



Network for investigation and
prosecution of genocide, crimes
against humanity and war crimes



The prosecution at national level of sexual and gender-based violence (SGBV) committed by the Islamic State in Iraq and the Levant (ISIL)



The Hague, July 2017

The Genocide Network

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Note: The organisation known as the Islamic State is also referred as Islamic State in Iraq and the Levant’ (ISIL), ‘Islamic State of Iraq and Al-Sham’ (ISIS) and ‘Daesh’. This organisation is not a State. Other groups have experienced similar crimes, but most of the information available through open sources refers to the Yazidi minority. For this reason, this report focuses exclusively on the persecution of Yazidis by ISIL.

1. Introduction

This report provides a contextual overview regarding sexual and gender-based violence (SGBV) perpetrated by ISIL members and advocates for characterising this type of violence within the spectrum of core international crimes. The European Union (EU) Member States may find this characterisation helpful should suspects of those crimes come under their jurisdiction. This report outlines: (i) the patterns of crimes, (ii) the contextual legal elements of core international crimes, (iii) elements of proof of a policy on sexual violence to be attributed to ISIL, and (iv) the coercive environment of sexual violence, plus two annexes. The first annex contains excerpts of documents that support the existence of an ISIL policy on sexual violence, and the second annex contains some applicable judicial precedents.

Members of the terrorist organisation ISIL have organised and committed numerous acts of sexual violence and other serious crimes against religious and ethnic minorities in Syria and Iraq. EU citizens and other nationals are involved in the perpetration of these crimes. Member States can prosecute these alleged perpetrators under different sets of domestic legislation governing, *inter alia*, the prosecution of ordinary crimes (rape, murder, forced marriage, mistreatment, etc.), acts of terrorism, and genocide, crimes against humanity and war crimes (often referred to as core international crimes). Nonetheless, the prosecution of SGBV committed in Syria and Iraq as core international crimes appears to be a reasonable choice based on the widespread and systematic nature of the crimes perpetrated. The international community supports the prosecution of SGBV perpetrated by ISIL as a core international crime, and insists that counter-terrorism and the fight against impunity of core international crimes are mutually reinforcing goals and a priority for international peace and security.

The United Nations Security Council (UN SC) considered that 'rape and other forms of sexual violence can constitute a war crime, a crime against humanity, or a constitutive act with respect to genocide.'¹ The Council further recognised that terrorist organisations use sexual violence deliberately² and stated that all United Nations (UN) member states are urged to investigate, prosecute and punish alleged perpetrators of SGBV.³ In the context of the EU Regional Strategy for Syria and Iraq and the threat constituted by ISIL, the European Council unreservedly

¹ UN SC Resolution 1820 on women, peace and security, S/Res/1820, 19 June 2008, para. 4, available at: [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1820\(2008\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1820(2008)).

² UN SC Resolution 2242 on women, peace and security, S/Res/2242, 13 October 2015, available at: [https://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2242\(2015\)](https://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2242(2015)), preamble.

³ *Ibid.*, para. 14.

condemned the violations of international humanitarian law and human rights committed by ISIL, and stressed that all people responsible for these violations must be held accountable.⁴

EU Member States may prosecute violence committed by ISIL under international crimes charges according to their respective legal systems. Depending on the domestic legislation of each country, the grounds for jurisdiction related to the prosecution of core international crimes may vary. Jurisdiction can therefore be triggered by the nationality of the perpetrator (active personality), the nationality of the victim (passive personality), or by universal jurisdiction. Moreover, core international crimes are not statute-barred, which might be seen as a determining factor for future prosecutions of SGBV perpetrated by ISIL under the rules governing the investigation and prosecution of core international crimes.⁵

2. Patterns of Crimes

ISIL perpetrated violence against civilians in Syria and Iraq according to certain patterns based on the perceived affiliation of their victims to ethnic, religious or political groups. Targeted groups include Yazidis, Christians, Turkmens, Sabea-Mandean, Kaka'e, Kurds, Shias,⁶ and Sunnis perceived affiliated to the Iraqi Government.⁷ These groups were subjected to systematic killings, abductions, pillage and the destruction of their property.⁸

Attacks against Yazidis involved specific features in the targeting of men, women and children according to their gender.⁹ Notwithstanding that other groups may have experienced similar crimes, the majority of the information available, which relates to the commission of serious violations of international humanitarian law in Syria and Iraq, focuses on the crimes committed towards Yazidis. ISIL's specific *modus operandi* of attack against Yazidis entailed:

- The capture of civilians and the brutal separation of men, women and children;
- Mass killings of men and forced conversions to Islam;

⁴ Council conclusions on the EU regional strategy for Syria and Iraq as well as the ISIL/Daesh threat – Council conclusions 9105/16, Brussels, 23 May 2016, paras. 8 to 13, available at: <http://data.consilium.europa.eu/doc/document/ST-9105-2016-INIT/en/pdf>.

⁵ For specifics on the investigation and prosecution of core international crimes in EU Member States, see the 'Strategy of the EU Genocide Network to combat impunity for the crime of genocide, crimes against humanity and war crimes within the European Union and its Member States' and the pertinent JHA Council Conclusions from 15-16 June 2015, available at: <http://www.eurojust.europa.eu/Practitioners/Genocide-Network/Pages/strategy.aspx>.

⁶ Human Rights Council, Report of the Office of the United Nations High Commissioner for Human Rights on the human rights situation in Iraq in the light of abuses committed by the so-called Islamic State in Iraq and the Levant and associated groups, A/HRC/28/18, 13 March 2015, para. 16.

⁷ *Ibid*, para. 29.

⁸ *Ibid*, para. 16 to 43.

⁹ Human Rights Council, 'They came to destroy: ISIS Crimes Against the Yazidis', A/HRC/32/CRP.2, 15 June 2016, para. 23 to 99, available at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/ColSyria/A_HRC_32_CRP.2_en.pdf.

- Conscription of children between eight and eighteen years of age to participate in the hostilities, as well as their forced conversions to Islam; and
- An organised system of sexual violence against women and girls.¹⁰

Thousands of Yazidi women and girls were captured by ISIL fighters who forcibly transferred them and kept them captive in holding sites in Syria. Yazidi women and girls were often registered and photographed at these locations. They were forced to live in inhumane conditions and subjected to inhumane treatment and to different forms of SGBV, such as rape, forced marriages, human trafficking for sexual purposes, body inspections, and forced birth control. At the detention centres, ISIL religious authorities instructed fighters to inspect and choose Yazidi women or girls for marriage and to celebrate these marriages between ISIL fighters and Yazidi females. The sale of Yazidi females as sex slaves was taking place either at the detention centres, in slave markets, which are identified in many locations, or through online auctions using encrypted applications to circulate detailed information and the price of the females being sold.¹¹ Once sold and/or forcibly married, Yazidi women and girls lived as sex slaves, subject to daily rapes and other forms of sexual violence, and were forced to work for the fighters and their families.

To gather information about the SGBV perpetrated by ISIL fighters, a large number of public documents can be found. Major international and non-governmental organisations, such as the UN Commission of Inquiry in Syria, the Office of the United Nations High Commissioner for Human Rights (OHCHR), the Commission for International Justice and Accountability, Amnesty International, Human Rights Watch, the US Holocaust Memorial Museum and the Global Justice Centre, prepared reports arguing that ISIL fighters perpetrated acts of genocide, crimes against humanity and war crimes.¹² Additionally, international media and the use of Open Source Intelligence (OSINT) provide for extensive information on the alleged perpetration of crimes by ISIL. The aforementioned information might be used by investigators and prosecutors to support the accounts of potential witnesses and alleged victims. A striking example of a document that could be used for investigative purposes is an online video, which has been posted by a number of media agencies, in which ISIL fighters can be seen bragging about

¹⁰ *Ibid*, para. 42 to 80.

