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Keeping the Promise of International Criminal Justice

Prosecuting and adjudicating gender-based mass atrocity crimes in “non-territorial” States

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Summary

Conflict is a breeding ground for gender-based violence. Previous discriminatory structures are reinforced and often result in conflict-related gender-based violence. In complex contexts characterized by religious, ethnic and / or political frictions, the vulnerability of some individuals is exacerbated. During the ISIS attack in the Sinjar region in northern Iraq, the religious minority group Yazidis was made the target. Through a systematic *modus operandi,* Yazidi men were murdered, and Yazidi women and children were captured and sold as slaves within ISIS for sex and forced labour. They were forced to convert to Islam and live according to strict religious rules as interpreted by ISIS. Survivors testify that they have been subjected to gross systematic violence and violations of their rights.

Gender-based violence committed in a specific context can constitute genocide, war crimes and / or crimes against humanity under International Criminal Law, so-called mass atrocity crimes. The prosecution of perpetrators, who have committed crimes so heinous that they "deeply shock the conscience of humanity" and "threaten peace, security and well-being in the world", is of concern to the international community as a whole according to the State parties to the Rome Statute of the International Criminal Court. Nevertheless, investigations, prosecutions and verdicts fail to reflect the prevalence and magnitude of gender-based mass atrocity crimes both internationally and nationally. In the case of ISIS, many perpetrators enjoy impunity. The States of commission do not have the capacity to investigate and convict the perpetrators, and justice through the International Criminal Court is hampered by a lack of jurisdiction.

National courts in "non-territorial" States, meaning on whose territory the crime has *not* been committed, are thus placed in the forefront in the fight against impunity for these perpetrators. This research claims that Sweden plays an important role, and therefore examines Sweden's ability to fight impunity by exercising universal jurisdiction over mass atrocity crimes and prosecute perpetrators under Act (2014:406) on criminal responsibility for genocide, crimes against humanity and war crimes. The analysis focuses on gender-based crimes against humanity, in particular persecution, in relation to an example case, *Taha Al J*, which is currently at trial in Germany.

Crimes against humanity have never been adjudicated in a Swedish court. This, paired with the structural lack of legal attention to gender-based mass atrocity crimes both internationally and nationally, makes it a thorny issue. This research introduces intersectionality as a concept to demonstrate how Yazidi women were not targeted as Yazidis or women, but as *Yazidi women*. The research proposes that Swedish courts should adopt an intersectional approach when interpreting and applying paragraphs concerning gender-based crimes against humanity. The research shows how such method of interpretation, without violating the principle of legality, would contribute to the global fight against impunity for gender-based crimes against humanity through acknowledging, investigating, prosecuting and ultimately adjudicating them in Swedish courts.

Sammanfattning

Konflikt är en grogrund för könsbaserat våld. Tidigare diskriminerande strukturer förstärks och mynnar ut i våld inom ramen för konflikten. I komplexa kontexter präglade av religiösa, etniska och/eller politiska slitningar förstärks vissa individers utsatthet. Under ISIS attack mot Sinjar-regionen i norra Irak utgjorde den religiösa minoritetsgruppen Yazidier måltavlan. Genom ett systematisk förfarande mördades Yazidiska män, och Yazidiska kvinnor och barn blev tillfångatagna och sålda som slavar inom ISIS för sex och tvångsarbete. De tvingades konvertera till Islam och leva efter ISIS strikta religiösa regler. Överlevare vittnar om att de blivit utsatta för grovt systematiskt våld och kränkningar.

Könsbaserat våld som är utfört i en specifik kontext kan utgöra folkmord, krigsbrott och/eller brott mot mänskligheten under den internationella straffrätten – så kallade folkrättsbrott. Lagföring av dessa förövare, som begått brott så avskyvärda att de ”djupt skakar mänskligheten samvete” och ”hotar freden, säkerheten och välståndet i världen” angår hela det internationella samfundet enligt parterna till Romstadgan för Internationella Brottmålsdomstolen. Trots det reflekterar varken internationella eller nationella utredningar, åtal och domar utbredningen och omfattningen av de könsbaserade folkrättsbrotten. I fallet ISIS går många förövare straffria. Domstolar i länder där brotten begåtts saknar kapacitet att utreda och döma förövarna, och rättvisa genom den Internationella Brottmålsdomstolen hindras på grund av avsaknad av jurisdiktion.

Nationella domstolar i ”icke-territoriella” länder, det vill säga länder på vars territorium brottet *inte* begåtts, placeras därför i framkant i bekämpandet av straffrihet för dessa förövare. Denna uppsats hävdar att Sverige spelar en viktig roll, och undersöker därför möjligheten för Sverige att utöva universell jurisdiktion över folkrättsbrott för att bekämpa straffrihet genom lagföring i Sverige under Lag (2014:406) om straff för folkmord, brott mot mänskligheten och krigsförbrytelser. Analysen fokuserar på könsbaserade brott mot mänskligheten, särskilt förföljelse, i relation till ett exempelfall, *Taha Al J*, som för närvarande prövas i tysk domstol.

Brott mot mänskligheten har aldrig tidigare dömts i svensk domstol. Detta, i kombination med den strukturella avsaknaden av rättslig uppmärksamhet mot könsbaserade folkrättsbrott både internationellt och nationellt, gör uppgiften komplex. Uppsatsen introducerar intersektionalitet som begrepp för att påvisa hur Yazidiska kvinnor inte blev utsatta i egenskap av Yazidier eller kvinnor, utan som *Yazidiska kvinnor*. Uppsatsen föreslår att svenska domstolar ska anamma en bred tolkningsmetod vid tolkning och tillämpning av paragrafer som rör könsbaserade brott mot mänskligheten. Uppsatsen påvisar hur en sådan tolkningsmetod, utan att stå i strid med legalitetsprincipen, bidrar till att motverka straffrihet för könsbaserade brott mot mänskligheten genom att upptäcka, utreda, och lagföra dem i Sverige.

Abbreviations

CCAIL	German Act to Introduce the Code of Crimes against International Law
CEDAW	Convention/Committee on the Elimination of Discrimination against Women
BrB	Brottsbalken
EU	European Union
ICC	International Criminal Court
ICL	International Criminal Law
ICTR	International Criminal Tribunal for Rwanda
ICTY	The International Criminal Tribunal for the former Yugoslavia
ISIS	Islamic State in Iraq and Syria
OHCHR	Office of the United Nations High Commissioner for Human Rights
Rome Statute	Rome Statute of the International Criminal Court
UCA	Act on criminal responsibility for genocide, crimes against humanity and war crimes (2014:406)
SDF	Syrian Democratic *Forces*
SGBV	Sexual and gender-based violence
The Policy Paper	Policy Paper on Sexual and Gender-Based Crimes
UN	United Nations
UN SC	United Nations Security Council
UNITAD	United Nations Investigative Team to Promote Accountability For Crimes Committed by Da'esh /ISIL

1. Introduction

1.1. Background

After the World War II, with the establishment of the Tokyo and Nuremburg trials, the idea that individuals, and not only States, could be held accountable for particularly serious violations of international law gained ground.[1] Since then, justice has been served through the framework of international criminal law (ICL) in the *ad hoc* international criminal tribunals of Former Yugoslavia (ICTY) and Rwanda (ICTR) . Furthermore, an important milestone was reached in 2002, with the adoption of a comprehensive codification of international criminal law in the form of the Rome Statute of the International Criminal Court (Rome Statute)[2], and the subsequent establishment of the International Criminal Court (ICC). The ICC is the first *permanent* forum for international criminal justice.[3] Following this development, international crimes have increasingly been codified and applied in domestic court systems. Moreover, the United Nations (UN) has set up or assisted a number of hybrid tribunals,[4] and in combination, these efforts have collectively advanced accountability for serious breaches of international humanitarian and human rights law.[5]

Notwithstanding these efforts, many perpetrators of international crimes are still not held accountable for their acts. The battle to end impunity for such crimes is fought on many fronts. Warfare is increasingly conducted in non-international conflicts with non-state armed groups, such as terrorist groups, as major actors. The threat of terrorism goes hand in hand with the perpetration of mass atrocity crimes, meaning genocide, crimes against humanity and war crimes.[6] One non-state actor that emerged on the international arena and has spread fear across the whole world, is the so-called Islamic State (ISIS). In its expansion in Iraq and Syria, ISIS targeted national minorities, in particular the religious minority of Yazidis. The heinous atrocities committed by ISIS against the Yazidi minority have been considered to amount to mass atrocity crimes by, *inter alia,* the UN Human Rights Council and the UN Investigative

[1]Gerhard Werle and Florian Jeßberger, *Principles of International Criminal Law* (4th edn, Oxford University Press 2020) 22.
[2] UN General Assembly The Rome Statute, *Rome Statute of the International Criminal Court (Last Amended 2010)* (International Criminal Court 1998).
[3] Werle and Jeßberger (n 1) 22.
[4] The Extraordinary Chambers in the Courts of Cambodia, the Special Tribunal for Lebanon, The Special Court and the Residual Special Court for Sierra Leone and the United Nations Mechanism for Criminal Tribunals.
[5] United Nations, 'International and Hybrid Criminal Courts and Tribunals' (*United Nations and the Rule of Law*) <https://www.un.org/ruleoflaw/thematic-areas/international-law-courts-tribunals/international-hybrid-criminal-courts-tribunals> accessed 15 February 2021.
[6] EuroJust, Network for Investigation and Prosecution of Genocide, crimes against humanity and war crimes, 'Cumulative Prosecution of Foreign Terrorist Fighters for Core International Crimes and Terrorism Related Offences' (2020) <https://www.eurojust.europa.eu/cumulative-prosecution-foreign-terrorist-fighters-core-international-crimes-and-terrorism-related> accessed 15 February 2021.

team to promote accountability for crimes committed by Da'esh/Isil (UNITAD).[7] These crimes fall within the scope of ICL. Nevertheless, few survivors have obtained justice on the national level in the States of commission, meaning where the crimes have been committed, or on the international arena, as very few ISIS militants have been charged or convicted for mass atrocity crimes.[8] The present accountability gap is attributable to the limited possibilities of trying such crimes in the States of commission, Iraq and Syria, and to the lack of jurisdiction of the ICC over the situation.[9]

This thesis delves into a rather unused avenue of obtaining justice and fighting impunity for mass atrocity crimes, namely the investigation and prosecution of such crimes in national courts of "non territorial" States, meaning States on whose territory the crime was *not* committed. State Parties[10] to the Rome Statute of the ICC have expressed that mass atrocity crimes "threaten the peace, security and well-being of the world", and that such crimes "must not go unpunished".[11] Furthermore, in the resolution that established UNITAD, the UN Security Council strongly condemns the acts perpetrated by ISIS and asserts that "those responsible in this group [ISIS] for such acts, including those that may amount to war crimes, crimes against humanity, and genocide, must be held accountable."[12] Thus, a general international will to fight impunity for such crimes can be discerned. The principle of universal jurisdiction provides States with the authority to exercise jurisdiction over mass atrocity crimes, even if the crime was not committed on the territory of the State, or by a national of the State. Against this backdrop, "non-territorial" States could play an important role in suppressing mass atrocity crimes by investigating and prosecuting them domestically. Germany is in the vanguard of bringing ISIS militants to trial for mass atrocity crimes.[13]

At the moment, a ground-breaking case is at trial in Germany, namely the case of *Taha Al J*.[14] This trial represents an important commitment to international justice, and is the first case ever, national or international, to include charges of genocide of the Yazidi people committed by an ISIS militant. However, despite the ground-breaking character of the case, the victim's counsels have expressed that the charges brought against *Taha Al J* does not reflect the full scope of criminal conduct in question. The indictment and charges lacks reference to violence, allegedly amounting to mass atrocity crimes, directed at the Yazidi victims on the discriminatory grounds

[7] UN Human Rights Council, '"They Came to Destroy": ISIS Crimes Against the Yazidis - Report of the Commission of Inquiry on Syria' (2016) 2016 A/HRC/32/CRP 2. UNITAD, 'Sixth Report of the Special Adviser and Head of the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh/Islamic State in Iraq and the Levant' (2021) S/2021/419. paragraph 10-13.

[8] United Nations, 'Six Years after Genocide, International Community Must Prioritize Justice for Yazidi Community' (*United Nations News*, 3 August 2020) <https://news.un.org/en/story/2020/08/1069432> accessed 1 April 2021.

[9] See below Chapter 2.3

[10] 123 countries are States Parties to the Rome Statute of the International Criminal Court.

[11] The Rome Statute (n 2). Preamble (3)(4)

[12] UN Security Council, 'Resolution 2379 (2017)' (2017) S/RES/2379.

[13] See e.g; Ye Beini, 'How Germany Is Leading the Way for Accountability for Crimes in Syria' (*International Justice Monitor*, 19 April 2019).

[14] *Taha Al J* Higher Regional Frankfurt/Main 5-3 StE 1/20 - 4 - 1/20.

of their gender (and religion).[15] Such violence is referred to as sexual and gender-based violence (SGBV) meaning acts that hurt, violate, force, threaten or restrict someone, based on their socially-assigned gender-roles or deviation of such norms.[16] SGBV can qualify as mass atrocity crimes, which then are referred to as sexual and gender-based crimes.[17] The UN Security Council has urged UN member states to investigate, prosecute and punish alleged perpetrators of sexual and gender-based crimes.[18] Nevertheless, the case of *Taha Al J* is not unique, as scholars have noted that both nationally and internationally, investigations, trials and verdicts fail to adequately reflect the prevalence and magnitude of sexual and gender-based crimes committed around the world.[19] The problem thus seems to be structural.

This thesis explores the possibility of prosecuting gender-based crimes within the scope of crimes against humanity in Swedish courts. It is a thorny issue because first, the avenue of exercising universal jurisdiction is rather unused; second, crimes against humanity has never been adjudicated in Swedish courts and lastly; scarce guidance relating to sexual and gender-based crimes can be found in national and international case law as such crimes have been structurally overlooked. In particular, gender-based crimes without sexual elements, proscribed in the Rome Statute as the crime against humanity of gender-based persecution, have only been included in charges one time, in the case of *Al Hassan* currently at trial before the ICC.[20]

The thesis makes the proposition that an intersectional approach can help Swedish legal authorities to overcome the conceptual flaws that underpin the acute accountability gap for perpetrators of gender-based crimes. Combining "textual, contextual and purposive" interpretation methods of provisions relating to gender-based crimes allow legal authorities to understand the discriminatory context in which mass atrocity crimes are committed and connect individual acts to such context. This is important because mass atrocity crimes have a "special character", requiring that acts must have been committed in a certain context to qualify as a mass atrocity crime. Hence, an individual act of SGBV must be connected to an overall context of a widespread or systematic attack against a civilian population to constitute a crime against humanity.[21] Overlooking sexual and gender-based crimes in charges and verdicts results in justice for only a part of the scope of criminal conduct in a certain case. Consequently, impunity for perpetrators of gender-based crimes is condoned.[22]

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[15] Yazda, 'Request for the Prosecution of Religious- and GBV in the Yazidi Genocide Case in Germany' (*Yazda*, 17 December 2020) <https://www.yazda.org/post/request-for-the-prosecution-of-religious-and-gbv-in-the-yazidi-genocide-case-in-germany> accessed 21 February 2021.

[16] European Center for Constitutional and Human Rights, 'Sexual and Gender-Based Violence' (*ECCHR*, 2021) <https://www.ecchr.eu/en/topic/sexual-and-gender-based-violence/> accessed 20 April 2021.

[17] See Terminology Chapter 1.8; Office of the Prosecutor, 'Policy Paper on Sexual and Gender-Based Crime' (International Criminal Court 2014) <https://www.icc-cpi.int/iccdocs/otp/otp-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf> accessed 15 March 2021.

[18] UN Security Council, 'Resolution 2242 on Women, Peace and Security.' (2015) S/res/2242.para 14.

[19] European Center for Constitutional and Human Rights (n 16).

[20] *The Prosecutor v Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* The International Criminal Court ICC-01/12-01/18.

