions in ways that make extreme anti-government ideologies (such as those of militia groups or sovereign citizens) appealing. They hold themselves to "God's laws," not "man's laws," and many do not feel bound to a government that they consider run by Jews, the New World Order or some other sinister entity. (Emphasis added).¹⁰⁰

Regarding Kahanism, Kahane Chai, and Kach, the religious impetus for their action is intertwined with a secular goal: the establishment of a theocratic Jewish state, to the exclusion of others.¹⁰¹ This is evidenced by the laws proposed by Meir Kahane during his tenure in the Knesset, which include the enslavement and/or forcible deportation of non-Jew native Palestinians.¹⁰² This proposal, if enacted, would have violated International Criminal Law, which prohibits both enslavement or forcible deportation of populations.¹⁰³

Finally, Hoffman explicitly characterizes HAMAS as inherently religious in Holy Terror,¹⁰⁴ highlighting language in the group's Covenant, which calls for the destruction of Israel at the hands of Islam.¹⁰⁵ Hoffman goes on to quote Sheikh Ahmad Ibrahim, a "senior cleric" of HAMAS, who rallied for the killing of all Jews.¹⁰⁶ Such extreme measures necessarily run afoul of international criminal law insofar as they exert a collective punishment on a populace.

¹⁰⁰ *Id.*

¹⁰¹ See IMEU Staff, *supra* note 33.

¹⁰² *Id.*

¹⁰³ See, e.g., U.N. General Assembly, *Rome Statute of the International Criminal Court, Article 7(1)(c) and (d) (last amended 2010)*, ISBN No. 92-9227-227-6 July 7, 1998), available at: <https://www.refworld.org/docid/3ae6b3a84.html> [accessed 26 November 2023].

¹⁰⁴ Hoffman, *supra* note 92, at 5.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*, citing ADL Special Background Report, *Hamas, Islamic Jihad and the Muslim Brotherhood: Islamic Extremists and the Terrorist Threat to America* (New York: Anti-Defamation league of B'nai B'rith, 1993), p. 4.

***B. The Mechanisms of Religious Liberty Restriction
by Violent Religious Extremism***

The second issue to address in this definitional exercise concerns how violent religious extremism creates an effect on its victims. The idea of religiously-motivated violence encapsulates both overt violence—such as murder, rape, kidnapping, forced sterilization, and others—and more subversive violence, such as intimidation. The mechanisms by which extremist groups (such as those discussed in Section I, *supra*) effectuate this violence are not unknown.

The Religious Freedom Project, an initiative of the Berkeley Center for Religion, Peace & World Affairs at Georgetown University, examined the interplay between violent religious extremism and religious liberty in a 2012 Sourcebook. The Sourcebook categorizes those interactions under two umbrellas: positive connections and negative connections.¹⁰⁷

Under the “negative connection” umbrella, three specific manifestations, or “pathways,” are relevant here: the outbidding pathway, the repression-reaction pathway, and the microphonemegaphone pathway. The outbidding pathway asserts:

Regimes that repress religious freedom are often state-sponsored religious monopolies that derive their legitimacy from their fidelity to a particular brand of religious orthodoxy. The legitimacy of such religiously repressive regimes rests on their putative religious purity. Because of this close relationship between political legitimacy and religious purity, such regimes are vulnerable to the charge that they are not as religiously pure

¹⁰⁷ Peter S. Henne et al., *Religious Freedom and Violent Religious Extremism: A Sourcebook of Modern Cases and Analysis*, BERKELEY CTR. FOR RELIGION, PEACE & WORLD AFFAIRS AT GEORGETOWN UNIV., <https://berkeleycenter.georgetown.edu/publications/religious-freedom-and-violent-religious-extremism-asourcebook-of-modern-cases-and-analysis> (last visited Nov. 26, 2023).

and orthodox as they claim and are therefore illegitimate. This can encourage more extreme religious groups to “outbid” the regime in its religious purity and attempt to establish a more religiously faithful and legitimate regime—by violence if necessary.¹⁰⁸

The repression-reaction pathway, conversely, holds:

Under some conditions, religious repression can encourage a violent religious reaction on the part of the religious groups being repressed. These groups may undertake reactive violence with varying degrees of ambition—to defend themselves from further violence, to eliminate the religiously repressive regime, to undertake a secessionist struggle to carve out territory independent of the repressive regime, or to replace the religiously repressive regime with another regime.¹⁰⁹

Finally, the microphone-megaphone pathway argues:

Religious groups without access to peaceful and legal means of influencing society—“microphones”—are more likely to use violent and illegal means of forcing society to call attention to their agenda—“megaphones.” In this pathway, it is not systematic religious

¹⁰⁸ *Id.* at 4 (citing discussions re: outbidding in Bloom (2007)); Toft, *Getting Religion?: The Puzzling Case of Islam and Civil War* (2007); Snyder (2000).

¹⁰⁹ *Id.* at 4 (citing Jeff Goodwin, *No Other Way Out: States and Revolutionary Movements, 1945-1991* (Cambridge Univ. Press, 2001); Hafez, *From Marginalization to Massacres: A Political Process Explanation of GIA violence in Algeria* (2004); Brian J. Grim and Roger Finke, *The Price of Freedom Denied: Religious Persecution and Conflict in the Twenty-First Century*. (Cambridge Univ. Press, 2011).

persecution alone but the silencing of religious voices that contributes to reactive violence. Such silencing or marginalization of religious voices need not include or be accompanied by the violent persecution of religious individuals, institutions, or practices.¹¹⁰

What is clear from these pathways is that religious liberty's interaction with violent religious extremism, and vice-versa, entails a cyclic relationship. In such cyclic relationship, the violent religious extreme limits the religious liberty of the moderate either 1) through violent acts that intimidate, or 2) through government control which favors certain religious practice—most especially to the detriment of adherents to other religions than that of the governmental power. The former intimidation method is most akin to the repression-reaction of microphone and megaphone pathways. The latter government control method is most akin to the outbidding pathway.

Through these negative pathways, where religious liberty is restricted, violent religious extremism ensues. Where violent religious extremism ensues, I also argue that the inverse is true: religious liberty restriction ensues. The cyclic cause-effect, however, does not entail a defense under international criminal law when actions arising out of this sociological phenomenon amount to international crimes. Nor should this phenomenon underlie mitigation stratagem concerning the international criminal. The *jus cogens* norms established over time by the international community apply irrespective of this duality, and necessarily so. In Section(s) III and IV, *infra*, I propose a novel approach to the issue of violent religious extremism that attempts to rationalize and justify intervention with more expediency than has traditionally been invoked to-date by the international community (via Universal Jurisdiction) or the International Criminal Court itself.

¹¹⁰ *Id.* at 4.

III. A “QUASI-PREEMPTIVE” APPROACH TO PROSECUTIONS OF VIOLENT RELIGIOUS EXTREMISM UNDER INTERNATIONAL CRIMINAL LAW

At the outset, it is important to clarify what invoking international criminal law attempts to gain in the context of religiously motivated violence via what I’m calling the “quasipreemptive approach.” This framework does not intend to create a Minority Report method of policing—that is, the framework doesn’t seek to recharacterize minor crime to a level of international importance.¹¹¹ Further, the framework doesn’t seek to criminalize “thought crime” in any more explicit or penal manner than is already codified in jus cogens or international agreements.¹¹¹ Finally, the framework doesn’t seek to undertake the prosecutorial balancing necessary to determine if international criminal charges advance the interests of justice or the stated aim of the International Criminal Court to “end impunity.”¹¹²

Within these caveats, the framework proposed here merely attempts to highlight that religious extremism may be fairly categorized as a form of torture, even when considering only the preceding events leading up to a later large-scale atrocity crime. This additional (and largely definitional) framework provides ICC prosecutors with a novel avenue to pursue when investigating situations involving violent religious extremism. Additionally, because the prohibition against torture is recognized as a jus cogens norm of international law, any tribunal would theoretically be competent to hear a prosecution based on violations thereof.¹¹³

¹¹¹ See also *infra* Section IV(c) (concerning the “Gravity Threshold” for international criminal law).

¹¹² *About the Court*, THE INT’L CRIM. CT., <https://www.icc-cpi.int/about/the-court> (last visited Mar. 20, 2024).

