



The Islamic State's Enslavement of the Yazidi Minority

An Inquiry into the Female Devotees' Responsibility

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Abstract

The notion of female devotees of the Islamic State (IS) as being naive and submissive companions of their fighting husbands has recently been defied by cases of active women participating in violent atrocities within the Caliphate in Iraq and Syria. Nevertheless, cases of more passive IS-women still exist. Thus, their position within the organization raises important legal questions regarding the assessment of their individual criminal responsibility. A recent German judgment from Düsseldorf Higher Regional Court sparked such queries as a woman was convicted for aiding and abetting a crime against humanity for having made use of an enslaved Yazidi in her home. The question that arose herein was whether her act was punishable as enslavement and, in that case, what form of liability that could be attributed to her.

This research study inquire into the lives and deeds of the foreign, female IS-devotees who resettled in the organization's self-proclaimed Caliphate between 2014 and 2019. Specifically, it examines their criminal responsibility for IS's institutionalized enslavement of the Yazidi minority. The question is whether they can be held individually criminally responsible for enslavement as a crime against humanity according to article 7.1(c) of the Rome Statute.

The issue is attacked in a three-part way, starting with the establishment of the definition and the parameters of the crime of enslavement through, inter alia, international case law and authoritative guiding documents from e.g. ICC. Subsequently, the IS-women's role within the Caliphate is clarified through, mainly, interpretation of official reports based on first-hand interviews with survivors, as well as ideological research on IS as an organization. Lastly, the governing law on individual criminal responsibility is settled.

The research shows that the women can indeed be held individually criminally responsible for enslavement, for having utilized enslaved workforce in the form of enslaved Yazidi women and girls. They can be convicted for complicity, however, it's unlikely that they can be considered perpetrators, as their contribution to the crime can't be considered "essential". Moreover, there is no opportunity to invoke coercion as a ground for excluding criminal responsibility since they have voluntarily joined the terrorist organization and placed themselves in the position they're in. The main conclusion drawn from this is that the women may hold an, essentially, dual position as both victims and perpetrators but their acts of enslavement is nevertheless criminal and should be punished accordingly.

Abbreviations

ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention on Human Rights
IS	The Islamic State of Iraq and Syria
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the former
ICTR	International Criminal Tribunal for Rwanda
IMT	International Military Tribunal in Nuremberg Yugoslavia
OTP	Office of the Prosecutor
SCSL	Special Court of Sierra Leone
UDHCR	Universal Declaration of Human Rights
UN	United Nations
UNHRC	United Nations Human Rights Council

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1. Theme and Question at Issue

1.1 The problem

The Islamic State (IS), a Sunni jihadist group and terrorist organization, exercised institutionalized enslavement¹ of the Yazidi, a religious minority, during the time of their self-proclaimed Caliphate in Iraq and Syria.² People moved from all over the world to the IS-governing parts between 2014 and 2019, to devote themselves to the organization and their ideology. The Caliphate collapsed in March 2019, approximately three years ago.³ Since then, questions have arisen regarding the prosecution and conviction of the IS-devotees that conducted heinous atrocities, such as enslavement.⁴ The focus of this research study will be the prosecution of the acts of enslavement committed by the female IS-devotees against women and children of the Yazidi minority. The legal question is whether, and what forms of criminal liability that can be attributed to them under the Rome Statute of the International Criminal Court (the Rome Statute), specifically article 7.1(c).⁵

Studies of IS's ideology, characterized by violent Islamist extremism, demonstrate that the institutionalized enslavement was based in the opinion that enslavement of this minority was permitted on the basis of their deviating religious beliefs.⁶ Slavery was a key socioeconomic component in IS's overall strategy and their operation has been described as "among the most egregious examples of institutional enslavement observed since the adoption of the 1926

¹ Enslavement and slavery will be used interchangeably throughout the thesis.

² UN Human Rights Council, *'They came to destroy': ISIS Crimes Against the Yazidis*, (They Came to Destroy) 15 June 2016, A/HRC/32/CRP.2, pp. 24-31.

³ The European Network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes (the Genocide Network), *'Cumulative Prosecution of Foreign Terrorist Fighters for Core International Crimes and Terrorism-Related Offenses'*, the Hague, May 2020, p. 5.

⁴ Ibid, p. 19.

⁵ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002, last amended 2010) 2187 UNTS 90, (Rome Statute).

⁶ *'They came to destroy'* (2016), supra note 2, p. 15.

Slavery Convention.”⁷ There is detailed information on how the enslavement was conducted; how Yazidi women and children were abducted, bought, sold and traded amongst male IS-devotees (IS-men) - both in real-life and at online auctions.⁸ What isn’t as clear, however, is the female IS-devotees’ (IS-women) role in this chain of slave trading and enslavement. The issue with demanding responsibility for the crimes committed by foreign terrorist fighters (FTF’s)⁹ has long been a topic within the international community and has been recognized in e.g. resolutions from the security council.¹⁰ Moreover, there are important incentives for carefully distinguishing the different forms of criminal liability that can be derived from the crime of enslavement, in order to effectively process and prosecute the acts. Detangling the different manifestations of slavery is necessary because the female ”slave users” aren’t slave owners; not all slave owners are slave traders, and so on. All the actors responsible for some part of this, often large scaled, chain of enslavement need to be held accountable for their contribution to this crime.

1.2 Purpose and Research Question

The purpose of this thesis is to research *whether IS-women can be held individually criminally responsible for slavery as a crime against humanity, for having made use of enslaved Yazidi women for house work.*

In order to answer the research question, the following sub-questions will be discussed:

- What was the IS-women’s position within the Caliphate? How does this effect their individual criminal responsibility?
- Which are the legal parameters of slavery as a crime against humanity, according to article 7 of the Rome Statute?

⁷ Al-Dayel Nadia, Mumford Andrew and Bales Kevin, (2022), ‘*Not Yet Dead: The Establishment and Regulation of Slavery by the Islamic State. Studies in Conflict and Terrorism*’, Studies in Conflict and Terrorism, 4 February 2020, 45(11), 929-952, p. 929. Available at <https://nottingham-repository.worktribe.com/output/3600404>. Accessed 13 April 2023.

⁸ *Düsseldorf Higher Regional Court on Behalf of the People*, judgment III-7 Its 2/20, 2 StE 4/20-5 VS-NfD, Federal Prosecutor General at the Federal Court of Justice, Karlsruhe, 12 May 2021, p. 13. (Düsseldorf Higher Regional Court, judgment 12 May 2021)

⁹ Foreign terrorist fighters is to be understood as non-citizens from Iraq and Syria that join IS as devotees.

¹⁰ Resolution 2178 (2014), Resolution 2396 (2017).

- How can the acts committed by the IS-women be legally characterized; is it a form of perpetration or complicity? What is the minimum amount of required effort in order for conviction, according to this provision?

1.3 Delimitation

The thesis will be limited to studying slavery as a crime within international criminal law, specifically article 7.1(c) of the Rome Statute on slavery as a crime against humanity; only briefly touching on the slavery provisions within human rights law and humanitarian law.¹¹ As will be further motivated below, sexual slavery as a crime according to e.g. article 7.1(g), article 8.2(b)(xxii), article 8.2(e)(vi) of the Rome Statute has also been left out of the scope of the thesis.

As implicated by the research question, the thesis will be limited to concerning enslavement, leaving out all other heinous crimes committed by IS towards the Yazidi minority. The reason for this is the limited time frame and scope of the essay. This, however, doesn't seek to minimize the gravity and relevance of all the other committed crimes, such as genocide and war crimes. These crimes will be mentioned throughout the essay, as their occurrence are vital in the context.

The thesis will also be limited to concerning the criminal liability of the IS-women, leaving out the IS-men. The reason for this is that the men's criminal responsibility for the enslavement is more readily assessed, as they are the slave owners and slave traders, and the perpetrators of sexual slavery. Their acts and contributions are rather legally obvious as opposed to the women's in the sense that they more clearly fulfill all the objective and subjective criteria for the crime. Due to the heavy patriarchal structures within the Caliphate, the men hold the power, make the decisions, control the women and children, and hereby also the Yazidi. The thesis will, hereby, not regard sexual slavery committed by the IS-men, or the explicit slave owning and trading conducted by them. It will be limited to the women's usage of forced labour as a form of slavery.

Additionally, the thesis will be limited to concerning Yazidi women and children - leaving out Yazidi men and boys. The reason for this is that it's the women and children that were being enslaved. The men and boys were subjected to other forms of heinous crimes, and a lot of them were killed during the Sinjar-massacre. Since the thesis regards the crime of slavery, the men and boys are not of direct interest.¹²

The thesis' exclusive focus on this specific case of slavery in modern time does by no means seek to take away from other situations and cases of enslavement occurring to other groups of people in other parts of the world. On

¹¹ See section 3.3 about slavery within international law.

¹² *'They came to destroy'* (2016), supra note 2, pp. 1-2.

the contrary, the expectation is that this research will contribute with useful insight than can be applied to other cases of modern day slavery.

1.4 Methodology & Material

Firstly, it's important to emphasize that Iraq and Syria haven't ratified the Rome Statute, therefore it's unlikely that the crimes committed by IS inside the Caliphate will be brought before ICC as they have no territorial jurisdiction over crimes committed in those countries.¹³ However, according to article 13(b) of the Rome Statute, there's an opportunity for the Security Council to refer the situation to ICC and thereby base jurisdiction on that decision.¹⁴ Thereto, there is an opportunity according to article 12.2(b) for ICC to investigate foreign IS-devotees who have traveled to the Caliphate and allegedly committed crimes under the Rome Statute therein. Jurisdiction would in this case be based on nationality, given that their country of residence is party to the Statute. This, however, has been previously dismissed by ICC's former prosecutor Fatou Bensouda who expressed that the jurisdiction is too narrow to start investigations on this basis.¹⁵ Thus, it seems as if it's highly unlikely that the ICC will be able to prosecute FTF's for the acts committed in Iraq and Syria - despite there being a theoretical possibility for jurisdiction. The thesis will examine this theoretical possibility from an, essentially hypothetical perspective; asking the question of how ICC would reason if they were granted jurisdiction in these cases. The thesis will hereby focus the research on the Rome Statute and its definitions in article 7, 25, 30 and 31. It's of great interest to establish the Rome Statute's stance on this issue regardless of whether jurisdiction is ever granted, because it gives a guiding idea to the nations of how international criminal law would treat these cases.

The method of legal positivism will be applied in the thesis. This method focuses on *de lege lata*; the law as it is. The purpose is to establish existing law, rather than the reasons behind the legal provisions or determining what the law should be. This is done through interpretation of the legal sources. This naturally entails an analytical element, particularly when interpreting the context and meaning of complex legal texts. Though the primary focus with legal positivism is not to critically assess the law and determine what it should be, legal posi-

¹³ Article 12.2(a), the Rome Statute, ICC, '*Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the alleged crimes committed by ISIS*', Office of the Prosecutor, 8 April 2015. (Fatou Bensouda, statement) Available at: <https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-fatou-bensouda-alleged-crimes-committed-isis> Accessed 13 April 2023.

¹⁴ Article 13(b), the Rome Statute; Holm Fanny & Wistrand Johansson Emil, '*Hantering- en av Svenska IS-resenärer i Syrien Ur Folkrättsligt Perspektiv*', Svensk Juristtidning ISSN 0039-6591, nr 3, s. 250-277, (2022). Available at: <https://svjt.se/content/hantering-en-av-svenska-resenarer-i-syrien-ur-folkraettsligt-perspektiv> Accessed 20 April 2023.

¹⁵ Article 12.2(b), the Rome Statute; Fatou Bensouda, statement (2015), *supra* note. 13.
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vism is not a substitute to this critical step in the process, but rather a prequel.¹⁶ Modern legal positivists recognize the critical and constructive legal element as a part of the method.¹⁷ The research question at hand requires a mere descriptive answer, which can be given through pure interpretation of existing law - however, it's of great interest to also critically analyze relevant provisions since this legal area is rather unclear. The thesis will, therefore, critically and constructively assess the law as well. To some extent, the research question thus demands an element of the normative doctrinal method, i.e. determining *de lege ferenda*¹⁸

Given that the slavery prohibition exists within different legal branches; international criminal law, international human rights law, EU-law and domestic criminal law, a challenge will be to remain clear in the focus of the thesis. The choice of sources are important as they need to have the correct angle of incidence on the slavery prohibition, to prevent confusion and inaccuracies. It has to be continuously clarified when sources from other branches, e.g. international human rights law, are being referred to and for what purpose.

Generally, solely sources with authority ought to be used. It's not as clearly established which these sources are within international law, as it is within national law. Article 38 of the Statute of the International Court of Justice (ICJ) constitutes a good point of reference for which source that enjoy authority. It lists international conventions; which are agreements between states, international custom or customary international law; defined as "general practice accepted as law", general principles of law recognized by civilized nations, judicial decisions; case law, and teachings from highly qualified publicists; doctrine. The hierarchy of the sources are as follows. International conventions and customary international law are considered primary sources, whereas general principles of law are secondary and case law and doctrine are subsidiary sources.¹⁹ The thesis will be based on all of these types of sources, as well as ones that are not enlisted in this article. For example, websites and newspaper articles will be used as well, since certain part of the thesis, such as the social science- and historical sections, demands non-legal sources.

¹⁶ Cryer Robert et al., *'Research Methodologies in EU and International Law'*, Hart Publishing, London, 2011, p. 38.

¹⁷ Hjertstedt Mattias, *'Beskrivningar av rättsdogmatisk metod: om om innehållet i metodavsnitt vid användning av ett rättsdogmatiskt tillvägagångssätt'* in Ruth Mannelqvist, Staffan Ingmanson and Carin Ulander-Wänman (eds.), *'Festskrift till Örjan Edström'* (Faculty of Law, Umeå University 2019) p. 167; Bruno Simma and Andreas L. Paulus, *'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View'* Vol. 93:302 (1999), *The American Journal of International Law*, pp. 303 & 306-308.

¹⁸ See Cryer Robert et al. (2011), *supra* note 16, p. 38.