[21] See e.g UN Human Rights Office of the High Commissioner (n 21).

[22] Serge Brammertz and Michelle J Jarvis (eds), *Prosecuting Conflict-Related Sexual Violence at the ICTY* (First edition, Oxford University Press 2016) 172.

1.2 Purpose and Research Questions

The point of departure of the research is the following two-fold thesis: 1) legal authorities in in "non-territorial States" play an important role in investigating prosecuting and trying perpetrators of sexual and gender-based crimes committed by ISIS militants with some nexus to the State, through the exercise of universal jurisdiction over such crimes; *and in doing that* 2) national legal authorities should employ an intersectional interpretation in order to effectively investigate SGBV and prosecute and adjudicate on conduct that qualifies as sexual and gender-based crimes to ensure non-impunity for perpetrators of such crimes.

The purpose of the research is to examine and analyse the assumptions underpinning the thesis. The analysis will be carried out by applying Swedish law to the circumstances of an example case; the German case of *Taha Al J*. The analysis will be limited to gender-based crimes within the scope of crimes against humanity, in particular the crime of persecution. The purpose of conducting the analysis with reference to an example State, case and crime is that it provides a clearly delimited frame for in-depth analysis, whilst it maintains a possibility to draw conclusions with relevance beyond the scope of the specific case. The following three research questions will guide the research in order to analyse the validity of the thesis:

1 In what capacity can Swedish courts adjudicate on mass atrocity crimes?
2 What is the applicable law to gender-based crimes within the scope of crimes against humanity in Sweden?
3 How can Swedish legal authorities interpret and apply the law relating to gender-based crimes within the scope of crimes against humanity to the circumstances of the case of *Taha Al J,* and what contributions could an intersectional interpretation of the law bring in such cases, bearing in mind the objective of the law to "prosecute to the fullest extent possible"[23] perpetrators of mass atrocity crimes?

1.3 Limitations

This research will not cover every aspects pertaining to international and domestic criminal law, but will be focused on establishing and interpreting the particular requirements set out in the provision of crimes against humanity and the underlying act of persecution in Swedish law. As such, aspects of criminal law that are general and applicable to all crimes both domestic and international, such as, *inter alia*, the requirement of a criminal intent will only be mentioned when relevant. Immunities and other modes of perpetration than direct perpetration will not be covered by the present research, neither will grounds that rule out liability be discussed. One of the main difficulties with investigating and prosecuting mass atrocity crimes in "non territorial" States pertains to acquiring and managing evidence, since access to the crime scene is often restricted and cooperation with the State of commission limited. These issues will be highlighted when relevant, but is not the focus of the present research. Moreover, universal

[23] Government of Sweden, Regeringens proposition 2013/14:146 Straffansvar för folkmord, brott mot mänskligheten och krigsförbrytelser 2014 [Prop. 2013/14:146] 75.

jurisdiction is in itself a complex concept. Aspects such as universal jurisdiction *in absentia* and issues pertaining to extradition will not be covered by this research.

These delimitations are necessary to make as ICL in itself cover a vast area of material and issues, which is further expanded and complicated when examining the application of such rules in domestic courts. In order to be able to substantiate the arguments of the thesis, the research will be delimited accordingly. This entails that several, in themselves interesting points and issues, will not be studied.

The most relevant topics that have been delimited are an analysis how Swedish courts can and should adjudicate on gender-based crimes within the scope of the crimes of war crimes and genocide. These crimes can overlap to a certain extent, and thus indictments can include charges of multiple mass atrocity crimes based on the same act. Each mass atrocity crime consists of several, distinct requirements that must be analysed separately, which is an exercise that cannot be made in the present research due to space and time constraints.

Consequently, the crime against humanity is singled out and analysed for two reasons. First, crimes against humanity have never been adjudicated in Swedish courts. Second, the provision relating to crimes against humanity is the only provision that explicitly proscribes gender-based violence without a sexual element, in the crime of gender-based persecution. The international case law with regards to gender-based persecution is extremely scarce, as the crime has only been included in charges one time, in the case of *Al Hassan*.[24] Thus, the crime against humanity is a relevant subject for researching both how Swedish courts *can* and *should* adjudicate on gender-based crimes.

1.4.Theoretical framework, methodology and material

The purpose of the thesis requires an attempt to ascertain what the Swedish applicable law to cases of crimes against humanity is. The thesis thus aims to account for *de lege lata*. With regards to this, the thesis will employ a legal dogmatic method. However, the legal dogmatics method will be modified with a critical element. In addition to establishing *de lege lata*, the purpose of the thesis require an analysis of applicable law that goes beyond the scope of the method of legal dogmatics. The thesis will employ an analysis of *de lege ferenda*, in order to examine how the law *should* be interpreted and applied, with an intersectional approach.

In the following section, the method of legal dogmatics will be outlined along with a discussion on the material used. In section 1.4.2, intersectional theory and the method employed, incorporating the theory, will be outlined. Moreover, the materials used in the research will be discussed.

[24] *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* (n 20).

1.4.1 Legal dogmatic method and material

The method of legal dogmatics entails an interpretation and systematisation of positive law. It aims to clarify the meaning and significance of the law.[25] The sources are "predominantly those that are thrown up by the legal process: principally statutes and decided cases, supplemented where possible with lawyers' literature expounding the rule and occasionally reflecting on them'.[26] The positive law is established by analysis of its own content, meaning that any analysis, criticism or proposals for improvement of the law is made from an internal perspective, limited by the scope of the sources of positive law.[27]

The method will be employed in the thesis in order to establish how crimes against humanity should be perceived in Swedish law in relation to the circumstances of the *Taha Al J case*. The method is employed with a view to concretize and contextualize the law by providing an analysis of real and specific circumstances which also provides more tangible conclusions.

The research will be conducted through analysing relevant sources of law. The material includes primary and secondary sources of both international and national law, as ICL "constitutes the framework for both the formulation and application of national law and ultimately sets the limits for what is to be punishable." [28]

As ICL is a part of the international legal order, it originates from the same legal sources. The sources of international law are referred to in article 38(1) of the Statute of the International Court of Justice.[29] The primary sources include international treaties, customary international law and general principles of law that are recognized by the world's major legal systems.[30]Subsidiary means for determining the law include decisions of international courts, international legal doctrine and decisions of national courts applying international law.[31]

Until the Rome Statute entered into force, treaties were of lesser significance in the field of ICL. The main contribution of the Rome Statute is its codification of previously unwritten customary law. It is a multilateral treaty with 123 State Parties.[32] The provisions of the Rome Statute has been further clarified by the Rules of Procedure and Evidence and in the Elements of Crimes.[33] Beyond codifying customary international law, the Rome Statute makes its own

[25] Aleksander Peczenik, 'Juridikens Allmänna Läror' [2005] Svensk Juristtidning 249, 249.
[26] Christopher McCrudden, 'Legal Research and the Social Science' [2006] The Law Quarterly Review 632, 634.
[27] Jan Vranken, ''Exciting Times for Legal Scholarship' [2012] Law and Method 42, 43.
[28] *NJA 1994 s. 480* (n 366).
[29]United Nations, Statute of the International Court of Justice 1946.
[30] ibid. article 38(1)(a)(b)(c)
[31] ibid.Art 38(1)(d)
[32] International Criminal Court, 'The State Parties to the Rome Statute' (2021) <https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx> accessed 20 February 2021.
[33] The Elements of Crimes is a non-binding guide to the Rome Statute, established by the United Nations. It is frequently cited at the ICC, and is considered to have a persuasive authority. See Preparatory Commission for the Establishment of an International Criminal Court, 'Report of the Preparatory Commission for the International Criminal Court: Addendum, PartII, Finalized Draft Text of the Elements of Crimes' (2000) U.N. Doc. PCNICC/2000/1/Add.2.

independent contribution to the development of the area of ICL.[34] Crimes against humanity as a concept has evolved through the Statutes of the international criminal tribunals and thus lacks any dedicated treaty.[35] Treaties of international human rights law are also relevant as grave breaches of such treaties can constitute mass atrocity crimes.

There is a close connection between treaties and customary law in the field of ICL. As ICL is in constant development, all customary law is not codified.[36] Consequently, one must keep in mind both when applying rules of ICL to a case.[37] Customary law exists of uniform, widespread and long-term State practice based on a sense of legal obligation (*opinio juris*).[38] To constitute *international* customary law, the practice must be connected to an issue in international law, for example domestic prosecution of international crimes. Provisions in the Statutes of ICTY and ICTR, set up by the UNSC, can be perceived as a determination of customary international law as they reflect the *opinio juris* on behalf of the Member States of the UN.[39] Moreover, the case law stemming from the international tribunals, especially the ICTY, "should be treated as strong evidence of customary international law".[40]

In Sweden, the main law governing international crimes is the Act on criminal responsibility for genocide, crimes against humanity and war crimes (2014:406) (hereinafter UCA as an abbreviation for "Universal Crimes Act" for ease of reference). The preparatory documents to the UCA, *Regeringens proposition 2013/14:146* (hereinafter referred to as the preparatory documents) will be studied as they constitute a source of Swedish law and as they provide important clarifications to the provisions in the law. In relation to the topic of the research, crimes against humanity, this is particularly important as no case-law exist. The Supreme Court of Sweden decided its first case concerning a mass atrocity crime, war crimes, on the 5th of May 2021.[41] When relevant to the scope of research, the Supreme Court's findings will be referred to.

Moreover, relevant paragraphs in the Swedish Criminal Code will be studied, in particular the second Chapter including rules on jurisdiction. Precedents from International Courts and tribunals will be outlined in order to establish how relevant paragraphs of applicable law has been interpreted and applied in practice. Lastly, doctrine is included in the material studied in order to gain a deeper comprehension of the rules. Some of the main works used in the examination include Mark Klamberg (ed) "*Lagföring i Sverige av internationella brott"* (Jure 2020) Douglas Guilfoyle *'International Criminal Law'* (Oxford University Press, 2016) and

[34]Werle and Jeßberger (n 32) 79.
[35] However, the UN International Law Commission has produced a set of Draft Articles on the Prevention and Punishment of Crimes against Humanity, and a proposed treaty is now being debated by governments around the world. See Douglas Guilfoyle, *International Criminal Law* (Oxford University Press 2016) 239.
[36]Gerhard Werle and Florian Jeßberger, *Principles of International Criminal Law* (Third edition, Oxford University Press 2014) 79.
[37]Werle and Jeßberger (n 1) 75–76.
[38]Statute of the International Court of Justice. Art 38(1); Werle and Jeßberger (n 32) 76.
[39]Werle and Jeßberger (n 32) 80.
[40] Guilfoyle (n 38) 248–249.
[41] *Högsta Domstolens dom i mål B 5595-19* Swedish Supreme Court 'Högsta Domstolen' 5 May 2021.

Gerhard Werle and Florian Jeßberger ”Principles of International Criminal Law” (Fourth Edition, Oxford University Press, 2020).

1.4.2 Theory-based method and material

When answering the third research question, of how Swedish legal authorities *can* and *should* interpret the provisions relating to gender-based crimes within the scope of crimes against humanity, the research builds on the positive law that is established through the method of legal dogmatics. However, the purpose of the thesis requires that information is gathered and studied in order to shed light on the context in which the crimes are committed in order to understand how factors such as gender, ethnicity and religion intersect and impact both survivors and perpetrators choices and experiences. The aim of gathering and studying such sources is not to establish what the law is, but instead of how the law should be applied and what considerations should be made in order to adequately address gender-based mass atrocity crimes in Swedish courts. This analysis of *de lege ferenda*, based on intersectional theory (elaborated on below in Chapter 1.4.3) entails an analysis of multiple sources of information which are not necessarily legal in nature. These sources form the basis for both the analysis of how the law *can* (in accordance with the UCA, its preparatory documents and ICL) and *should* be interpreted and applied to the circumstances of the example case of *Taha al J*.

The material used includes information from various non-governmental organizations and European Union (EU) institutions. An important document of reference is the ICC Prosecutor’s Policy Paper on Sexual and Gender-based crimes (the Policy Paper) as it outlines how gender-based crimes are proscribed by ICL.[42] Moreover, news articles will be included in the material used, with an aim to outline current events. The breadth of information aims to provide an insight into the context where the crimes are perpetrated, as well as an insight into the experiences of the survivors. Information stemming from ISIS itself, such as Fatwas and other instructions, is only accessible to the general public through the internet and social media. In order for legal authorities to fully rely on the information in these sources as evidence in court, further assessment must be conducted with regards to the reliability of the documents. However, such an analysis falls outside the scope of the present thesis. The reason behind including such information in the thesis, despite potential shortcomings, is that the information available is both very extensive and cohesive. As such, the information can provide a general overview of the context, without having to assess the reliability of each and every document.

Legal scholarship relating to intersectionality and mass atrocity crimes lay the foundation for the analysis of the thesis. The aim of including legal scholarship is to assist in conceptualising intersectionality and an intersectional interpretation within the framework ICL of in order to analyse how the concept can be employed in domestic courts. Some of the main works used in the examination include Ana Maria Beringola, ‘Intersectionality: A Tool for the Gender Analysis of Sexual Violence at the ICC’ 2017 Amsterdam Law Forum, Gregor Maučec, ‘The International Criminal Court and the Issue of Intersectionality—A Conceptual and Legal

[42] Office of the Prosecutor (n 17).

Framework for Analysis' [2021] iCourts Working Paper Series No. 237 Forthcoming in International Criminal Law Review and Emily Chertoff, 'Prosecuting Gender-Based Persecution: The Islamic State at the ICC' 2017 Yale Law Journal.

1.4.3 Theoretical framework - intersectionality as a socio-legal concept

Intersectionality as a theory criticises how discrimination and systems of subordination are seen along a single categorical axis of for example gender or ethnicity in law and policies. The term "intersectionality" was coined by Kimberlé Crenshaw in the field of law, linked to the phenomenon of race feminism. Crenshaw argued that persons facing discrimination or subordination on two or more grounds are obscured by law and policy as inquiry is limited into the experiences of otherwise-privileged members of the group.[43] Crenshaw demonstrated that the "traditional" single-dimensional analysis and rhetoric of discrimination and gender equality focused attention on black men and white women respectively, hence it could not fully grasp the lived experiences of black women.[44]

The theory recognises that individuals are complex and have multiple identities and holds that the intersectional experience is greater than the sum of racism and sexism.[45] Thus, to fully embrace the experiences and concerns of people belonging to several marginalised groups, the historical, social and political context must be taken into account to discern how patriarchy, racism, economic disadvantage and other systems intersect and contributes to create layers of inequality. These factors structure the relative positions of different races, of men and women and other groups.[46]

A single-dimensional and additive analysis of discrimination creates gaps in which persons with complex identities are obscured. The intersectional theory challenges and tries to correct this by unveiling how intersecting grounds of discrimination exacerbates the vulnerability of individuals with multiple identities and creates a unique form of discrimination.[47] Vulnerability is not understood as a characteristic of different socio-demographic groups. Instead, vulnerability is the result of "different and interdependent societal stratification processes that result in multiple dimensions of marginalisation".[48] As a socio-legal concept, intersectionality

[43] Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politic' 1989 University of Chicago Legal Forum. 139, 155.
[44] Kimberlé Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color' Stanford Law Review 1241.("Although the rhetoric of both agendas formally includes Black women, racism is generally not problematized in feminism, and sexism, not problematized in antiracist discourses. Consequently, the plight of Black women is relegated to a secondary importance…")
[45] Crenshaw (n 45). 139, 155.
[46] United Nations General Assembly, 'Review of Reports, Studies and Other Documentation for the Preparatory Committee and the World Conference' (2001) A/CONF.189/PC.3/5. Paragraph 23
[47] Aisha Nicole Davis, 'Intersectionality and International Law: Recognizing Complex Identities on the Global Stage' 2015 Harvard Human Rights Journal 205, 208.
[48] Christian Henrik and et al., ''Vulnerability and Vulnerable Groups from an Intersectionality Perspective' 2020 International Journal of Disaster Risk Reduction 1.

has particularly gained ground in the human rights discourse and in anti-discrimination law. Discrimination forms the basis for multiple violations of international human rights law. Human rights bodies have increasingly recognized that grounds for discrimination are "intrinsically linked".[49] Intersectionality has been acknowledged by several international human rights law bodies as a valuable tool to understand, address and adequately redress discrimination based on intersecting grounds.[50]

Despite the acute accountability gap for perpetrators of sexual and gender-based crimes, international criminal law has not yet grappled with intersectionality as a concept. It has however been introduced in academia by scholars such as Beringola and Maučec, as a valuable tool in the proceedings at the ICC.[51] Their work form the basis for the analysis of how intersectionality as a concept can be envisioned in national criminal proceedings

In conclusion, the following understanding of intersectional discrimination informs the analysis in the thesis: intersectional discrimination occurs in circumstances when individuals suffer from discriminatory targeting based on two or more grounds of discrimination in the context of mass atrocity crimes. For example, if an individual is targeted on the basis of gender and religion concurrently, the form of discrimination within the scope of mass atrocity crimes can only be understood and adequately addressed by legal authorities through analysing how the intersection of gender and religion creates a unique form of discrimination. The identities of gender and religion are inextricably linked, and it would be impossible to capture the form of discrimination through analysing the two grounds separately and then add them to each other, as the experience of intersectional discrimination is greater than the sum of discrimination based on gender and religion. Intersectional discrimination has a specific and unique impact on individuals, and hence "merits special and thorough consideration and appropriate remedying."[52]

[49] 2010 Convention on the Elimination of all forms of discrimination against Women (CEDAW), *General Recommendation N' 28 on the Core Oblgations of States Parties under Article 2 of the Convention on the EliminationofAllFormsofDiscrminationagainstWomen,* CEDAW/C/2010/47/GC.2,19October2010, para. 18.