¹¹ *Ibid*, para. 57.

¹² See for example the following reports: Report Human Rights Council, 'They came to destroy'; Report Amnesty International, 'Escape from Hell: Torture and Sexual Slavery in Islamic State Captivity in Iraq', December 2014, available at: <https://www.amnestyusa.org/reports/escape-from-hell-torture-sexual-slavery-in-islamic-state-captivity-in-iraq/>; Report Human Rights Watch, 'Iraq: ISIS Escapees Describe Systematic Rape', April 2015; Global Justice Center, 'ISIS's Gender-Based Crimes against Yazidi Women and Girls', Letter in Support of Filing OTP-CR-397/15, 17 December 2015, available at: <http://globaljusticecenter.net/files/CounterTerrorismTalkingPoints.4.7.2016.pdf>; United States Holocaust Memorial Museum Report, 'Our Generation is Gone: The Islamic State's Targeting of Iraqi Minorities in Ninewa', 2015, available at: <https://www.ushmm.org/m/pdfs/Iraq-Bearing-Witness-Report-111215.pdf>.

purchasing Yazidi women at a slave market. The video shows these fighters explaining how the price of each woman was determined based on her age and other physical features.¹³ Many other publicly available articles describe the pattern of crimes according to which Yazidi women have been forced to marry ISIL fighters.¹⁴

The abovementioned organisations and media have reported that ISIL crimes of sexual violence against Yazidi women and girls entailed patterns of:

- Sexual slavery,
- Persecution,
- Torture,
- Rape,
- Inhumane treatment, and
- Outrages upon personal dignity.

3. Contextual Legal Elements

The crimes perpetrated by ISIL against Yazidis present some or all of the contextual elements of war crimes, crimes against humanity, and genocide, as they have been defined by the Rome Statute. The Rome Statute is taken here as a reference even though domestic legislation may have a definition for each of these crimes, which may vary slightly from the definitions contained in the Rome Statute.

3.1. SGBV amounting to war crimes (Article 8 of the Rome Statute)

Yazidis constitute a civilian group that does not participate in the hostilities taking place in the territory occupied by ISIL. Therefore, Yazidis are protected by international humanitarian law.¹⁵ Crimes of sexual violence against Yazidis are connected to the armed conflict taking place in Syria and Iraq because they are committed in furtherance of an ISIL policy (see below) which is

¹³ This video has been commented on by several media outlets. See, e.g. <http://en.alalam.ir/news/1645633>; <http://www.telegraph.co.uk/news/worldnews/islamic-state/11205321/Watch-Isil-jihadists-in-new-video-joke-about-buying-Yazidi-sex-slaves.html>; <http://www.ibtimes.co.uk/isis-jihadists-negotiate-yazidi-girls-slave-market-chilling-video-1472798>.

¹⁴ See, e.g.: <https://twitter.com/nbcnews/status/806467293765050368>; <http://www.nbcnews.com/storyline/isis-terror/inside-secret-rescue-yazidi-sex-slaves-isis-captors-n692111>; <http://www.thejournal.ie/isis-building-a-society-2125989-May2015/>; <http://www.independent.co.uk/news/people/yazidi-sex-slave-sold-to-isis-fighter-with-10-year-old-sister-was-gang-raped-beaten-and-scalded-with-10285014.html>; <http://www.independent.co.uk/news/world/middle-east/isis-escape-one-yazidi-womans-horrific-ordeal-and-miraculous-rescue-from-the-hands-of-one-of-the-10508468.html>; <https://www.hrw.org/news/2016/04/18/yezidi-women-after-slavery-trauma>; <http://www.metronews.ca/news/world/2016/05/01/yazidi-woman-made-a-daring-escape-from-isis.html>; <http://www.foxnews.com/world/2016/06/04/iraqi-christian-details-how-isis-fighters-married-her-only-for-rape.html>; http://www.huffingtonpost.co.uk/2014/09/11/isis-sex-slaves-british-jihadists_n_5802532.html; <http://www1.cbn.com/700club/escapees-offer-first-hand-accounts-isis-horrors>.

¹⁵ Article 3 of the Geneva Conventions, 12 August 1949; Article 8 of the Rome Statute of the International Criminal Court, 17 July 1998.

applied to target ‘infidel’ groups and to establish an Islamic State.¹⁶ ISIL policies on sexual violence are binding on all members of the organisation.

3.2. SGBV amounting to crimes against humanity (Article 7 of the Rome Statute)

Patterns of violence similar to ISIL crimes against Yazidis were committed in the former Yugoslavia against Bosnian Muslims. SGBV perpetrated against Bosnian Muslims has been considered by the International Criminal Tribunal for the former Yugoslavia (ICTY) to be inflicted upon the victims in the context of a widespread or systematic attack against a civilian population. The ICTY identified, *inter alia*, the following unlawful conduct taking place in the attack against the civilian population identified by the ICTY: taking control of villages, looting, destruction of monuments and temples, forced displacement of a vast number of civilians, killings, forced detention in holding sites, detention in appalling conditions, and rape and other forms of sexual violence in detention facilities.¹⁷ In 2016, the *Karadzic* judgement considered these acts to be crimes against humanity, which were, according to the Trial Chamber, ‘demonstrated by the existence of a campaign of co-ordinated violence during the take-overs and in the detention facilities.’¹⁸ Therefore, the acts of SGBV taking place in the context of a systematic or widespread attack against the civilian population were prosecuted under crimes against humanity charges. Similarly, a high level of coordination is noticeable in ISIL’s attacks on the Yazidi population during which the ISIL fighters capture, kill, transport, and hold captive thousands of Yazidi women and girls in detention facilities. ISIL members appear to be aware that this unlawful conduct is part of the organisation’s attack against Yazidis. Paragraph IV explains to what extent ISIL authorities have expressed their intent to commit similar crimes against Yazidis. These elements suggest the existence of evidence of an ‘organisational policy’ governing the conduct of the attack by ISIL against Yazidis.¹⁹

3.3. SGBV amounting to genocide (Article 6 of the Rome Statute)

The patterns of crime committed by ISIL are similar to those committed in the former Yugoslavia. In the 2016 *Karadzic* judgement, the Chamber considered that acts of genocide had been committed through: the mass killing of Bosnian Muslim men, forced displacement, the separation of men and boys from women, and inhumane treatment in detention, which caused serious bodily or mental harm to thousands of Bosnian Muslims in Srebrenica.²⁰ Similar to the persecution of Bosnian Muslims in Srebrenica, ISIL has organised a large-scale system of sexual

¹⁶ Human Rights Council, ‘They came to destroy’, paras. 169, 171 and 172.

¹⁷ ICTY, *Prosecutor v. Radovan Karadzic*, Trial Judgment, Case No. IT-95-5/18-T, 24 March 2016, paras. 2614 to 2624.

¹⁸ *Ibid*, paras. 2444 and 2623.

¹⁹ See Article 7(2)(a) Rome Statute.