¹¹³ Erika De Wet, *The Prohibition of Torture as an International Norm of Jus Cogens and Its Implications for*

The next logical question arises: why is such definitional work necessary? At present, there is no internationally accepted definition of “terrorism.”¹¹⁴ This struggle to define “terrorism” creates subsequent difficulty in defining violent religious extremism, because the latter encompasses the former.¹¹⁵ International bodies have taken to addressing terroristic conduct via the various enumerated crimes against humanity and/or war crimes provisions of the ICC, the ICTR, and the ICTY.¹¹⁵ This “quasi-preemptive” framework seeks to operate in the context of the enumerated crime against humanity of torture, in keeping with the tradition of international tribunals that lean on previously defined international crimes and adopt these agreed-upon definitions to the novel issue of violent religious extremism.

Finally, I turn to the necessity of the “quasi-preemptive” approach. A frequent critique of the International Criminal Court is that the organization is extremely slow in addressing the situations it

National and Customary Law, 15 EUR. J. OF INT’L L. 97 (Feb. 2004). See also *UN Experts Call for States to Uphold Absolute Prohibition of Torture in Armed Conflict*, OHCHR, <https://www.ohchr.org/en/statements/2023/06/un-experts-call-states-uphold-absolute-prohibition-torture-armedconflict> (last visited Mar. 20, 2024). See also *The Prohibition against Torture and Its Pragmatic Effects*, PUBLIC INT’L L. & POLICY GRP., <https://www.publicinternationallawandpolicygroup.org/lawyering-justiceblog/2023/6/9/the-prohibition-against-torture-and-its-pragmatic-effects> (last visited Mar. 20, 2024). See also *Prosecutor v. Kunarac, et al.*, Case No. IT-96-23 & 23/1, Judgement of Trial Chamber II in the Kunarac, Kovac and Vukovic Case, ¶ 497 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001).

¹¹⁴ *Terrorism and Terrorists | How Does Law Protect in War?*, INT’L COMMITTEE OF THE RED CROSS, https://casebook.icrc.org/a_to_z/glossary/terrorism-and-terrorists (last visited Mar. 20, 2024).

¹¹⁵ *What is Violent Extremism?* (Australian Government Living Safe Together Initiative Apr. 2020).

¹¹⁵ *Frequently Asked Questions on International Law Aspects of Countering Terrorism*, UNITED NATIONS OFFICE ON DRUGS AND CRIME (2009).

investigates.¹¹⁶ One means of addressing this problem, and the means advocated for here, involves the prosecutor of the ICC exercising its power to open an investigation into a given situation *proprio motu*.¹¹⁷ Because the ICC's Office of the Prosecutor (OTP) has the authority to initiate an investigation without third-party prompting or referral by a State Party to the Rome Statute, the Prosecutor can elect where to allocate its resources.¹¹⁸ This leaves the decision to investigate and/or press charges within the exclusive purview of the OTP.

In response to the limited resources and time available to the ICC's OTP, the "quasipreemptive" approach advocates for a more efficient use of OTP resources by promoting early intervention by the court. Specifically, this approach advocates for the Office of the Prosecutor to open investigations with more frequency and earlier in the lifetime of a particular situation. By exercising this *proprio motu* power more frequently, the OTP could begin to collect evidence more quickly.

Merely "starting the clock" more quickly on a particular situation is likely insufficient to enable the ICC

¹¹⁶ See, e.g., Elizabeth Wilmschurst CMG KC, *Strengthen the International Criminal Court*, CHATHAM HOUSE, <https://www.chathamhouse.org/2019/06/strengthen-international-criminal-court> (last visited Mar. 20, 2024). See also *DRC's Deputy Prosecutor Breaks down the ICC's Sluggish Pace with Precision*, AFRICANEWS, <https://www.africanews.com/2023/11/17/drcs-deputy-prosecutor-breaks-down-the-iccs-sluggish-pace-withprecision/> (last visited Mar. 20, 2024). See also Benjamin Gumpert and Yulia Nuzban, *Part I: What Can Be Done about the Length of Proceedings at the ICC?*, EJIL: TALK! (Nov. 15, 2019), <https://www.ejiltalk.org/part-i-whatcan-be-done-about-the-length-of-proceedings-at-the-iccl/>. See also Leila Nadya Sadat, *Politics, Procedure, and Law: Three Continuing Challenges for the ICC in Its Third Decade*, HARRIS INST. AT WASHINGTON UNIV. SCH. OF L., <https://sites.law.wustl.edu/WashULaw/harris-lexlata/politics-procedure-and-lawthree-continuing-challenges-for-the-icc-in-its-third-decade/> (last visited Mar. 20, 2024).

¹¹⁷ See Rome Statute Art. 15(1).

¹¹⁸ The decision to open an investigation must be approved by the Pre-Trial Chamber following a preliminary evidentiary hearing on the Prosecutor's request for authorization of an investigation. See Rome Statute Art. 15(3) – (4).

to act on the early evidence it collects. This is where the “quasi preemptive” approach comes in: the goal of this approach is to re-frame the definition of particular international crimes (here, torture), with the intent that this re-framed definition would be supported by the type of evidence that could be collected in the early days of the investigation into a given situation.

As will be discussed more below, the idea that a pre-existing and internationally accepted definition of torture could be implemented in new ways is a necessary evolution for the ICC if the Court seeks to address the criticisms it faces. If criminal prosecutions in international tribunals take upwards of years to resolve,¹¹⁹ it behooves these judicial bodies to seek to expedite their processes where feasible, and where that expediting will not result in a miscarriage of justice.

Ultimately, any development that affords the International Criminal Court more capacity to act under its governing framework will serve to bolster the court’s public perception. As of 2020, the International Criminal Court (ICC) had only indicted 45 individuals since its inception in 2001. “Only 14 out of the 45 have resulted in a complete proceeding, and only nine were convicted.”¹²⁰ The ICC remains stifled from administering justice due to an overly burdensome procedural practice that fails to

¹¹⁹ For instance, the trial of Jean-Pierre Bemba took four years, and an additional two years for the trial chamber to find him guilty. See, Benjamin Gumpert & Yulia Nuzban, *Part I: What Can Be Done about the Length of Proceedings at the ICC?*, EJIL: TALK! (Nov. 15, 2019), <https://www.ejiltalk.org/part-i-what-can-be-done-about-the-length-of-proceedings-at-the-icc/>, citing *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08 (Int’l Crim. Court). See also *Bemba*, INT’L CRIM. CT., <https://www.icc-cpi.int/car/bemba> (last visited Mar. 23, 2024).

¹²⁰ Sarah Goodman, *The Effectiveness of the International Criminal Court: Challenges and Pathways for Prosecuting Human Rights Violations*, 12 INQUIRIES J. (Apr. 2020).

deliver on its promise of promoting fairness and ending impunity.¹²¹

In addition to an analysis of the ICC's role under the "quasi-preemptive" framework, I also will explore the potential universal jurisdiction that attends the crime of torture under both War Crimes and Crimes Against Humanity analyses. Universal jurisdiction presents an interesting opportunity for powerful states to intervene in response to the inaction of international judicial bodies or local domestic tribunals.

A. Violent Religious Extremism and the International Crime Against Humanity of Torture

The definitional argument in this work is that the way in which violent religious extremism suppresses the religious liberty of others is itself a form of torture. It is notable that this conceptualization of "torture" is distinct from the traditional and popular perceptions of torture, such as in extreme interrogation tactics where an individual is restrained or otherwise at the mercy of their captor. The expansive view of torture outside of this preconception is integral to this framework and will be discussed in detail below.

1. Defining Torture in International Law

To begin, there is a plurality of definitions concerning torture in international law. The first of these definitions concerns torture in the context of war. Under International Humanitarian Law, the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) held the following in its judgment in the Kunarac case:

¹²¹ Leila Nadya Sadat, *Politics, Procedure, and Law: Three Continuing Challenges for the ICC in Its Third Decade*, HARRIS INST. WASHINGTON U. SCH. L., <https://sites.law.wustl.edu/WashULaw/harrislexlata/politics-procedure-and-law-three-continuing-challenges-for-the-icc-in-its-third-decade/> (last visited Mar. 20, 2024).