[50] See Committee on the Elimination of Racial Discrimination (CERD), *General Recommendation N' 25, GenderRelatedDimensions of RacialDiscrimination,* U.N. Doc. A/55/18, annex V, Fifty-sixth session, 2000, 20 March 2000; 2014 *CEDAW, JointgeneralrecommendationN'31 ofthe Committee on the EliminationofDiscriminationagainst Women/general comment N' 18 of the Committee on the Rights of the Child on harmful practices,* CEDAW/C/GC/31-CRC/C/GC/18, 14 November 2014, para. 15.

[51] Ana Maria Beringola, 'Intersectionality: A Tool for the Gender Analysis of Sexual Violence at the ICC' 2017 Amsterdam Law Forum; Gregor Maučec, 'The International Criminal Court and the Issue of Intersectionality—A Conceptual and Legal Framework for Analysis' [2021] iCourts Working Paper Series No. 237 Forthcoming in International Criminal Law Review; Gregor Maučec, 'Law Development by the International Criminal Court as a Way to Enhance the Protection of Minorities—the Case for Intersectional Consideration of Mass Atrocities' [2021] Journal of International Dispute Settlement 1.

[52] Maučec, 'The International Criminal Court and the Issue of Intersectionality—A Conceptual and Legal Framework for Analysis' (n 53) 6.

1.5. Terminology

ISIS/ISIS militant

The acronym ISIS stands for the Islamic State of Iraq and Syria, and refers to the radical militant group that has been classified as a terrorist organization (elaborated on below, in Chapter 2.1)[53] The entity is also known under the acronyms ISIL (The Islamic State in Syria and the Levant), the IS (the Islamic State) or by the pejorative name "Da'esh". For ease of reference, this research will use the acronym ISIS. ISIS militant refers to a member of ISIS.

Sexual and gender-based violence (SGBV)

This term refers to acts that hurt, violate, force, threaten or restrict someone, based on their socially-assigned gender-roles or deviation of such norms.[54] UN Human Rights Office of the High Commissioner (OHCHR) defines gender-based violence as "any harmful act directed against individuals or groups of individuals on the basis of their gender. It may include sexual violence, domestic violence, trafficking, forced/early marriage and harmful traditional practices."[55] OHCHR defines sexual violence as "a form of gender-based violence and encompasses any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed against a person's sexuality using coercion, by any person regardless of their relationship to the victim, in any setting. Sexual violence takes multiple forms and includes rape, sexual abuse, forced pregnancy, forced sterilization, forced abortion, forced prostitution, trafficking, sexual enslavement, forced circumcision, castration and forced nudity."[56]

Gender-based crimes

The understanding of gender-based crimes adopted in this research builds on the definition of the term made by the ICC Prosecutor in the Policy Paper, that gender-based crimes are mass atrocity crimes "committed against persons, whether male or female, because of their sex and/or socially constructed gender roles. Gender-based crimes are not always manifested as a form of sexual violence. They may include non-sexual attacks on women and girls, and men and boys, because of their gender".[57] In sum, when gender-based *violence* qualifies as a mass atrocity crime it is understood as a gender-based *crime*. Gender-based crimes encompasses sexual crimes. Sexual violence is however explicitly proscribed as sexual crimes under ICL. The only explicit provision proscribing gender-based crimes without requiring sexual elements is gender-based persecution as a crime against humanity.

[53] EuroJust, Network for Investigation and Prosecution of Genocide, crimes against humanity and war crimes (n 6) 5.
[54] European Center for Constitutional and Human Rights (n 16).
[55] UN Human Rights Office of the High Commissioner, 'Sexual and Gender-Based Violence in the Context of Transitional Justice' (2014) <https://www.ohchr.org/documents/issues/women/wrgs/onepagers/sexual_and_gender-based_violence.pdf> accessed 15 April 2021.
[56] ibid.
[57] Office of the Prosecutor (n 17) 3.

Sexual crimes
This research adopts the understanding of a sexual crime as "an act of a sexual nature" that qualifies as a mass atrocity crime. Such acts are "not limited to physical violence, and may not involve any physical contact — for example, forced nudity. Sexual crimes, therefore, cover both physical and non-physical acts with a sexual element" in accordance with the Policy Paper.[58] In sum, when sexual *violence* qualifies as a mass atrocity crime it is understood as a sexual *crime*.

Justice
Defining justice is a complex matter. The main focus of this research is justice through prosecution and punishing of perpetrators of mass atrocity crimes, in this research referred to "*international criminal justice*". The motivation behind focusing on this aspect of justice is that it is the objective of adopting the UCA according to the preparatory documents.[59] Moreover, as Michelle Bachelet, the UN High Commissioner for Human Rights put it: "criminal accountability for the most serious violations is a cornerstone of our human rights architecture, and an essential demand of victims."[60] However, the notion of international criminal justice encompasses a wider perception of justice than merely retributive justice. This is reflected on in Chapter 3.2 and 5.1.

1.6. Outline

Ensuing this introductory segment of the thesis, four chapters follow.

Chapter 2 provides an outline of the development of ISIS and a contextualization of the crimes ISIS committed against the Yazidi minority in particular. Furthermore, the chapter highlights the limited avenues for fighting impunity for perpetrators of mass atrocity crimes in Iraq and Syria and at the ICC. "Non-territorial" States are fore fronted in the pursuit of closing the accountability gap, and the national interest of fighting impunity of such States are reflected on. Chapter two thus aim to position the research topic within its broader context and highlight its relevance.

Chapter 3 delves into ICL and its application in "non-territorial" States. First, the chapter account for the definition of mass atrocity crimes under ICL and the objectives of such law. Second, focus will be directed to how Swedish courts can apply rules of ICL. The chapter ascertains whether Sweden as a "non-territorial" State has an *entitlement* or a *duty* to investigate and prosecute gender-based crimes within the scope of crimes against humanity according to

[58] ibid
[59] Government of Sweden Regeringens proposition 2013/14:146 Straffansvar för folkmord, brott mot mänskligheten och krigsförbrytelser (n 24).
[60] Michelle Bachelet, 'Accountability Mechanisms and the Global Flight against Impunity' (*OHCHR*, 5 November 2020) <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=26473&LangID=E> accessed 10 May 2021.

national and international obligations. Lastly, the substantive national law governing mass atrocity crimes in Sweden is introduced.

Chapter 4 paints the picture of a lack of international and national judicial attention to sexual- and gender-based crimes. Against this background, the example case of *Taha Al J* is introduced along with applicable Swedish law. An analysis, with a view to discern how Swedish legal authorities *can* and *should* interpret the provisions in the Swedish law that concerns gender-based crimes within the scope of crimes against humanity is conducted. The analysis is focused on the crime of persecution on the basis of religion and gender as a crime against humanity in Swedish law. The analysis has a two-fold focus: the scope and meaning of the provision is analysed together with a parallel analysis of the contribution of an intersectional approach to the objective of the UCA in fighting impunity for perpetrators of mass atrocity crimes.

Chapter 5 reflects on potential tensions between the intersectional approach and the identified objectives of ICL, beyond fighting impunity. More specifically, the intersectional approach is juxtaposed with the principle of legality in an analysis of whether the former violates the latter. Chapter 5 also identifies a gap in the discourse on the national level relating to several of the objectives of ICL discerned at the international level. The potential contributions of the intersectional approach to such objectives are reflected on. Finally, chapter five contains a conclusion of the research and makes concluding remarks in relation to the veracity of the formulated thesis.

2. Contextualizing mass atrocity crimes committed by ISIS militants in Iraq and Syria

2.1. ISIS in Iraq and Syria

This section will in brief terms outline ISIS activities in Syria and Iraq, for the purpose of sketching a factual and contextual background to the legal analysis employed through the research. ISIS is a non-state actor, often described and defined as a terrorist organisation.[61] It is a jihadist organization, splintered from Al-Qaeda. The organisation, still part of Al-Qaeda, gained footing under the name ISI (The Islamic State of Iraq) in Iraq in 2006 upon the invasion of United States troops in 2003. The Shia Vice President Maliki replaced Saddam Hussein as the leader of Iraq with encouragement of the US following the killing of Saddam Hussein. However, the Maliki regime alienated the minority Sunni population in Iraq, which constitute around 20 % of its population. [62] Sunni Arabs felt threatened by the government, as they felt that their interests would not be considered by a government which marginalized them both politically and economically. Sunni leaders boycotted the Parliament and Sunni military leaders and fighters dismissed or left their posts. In this political vacuum, ISI gained power and members.[63] In 2010, upon the killing of the former ISI leader Abu Omar Al-Baghdadi, Abu Bakr al-Baghdadi became the leader of the organization until his death in 2019. Against the backdrop of the general unrest in the region following the Arab Spring, Baghdadi declared an expansion of ISI in Iraq and into Syria in 2013 and consequently changed its name onto ISIS.[64] Al-Qaeda did not approve of this and formally renounced their cooperation with ISIS on February 2, 2014.[65] Upon the declaration of its expansion, ISIS gained large areas of territory through a violent expansion, including the city of Raqqa that would become the capital upon the declaration of an Islamic State in Iraq and Al-Sham[66] with Al-Baghdadi as its Caliph on the 29th of June 2014.[67] At the organizations height, it held around a third of Syria and 40 percent of Iraq.[68] The violent expansion put national minorities of Iraq and Syria at great risk, as the vision of an Islamic State was not tolerant to dissenters. ISIS targeted minorities based on

[61] *See* UN Security Council, 'Resolution 2249' (2015) S/RES/2249.Resolution 2249 (2015) in which the UN Security Council determined that ISIS "constitutes a global and unprecedented threat to international peace and security".
[62] Graeme Wood, ''What ISIS Really Wants' (*The Atlantic*, March 2015) 10 <https://www.theatlantic.com/magazine/archive/2015/03/what-isis-really-wants/384980/> accessed 16 March 2021.
[63] Alon Ben-Meir, ''Defeating ISIS And Ending Sunni-Shiite War In Iraq' (*Alon Ben-Meir Professor*, 26 July 2016) <http://alonben-meir.com/writing/defeating-isis-ending-sunni-shiite-war-iraq/> accessed 20 March 2021.
[64]Jessica Stern and JM Berger, *ISIS: The State of Terror* (First ECCO paperback edition, Ecco Press, an imprint of HarperCollins Publishers 2016) 39.
[65] ibid 43.
[66] Al-Sham is a pre-1914 name for present-day Syria, Lebanon, Israel, and Jordan.
[67] Stern and Berger (n 66) 46–47.Stern, Berger (n. 18) 46-47
[68]Wilson Center, 'Timeline: The Rise, Spread, and Fall of the Islamic State' (*Wilson Center*, 28 October 2019) <https://www.wilsoncenter.org/article/timeline-the-rise-spread-and-fall-the-islamic-state> accessed 10 March 2021.

perceived affiliation to certain ethnicity, religion or political belief.[69] ISIS performed systematic killings, abductions, pillage and destruction of property of members belonging to these groups.[70] The specific crimes committed against the Yazidis will be elaborated on in the following section.

The rapid territorial gains and the declaration of a Caliphate prompted international response. Over the following years, ISIS lost territory in offensives by multiple actors. By October 2017, the last ISIS militants in the declared capital of Raqqa surrendered. In December the same year, the organization had lost 95 % of its acquired territory and the Iraqi Prime Minister al-Abadi declared victory over ISIS in Iraq.[71] ISIS was however still active, committing terrorist attacks around the world. Offensives continued by the US backed coalition of Syrian Kurds and Arabs known as the Syrian Democratic Forces (SDF). Finally, in December 2018, the US President Trump declared ISIS defeated. SDF continued its offensive and took the last ISIS stronghold of Baghouz, leading to a mass surrender of ISIS fighters in March 2019. The leader of ISIS, Al-Baghdadi, was killed in October the same year in a U.S airstrike.[72]

2.2. The specific pattern of crimes against the Yazidis

The Yazidis are a religious minority residing in the Nineveh Plains area in northern Iraq. The religion's roots date back to the 12th century. Before the invasion of ISIS militants, Yazidis constituted around 60 % of the population in the Sinjar region of Nineveh Plains.[73] The Yazidi belief is based on oral myths, folk legends and hymns, and is centred around the belief in one God and creator of the world and seven angels entrusted to preserve it.[74] The Yazidis have been perceived as devil worshippers by their neighbours and this, paired with the fact that the Yazidis are not "people of the book", an Islamic term encompassing Jews and Christians, have formed the basis for the persecution of the Yazidis throughout centuries.[75]

As established above, the increased territorial dominance of ISIS negatively affected in particular national minorities. Although many minorities were targeted, the majority of information available of serious crimes committed by ISIS focuses on crimes committed against the Yazidis.[76] ISIS has publicly reviled Yazidis as "*kuffar*", or infidels, as one of the guiding

[69]See, Stern and Berger (n 66) 47–48. And UN Human Rights Council, 'Report of the Office of the United Nations High Commissioner for Human Rights on the Human Rights Situation in Iraq in the Light of Abuses Committed by the So-Called Islamic State in Iraq and the Levant and Associated Groups' (2015) A/HRC/28/18. Paras 16, 29

[70] UN Human Rights Council (n 71). paras 16-43

[71] Wilson Center (n 70).

[72] ibid.

[73] Nelida Fuccaro, ''Ethnicity, State Formation, and Conscription in Postcolonial Iraq: The Case of the Yazidi Kurds of Jabal Sin-Jar' 1997 International Journal of Middle East Studies 559, 564.

[74] Birgül Açikyildiz, *The Yezidis: The History of a Community, Culture and Religion* (B Tauris 2010) 1. 33-36.

[75] 'Yazidi', , *Columbia Electronic Encyclopedia* (6th Edition, Columbia University Press 2020) <https://eds-a-ebscohost-com.ludwig.lub.lu.se/eds/detail/detail?vid=9&sid=1f569625-11a5-4d83-826f-400fd9273b93%40sessionmgr4007&bdata=JnNpdGU9ZWRzLWxpdmUmc2NvcGU9c2l0ZQ%3d%3d#AN=134503033&db=lfh> accessed 20 March 2021.