¹⁹ Bring Ove, Klamberg Mark, Said Mahmoudi and Wrang Pål, *'Sverige ooh Folkkrätten'*, Nordstedts Juridik (2020), pp. 29-35.; Article 38, the Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993 (hereafter ICJ Statute.)

The legal findings will be continuously concluded in an ending section of each chapter, wherein the foregoing facts presented will be criticized and related to the research question. The purpose of this method is to ensure that each chapter is self-supporting, with the aim of making the thesis more legible and functional for the reader.

The starting point for the legal analysis is article 7 of the Rome Statute, specifically article 7.1(c) on enslavement as a crime against humanity. This article will be up for interpretation through (1) ICC's highly authoritative, yet non-binding document "Elements of Crimes", which, according to article 9 of the Rome Statute, "shall assist the Court in the interpretation and application of articles 6, 7, 8 and 8 bis." (2) The Research Network on the Legal Parameters of Slavery's so-called "Bellagio-Harvard Guidelines." This is also non-binding, yet holds important authority as the Research Network is made up of leading scholars on the legal field of slavery, such as professor Jean Allain, professor of international law at Monash University and the Wilberforce Institute, University of Hull and Kevin Bales, professor of contemporary slavery at the University of Nottingham and cofounder of the NGO Free the Slaves.²⁰ Jean Allain is one of the most cited authors on the field of the international slavery prohibition and several of his articles will be referred to in this thesis. Lastly, the Rome Statute will also be interpreted in light of (3) international case law from the ICC, the International Court of Justice (ICJ), the International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Court of Cambodia (ECCC), as well as national cases from Sweden and Germany.

The phenomenon of foreign IS-devotees is a fairly new one and the case law is limited to national cases dealing with returning devotees that face prosecution based on nationality. Though these national cases apply domestic law and therefore aren't applicable as a whole to this thesis' research question, some countries such as Sweden and Germany have based their domestic laws on crimes against humanity on the definition in the Rome Statute.²¹ Therefore, the thesis will refer to a couple domestic cases for legal guidance regarding the interpretation of the definition of the crime - as well as guiding information about the IS-women's role within the Caliphate. The main case that will be discussed is a

²⁰ Allain Jean, et al., *The Bellagio-Harvard Guidelines on the Legal Parameters of Slavery*, (The Bellagio-Harvard Guidelines) Research Network on the Legal Parameters of Slavery, 3 March 2012, p. 21. See also 'Mr. Jean Allain', United Nations Audiovisual Library of International Law. Available at: https://legal.un.org/avl/pdf/ls/Allain_bio.pdf and kevinbales.net, <http://www.kevinbales.net/about.html> Accessed 3 May 2023.

²¹ Though the Statute doesn't require for national jurisdictions to incorporate the regulations in domestic law, it's of great interest for the nations to do so to be able to effectively prosecute international crimes in accordance with the principle of complementarity. See Ds 2001:3 'Romstadgan för internationella brottmålsdomstolen', p. 129. Prop. 2013/14:146, s. 74 f. Cf. also the law with article 5 of the Rome Statute. See also Düsseldorf Higher Regional Court, judgment 12 May 2021, *supra* note 8, p. 40.

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German judgment from the Düsseldorf Higher Regional Court, wherein a woman was convicted for aiding and abetting a crime against humanity (slavery) for having allowed an enslaved Yazidi woman to conduct house chores in her home.²² Reference to a foreign jurisdiction naturally brings challenges in evaluating and interpreting foreign sources without having in-depth knowledge of the domestic legal system - however, because these references will be limited to concerning the parts that are codifications of international law, this issue will be avoided. For example, the thesis will be limited to treating the framework on individual criminal responsibility as found in the Rome Statute without assessing or comparing it to national legislations. When referring to national cases, the courts' reasoning on the criminal responsibility will therefore be left out.

Moreover, the study takes a gendered perspective by focusing solely on the IS-women. This perspective has been emphasized by scholars who suggest that this is a dual issue that gives rise to complex legal questions. This will be examined in light of article 7 of the Rome Statute.

1.5 Literature Review

The thesis focuses on three main fields within public international law: IS and the enslavement of the Yazidi, the slavery prohibition and individual criminal responsibility. The following is an account of previous research made by leading scholars on these three fields. The purpose is to clarify what studies the essay draws from and what this study seeks to add to the discussion. All of this research is relevant to this thesis's topic, however, none of it merges all three topics and provides a comprehensive assessment of the IS-women's responsibility in specifically the enslavement of the Yazidi - as will be done in this study.

On the topic of IS, information about the enslavement of the Yazidi have been established through first-hand interviews with e.g. survivors and relatives of survivors, in reports published by the UN Human Rights Council and the Independent International Commission of Inquiry on the Syrian Arab Republic.²³ The IS-women's position within the organization have been assessed by scholars such as Helen Duffy - professor of humanitarian law and human rights at University of Leiden - who has underlined the importance of not categorizing all IS-women as mere victims, whilst still considering their possible expo-

²² Düsseldorf Higher Regional Court, judgment 12 May 2021, *supra* note 8, p. 13.

²³ See *'They Came to Destroy'* (2016), *supra* note 2, Human Rights Council, *'I Lost My Dignity': Sexual and Gender-Based Violence in the Syrian Arab Republic* (I Lost My Dignity), Conference room paper of the Independent International Commission of Inquiry on the Syrian Arab Republic, A/HRC/37/CRP.3, 8 March 2018 and Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, *'Rule of Terror: Living under ISIS in Syria'* (Rule of Terror), 14 November 2014.

sure to crimes such as human trafficking and coercion.²⁴ Other scholars that have examined this is Anita Perešin, Efraim Benmelech & Esteban F. Klor and Vera Mironova - which are all referenced in this thesis.²⁵ There seems to be consensus regarding the women's dual position and role as both perpetrators and victims, though some emphasize one of the aspects over the other. Ultimately, this research study seeks to elaborate on this - applying the gender perspective on specifically the conducted enslavement. Moreover, the question of demanding responsibility for the crimes committed by FTF's is a complicated jurisdictional question that has been discussed by e.g. Fanny Holm and Emil Wistrand Johansson in their article "Hanteringen av svenska IS-resenärer i Syrien ur folkrättsligt perspektiv."²⁶

Jean Allain is one of the most prominent scholars on the topic of the international slavery prohibition. He has published several articles, some which are featured in this thesis, that addresses the definition of enslavement and the evolution of slavery throughout time.²⁷ Amongst many things, he has clarified the definition of the phrase "powers attaching to the right of ownership" found in article 7 of the Rome Statute. Moreover, Jean Allain is one of the academics that make up the Research Network on the Legal Parameters of Slavery, which have established the Bellagio-Harvard Guidelines. Thereto, authors Patricia Viseur Sellers and Joycelyn Getgen Kestenbaum have written articles on the slavery prohibition.²⁸ They've contributed with useful insight into the distinction between the international crime of the slave trade, slavery and human trafficking, as well as the definition of slavery and the historical development of e.g. de jure and de facto slavery. Additionally, David Weissbrodt's article "Slavery" will be effectively references in the thesis, as it discusses e.g. the historical evolu-

²⁴ Duffy Helen, *'International Legal Advice on the Potential Prosecution of Adult Females in Al Hol by Courts Established by the Autonomous Administration of North East Syria'*, 21 may 2020, p. 9.

²⁵ Perešin Anita, *'Why Women from the West are Joining ISIS'*, Office of the National Security Council, Croatia, *International Annals of Criminology* (2018); Benmelech Efraim & Klor Esteban F., *'What Explains the Flow of Foreign Fighters to ISIS?'*, *Terrorism and Political Violence* 32 (7): 1458-1481, (2020), p. 1.

²⁶ Holm Fanny & Wistrand Johansson Emil, (2022), supra note 14.

²⁷ Allain Jean, *'The Definition of Slavery in International Law'*, *Howard Law Journal* 52(2), 239-276; Allain Jean, *'Slavery Convention. Protocol Amending the Slavery Convention. Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery'*, *United Nations Audiovisual Library of International Law*, September 2017, p. 5; Allain Jean, *'Contemporary Slavery and Its Definition in Law'* in Bunting A. And Quirk Joel, *Contemporary Slavery: Popular Rhetoric and Political Practice* (UBC Press 2017).

²⁸ Viseur Sellers Patricia and Getgen Kestenbaum Jocelyn, *'Sexual Slavery and Customary International Law'*, 9 January 2020, p. 7. Cardozo Legal Studies Research Paper No. 597; Viseur Sellers Patricia and Gergen Kestenbaum Jocelyn, *'Missing in Action: The International Crime of the Slave Trade'*, p. 18, *18 Journal of International Criminal Justice* (forthcoming 2020), Cardozo Legal Studies Research Paper No. 607, 23 April 2020.

tion of the legal rules on slavery, as well as the current legal situation.²⁹ He, too, has contributed with insight into the definition of slavery which is useful for this thesis' research question.

Moving on to individual criminal responsibility, Kai Ambos has written insightful articles on individual criminal responsibility wherein he e.g. clarifies the difference between perpetration and complicity according to the Rome Statute.³⁰ These articles are drawn from a lot in the thesis. On a similar note, Sarah Finnin has written an article wherein she analyses the requirement of intent through a comparative perspective between common law and civil law.³¹ Furthermore, Jérémie Gilbert has clarified the requirements for the exclusion grounds found in the Rome Statute, in his article "Justice not Revenge: The International Criminal Court and the 'grounds to exclude criminal responsibility': defenses or negation of criminality?"³²

1.6 Outline

A part from the introductory chapter, the thesis will consist of four chapters. Each chapter will end with a subsection on preliminary conclusions about the aforementioned information presented.

In chapter two the reader will firstly be provided with information about IS as an organization through an assessment of their emergence, ideology, and the everyday life within the Caliphate. Thereafter, there will be a specific focus on the women and girls of IS, specifically the foreign IS-women and their motives. Subquestion number one will be answered in connection with this. Subsequently, IS's system of enslavement of the Yazidi will be accounted for - including an historical background to the Sinjar-massacre. Lastly, IS's role within international law will be explained.

Chapter three will provide an historical background to the international crime of slavery and the slave trade - going back to when enslavement was first prohibited in international law and leading up to the current legal framework on slavery. The chronological account will hereby conduce to a *de lege lata* evaluation of the existing law on the field of slavery, with a clear focus on internatio-

²⁹ Weissbrodt David, 'Slavery', Oxford Public International Law, article last updated in March 2014, para 4.

³⁰ Ambos Kai, 'Criminal Responsibility, Modes of', Oxford Public International Law, last updated June 2021; Ambos Kai, 'Treatise on International Criminal Law', Volume I: Foundations and General Part, (2013) 306-307.

³¹ Finnin Sarah, 'Elements of Accessorial Modes of Liability: Article 25(3)(b) and (c) of the Rome Statute of the International Criminal Court', Nijhoff Leiden, 2012.

³² Gilbert Jérémie, 'Justice not Revenge: The International Criminal Court and the 'grounds to exclude criminal responsibility': defenses or negation of criminality?', 17 July 2006, The International Journal of Human Rights, Vol. 10, Issue 2, pp. 150-151.

nal criminal law and article 7 of the Rome Statute. The legal parameters of the crime will be assessed. Herein, subquestion number two will be answered.

Chapter four will account for article 25 of the Rome Statute, specifically assessing the difference between perpetration versus complicity, and thereafter aiding and abetting as the weakest form of complicity - with the purpose of establishing the minimum requirements for conviction in accordance with this provision. Subquestion number three will be answered herein.

Chapter five will merge the continuous, preliminary conclusions into final concluding statements which ultimately seek to answer the research question and clarify potential uncertainties.

2. Inside the Caliphate: Morals and Atrocities

2.1 The Islamic State (IS)

The Islamic State (IS), also known as the Islamic State of Iraq and Syria (ISIS), the Islamic State of Iraq and the Levant (ISIL) or Daesh - is an armed group that's been designated as a terrorist group by the United Nations Security Council in Resolution 2170.³³ The group is infamously known for their extreme violence and jihadist ideology.³⁴ This section will provide an account of IS as an organization, with a specific focus on the lives and position of the IS-women within the Caliphate. The women's and girls' role in relation to the men's will be examined, as well as the foreign IS-women and their motives moving to the Caliphate. Thereto, IS's systematic enslavement of the Yazidi will be explained. And the last subsection will be on the organization's role within international law. The aim is to equip the reader with the background information necessary to the understanding of the upcoming analysis on the women's responsibility for the enslavement.

In 2011, a war erupted in Syria. Since then, more than 6 million Syrians have emigrated from the country and 6.7 million are internally displaced. This is often spoken of as the Syrian Refugee Crisis. Today, 12 years later, this crisis remains the worlds largest refugee crisis.³⁵ The conflict began in 2010-2011 with the "Arab Spring", which was an uprising of pro-democracy protests in Tunisia and other North African countries which quickly spread to Syria; specifically Damascus and Aleppo.³⁶ The protesters' pro-reform demonstrations were directed against the Syrian president Bashar al-Assad and the authoritarian

³³ Resolution 2170 (2014) S/RES/2170, Adopted by the Security Council at its 7242nd meeting, on 15 August 2014.

³⁴ 'Rule of Terror' (2014), supra note 23, paras. 1 & 6.

³⁵ USA for UNHCR, 'Syria Refugee Crisis Explained', March 14, 2023. Available at: <https://www.unrefugees.org/news/syria-refugee-crisis-explained/> Accessed 10 April 2023.