497. [...] The Trial Chamber holds that, in the field of international humanitarian law, the elements of the offense of torture, under customary international law are as follows:

- (i) The infliction, by act or omission, of severe pain or suffering, whether physical or mental[;]
- (ii) The act or omission must be intentional[; and]
- (iii) The act or omission must aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person.¹²²

The definition of torture as understood under customary international law was later affirmed by the appeals court of the ICTY, where neither party objected to the findings of the trial chamber on the definitional aspects of torture found in paragraph 497 of the trial chamber's judgment.¹²³¹²⁴

In contrast to the ICTY's definition of torture stands the definition under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (or "Convention Against Torture," shortened as "CAT"). Under Article 1 of this instrument, the international crime of "torture" is defined as:

... any act by which severe pain or suffering, whether physical or mental, is intentionally

¹²² Prosecutor v. Kunarac, et al., Case No. IT-96-23 & 23/1, Judgement of Trial Chamber II in the Kunarac, Kovac and Vukovic Case, ¶ 497 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001).

¹²³ Prosecutor v. Kunarac, et al., Case No. IT-96-23 & 23/1(A), Appeals Chamber Judgment in the Kunarac, Kovac and Vukovic Case (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2002).

¹²⁴ Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, 1465 U.N.T.S. 85, 113; S. Treaty Doc. No. 100-20 (1988) (U.S. adoption thereof).

inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.¹²⁵ (Emphasis added).

The final definition of relevance to this discussion is found in one of the International Criminal Court's guiding documents—the Elements of Crimes. The ICC's Elements of Crimes definition of torture, as applied specifically to Crimes Against Humanity, can be found in Article 7(1)(f) of that instrument. A *prima facie* case for torture under the Rome Statute must demonstrate the following, beyond a reasonable doubt¹²⁵:

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.
2. Such person or persons were in the custody or under the control of the perpetrator.
3. Such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions.
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a

¹²⁵ See Rome Statute Art. 66(3).

widespread or systematic attack directed against a civilian population.¹²⁶¹²⁷

Under the ICC's Elements of Crimes framework, no specific intent must be demonstrated in order to sustain a conviction for the international Crime Against Humanity of torture.¹²⁸

There is considerable literature addressing the scope of these definitions, which almost uniformly acknowledge that torture is an international crime with broad potential application. In the second volume of *International Criminal Law* by Johan van der Vyver, the author notes¹²⁹: ... [T]orture has become a crime under customary international law, ... its prohibition is a matter of [j]us cogens, and ... it may be prosecuted under the principles [pertaining] to universal jurisdiction. The judgment of the ICTY in *Prosecutor v. Anto Furundžija*,¹²⁸ in the *Čelebići Case*,¹²⁹ and in *Prosecutor v. Dragoljub Kunarac*,¹³⁰ as well as the judgment of the British House

¹²⁶ International Criminal Court Elements of Crimes, Art. 7(1)(f).

¹²⁸ *Prosecutor v. Anto Furundžija*, Case No. IT-95-I-T, ¶ 137-39, 144, 153-57 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998), reprinted in part in 38 I.L.M. 317 (1999).

¹²⁷ JOHAN D. VAN DER VYVER, *Particular Instances of Crimes Against Humanity, (F) Torture*, INT'L CRIM. L. 128 (Lambert Academic Publishing 2021).

¹²⁸ *Prosecutor v. Anto Furundžija*, Case No. IT-95-I-T, ¶ 137-39, 144, 153-57 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998), reprinted in part in 38 I.L.M. 317 (1999).

¹²⁹ *Prosecutor v. Zejnil Delalić & Others (the "Čelebići Case")*, Case No. IT-96-21-T, ¶ 452, 454 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998).

¹³⁰ *Prosecutor v. Kunarac, et al.*, Case No. IT-96-23-T & 23/1-T, Judgment of Trial Chamber II in the Kunarac, Kovac and Vukovic Case, ¶ 466 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001).

of Lords in *Ex Parte: Pinochet Ugarte* (No. 3),¹³¹ support this conclusion.¹³²¹³³ (Internal citation retained).

What is particularly noteworthy between the ICC and ICTY definitions and the CAT is that the former two organizations omit the requirement that torture be conducted “by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”¹³⁵ Indeed, neither the ICC nor ICTY place any restriction on the parties that may be held accountable for committing or promoting torture. The ICC, for example, has jurisdiction over natural persons¹³⁴ that commit¹³⁵ or attempt to commit¹³⁸ the torturous act, as well as instigators,¹³⁶ facilitators,¹³⁷ aiders and abettors,¹³⁸ and contributors.¹³⁹

In describing the diverging definitions of torture, van der Vyver notes that “the torture convention, being an international treaty, only addresses the obligations of States and therefore has a limited application. The customary¹⁴⁰-law meaning of torture exceeds those confines.”¹⁴³ Further,

The main difference between ‘torture’ as defined by the Torture Convention and ‘torture’ as defined for purposes of ICC jurisdiction is that the culprit in the latter instance is not confined to persons acting as,

¹³¹ *R. v. Bow Street Metropolitan Stipendiary Magistrate & Others, Ex Parte Pinochet Ugarte* (Amnesty International & Others Intervening) (No. 3), [1999], 2 All E.R. 97 (H.L.).

¹³² See also Andreas Zimmerman, *Die Schaffung eines ständigen Internationalen Strafgerichtshofes: Perspektiven und Probleme Staatenkonferenz in Rom*, 58 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 47, at 57 (1998).

¹³³ Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, 1465 U.N.T.S. 85, 113; S. Treaty Doc. No. 100-20 (1988) (U.S. adoption thereof).

¹³⁴ Rome Statute Art. 25(1).

¹³⁵ Rome Statute Art. 25(3)(a).

¹³⁶ Rome Statute Art. 25(3)(b).

¹³⁷ Rome Statute Art. 25(3)(c).

¹³⁸ *Id.*

¹³⁹ Rome Statute Art. 25(3)(d).

¹⁴⁰ Van der Vyver, *supra* note 127, at pp. 129.

or with the consent or acquiescence of, a public official or in an official capacity. Torture as a crime against humanity includes the infliction of severe pain or suffering pursuant to a governmental as well as an organizational policy.¹⁴¹

2. Applying Definitions of Torture in International Criminal Law Cases: Actus Reus and Mens Rea

When applying the ICC definition of “torture” as a crime against humanity to the issue of violent religious extremism, the exact conduct must be considered on a case-by-case basis. Even so, examining the violent religious extremist conduct limiting religious free exercise (as discussed in Section II, *infra*) provides an overview of potential legal arguments to be made in support of a “torture” classification of that conduct.

In *Prosecutor v. Kayishema*, a case before the International Criminal Tribunal for Rwanda (ICTR), the court codified the *mens rea* elements necessary to bring crimes against humanity charges generally, holding:

The perpetrator must knowingly commit crimes against humanity in the sense that he must understand the overall context of his act. Part of what transforms an individual’s act(s) into a crime against humanity is the inclusion of the act within a greater dimension of criminal conduct; therefore[,] an accused should be aware of this greater dimension in order to be culpable thereof. Accordingly, actual or constructive knowledge of the broader context of the attack, meaning that the accused must know that his act(s) is[/are] part of a widespread or systematic attack on a civilian population and pursuant to some sort of policy or plan, is necessary to

¹⁴¹ *Id.* at 132.

satisfy the requisite *mens rea* element of the accused.¹⁴²

“Both under customary international law and under the ICC Statute, a crime against humanity requires that [the] ‘underlying crime’ be committed in the context of what is known as the chapeau element.”¹⁴³ (Emphasis added). To satisfy this requirement, the act underlying a crime against humanity charge must constitute ‘part of’ ‘a systematic attack directed against any civilian population.’ This is known as the nexus.¹⁴⁴ Under the Rome Statute, the attack must also be “pursuant to a state or organizational policy.”¹⁴⁵

Concerning the *actus reus* of violent religious extremism as torture, some act which causes severe pain and/or suffering (either physical or mental) must be committed. This article’s “quasi-preemptive” approach does not argue otherwise. However, it may be reasonable to assume that conduct meeting this threshold may arise before larger, subsequent criminal acts take place. Consider, for example, the National Liberation Front of Tripura (NLFT), a Christian secessionist¹⁴⁶ group acting via the microphone-megaphone pathway¹⁴⁷ in response to perceived repression by a Hindu nationalist government and negative public perceptions of Christians in

¹⁴² Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-T, Judgment, ¶ 133-4 (Int’l Crim. Trib. for Rwanda May 21, 1999).