²⁰ *Ibid*, paras. 5655 to 5665.

violence targeting Yazidi women and girls. In the *Akayesu* judgement, the Chamber considered that rape and sexual violence ‘constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy’ a group as such. The Chamber even qualified SGBV as ‘one of the worst ways to inflict harm on the victims.’²¹

In the context of the SGBV inflicted upon Yazidi females, it would be necessary to establish the ISIL’s members’ intent to destroy, in whole or in part, the Yazidi community as such. Documentary evidence of the existence of an ISIL policy deemed to establish a system of sexual slavery is available. These documents could be helpful to prove the genocidal intent of ISIL to eliminate Yazidis as a religious group. This documentary evidence contains policy measures concerning the treatment of Yazidi females, such as: the justification to take infidel women captives and to sell them as concubines and sex slaves; the defence of a literal revival of slavery to procreate Muslims who would supersede Yazidis through patrilineal descent; the compulsory supervision by ISIL imams when choosing captive women as personal slaves; regulations on how to participate in the trade of sex slaves; detailed regulations on intercourse with sex slaves; regulation of the transmission of ownership over sex slaves as property; samples of marriage contracts with captive women; and medical forms for couples to be married. These elements, combined with the separation of Yazidi males and females and the mass killing of adult men, threaten the survival of Yazidis as a religious group. Furthermore, an article published in the journal *PLOS Medicine* supports the allegations according to which ISIL committed genocide against the Yazidi community in the region of Mount Sinjar (Iraqi Kurdistan). A team of four researchers conducted a retrospective household survey to estimate the number and demographic profile of Yazidis killed and kidnapped by ISIL. The findings from the survey were: approximately 2.5 per cent of the Yazidi population (\approx 9 000 people) were either killed or kidnapped over the course of a few days in August 2014. The researchers estimated that 3 100 Yazidis were killed, with nearly half of them executed and the remainder dead from starvation, dehydration or injuries suffered as a result of the violence inflicted upon them during the ISIL siege. Combined with other existing evidence, these estimates could support a formal genocide investigation by an appointed judicial authority.²²

²¹ ICTR, *Prosecutor v. Jean-Paul Akayesu*, Trial Judgment, Case No. ICTR-96-4-T, 2 September 1998, para. 731.

²² Cetorelli, V., Sasson, I., Shabila, N. and Burnham, G. (2017), ‘Mortality and kidnapping estimates for the Yazidi population in the area of Mount Sinjar, Iraq, in August 2014: A retrospective household survey’, *PLoS Med* 14(5): e1002297, available at: <https://doi.org/10.1371/journal.pmed.1002297>.

4. A Policy of Sexual Slavery: Measures that Threaten the Survival of Yazidis and Other Groups

Documentary evidence containing policy measures on sexual violence is rarely found when international crimes are committed. In determining the elements of crimes, such policy provides an objective indication of the intent to commit international crimes. Such policy confirms ‘the context of a manifest pattern’ for the crime of genocide and of ‘knowledge of a widespread or systematic attack directed against any civilian population’ for crimes against humanity.²³ Moreover, with respect to crimes against humanity, documentary evidence expressing the perpetrator’s willingness to commit the crimes would prove the existence of an organisational policy as ‘it is understood that policy to commit such attack requires that the State or organisation actively promote or encourage such an attack against a civilian population.’²⁴

ISIL authorities issued documents that regulate in detail the system of sexual slavery of non-Muslim women that exists within regions controlled by ISIL. This material provides evidence of the existence of an ‘organisational policy’ to commit core international crimes, and might therefore be useful to prove: (i) the intent of ISIL to ‘attack’ the Yazidi civilian population; (ii) the discriminatory intent required for the crime of persecution; and (iii) the genocidal intent to destroy, in whole or in part, Yazidis as a protected group if a determination can be made that the anti-Muslim policy of ISIL was used by certain military commanders to justify their targeted attacks on Yazidi villages and consequently to prevent the survival of Yazidis as a group.

The material evidence listed below outlines the existence of an ISIL policy on sexual slavery since it justifies, regulates and organises this practice within the organisation.²⁵ Further details concerning excerpts and accessibility are elaborated in Annex I. This evidence is not exhaustive and is publicly accessible. In the context of this policy, ISIL members act in support of, *inter alia*:

- The denial of the persistence of Yazidis as a religious group and the justification for enslaving Yazidi women;²⁶
- Justifying the captivity and sale of women as concubines for Muslim men. Such a practice is seen by ISIL members to be an act of generosity towards Muslim men;²⁷

²³ Elements of Crimes of the Rome Statute, Article 6(a), para. 3 and Article 7, para. 2.

²⁴ Elements of Crimes of the Rome Statute, Article 7, para. 3.

²⁵ The documents mentioned below are allegedly attributed to ISIL; authenticity and reliability should be further assessed.

²⁶ ISIS Dabiq article, ‘The Revival of Slavery Before the Hour’, available at: <http://www.danielpipes.org/rr/2014-10-dabiq.228.pdf>.

²⁷ ISIS Pamphlet on Slavery, Fatwa Issuing and Research Department, available at: <http://www.aymennjawad.org/2015/12/unseen-islamic-state-pamphlet-on-slavery>.

- The defence of a literal revival of slavery based on the fact that ‘the slave girl gives birth to her master’, who is Muslim through his paternal affiliation²⁸; and
- The supervision of the sexual slavery network by religious authorities. Indeed, according to ISIL’s sex slavery policy, captive girls are not allowed to be taken as slaves before an Iman rules on the issue.²⁹

Moreover, many written documents can be used to establish that the sex slavery network operating on the territory occupied by ISIL is highly organised. The rules used to buy and sell sex slaves are similar to the rules applicable to any other trade market, namely, norms on registration and bids to purchase sex slaves.³⁰ In addition, intercourse with sex slaves is highly regulated with respect to what is permitted for the owner and what is not.³¹

Sex slaves are the property of the owner. Buying, selling and giving them as a gift are permitted. Slaves are considered part of each owner’s estate.³²

Furthermore, the transactions taking place on the sex slave market and the relationships that are created are documented and recorded in writing. ISIL has created a number of sample forms to be used by men making transactions on the sex slave market.³³ ISIL’s organisational policy is addressed to its members, who must conform to it. Many ISIL fighters have participated in any manner in the vast system of organised sexual violence (e.g. capture, transportation, maintenance of the captives in holding sites, assisting the slave trade, buying slaves, forcibly marrying a captive, authorising a marriage, rape, mistreatment, body inspections, etc.). Should EU Member States be in a position to prosecute ISIL members, national authorities should investigate whether ISIL members participated in the extensive system of sexual violence. In such case, the prosecution may take the elements potentially demonstrating an internal policy on sexual slavery into account to demonstrate the contextual elements of core international crimes and decide to prosecute the alleged perpetrators of SGBV according to the legislation applicable with respect to the commission of core international crimes. Documentary evidence of a *policy* on sexual slavery, if supported by evidence *connecting* the suspect to this organised system, would facilitate the prosecution of sexual violence as a core international crime.

²⁸ ISIS Dabiq article, ‘The Revival of Slavery Before the Hour’.

²⁹ ISIS Pamphlet on Slavery.

³⁰ See, e.g.: <http://www.dailymail.co.uk/news/article-3377086/Islamic-State-ruling-aims-settle-sex-female-slaves.html>.