³⁶ Chauhan Ananaya, 'Syrian Civil War,' Jus Corpus Law Journal, 2022, Vol. 2(4):331—347, p. 334; Covarrubias Jack & Lansford Tom, 'The New Islamic State: Ideology, Religion and Violent Extremism in the 21st Century', published by Taylor & Francis Group, 2016, ProQuest Ebook, p. 22.

practices of the Assad regime, which had been in place since Hafez al-Assad (Bashar al-Assad's father) became president in 1971.³⁷

In 2012, the conflict began to escalate as outer nations started to get involved and in July of the same year, the International Committee of the Red Cross declared that the conflict had reached the level of a civil war; a non-international armed conflict.³⁸ At this time, there were hundreds of armed groups on both sides of the conflict in Syria - the Islamic State, IS - led by Abu Bakr al-Baghdadi - was one of them.³⁹ IS was derived from al-Qaeda, which was a group of puritanical Sunni militants lead by Usama Bin Laden, known for their brutal acts of suicide bombings, beheadings and kidnappings - targeted against both Shia and Sunni muslims.⁴⁰ Islamist militant groups have a notorious tendency to embrace puritanical interpretations of *sharia* - IS is a prime example of this.⁴¹

In April 2013, IS developed into a more well-organized and dominant armed group that posed a great threat to the peace and security.⁴² Their main goal is to establish a fundamentalist regime, based on their extreme version of Islamic law, through violence and terrorism.⁴³ IS quickly conquered large territories in Iraq and Syria, e.g. the cities Mosul and Raqqa - which they used for training recruits and for planning attacks.⁴⁴ On June 29 2014, IS proclaimed itself a Caliphate.⁴⁵ The Caliphate lived on from 2014 to its fall in 2019, and at its

³⁷ The Editors of Encyclopedia Britannica (Britannica), 'Syrian Civil War', last updated 4 April 2023. Available at: <https://www.britannica.com/event/Syrian-Civil-War> Accessed 10 April 2023.

³⁸ International Committee of the Red Cross (ICRC), 'Syria: ICRC and Syrian Arab Red Crescent maintain aid effort amid increased fighting', 17 July 2012. Available at: <https://www.icrc.org/en/doc/resources/documents/update/2012/syria-update-2012-07-17.htm> Accessed 10 April 2023.

³⁹ 'Rule of Terror' (2014), supra note 23, para. 5.

⁴⁰ Haven Jordan, 'Religious Extremism and Sectarian Violence: The Rise of ISIS', Ex-Patt Magazine of Foreign Affairs Vol. 3, Article 2, (2015), p. 4. Available at: <https://uknowledge.uky.edu/cgi/viewcontent.cgi?article=1023&context=ex-patt> Accessed 8 May 2023.

⁴¹ Robinson Kali, 'Understanding Sharia: The Intersection of Islam and the Law', Council on Foreign Relations, last updated 17 December 2021. Available at: <https://www.cfr.org/background/understanding-sharia-intersection-islam-and-law> Accessed 11 April 2023.

⁴² 'Rule of Terror' (2014), supra note 23, para 5.

⁴³ Robinson Kali, (2021), supra note 41, under "How do extremist groups interpret sharia?"

⁴⁴ Haven Jordan, (2015), supra note 40, p. 5.

⁴⁵ 'Rule of Terror' (2014), supra note 23, para. 17.

height it covered up to a third of Syria and 40% of Iraq.⁴⁶ It controlled more than 100 000 km of land and 11 million residents therein.⁴⁷

During this time, IS committed gruesome acts - such as murders, enforced disappearances and torture - against the civilian population. Religious minorities, such as the Yazidi, were particularly exposed - as well as women and children.⁴⁸ Based on first-hand reports from survivors and devotees, the Independent International Commission of Inquiry on the Syrian Arab Republic have established that IS committed both war crimes, the crime of genocide against the Yazidi, and crimes against humanity of murder, torture, enslavement, rape, sexual slavery, forced pregnancy and sexual violence.⁴⁹ They publicly hung, shot and stoned men, women and children and put mutilated bodies on display as a warning to the population of "the consequences of failure to submit to the armed group's authority."⁵⁰

FTF's, meaning non-citizens from Iraq and Syria, were recruited from all over the world. Men, women and children have moved to the Caliphate to willingly join the organization and participate in their combats and live in its territory under its rule.⁵¹ It has been estimated that 40 000 people from 80 different countries have relocated to the Caliphate and joined IS.⁵² IS terrorized adversaries and recruited devotees through terrorist attacks, brutal killings and torture, which they spread knowledge about through e.g. social media.⁵³ The prosecution and conviction of these foreign fighters has been an active conversation which have given rise to important legal questions in regards to e.g. international criminal law - this thesis' research question being one of them.

In March 2019, five years after the Caliphate was declared, the organization was territorially defeated after IS lost its final area of land which they had control over, in the Syrian desert town of Baghuzthe.⁵⁴ However, despite the fall of the Caliphate, IS is still a living organization today and they continue to attract

⁴⁶ Wilson Center, contributed by Glenn Cameron, Rowan Mattisan, Caves John, and Nada Garrett, *Timeline: the Rise, Spread and Fall of the Islamic State*, 28 October 2019. Available at: <https://www.wilsoncenter.org/article/timeline-the-rise-spread-and-fall-the-islamic-state> Accessed 11 April 2023.

⁴⁷ The Genocide Network (2020), supra note 3, p. 5.

⁴⁸ Ibid, p. 13.

⁴⁹ *'Rule of Terror'* (2014), supra note 23, paras. 73-78.

⁵⁰ Ibid, para. 33.

⁵¹ The Genocide Network (2020), supra note 3, p. 6.

⁵² Farrall Leah, *The Fall of the ISIS 'caliphate'*, under "background", Parliament of Australia. Available at: https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook46p/ISISCaliphate Accessed 11 April 2023.

⁵³ Covarrubias Jack & Lansford Tom, (2016), supra note 36, p. 38

⁵⁴ Chulov Martin, *The Rise and Fall of the ISIS 'caliphate'*, the Guardian, 24 March 2019.- Available at: <https://www.theguardian.com/world/2019/mar/23/the-rise-and-fall-of-the-isis-caliphate> Accessed 11 April 2023.

followers and incite and organize terrorist attacks.⁵⁵ Thereto, thousands of women and children of IS-men are being held in two "locked, sprawling camps" called *al-Hoq* and *Roj*, in northeast Syria, where they continue to get exposed to horrific treatment.⁵⁶

IS's desire is to create a caliphate based on their strict interpretation of the Quran and sharia, and to eradicate all other religions - including all other positions within Islam.⁵⁷ As a Jihadi-Salafist organization, IS considers all deviating ideas and beliefs to be threats - e.g. local governments and Western culture - and they fight back through jihad (struggle) in the name of God.⁵⁸ On this note, the focus of this thesis is IS's aspiration to eradicate the Yazidi - which will be further discussed in section 2.4.

2.2 The Women and Girls of IS

*"While the immense suffering induced by (the practices in Syria) impacts Syrians from all backgrounds, women and girls have been disproportionately affected, victimized on multiple grounds, irrespective of perpetrator or geographical area."*⁵⁹

Life within the Caliphate was characterized by heavy patriarchal structures.⁶⁰ IS discriminated women, girls and sexual minorities as a matter of policy.⁶¹ According to IS's rules, the women are subordinate to the men and they live under strict regulations on what they must wear, with whom they are allowed to socialize, where they are allowed to go, with what they are allowed to work, etc. For example, all women and girls over 10 years of age were forced to be fully covered with certain clothing outside of their house, they were prohibited to be in the company of men outside of their immediate family and they were prohibi-

⁵⁵ Ambassador Jeffrey DeLaurentis, 'Remarks at a UN Security Council Briefing on Threats to International Peace and Security Caused by Terrorist Acts', United States Mission to the United Nations, 9 August 2022. Available at: <https://usun.usmission.gov/remarks-at-a-un-security-council-briefing-on-threats-to-international-peace-and-security-caused-by-terrorist-acts-7/> Accessed 11 April 2023.

⁵⁶ Human Rights Watch, 'My Son is Just Another Kid', *Experiences of Children Repatriated from Camps for ISIS Suspects and Their Families in Northeast Syria*, 21 November 2022. Available at: <https://www.hrw.org/report/2022/11/21/my-son-just-another-kid/experiences-children-repatriated-camps-isis-suspects-and> Accessed 11 April 2023.

⁵⁷ Covarrubias Jack & Lansford Tom, (2016), *supra* note 36, p. 34.

⁵⁸ French Nathan S., 'And God Knows the Martyrs: Martyrdom and Violence in Jihadi-Salafism', Introduction: Jihadi-Salafism, Theodicy, and the Renunciation of Suffering, (New York, 2020; online edn, Oxford Academic, 21 May 2020), p. 9.

⁵⁹ 'I Lost My Dignity', *supra* note 23, p. 1.

⁶⁰ 'Rule of Terror' (2014), *supra* note 23, para 49.

⁶¹ 'I Lost my Dignity' (2018), *supra* note 23, p. 2.

ted to leave their homes without the company of a male relative.⁶² To great extent, the women were confined to their houses with very limited freedom of movement. Violations of these rules were punished by the *Al-Hisbah* morality police and the all-female brigade *Al-Khans'aa*. The punishments consisted of extreme psychological and physical harm, as well as outright executions through e.g. stoning. There is detailed footage of how women were punished, ostensibly for adultery (unapproved contact with the opposite sex), by being made to stand, veiled with their hands bound to their sides, in a shallow grave, while men threw rocks at their heads until they collapsed and died.⁶³ The women and girls who survived the sexual and gender-based violence were subjected to threats of divorce, excommunication from their families and honor killings. There-to, many women experienced severe physical and mental illness and suicidal feelings, which resulted in some taking their own lives.⁶⁴

All of the above stated applied to both women who were citizens of Syria and Iraq, and non-citizens - IS-travelers or FTF's. However, IS did make a significant distinction between women they considered *heretic*, and the women they considered to be essential to the building of the Caliphate.⁶⁵ Non-Muslim women, or females accused of associating with other armed groups or of working with the government - were often considered heretic; the Yazidi women and girls is one example. Declaring someone to be heretic - or *kufar* or infidels - was referred to as the practice of *takfir*, and that was the way that IS justified attacks on individuals and groups that they considered to be a "challenge to its dominance."⁶⁶ The "heretic women" were treated as slaves and according to IS's institution, that was entirely approved. In their pamphlet "Questions and Answers on Taking Captives and Slaves" which has been printed by IS's publishing house *Al-Himma Library*, they clarify their "interpretation of the position of Islamic law on possessing, treating, punishing and treading non-Muslim female slaves" and herein they justify "a treatment of women that is outrageous and unacceptable in the modern world."⁶⁷ The women who migrated from other countries to the Caliphate were, instead, often considered to play an important role in the establishment of the Caliphate - and hereby treated differently and better than the "heretic" females.⁶⁸

Despite the patriarchal and oppressive structures experienced by the women of IS, more recent information and insight into life within the Caliphate have

⁶² 'Rule of Terror' (2014), supra note 23, para 48. Perešin Anita (2018), supra note 23, p. 37.

⁶³ Ibid 'Rule of Terror', paras. 47-52.

⁶⁴ 'I Lost my Dignity' (2018), supra note 23, para. 6; Amnesty International, 'Escape from Hell: Torture and Sexual Slavery in Islamic State Captivity in Iraq', (Escape from Hell) 2014, pp. 4 & 13 Available at: <https://www.amnesty.org/en/documents/mde14/021/2014/en/> Accessed 20 May 2023.

⁶⁵ Perešin Anita, (2018) supra note 25, p. 33.

⁶⁶ 'Rule of Terror' (2014), supra note 23, para. 32.

⁶⁷ Perešin Anita, (2018) supra note 25, p. 33.

⁶⁸ Ibid, p. 33.

revealed that some women in fact held active and extensive roles in the crimes committed against the Yazidi. Anita Perešin give examples of such cases in her article "Why Women from the West are Joining ISIS", mentioning the names of Mujahidah Bint Usama - a former British medical student who posted a photograph of herself in a nurse uniform, holding up a severed head, and Khadijah Dare - another British woman who expressed her desire to become the first woman to commit an execution of ISIS's enemies.⁶⁹ These are extreme examples, whereas there are other cases that demonstrate that IS-women's passivity also has been considered criminal under International law. The case of Jennifer Wenisch is one example. It regarded a German woman who moved to the Caliphate and participated in IS's atrocities. She was sentenced to ten years in prison for membership in a foreign terrorist organization, aiding and abetting murder by omission and crimes against humanity with fatal consequences. The woman had stood by as her husband punished a five year old, enslaved Yazidi girl for having peed on a mattress - by chaining her to a fence in their backyard and letting her die from thirst outside in the sun.⁷⁰ In another case from Sweden, a woman was convicted for aggravated war crimes for omission to prevent her son from being recruited and used as a child soldier for IS in Syria. The court found that the woman didn't have the power to stop the child from being used as a soldier when she was in Syria, however, they found that she had placed herself in a situation where she must have understood that she would lack this ability - and therefore she couldn't escape criminal liability.⁷¹ Thus, these cases demonstrate the other side of the coin to the IS-women's position within the Caliphate.

2.3 The Motives of the Female IS-Travelers

*"Because of the threat ISIS poses to other nations, it is critical to understand the factors that lead foreigners to join this Islamic jihadist state. Foreign recruits represent a threat to the international community for a number of reasons."*⁷²

⁶⁹ Ibid, pp. 37-38.

⁷⁰ Gliwitzky Florian, Judge at the Higher Regional Court, Head of the judicial Press office at the Munich Higher Regional Court, "Strafverfahren gegen Jennifer W. wegen Verdachts der mitgliedschaftlichen Beteiligung an einer terroristischen Vereinigung im Ausland u.a.," Press Release, Oberlandesgericht München (Munich Higher Regional Court), October 25, 2021. Available at: <https://www.justiz.bayern.de/gerichte-und-behoerden/oberlandesgerichte/muenchen/presse/2021/30.php> Accessed 18 April 2023.

⁷¹ Sveriges Domstolar, Stockholms tingsrätt, 'Kvinna döms till sex års fängelse för grovt folkrättsbrott och grov krigsförbrytelse', 4 March 2022. Available at: <https://www.domstol.se/nyheter/2022/03/kvinna-doms-till-sex-ars-fangelse-for-grovt-folkrattsbrott-och-grov-krigsforbrytelse/> Accessed 25 April 2023. Judgment B 20218-20, Stockholms tingsrätt, 4 March 2022.