[76] Eurojust, ''The Prosecution at National Level of Sexual and Gender-Based Violence (SGBV) Committed by the Islamic State in Iraq and the Levant (ISIL)' (2017) 2017/00014 5 <https://www.eurojust.europa.eu/prosecution-

spirits in Yazidism, *Tawusi Malek*, is identified by ISIS as identical to the Qur'anic Satan.[77] A specific pattern of criminality against the Yazidis can be discerned, as ISIS targeted Yazidi men, women and children differently based on their gender and age.[78]

On the 3rd of August 2014, ISIS militants attacked and subsequently gained control over areas in the Sinjar region, an area on the border between Iraq and Syria.[79] The area held few military objects, and ISIS fighters focused on capturing fleeing Yazidis. Upon capture, the *modus operandi* of the ISIS militants, notwithstanding where the Yazidis were captured, was to swiftly separate men, women and children. An organized transfer of the captured Yazidis were conducted to cities deeper within ISIS controlled areas.[80]

Men and boys who had reached puberty were summarily executed by ISIS fighters upon refusal to convert to Islam. The men and boys who were forcibly converted to Islam, became ISIS captives held in ISIS controlled villages and were forced to work and follow religious rules as interpreted by ISIS.[81]

Yazidi women and girls were forcibly transferred to different holding sites in Iraq and Syria. Girls above the age of 9 and unmarried women were separated from married women and small children who were sold together as a "package".[82] The conditions in the holding sites were inhumane, as they were overcrowded with scarce access to food, water and without access to medicine. Women were kept in the sites for up to four months and sold to ISIS fighters in the sites or in slave markets. Reports indicate that the trade of Yazidi women and girls was organized and highly controlled by rules prescribed by ISIS, and that the women and girls were generally seen as property where the rights of the "owner" was generally respected. Upon purchase, the ISIS fighter retained full ownership of the woman or girl, and could subsequently either resell, "gift" her to another fighter or will her according to his wishes.[83] The sold women and girls were generally kept locked inside the "owning" ISIS militants household. A vast collection of reports indicate that they were systematically subjected to brutal sexual violence, beatings and forced labour in the households. Access to food, water and medicine was entirely subjected to the will of the "owning" ISIS family.[84] Attempts to escape were systematically met with severe consequences such as gang rapes and beatings.[85] As established above, these crimes have been considered to constitute genocide and multiple war crimes and crimes against humanity.[86]

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national-level-sexual-and-gender-based-violence-sgbv-committed-islamic-state-iraq-and> accessed 10 February 2021.

[77] ibid 1.

[78] UN Human Rights Council (n 7). paras 23-99.

[79] ibid. para 18.

[80] ibid. para 30.

[81] ibid. paras 32-41.

[82] ibid. paras 42-47.

[83] ibid. para 62.

[84] ibid.paras 63-78.

[85] ibid.paras 67-68.

[86] See footnote 7. ibid p. 1. Eurojust (n 78) 7–13. EuroJust, Network for Investigation and Prosecution of Genocide, crimes against humanity and war crimes (n 6) 8–15.

2.3. Limited avenues for justice in Iraq, Syria and at the ICC

On March 2, 2021 Iraq adopted the "Law on Yazidi Female Survivors".[87] The law formally recognizes the crimes ISIS perpetrated against the Yazidis in 2014 as a genocide and as crimes against humanity.[88] The law has been denoted as ground-breaking[89] and aims to provide financial redress and rehabilitation to survivors of atrocities committed by ISIS. Moreover, article 11 underscores that no one accused of kidnapping or enslavement shall be given pardon or amnesty and that investigation and prosecution of perpetrators of such crimes shall continue. The significance of the law will have to be evaluated once it is implemented in practice. Up until now, Iraq has been internationally critiqued for failing to prosecute sexual and gender-based violence perpetrated by ISIS. Report findings indicate that prosecutions of ISIS militants are "fast-tracked" under Iraqi counter-terrorism law.[90] ISIS militants are most often convicted based on their ties to ISIS, rather than on the nature and type of the crimes they have committed.[91] As a result, Iraqi courts have up until now systematically failed to investigate the most egregious crimes committed by ISIS.[92]

In relation to Syria, reports indicate that Syria has failed to enact legislation that addresses gender-based violence.[93] Moreover, around 10'00 ISIS fighters are detained by SDF forces in Syria since 2019, awaiting a national or international judicial response. Only a few "quasi-judicial" proceedings have been held, without much progress in sight.[94]

[87] A translation of the law is available at: https://ekurd.net/yazidi-female-survivors-law-2021-03-04. Note however that the translation "should not be considered the final legal workding or numbering". Despite its name, the law includes other national minorities than Yazidis and in some cases males within its scope, See article 2 of the Yazidi Female Survivors Law.

[88] Article 9, the Yazidi Female Survivors Law

[89] See Ingvill Bryn Rambøl, ''New Law Offers Redress for Yazidis' (*Nobel Peace Center*, 5 March 2021) <https://www.nobelpeacecenter.org/en/news/new-law-offers-redress-for-yazidis> accessed 17 March 2021.

[90]On a sidenote, trying ISIS militants only under counter-terrorism law is the case in most States dealing with ISIS militants, see Section 2.4, and EuroJust, Network for Investigation and Prosecution of Genocide, crimes against humanity and war crimes, 'Cumulative Prosecution of Foreign Terrorist Fighters for Core International Crimes and Terrorism Related Offences' (2020) <https://www.eurojust.europa.eu/cumulative-prosecution-foreign-terrorist-fighters-core-international-crimes-and-terrorism-related> accessed 15 February 2021.

[91] MADRE, 'Open Letter to the UN Security Council on the Government of Iraq's Prosecutions of ISIS Fighters' (*MADRE*, 13 June 2018) <https://www.madre.org/press-publications/human-rights-report/open-letter-un-security-council-government-iraqs-prosecutions> accessed 17 March 2021.

[92] MADRE, 'Gender-Based Violence and Discrimination Against Women and Girls in Iraq' (The Committee on the Elimination of Discrimination against Women 2019) INT_CEDAW_ICO_IRQ_33722_E.

[93] United Nations Committee to end all forms of Discrimination against Women (CEDAW), 'Seeking Accountability and Demanding Change: A Report on Women's Human Rights Violations in Syria before and during the Conflict' (2014) 58th Session <https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/SYR/INT_CEDAW_NGO_SYR_17381_E.pdf> accessed 9 March 2021. P. 34-36

[94] Roger Lu Phillips, 'A Tribunal for ISIS Fighters – A National Security and Human Rights Emergency' (*Just Securty*, 30 March 2021) << https://www.justsecurity.org/75544/a-tribunal-for-isis-fighters-a-national-security-and-human-rights-emergency/> accessed 21 April 2021.

On the international arena, the UN has established two bodies tasked with collecting and analysing evidence and information of mass atrocity crimes in Iraq (UNITAD) and Syria (the International, Impartial and Independent Mechanism) with a view to ”assist criminal proceedings in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes.”[95] However, these bodies are ”neither a prosecutor’s office nor a court.”[96] The ICC has jurisdiction over four international crimes: the crime of aggression, genocide, war crimes and crimes against humanity according to the Rome Statute.[97] The ICC Prosecutor Bensouda has stated that “the atrocities allegedly committed by ISIS undoubtedly constitute serious crimes of concern to the international community and threaten the peace, security and well-being of the region, and the world.” However, the avenue of justice through the ICC is obstructed as neither Iraq nor Syria is a party to the Rome Statute or have accepted ICC’s jurisdiction which is a prerequisite for jurisdiction.[98] As a result, the ICC lacks jurisdiction over acts committed on the territory of Iraq and Syria and of acts committed by nationals of the two States. The ICC can obtain jurisdiction if the United Nations Security Council (UN SC) refer the situation in Syria to the ICC.[99] However, such attempt with regards to the situation in Syria was vetoed by China and Russia in 2014 and no attempt with regards to Iraq has been made.[100] Against this backdrop, the ICC Prosecutor emphasized that “under the Rome Statute, the primary responsibility for the investigation and prosecution of perpetrators of mass crimes rests, in the first instance, with the national authorities” and announced that the jurisdictional basis for opening a preliminary examination into the situation of IS acts in Syria and Iraq was “too narrow”.[101] Finally, the idea of establishing a new international tribunal competent to try ISIS militants have gained momentum in Europe, on the initiative of especially the Netherlands and Sweden. The tribunal would try the around 800 European ISIS militants that are being held by SDF forces in Syria, as the Kurdish authorities lack capacity to investigate and prosecute the ISIS militants. However, as noted by Dworkin, the prospects of establishing an international tribunal “remains more a political aspiration than a well-developed and credible policy”.[102]

In conclusion, although this section only provides a brief overview, it is apparent that the avenues of fighting impunity for perpetrators of mass atrocity crimes are limited. This underscores the conclusion that ISIS militants are met with widespread impunity for their committed atrocities, and furthermore puts “non-territorial States” at the frontline in the fight against impunity for perpetrators of mass atrocity crimes.

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[95] UN International Impartial and Independent Mechanism, ‘Mandate’ (2021) <https://iiim.un.org/mandate> accessed 21 May 2021. Investigative Team to Promote Accountability for Crimes Committed by Da’esh/ISIL (UNITAD), ‘Mandate’ (*UNITAD*, 2021) <https://www.unitad.un.org/content/our-mandate> accessed 21 May 2021.

[96] UN International Impartial and Independent Mechanism (n 96).

[97] The Rome Statute (n 2). Articles 5, 6, 7, 8, 8*bis.*

[98] ibid. Article 12 (1)(2).

[99] ibid. Article 13 (b) of the Rome Statute,

[100] Alexander Skander Galand, ‘The Situation Concerning the Islamic State: Carte Blanche for the ICC If the Security Council Refers?’ (*EJIL:Talk*, 27 May 2015) <https://www.ejiltalk.org/the-situation-concerning-isis-carte-blanche-for-the-icc-if-the-security-council-refers/> accessed 20 March 2021.

[101] Office of the Prosecutor, ‘Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the Alleged Crimes Committed by ISIS’ (*International Criminal Court*, 8 April 2015).

[102] Anthony Dworkin, ‘A Tribunal for ISIS Fighters?’ (*European Council on Foreign Relations*, 31 May 2019) <https://ecfr.eu/article/commentary_a_tribunal_for_isis_fighters/> accessed 19 March 2021.

2.4 The interest of Sweden as a "non-territorial" State to punish mass atrocity crimes perpetrated by ISIS

The crimes perpetrated by ISIS can fall under national legislations as ordinary crimes such as rape, murder and forced marriage, as acts of terrorism under anti-terrorism legislation or as mass atrocity crimes of genocide, war crimes and crimes against humanity.[103] The intersection of terrorism and the perpetration of mass atrocity crimes was highlighted in the UN Security Council when it noted that terrorist organizations use sexual violence deliberately, and stated that all UN member states are urged to investigate, prosecute and punish alleged perpetrators of gender-based crimes.[104] Moreover, the European Council has unreservedly condemned violations of international humanitarian law and human rights law committed by ISIS, and has stressed that all people responsible for such violations "must be held accountable".[105] Beyond a general interest of obtaining international criminal justice, States have a more concrete national interest in trying alleged perpetrators of mass atrocity crimes residing within the territory, as, to use the words of the Swedish Police "Sweden is not a safe haven for war criminals".[106] Three recent developments have brought the reality of adjudicating mass atrocity crimes committed by ISIS close to home in Sweden, and several other European States.

First, with the influx of refugees from areas affected by ISIS, victims and potentially perpetrators of such crimes, and thus evidence, is present on the territory of European Union (EU) member states. Persons that have committed grave crimes, including mass atrocity crimes, are excluded from refugee status and the international protection that flows from such status.[107] However, it is sometimes not possible to return these persons to their state of origin once they have arrived to the State in which they seek protection. This is due to the principle of *non-refoulment* that entails an absolute prohibition to return individuals to a state where they risk facing torture or cruel, inhuman or degrading treatment or punishment.[108]

Second, EU Member States furthermore face the returning of foreign terrorist fighters, meaning "individuals who travel to a State other than their States of residence or nationality for the

[103] EuroJust, Network for Investigation and Prosecution of Genocide, crimes against humanity and war crimes (n 6) 1.
[104] UN Security Council, 'Resolution 2242 on Women, Peace and Security.' (n 18).para14
[105] European Council, 'Council Conclusions on the EU Regional Strategy for Syria and Iraq as Well as the ISL/Daesh Threat - Council Conclusions' (2016) 9105/16.paras. 8-13.
[106] Swedish Police, 'Sweden Is Not a Safe Haven for War Criminals' (2017) <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiZ68uknLDwAhWxtIsKHRlBBQAQFjAAegQIA-hAD&url=https%3A%2F%2Fpolisen.se%2Fcontentassets%2Ff6d86bd4600246899991e8137cf8ca3d%2Fsverige-ingen-fristad-engelska-tryck.pdf&usg=AOvVaw2KvD3DJhH6x6L6xS0oPBD6> accessed 19 May 2021.
[107] See Article 1 F Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) 1949.
[108] The rules regulating the principle of non-refoulement are found in, *inter alia*, Article 3 in the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Article 7 in the 1966 International Covenant on Civil and Political Rights; and Article 3 in 1950 European Convention For the Protection of Human Rights and Fundamental Freedoms.

purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist raining including in connection with armed conflict".[109] The UN Security Council called upon all UN Member States "to take national measures to suppress the flow of foreign terrorist fighters (…) and bring [them] to justice". However, the UN Security Council only addresses the issue of returning foreign terrorist fighters from a counter-terrorism perspective.[110] This focus is reflected in the fact that the issue of investigating and prosecuting foreign terrorist fighters has mainly been approached from a counter-terrorism perspective in EU member states, similar to the Iraqi approach.[111]

Lastly, repatriating ISIS affiliated women and children of European nationality, that are being held by SDF forces in holding sites in Northern Syria, have gained political momentum. Norway, Denmark and Finland have decided to repatriate children and their mothers with the motivation that it is better to repatriate and try them in domestic courts than wait for their voluntary return after several years of radicalisation in the camps.[112] Human Rights Watch have called upon the Swedish Government to repatriate its nationals (around 65-75 individuals) from the holding sites.[113]

2.5. Concluding remarks

The information in the present chapter forms the basis for the analysis in the following chapters. Some remarks can however be made already at this point. ISIS committed crimes targeted at the Yazidi minority, and the pattern of criminality indicate that the Yazidis were targeted both on the basis of their faith and on the basis of their gender. The information available indicate that the crimes perpetrated by ISIS amounts to mass atrocity crimes, including gender-based crimes. National courts in both Iraq and "non-territorial States" have tended to focus on charges of terrorism when dealing with these crimes. The alleged grave violations of international humanitarian law and human rights law committed by ISIS are not reflected in charges of terrorism. Consequently, the focus on anti-terrorism condones impunity for the conduct that amounts to mass atrocity crimes. Such grave violations of international humanitarian law and human rights law should be investigated as mass atrocity crimes, and states should cumulate charges of terrorism and mass atrocity crimes when appropriate. This would "ensure the full criminal responsibility of suspects, deliver higher sentences for the acts committed and lead to more justice for victims".[114] This highlights the complexity of the present research, as the marginalization of gender-based crimes seems to occur in two phases. First, as established in this chapter, mass atrocity crimes seem to be generally overlooked in favour of anti-terrorism

[109] UN Security Council, 'Resolution 2178' (2014).Preamble.
[110] EuroJust, Network for Investigation and Prosecution of Genocide, crimes against humanity and war crimes (n 6).4.
[111] Ibid. 5.
[112] Jesper Sundén, 'IS-Barnen: "Sverige Måste Ta Samma Beslut' (*Svenska Dagbladet*, 19 May 2021) <https://www.svd.se/is-barnen-sverige-maste-ta-samma-beslut> accessed 22 May 2021.
[113] Human Rights Watch, "Nordic Countries: Repatriate Nationals from Northeast Syria Potential Complicity in Unlawful Detention of ISIS Suspects, Children" (Human Rights Watch, 26 May 2021) <https://www.hrw.org/news/2021/05/26/nordic-countries-repatriate-nationals-northeast-syria> accessed 27 May 2021
[114] EuroJust, Network for Investigation and Prosecution of Genocide, crimes against humanity and war crimes (n 6) 4.

charges by national courts. Second, as will be elaborated on in chapter 4, gender-based crimes are being paid inadequate international and national judicial attention within the scope of mass atrocity crimes, in particular when it concerns conduct without sexual elements.