³¹ Fatwa Number 64, ISIL Committee of Research and Fatwas. See an article mentioning the Fatwa, available at: <http://www.reuters.com/article/us-usa-islamic-state-sexslaves-exclusive-idUSKBN0UC0AO20151229>.

³² Questions and Answers, ISIS Pamphlet, mentioned in a Human Rights Watch blog article, ‘Slavery: the ISIS Rules’, 5 September 2015, available at: <https://www.hrw.org/news/2015/09/05/slavery-isis-rules>.

³³ See, e.g., a sample of marriage contracts via payment, a sample of authorised marriages, and medical forms to be used by couples to be married. Documents to be found in the archives of Islamic State documents, available at: <http://www.aymennjawad.org/2016/01/archive-of-islamic-state-administrative-documents-1>.

Witnesses and victims who have taken refuge in Europe are likely to corroborate the existing written evidence through testimonial evidence. Thanks to Europol's new mandate, which gives them competence regarding the investigation of core international crimes, further possibilities are available to support Member States' national investigative authorities, including by sharing information on witnesses and victims among EU law enforcement agencies.

5. Intent vs Motivation and Consent

According to ICTY jurisprudence (see below), the personal motivation of perpetrators when they commit international crimes is irrelevant, because it does not exclude criminal intent. Therefore, if an individual commits sexual violence for his personal pleasure, such as possessing sex slaves, or marrying or raping Yazidis, he can nonetheless be prosecuted and charged for the commission of core international crimes as long as a connection exists between his conduct and the contextual elements of the crime, as defined by the Rome Statute.

The irrelevance of personal motivation of the alleged perpetrators with respect to their conviction for the commission or participation in the commission of core international crimes has been established by the jurisprudence of the *ad hoc* tribunals. The Chamber in the *Tadic* Appeals Judgement stated that:

*'crimes against humanity can be committed for purely personal reasons, provided it is understood that the two aforementioned conditions – that the crimes must be committed in the context of widespread or systematic crimes directed against a civilian population and that the accused must have known that his acts, in the words of the Trial Chamber, "fitted into such a pattern" – are met.'*³⁴

In the same way, the Chamber in the *Kunarac* Appeals Judgement stated that the sexual motivation of the alleged perpetrator does not *per se* exclude the intent to torture his victim because intense pain and suffering are foreseeable consequences of the conduct.³⁵

This ICTY jurisprudence was later reaffirmed in the *Kvočka* Appeals Judgement, in which the Chamber ruled on rapes taking place in detention camps. The Chamber deemed that the personal enjoyment of the accused of the sexual violence he perpetrated did not make his conduct less unlawful. The Chamber underlined that 'the jurisprudence of the Tribunal is very clear that "crimes against humanity can be committed for purely personal reasons."³⁶

Likewise, the absence of consent of a victim of sexual violence must not be established, as it is not an element of rape or other crimes of sexual violence. The very definition of sexual violence as it is contained in the ICC Elements of Crimes describes sexual violence as an 'act of a sexual

³⁴ ICTY, *Prosecutor v. Duko Tadic*, Appeals Judgement, IT-94-1-A, 15 July 1999, para. 255.

³⁵ ICTY, *Prosecutor v. Kunarac et al.*, Appeals Judgement, IT-96-23 & IT-96-23/1-A, 12 June 2002, para. 153.

³⁶ ICTY, *Prosecutor v. Kvočka et al.*, Appeals Judgement, IT-98-30/1-A, 28 February 2005, para. 689.

nature by force, or by threat of force or coercion' which results in the incapacity of the victim to consent to such act.³⁷

The ICTY also ruled on the issue of consent and sexual violence in detention sites in *the Kunarac Appeals Judgement*. The Chamber stated that:

*'Force or threat of force provides clear evidence of non-consent, but force is not an element per se of rape. In particular, the Trial Chamber wished to explain that there are "factors other than force" which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim. A narrow focus on force or threat of force could permit perpetrators to evade liability for sexual activity to which the other party had not consented by taking advantage of coercive circumstances without relying on physical force.'*³⁸

In this case, the Chamber considered that the extreme detention conditions and the intensity and regularity of the rapes committed on the detained women established 'circumstances that were so coercive as to negate any possibility of consent'.³⁹ The Chamber added: 'This finding shows that force or compulsion was used prior to rape. In this context, the Appeals Chamber further refers back to its finding that the coercive circumstances of this case made consent to the sexual acts by the Appellants impossible.'⁴⁰

6. Conclusion

It can reasonably be argued that ISIL members have perpetrated sexual violence and committed core international crimes. Information available from international organisations, non-governmental organisations, media, and social networks by using OSINT provide evidence that can be used to investigate and prosecute alleged perpetrators. Based on the specific circumstances of each case and specific national legislation, national authorities could consider prosecuting core international crimes cumulatively with terrorist offences (such as membership in a terrorist organisation). Both the fight against impunity and the fight against terrorism are mutually reinforcing goals. A large number of publicly available documents could potentially constitute material evidence that ISIL had a policy to commit sexual violence against women and girls because of their religious identity. Such sexual violence, envisaged in the context of the broader violence used by ISIL, could constitute core international crimes. When the aforementioned policy is considered in light of the supporting evidence, a strong argument can be made highlighting patterns of sexual violence and individual criminal responsibility.

³⁷ ICC Elements of Crime, Articles 7(1)(g)-1, 7(1)(g)-6; Article 8(2)(b)(xxii)-1; Article 8(2)(b)(xxii)-6.

³⁸ *Kunarac*, Appeal Judgement, para. 129.

³⁹ *Ibid*, para. 132, 133.

⁴⁰ *Kunarac*, Appeal Judgement, para. 409.

ANNEX I - Documentary Evidence: Excerpts potentially establishing an ISIL policy on sexual slavery⁴¹

This first Annex contains fragments of documents attributed to ISIL that potentially constitute evidence of the existence of a policy on sexual slavery when interpreted in the context of the global violence perpetrated by ISIL. The evidence presented is not exhaustive and is accessible online.

Examples of excerpts potentially establishing an ISIL policy on sexual slavery	Source	Extract
<p>Excerpt that seems to question the survival of Yazidis as a group and may be seen by ISIL members as a justification for sexual enslavement of Yazidi females.</p>	<p>ISIL magazine <i>Dabiq</i>⁴²</p>	<p>‘Upon conquering the region of Sinjar in Wilāyat Ninawā, the Islamic State faced a population of Yazidis, a pagan minority existent for ages in regions of Iraq and Shām. Their continual existence to this day is a matter that Muslims should question as they will be asked about it on Judgment Day (...) Their creed is so deviant from the truth that even cross-worshipping Christians for ages considered them devil worshippers and Satanists (...). Accordingly, the Islamic State dealt with this group as the majority of fuqahā’ (experts) have indicated how mushrikīn (idolaters) should be dealt with. Unlike the Jews and Christians, there was no room for jizyah payment. Also, their women could be enslaved unlike female apostates who the majority of the fuqahā’ say cannot be enslaved and can only be given an ultimatum to repent or face the sword. After capture, the Yazidi women and children were then divided according to the Shari’ah amongst the fighters of the Islamic State who participated in the Sinjar operations, after one fifth of the slaves were transferred to the Islamic State’s authority to be divided as khums (one fifth of spoils of war for Allah and for His Messenger, and for kinsmen and orphans and the needy and the wayfarer - Qur’an 8:41). This large-scale enslavement of mushrik (idolater) families is probably the first since the abandonment of this Shari’ah law (...). [O]ne should remember that enslaving the</p>

⁴¹ Because the information gathered in this Annex is primarily found on the Internet, the reliability of the documents should be further assessed. The excerpts listed in this annex should be seen as potential leads for further investigation.