¹⁴³ Robert Dubler, SC, and Matthew Kalyk, *Crimes Against Humanity Under Customary International Law and the ICC: The Chapeau Elements*, in CRIMES AGAINST HUMAN. IN THE 21ST CENTURY 638 (Brill 2018).

¹⁴⁴ *Id.*

¹⁴⁵ Rome Statute Art. 7(2)(a).

¹⁴⁶ *Constitution of National Liberation Front Of Tripura*, S. ASIA TERRORISM PORTAL (SATP), https://www.satp.org/satporgtp/countries/india/states/tripura/documents/papers/nlft_const.htm (last visited Mar. 23, 2024).

¹⁴⁷ See *infra* Section II for a discussion on the pathways of religious liberty restriction.

Northeastern India.¹⁴⁸ In the case of the NLFT, the organization “forced people to convert to Christianity and killed those Hindus who refused.”¹⁴⁹ Even if the impact of their conduct was limited to a small geographic area or to a limited number of people, their actions discriminated on the basis of religion, and exhibited a behavior that sought to destroy the personality of their victims, insofar as religion is a protected class that is integral to an individual’s perception of self. This conduct, while extreme, is clearly the sort of crime triable in an international forum, even if under a litany of different definitions. The classification of this action as “torture” thus represents a “tool” for prosecutors to consider wielding in their pursuit of justice. Even a small number of individuals subjected to forced religious conversion, in light of the *mens rea* element where the perpetrator intends to destroy that person’s current religiosity, is conduct of international concern and necessitates a criminal investigation.

A modern example of forced conversion involves Palestinian HAMAS, as discussed in Section I, *supra*. In 2012, Reuters reported on Palestinian Christians who were allegedly forcibly converted to Islam in response to credible fear for their safety if they refused conversion.¹⁵⁰ Interestingly, this claim was brought by a local Church, and not the named individuals. The availability of witnesses to testify concerning their religious conversions under duress, if a genuine fear of safety remains post-conversion, is a potential area of concern for the ICC OTP.

Another example of extremist conduct that may rise to the level of torture concerns the deliberate

¹⁴⁸ Peter S. Henne *et al.*, *India in RELIGIOUS FREEDOM AND VIOLENT RELIGIOUS EXTREMISM: A SOURCEBOOK OF MODERN CASES AND ANALYSIS* 21, Berkeley Center for Religion, Peace & World Affairs at Georgetown Univ., <https://berkeleycenter.georgetown.edu/publications/religious-freedom-and-violent-religious-extremisma-sourcebook-of-modern-cases-and-analysis> (last visited Nov. 26, 2023).

¹⁴⁹ *Id.*

¹⁵⁰ Nidal Al-Mughrabi, *Gaza Christians Sense Pressure to Convert to Islam*, REUTERS (July 26, 2012), <https://www.reuters.com/article/idUSBRE86P0J4/>.

targeting of individuals who profess a contrary or “incompatible” religious belief compared to that of the subjugator. This may be seen in instances where an extremist group seeks the establishment of a governmental State based in religious law, to the exclusion (or eradication) of other faiths.¹⁵¹ The conduct leading up to State control may be enough to base an international prosecution under the crime against humanity of torture, perhaps with evidence drawn from displaced individuals who testify to their genuine fear.

In contrast to the very visceral and overtly violent practices of forced religious conversion or religious targeting, there are the more subtle and subversive discriminatory practices that ultimately give rise to fear in targeted religious communities. Notable historical examples of this include the Jewish response to antisemitism via “Crypto-Judaism” in Spanish territories before the year 1500,¹⁵² as well as the “Hidden Christian” or “Kakure Kirishitan” movement in Japan between 1614 and 1873.¹⁵³ “Hidden Christians” were Japanese Catholics who were forced underground at the outset of the Edo period because of persecution and targeting by the Tokugawa shogunate.¹⁵⁴ The ban on Christianity that ensued in Japan was lifted by the Meiji government in 1873.¹⁵⁵ While these historical practices may seem removed from the modern context, the increasing prevalence and acceptance of antisemitism globally in the

¹⁵¹ See, e.g., Greg Botelho, *Faith Turns Christians into Terrorist Targets*, CNN, <https://www.cnn.com/2015/04/24/world/terrorists-attacks-on-christianity/index.html> (last visited Mar. 24, 2024).

¹⁵² JANET JACOBS, *HIDDEN HERITAGE: THE LEGACY OF THE CRYPTO-JEWS* (Univ. of California Press 2002).

¹⁵³ Linda Sieg, *Japan’s Ageing “Hidden Christians” Fear They May Be Their Religion’s Last Generation*, REUTERS (Nov. 14, 2019), <https://www.reuters.com/article/idUSKBN1XO31O/>.

¹⁵⁴ Anthony Kuhn, *Driven Underground Years Ago, Japan’s “Hidden Christians” Maintain Faith*, NPR (Oct. 11, 2015), <https://www.npr.org/sections/parallels/2015/10/11/446865818/driven-underground-years-ago-japans-hidden-christians-maintain-faith>.

¹⁵⁵ *Id.*

year 2024 points to a troubling, antireligious regression.¹⁵⁶¹⁵⁷

If the conduct of a violent extremist group that suppresses religious free exercise is accepted as an appropriate actus reus in the prima facie case for torture under the Rome Statute, the next element concerns the degree of control the subjugator exercises over their victim. That control need not be physical restraint, imprisonment, or restriction of liberty. As van der Vyver notes in *International Criminal Law*, Vol. II, “[b]eing ‘in the custody’ or ‘under the control’ of the perpetrator must be given a wide meaning.”¹⁶⁰

In each instance above, the physical control of every movement of the victim is not essential to the subjugator exercising its will over said victim. As such, the victim still remains under the control of the perpetrator, regardless of their physical liberty to move or act absent restraint. Fear by intimidation should therefore be sufficient to satisfy the “control” element.

The next element that must be proven in the ICC definition of “torture” as a crime against humanity concerns the provision that torture cannot be caused merely by the co-incident, legal penalization accompanying lawful sanction of an individual. Put simply, an otherwise legal penalization levied on a convicted criminal who has experienced their appropriate due process is assumed to not be torture. This element is definitional, in that “torture” is universally prohibited, but lawful sanctions cannot amount to torture.¹⁵⁸ The

¹⁵⁶ See Center for Antisemitism Research, *Americans Increasingly Aware of and Concerned about Antisemitism*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/resources/report/americans-increasingly-aware-and-concerned-about-antisemitism> (last visited Mar. 23, 2024). See also Hope D. LaFreniere Tamez et al., *Explaining the Rise of Antisemitism in the United States*, 47 STUDIES IN CONFLICT & TERRORISM (Routledge 2024).

¹⁵⁷ JOHAN D. VAN DER VYVER, *Particular Instances of Crimes*, *supra* note 127, at 132, *citing* Christopher K. Hall, *Torture*, in COMMENTARY ON THE ROME STATUTE OF THE INT’L CRIMINAL COURT (Otto Triffterer ed., Baden-Baden: Nomos Verlagsgesellschaft, 1999).

¹⁵⁸ See *Id.* at 133.

drafters of the Rome Statute recognized that lawful sanction may involve severe pain or suffering at the hands of a government entity which “essentially attends legitimate punishments, such as imprisonment, corporal punishment[,] or capital punishment. The [provision] was not intended to exclude or to excuse legally sanctioned punishments that have all the markings of torture per se.”¹⁵⁹ With this understanding, the practice of solitary confinement may constitute torture per se, regardless of its legality under domestic law.¹⁶⁰

In instances where a theocracy (or other religiously-motivated government) seeks to curtail the religious free exercise or liberty of a minority religion within its geographic jurisdiction, such as discussed in the microphone-megaphone pathway, Section II, *supra*, this too appears to constitute “torture.” This is because the right to the free exercise of religion is enshrined in several international law instruments.¹⁶¹ Debate continues on whether this right will become a *jus cogens* peremptory norm of international law in the near future.¹⁶²¹⁶³ While such an enshrined right would be a benefit to the

¹⁵⁹ *Id.*

¹⁶⁰ See, e.g., U.S.: *Prolonged Solitary Confinement Amounts to Psychological Torture*, Says UN Expert, U.N. OFF. OF THE HIGH COMM’R FOR HUM. RTS., <https://www.ohchr.org/en/pressreleases/2020/02/united-states-prolonged-solitary-confinement-amounts-psychological-torture> (last visited Mar. 23, 2024).