The next chapter will introduce the legal area of ICL that governs mass atrocity crimes, and outline how rules of ICL be applied in national courts. It will also elaborate on whether "non-territorial" States have a *right* or a *duty* to investigate and prosecute mass atrocity crimes.

3. International Criminal Law and its application in National courts

In order to examine the application of rules of ICL in national courts, this chapter will begin by firstly ascertain the meaning and scope of mass atrocity crimes under ICL along with the objectives of the law. Chapter 3.2 provides a brief overview of the institutions that can apply rules of ICL – from international to national tribunals and courts. After this contextualization, Chapter 3.3 circles in on Sweden and examines the potential avenues for exercising jurisdiction over mass atrocity crimes, and the law governing such crimes. The Chapter furthermore tries to establish whether Sweden has a *right* or a *duty* to investigate and prosecute mass atrocity crimes in its national courts.

3.1. Defining mass atrocity crimes and the objectives of International Criminal Law

ICL is a relatively new branch of public international law, in constant development. As established in Chapter 1.4.1, the rules of ICL have been developed mainly in international customary law and the main treaty codifying rules of ICL is the Rome Statute. Hence, there is a close connection between treaties and customary law in the field of ICL.

To constitute a crime under ICL, a certain conduct must satisfy three requirements. First, it must entail individual responsibility and be subject to punishment. Second, the rule must be part of the body of international law and third, the conduct is required to be punishable notwithstanding of whether it is criminalized in national law.[115] The crimes that are regulated under ICL consist of grave breaches of the law of armed conflict, and widespread violations of human rights norms committed both during armed conflict and in peace time. Traditionally, the three recognized international crimes are the crimes of genocide, war crimes and crimes against humanity, referred to as mass atrocity crimes. [116] These crimes "threaten the peace, security and well-being of the world and as such, they are "of concern to the international community as a whole".[117]

As already mentioned, mass atrocity crimes have a "special character" in comparison to "ordinary" crimes under domestic legislations. What separates a mass atrocity crime from a crime under domestic law is that mass atrocity crimes must have been committed *in a specific context*. The required specific context is contained in a *chapeau* requirement of each mass atrocity crime.

[115] Werle and Jeßberger (n 1) 36.
[116] The crime of aggression could also be included in the list of mass atrocity crimes as the International Criminal Court activated its jurisdiction over the crime of aggression on the 17th of July 2018.
[117] See Fanny Holm, 'Den Internationella Straffrättens Ändamål' in Mark Klamberg (ed), *Lagföring i Sverige av internationella brott* (Jure 2020). Preamble (4)(9) and Article 5.

Mass atrocity crimes consist of a material element (*actus reus*) and a mental element (*mens rea*). In determining individual responsibility for a mass atrocity crime, it must be examined whether the accused fulfil the material elements of the crime (individual conduct, consequence, and any other accompanying circumstance as defined in the crime) with the required levels of knowledge and intent as defined in the crime. Thus, mass atrocity crimes are structured around a *chapeau* requirement and underlying prohibited acts, for example murder. When an underlying act is perpetrated in a context that satisfies the *chapeau* requirement, the murder qualifies as a mass atrocity crime.[118] For example, for murder to constitute a crime against humanity, it must have been committed as part of a widespread or systematic attach directed at a civilian population.[119] The definition and scope of the underlying act of persecution and the *chapeau* requirement of crimes against humanity in Swedish law, with reference to both customary and treaty law, is detailed in Chapter 4.3.

Why have this field of international law developed, although underlying acts, such as for example murder, are proscribed in the domestic law of States around the world? ICL, as all other law, is assumed to exist in response to social needs.[120] It aims to protect three fundamental values of the international community, namely the "peace, security and the well-being of the world".[121] ICL have the capacity to "pierce the veil of sovereignty" [122] as it deals with crimes that affect "the international community as a whole".[123] More specifically, a number of objectives pursued by ICL has been discerned in academia, including "retribution, deterrence, creating a historical record and giving a voice to the victims while the rights of the accused are protected."[124] These objectives are to various degrees explicitly stated in Statutes of international courts and tribunals and/or expressed in case-law.[125]

Retribution is deeply rooted in the historical evolvement of the concept of international criminal justice, and is an objective recognized in the preambular and opening articles of the Statutes of all international courts and tribunals.[126] Retribution is based on the idea that an individual that

[118] To constitute *genocide*, an act must have been "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such"; to constitute *war crimes*, an act must have been committed in the context of an armed conflict, and to constitute *crimes against humanity*, an act must have been "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack" See Rome Statute Articles 6, 7, 8.

[119] Ibid.

[120] Martti Koskenniemi, *From Apology to Utopia the Structure of International Legal Argument: Reissue with a New Epilogue* (Cambridge University Press 2006) 24.

[121] *See* Werle and Jeßberger (n 1) 38. And The Rome Statute (n 2).Preamble (9)

[122]Mahmoud Cherif Bassiouni, 'The Philosophy and Policy of International Criminal Justice' in Lal Chand Vohrah et al. (eds), *Man's Inhumanity to Man* (Kluwer Law International 2003) 65.

[123]The Rome Statute (n 2). Preamble (4), (9). Article 5(1).

[124] Mark Klamberg, 'What Are the Objectives of International Criminal Procedure? Reflections on the Fragmentations of a Legal Regime' 2019 Vol. 79, No. 2 Nordic Journal of International Law 279.

[125]See e.g. Fanny Holm, 'Den Internationella Straffrättens Ändamål' in Mark Klamberg (ed), *Lagföring i Sverige av internationella brott* (Jure 2020). And Mark Klamberg, 'What Are the Objectives of International Criminal Procedure? Reflections on the Fragmentations of a Legal Regime' 2019 Vol. 79, No. 2 Nordic Journal of International Law 279.

[126] Charter of the International Military Tribunal annexed to the London Agreement, 8 August 1945, 82 U.N.T.S. 280, 82 UNTS 279, article 1; Charter of the International Military Tribunal for the Far East, 19 January 1946 amended 26 April 1946, article 1; Statute of the International Criminal Tribunal for the Former Yugoslavia adopted 25 May 1993 by Resolution 827, 1993, preamble and article 1; Statute of the International Criminal Tribunal for Rwanda adopted 8

has committed a criminal act deserves to be punished for it with a punishment that is proportional to the crime.[127] Thus, the objective is to do *justice* by punishing perpetrators of mass atrocity crimes. Prevention of future crimes is also recognized as an objective in ICL.[128] The Rome Statute explicitly states that State Parties are "determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes".[129] Close to the objective of prevention lies the objective of communicating with both the perpetrator, the victims and the public about the wrongful and criminal nature of the perpetrator's conduct.[130] The ICTY expressed it as an "educating function" that sends a strong message of condemnation that grave violations of international humanitarian law and international human rights law cannot be tolerated. The idea is that the strong message of condemnation paired with the punishment of perpetrators has a preventative effect if the message internalizes as a moral principle amongst the general public.[131]

As argued by Packer, crime control builds on the objectives of retribution and deterrence and requires efficient criminal proceedings with a view to "apprehend, try, convict and dispose" of as many criminal offenders as possible. The objective of crime control is however not limitless. Equally as important as crime control is the objective of ensuring a fair trial for the accused (and for victims and witnesses).[132] Widely agreed on by scholars is that it is crucial to the legitimacy of international criminal law that legal procedures respect the principle of legality, *nullum crimen [nulla poene] sine lege*, and of a fair trial for the accused which are fundamental aspects of ensuring the protection of the rule of law.[133]

Stemming from the "special character" of mass atrocity crimes, several other objectives of international criminal justice have been discerned that are not traditionally pursued by national criminal law. These objectives relate to a broader perception of justice for victims and affected communities than retributive justice. The objectives of creating a historical record of the conflict and criminal conduct and giving a voice to victims have been identified both by academia and in case law as important aspects of ICL in order to achieve peace and reconciliation in transitional justice contexts.[134] Research has indicated that the achievement of peace and reconciliation necessitates criminal procedures that aims beyond merely retributive

November 1994 by resolution 955, 1994, article 1; Rome Statute of the International Criminal Court, 17 July 1998, 2187 U.N.T.S. 90, preamble and article 1

[127] Anthony Duff and David Garland, 'An Introduction: Thinking About Punishment' in Anthony Duff and David Garland (eds), *A Reader On Punishment* (Oxford University Pres 1994) 6–8.

[128] Fanny Holm, 'Den Internationella Straffrättens Ändamål' in Mark Klamberg (ed), *Lagföring i Sverige av internationella brott* (Jure 2020) 48–49.

[129] The Rome Statute (n 2). Preamble (5)

[130] Holm, 'Den Internationella Straffrättens Ändamål' (n 125) 49.

[131] *The Prosecutor v Dario Kordic and Mario Cerkez Appeals Judgment* [2004] ICTY Appeals Chamber IT-95-14/2-T.para 1080-1.

[132] Herbert Packer, *The Limits of the Criminal Sanction* (Stanford University Press 1968).

[133] See for example: Holm, 'Den Internationella Straffrättens Ändamål' (n 125) 49–50. Packer (n 129).and David Luban, 'Fariness to Rightness: Jurisdiction, Legality and the Legitimacy of International Criminal Law' in Samantha Bessom and John Tasioulas (eds), *The Philosopgy of International law* (The Oxford University Press 2010).

[134] See, Antonio Cassese, 'Reflections on International Criminal Justic' (1998) 61:1 Modern Law Review 6. *Prosecutor v Momir Nikolic Sentencing Judgement,* ICTY Trial Chamber Case No. IT-02-60/2-S, 12 Dec 2003.para 60.*Prosecutor v Ahmad Al Faqi Al Mahdi Judgement and Sentence* (ICC Trial Chamber VIII)., para 67.

and deterring functions.[135] The idea is that the evidence and documentation of mass atrocity crimes, including victims and witness statements, constitute a "truthful" account of the crime and its context.[136]

These objectives should guide how a rule is interpreted and applied by judicial authorities, as the interpretation and application of a rule should ensure the objectives which the law-maker preferred.[137] According to Klamberg, these objectives "pull in different directions" which can create both tensions and a fragmentation of the procedural system as there is no "universal and fixed hierarchy" of objectives.[138]

3.2 Applying rules of international criminal law – from international to national courts

In principle, the prosecution of mass atrocity crimes fell exclusively within the sphere of national criminal jurisdiction prior to the entry into force of the Rome Statute establishing the ICC.[139] Exceptions include internationalized tribunals and the ICTY and the ICTR, but their *ad hoc* nature and limited scope of application enforces the position of national courts as the primary fora for the prosecution of mass atrocity crimes. Even after the establishment of the ICC, notwithstanding its permanent character, national courts remain the primary fora for the suppression of core international crimes. In fact, the Rome Statute reinforces rather than weakens the importance of the national courts, as the jurisdiction of the ICC is premised on the principle of complementarity. [140] The principle entails that national courts of State parties to the Rome Statute have the primary competence to adjudicate on mass atrocity crimes, with the jurisdiction of the ICC functioning as a supplement to national jurisdiction. As established in the Preamble of the Rome Statute, effective prosecution must be "ensured by taking measures at the national level and by enhancing international cooperation" and that it is each State's duty to "exercise its criminal jurisdiction over those responsible for international crimes".[141] The Rome Statute does not set out an explicit obligation for State Parties to incorporate the crimes and principles of the Statute into national law. However, when a State becomes a party to the Statute, national legislation enabling prosecution of its offences is presupposed to exist. Thus, the Rome Statute balances the jurisdiction of the ICC and the national courts of State Parties in a manner that allows States to prosecute mass atrocity crimes without an intervention of the ICC, but still empowers the ICC with far-reaching oversight into the core of States domestic

[135] Janine Clark, *International Trials and Reconciliation; Accessing the Impact of the International Criminal Tribunal for the Former Yugoslavia* (Routledge 2014).
[136] Holm, 'Den Internationella Straffrättens Ändamål' (n 125) 50–51.
[137] Ibid
[138] Klamberg (n 122) 279–302.
[139] Jann K Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (Oxford University Press 2008).
[140] Ward N Ferdinandusse, *Direct Application of International Criminal Law in National Courts* (TMC Asser Press 2006) 1.
[141] The Rome Statute (n 2). Preamble (4)(6)

criminal law.[142] Ideally, States will fulfill their duties to prosecute mass atrocity crimes committed on their territory, and if not, the jurisdiction of the ICC can be triggered under certain circumstances. Article 17 of the Rome Statue establishes that the competency of the ICC can override the national courts primary competency when a State is shielding an accused[143] or when a state is unable to carry out an investigation or prosecution.[144] The assessment of whether these conditions are fulfilled or not are carried out by the ICC itself.[145]

The relationship between international and national law is not always clear-cut as international law exists in parallel with national laws, but can also be seen as part of the same system where international norms of law have primacy over national law.[146] There is no uniform standard of how States should implement their obligations in relation to international law, thus each state have the authority to choose its own method.

Rules of customary international law forms part of national law in practically every State.[147] With regards to international treaty law, two main theories guide its application in domestic legal systems, namely a monistic view and a dualist view of international law.[148] States can basically choose to adopt either theory, or a combination of both. While it is outside the scope of the theses to delve into these theories in depth, it is relevant to give a short overview of the main content and differences between the two theories.

According to the *monist* view of international law, national and international law is recognized to form a unity. Monists oppose a strict division of international and national law as posited by dualists. A monist view entails that rules of international law a State has accepted, by way of treaties for example, are directly applicable in national courts.[149] According to a *dualist* view, rules of the system of international law and of national law are considered as separate spheres and one cannot purport to have an effect on or overrule the other.[150] The view is founded on the the conviction that the inter-state and intra-state relations are inherently different, with different legal structures employed by the state internally and between states.[151] If no special legislative act has been taken that implements a rule of international law, it is only indirectly applicable as a complement to national legal rules. If a rule of international law and a rule of national law is in conflict in such situations, the national law takes precedence in general.[152]

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[142] Werle and Jeßberger (n 32). marginal no. 264-266.
[143] Rome Statute Art 17.1 (a)(b) and 2(a)
[144] Rome Statute Art 17.1 (a)(b)
[145] Werle and Jeßberger (n 32). Marginal no 264-266.
[146] Hans Kelsen, *Principles of International Law* (Robert Tucker ed, 2nd edn, Holt, Rinehart and Winston 1966) 566–567.
[147]Dapo Akande, 'Sources of International Criminal Law' in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (Oxford University Press 2009) 41.
[148] Ove Bring, Said Mahmoudi and Pål Wrange, *Sverige och folkrätten* (4th edn, Norstedts Juridik AB 2020) 42.
[149] Ove Bring, 'Monism Och Dualism Igår Och Idag' in Inger Östdahl and Rebecka Stern (eds), *Folkrätten i svensk rät* (Liber Förlag 2012) 22.
[150] Malcolm N Shaw, *International Law* (Eighth edition, Cambridge University Press 2017) 97.
[151] ibid 98.
[152] Bring, Mahmoudi and Wrange (n 146) 46.

The approach adopted by Sweden in modern time is usually described as dualist.[153] Consequently, rules of international law must be implemented in the national legal system in order to be directly applicable in Swedish courts. Generally, there are two ways in which a State can implement international law; 1) through *incorporation*, where an international rule is integrated in the national legal order by for example a rule of reference to it in national law, and 2) through *transformation*, meaning that a norm of international law is implemented in the national legal system through the enactment of a national law that mirrors the content of the international rule.[154] Single clauses can be transformed through a change in existing laws, but transformation can also mean the enactment of a completely new law. The main rules governing mass atrocity crimes, in particular the main provisions from the Rome Statute, have been transformed into Swedish national law through the enactment of the UCA. Before the UCA was enacted in 2014, rules of ICL was directly applicable in Swedish national courts through a rule of reference in The Swedish Penal Code, *Brottsbalken*[155] (hereinafter BrB) Chapter 22, Section 6 d.