⁷² Benmelech Efraim & Klor Esteban F., (2020), supra note 25, p. 1.

Since the exclamation of the self-proclaimed Caliphate, people from countries all over the world have moved to the IS-governing parts of Iraq and Syria to devote themselves to the organization.⁷³ These people are referred to as FTF's and the official definition of this phenomenon has been established by the United Nations Security Council, as 'individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict'⁷⁴ Many of these people are women and children. This phenomenon gives rise to the question of *why* people make the decision to relocate to the Caliphate and live under IS's rules. The further part of this section will be dedicated to answering that question, with a particular focus on the female foreign travelers. The reason for this focus is the thesis' explicit delimitation to the IS-women. Naturally, every woman's motives were different but the most common factors have been distinguished and will be accounted for.

The migration of people to a Muslim country is sometimes referred to as *hijra* and the migrating women often called themselves *muhajirah*.⁷⁵ The women often moved to the Caliphate with their families because their husbands had decided to join IS as foreign fighters, but they also travelled with relatives, a group of female friends, with their children or alone. Some of them were Muslims and some of them were convinced to convert.⁷⁶ One of IS's most effectively used methods of recruitment is the use of social media and online-publications about life within the Caliphate. This was often how IS reached the foreign fighters and the foreign IS-women. They specifically targeted women by designing social media campaigns that portrayed the Caliphate as an "ideal place for a new start (...)" and gave a romanized image of jihad. IS needed women inside the Caliphate, particularly foreign women, for several reasons. They needed them in the houses to raise a new generation of jihadists, but they also needed them as teachers, police officers and doctors - since they wanted women to be taught and treated only by women. Thereto, they were important online recruiters of other women to join IS.⁷⁷

The motives for their decision to travel to the Caliphate were many. For some it was ideological, religious and political. Many aspired to fulfill their duty of supporting the fight against the Assad regime, and some saw it as a way to secure their place in *Jannah* (Paradise). They aspired to be a part of the building of a utopian Muslim caliphate. Some women have also expressed that they made the decision based on personal reasons, such as questions of identity, boredom, a desire for adventure, adolescent rebellion, etc. An IS online recruiter

⁷³ Benmelech Efraim & Klor Esteban F., (2020), *supra* note 25, p. 1.

⁷⁴ UN Security Council Resolution 2178 on Foreign Terrorist Fighters, 24 September 2014, p. 8. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N14/547/98/PDF/N1454798.pdf?OpenElement> Accessed 11 April 2023.

⁷⁵ Perešin Anita, (2018) *supra* note 25, p. 32-33.

⁷⁶ *Ibid*, p. 34.

⁷⁷ *Ibid*.

named Aqsa Mahmood has expressed: *"I feel like I have no direction in life anymore. It's funny how things work out, once upon a time I used to be such a career obsessed girl. Now I have no clue. I just want another fresh start and to do it right this time."*⁷⁸ Many women also came from troubling family relationships and traumatic experiences, seeking to experience a sense of "belonging and sisterhood."⁷⁹ Moreover, some of the radicalized women have strictly economic motives; in Vera Mironova's words: "they're in it for the money."⁸⁰ Though, Mironova's statement more specifically refers to the women who already live within the al-Hol Camp and claim to be supporters in order to be able to afford the life within the camp. The women earn money from e.g. teaching and prostitution, yet the families have difficulties providing for the living costs - therefore some of them pretend to still be devoted participants of IS, in order to be supported with a substantial amount of money which they otherwise wouldn't get.⁸¹

The foreign IS-women have sometimes been called "jihadi brides", referring to their role as accompanying females of their fighting husbands. Others have objected to this description, instead describing them as "active perpetrators of violence", by reason of reports about these women supporting, celebrating and committing brutality and violence - e.g. against other women. IS-women have seemingly supported the mistreatment of the Yazidi women and girls and run slave markets, as well as conducted punishments for violations of the female dress-code.⁸²

In sum, the foreign IS-women's motives and roles varied greatly. However, the general idea was that women had a certain function within the Caliphate, which attracted and intrigued females from all over the world. There's evidence of some of the women committing gruesome acts of violence against e.g. other women during their time in the Caliphate, however, there's also clear evidence that the women held a particularly exposed, vulnerable and subordinate position within the Caliphate - and that the foreign IS-women were subjected to acts of violence themselves. One circumstance doesn't exclude the other - but one important question arises in the light of this: how does this affect what kind of criminal responsibility that can be attributed to the IS-women for the acts of enslavement committed against the Yazidi?

⁷⁸ Perešin Anita, (2018), supra note 25, p. 34.

⁷⁹ Ibid, p. 35.

⁸⁰ Mironova Vera, *'Life inside Syria's al-Hol camp'*, Middle East Institute, 9 July 2020, under "Who are these ISIS supporters?" Available at: <https://www.mei.edu/publications/life-inside-syrias-al-hol-camp> Accessed 10 May 2023.

⁸¹ Ibid, under "Who are these ISIS supporters?"

⁸² Perešin Anita, (2018), supra note 25, p. 37-38.

2.4 IS's Enslavement of the Yazidi

*"On 2 August, the day before the attack, the Yazidis of Sinjar – farmers, teachers, doctors, housewives, and school children – spent their day like any other. Within 24 hours, their lives would become unrecognisable to them. The date of 3 August 2014 would become a dividing line, demarcating when one life ended, and – for those who survived – when another, infinitely more cruel, existence began."*⁸³

During the start of the Syrian war, on August 3 2014, IS invaded the city of Sinjar - located by the Sinjar Mountains in northern Iraq. This was the home of the majority of the world's Yazidis. The attack amount to genocide and was motivated by IS's desire to eradicate the Yazidi culture and religion, by destroying Yazidi religious and cultural sites and artifacts. It was a part of IS's broader campaign of ethnic and religious cleansing, aimed at creating a homogeneous religious state.⁸⁴ The Yazidis are ethnic Kurds, but define their identity mainly on their religious beliefs.⁸⁵ They follow a syncretic faith blending elements of Zoroastrianism, Islam and Christianity.⁸⁶ There is a long history of other communities viewing the Yazidi as "devil-worshippers" based on their religious beliefs. This is an incorrect but widely-held perception that have caused "cycles of persecution" all the way back to the Ottoman Empire, and widespread discrimination all throughout modern history.⁸⁷

Hundreds of IS-fighters attacked Sinjar in the early hours of August 3rd. It was a highly organized attack and they faced little resistance as they moved into the city. IS's focus was to capture the Yazidi, they set up checkpoints and mobile patrols with the mission of searching for fleeing families, and they trapped thousands of people in temperatures around fifty degrees celsius and denied them access to water, food and medical care. Eventually, the US sent military action and the Syrian Kurdish forces, the YPG, created a corridor from Syria to Mount Sinjar which allowed people to be moved to safety. But this wasn't until hundreds of people, including children, had died as a result of the attack. Many of the men died and the boys were forced to become child soldiers or suicide bombers, while the women and children were captured, forced to convert to Islam and subjected to forced labour, forced marriages and sexual- and gender-based violence.⁸⁸

The women and girls were enslaved by IS for both sexual- and work purposes. They were sold and traded amongst IS-fighters, often many times over, both at slave markets (*souk sabaya*) inside the Caliphate and and at online auc-

⁸³ *'They Came to Destroy'* (2016), supra note 2, para. 22.

⁸⁴ *Ibid*, paras. 1 & 203.

⁸⁵ Düsseldorf Higher Regional Court, judgment 12 May 2021, supra note 8, p. 12.

⁸⁶ *Ibid*, p. 12.

⁸⁷ *'They Came to Destroy'* (2016), supra note 2, para. 19.

⁸⁸ *Ibid*, paras. 64-68; *'Escape from Hell'* (2014), supra note 64, p. 4.

tions.⁸⁹ They were auctioned with information about their age, marital status, location, price and photographs. Children below nine years of age were sold in a "package" with their mothers, thereafter the children were sold independently. Young girls were given drugs to hasten their puberty, for the purpose of enhancing their worth on the slave market.⁹⁰ The young girls were often used for sexual purposes, whereas the older women were forced to conduct house work.⁹¹ IS's slavery system was very rigid and based on clear ideological beliefs that they used to justify their atrocities. The enslavement occurred in a very controlled and authorized manner, and only the ones who "owned" the slaves held the rights as property owners.⁹² Once the purchase was done, the fighter received complete rights of ownership - meaning that they could resell, gift or will his slave however desired. Within IS's institution, the slaves (*sabaya*) are "spoils of war" and IS forbids the selling of Yazidis to non-IS members - such sales are punished by death.⁹³

According to IS's beliefs, the enslavement of the Yazidi was justified based on Sharia or Islamic law.⁹⁴ Slavery was a key socioeconomic component in IS's overall strategy and their operation has been described as "among the most egregious examples of institutional enslavement observed since the adoption of the 1926 Slavery Convention."⁹⁵ In an English-language online magazine called Dabiq, IS published a statement expressing that "one should remember that enslaving the families of the kuffar - the infidels - and taking their women as concubines is a firmly established aspect of the Shariah, or Islamic law."⁹⁶ This is how they attempted to legitimize their crimes.

In a letter published by the United Nations Security Council, special adviser and head of the investigative team to promote accountability for crimes committed by IS in Iraq and the Levant (UNITAD), Karim Asad Ahmad Khan, confirmed that: "(...) based on our independent criminal investigations, UNITAD has established clear and convincing evidence that genocide was committed by ISIL against the Yazidi as a religious group." IS's atrocities lasted for years and their intent was to permanently destroy the Yazidi, physically and biologically, by either forcing them to convert or killing them. Moreover, it has also been

⁸⁹ *They Came to Destroy* (2016), supra note 2, paras. 55 & 57.

⁹⁰ Ibid, paras. 81-82; F. Strasser, 'ISIS Makes Sex Slavery Key Tactic of Terrorism Action Against Violent Extremism Must Address Abuse of Women, U.N. Official Says', United States Institute of Peace, October 2016. Available online at <https://www.usip.org/publications/2016/10/isis-makes-sex-slavery-key-tactic-terrorism> Accessed 12 April 2023.

⁹¹ Düsseldorf Higher Regional Court, judgment 12 May 2021, supra note 8, p. 13.

⁹² *They Came to Destroy* (2016), supra note 2, para 54.

⁹³ Ibid, para. 62 & 76.

⁹⁴ *They came to destroy* (2016), supra note 2, p. 15.

⁹⁵ Al-Dayel Nadia, Mumford Andrew and Bales Kevin, (2022), supra note 7, p. 929.

⁹⁶ Abdelaziz Salma, 'ISIS States its Justification for the Enslavement of Women', 13 October 2014, CNN World. Available at: <https://edition.cnn.com/2014/10/12/world/meast/isis-justification-slavery/index.html> Accessed 18 April 2023.

confirmed that war crimes were committed against unarmed cadets.⁹⁷ As for crimes against humanity, the evidence of sexual and gender-based violence committed against Yazidi women and girls have been confirmed as amounting to crimes against humanity. The acts meet the requirement of being committed as part of a widespread and systematic attack directed against a civilian population, according to article 7 of the Rome Statute - as the Yazidi women and girls across Iraq and Syria were systematically captured, separated, deported and enslaved.⁹⁸

2.5 IS' Role Within International Law

It's undisputed that there was an on-going non-international armed conflict in Iraq and Syria that IS participated in during the time of their self-proclaimed Caliphate. Furthermore, it has to be considered undisputed that IS is an organized armed group, capable of implementing and adhering to the rules of international humanitarian law - in the sense that is required in order for IS to be considered a non-state participant.⁹⁹ Nevertheless, ICC have established a number of criteria which should be fulfilled in order for a group to be considered an organization; these criteria deserve to be assessed here. The following aspects have to be considered: "(i) whether the group is under a responsible command, or has an established hierarchy; (ii) whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population; (iii) whether the group exercises control over part of the territory of a State; (iv) whether the group has criminal activities against the civilian population as a primary purpose; (v) whether the group articulates, explicitly or implicitly, an intention to attack a civilian population; (vi) whether the group is part of a larger group, which fulfills some or all of the above mentioned crite-

⁹⁷ United Nations, Meetings Coverage and Press Releases, *'ISIL/Da'esh Committed Genocide of Yazidi, War Crimes against Unarmed Cadets, Military Personnel in Iraq, Investigative Team Head Tells Security Council'*, 10 May 2021. Available at: <https://press.un.org/en/2021/sc14514.doc.htm> Accessed 7 May 2023.

⁹⁸ Global Justice Center, *'Daesh Gender-Based Crimes against Yazidi Women and Girls Include Genocide'*, 7 April 2016, p. 7. Available at: <https://globaljusticecenter.net/publications/ad-vocacy-resources/284-daesh-s-gender-based-crimes-against-yazidi-women-and-girls-include-genocide> Accessed 20 May 2023.

⁹⁹ UNSC, Resolution 1540, S/RES/1540 (2004), 28 April 2004.

ria.”¹⁰⁰ During the time of the Caliphate, IS applied an hierarchal structure with Abu Bakr Al-Baghdadi at the top as the *caliph*, holding the absolute power. There were deputies, a command and a control system, various ministries - such as the war ministry, the public relations ministry, the public security ministry and the media ministry - underneath him. They had a judicial system, an army and a police force. Thus, there are many indicating factors that they - though they weren't a *state* in the meaning of international law - IS was highly organized and had extensive financial resources and controlled territory. The Genocide Network has indeed stated that IS is ”definitely capable of committing crimes against humanity”, based on the above criteria.¹⁰¹

2.6 Preliminary Conclusions

The IS-women were both victims of severe forms of oppression by the IS-men, and perpetrators of violent atrocities. Some were actively and willingly participating, while others were placed in violent situations and forced to contribute - either by physical or psychological threat. By reason of the various motives behind the women's decision to join and the different methods used by IS to recruit foreign women to the organization, one could argue that it's relevant to assess whether they have in fact been lured into this life - and subsequently what opportunities they have had to change their minds, decline to participate in the various acts and, furthermore, to leave the Caliphate. Though these circumstances don't erase the acts committed by them and their role in the chain of enslavement of the Yazidi, it's relevant to raise the question of whether this affect their individual criminal responsibility if it can be established that they were coerced or in any similar way deprived of their ability to make a decision of their own. Evidently, some women - such as Mujahidah Bint Usama and Khadijah Dare - had clear intentions to participate as active fighters and to commit various atrocities. In these cases, their legal liability is rather flagrant. But in other cases, the women might be lacking in their criminal intent. The question of the criminal intent and how this affects the women's responsibility according to the Rome Statute will be further elaborated on in section 3.3.2 and 3.4, *inter alia*.