¹⁶¹ See Universal Declaration of Hum. Rts., G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948). See also Christian Tomuschat, *Protection of Human Rights under Universal International Law*, UNITED NATIONS CHRONICLE (Dec. 2016) (United Nations LIII ed.), <https://www.un.org/en/chronicle/article/protection-human-rights-underuniversal-international-law>.

¹⁶² See David Abrahams & Tayla Dye, *The Possibility of the Right to Religion Emerging as a Jus Cogens Norm (Part 1)*, 37 OBITER: NELSON MANDELA U. L. J. 201 (Jan. 2016).

¹⁶³ JOHAN D. VAN DER VYVER, *Particular Instances of Crimes Against Humanity, (F) Torture*, at pp. 135, citing Prosecutor v. Dominic Ongwen, Case No. ICC-02/04-01/15-1762, Trial Judgment (Int’l Crim. Court, Feb. 4, 2021), at ¶ 2707 and 2739. Also citing ICC Elements of Crimes, General Introduction, ¶ 4.

classification of violent religious extremism as a form of torture, it is not necessary.

As mentioned previously, the *mens rea* element of the crime of torture as a crime against humanity under the Rome Statute does not require the perpetrator have any specific intent to effectuate torture. Rather, the result of the conduct, whether the perpetrator caused it deliberately or by reckless indifference, itself evidences the requisite *mens rea* to sustain a conviction. It is not necessary for the perpetrator to complete “a value judgment as to the severity of the pain inflicted by his or her wrongful act.”¹⁶⁶

3. Applying Definitions of Torture in International Criminal Law Cases: The Nexus

The final element of the crime against humanity of torture under the Rome Statute, known as the “nexus,” requires that 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.”¹⁶⁴ This element is descriptive on its face—while there is no specific intent required to effectuate torture, there is a caveat pertaining to ICC jurisdiction over the offense (that the perpetrator appreciate the international character of their act). While descriptive on its face, the actual work of parsing the nexus element is more complicated in practice.

An accused can only be liable for a crime against humanity where there is a nexus between the attack and the crime. This nexus consists of two elements: 1) Objective element: the commission of an act which, by its nature or consequences, is objectively part of the attack; and 2) Subjective element: knowledge

¹⁶⁴ International Criminal Court Elements of Crimes, Art. 7(1)(f).

of the attack and that the crime is part thereof.¹⁶⁵ (Emphasis retained).

The nexus is distinct from *mens rea* in that the intent of a third (non-accused) party might bear on the nexus, yet not on the *mens rea* of a given offense.¹⁶⁶ The nexus is unique to the prosecution of crimes against humanity and serves to elevate the moral culpability of the accused.¹⁶⁷ Concerning the subjective element, per Judge Cassese of the ICTY, “the same act [constituting] both a war crime and a crime against humanity is necessarily more serious when committed as a crime against humanity because of the nexus.”¹⁶⁸ (Emphasis retained). Here, the requirement is that a perpetrator recognizes that their conduct contributes to a larger whole.

There need not be an explicit writing or organization creating the “widespread or systematic attack.”

“[W]idespread” refers to the large-scale nature of the attack and the number of victims, whereas “systematic” refers to “the [organized] nature of the acts of violence and the improbability of their random occurrence.” Patterns of crimes – that is the non-accidental repetition of similar criminal conduct on a regular basis – are a common expression of such systematic occurrence.¹⁶⁹

¹⁶⁵ Robert Dubler, SC, and Matthew Kalyk, *Crimes Against Human. Under Customary Int’l Law and the ICC: The Chapeau Elements*, *supra*, at 725.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 726.

¹⁶⁸ Prosecutor v Tadić, Case No IT-94-1-A, Judgment of the Appeals Chamber re: Sentencing, Separate Opinion of Judge Cassese (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999).

¹⁶⁹ Prosecutor v. Nahimana, *et al.*, (the “Media Case”), Case No. ICTR-99-52, Appeal Judgement (Int’l Crim. Trib.

In the case of forced religious conversion, the repeated conversion of individuals over time is indicia of a “non-accidental repetition of similar criminal conduct on a regular basis.”¹⁷⁰

The second condition in parsing the nexus concerns the objective prong: what constitutes “part of” a systematic attack? In their treatise on the Chapeau elements of crimes against humanity, Dubler notes:

A number of ad hoc Tribunals have held that the accused’s acts will form part of an attack if, by their nature, aims, characteristics or consequences, they are objectively part of the attack and are liable to have the effect of furthering that attack.¹⁷⁴ An act need not share all the characteristics of the ‘attack’ and can take place before or after, and at places away from, the main attack and still be regarded as part of it, if there is sufficient connection between the two.¹⁷¹ ... The ICC has adopted the same approach, holding that the

For Rwanda Nov. 28, 2007), citing *Kordić and Čerkez* Appeal Judgement, ¶ 94. See also *Blaškić* Appeal Judgement, 101; *Kunarac et al.*, Appeal Judgement, ¶ 94. For a discussion concerning the scale of attacks under this requirement; see Section IV(C), *infra*, concerning the Gravity Threshold for International Criminal Prosecution.

¹⁷⁰ *Id.*

¹⁷¹ Prosecutor v. Kunarac, et al., Case No. IT-96-23 & 23/1(A), Appeals Chamber Judgment in the Kunarac, Kovac and Vukovic Case (Int’l Crim. Trib. for the Former Yugoslavia June 12, 2002), at ¶ 99-100, affirming Prosecutor v. Kunarac, et al., Case No. IT-96-23 & 23/1, Judgement of Trial Chamber II in the Kunarac, Kovac and Vukovic Case, ¶ 417-418 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001). Followed by Prosecutor v. Vasiljević, Case No. IT-98-32-T, Trial Chamber Judgment, (Int’l Crim. Trib. for the Former Yugoslavia Nov. 29, 2002), ¶ 32; Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, Trial Chamber Judgment, (Int’l Crim. Trib. For Rwanda Dec. 1, 2003), ¶ 866; Prosecutor v. Semanza, Case No. ICTR-97-20-T, Trial Chamber Judgment, (Int’l Crim. Trib. for Rwanda May 15, 2003), ¶ 326; Prosecutor v. Sesay, Kllon and Gbao, Case No. SCSL-04-15-T, Trial Chamber Judgment, (Special Court for Sierra Leone Mar. 2, 2009), ¶ 89; Prosecutor v Tadić, Case No. IT-94-1-A, Appeals Chamber Judgment, (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999), ¶ 271.

acts must be committed ‘in furtherance of’ the relevant attack considering the ‘nature, aims and consequences of such act.’¹⁷² (Internal citation retained).

Determining whether conduct constitutes ‘part of an attack is a question of fact. Per the Trial Chamber of the Special Court for Sierra Leone, “while each case will depend on the facts, the following factors indicated a ‘reliable indicia’ of the nexus element:”

1. the similarities between the perpetrator’s acts and the acts occurring within the attack;
2. the nature of the events and circumstances surrounding the perpetrator’s acts;
3. the temporal and geographic proximity of the perpetrator’s acts with the attack; and
4. the nature and extent of the perpetrator’s knowledge of the attack when he commits the acts.¹⁷³

Discriminatory animus is a sufficient unifying factor to constitute an attack.

... [I]n Kunarac, the ICTY Trial Chamber held that the torture, enslavement and sexual assaults carried out by the Bosnian Serb defendants on Muslim women were part of the ‘attack’ because the victims were chosen by

¹⁷² Prosecutor v. Katanga and Chui, Case No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges, (Int’l Crim. Court Oct. 13, 2008), ¶ 400; Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, (Int’l Crim. Court June 15, 2009), ¶ 84, 86; Authorisation of an Investigation into the Situation in the Republic of Kenya, Case No. ICC-01/09-19, Pre-Trial Chamber II Decision, (Int’l Crim. Court Mar. 31, 2010), ¶ 98. Quotation and internal references from Dubler, SC, and Kalyk, *supra* note 165, at 727-28.