3.3. National Jurisdiction and Competence to Adjudicate mass atrocity crimes in Sweden

Generally, national legal authorities are only able to investigate and prosecute a crime if a sufficient link exists between the State and the crime. Normally, the link is territorial, meaning that the crime was committed on the territory of the State that wishes to exercise jurisdiction over the crime. This notion is based on the *principle of territoriality*. However, as the scope of this research is contained to crimes committed outside the territory of Sweden, this section will focus on national rules governing the competence to adjudicate crimes committed outside of Swedish territory. Rules on jurisdiction are found in Chapter two of the BrB. Two main principles form the foundation of the rules of jurisdiction, namely the *active personality principle* and the *universality principle*.[156]

Jurisdiction according to Chapter 2, Section 2 paragraph 1 BrB is based on the *active personality principle* and entails jurisdiction over offences committed outside of Swedish territory by three categories of persons. First, Swedish citizens and aliens domiciled in Sweden, second, an alien not domiciled in Sweden, but that has obtained Swedish citizenship after the act was committed or that is domiciled in in another Nordic country and third, an alien present on Swedish territory when the act committed entails a prison sentence of more than 6 months. In an international comparison, this provision has a wide scope of application as it includes persons that has obtained a Swedish citizenship *after* the alleged crime has been perpetrated.[157] The wide scope of the principle is based on the general rule in Swedish law proscribing

[153] ibid 47.
[154] Ferdinandusse (n 137) 7.
[155] SFS 1962:700 Brottsbalken.
[156] Dennis Martinsson, 'Jurisdiktion Avseende Brott Begångna Utanför Svenskt Territorium' in Mark Klamberg (ed), *Lagföring i Sverige av internationella brott* (Jure 2020) 63.
[157] ibid 65.

extradition of Swedish citizens to foreign States.[158] The exercise of jurisdiction is however premised on the requirement of double criminality, meaning that the act must be criminalized in both Swedish law, where the alleged perpetrator is to be prosecuted, and in the domestic law of the State of commission,[159]

Section 3 paragraph 6 BrB establishes that Swedish courts are always competent to exercise jurisdiction over crimes against international law, regardless of the place of commission or the nationality of the perpetrator.[160] The provision is a manifestation of the principle of *universality*, and encompasses all acts contained in the UCA.[161] According to this principle, the presence or residence of a an alleged perpetrator in Sweden is not necessary to establish the jurisdiction of Swedish courts over mass atrocity crimes. Moreover, the provision does not set forth a requirement of double criminality. This entails that universal jurisdiction according to the provision has a very wide scope of application. Jurisdiction based on universality according to Section 3 is considered *lex specialis* in relation to jurisdiction according to section 2 based on the active personality principle, as the former allows for *unconditional authority* to prosecute mass atrocity crimes without the requirement of double criminality.[162] In contrast, adjudication according to section 2 is limited by its paragraph 3 which establishes that no sanction may be imposed that is considered more severe than the most severe penalty provided for the offence under the law in the place where it was committed. Thus, legal authorities should first examine whether jurisdiction according to Section 3 can be established, and if so, there is no need to examine jurisdiction according to Section 2.[163] This means that adjudication of mass atrocity crimes in principle always will be based on universal jurisdiction in accordance with Section 3 BrB.

The principle of universal jurisdiction is aimed at ensuring that no sanctuary of impunity for serious international crimes exists anywhere in the world.[164] Thus, universal jurisdiction allows for prosecution of international crimes, including mass atrocity crimes, even when jurisdiction based on the traditional principles of jurisdiction such as territoriality or personality is unavailable. The principle of universality is the most contested and debated ground for jurisdiction. It is a complex concept that cannot be given full justice within the scope of this research. Instead, it suffices to say that the principle of universal jurisdiction over mass atrocity crimes is accepted in customary international law.[165] Exercising universal jurisdiction is generally justified in two situations: first, if the State of commission is unable or unwilling to investigate and prosecute the acts, and second, if the crime perpetrated is directed against the communal interest of the international community or humanity as such, a notion including mass atrocity crimes.

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[158] Ibid.
[159]Chapter 2 Section 2 paragraph 2 BrB
[160] SOU 2002:98 Internationella brott och svensk jurisdiktion 2002 82.
[161] Section 3, paragraph 6 BrB
[162] Martinsson (n 154) 64.
[163] ibid.
[164] ibid 68.
[165] See Prosecutor v Tadic (Case No. IT-94-1), ICTY Appeals Chamber, Decision on the Decision on the Defence motion for Interlucotory Appeal on Jurisdiciton, 1 oktober 1995 para 65 and Martinsson (n 154).

In Sweden, the wide scope of universal jurisdiction is limited by a requirement of an authorisation to prosecute a crime issued by the Swedish Government or a public authority designated by the Government.[166] This requirement constitutes a limitation to the wide scope of universal jurisdiction, as it narrows the possibilities of applying universal jurisdiction in practice.[167] There are no legal provisions that regulate the issuing of an authorization to prosecute, and the preparatory documents indicate that it is a discretionary assessment that should take into account factors including the seriousness of the alleged criminal act, Sweden's interest in prosecuting the crime and potential foreign policy considerations.[168]

3.3.1 Do States have a *right* or a *duty* to prosecute mass atrocity crimes?

The principle of universal jurisdiction grants Sweden authority – a *right* - to prosecute mass atrocity crimes. Universal jurisdiction is generally construed as an entitlement on behalf of the State. Customary international law recognizes that a State has a *duty* to prosecute crimes under international law that is committed on the territory of the State.[169] For war crimes and genocide, this duty is also codified in international treaties.[170] The question of whether a duty to investigate and prosecute mass atrocity crimes committed *outside* of the territory of the State is more complex. The Rome Statute has left open the question of whether there is a duty to prosecute under the principle of universal jurisdiction.[171] A general *duty* to prosecute mass atrocity crimes has only been recognized by international customary law for war crimes in international armed conflicts, based on obligations in the Geneva Conventions. If a perpetrator is present on the territory of a State, the State is obligated to try perpetrators or hand them over to a state that is willing to prosecute. [172] This obligation is referred to as *aut dedere aut iudicare* , and is a separate, albeit related, concept to universal jurisdiction.

The International Law Commission has noted that "there is a lack of international conventions with this [*aut dedere aut iudicare*] obligation in relation to most crimes against humanity, war crimes other than grave breaches, and war crimes in non-international armed conflict."[173]

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[166] See 2 Chapter Section 5 Paragraph 2 Sentence 1.

[167] Martinsson (n 154) 69.

[168]Government of Sweden Regeringens proposition 2013/14:146 Straffansvar för folkmord, brott mot mänskligheten och krigsförbrytelser (n 24) 56., see also Justitiedepartementet "Åtalsförordnande enligt 2 kap Brottsbalken" (DS 2014:13) s 27

[169] Werle and Jeßberger (n 1) 104.

[170] Genocide Convention, Article IV; Geneva Convention I, Art 49; Geneva Convetion II, Art 50; Geneva Convetion III, Art 129 and Geneva Convention IV, Art 146. See also European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (ETS No. 5 (1950)) Art 1 and 5, See also ibid.

[171] ibid 106–107.

[172] ibid 105–106.

[173]International Law Commission, 'The Obligation to Extradite or Prosecute (Aut Dedere Aut Judicare)' (United Nations 2014) 7, note 445 <https://legal.un.org/ilc/texts/instruments/english/reports/7_6_2014.pdf> accessed 14 May 2021.. In relation to crimes against humanity, "the 2006 International Convention for the Protection of All Persons from Enforced Disappearance follows the Hague formula, and refers to the "extreme seriousness" of the offence, which it qualifies, when widespread or systematic, as a crime against humanity. However, outside of this,

Moreover, the Genocide Convention only obligates State Parties to exercise *territorial* jurisdiction.[174] Nevertheless, scholars argue that current and emerging customary international law offer convincing reasons for suggesting a duty for States to bring alleged perpetrators to justice (by either prosecuting or extraditing the perpetrator to another willing State) for war crimes, genocide and crimes against humanity, at least with respect to perpetrators that are nationals of the State.[175] However, establishing that such duty exist now, as a matter of customary international law, is premature. This entails that the exercise of universal jurisdiction is to a large extent in legal terms optional, and consequently States adopt different approaches.

Two main conceptions of what the role of States is and should be in the international regime governing mass atrocity crimes determine the practical use of universal jurisdiction domestically. First, States taking a "*global enforcer*" approach exercise jurisdiction because they consider their domestic system to have a role in preventing and mass atrocity crimes committed anywhere in the world. Second, States taking a "*no safe haven*" approach exercise jurisdiction in order to "avoid becoming a refuge for participants in core international crimes".[176]

In Sweden, the relevant legal authorities have explicitly stated that Sweden are under a duty to investigate and prosecute genocide, crimes against humanity and war crimes.[177] In practice however, investigations are not initiated if the absence of the suspect prevents the crime from being effectively investigated. Trial International conducted interviews with a Prosecutor from the War Crimes Unit (responsible for investigating and prosecuting mass atrocity crimes in Sweden) in 2019, who held that if there is no reasonable chance of apprehending a suspect in Sweden, Prosecutors will not start a case.[178] Due to the nature of mass atrocity crimes, they are difficult to investigate as they are committed on foreign territory and hence the evidence is located far from the Swedish investigative authorities.[179] The Prosecutor has considerable discretion to decide not to open an investigation if it is "manifest that it is not possible to investigate the offence." This reflects the "*no-safe haven*" approach, as cases in practice are only brought against suspects that are present on national territory. In terms of prosecution, the Prosecutor is obliged to prosecute a crime if a person who may be reasonably suspected of the

there appears to be a lack of international conventions with the obligation to extradite or prosecute in relation to crimes against humanity."

[174] I.C.J. Reports 2007, p. 43, 'Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment', (2007). p. 43, at pp. 226–227 and 229, paras. 442, 449.

[175] Darryl Robinson, 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court' [2003] EJIL 481. 481, 491-492.

[176]Máximo Langer, 'Universal Jurisdiction Is Not Disappearing: The Shift from "Global Enforcer" to "No Safe Haven" Universal Jurisdiction' [2015] Journal of International Criminal Justice 245, 249.

[177]See: SFS 1942:740. The Swedish Code of Judicial Procedure.Chapter 23 Section 1 paragraph 1; The Swedish Police, 'Krigsbrott – Polisens Arbete' (*Polisen*, 29 September 2020) <https://polisen.se/om-polisen/polisens-arbete/krigsbrott/> accessed 21 April 2021.

[178] . Open Society Justice Initiative and TRIAL International, 'Universal Jurisdiction Law and Practice in Sweden' (2020) 13 <https://www.justiceinitiative.org/publications/universal-jurisdiction-law-and-practice-in-sweden> accessed 21 April 2021. Interview with a prosecutor from the war crimes unit on 25 October 2019

[179] Miriam Ingeson, 'Strukturella Förundersökningar' in Mark Klamberg (ed), *Lagföring i Sverige av internationella brot* (Jure 2020) 349.

offence is identified in the preliminary investigation and if sufficient reason exists for prosecution. To constitute sufficient reasons for prosecution, the prosecutor must objectively be able to expect a conviction in the case.[180] Not to forget however, the prosecutor need approval of "the Government or the public authority designated by the Government" before filing an indictment. As established above, this requirement effectively limits the wide scope of universal jurisdiction in Swedish law.

Recent developments in Sweden, reflected in several other EU member States, indicate a slight shift from the "*no-safe haven*" approach to what Jeßberger defines as a "*complementary preparedness*" approach.[181] This approach builds on the idea that Prosecutors conduct certain activities with a view to, on the basis of universal jurisdiction, prepare for and support potential future trials in the same or in a different jurisdiction.[182] One such activity that Jeßberger highlights is the initiations of structural investigations. The War Crime Unit has initiated several structural investigations starting in 2015. In 2019, two investigations were conducted in relation to Syria and Iraq, where one focused on the crimes committed by ISIS in Iraq and Syria. Structural investigations are broad preliminary investigation without a specific suspect. In such investigations, available evidence is collected consolidated, preserved and analysed in order to facilitate future criminal proceedings in Sweden or in other state.[183] This type of investigation combines national and international investigation efforts to try to establish the *chapeau* requirements of a mass atrocity crimes.[184] Hence, a robust investigation into the context is already made when specific suspects are identified, which allows for effective prosecutions. The structural investigation into the situation in Iraq and Syria was initiated with the motivation that the large influx of refugees from Iraq and Syria now residing in Sweden entails a sufficiently strong national interest in investigating the events, and enough evidence present in Sweden to warrant an investigation. These investigations har resulted in several investigations of specific suspects.[185] The shift towards proactively preparing and facilitating future criminal proceedings based on universal jurisdiction indicates a will on behalf of Sweden to find effective ways to fight impunity for such crimes in practice. However, the conclusion that some link to Sweden must exist in practice for the investigation and prosecution of mass atrocity crimes seems to remain valid as these investigations were initiated with the motivation that victims, perpetrators and thus evidence was present on Swedish territory. Another activity pertaining to the "complementary preparedness" approach according to Jeßberger is an enhanced international judicial cooperation.[186] Worth mentioning is that in May 2021 Sweden concluded a cooperative agreement with UNITAD, the UN body with a mandate to investigate and collect evidence of the crimes committed by ISIS in Iraq. The agreement entails that

[180] SFS 1942:740. The Swedish Code of Judicial Procedure.Chapter 23 Section 2.
[181] Florian Jeßberger, 'Towards a "Complementary Preparedness" Approach to Universal Jurisdiction – Recent Trends and Best Practices in the European Union' (European Parliament, Policy Department, Directorate-General for External Policies 2018) 7 <https://www.jura.uni-hamburg.de/die-fakultaet/professuren/professur-jessberger/media-fj/media-forschung-stellungnahmen/briefing-eu-parl-2018.pdf>> accessed 10 May 2021.
[182] ibid.
[183] Ingeson (n 177) 352–353.
[184] ibid 353.
[185] ibid 352.
[186] Jeßberger (n 179) 7.

Sweden can use evidence collected by UNITAD in national proceedings, and to certain extent also share collected evidence with UNITAD.[187] Investigative and judicial cooperation is also intensifying within the EU.[188]

In April 2021, the non-governmental organization Civil Rights Defenders filed a criminal complaint against representatives from the Syrian Government for war crimes and crimes against humanity.[189] The reactions of legal authorities to this case will entail an opportunity to analyse if Sweden will shoulder the "global enforcer" approach, as the alleged perpetrators lack *any* connection to Sweden. Thus far, no such cases have been adjudicated on in Sweden.

3.3.2 The substantial law

Sweden signed the Rome Statute in 1998, and ratified it in 2001. Against this backdrop, the Swedish Government decided in 2000 to review the legal framework at the time governing international crimes. The conclusions of the review subsequently led to the enactment in 2014 of the UCA. International crimes committed before the UCA entered into force on the 1st of July 2014 are prosecuted under Chapter 22 Section 6 BrB and under the Act (1964:169) on Criminal Responsibility for Genocide. Chapter 22 Section 6 BrB defines "crimes against international law" and criminalizes "serious violations" of international law relating to international obligations stemming from treaties and international customary law in the field of international humanitarian law. Crimes against humanity was not defined as a crime in Swedish national law until the enactment of the UCA. In the following, the thesis will focus on acts committed after 2014, that consequently fall within the scope of the UCA.

Upon adopting a law in Sweden, the Government provides a bill which explains the reason for the law and its provisions. These preparatory documents are a source of law, and Swedish courts may use them to interpret the law. The preparatory document to the UCA underscores that the ratification of the Rome Statute does not require a national criminalization of the offences. [190] But as the Rome Statute and the prosecution at the ICC is secondary to national jurisdictions, the preparatory documents highlight Sweden's strong national interest in ensuring that national law criminalizes offences and permit prosecution of such offences in a manner that is harmonized with Sweden's international obligations.[191] The preparatory documents motivates the enactment of the UCA as follows: "Serious violations of international law must be prevented and prosecuted as far as possible. It is therefore, as has been stated, important that Swedish legislation enables prosecution at least to the same extent as at the International Criminal Court.