¹⁰⁰ ICC, *Prosecutor v. Ruto et al.*, 'Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute', (Ruto Confirmation of Charges Decision), ICC-01/09-01/11, 23 January 2012, para. 185. See also Corrigendum of the Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (ICC Pre-Trial Chamber II), 2010, ICC-01/09-19-CORR. para. 93. Available at <https://www.refworld.org/cases/ICC/4bc2fe372.html> Accessed 16 May 2023.

¹⁰¹ The Genocide Network (2020), *supra* note 3, pp. 10 & 15.

3. The Slavery Prohibition

3.1 The Origins of Slavery

This chapter will firstly examine the history of slavery as a phenomenon and the development of the first slavery prohibitions, and subsequently move on to establishing the contemporary law - taking a clear focus on article 7.1(c) of the Rome Statute. Section 3.4 will deep-dive into the three legal parameters of article 7.1(c) with the purpose of providing a comprehensive assessment of the various aspects that need to be considered when determining whether a crime of enslavement has been committed or not. Moreover, section 3.5 is an account of a recent German case that seek to demonstrate one of the focal points of the research question, which is the IS-women's acts in relation to the definition of article 7.1(c).

Slavery and the slave trade, simplified as the condition in which one human being (is) owned by another¹⁰² and the act of capturing, selling and buying enslaved persons¹⁰³ is an ancient phenomenon that can be traced all the way back to Mesopotamia, 6800 years B.C. The Egyptians, Romans and Anglo-Saxons, amongst other groups of people, exercised slavery since the early days.¹⁰⁴ Slavery is hereby a universal institution and not a product of Western civilization - leastways when speaking of the origins of the concept.¹⁰⁵ Slavery during the ancient times was characterized by nations' efforts of creating empires, and hereby using slaves for labour.¹⁰⁶ The element of racism and white supremacy, which often characterizes the slavery-discussion in today's world, became introduced in more recent times - in junction with the Europeans' colonization of the world.¹⁰⁷

¹⁰² Hellie Richard, Britannica, 'Slavery' last updated Feb 24 2023. Available at: <https://www.britannica.com/topic/slavery-sociology> Accessed 13 April 2023.

¹⁰³ Wallenfeldt Jeff, Britannica, 'Slave Trade'. Available at: <https://www.britannica.com/topic/slave-trade> Accessed 13 April 2023.

¹⁰⁴ Weissbrodt David (2014), supra note 29, para 4.

¹⁰⁵ Mintz Steven, Gilder Lehrman Institute of American History, 'Historical Context: Myths and Misconceptions: Slavery and the Slave Trade'. Available at: <https://www.gilderlehrman.org/history-resources/teaching-resource/historical-context-myths-and-misconceptions-slavery-and-slave> Accessed 13 April 2023.

¹⁰⁶ Weissbrodt David (2014), supra note 29, para 4.

¹⁰⁷ Mintz Seven, 'Historical Context: Myths and Misconceptions: Slavery and the Slave Trade', supra note 105.

In the late 1300's, slaves from the Middle East and North Africa were transported to Europe due to labour shortage in the aftermath of the Black Plague.¹⁰⁸ This was the first step in the so called African slave trade. Western colonialism formally began in the 1500's.¹⁰⁹ At this time, the Portuguese became the first to establish the transatlantic slave trade, by first sending merchants to plunder the African coast of their resources and wealth - and thereafter enslaving the tribal populations.¹¹⁰ Portugal influenced the other European nations, such as Spain, the United Kingdom, the Netherlands, Germany and Denmark-Norway,¹¹¹ which began participating in the same acts of colonization. Thus, this is when the slavery system transformed to become de facto commercialized and racialized.¹¹²

Though the slavery that occurred during the ancient times, e.g. in ancient Rome (founded in 753 B.C.¹¹³) wasn't characterized by racism - as it has been in later times - there was still elements of ethnicity and stereotypes involved.¹¹⁴ Sandra Joshel, historian and classicist, explains that the Romans didn't necessarily have an understanding of the concept of race - as that was developed during the 1400's in Europe and the United States - but they did have "clear notions about non-Romans, different cultures, and even different body types and facial features." These aspects influenced the slavery and the slave trade greatly,

¹⁰⁸ Free the Slaves organization, 'Slavery in History'. Available at: <https://freetheslaves.net/slavery-today-2/slavery-in-history/> Accessed 13 April 2023.

¹⁰⁹ "Western colonialism is defined as 'a political-economic phenomenon whereby various European nations explored, conquered, settled, and exploited large areas of the world.'" Nowell C., Magdoff H. And Webster R., 'Western Colonialism', Britannica, last updated 30 March 2023. Available at: <https://www.britannica.com/topic/Western-colonialism> Accessed 13 April 2023.

¹¹⁰ Randive Mayur, 'Case Study: Portugal and the Transatlantic Slave Trade', Human Rights Pulse, July 25 2021. Available at: <https://www.humanrightspulse.com/mastercontentblog/case-study-portugal-and-the-transatlantic-slave-trade> Accessed 13 April 2023;

Lowcountry Digital History Initiative LDHI, African Passages, Lowcountry Adaptations, 'The Transatlantic Slave Trade' Available at: https://ldhi.library.cofc.edu/exhibits/show/africanpassageslowcountryadapt/introductionatlanticworld/transatlantic_slave_trade Accessed 13 April 2023.

¹¹¹ Nigerian Tribune Magazine, Tribune Online, '11 Countries that Colonized Other Countries', Sep 24 2022. Available at: <https://tribuneonline.ng.com/11-countries-that-colonized-other-countries/> Accessed 13 April 2023.

¹¹² Elliot Mary & Hughes Jazmine, 'Four hundred years after enslaved Africans were first brought to Virginia, most Americans still don't know the full story of slavery', New York Times Magazine, Aug 19 2019. Available at: <https://www.nytimes.com/interactive/2019/08/19/magazine/history-slavery-smithsonian.html> Accessed 13 April 2023.

¹¹³ History.com Editors, 'Ancient Rome' Aug 21 2020. Available at: <https://www.history.com/topics/ancient-rome/ancient-rome> Accessed 13 April 2023.

¹¹⁴ Joshel Sandra, 'Roman Slavery and the Question of Race', Black Past, January 4 2009. Available at: <https://www.blackpast.org/global-african-history/perspectives-global-african-history/roman-slavery-and-question-race/> Accessed 13 April 2023.

as the slaves' place of origin was considered an indication of their character and behavior. Thereto, the Romans did in fact have negative ethnic stereotypes and denigrated slaves and their supposed characteristics.¹¹⁵ Thus, though the fundamental aspiration with slavery was to pursue economic and geopolitical power, the victims of enslavement seem to have been carefully selected based on e.g. ethnic origins. This resonates with more modern day slavery. Relating this to the topic of IS and the Yazidi, it's clear that - just like ancient times - there's a clear element of xenophobia, power and privilege involved. IS sought to eradicate the Yazidi on the basis of their deviating religious beliefs, and aspired to using them for e.g. forced labour to help build their Caliphate and extend their power. Moreover, they had the resources - in the form of a heavily organized and structured institution - to do so, whereas the Yazidi didn't have enough power to prevent the attack and continuous violations on them.¹¹⁶

The slavery prohibition was established in more modern times, as an attempt to abolish mainly the African slave trade, which had grown to be the largest long-distance forced movement of people in recorded history.¹¹⁷ Prior to this, during the ancient times, slavery was not considered wrong or illegal. E.g. in Hammurabi's Code from ancient Babylon, one of the earliest written legal codes in history,¹¹⁸ slavery was an established institution.¹¹⁹ As has been established, the African slave trade began with western colonization during the Age of Discovery in the 15th century.¹²⁰ From the very beginning, slavery served as a crucial prerequisite for colonization¹²¹ as the forced labour was vital for the Europeans to conquer the land and develop a strong economy and geopolitical power. The main purpose of the modern colonization was territorial conquest and acquisition of geo-strategical advantages, and colonies were a symbol of national greatness and superiority. The enslavement was hereby a method whereby Europe achieved this status.¹²²

¹¹⁵ Joshel Sandra, (2009), supra note 114.

¹¹⁶ *'They came to destroy'* (2016), supra note 2, p. 6.

¹¹⁷ LDHI, *'The Transatlantic Slave Trade'*, supra note 110.

¹¹⁸ Editors of History.com, *'Code of Hammurabi'*, Feb 21 2020. Available at: <https://www.history.com/topics/ancient-middle-east/hammurabi> history.com Accessed 13 April 2023.

¹¹⁹ Weissbrodt David (2014), supra note 29, para. 25.

¹²⁰ Kämmerer Axel Jörn, *'Colonialism'*, January 2018, Oxford Public International Law, para 6. Available at: <https://opil-ouplaw-com.ezp.sub.su.se/display/10.1093/law:epil/9780199231690/law-9780199231690-c690?print=pdf> Accessed 13 April 2023.

¹²¹ Colonization is defined as "conquest, usually involving alien dominance and subjugation" and as being "marked by a belief in the anthropological, cultural, and political superiority of the European powers and their people, which is sometimes masked as an educative mission." This ideology and belief is what is often referred to as white supremacy today. See Kämmerer Axel Jörn, (2018), supra note 120, para. 1; Jenkins Philip John, *'White Supremacy'*, Britannica, Feb 23 2023. Available at: <https://www.britannica.com/topic/white-supremacy> Accessed 13 April 2023.

¹²² Kämmerer Axel Jörn, (2018), supra note 120, para. 10.

3.2 The First Slavery Prohibitions

National laws and international agreements first began to prohibit slavery during the 18th and 19th century. The French Declaration of the Rights of Man and the Citizens (1789) were among the first, then came the Danish subjects (1804), the Act of the Congress of Vienna (1815) - which was the first time that slavery became a matter of international concern, the Slavery Abolition Act (1833), the Treaty between Austria, Great Britain, Prussia and Russia for the Suppression of the African Slave Trade (1841), the US's Third Amendment to the US constitution after the Civil War (1865) and finally, during the Berlin West Africa Conference (1884-85) it was "declared that the slave trade was forbidden by principles of international law."¹²³ This development led up to the formation of the Temporary Slavery Commission - a body within the League of Nations - and their report from 1924. Later came the 1926 Convention to Suppress the Slave Trade and Slavery (the Slavery Convention) and subsequently the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (the Supplementary Convention), adopted by the League of Nations.¹²⁴ The 1926 Slavery Convention and subsequently the Supplementary Convention from 1956 were the first to coin the official legal definition of the terms slavery and slave trade within international law.¹²⁵ Article 1 of the Slavery Convention reads as follows:

"For the purpose of the present Convention, the following definitions are agreed upon:

"1) Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.

(2) The slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves."

The article makes a distinction between the crime of the slave trade and the crime of slavery, as well as defines the two different forms of conduct. Within the legal doctrine it's clear that the phrase "any or all the powers attaching to right of ownership" is the most interesting and dubious phrase in the slavery definition.¹²⁶ As will be shown in section 3.4 this phrase is still applicable and has been replicated in article 7 of the Rome Statute. For that reason it's crucial to clarify the definition of this phrase. The thesis questions the individual cri-

¹²³ Weissbrodt David (2014), *supra* note 29, para. 26.

¹²⁴ Warnshuis A.L. & Chamberlain Joseph P. , *The Slavery Convention of Geneva, September 25, 1926*, International Conciliation, 12, January 1928, p. 10.

¹²⁵ Allain Jean, *'The Definition of Slavery in International Law'*, *supra* note 27, p. 241.

¹²⁶ *Ibid*, p. 241.

minimal responsibility of the slave users, as opposed to the slave owners and traders. In order to answer this question it's necessary to establish the definition of slavery, to be able to determine which acts of conduct that amount to this crime - and thus, if the acts committed by the IS-women are acts of slavery.

The 1926-definition referred to the traditional form of slavery known as chattel slavery, which was the term for the circumstance of a person being owned as chattel (goods) by another.¹²⁷ During this time, slavery was a legal concept that meant legal ownership over another person who was to be used as commodity for e.g. labour - *de jure ownership*.¹²⁸ Ascertaining slavery in cases of *de jure* ownership was hereby seldom an issue. However, as *de jure* ownership was eventually abolished, the question of *de facto ownership* arose. The phrase "powers attaching to the right of ownership" refers to various forms of power and control over another, and hereby also different forms of conduct. The phrase is not limited to *de jure* ownership, but also includes various forms of *de facto ownership* - acts of conduct that in fact amount to slavery, despite the absence of legal ownership over another.¹²⁹ As will be further established below, the need for interpretation of this phrase has grown even bigger with time, as new forms of contemporary slavery have developed, and as *de jure* slavery has been abolished through international law, whilst *de facto* slavery still exists. To conclude, the initial intent was to prohibit slavery since it was previously legalized. With time, the issue has developed to defining which acts that are to be considered slavery since *de facto* slavery continues to occur, despite it being internationally prohibited through law.¹³⁰

3.3 The Existing Law on Slavery: General Overview

In the 1970's, slavery started to be considered a norm of *jus cogens* through the emergence of a general consensus, which "spurred on by the work of the United Nations International Law Commission and the determination by the International Court of Justice, in the 1970 *Barcelona Traction* case, that the "protection from slavery" created obligations *erga omnes*."¹³¹ *Jus cogens* means "the

¹²⁷ Ibid, p. 243 & 257.

¹²⁸ Ibid, p. 242.