¹⁷³ *Id.* at 728, *citing* Prosecutor v. Brima, Kamara and Kanu, Case No. SCSL-04-16-T, Trial Chamber II Judgment, (Special Court for Sierra Leone June 20, 2007), ¶ 220; *followed in* Prosecutor v. Charles Ghankay Taylor, Case No. SCSL-2003-01-T, Trial Chamber Judgment, (Special Court for Sierra Leone Apr. 26, 2012), ¶ 512.

reason of their ethnicity and the crimes in question corresponded with other such acts occurring against Muslim civilians in the same region of Foča at the time.¹⁷⁴

Because the impetus in Kunarac arose from a discriminatory animus, directed at a protected class (ethnicity), the same reasoning is readily applicable to questions of religiously-motivated crime. In the case of crime directed at a religious group, the acts supporting discrimination, provided they are of sufficient severity, should constitute part of a widespread or systematic attack as demanded by the bipartite nexus requirement.

B. Individual and Joint Culpability of Violent Religious Extremists Under International Criminal Law

Whether the restriction of religious liberty takes the form of methodical government censure or violent subjugation, both mechanisms serve the ultimate, illegal purpose of destroying the victim's personality via mental anguish. The next question concerns how the ICC can meet its stated goal of holding the most responsible to account for these acts. If the perpetrator is governmental, the question is more straightforward. If the perpetrator is an organization, or perhaps even an unorganized group sharing an ideology, the question is more complex.

Concerning the former scenario, a government almost always represents a hierarchical structure with a clear executive leader or small cadre of leaders.¹⁷⁵ When

¹⁷⁴ Robert Dubler, SC, and Matthew Kalyk, *Crimes Against Humanity Under Customary International Law*, *supra*, at 728 (citing Prosecutor v. Kunarac, et al., Case No. IT-96-23 & 23/1, Judgement of Trial Chamber II in the Kunarac, Kovac and Vukovic Case, Int'l Crim. Trib. for the Former Yugoslavia (Feb. 22, 2001), 592).

¹⁷⁵ For a list of government structures, see *Government Type - The World Factbook*, U.S. CENT. INTEL. AGENCY, <https://www.cia.gov/the-world-factbook/field/government-type/> (last visited Mar. 24, 2024). See also Wikipedia: List of countries by system of government (Mar. 2024).

the conduct of government officers is limited to a faction, agency, or group within that government (or otherwise a subset of that government), the office of the prosecutor would limit their inquiry to the leader of that subset (rather than the head of the entire government, for example). The way that the ICC determines the most responsible individual turns on three factors: “[1] the rank of the person; [2] the role played by that person in the commission of crimes within the jurisdiction of the Court; and [3] the role played by the state entities, organizations, or armed groups to which the person belonged in the overall commission of crimes within the jurisdiction of the Court.”¹⁷⁶

The latter scenario—the possibility of a non-governmental organization perpetrating torture, or the possibility of individuals perpetrating torture under a shared ideology absent formal organization—complicates the analysis in defining the “most responsible” actor. In such case, the appropriate course of action may be to avoid prosecuting the individual actors at the international level, and instead to prosecute the ideological figurehead. Under this method of prosecution, the court would likely rely on the concept of Joint Criminal Enterprise (JCE) liability.

The doctrine of Joint Criminal Enterprise in international crimes derives from the ICTY’s trial proceedings re: Tadić, and is clarified in the 2017 Appeal judgment in the same matter. “The three requisite elements of [a] joint criminal enterprise’s actus reus (JCE I) are: (i) a group of persons, (ii) the existence of a common plan, and (iii) the contribution of the accused within the

¹⁷⁶ Susana SáCouto & Katherine A. Cleary, *The Gravity Threshold of the International Criminal Court*, 23 AM. J. INT’L L. 807, 849 (2008), citing Prosecutor v. Dyilo, Case No. ICC-01/0401/06, Decision Concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo (Int’l Crim. Court Feb. 24, 2006), Annex I (“Decision on the Prosecutor’s Application for a Warrant of Arrest, Article 58” (Feb. 10, 2006), formerly under seal), at ¶ 51-52.

common plan.”¹⁷⁷ Another relevant form of joint criminal enterprise liability is JCE III, or so-called “Pinkerton Liability,”¹⁷⁸ which charges that the result of the accused’s conduct would foreseeably amount to international crimes. Both JCE I and JCE III are relevant with respect to the crime of torture when committed by a group sharing an extremist ideology, but absent formal organization structure (or with organizational structure which is non-governmental in nature). Regarding JCE III, perpetrators are culpable when:

(i) ... the crime was a natural and foreseeable consequence of the execution of [the criminal] enterprise, and (2) ... the accused was aware that such crime was a possible consequence of the execution of that enterprise, and that, with that awareness, he participated in that enterprise. The first is an objective element of the crime, and does not depend upon the state of mind on the part of the accused. The second is the subjective state of mind on the part of the accused which the prosecution must establish. None of the various formulations in Tadic Conviction Appeal Judgment require the prosecution in such a case to establish that the accused intended such further crime to be committed, or that he shared with that other participant the state of mind required for that further crime. The Trial Chamber is satisfied that the prosecution does not have to do so.¹⁷⁹

¹⁷⁷ Gerhard Werle, *Individual Criminal Responsibility* in Article 25(5) of the ICC Statute, J. INT’L CRIM. JUST. 953, 959 (2007), <https://ssrn.com/abstract=2201560> (citing Prosecutor v. Tadić, Case No. IT04-74-A, Judgment Int’l Crim. Trib. for the Former Yugoslavia (Nov. 29, 2017), 254 et seq.).

¹⁷⁸ This is derived from U.S. conspiracy liability, see *Pinkerton v. United States*, 328 U.S. 640 (1946).

¹⁷⁹ Prosecutor v. Radoslav Brdanin & Momir Talic, Case No. IT-99-36-T, Decision on Form of Further Amended Indictment and Prosecution Application to Amend (Int’l Crim. Trib. for the Former Yugoslavia June 26, 2001), ¶ 30.

The precise form of liability charged in ICC proceedings is important, as both JCE I and JCE III entail differing frameworks concerning their requisite *mens rea*, *actus reus*, and nexus. While remaining faithful to the same criterion incident to the underlying crime charged (here, torture), an additional layer of analysis must be completed in light of the culpability charged. Both JCE I and JCE III arise from the same formulation of *actus reus*. In the Appeals judgment in *Prosecutor v. Tadić*, the ICTY held that the *actus reus* of Joint Criminal Enterprise liability was customary international law. The court expanded on the simplified *actus reus* described above, holding that JCE required:

- i. *A plurality of persons*. They need not be organized in a military, political or administrative structure, as is clearly shown by the Essen Lynching and the Kurt Goebell cases.
- ii. *The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute*. There is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialize extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.
- iii. *Participation of the accused in the common design* involving the perpetration of one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime under one of those provisions (for example, murder, extermination, torture, rape, etc.), but may take the form of assistance in, or contribution to, the execution of the

common plan or purpose.¹⁸⁰ (Emphasis retained).

The mens rea element diverges for the two forms of liability. The mens rea underlying JCE I requires: "... the intent to perpetuate a certain crime (this being the shared intent on the part of all co-perpetrators)."¹⁸¹ The mens rea accompanying JCE III requires: "the intention to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commissions of a crime by the group."¹⁸² In the latter case of JCE III, "responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was foreseeable that such a crime might be perpetrated by one or other members of the group and (ii) the accused willingly took that risk."¹⁸³

In the instance of torture via violent religious extremism, it is clear from these *jus cogens* formulations of Joint Criminal Enterprise liability that, if a tribunal accepts the definition of torture as arising from extremist acts, the conduct of multiple members of the "joint enterprise" might be fairly charged and litigated. This construction of liability affords the ICC and other international tribunals broad leeway in deciding who to target and ultimately charge with an international crime. While a figurehead, such as a religious leader who inspires violent action, might not be directly involved in the commission of an international crime, they might still face accountability for their public statements and inflammatory messaging as a member of a joint criminal enterprise with a religious faithful who exerts violence but-for the religious teachings they receive. JCE therefore remains the preeminent means of attaching liability to leadership who are physically disconnected from the violence their adherents or subordinates engage in.

¹⁸⁰ Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999), ¶ 227.

¹⁸¹ *Id.* at ¶ 228.

¹⁸² *Id.* (Emphasis retained).

¹⁸³ *Id.* (Emphasis retained).