[187] Justitiedepartementet, 'Avtal Har Ingåtts För Att Förbättra Möjligheterna Att Utreda Brott Begånga Av IS' (*Regeringskansliet*, 7 May 2021) <https://www.regeringen.se/pressmeddelanden/2021/05/avtal-har-ingatts-for-att-forbattra-mojligheterna-att-utreda-brott-begangna-av-is/> accessed 20 May 2021.

[188] Miriam Ingeson, 'Strukturella Förundersökningar' in Mark Klamberg (ed), *Lagföring i Sverige av internationella brot* (Jure 2020) 351.

[189] Civil Rights Defenders, 'Civil Rights Defenders Files Criminal Complaint in Sweden against Representatives of Syria's Regime' (*Civil Rights Defenders*, 19 April 2021) <https://crd.org/2021/04/19/civil-rights-defenders-files-complaint-in-sweden-against-representatives-of-syrias-regime/> accessed 15 May 2021.

[190] Government of Sweden Regeringens proposition 2013/14:146 Straffansvar för folkmord, brott mot mänskligheten och krigsförbrytelser (n 24).

[191] SOU 2002:98 Internationella brott och svensk jurisdiktion (n 158) 20. 67-68.

It is also *inter alia* to this end a reform should be implemented."[192] Thus, crime control is the objective of the law, and any other objectives are not mentioned in the preparatory documents to the UCA. The effects of this is reflected on in Chapter 5.1 of this research.

The UCA criminalizes genocide, war crimes and crimes against humanity. The provisions mirror in large parts the provisions of the Rome Statute and follow the logic of a *chapeau* requirement and underlying prohibited acts. It provides a legal basis for the prosecution of mass atrocity crimes in Swedish courts. The UCA furthermore incorporates modes of liability that are typically used in ICL, for example command responsibility.[193] This research will however not account for any other mode of liability than liability by commission as an individual, meaning that a person performs the material element of an offence with the required mental state.[194]

In accordance with the Rome Statute, SGBV can constitute sexual and gender-based crimes within the scope of crimes against humanity in the UCA. The UCA explicitly proscribes sexual violence as crimes against humanity (serious sexual abuse and sexual slavery)[195], and gender-based persecution as a crime against humanity.[196] The contextual requirement of crimes against humanity necessitates that the underlying act "constitutes or is part of a widespread or systematic attack on a civilian population".[197] This meaning and scope of this provision is detailed in Chapter 4.3. The same underlying act, for example rape, can qualify as multiple mass atrocity crimes as long as the respective *chapeau* requirements are satisfied. This means that there is a potential concurrence of offences. For example, murder in a context of an armed conflict and widespread attack against civilians can amount to both a crime against humanity and a war crime. The provisions thus overlap to some extent but the individual *chapeau* requirement attached to each crime is distinct and thus enables legal authorities to bring cumulative charges and convictions for multiple crimes based on the same underlying act.[198] Hence, although this research focuses on gender-based crimes within the scope of crimes against humanity, some conclusions will be general in character, meaning that they are applicable also in the analysis of SGBV amounting to war crimes and genocide.

[192] Government of Sweden Regeringens proposition 2013/14:146 Straffansvar för folkmord, brott mot mänskligheten och krigsförbrytelser (n 24) 75.
[193]Swedish Government, Act on criminal responsibility for genocide, crimes against humanity and war crimes (2014:406) ('UCA'). Section 13.
[194] Werle and Jeßberger (n 1) 239.
[195] ibid.Section 2 Paragraphs 3, 5 UCA
ibid.[196] Section 2 Paragraph 8
[197]ibid.. Section 2. The contextual element of genocide require that the underlying act must have been perpetrated "with the intention of completely or partly destroying a national, ethnic, racial or religious group as such". See Section 1 of the UCA. The contextual element of war crimes necessitates that the underlying act is committed as "part of or otherwise connected with an armed conflict or occupation". See Section 3 of the UCA
[198],Government of Sweden Regeringens proposition 2013/14:146 Straffansvar för folkmord, brott mot mänskligheten och krigsförbrytelser (n 24) 224. 226.

3.4 Concluding remarks

This chapter aimed to answer the first two research questions posed in Chapter 1.2, namely "in what capacity can Swedish courts adjudicate on mass atrocity crimes?" and "what is the applicable law to mass atrocity crimes including sexual and gender-based violence?" By answering these research questions, some conclusions can be drawn in relation to the formulated thesis of the research.

The structure of ICL entails that national jurisdictions are the primary fora for the prosecution of mass atrocity crimes. If a crime is committed on the territory of the State, a general duty to prosecute such crimes exist. However, avenues of fighting impunity in Iraq and Syria (and at the ICC) are obstructed, as established in Chapter 2.3. This forefronts the importance of "non-territorial" States, such as Sweden, as actors that can fight impunity for perpetrators of mass atrocity crimes. However, if the suspect has no nexus to the Sweden at all, the practical possibilities and national interest to investigate and prosecute are narrow. As argued by Jeßberger, the "*global enforcer*" approach "may be overambitious" and the "*no safe haven*" approach "is merely reactive and disregards the interests of the international community at stake in universal jurisdiction cases."[199] Consequently, recent developments pertaining to the "*complementary preparedness*" approach, including structural investigation and enhanced international judicial cooperation, constitute important progress against the objective of fighting impunity for perpetrators of gender-based crimes. Moreover, with the return of foreign terrorist fighters and with the influx of refugees and asylum seekers from Iraq and Syria, potential perpetrators of mass atrocity crimes with a nexus to Sweden are present on Swedish territory, which correlates with an enhanced national interest to investigate and prosecute mass atrocity crimes. Although a *duty* to investigate or prosecute mass atrocity crimes committed outside the territory of a State is limited in scope, these conclusions substantiate the thesis that national courts of "non-territorial" States play an important role in investigating and prosecuting perpetrators of mass atrocity crimes committed by ISIS militants with some nexus to the state, through the exercise of universal jurisdiction over such crimes."

[199] Jeßberger (n 179) 7.

4. Addressing gender-based mass atrocity crimes in national courts

Trial International releases an annual report that highlights national "cases where judges or prosecutors have initiated investigations into the most serious international crimes".[200] According to the 2021 report, 30 trials based on universal jurisdiction and on active or passive personality jurisdiction "when these cases have also had an impact on the practice of universal jurisdiction" are ongoing worldwide. At least 144 suspects are identified and charges include 76 charges for war crimes, 81 charges for crimes against humanity, 40 charges for torture and 18 charges for genocide.[201] Within the EU, statistics indicate a stark increase over the last years in investigations and trials for mass atrocity crimes in member states, and some increase in EU member states cumulatively prosecuting and bringing justice to foreign terrorist fighters for both mass atrocity crimes and terrorism-related offences. [202] Notably however, only few investigation and charges are concerned gender-based crimes. In several ongoing cases, SGBV is either not addressed[203] or is treated as single incidents under domestic law, meaning that prosecutors are not including charges of gender-based crimes.[204]

The first investigations, prosecutions and verdicts relating to gender-based crimes in Sweden under the UCA, and in other national legal systems, will carry paramount importance as they will set a blueprint for the application and interpretation of the scope of such provisions in coming cases in the domestic legal system. Crimes against humanity has never been prosecuted in Sweden, and the case law relating to SGBV according to the previous provision on crimes against international law is very limited.[205]

The preparatory documents to the UCA instructs national legal authorities to interpret and apply the national law "with great regard taken to the rules of international law and how they have been interpreted and applied by for example international tribunals, in particular the International Criminal Court".[206] Thus, when presented with facts of SGBV, national legal authorities will turn to the case law of international courts for guidance in how to apply and

[200] The report does "not include every complaint that victims, lawyers and NGOs filed under universal jurisdiction with national authorities in 2020 if these complaints did not result in significant judicial advances, are still pending or have been dismissed by the relevant national authorities". See, TRIAL International, 'Universal Jurisdiciton Annual Review 2021' (2021) <https://reliefweb.int/sites/reliefweb.int/files/resources/Trial%20International_UJAR_DIGITAL.pdf> accessed 20 April 2021.

[201] ibid 13.

[202] Eurojust, 'Genocide and War Crimes Cases Rise by 1/3 in the EU in 3 Years' (*Eurojust*, 23 May 2019) <https://www.eurojust.europa.eu/genocide-and-war-crimes-cases-rise-13-eu-3-years> accessed 20 April 2021. EuroJust, Network for Investigation and Prosecution of Genocide, crimes against humanity and war crimes (n 6) 5.

[203] TRIAL International (n 200) 46.

[204] ibid 48.

[205] Maria Sjöholm, 'Sexuellt Våld Och Genusrelaterade Brott' in Mark Klamberg (ed), *Lagföring i Sverige av Internationella Brott* (Jure 2020).

[206] Government of Sweden Regeringens proposition 2013/14:146 Straffansvar för folkmord, brott mot mänskligheten och krigsförbrytelser (n 24) 71. (my translation)

interpret the scope of provisions relating to gender-based crimes. This judicial methodology has been confirmed by the Swedish Supreme Court in its first case relating to mass atrocity crimes.[207] Hence, Chapter 4.1 will provide an overview of the attention paid by the ICTY, the ICTR and the ICC to such crimes in their case law. As already established, the magnitude and prevalence of gender-based crimes has not been adequately reflected in judicial activities. The chapter will introduce some conceptual shortcomings identified by scholars that might explain the lack of adequate judicial attention to gender-based crimes thus far and the added value of an intersectional approach. Chapter 4.2 will introduce the example case of *Taha Al J*. Chapter 4.3 will narrow down the analysis of gender-based crimes to the circumstances of the example case and within the scope of crimes against humanity. It will, based on the circumstances of the case, focus on the crime of persecution. Alongside the analysis, the added value of an intersectional approach to the objective of fighting impunity for perpetrators of mass atrocity crimes will be elaborated on. Chapter 4.4 will make concluding remarks with reference to the second limb of the thesis proposed in chapter 1.2 that national legal authorities should employ an intersectional interpretation in order to effectively investigate acts of SGBV and prosecute and adjudicate on conduct that amounts to gender-based crime to ensure non-impunity.

4.1. Gender-based crimes in international courts and tribunals – an overview of case law

SGBV, and subsequently sexual and gender-based crimes, are often mentioned in one breath. However, gender-based violence *without* sexual elements was not considered worthy of international judicial attention until the establishment of gender-based persecution as a crime against humanity in the Rome Statute. [208] The Statutes of ICTY and ICTR only contained provisions relating to sexual violence, and hence these tribunals lack jurisdiction over the crime of gender-based persecution.

Sexual violence is explicitly proscribed in the Rome Statute as war crimes and crimes against humanity and includes acts of rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and any other form of sexual violence of comparable gravity.[209] Rape can also be charged as torture, and rape is a constitutive act to genocide.[210] Gender-based violence, without a sexual component, includes for example torture, forced marriage and slavery of women and girls. The provisions relating to these crimes do not make an explicit reference to gender, hence the categorization of gender-based violence in such cases must be made explicitly by the legal authorities and highlighted in investigations, prosecutions and verdicts.[211] The only mass atrocity crime, explicitly proscribing gender-based violence is the crime of gender-based persecution as a crime against humanity.[212]

[207] *Högsta Domstolens dom i mål B 5595-19* Swedish Supreme Court 'Högsta Domstolen' 5 May 2021.para 5..
[208]ibid. Article 7(h).
[209]The Rome Statute (n 2). Articles 7(1)(g), 8(2)(b)(xxii), and 8(2)(e)(vi).
[210] Office of the Prosecutor (n 17) 9.
[211] Office of the Prosecutor (n 17). Paras 7-8.
[212] The Rome Statute (n 2). Article 7(g).

The ICC Prosecutor Bensouda held in her Policy Paper on sexual and gender-based crimes that her office will cumulate charges of acts of SGBV as war crimes, crimes against humanity, and genocide ”in order to properly describe, inter alia, the nature, manner of commission, intent, impact, and context” when appropriate.[213] Moreover, it will seek to ”highlight the gender-related aspects of other crimes within its jurisdiction.”[214]

In practice, some disagreement exist both at the ICC and at the *ad hoc* tribunals as how to categorize certain acts gender-based and/or sexual crimes.[215] This uncertainty is underscored by the “peculiar” definition of “gender” in the Rome Statute, defining it as “the two sexes, male and female, within the context of society”. [216] This definition is confusing, as it refers to both gender, meaning as a social construct and biological sex. The definition with reference to biological sex has been described by scholars as a ”stunningly narrow conception of gender”.[217] In the Policy Paper, the OTP holds that the definition of gender should be interpreted in accordance with internationally recognised human rights, which entails acknowledging social constructs of gender and gender roles as well as biological sex.[218]

In terms of sexual violence, the ICTY and the ICTR made significant contributions to an international legal and policy framework that is unequivocal in the importance of addressing sexual violence in conflict and in enabling the prosecution of such conduct as genocide, crimes against humanity and war crimes.[219] The legacy of the two tribunals is the cementing of sexual violence as a strategy of warfare, and thus worthy of the attention of ICL. Before this contribution, sexual violence was “largely relegated to indifference in international criminal law and policy frameworks” and was generally dismissed as isolated incidents.[220] However, the perception of sexual violence as instrumental and committed in pursuance of “strategic” conflict-related goals has been critiqued by scholars as representing a too narrow conception of the realities of SGBV in conflict.[221]

The ICC track-record of charging and convicting acts of gender-based crimes is also complicated. In the first trial and conviction at the ICC, in the case of *Lubanga*[222], the conviction included no reference to gender-based crimes, despite evidence of widespread SGBV

[213] Office of the Prosecutor (n 17). Para 8.
[214] ibid.
[215] Maria Sjöholm, ‘Sexuellt Våld Och Genusrelaterade Brott’ in Mark Klamberg (ed), *Lagföring i Sverige av Internationella Brott* (Jure 2020) 275.
[216]The Rome Statute (n 2). Article 7(3). See Rhonda Copelon, ‘Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law’ [2000] McGill Law Journal 217, 236.
[217] Brenda Cossman, ‘Gender Performance’ Sexual Subjects and International Law’ [2002] Canadian Journal of Law and Jurisprudence 281. 283-284.
[218] Office of the Prosecutor (n 17). 3, paras 15-16.
[219] For an overview of landmark cases from the ICTY, see ICTY, ‘Landmark Cases’ <https://www.icty.org/en/features/crimes-sexual-violence/landmark-cases> accessed 5 May 2021.
[220] Kelly-Jo Bluen, ‘Globalizing Justice, Homogenizing Sexual Violence: The Legacy of the ICTY and ICTR in Terms of Sexual Violence’ [2016] AJIL Unbound 214.
[221] Kelly-Jo Bluen ”Globalizing Justice, Homogenizing Sexual Violence: The Legacy of the ICTY and ICTR in terms of Sexual Violence” (2016) *AJIL Unbound, 110*, 214-219.
[222] *Situation in the Democratic Republic of the Congo, in the case of the Prosecutor v Thomas Lubanga Dyilo* [2012] ICC Trial Chamber ICC-01/04-01/06.

perpetrated or incited by Lubanga surfacing during the trial through victims' testimonies. The Prosecutor had failed to investigate and charge acts of SGBV, which made it difficult to convict *Lubanga* of such crimes.[223] The Prosecutor and the ICC had an opportunity to rectify the mistakes of *Lubanga* in the case of *Bemba*. *Bemba* was convicted of war crimes and crimes against humanity.[224] Sexual violence was made the centrepiece of the charges, and commentators hailed the case as an important progress in the advancement of justice in the realm of SGBV.[225] However, *Bemba* was acquitted by the ICC Appeals Chamber.[226] The acquittal had wide implications, both for the victims who were left without redress, and for international criminal justice in the realm of sexual and gender based violence in general as it constituted a setback and overturn of the important achievement of a first time conviction of such acts.[227]

However, recent case law development at the ICC indicate a strong commitment in advancing accountability and justice for gender-based crimes, both with and without sexual elements. This commitment is underscored in the Policy Paper adopted by the ICC Prosecutor, in which the Prosecutor commits itself to apply a "gender analysis" when investigating mass atrocity crimes to identify SGBV and prosecute gender-based crimes.[228] In 2019, *Ntganda* was convicted of war crimes and crimes against humanity including rape and sexual slavery.[229] Another critical milestone was reached in February 2021 in the conviction in the case of *Ongwen.*[230] The charges and subsequent conviction included 11 charges of gender-based crimes, and included for the first time charges and convictions of forced pregnancy as a standalone crime as a war crime and a crime against humanity and forced marriage as "another inhumane act" constituting a crime against humanity before the ICC.[231] These two cases constitute critical milestones in the advancement of international criminal law. Despite this progress, gender-based persecution as a crime against humanity has never been adjudicated on before the ICC.