¹²⁹ Ibid, p. 258.

¹³⁰ "De jure slavery (evidences by legal title) and de facto slavery (evidenced by customary practice)." Viseur Sellers Patricia and Getgen Kestenbaum Jocelyn, (2020), *supra* note 28, p. 7.

¹³¹ Allain Jean, 'Slavery Convention. Protocol Amending the Slavery Convention. Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery', *supra* note 27, p. 5. See also *Barcelona Traction, Light and Power Company Limited (New Application, 1962)*, *Belgium v Spain*, Judgment, Merits, Second Phase, ICJ GL No 50, 5th February 1970, para. 33-34.

compelling law” and is a legal term that refers to the legal status of certain international crimes, which have been given the highest hierarchical position of all norms and provisions as fundamental and overriding principles of international law.¹³² Article 53 of the Vienna Convention on the Law of Treaties (the Vienna Convention) refers to these kind of principles as it states that a ”treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of international law”, the latter term is defined as ”a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted, and which can be modified only by a subsequent norm of general international law having the same character.”¹³³ *Erga omnes* means ”obligations (owed) towards all” and is related to *jus cogens* since it refers to obligations derived from principles of basic human rights, such as protection from slavery.¹³⁴

Besides slavery being a peremptory and non-deogable *jus cogens* norm, the crime is regulated in different international legal instruments, both within international human rights law, international criminal law, and international humanitarian law. The Universal Declaration of Human Rights (UDHR), one of the most fundamental human rights documents founded in 1948 regulates slavery and the slave trade in its article 4. Furthermore, the crime is regulated in article 8 of the International Covenant on Civil and Political Rights (ICCPR) and article 4 of the European Convention on Human Rights (ECHR), amongst other regional human rights instruments.¹³⁵ However, this research thesis is focused on international criminal law and the instrument of interest is the Rome Statute; specifically article 7.1(c) on slavery as a crime against humanity - which will be subject to a comprehensive analysis in the following section. Moreover, article 7.1(g), article 8.2(b)(xxii), article 8.2(e)(vi) regulates sexual slavery. Sexual slavery is herein distinguished as a separate crime to other forms of slavery. It is constituted as a war crime in both international and non-international armed conflicts, as well as a crime against humanity.¹³⁶

¹³² Cornell Law School, Legal Information Institute, '*Jus Cogens*.' Available at: https://www.law.cornell.edu/wex/jus_cogens Accessed 13 April 2023.

¹³³ Article 53, Vienna Convention on the Law of Treaties, 1969.

¹³⁴ Frowein Jochen A., '*Obligations erga omnes*', Oxford Public International, last updated December 2008, para. 3. Available at: (<https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-c1400?prd=EPIL> Accessed 13 April 2023.

¹³⁵ For example article 5 of the 1981 African Charter on Human and Peoples' Rights, article 29(a) of the 1990 African Charter on the Rights and Welfare of the Child, article 6(1) of the 1969 American Convention on Human Rights and article 1(3) of the 1995 Agreement on Human Rights annexed to the Dayton Accords.

¹³⁶ A part from the Rome Statute, slavery has been regulated in e.g. the following criminal law instruments: Article 6 of the 1945 Charter of the International Military Tribunal (IMT Charter, Nuremberg), article 5(c) of the 1993 Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY), article 3(c) of the 1994 Statute of the International Criminal Tribunal for Rwanda (ICTR).

3.4 Article 7.1(c) of the Rome Statute - The Legal Parameters

Parameter 1: The Contextual Element

Enslavement is a crime against humanity according to article 7.1(c) of the Rome Statute. The crime consists of several legal parameters/constituent elements that are required to be fulfilled in order for an act to be convicted as such. In this section, these parameters will be examined.

Article 7 lists several different acts that can constitute crimes against humanity, enslavement is one of them. The first criteria is common for all the different acts and it is that the act was committed "as part of a widespread and systematic attack against any civilian population" and that the accused had "knowledge of this attack."¹³⁷ This is often referred to as the contextual element - *actus reus*¹³⁸ and it refers to outer factors, independent from the accused's criminal intent. The task is to establish the factual circumstances, which firstly requires the establishment of the definitions of the terms attack, widespread and systematic attack, as well as civilian population. The term attack has been clarified by the ICC in *Prosecutor v. Bosco Ntaganga*, as denoting "a course of conduct involving the multiple commission of acts referred to in article 7.1 of the Statute."¹³⁹ The definition of a widespread and systematic attack has been clarified in e.g. the case of *Prosecutor vs. Augustin Ndindiliyimana & Others*. In paragraph 260, the Court expressed the following: "the term 'widespread' refers to the large scale nature of the attack and the number of victims, whereas the term 'systematic' refers to 'the organized nature of the acts of violence and the improbability of their random occurrence.'"¹⁴⁰ As for the definition of a civilian population, the ICC clarified in the *Muthaura et al. case* as "groups distinguishable by nationality, ethnicity or other distinguishing features" and can include groups defined by its political affiliation.¹⁴¹

¹³⁷ Article 7.1, the Rome Statute.

¹³⁸ Palacios-Arapiles Sara, *The Interpretation of Slavery before the International Criminal Court: Reconciling Legal Borders?*, 23 December 2022, p. 422. Available at: https://brill.com/view/journals/mpyo/25/1/article-p416_15.xml Accessed 13 April 2023.

¹³⁹ *Prosecutor v. Bosco Ntaganga*, ICC-01/04-02/06, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the *Prosecutor Against Bosco Ntaganda* (PTC), 9 June 2014, para 22.

¹⁴⁰ *Prosecutor v. Augustin Ndindiliyimana, François-Xavier Nzunonemeye and Innocent Sagabutu*, ICTR-00-56-A, Judgement (AC), 11 February 2014, para 260. See also Bagosora and Nsengiyumva Appeal Judgment, ICTR-98-41-A, Judgment, 14 December 2011, para 389.

¹⁴¹ *Prosecutor v. Muthaura, Kenyatta and Ali (Prosecutor v. Muthaura et al.)*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11-382-Red, 23 January 2012, para. 110.

Moreover, the accused must have had knowledge of these objective circumstances - however, as will be established below, this knowledge extends beyond the mere awareness of the attack, and also requires the evidence of criminal intent. This will be further analyzed in the last part of this section.

Parameter 2: The Material Element - Powers Attaching to the Right of Ownership

The material element refers to the definition of enslavement, found in article 7.2(c) of the Rome Statute. The definition determines which acts that amount to enslavement, and hence which conducts that fit within the scope of this provision. It's the phrase "powers attaching to the right of ownership" that is up for analyze. The provision reads as follows:

*"Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;*¹⁴²

Firstly, it's the ownership that distinguishes slavery from other forms of control over another person. Ownership should be understood as possession, equated to ownership of "a thing."¹⁴³ As has been expressed by the Research Network on the Legal Parameters of Slavery¹⁴⁴ in the Bellagio-Harvard Guidelines, it's the ownership that enables "the factual conditions for the exercise of any or all of other powers attaching to the right of ownership" such as the buying, selling, transferring, using, managing the use of, profiting from the use of, disposal, mistreatment or neglect of a person.¹⁴⁵ The evidence of ownership over the supposed slave is hereby crucial in determining whether the crime is being committed, and the acts of conduct enlisted above are indicators of such ownership - as that is the condition that enables for all of these acts to be conducted.¹⁴⁶

The acts most relevant to the research question are (1) the use of a person; understood as deriving benefit from the services or labour of that person, (2) the act of managing the use of a person; e.g. a brothel owner delegating power to a day manager, and (3), the profiting from the use of a person; cases where a person is lent for profit or where a person is making money or deriving other

¹⁴² Article 7.2(c), the Rome Statute.

¹⁴³ The Bellagio-Harvard Guidelines, supra note 20, p. 16.

¹⁴⁴ "The Research Network is made up of a group of leading academics in the history and sociology of slavery; and legal scholars from various fields of law." UK Research and Innovation, 'Slavery as the Powers Attaching to the Right of Ownership' Available at: <https://gtr.ukri.org/projects?ref=AH/G018499/1> Accessed 13 April 2023.

See also Allain Jean, 'Contemporary Slavery and Its Definition in Law' (2017), supra note 27.

¹⁴⁵ The Bellagio-Harvard Guidelines, supra note 20, pp. 17-18.

¹⁴⁶ Ibid, p. 17.

forms of benefit from the use of another person.¹⁴⁷ This has also been clarified in ICC's document "Elements of Crimes", in which they express that e.g. the exacting of forced labour is to be understood as imposing "a similar deprivation of liberty" as e.g. purchasing, selling or bartering a person.¹⁴⁸ Furthermore, in the Katanga case the ICC added "the use, enjoyment and disposal of a person" to this list of acts - which clearly resonates with the Bellagio-Harvard Guidelines.¹⁴⁹ Additional legal support for this stance can be found in a report established by the UN Secretary General during the drafting process of the 1956 Supplementary Convention. Herein, examples of powers attaching to the right of ownership were set out in a non-exhaustive list. These were e.g. the ability to make a person an "object of a purchase"; the ability to use a person and the person's labour in "an absolute manner"; the entitlement to the products of the person's labour "without any compensation commensurate to the value of the labour"; and the capacity to transfer a person.¹⁵⁰ Furthermore, in *Prosecutor v. Kaing Guek Eav alias Duch*, ICC mentioned economic exploitation and consumption of a person as additional examples of powers attaching to the right of ownership.¹⁵¹

Parameter 3: The Mental Element

The mental element/the mens rea is the question of the accused's subjective understanding of the circumstances, and furthermore their criminal intent. This element is often difficult to establish and prove, as it directly relates to the accused's psychological state at the time of the committed act. Intent and knowledge, as a requirement for punishment for any of the crimes in the Rome Statute, is regulated in article 30 of the Rome Statute, and reads as follows:

1. *Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.*
2. *For the purposes of this article, a person has intent where:*
 - (a) *In relation to conduct, that person means to engage in the conduct;*

¹⁴⁷ Ibid, p. 17.

¹⁴⁸ International Criminal Court (ICC), 'Elements of Crimes,' 2011, ISBN No. 92-9227-232-2, p. 4. Available at: <https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf> Accessed 20 May 2023.

¹⁴⁹ *Prosecutor v. Germain Katanga*, ICC-01/04-01/07-3436-tENG, Trial Chamber II, Judgment pursuant to article 74 of the Statute, 7 March 2014, para. 975.

¹⁵⁰ United Nations Economic and Social Council (ECOSOC), 'Slavery, the Slave Trade, and Other Forms of Servitude, Report of the Secretary-General', UN Doc E/2357, 27 January 1953, pp. 27–28.

¹⁵¹ *Prosecutor v Kaing Guek Eav alias Duch*, Supreme Court Chamber, Extraordinary Chambers in the Courts of Cambodia, 001/18-07-2007-ECCC/SC, 3 February 2012, para. 156.

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly."

In *Prosecutor v. Kupreškić*, the Court established that "the requisite mens rea for crimes against humanity appears to be comprised by (1) the intent to commit the underlying offense, combined with (2) knowledge of the broader context in which that offense occurs."¹⁵² Determining intent and knowledge firstly requires an understanding of the definition of these terms in this context. Though intent isn't a foreign concept, but rather exists as a requirement within every legal system, the definition varies greatly depending on the instrument and the interpreting body.¹⁵³ In the *Tadić Appeals Chamber* it was established that the accused must have (1) known that there was an ongoing attack on the civilian population, (2) known that his/her acts were a part of, or fits in with the widespread and systematic attack, and (3) not committed the acts for purely personal reasons unrelated to the armed conflict.¹⁵⁴ In regards to the first criteria, it's irrelevant whether the accused has knowledge of any details or solely is aware of the conflict in broad terms. It's also irrelevant whether he/she approves of the goal behind the attack or not.¹⁵⁵ Thus, the requirement is a mere consciousness of the ongoing, widespread and systematic attack. Moreover, criteria number two solely requires the evidence that the accused "(took) the risk that his acts were part of the attack" in order for knowledge to exist.¹⁵⁶ In other words, it's not a requirement that the accused effortfully attempted to participate in the attack by committing the act. It's enough that they were aware of the risk that the act could potentially be considered a part of the attack. As for criteria number three, the understanding seems to be that evidence that the accused conducted the act for purely "personal reasons" could be indicative for the fact that he/she wasn't aware that his acts were a part of the attack. Ho-

¹⁵² *Prosecutor v. Kupreškić*, Trial Chamber International Criminal tribunal for the former Yugoslavia (ICTY), IT-95-16-T, Judgment 14 January 2000, para. 556. See also *Prosecutor v. Semanza*, ICTR-97-20-T, Judgment 15 May 2003, para. 332.

¹⁵³ Finnin Sarah, (2012), supra note 31, pp. 325-59.

¹⁵⁴ *Prosecutor v. Tadić (alias 'Dule')*, ICTY, IT-94-1-T, Judgment 7 May 1997, paras. 656-659.

¹⁵⁵ *Prosecutor v. Jadranko Prlić*, ICTY, IT-04-74-T, Judgement (TC), 29 May 2013, para. 45.