C. Considerations Pertaining to Universal Jurisdiction

Universal Jurisdiction is “the authority of any state to assert jurisdiction over an unlawful act, regardless of the nationality of the perpetrator or victim, and regardless of where the act took place.”¹⁸⁴ The justifications surrounding universal jurisdiction vary, but tend to advance the claim that “states exercising universal jurisdiction are agents of the international community enforcing obligations that are universally accepted.”¹⁸⁵ Universal jurisdiction was discussed at some length in the International Court of Justice’s (ICJ) holding concerning the April 2000 Arrest Warrant sought by the Brussels Tribunal in the First Instance against Abdulaye Yerodia Ndombasi, a foreign minister of the Democratic Republic of the Congo. In its holding, the ICJ noted a number of important characteristics of universal jurisdiction. For one, the Court highlights that the exercise of “pure” universal jurisdiction (where the prosecuting entity is completely disinterested in the litigation but-for the universal jurisdiction) is not per se unlawful.¹⁸⁶ Further, and specifically regarding the exercise of jurisdiction over criminal offenses, the ICJ expressed in dicta that “it was . . . necessary to ‘prove the existence of a principle of international law restricting the discretion of States as regards criminal legislation.’”¹⁸⁷ In such instances where a disinterested state nonetheless wishes to exercise universal jurisdiction to bring a

¹⁸⁴ BETH VAN SCHAACK & RONALD C. SLYE, INT’L CRIM. L. AND ITS ENFORCEMENT: CASES AND MATERIALS 106 (Foundation Press 4th ed. 2020) (citing *United States v. Ali Mohamed Ali, Also Known as Ahmed Ali Adan, Also Known as Ismail Ali*, 718 F.3d 929 (D.C. Cir. 2013)).

¹⁸⁵ VAN SCHAACK, INT’L CRIMINAL L. AND ITS ENFORCEMENT, *supra* note 184.

¹⁸⁶ Arrest Warrant of 11 April 2000 (*Democratic of the Congo v. Belgium*), 2002 I.C.J. Reports 3 (Feb. 2002), at ¶ 45.

¹⁸⁷ *Id.* at 49 (citing the ICJ’s prior *Judgment* in the Case of the S.S. Lotus, France v. Turkey, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7)).

perpetrator to justice, they do so by conceptually “acting as agents for the international community.”¹⁸⁸

In addition to the subject-matter jurisdiction over perpetrators afforded by universal jurisdiction, so too does university jurisdiction presumably endow a prosecuting state with personal jurisdiction over those charged with international crimes. In *DRC v. Belgium*, the ICJ holds that “there is no rule of international law ... which makes illegal co-operative overt acts designed to secure [a perpetrator’s] presence within a State wishing to exercise jurisdiction.”¹⁸⁹ To exercise this jurisdiction, however, the Court cautions that “[i]t is equally necessary that universal criminal jurisdiction be exercised only over those crimes regarded as the most heinous by the international community.”¹⁹⁰ The Court ultimately holds that Crimes Against Humanity, as a conceptual class of offenses, fall into “that small category [of offences] of which an exercise of universal jurisdiction is not precluded under international law.”¹⁹¹

In light of the *DRC v. Belgium* holding, the definitional work of classifying violent religious extremism as a form of torture is an integral step in gaining the broad enforcement power that universal jurisdiction affords. The fact that torture has been condemned by so many international legal instruments, while also enumerated as both a Crime Against Humanity and War Crime by the Rome Statute, lends credence to the claim that prosecutions charging torture would fall within the purview of universal jurisdiction. In essence, if a court finds that a violent religious extremist’s conduct qualifies as torture under the reasoning of this paper, the ability of any sovereign to prosecute that individual would be co-incident with such a finding under the concept of universal jurisdiction.

¹⁸⁸ *Democratic of the Congo v. Belgium*, *supra* note 180, at ¶ 51.

¹⁸⁹ *Id.* at ¶ 58.

¹⁹⁰ *Id.* at ¶ 60.

¹⁹¹ *Id.* at ¶ 65.

IV. LESSER PRELIMINARY MATTERS CONCERNING THE ICC, AND DEFENSES IN FAVOR OF THE “QUASI-PREEMPTIVE” APPROACH

This final section of this work concerns both 1) the preliminary and procedural matters that must be addressed before a prosecution at the ICC is deemed legitimate and necessary, and 2) the questions that naturally accompany the proposal of a new legal framework.

A. International Criminal Court Jurisdiction

The ICC acquires personal jurisdiction over natural persons through a number of statutory vehicles provided for in the Rome Statute. The court's subject matter jurisdiction is also limited by the Rome Statute. Regarding personal jurisdiction, the court has jurisdiction over natural persons¹⁹² above 18 years of age.¹⁹³ The ICC statute expressly provides for jurisdiction over individuals (or joint enterprises) and not States as entities.¹⁹⁴ It is understood that the conduct of States as entities is regulated by other international instruments. Still, it is deliberately noted in the Rome Statute that the status of an individual as the head of government of a State does not protect that individual from their liability as a natural person before the ICC.¹⁹⁵

The court acquires its jurisdiction over natural persons if one of the following mechanisms are satisfied:

- (a) ... [O]ne or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
- (b) ... [O]ne or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting

¹⁹² Rome Statute Art. 25(1).

¹⁹³ Rome Statute Art. 26.

¹⁹⁴ Rome Statute Art. 25(4).

¹⁹⁵ Rome Statute Art. 27.

under Chapter VII of the Charter of the United Nations; or

- (c) ... The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.¹⁹⁶

As a preliminary matter, “[a] State which becomes a Party to [The Rome] Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred.”¹⁹⁷ Further:

- 2. the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
 - (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
 - (b) The State of which the person accused of the crime is a national.
- 3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question.¹⁹⁸

Ultimately, the question of personal jurisdiction in an instance of torture arising from violent religious extremism is a question of fact to be determined in each case. It is of note, however, that the declaration provision in Rome Statute Art. 12(3), *supra*, must adhere to the Statute’s provisions on temporal jurisdiction. The issue of temporal jurisdiction is of particular relevance here, because the aim of “quasi-preemptive” prosecution is to prosecute smaller crimes which occur before the central

¹⁹⁶ Rome Statute Art. 13.

¹⁹⁷ Rome Statute Art. 12.

¹⁹⁸ Rome Statute Art. 12(2)-(3).

atrocity crime bringing a given situation into international focus.

Temporal jurisdiction before the court simply limits the court's purview to the oversight of crimes which 1) constitute crimes at the time of the offense, and 2) where the offense took place by a national of or in the territory of a State Party to the Rome Statute.¹⁹⁹ Regarding subject matter jurisdiction, the ICC is deliberately limited in the forms of crimes it can investigate and prosecute. These are the crimes of Genocide, Aggression, War Crimes, and Crimes Against Humanity.²⁰⁰ The central aim here in the definition of violent religious extremism as torture, and thus a crime against humanity, is driven by a need to establish a legitimate ground for ICC intervention in a situation evidencing this form of conduct.

B. Complementarity and "Quasi-Preemptive" Prosecution

The next issue concerning the involvement of the ICC is the court's deliberate function as a complimentary judicial body to be used only when domestic or hybrid tribunals are unable to render genuine justice. Article 17 of the Rome Statute deals explicitly with the issues that render a case inadmissible before the court.²⁰¹ The provisions of this article codify the general aim of the ICC as a complimentary judicial body, but recognize that some domestic proceedings may constitute sham enforcement aimed at undermining the court's exercise of jurisdiction.²⁰²

In the instance of a religious regime that promotes violent extremism, it is unlikely that genuine justice will be brought by that regime against extremists for the crimes they commit. This would be a clear instance where the ICC has an interest in asserting itself by investigation and prosecution. The murkier question concerns whether

¹⁹⁹ Rome Statute Art. 11.

²⁰⁰ Rome Statute Art. 5.

²⁰¹ Rome Statute Art. 17.

²⁰² Rome Statute Art. 17(1)(b), (2)(c).

prosecution of lesser crimes, in the context of an ongoing larger crime, might also preempt the opportunity for the local jurisdiction to attempt to prosecute. In this way, the “quasi-preemptive” approach might rob local governments of the chance to demonstrate their capacity to function as an administrator of justice.