⁴² ‘The Revival of Slavery before the Hour’, *Dabiq*, available at: <http://www.danielpipes.org/rr/2014-10-dabiq.228.pdf>.

		families of the kuffār (infidels) and taking their women as concubines is a firmly established aspect of the Sharī'ah that if one were to deny or mock, he would be denying or mocking the verses of the Qur'ān and the narrations of the Prophet (sallallāhu 'alayhi wa sallam), and thereby apostatizing from Islam.'
Excerpt that describes sexual slavery as an act of generosity towards Muslim men.	ISIS Pamphlet on Slavery ⁴³	'7. In captivity and enslavement is generosity on men who are incapable of marrying. And this is from God's mercy on men who cannot find marriage or for whom the matter of marriage is difficult from expenditures and the like, so God has allowed them to have concubines in the possession of the right hand (...). Likewise it is from generosity upon men to be allowed to take women captive and purchase them, and this is something by which unmarried men benefit most or the one who desires multiple [spouses] but cannot be just, so for him is the possession of the right hand as wealth.'
Excerpt that could support the fact that new-borns coming from intercourse taking place in the context of sexual slavery should acquire Muslim status.	ISIS Dabiq article 'The Revival of Slavery Before the Hour' ⁴⁴	This article engages in a discussion to defend a literal interpretation of slavery based on the hadith (religious saying): 'the slave girl gives birth to her master' by which the child of a concubine has the (Muslim) status of her master. Sexual slavery is seen as a means to terminate the existence of infidels.
Excerpt that might explain how religious authorities supervise the taking of sexual slaves by ISIS members.	ISIS Pamphlet on Slavery (Fatwa Issuing and Research Department) ⁴⁵	'3. The captivity of the women of the disbelievers waging war and their enslavement must be through jihad in that they are sabaya (female prisoners of war). It is not allowed to take the sabaya as slaves before the ruling of the Imam [i.e. the Caliph] upon them because he may rule to be benevolent towards them or ransom for them. Therefore it is not allowed to lie carnally with them or enjoy them simply for being sabi (captive girls), but also the Imam must make divisions among them [and thus] if they are allowed to be taken as slave girls, the possessions of one's right hand, then one can lie carnally with them according to Shari'i conditions.'

⁴³ Aymenn Jawad Al-Tamimi, 'Unseen Islamic State Pamphlet on Slavery', 29 December 2015, available at: <http://www.meforum.org/blog/2015/12/unseen-islamic-state-pamphlet-on-slavery>.

⁴⁴ ISIS, 'The Revival of Slavery'.

⁴⁵ 'Unseen Islamic State Pamphlet on Slavery'.

Excerpt that could be used to demonstrate that the trade in sex slaves is highly organised.

*ISIS Notice on Buying Sex Slaves*⁴⁶

'The brothers who desire to buy sabaya (captive girls) must register their names with the admin official of the battalion or sector. As for the brothers performing ribat (guard duty at a frontier outpost in order to defend the 'house of Islam') on the front lines, coordination will be done with the amir (commander-in-chief) of the battalion with their coming down at the defined time that we will subsequently convey to the admin official within ten days at most from the date of this announcement. And whoever does not register his name has no right to attend the "slave trade market". And the bid is to be submitted in the sealed envelope at the time of purchase, and the one who wins the bid is obliged to purchase. And God is the guarantor of success.'

Extract detailing the ISIL regulation governing sexual intercourse between members of the organisation and slaves

*ISIS Fatwa No 64*⁴⁷

'One of [on] the graces which Allah has bestowed upon the State of Caliphate is the conquest of large surface areas of the country and one of the inevitable consequences of the jihad of establishment is that women and children of infidels will become captives of Muslims. Consequently, it is necessary to clarify some rules pertaining to captured prisoners to avoid any violations dealing with them (...)

-If the owner releases his female captive then he is not permitted to have intercourse with her afterwards because she has become free and is no longer his property.

-If two or more individuals are involved in purchasing a female captive, none of them are permitted to have intercourse with her because she is part of a joint ownership.

-It is not permissible to have intercourse with a female captive during her menstrual cycle.

-It is not permissible to have anal sex with a female captive.

-The owner of a female captive should show compassion towards her, be kind to her, not humiliate her, and not assign

⁴⁶ 'Archive of Islamic State Administrative Documents', released by Jawad Al-Tamimi, 11 January 2016, Specimen 13 Y: Notice on Buying Sex Slaves, Homs province, 15 June 2015, available at:

<http://www.aymennjawad.org/2016/01/archive-of-islamic-state-administrative-documents-1>.

⁴⁷ ISIL Committee of Research and Fatwas, 'FATWA Number 64', 29 January 2015, available at:

http://graphics.thomsonreuters.com/doc/slaves_fatwa.pdf.

	<p>her work she is unable to perform. -The owner of a female captive should not sell her to an individual whom he knows will treat her badly or do unto her what Allah has forbidden.'</p>
<p>Document stating that sexual slaves are the 'property' of the owner.</p>	<p><i>Questions and Answers</i> (ISIS pamphlet)⁴⁸</p> <p>'Question 6: Is it permissible to sell a female captive? It is permissible to buy, sell, or give as a gift female captives and slaves, for they are merely property, which can be disposed of as long as that doesn't cause [the Muslim ummah] any harm or damage....</p> <p>Question 10: If a man dies, what is the law regarding the female captive he owned? Female captives are distributed as part of his estate, just as all [other parts] of his estate [are distributed]. However, they may only provide services, not intercourse, if a father or [one of the] sons has already had intercourse with them, or if several [people] inherit them in partnership.'</p>
<p>See, also, the administrative documents issued by the authorities of the Islamic State that can be found online, such as: Marriage contracts Authorised marriage certificates Medical forms for couples that will be married</p>	<p>See open source Archive of Islamic State.⁴⁹</p>

⁴⁸ Text posted on a Twitter account reproducing excerpts from an ISIS pamphlet, available at: www.memrijttm.org. Information obtained in the following report: Human Rights Watch, 'Slavery: The ISIS Rules', 5 September 2015, available at: <https://www.hrw.org/news/2015/09/05/slavery-isis-rules>.

⁴⁹ Specimen 13H: marriage contract, Tel Ref'at (Aleppo province); Specimen 16V: sample marriage contract; Specimen 22M: marriage contract, Ramadi belt area; Specimen 22N: Medical form for couple to be married (goes with Specimen 22M), Archive of Islamic State, all documents can be found at: <http://www.aymennjawad.org/2016/01/archive-of-islamic-state-administrative-documents-1>.

ANNEX II - International Jurisprudence Applicable to ISIL's Crimes of Sexual Violence⁵⁰

This second Annex contains selected examples of international jurisprudence related to sexual violence, which could be useful for further investigation and prosecution of SGBV allegedly perpetrated by ISIL members.⁵¹ Prosecuting sexual violence as an international crime requires cumulative determination of the following elements: (i) the contextual elements of international crimes, (ii) the specifics of sexual violence, and (iii) evidence linking individual perpetrators.

Annex II provides an overview of existing jurisprudence in relation to the two first points.