¹⁵⁶ *Prosecutor v. Kunarac et al.*, ICTY, IT-96-23-T and IT-96-23/1-T, 22 February 2001, para. 434; *Prosecutor v. Kunarac, Kovac and Vuković*, ICTY Appeals Judgement, IT-96-23-T and IT-96-23/1-A, 12 June 2001, para. 102. See also *Prosecutor v. Vasiljević*, IT-98-32-T, Judgment 29 November 2002, para. 37.

wever, it's not a requirement to establish the absence of such personal reasons in order for knowledge to be evidenced.¹⁵⁷

3.5 Düsseldorf Higher Regional Court on Behalf of the People, judgment III-7 Its 2/20, 2 StE 4/20-5 VS-NfD (12 May 2021)

In a German case from Düsseldorf Higher Regional Court from 12 May 2021, a woman was convicted for aiding and abetting enslavement as a crime against humanity, *inter alia*. The judgment was based on the German Code of Crimes Against International Law (Völkerstrafgesetzbuch, VStGB), however, the court relied upon the Rome Statute's definition of crimes against humanity.¹⁵⁸ The woman (the accused) was a German national who had traveled to the Caliphate with her three-year old daughter and her friend, where she joined IS and got married to an IS-fighter. The accused lived with her husband and their children in the Caliphate for years and during this time she "made considerable use of the enforced services of the joint plaintiff for cleaning and other work in her respective dwellings, the joint plaintiff being a Yazidi woman who was kept as a slave (...)." ¹⁵⁹ The Court found that the accused was an active member of IS, because she had "actively promoted its aims and integrated herself within the organization with its agreement."¹⁶⁰ Moreover they stated that "deliberately entering the territory of IS, marrying an IS member, receiving money and accommodation from IS, following orders given by a husband with commanding authority and by other local commanders, deliberately deciding to expand the 'constituent people' of IS, using blog posts to call on those of similar beliefs in Europe to likewise travel to the territory of IS and join that organization, and receiving training in dealing with weapons" is evidence of active promotion.¹⁶¹

The accused's friend would bring her slave to the accused's household and let the slave conduct housework there. The accused was unable to communicate with the slave due to limited language skills, instead she would inform her friend of what kind of work she wanted done - and the friend would then instruct the slave to carry out that work. It usually involved cleaning, watching the accused's children and serving food. When the friend and the slave arrived, the accused always locked the door from the inside. In the judgment, the court established that the accused was aware that the slave was a Yazidi and that she had been captured by IS and was being held against her will as a slave by the

¹⁵⁷ *Prosecutor v. Kunarac et al.*, (2001), *supra* note 154, paras. 81 & 102-103. ICTY, *Prosecutor v. Krnojelac*, IT-97-25-T, Judgment 15 March 2002, para. 59. See also ICTY, *Prosecutor v. Blaškić*, IT-95-14-T, Judgment 3 March 2000, paras. 254-255, 257.

¹⁵⁸ Düsseldorf Higher Regional Court, judgment 12 May 2021, *supra* note 8, p. 40.

¹⁵⁹ *Ibid.*, p. 7.

¹⁶⁰ *Ibid.*, p. 34.

¹⁶¹ *Ibid.*, p. 33.

accused's friend and her husband. The accused was also aware that the slave was forced to submit sexually to the friend's husband. The Court stated that "The accused accepted without criticism the view, taken by IS, that the enslavement of Yazidis was justified."¹⁶² The work that the slave conducted in the accused's household was "exclusively in (the accused's) interest" and even though the slave was being instructed by the friend, and not by the accused, the accused decided what kind of work she wanted done. In their legal assessment, the court established that "by using the labour of the joint plaintiff who was enslaved by (the friend), the accused aided and abetted the crime against humanity committed by (the friend) in notional concurrence with deprivation of liberty lasting more than 1 week."¹⁶³ Moreover, the judges referred to the Rome Statute's definition of enslavement, stating that enslavement means "the exercise of any or all of the powers attaching to the right of ownership over a person. Conventional forms of enslavement include the purchase, sale, lending or exchanging of one or more persons, including 'similar' forms of deprivation of liberty (MüKoStGB/Werle, loc. cit., paragraph 57)."¹⁶⁴ They went on to state that the accused "promoted both the qualified deprivation of liberty committed by (the friend) and her crime against humanity", furthermore, "the promotion of the offense arises, first, from the participation of the accused in the specific organization of the enslavement and also the deprivation of liberty during the time spent by (the friend) and the joint plaintiff in the dwelling of the accused, by locking the door, and also from the fact that, by exploiting the enslavement and the associated qualified deprivation of liberty, the accused expressed towards (the friend) her acceptance and approval of the predicate offense, which served to encourage (the friend's) actions."¹⁶⁵

As mentioned in section 1.4, the Court's reasoning in regards to the individual criminal responsibility (aiding and abetting) isn't of relevance to this research study as it was based on German domestic law. However, the judges' stance regarding the woman act in relation to the definition of enslavement as a crime against humanity is of interest as it demonstrates that the woman's more passive act (in direct comparison to the man and woman who brought the slave to her home) does fall within the scope of the crime.

3.6 Preliminary Conclusions

As for the contextual element of the crime, the attack against the Yazidi was widespread by nature of the large scale and number of victims, and systematic due to the highly organized nature of the acts committed. It's clear that the acts committed amounted to an attack, as essentially every act enlisted in article

¹⁶² Ibid, pp. 18-19.

¹⁶³ Ibid, pp. 28 & 40.

¹⁶⁴ Ibid, p. 40.

¹⁶⁵ Ibid, p. 41.

7.1(a-k) were committed. Thereto, the Yazidi are a civilian population within the meaning of the article, based on the definition established by ICC in the *Muthaura et al. case*¹⁶⁶ - their main distinctive feature being their religious beliefs.¹⁶⁷ Given that the IS-women were well-informed with the circumstances of the life within IS, they must also be considered to have had knowledge of this widespread and systematic attack before they moved to the Caliphate - and at the very least, once they arrived.

Moving on to the material element, it's been established that the act of making use of enslaved workforce does fall within the definition of enslavement as a crime against humanity, as it's considered to be an act of power attached to the right of ownership. By letting and instructing the enslaved Yazidis to conduct housework in their homes, the women are using and managing the use of them. Even in the situation where a man brings home a slave and instructs her to conduct housework, without the IS-woman having any part in it - the woman is still profiting from the use of the slave, in the form of domestic work. As evidenced, this is also an act that falls within the scope of powers attaching to the right of ownership. Ultimately, the women's role in the enslavement falls within the definition of the crime. This has also been confirmed in the Düsseldorf judgment, accounted for above.

In regards to the third and final requirement, the mental element, the IS-women were well-informed with the fact that there was an ongoing attack against the Yazidi - at the very least they became aware of this when they relocated to the Caliphate. It was a whole institution and system that they couldn't have failed to notice. As has been established, a broader knowledge is all that is required, thus it's irrelevant whether the women had insight into the details or the extent of the attack. It's also irrelevant if they approved of the attack or not. Moreover, they have - at least - taken the risk that their act of making use of the enslaved workforce was a part of this attack. Regardless if whether the person is devotedly conducting the act for the purpose of participating in the extinction of the Yazidi, it must be considered clear that there is a risk that this person is Yazidi and that the act therefore will be considered a part of the attack against that minority. And the accused must be considered to have taken this risk, conscious of the ongoing attack as they live within the Caliphate and are well-informed with IS's treatment of the Yazidi.

In summary, the definition of enslavement as a crime against humanity according to article 7.2(c) does cover the acts of the IS-women, despite the often secondary role in the chain of enslavement. In other words, it's not only the owning and trading of slaves that is covered by the definition of the crime, but a broad range of conducts that are considered powers attaching to the right of ownership.

¹⁶⁶ *Prosecutor v. Muthaura et al*, 23 January 2012, supra note 140, para. 110.

¹⁶⁷ See section 4.2.

4. Individual Criminal Responsibility

4.1 Perpetration and Complicity

The following chapter is an account of the governing law on individual criminal responsibility, as found in the Rome Statute. Firstly, the definitions and differences between perpetration and complicity will be examined, as this is the first question to be asked in regards to the IS-women; are they responsible for perpetration or complicity? Secondly, section 4.2 focuses specifically on aiding and abetting as a form of complicity, with the purpose of establishing the minimum threshold for conviction. Lastly, coercion or necessity as a ground for excluding responsibility will be examined in section 4.3, with the purpose of establishing the applicability of this in relation to the IS-women.

What distinguishes the Rome Statute, and international criminal law, from instruments within international humanitarian law and international human rights law, is that it has jurisdiction over individuals criminally liable for international crimes - rather than states or organizations. Both heads of state, government officials, military commanders and other individuals can be held accountable under the Rome Statute, before the ICC.¹⁶⁸ Individual criminal responsibility is regulated in article 25 of the Rome Statute and the main rule herein is found in 25.2, which states that "a person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute." Moreover, the following subparagraph, 25.3, elaborates on the scope of the article by establishing that individuals can be criminally liable for acts that they possess at least some personal culpability for. In other words, a person doesn't have to commit the crime independently in order for responsibility to be attributed to them. The article lists different forms of criminal responsibility in point a-f; it is point a and c that are of the greatest relevance to this research thesis. According to point a someone can be held responsible as a perpetrator for either committing the crime independently, jointly with another or through another person, regardless of whether that other person is criminally responsible.¹⁶⁹ Committing a crime jointly with another person is sometimes referred to as co-perpetration and it refers to the situation where two or more people are mutually responsible for the conduct. This form of responsibility requires that there is (1) a common plan, (2)

¹⁶⁸ Article 25-28, the Rome Statute.

¹⁶⁹ Article 31.1(a), the Rome Statute.

an essential contribution and (3) a mental element. These criteria have been clarified in the *Lubanga Case*. Firstly, the common plan must include "an element of criminality, meaning that it must involve the commission of a crime with which the suspect is charged."¹⁷⁰ The perpetrators must also be subjectively aware of a risk that this plan will result in the commission.¹⁷¹ Secondly, when determining whether there has been an essential contribution one can use the "power to frustrate" formula. The idea with this formula is that "the co-perpetrators have the 'power to frustrate the commission of the crime.' This has been denied as a legal requirement, but accepted as guiding when determining "how much more difficult or unlikely it would have been that the crime in abstract would have occurred without the accused's contribution."¹⁷² Thereto, the contribution must be coordinated in the sense that the perpetrators doesn't only have the same purpose, but a common one.¹⁷³ Importantly, the term essential contribution constitutes a higher threshold than the term substantial contribution, which is required for aiding and abetting.¹⁷⁴ Lastly, the mental element is constituted by the intent or awareness to (1) the commission of the crime and (2) the essential nature of the accused's contribution.¹⁷⁵ The Rome Statute's concept of co-perpetration is closely related to the concept of joint criminal enterprise (JCE) which was used by the ICTY and ICTR.¹⁷⁶ One important difference between the two is that co-perpetration focuses on objective elements and JCE on subjective ones. Co-perpetration requires that the perpetrators are aware of the occurrence of the crime as a result of a common plan, whilst JCE requires that the common plan is aimed at the commission of the crime.¹⁷⁷

Aiding and abetting, and otherwise assisting - as it's defined in article 25.3(c) - is the lowest form of complicity; meaning that it covers any act that contributes to the commission of attempted commission of a crime.¹⁷⁸ For the purpose of establishing the minimum amount of contribution required by the IS-women in order for them to be convicted, the following section will be devoted to examining aiding and abetting as a form of individual criminal responsibility -

¹⁷⁰ Ruto Confirmation of Charges Decision (2012), supra note 100, § 301.

¹⁷¹ Judgment pursuant to Art. 74 of the Statute, Lubanga Dyilo (ICC-01/04-01/06-2842), Trial Chamber I, 14 March 2012 (Judgment), § 994; Decision on the Confirmation of Charges. Lubanga (ICC-01/04-01/06-803-tEN), Pre-Trial Chamber I, 29 January 2007 (Lubanga Confirmation of Charges Decision), § 344.

¹⁷² Wirth Steffen, 'Co-Perpetration in the Lubanga Trial Judgment', Journal of International Criminal Justice, 10(4), September 2012, pp. 987-988.

¹⁷³ Judgment, *Krajićnik* (IT-00-39-T), Trial Chamber I, 27 September 2006 (*Krajićnik* Trial Judgment), §884.

¹⁷⁴ Ruto Confirmation of Charges Decision, (2012), supra note 100, § 305. See also Wirth Steffen (2012), supra note 171, p. 974.

¹⁷⁵ Wirth Steffen (2012), supra note 172, p. 989.

¹⁷⁶ Ibid, p. 973.

¹⁷⁷ Ibid, pp. 974-975.

¹⁷⁸ Finnin Sarah, (2021), supra note 31, para. 20.

leaving out the other forms of responsibility mentioned in article 25 of the Rome Statute.

4.2 The Definition of Aiding and Abetting

As mentioned, aiding and abetting, and otherwise assisting in the commission of a crime, is the weakest form of complicity. Any act that, in any way, contributes to the commission of a crime is covered by this form of individual responsibility according to article 25.3(c) of the Rome Statute.¹⁷⁹ In the *Bemba trial judgment*, the court clarified that *aiding* refers to the circumstance of providing partial or material assistance to the commission, whilst *abetting* is defined as "the moral or psychological assistance... to the principal perpetrator" which can consist of as little as a "tacit approval" of the commission.¹⁸⁰ Since this is the form of complicity that requires the least effort by the accused, the difficulty lies in determining the minimum requirements that ought to be fulfilled.¹⁸¹ According to article 2.3(d) of the International Law Commission's Draft Code of Crimes Against Peace and Security of Mankind (ICL Draft Code) from 1996, the accused's contribution must be "direct and substantial" and facilitate the commission of the crime in question in some "significant way."¹⁸² This was further explained in the *Tadić case*, wherein the court held that "substantial" should be understood as the presence of a causal relationship between the contributing act and the result of the commission - either in terms of physical presence at the scene of the crime or a distant contribution.¹⁸³ Moreover, article 25.3(c) also includes the sentence "or otherwise assists in its commission or its attempted commission" - which is an even broader term than aiding and abetting, with an even lower threshold.¹⁸⁴ Furthermore, there are indications of the Rome Statute being even less restrictive than the ICL Draft Code, as article 25.3(c) covers "assistance either in physical form or in the form of moral support", including mere exhortation or encouragement. The article hereby doesn't seem to require directness and substantiality.¹⁸⁵

It should be emphasized that the mens rea requirement still applies in cases of aiding and abetting, meaning that it must not only be established that the accused contributed to the commission, but also that he/she had some form of

¹⁷⁹ Ibid, para 20.

¹⁸⁰ *Prosecutor v. Bemba et al.*, ICC Judgment Pursuant to Article 74 of the Statute, ICC-01/05-01/13-1989-Red, 19 October 2016, paras 88-89.

¹⁸¹ Ambos Kai (2021), supra note 30, para 21.