One of the primary benefits of the “quasi-preemptive” approach is in how it leaves open the possibility of later prosecution for larger crimes. By targeting enforcement on smaller matters earlier in the timeline of a developing situation, the ICC might compliment the local jurisdiction by taking on the burden of prosecution during a time of upheaval or civil unrest, and then defer to the local jurisdiction if it wishes to prosecute later crimes committed by the criminal actor. In this sense, both the ICC and local jurisdiction play a coordinated role in redressing atrocity crime, and the ICC bolsters its claims to legitimacy by completing simpler prosecutions on smaller issues more quickly. This approach takes less resources, allows for evidence to be more easily collected, and reduces the total time before a verdict is rendered by the various trial and appeals chambers of the ICC.

C. The Gravity Threshold

The final open question accompanying the “quasi-preemptive” approach concerns the gravity threshold. The Gravity Threshold is not expressly defined in the Rome Statute. Rather, the concept arises from case law acting to review the appropriateness of prosecutorial decision making in the choice to bring charges in certain cases. Both the Office of the Prosecutor and the Pre-Trial Chamber have a voice in the “gravity” discussion. The former implements the gravity threshold as a means of screening cases, likely in an effort to promote economy in the use of limited prosecutorial resources. The OTP considers the following criteria in re: gravity:

- the number of persons killed;

- the number of victims, particularly in the case of crimes against “physical integrity,” such as willful killing or rape;
- the severity of the crimes;
- the scale of the crimes;
- the systematicity of the crimes;
- the nature of the crimes;
- the manner in which those crimes were committed; and
- the impact of the crimes.²⁰³

Further, “the ‘concept of gravity should not be exclusively attached to the act that constituted the crime but also to the degree of participation in its commission.’”²⁰⁴

²⁰³ SáCouto & Cleary, *The Gravity Threshold of the International Criminal Court*, *supra* note 176 at 824-825, citing Luis Moreno-Ocampo, STATEMENT AT THE INFORMAL MEETING OF LEGAL ADVISORS OF MINISTRIES OF FOREIGN AFFAIRS 6 (Oct. 24, 2005) (“We are currently in the process of refining our methodologies for assessing gravity. In particular, there are several factors that must be considered. The most obvious of these is the number of persons killed—as this tends to be the most reliably reported. However, we will not necessarily limit our investigations to situations where killing has been the predominant crime. We also look at number of victims of other crimes, especially crimes against physical integrity. The impact of the crimes is another important factor.”); also citing ROD RASTAN, THE POWER OF THE PROSECUTOR IN INITIATING INVESTIGATIONS 7 (2007) (stating that, “[i]n practice, in determining whether the situation is of sufficient gravity, the Office will consider issues of severity; scale; systematicity; impact; and particularly aggravating aspects”); also citing ICC, OFFICE OF THE PROSECUTOR, REPORT ON THE ACTIVITIES PERFORMED DURING THE FIRST THREE YEARS (June 2003-June 2006) 6 (2006) (stating that, “factors relevant in assessing gravity include: the scale of the crimes; the nature of the crimes; the manner of commission of the crimes; and the impact of the crimes”). For this footnote in context, see Susana SáCouto & Katherine A. Cleary, *The Gravity Threshold of the International Criminal Court*, original FN 38, at pp. 825.

²⁰⁴ SáCouto & Cleary, *supra* note 176, citing ROD RASTAN, THE POWER OF THE PROSECUTOR IN INITIATING INVESTIGATIONS, *supra*, at 7 (“The global character of the ICC, its statutory provisions and logistical constraints, in turn, support the policy decision of focusing, as a general rule, the Office’s investigative and prosecutorial efforts and resources on those who bear the greatest responsibility for those crimes.”).

The other arbiter of the ICC's approach to this gravity threshold is the Pre-Trial Chamber (PTC), which serves an important function as a check on the OTP's charging decisions. In the PTC's decision in *Prosecutor v. Dyilo*, the chamber recognized a distinction between the gravity threshold and "gravity-driven" crimes.²⁰⁵

The Chamber ... observes that this gravity threshold is in addition to the drafters' careful selection of the crimes included in articles 6 to 8 of the [Rome] Statute, a selection based on gravity and directed at confining the material jurisdiction of the Court to the "most serious crimes of international concern." Hence, the fact that a case addresses one of the most serious crimes for the international community as a whole is not sufficient for it to be admissible before the Court.²⁰⁶

The court summarizes its gravity threshold inquiry by stating "that a case will meet the requirements of Article 17(1)(d) ['gravity threshold'] if the following three questions can be answered affirmatively":²⁰⁷

- (i) Is the conduct which is the object of a case systematic or large scale (due consideration should also be given to the social alarm caused to the international community by the relevant type of conduct)?;
- (ii) Considering the position of the relevant person in the State entity, organi[z]ation or armed group to which he belongs, can it be considered that such person falls within the

²⁰⁵ *Prosecutor v. Dyilo*, *supra*, Decision Concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo (Int'l Crim. Court Feb. 24, 2006), Annex I ("Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58" (Feb. 10, 2006), formerly under seal), ¶ 44-45.

²⁰⁶ *Id.* at ¶ 41.

²⁰⁷ SáCouto & Cleary, *supra* note 176, at 835.

category of most senior leaders of the situation under investigation?; and

(iii) Does the relevant person fall within the category of most senior leaders suspected of being most responsible, considering[:]

(1) the role played by the relevant person through acts or omissions when the State entities, organizations or armed groups to which he belongs commit systematic or large-scale crimes within the jurisdiction of the Court, and

(2) the role played by such State entities, organi[z]ations or armed groups in the overall commission of crimes within the jurisdiction of the Court in the relevant situation?²⁰⁸

The PTC noted that “the factors outlined in its decision were not discretionary considerations, but rather necessary conditions for meeting the gravity threshold under the Rome Statute.”²⁰⁹

In analyzing violent religious extremism under the gravity test, the prosecutor’s analysis of the *mens rea* underlying the crime may also be relevant to their gravity determination. Attacks that assault the personality of individuals via torture have been proven to be of international concern. The litany of international instruments denouncing torture testify bolster this assertion. The question seems to turn less on the gravity of the *mens rea* implicit in torture, and instead on the breadth of the *actus reus* pertaining to the criminal act. Where a quasi-preemptive prosecution would likely rely on a limited number of victims to support a charge, the emphasis would need to be placed more on the systematic nature of the conduct in question, and less on the quantity of affected victims.

²⁰⁸ *Id.* at ¶ 63.

²⁰⁹ SáCouto & Cleary, *supra* note 176 (citing Prosecutor v. Dyilo, *supra* note 205, Decision Concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, at ¶ 62).

In the alternative, provided that violent extremist conduct is limited to a protected class of individuals (such that attacks are deliberate in selecting victims based on this discriminatory animus), this may also be sufficient to constitute “part of an attack directed against a civilian population,” and of sufficient extent to satisfy the gravity threshold. This is because 1) the deliberate targeting of victims is logically an indicia of a systematized attack *per se*, and 2) torture is viewed as so severe and of such troubling nature under international law as to enjoy a *jus cogens* prohibition against it. Regarding the appropriate party to prosecute under this scheme, the source of the religious or theological teachings espousing the use of violence appear the obvious target. Because religious figures enjoy a heightened ability to persuade, they should bear a heightened responsibility when the fruits of their preaching, proselytizing, and public speaking result in serious harms to others.

V. CONCLUSION

As has been stated previously, the responsibility rests on the ICC’s Office of the Prosecutor in whether or not to abide by the recommendations contained in this article. The OTP is a judicial organ with limited resources, and the task of expanding investigative efforts, as called for here, is clearly a drain on those resources. However, the time saved by promoting more efficient and speedy trials may counterbalance the increased expenditure on investigation and evidence collection necessary for quasi-preemptive prosecution. Even if the OTP were to fully embrace this prosecution model, it is an open question to what extent this style of prosecution would yield satisfactory results that achieve justice for aggrieved parties. If nothing else, this model affords a host country the benefit of time in periods of turmoil or transition. The interim prosecution and shorter-duration penalties arising from these cases are an imperfect, but potentially necessary, means to support healing communities in their establishment of judicial systems

that can hold perpetrators more fully to account for their actions.

Violent religious extremism may be fairly characterized under a number of the enumerated crimes against humanity considered in the Rome Statute. The advocacy of “torture” in this instance is not intended to exclude other, creative methods of redressing violent religious extremist conduct. Rather, this model attempts to provide a roadmap that could later be expanded to encompass the various other definitions reasonably applicable to this conduct.