1. Relevant contextual elements of war crimes, crimes against humanity and genocide

1.1. War crimes

War crimes are defined by Article 8 of the Rome Statute⁵² as:

- Conduct which is contrary to the rules of International Humanitarian Law;
- Conduct which takes place in the context of or is associated with an armed conflict (*nexus* between the offence and an armed conflict). It should be further underlined that war crimes may occur during both international and non-international armed conflicts.

In addition, international criminal law requires that the alleged perpetrator was aware of the factual circumstances that establish the existence of an armed conflict to qualify his wrongful behaviour as a war crime.

With respect to the specific *nexus* between SGBV and armed conflicts, the ICTY's jurisprudence provides useful guidance. The Appeals Chamber in *Kunarac* stated that:

*'[I]f it can be established, as in the present case, that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict.'*⁵³

In the *Tadic* case, the ICTY Trial Chamber ruled on sexual violence taking place in detention centres and stated that:

'Those acts clearly occurred with the connivance or permission of the authorities running these camps and indicate that such acts were part of an accepted policy towards prisoners in the camps in opstina Prijedor. Indeed, such treatment effected the objective of the Republika Srpska to ethnically cleanse, by means of terror, killings or otherwise, the areas

⁵⁰ This annex is based on the definitions of the crime of genocide, crimes against humanity and war crimes as provided by the Rome Statute. Each Member State may have its own particular definitions applicable to national jurisdiction.

⁵¹ For a comprehensive reference, see Brammertz, S. & Jarvis, M. (2016) *Prosecuting Conflict-Related Sexual Violence at the ICTY*, Oxford: Oxford University Press.

⁵² Rome Statute, Article 8. Elements of Crimes, Article 8.

⁵³ *Kunarac*, Appeals Judgement, para. 58.

*of the Republic of Bosnia and Herzegovina controlled by Bosnian Serb forces. Accordingly, those acts too were directly connected with the armed conflict.*⁵⁴

With respect to the persecution of Yazidis by ISIL fighters, the contextual elements of war crimes could be demonstrated by national authorities prosecuting ISIL fighters for these crimes. Indeed, Yazidis constitute a civilian group not taking part in the hostilities. Therefore, Yazidis are protected by international humanitarian law.⁵⁵ Also, SGBV perpetrated against Yazidis is connected to the armed conflict taking place in Syria and Iraq because the acts of SGBV are committed in furtherance of an ISIL policy to eliminate infidel groups and to establish an Islamic State.⁵⁶ With respect to the *mens rea*, ISIL fighters actively participating in the hostilities in the territory occupied by ISIL are therefore aware of the existence of an armed conflict in Syria and Iraq.

1.2. Crimes against humanity

Crimes against humanity are defined by Article 7 of the Rome Statute, according to which a crime against humanity is an attack that is widespread or systematic and is perpetrated against a civilian population.⁵⁷

In addition, Article 7 of the Rome Statute requires that the perpetrator was aware that his conduct took place within the context of a widespread or systematic attack against a civilian population.

Patterns of violence similar to those perpetrated against Yazidis have been considered by the ICTY to be conduct taking place in the context of a widespread or systematic attack against a civilian population. The ICTY in this way considered the following conduct to constitute crimes against humanity: taking control of villages, looting, destruction of monuments and temples, forced displacement of a vast number of civilians, killings, forced detention in holding sites, detention in appalling conditions, and rape and other forms of sexual violence in detention facilities.⁵⁸ The Chamber, in the *Karadzic* Trial Judgement, considered the aforementioned conduct to constitute crimes against humanity because the conduct identified ‘a clear pattern of widespread intimidation [...] demonstrated by the existence of a campaign of co-ordinated violence during the take-overs and in the detention facilities.’⁵⁹

⁵⁴ *Tadic*, Trial Judgement, para. 575.

⁵⁵ Geneva Conventions, Article 3 common; Rome Statute, Article 8.

⁵⁶ Human Rights Council, ‘They came to destroy’, paras. 169, 171 and 172.

⁵⁷ Rome Statute, Article 7; Elements of Crimes, Article 7.

⁵⁸ *Karadzic*, Trial Judgement, paras. 2614 to 2624.

⁵⁹ *Karadzic*, paras. 2444 and 2623.

In the existing jurisprudence on SGBV, SGBV is clearly often considered to be part of an attack against a civilian population. In this way, the Chamber in the *Kunarac* Trial Judgement held that:⁶⁰

'[The defendants] abused [the victims] and raped three of them many times, thereby perpetuating the attack upon the Muslim civilian population. Kovac would also invite his friends to his apartment, and he sometimes allowed them to rape one of the girls. Kovac also sold three of the girls [...] [the defendants] mistreated Muslim girls and women, and only Muslim girls and women, because they were Muslims. They therefore fully embraced the ethnicity-based aggression of the Serbs against the Muslim civilians, and all their criminal actions were clearly part of and had the effect of perpetuating the attack against the Muslim civilian population.'

Similarly, ISIL fighters perpetrate sexual violence against Yazidi women and girls in a widespread and systematic manner. The alleged perpetrators specifically target their victims because of their religion and gender.

1.3. Crime of genocide

The crime of genocide is defined by Article 6 of the Rome Statute as:

'any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group, or (e) Forcibly transferring children of the group to another group.'

Therefore, the crime of genocide entails:⁶¹

- The killing of one or more persons;
- Because of their affiliation to a particular national, ethnical, racial or religious group.

In addition, international criminal law requires that the alleged perpetrator intends to destroy, in whole or in part, the targeted group, as such.

1.3.1. Useful jurisprudence with respect to the actus reus:

In 2016, the ICTY Trial Chamber convicted Karadzic of genocide against Bosnian Muslims in Srebrenica for patterns of crimes similar to the conduct of ISIL towards the Yazidi population.

These patterns included, *inter alia*:⁶²

- Capture of civilians
- Mass killings of Bosnian Muslim men
- Forced removal of women and children
- Separation of men and boys from women
- Inhumane treatment of persons while in detention

⁶⁰ ICTY, *Prosecutor v. Kunarac, Kovac and Vukovic*, Trial Judgement, IT-96-23-T & IT-96-23/1-T, 22 February 2001, paras. 587 and 592.

⁶¹ Rome Statute, Article 6; Elements of Crimes, Article 6.

⁶² For patterns of crimes similar to those against Yazidis, see *Karadzic*, Trial Judgement, paras. 5655 to 5665.