¹⁸² International Law Commission's Draft Code of Crimes Against Peace and Security of Mankind (ICL Draft Code), p. 21.

¹⁸³ *Prosecutor v. Tadić*, IT-94-1-T, ICTY Trial Chamber, 7 May 1997, paras. 674, 688-692.

¹⁸⁴ Ambos Kai (2021), supra note 30, para 20.

¹⁸⁵ *Prosecutor v. Anto Furundžija*, IT-95-17/1-T, ICTY, Trial Judgment, 10 December 1998, para 231.

mental awareness or intention to do so. In the *Charles Taylor case*, it was established that the so-called "knowledge standard" should be applied when determining the mens rea of the accused, rather than the "purpose standard." The knowledge standard requires that the accused had known that his/her acts would assist the commission in some way, but doesn't require the outright purpose to contribute.¹⁸⁶

4.3 Grounds for Excluding Criminal Responsibility - Article 31.1(d) of the Rome Statute

Article 31 of the Rome Statute lists different grounds for excluding criminal responsibility. Subparagraph 1(d) is of the greatest relevance to this thesis' research question as it allows for exclusion in the situation where "the conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be (i) made by other persons, or (ii) constituted by other circumstances."¹⁸⁷ This is often referred to as necessity, compulsion or coercion.¹⁸⁸ Scholars have noted that this ground for exclusion is only applicable to "bottom perpetrators" and not the top- or mid-level once since they cannot be coerced.¹⁸⁹ The term "duress" refers to some form of defense-situation and has been describes as being based on three factors: (1) necessity, (2) reasonability and (3) proportionality. Firstly, necessity refers to the circumstance that the situation must have made it impossible for the accused to act in conformity with the law. In the *Krupp et al. Case* the court established that "the question is to be determined from the standpoint of the honest belief of the particular accused in question... The effect of the alleged compulsion is to be determined not by objective but subjective standards. Moreover, as in the case of self-defense, the mere fact that such danger was present os not sufficient. There must be an actual bona fide belief in danger by the particular individual."¹⁹⁰ Secondly, rea-

¹⁸⁶ *Prosecutor v. Charles Ghankay Taylor*, SCL-03-01-A, Appeals Chamber, Judgment 26 September 2013, paras 327-367.

¹⁸⁷ Article 31.1(d) of the Rome Statute.

¹⁸⁸ Gilbert J  r  mie, (2006), *supra* note 32, p. 14.

¹⁸⁹ Krebs Beatrice, 'Justification and Excuse in Article 31(1) of the Rome Statute', (2013), *Cambridge Journal of International and Comparative Law* 2, no. 3 (2013): 382-410, p. 407. See also Ambos Kai, (2013), *supra* note 30, p. 360.

¹⁹⁰ *Law Report of trials of War Criminals (LRTWC)*, Vol. X, p.148. Published for the United-Nations War Crimes Commissions by his majesty's stationery office, 1949. See also Gilbert J  r  mie (2006), *supra* note 32, p. 20.

sonability refers to the circumstance that any reasonable person in the same situation would have feared the danger that would deprive him/her of his ability to act in conformity. It can be said to refer to three ideas. (1) The accused must have reasonably believed in the existence of the threat, (2) he/she must have had some reasons to believe that such a threat would have been executed and (3) he/she must have been reasonably brave.¹⁹¹ As for the last requirement, proportionality, the criminal act and the gravity of the threat must be proportionate. This comes from the wording in article 31.1(d) that states that "the person does not intend to cause greater harm than the one sought to be avoided". This criteria ensures that the gravity of the crimes within the Rome Statute isn't denied by this exclusion ground. In the *Erdemovic Case*, the dissenting judge Cassese explained that: "this requirement cannot normally be met with respect to offenses involving the killing of innocents, since it is impossible to balance one life against another." He later added that: "in exceptional circumstances this requirement might be met, for example, when the killing would be in any case perpetrated by persons other than the one acting under duress." The later statement refers to the circumstance of "simply saving your own life when the other person will inevitably die, which may not be 'disproportionate' as a remedy."¹⁹²

Subparagraphs 31.1(d)(i-ii) states that the duress can be constituted either by other persons or by other circumstances beyond the accused's control. Whilst the first point is rather clear, the second one is interesting because it enables exclusion of responsibility based on more indirect circumstances happening around the accused. One very important fact is that precedents in international criminal law clearly demonstrate that if the accused has put himself voluntarily in the circumstances that have created the threat, duress is not acceptable. An obvious depiction of this is article 9 of the Military Tribunal of Nuremberg, which states that any person that joins an organization that has been recognized as criminal, can be presumed responsible of his/her acts within that organization.¹⁹³ This conclusion was also drawn in the '*Milch*' Cases in Nuremberg, in which two active members of the National-Socialist Party claimed that they had acted under duress during the so-called "crystal night." The German Supreme Court dismissed this and found that they "knew the program and the fighting methods of the NSDAP (Nazi Party). (...) in this condition of necessity for which he himself was to blame, could he have benefited from a possible

¹⁹¹ S. Glaser, *L'infraction Internationale*, Paris, L.G.D.J., 1957, p. 95. See also Gilbert J  r  mie (2006), *supra* note 32, p. 21.

¹⁹² *Prosecutor v. Dra  zen Erdemovic*, ICTY, Appeals Chamber, 7 October 1997, (Case No. IT-96-22-A), Separate and Dissenting Opinion of Judge Cassese, Para. 12. See also Gilbert J  r  mie (2006), *supra* note 32, p. 22.

¹⁹³ "Article 9 of the Nuremberg Charter states that International Military Tribunal has the power to declare at the trial of any individual member of any group or organization that the group or organization of which the individual was a member was a criminal organization". See: LRTWC, Vol.VII, p.21. See also Gilbert J  r  mie (2006), *supra* note 32, p. 22.

misapprehension of the circumstances that could have mislead him as to the condition of necessity or compulsion.”¹⁹⁴ This stance also been confirmed by dissenting judge Cassese in the Erdemovic case: ”(...) duress or necessity cannot excuse from criminal responsibility the person who intends to avail himself of such defence if he freely and knowingly chose to become a member of a unit, organization or group institutionally intent upon actions contrary to international criminal law.”¹⁹⁵

4.4 Preliminary Conclusions

The IS-women’s act of making use of enslaved Yazidis must be examined, firstly, in light of the requirements for co-perpetration. It’s clear that the women aren’t individual perpetrators, since they couldn’t have conducted the crime of enslavement without the IS-men’s conducts. However, co-perpetration is relevant because the men and women could potentially be considered to be joint perpetrators. Firstly, the IS-women must have acted as part of a common plan to enslave the Yazidi and utilize their forced labor within their homes. The women must also have been aware that there was a risk that this plan would indeed result in the commission. Based on what’s been said about the women’s role within the Caliphate, the understanding is that in most cases they were well-informed with IS as an organization when they decided to join and devote themselves within the Caliphate. IS had a clear idea about the women’s role and their expected contribution to the life therein. For example, the women were expected to take care of the households. Provided that the women understood IS’s slavery system, it can be argued that they acted as part of a common plan to enslave the Yazidi when they chose to move to the Caliphate - because they must have understood that their role therein would require them to participate in the enslavement.

Secondly, it must be established that their act of allowing and instructing the slaves within their homes can be considered an essential contribution to the crime. The question here seems to be how vital the women’s act was in the overall commission. Given that the purpose of capturing and enslaving the Yazidi was to control them, keep them in that enslaved state and also make use of them for e.g. forced labour - the women have indeed contributed to a significant part of this as they have made use of the slaves. On the other hand, the slaves would likely have been used regardless of if the women would’ve contributed or not. Applying the ”power to frustrate” formula would likely result in the conclusion that the absence of the women’s contribution wouldn’t have made it a lot more difficult to conduct the enslavement. The men would be able

¹⁹⁴ German Supreme Court in the British Zone, *Entscheidungen des Obersten Gerichtshofes für die Britische Zone in Strafsachen*, Vol.1, 1949, p.201, Quoted in Dissenting Opinion of Judge Cassese, footnote 12, translation of judge Cassese.

¹⁹⁵ *Prosecutor v. Dražen Erdemović*, supra note 191, para. 17.

to commit it without their contribution. Moreover, the question of whether the supposed common plan to commit the crime was coordinated is also disputed. From what's been said about the IS-women's motives behind their decision to join the organization, a lot of them had other motives than to specifically contribute to the enslavement of the Yazidi. Though their plan might be said to contribute to the commission, it's likely not a coordinated plan in the sense that they had the same, common intentions. However, there were women that had clear ideological motives and intentions of participating in the organization as active perpetrators/foreign fighters, and not only as companions to the men. Yet, this doesn't change the fact that instructing slaves to conduct work isn't an essential contribution. Though, women who contributed in other more essential ways could very well be considered perpetrators.

Lastly, the mental element requires that the IS-women had intent or awareness to both the commission of the crime and the nature of their contribution. Based on what's been previously said, this requirement must be considered fulfilled as they have been well-informed with their expected role within the Caliphate.

To conclude, it's unlikely that the IS-women could be convicted as co-perpetrators of a crime against humanity because the contribution of instructing slaves to do housework likely wouldn't be considered essential. However, they can be convicted for complicity as, at least, aidors and abettors. All that needs to be established then is that their act constituted assistance either in physical form or moral support. The act of allowing or instructing a slave to do housework for her should be considered clear assistance in the commission of the enslavement, because it favors the crime. The women have also fulfilled the knowledge requirement as they have had knowledge that their act would assist the commission - whether they have had the outright purpose to contribute isn't relevant. Moreover, there is no possibility for the women to evoke article 25 and claim duress as exclusion ground, because they have voluntarily joined IS and moved to the Caliphate. In the case of someone not having moved voluntarily but been forced or deceived, there is a possibility for them to claim duress - however, the understanding is that the women usually make the voluntary and informed decision themselves.

5. Concluding Remarks: Can the IS-Women be Held Individually Criminally Responsible for Enslavement?

The IS-women can be held individually criminally responsible as complicitors for enslavement as a crime against humanity, for having made use of enslaved Yazidis in their homes within the Caliphate. There was an ongoing widespread and systematic attack against the Yazidi and enslavement was an institutionalized system that contributed to the overall goal with the attack - to eradicate this civil population. According to the definition of enslavement in article 7.2(c) of the Rome Statute, all kinds of acts that demonstrate ownership over another person is criminalized - this includes the act of utilizing enslaved workforce. In the majority of the cases, the foreign women that moved to the Caliphate were well-informed with IS and their violent methods, such as the enslavement, and yet choose to join the group. This has been considered enough to evidence knowledge and intent to commit the crime.¹⁹⁶ Regardless of the fact that they too were victims of heinous atrocities, they contributed to the crime by allowing and instructing the Yazidi women and children to conduct house work for them. According to article 25 of the Rome Statute, such a contribution is punishable since there is a causal relationship between the act and the commission. Whilst it's unlikely that they could be considered perpetrators according to article 25.3(a), for having committed it jointly with others (the IS-men), they can undeniably be convicted for complicity according to 25.3(c). Conviction requires evidence that support both the contextual, material and the mental element of the crime. The mental element is what hinders conviction for perpetration, as that requires evidence of acting as part of a common plan. Conviction for e.g. aiding and abetting merely requires evidence of intention to contribute to someone else's crime; which is easier to prove in these cases.

On the topic of the mental element, the fact that IS applies an ideology that emphasizes patriarchal norms and structures and oppresses the IS-women in violent ways, creates a situation where the women seem to have very limited opportunities to refuse to do as they are being instructed - let alone to leave the Caliphate as they please. It's been established that the mere act of making an

¹⁹⁶ Düsseldorf Higher Regional Court, judgment 12 May 2021, *supra* note 8.

informed decision to move to the Caliphate and join IS is enough evidence of intent to participate as an active member, nevertheless, one could argue that in some cases this intent isn't as clear. One hypothetical situation is that of a woman who chooses to join IS and move to the Caliphate with her "jihadi husband", when she arrives she's shocked and shaken by the life therein and realizes that she doesn't support the acts committed and wants to leave. That's likely not a decision that she can make independently. Furthermore, if someone then brings an enslaved Yazidi to her house and prompts her to decide what work she wants done, her opportunity to say no and refuse to make use of the slave is likely also limited. Evidence does show that a lot of the IS-women had naive notions about IS and quite harmless motives, such as seeking to find meaning in their life - rather than seeking to actively eradicate the Yazidi and creating a Salafi utopia. In these situations, it can be argued that their criminal liability should be treated differently than in cases of active female terrorist fighters. Nevertheless, there is no opportunity for them to invoke duress (coercion or necessity) as a ground for excluding criminal responsibility according to article 31.1(d) of the Rome Statute. Their voluntary participation in the organization hinders the application of this exclusion ground. That seemingly leaves a situation where all IS-women that have made use of enslaved Yazidis will be treated the same in the eyes of the law, regardless of their differentiating intentions and positions within the Caliphate. Naturally, this circumstance can be linked to both advantages and disadvantages; a clear advantage being that all participants in the chain of enslavement are being prosecuted. Hereby, the combatting of this grave international crime likely becomes more efficient and it presumably also creates a deterrent effect for foreign women who consider joining IS. On the other hand, the contemporary law doesn't show much mercy for coerced, tricked and naive IS-women. Though they are considered voluntary devotees within the meaning of the law, the de facto circumstances of living within a system of such grave oppression and patriarchal structures may in many cases create situations of captivity and deprivation of autonomy of these women.

To conclude, this study has proven an affirmative answer to the research question while simultaneously demonstrating the nuances to the issue with the IS-women. Room for further research on the issue remains, e.g. in regards to the jurisdictional uncertainties, drawing from Fatou Bensouda's statement from 2015. ICC's reluctance to claim jurisdiction over the crimes committed within the Caliphate can be criticized on the basis of the theoretical possibility existent according to article 12.2(b) and article 13(b) of the Rome Statute. This thesis, however, shows that if ICC were to be granted jurisdiction, the IS-women could be held responsible for complicity under article 25 of the Rome Statute.

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