- Causing serious bodily or mental harm to thousands of female and male members of the Bosnian Muslims of Srebrenica

The Chamber considered these patterns of crime to amount to genocide because:

*'Thousands of female and male members of the Bosnian Muslims of Srebrenica were subjected to serious bodily or mental harm as a result of actions of the Bosnian Serb [F]orces and that this harm was of such serious nature as to contribute or tend to contribute to the destruction of part of the group.'*⁶³

The ISIL crimes, in addition to presenting patterns of violence that are similar to the crimes perpetrated in Srebrenica, involve a large-scale system of sexual violence against Yazidi women and girls. As mentioned above, rape and sexual violence have been considered by the Trial Chamber in the *Akayesu* case to be 'one of the worst ways of inflicting harm on the victim as he or she suffers both bodily and mental harm.'⁶⁴

1.3.2. Useful jurisprudence with respect to the mens rea:

The Appeals Chamber in the *Stakic* case stated that the assessment of genocidal intent shall be made in light of a comprehensive assessment of the totality of the evidence presented by the parties. The Appeals Chamber considered that:

*'[T]he Trial Chamber's compartmentalised mode of analysis obscured the proper inquiry. Rather than considering separately whether the Appellant intended to destroy the group through each of the genocidal acts specified by Article 4(1)(a), (b), and (c), the Trial Chamber should expressly have considered whether all of the evidence, taken together, demonstrated a genocidal mental state.'*⁶⁵

In the *Karadzic* case, the ICTY Trial Chamber assessed the totality of the evidence presented by the parties and deduced the genocidal intent of the Serbian forces from the context in which the killings and forced removal of Bosnian Muslims took place in Srebrenica:

*'Viewing the evidence in its totality, the Chamber considers that the Bosnian Serb [F]orces must have been aware of the detrimental impact that the eradication of multiple generations of men would have on the Bosnian Muslims in Srebrenica in that the killing of all able-bodied males while forcibly removing the remainder of the population would have severe procreative implications for the Bosnian Muslims in Srebrenica and thus result in their physical extinction. The Chamber therefore finds beyond reasonable doubt that these acts were carried out with the intent to destroy the Bosnian Muslims in Srebrenica as such.'*⁶⁶

The investigation of the crimes perpetrated against Yazidis could potentially lead to the identification of the intent of ISIL to destroy in whole or in part the Yazidi community as a

⁶³ *Ibid*, para. 5665.

⁶⁴ *Akayesu*, Trial Judgement, para. 731. For similar findings, see ICTY, *Prosecutor v. Stakić*, Trial Judgement, Case No. IT97-24, 31 July 2003, para. 516; ICTR, *Prosecutor v. Rutaganda* Trial Judgement, Case No. ICTR-96, para. 51; ICTR, *Prosecutor v. Musema*, Trial Judgement, Case No. ICTR-96-13, 27 January 2001, para. 156.

⁶⁵ ICTY, *Prosecutor v. Milomir Stakic*, Appeals Judgement, Case No. IT-97-24-A, 22 March 2006, para. 55.

⁶⁶ *Karadzic*, Trial Judgement, para. 5671.

group. The patterns of crimes perpetrated by ISIL against Yazidis present similarities with the patterns of crimes perpetrated by Bosnian Serb forces against the Bosnian Muslims in Srebrenica. The following points may be useful to attempt to establish whether ISIL has the intent to destroy, in whole or in part, the Yazidi community as such.

The abovementioned documentary evidence potentially establishes a policy of sexual enslavement of Yazidi women and girls, and the displacement of the Yazidi community combined with the separation of Yazidi men and women.

On this point, the prosecution in the *Karadzic* case argued that:⁶⁷

'While forcible transfer alone does not "necessarily" constitute genocide, forcible transfer can be a powerful additional means - when coupled with any of the specified actus reus - by which to ensure the physical destruction of a group. This is particularly the case when the forcible transfer involves the separation of its members. Certainly, as repeatedly confirmed in ICTY case-law, forcible transfer and genocide are not mutually exclusive crimes.'

The systematic violence against Yazidis as a group, the scale of violence, the gravity and the planning of the acts of violence, as well as the use of derogatory language can be indications of genocidal intent.

On this point, the Trial Chamber in the *Akayesu* case stated that:

*'[T]he genocidal intent inherent in a particular act charged [can be inferred] from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act.'*⁶⁸

Similarly, the Trial Chamber in the *Kayishema* case stated that:

*'The Chamber finds that the intent can be inferred either from words or deeds and may be demonstrated by a pattern of purposeful action. In particular, the Chamber considers evidence such as the physical targeting of the group or their property; the use of derogatory language toward members of the targeted group; the weapons employed and the extent of bodily injury; the methodical way of planning, the systematic manner of killing. Furthermore, the number of victims from the group is also important.'*⁶⁹

In the same way, the Appeals Chamber in the *Jelusic* case referred to evidence presented by the prosecution to consider that the defendant adhered to a plan established to eradicate Muslims. The Chamber specifically referred to the following utterances that were attributed to the defendant:

⁶⁷ *Prosecutor v. Karadzic*, Prosecution Final Trial Brief, Trial Chamber III, Case No IT-95-5/18-T, 23 September 2014, para. 576, available at: http://www.icty.org/x/cases/karadzic/custom5/en/140923_1_1_1.pdf

⁶⁸ *Akayesu* Judgement, para. 523.

⁶⁹ ICTR, *Prosecutor v. Kayishema et al.*, Trial Judgement, Case No. ICTR-95-1-T, 21 May 1999, para. 93.

*'[T]hreats by the respondent to kill 70%, to beat 30%, and spare only 5-10% of the Muslim detainees, statements by the respondent that he wanted to rid the world of the Muslims, announcements of his quota of daily killings, and his desire to sterilise Muslims in order to prevent proliferation of the group.'*⁷⁰

Similarly, sexual violence against Yazidi females can be considered as a mean to cause serious bodily or mental harm, and/or inflict conditions of life calculated to bring about the physical destruction of the group.

On this point, the Trial Chamber, in the *Mladic* case, stated that the evidence presented to support a charge related to rape and other acts of sexual violence 'also provide[d] information on the perpetrators' genocidal intent.'⁷¹

Therefore, the Trial Chamber considered the accused's knowledge that 'girls from Foca were kept by his troops as sexual slaves' to be part of the evidence establishing genocidal intent, when taking into account the destructive effects of the rapes on the women.⁷²

Similarly, the Trial Chamber in the *Kayisema* case considered rape to be one 'method[...] of destruction which does not immediately lead to the death of members of the group.'⁷³

Moreover, the ICJ also stressed that rape was a form of conduct that causes serious bodily and mental harm:

*'The Court considers that ... rape and other acts of sexual violence were perpetrated within the context of the conflict. It recalls that Croatia has established that acts of rape were committed in a number of localities in Eastern Slavonia and that they caused serious bodily and mental harm to members of the protected group.'*⁷⁴

2. Specifics of SGBV to prosecute ISIL fighters for particular unlawful conduct

2.1. Sexual slavery

According to the ICC elements of crime, sexual slavery is a form of unlawful conduct that can constitute a war crime or a crime against humanity. The ICC and the *ad hoc* tribunals defined the scope of sexual slavery.

⁷⁰ ICTY, *Prosecutor v. Goran Jelusic*, Appeals Judgement, IT-95-10-A, 5 July 2001, para. 66.

⁷¹ ICTY, *Prosecutor v. Ratko Mladic*, Rule 98 bis Decision, IT-09-92-T, 15 April 2014, transcript page 20939; for similar findings on sexual violence as acts of genocide, see: *Stakić*, Trial Judgement, para. 516; *Rutaganda*, Trial Judgement, para. 51; *Musema*, Trial Judgement, para. 156.

⁷² *Mladic*, Rule 98 bis Decision, transcript page 20946.

⁷³ ICTR, *Prosecution v. Kayisema et al.*, Trial Judgement, Case No. ICTR-95-1, 21 May 1999, para. 116.

⁷⁴ ICJ, *Croatia vs. Serbia - Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, 3 February 2015, para. 363.

The Trial Chamber in the *Katanga* case defined the right of ownership ‘as the use, enjoyment and disposal of a person who is regarded as property, by placing him or her in a situation of dependence which entails his or her deprivation of any form of autonomy.’⁷⁵

The Appeals Chamber in the *Kunarac* case mentioned some indices of enslavement in the context of sexual slavery:

*‘control of someone’s movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour.’*⁷⁶

ISIL’s conduct, resulting in the selling or giving away of Yazidis females to become sex slaves, presents similarities with several factors listed by the *Kunarac* Appeals Judgement. Moreover, documentary evidence regulating the ‘right of ownership’ over sexual slaves within ISIL’s organisational policy can be found (see above).

2.2. Persecution

Persecution is another crime against humanity. The crimes committed against the Yazidis are similar to the crimes committed in Srebrenica against the Bosnian Muslims. In this regard, the ICTY considered mass killings and separation of men and women as acts of persecution.

Rape and sexual violence have also been considered by international courts and tribunals to be persecutory acts.⁷⁷ In this way, sexual violence perpetrated against Yazidi women and girls can be considered part of ISIL’s campaign of persecution against Yazidis. Sexual violence constitutes a violation of the right to physical integrity and therefore is a severe deprivation of fundamental rights against the group. Moreover, the targeting of Yazidi females is based on both their affiliation to a religious group and their gender. Therefore, by determining the identity of the victims, the discriminatory intent of the perpetrator can be demonstrated.

More specifically, the Trial Chamber in the *Kunarac* case rejected the concept that the personal motivation or sexual urge of the accused prevented the accused from having raped his victims with a discriminatory intent:⁷⁸

‘[T]he accused Zoran Vukovic argued that, even if it were proved that he had raped a woman, the accused would have done so out of a sexual urge, not out of hatred. However, all that matters in this context is his awareness of an attack against the Muslim civilian population of which his victim was a member and, for the purpose of torture, that he intended to discriminate between the group of which he is a member and the group of his victim.... The Trial Chamber has no doubt that it was at least a predominant purpose, as

⁷⁵ ICC, *Prosecutor v. Germain Katanga*, Trial Chamber II, Judgement, ICC-01/04-01/07, 7 March 2014, para. 975.

⁷⁶ *Kunarac*, Appeals Judgement, para. 119.

⁷⁷ See, for example, *Stakic*, Trial Judgement, paras. 757 and 818.

⁷⁸ *Kunarac*, Trial Judgement, para. 816.

the accused obviously intended to discriminate against the group of which his victim was a member, i.e. the Muslims, and against his victim in particular.'

The Appeals Chamber in the *Dordevic* case confirmed the position adopted by the judges in the *Kunarac* Judgement:⁷⁹

'It [discriminatory intent] may nevertheless be inferred from the context of the attack so long as, in the light of the facts of the case, circumstances surrounding the commission of the crime substantiate the existence of such intent. Furthermore, the case law shows that the fact that crimes occurred while the victims were – on discriminatory grounds – deported or detained prior to deportation, has been considered in order to infer discriminatory intent from the circumstances.'

The Appeals Chamber further recalls that personal motive does not preclude a perpetrator from also having the requisite specific intent. The Appeals Chamber emphasises that the same applies to sexual crimes, which in this regard must not be treated differently from other violent acts simply because of their sexual component. Thus, a perpetrator may be motivated by sexual desire but at the same time also possess the intent to discriminate against his or her victim on political, racial, or religious grounds.'

2.3. Torture

Some forms of SGBV can amount to torture as a result of the degree of pain or suffering inflicted on the victim. Torture when inflicted within a specific context can be a war crime or a crime against humanity.

In the *Kunarac* Appeals Judgement, the Chamber ruled on the intensity of the suffering resulting from rape, and stated that:

*'Generally speaking, some acts establish per se the suffering of those upon whom they were inflicted. Rape is obviously such an act. The Trial Chamber could only conclude that such suffering occurred even without a medical certificate. Sexual violence necessarily gives rise to severe pain or suffering, whether physical or mental, and in this way justifies its characterisation as an act of torture.'*⁸⁰

2.4. Forced marriage

One can argue that forced marriage is a form of conduct that falls under the category of 'other inhumane acts' in Article 7 of the Rome Statute. The elements of crime state that for conduct to be considered a crime against humanity under the 'other inhumane acts' category, the perpetrator must inflict great suffering or serious bodily injury to his victim or to his/her mental or physical health, and that the act perpetrated must be similar to other crimes against humanity in gravity and in nature.⁸¹ One can also argue that the forced marriage of sex slaves to ISIL fighters belongs to the category of 'other inhumane acts'. Women who are forcibly married endure terrible living conditions and are beaten, raped and mistreated on a regular basis. Their

⁷⁹ ICTY, *Prosecutor v Vlastimir Dordevic*, Appeals Chamber, Case No. IT-05-87/1-A, 27 January 2014, paras. 886 to 887.

⁸⁰ *Kunarac*, Appeals Judgement, para 150.

⁸¹ Elements of Crimes, Article 7 (1)(k).

living conditions may therefore result in great suffering or serious injury to [their] body or to [their] mental or physical health.

In this regard, the Special Court for Sierra Leone (SCSL) in the *Brima, Kamara and Kanu Appeals* Judgement recognised that ‘forced marriage shares certain elements with sexual slavery such as non-consensual sex and deprivation of liberty.’ However, the Chamber also insisted on distinguishing factors, which would justify its consideration as a distinct crime:

‘First, forced marriage involves a perpetrator compelling a person by force or threat of force, through the words or conduct of the perpetrator or those associated with him, into a forced conjugal association with another person resulting in great suffering, or serious physical or mental injury on the part of the victim. Second, unlike sexual slavery, forced marriage implies a relationship of exclusivity between the “husband” and “wife,” which could lead to disciplinary consequences for breach of this exclusive arrangement.’⁸²

2.5. Outrage upon personal dignity

SGBV may also be considered as constituting an outrage upon personal dignity. Article 3 Common to the Geneva Conventions of 1949 (applicable to non-international armed conflicts) prohibits outrages upon personal dignity at all times. Additional Protocol II provides that particular outrages upon personal dignity are ‘humiliating treatment, rape, enforced prostitution and any form of indecent assault.’ Therefore, the serious sexual abuses committed against Yazidi women and girls can be considered as constituting outrages upon personal dignity.

The following jurisprudence supports such an approach and considers different forms of SGBV as being outrages upon personal dignity.

ICTY, *Furundzija* Judgement:

‘[N]ot only rape but also any serious sexual assault falling short of actual penetration. It would seem that the prohibition embraces all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim’s dignity.’⁸³

SCSL, *Taylor* Judgement:

‘[I]t has been proved beyond reasonable doubt that an unknown number of women and girls captured in Kenema District were used by the AFRC and RUF as sex slaves (...). The Trial Chamber also recalls that it has found that each of these instances constitutes an outrage upon personal dignity.’⁸⁴

⁸² SCSL, *Prosecutor v. Brima, Kamara and Kanu*, Appeals Judgement, Case No. SCSL-2004-16-A, para. 195.

⁸³ ICTY, *Prosecution v. Furundzija*, Trial Judgement, Case No. IT-95-17/1, 10 December 1998, para. 186.

⁸⁴ SCSL, *Prosecutor v. Charles Ghankay Taylor*, Trial Chamber II, Judgement, 18 May 2012, para. 2051.

ICTY, *Kunarac* Judgement:

*'The Trial Chamber finds that this sexual exploitation of A.B. and FWS-75, in particular their sale, constitutes a particularly degrading attack on their dignity.'*⁸⁵

⁸⁵ *Kunarac*, Trial Judgement, para. 756.