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[223] Louise Chappell, 'A Chance for the International Criminal Court to Fix Sex Crimes Injustice' (*The Conversation*, 17 December 2017) <https://theconversation.com/a-chance-for-the-international-criminal-court-to-fix-sex-crimes-injustice-88966> accessed 20 April 2020.

[224] *Situation in the Central African Republic, in the case of the Prosecutor v Jean-Pierre Bemba Gombo Judgment pursuant to Article 74 of the Statute* (ICC Trial Chamber III) 74.

[225] Kerstin Bree Carlson, 'Bemba Acquittal Overturns Important Victory for Sexual Violence Victims' (*The Conversation*, 15 July 2018) <https://theconversation.com/bemba-acquittal-overturns-important-victory-for-sexual-violence-victims-99948> accessed 20 April 2021.

[226] *Judgment on the appeal Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute"* [2018] ICC Appeals Chamber No. ICC-01/05-01/08.

[227] Carlson (n 227).

[228] Office of the Prosecutor (n 17) 4. *"Gender analysis'" examines the underlying differences and inequalities between women and men, and girls and boys, and the power relationships and other dynamics which determine and shape gender roles in a society, and give rise to assumptions and stereotypes. In the context of the work of the Office, this involves a consideration of whether, and in what ways, crimes, including sexual and gender-based crimes, are related to gender norms and inequalities"*

[229] The conviction was upheld by the Appeals Chamber, see: *Situation in the Democratic Republic of the Congo in the case of the Prosecutor v Bosco Ntganda* [2021] ICC Appeals Chamber ICC-01/04-02/06 A3.

[230] *Situation in Uganda in the case of the Prosecutor v Dominic Ongwen* [2021] ICC ICC-02/04-01/15.

[231] Nisha Varia, 'LRA's Ongwen: A Critical First ICC Conviction' (*Human Rights Watch*, 13 March 2021) <https://www.hrw.org/news/2021/03/13/lras-ongwen-critical-first-icc-conviction> accessed 20 April 2021.

However, charges in the of case of *Al-Hassan,* currently at trial, include persecution on the basis of gender (and religion) for the first time.[232]

From the brief review of international case law concerning gender-based mass atrocity crimes, the conclusion can be drawn that there is an increasing commitment to justice by holding perpetrators of such crimes accountable. Historically, ICL has not recognized gender as a relevant category of persecution. Thus, the inclusion of the crime of gender-based persecution in the Rome Statute, followed in the UCA is a monumental step forward in recognizing the multifaceted ways men and women are targeted in systematic and widespread attacks. Notwithstanding, charges of gender-based persecution has only been included in the indictment in one case thus far, the case of *Al Hassan*. In contrast, ethnic and political persecution has been given much more judicial attention, despite existing evidence of SGBV in some cases where ethnic and political persecution was prosecuted.[233]

Scholars have argued that the ICC case law showcases conceptual shortcomings that hinder the advancement of accountability for gender-based crimes and thus justice for victims. Firstly, when addressing acts of SGBV, international criminal justice has been overly focused on acts of sexual violence. This has in turn led to a conflation of the understanding of SGBV, and a "legal mischaracterization" of gender-based violence *as* sexual violence.[234] Such mischaracterization has fatal effects, as it obscures gender-based violence without sexual elements within the context of mass atrocity crimes. Consequently, it does not challenge the global widespread impunity for perpetrators of gender-based crimes without sexual elements. Secondly, Chertoff argues that "gender-based crimes have been subsumed within the crimes of genocide or political and ethnic persecution because of a lack of intersectional perspective on the part of international jurists."[235] Scholars have introduced intersectionality as a method and interpretative tool that would assist the ICC in overcoming these two main identified shortcomings. The approach entails a broad "textual, contextual and teleological" interpretation of provisions relating to gender-based crimes.[236]

[232]Georgiana Epure, 'Writing the Jurisprudence on Gender-Based Persecution: Al Hassan on Trial at the ICC' (*International Justice Monitor*, 16 July 2020) <https://www.ijmonitor.org/2020/07/writing-the-jurisprudence-on-gender-based-persecution-al-hassan-on-trial-at-the-icc/> accessed 20 April 2021.

[233] Emily Chertoff, 'Prosecuting Gender-Based Persecution: The Islamic State at the ICC' [2017] Yale Law Journal 1050, 1070. For example: strong evidence exist of mass rape of women in conflicts in the DRC, Uganda, and the Darfur region of Sudan. *See, e.g.*, Thomas Escritt, 'Sex Crimes in Focus at Hague Trial of Ugandan Rebel Commande' (*Reuters*, 2 December 2016) <http://www .reuters.com/article/us-warcrimes-uganda-idUSKBN13R15M [http://perma.cc/N48S> accessed 20 April 2021.

[234] Alexandra Lily Kather and Alexander Schwarz, 'Intersecting Religious and Gender-Based Persecution in YAzidi Genocide Case: A Request for an Extension of Charges' (*Just Security*, 24 February 2021) <https://www.justsecurity.org/74943/intersecting-religious-and-gender-based-persecution-in-yazidi-genocide-case-a-request-for-an-extension-of-charges/> accessed 20 February 2021.

[235] Chertoff (n 236) 1070.

[236] Maučec, 'Law Development by the International Criminal Court as a Way to Enhance the Protection of Minorities—the Case for Intersectional Consideration of Mass Atrocities' (n 53) 3.

The contextual interpretation sheds light on the overall-context of discrimination in which the crimes took place, and examines how the individual criminal acts connects with other perpetrated acts within the context of criminality.[237] This allows legal authorities to understand how the perpetrated SGBV is connected to the broader attack which is a requirement for an act to constitute a crime against humanity. This is significant as the over-all discrimination in a context, based on gender and often other intersecting factors (such as religion in the case of the Yazidis) is the "root cause" of SGBV. Such discriminatory structures are often exacerbated during conflict and unrest pave way for the perpetration of gender-based crimes.[238] The understanding of SGBV as individualized, random incidents is refuted by connecting these acts to the overall pattern of crimes in a context of discrimination.[239] Moreover, when the acts are contextualized in this manner, discriminatory targeting and intent can be discerned on single, multiple or intersecting grounds, relevant for the crime of persecution that contains a discrimination requirement.[240] The intersectional approach underscores the importance of interpreting the law in a manner that recognizes intersectional discrimination as a distinct type of discrimination which cannot be understood through an additive analysis.

The teleological or purposive interpretation takes into account the purpose of the ICC, and of ICL in general, to protect human dignity and individual rights against grave violations by holding perpetrators of such violations accountable.[241] Against this purpose, intersectionality contributes to ensuring that indictments and charges are labelled and phrased in a manner that recognizes gendered and intersectional targeting, and thus ensures that charges reflect the full scope of criminal conduct. When indictments highlight gendered violence and charges reflect the full scope of criminal conduct, judges are presented with facts that can allow them to, with an intersectional approach, recognize and adjudicate criminal discrimination on intersectional grounds.

4.2 Introducing the example case of *Taha al. J*

A ground-breaking trial begun in Germany on the 24th of April 2020 against the defendant Taha Al-J.[242] Taha Al-J, who according to German privacy laws are not identified further, faces multiple charges of international crimes allegedly committed in 2015. In 2013, the defendant integrated himself in the ISIS structures in his home country of Iraq, and was subsequently a member of ISIS when the alleged offences were perpetrated. German authorities learned about the alleged crimes of Taha Al.-J through his wife of German nationality, *Jennifer W*, and he was arrested in Greece in May 2019 and subsequently extradited to Germany in October the same

[237] Beringola (n 53).92-92.
[238]See, *inter alia*, Council of Europe, 'What Causes Gender-Based Violence?' (*Council of Europe*) <https://www.coe.int/en/web/gender-matters/what-causes-gender-based-violence> accessed 15 March 2021.; UN Human Rights Office of the High Commissioner, 'Women's Human Rights and Gender-Related Concerns in Situations of Conflict and Instability' (*OHCHR*) <https://www.ohchr.org/en/Issues/Women/WRGS/Pages/PeaceAndSecurity.aspx> accessed 19 March 2021.
[239] ibid 96–98.
[240] As elaborated on in Chapter 4.3.2
[241] Maučec, 'Law Development by the International Criminal Court as a Way to Enhance the Protection of Minorities—the Case for Intersectional Consideration of Mass Atrocities' (n 53) 40.
[242]*Taha Al J* (n 14).

year.[243] The charges include crimes under the German Code of Crimes Against International Law (CCAIL) which is a 2002 implementation of the Rome Statute for acts of genocide, crimes against humanity and war crimes. Under the CCAIL, the charges in Taha Al-Js indictment include: genocide[244]; crimes against humanity (killing, torture, enslavement and depravation of liberty)[245]; and war crimes (killing and torture).[246]

The trial against Taha Al-J is the first trial in history that addresses the atrocities committed against the Yazidi minority with genocide included in the charges. Moreover, neither Taha Al-J nor the victims are of German nationality, the defendant was not on German soil when he was apprehended, and the scene of the crime is in Iraq. Thus, the German Court's jurisdiction is based on the principle of universality. The trial represents the first universal jurisdiction trial with charges of genocide under the CCAIL.[247]

According to the bill of indictment,[248] Taha Al-J. bought a Yazidi woman, Nora T and her 5-year old daughter as slaves at the turn of May and June 2015. Nora T and her daughter had initially been held and offered for purchase at an IS base in Syria. They had been purchased and resold multiple times before being purchased by the defendant. They had originally been captured in the Sinjar region following the attack by ISIS in August 2014. The defendant brought the mother and daughter to his and his wife's household in Fallujah in Iraq at the turn of June and July 2015. According to the charges, Taha Al J acquired the Yazidi mother and daughter with an intent to exterminate the Yazidi minority but also " to have personal benefits from their services in his household."[249] The mother and daughter were forced to keep house and was provided with insufficient food and water. Furthermore, Taha al J allegedly prohibited both of them from practicing their own religion. He forced them to convert to Islam and follow strict religious rules.[250] Both the mother and the daughter were subjected to repeated harassments and beatings. At some time between the end of July and September 2015, the defendant chained the 5-year-old daughter to the bars of a window outside in the scorching sun, allegedly as a "punishment" for wetting her bed. The weakened girl died from thirst following this treatment.[251]

[243] Deutsche Welle, 'Prozess Gegen Mutmaßlichen Jesiden-Mörder' (*Deutsche Welle*, 24 March 2020) <https://www.dw.com/de/prozess-gegen-mutma%C3%9Flichen-jesiden-m%C3%B6rder/a-53230203> accessed 16 March 2021.
[244] *Act to Introduce the Code of Crimes against International Law of 26 June 2002* (Germany).Section 6(1) No. 1-3
[245] ibid. Section 7 (1) No. 1,3,5,9.
[246] ibid. Section 8 (1), No. 1 and 3
[247]Kather and Schwarz (n 238).
[248] There is no English translation of the bill of indictment or charges, but an English press-release paraphrasing the charges is available. *See*: HIGHER REGIONAL COURT FRANKFURT/MAIN, ''Beginning of the Main Trial against Taha Al-J'' (2020) No 30/2020 <https://ordentliche-gerichtsbarkeit.hessen.de/pressemitteilungen/main-trial-taha-al-j> accessed 17 March 2021.
[249] ibid.
[250] ibid.
[251] ibid.

The wife of Taha Al-J, Jennifer W, was separately prosecuted under CCAIL for murder as a war crime. Her trial started in September 2019 and adjudication is based on the active personality principle as Jennifer W is a German national.[252] The Prosecutor stated that although Taha Al-J chained the girl, Jennifer W did nothing to prevent the girl's death. Jennifer W was believed to have been involved with ISIS from September 2015 to 2016 as a patrolling "moral police" tasked with ensuring that women complied with the rules of conduct and clothing established by ISIS.[253] Information gathered by a police informant from Jennifer W substantiated grounds to subsequently investigate and charge Taha Al J.[254] The prosecution against Jennifer W is also historic, as it is believed to be the first prosecution anywhere around the globe for international crimes committed by ISIS against Yazidi victims.[255] Charges against both Taha al J and Jennifer W includes membership in a terrorist organization and other offences under German national law.[256]

Commentators have hailed the proceedings in the case of *Taha Al J* as "an important commitment to international justice" as it is the first case to ever include charges of genocide in relation to the crimes against the Yazidis, and as it is the first case where jurisdiction based on universality was actively sought. Cases against ISIS militants before Taha Al J predominantly involved German returning terrorist fighters and foreigners seeking refuge in Germany from the conflicts in Iraq and Syria.[257] Thus, *Taha Al J* could be perceived as a manifestation of the "global enforcer" approach to universal jurisdiction, although the initiation of the case was dependent on information provided by the German national *Jennifer W.*

Despite the many "firsts" of the case, the case has also raised concern among commentators as the indictment does not include any charges of gender-based crimes or any reference to gendered harm.[258] The victims counsels have requested an extension of the charges to include the crime against humanity of persecution on the grounds of gender and religion. In relation to the request, the victims' counsels expressed "an urgent need to charge and prosecute acts of religious and gender-based violence committed by ISIS against the Yazidi community" and

[252] Higher Regional Court of Munich, ''Strafverfahren Gegen Jennifer W. Wegen Verdachts Der Mitgliedschaftlichen Beteiligung an Einer Terroristischen Vereinigung Im Ausland u.a' (6 March 2019) <https://www.justiz.bayern.de/gerichte-und-behoerden/oberlandesgerichte/muenchen/presse/2019/15.php> accessed 17 March 2021.

[253] Ibid.

[254] Matthias von Hein, 'Prosecuting IS Returnees in Germany Requires the Law's Longest Arm' (*Deutsche Welle*, 17 May 2020) <https://www.dw.com/en/prosecuting-is-returnees-in-germany-requires-the-laws-longest-arm/a-53457461> accessed 26 April 2021.

[255]See Amal Clooney, ''ISIS Militant on Trial in Munich for Membership of a Foreign Terrorist Organization and War Crime of Murder of 5-Year-Old Yazidi Child'' (*Doughty Street*, 8 April 2019) <https://www.doughtystreet.co.uk/news/isis-militant-trial-munich-membership-foreign-terrorist-organization-and-war-crime-murder-5> accessed 18 March 2021; Yazda, 'ISIS Militant on Trial in Munich for Membership of a Foreign Terrorist Organization' (*Yazda*, 10 April 2019) <https://www.yazda.org/post/isis-militant-on-trial-in-munich-for-membership-of-a-foreign-terrorist-organization>.

[256]*Taha Al J* (n 14). and Higher Regional Court of Munich (n 256).

[257] Paul Weber, 'The Many "firsts" of the Frankfurt Genocide Trial' (*PILPG*, 22 February 2021) <https://www.publicinternationallawandpolicygroup.org/lawyering-justice-blog/2021/2/22/the-many-firsts-of-the-frankfurt-genocide-trial> accessed 10 May 2021.

[258] Alexandra Lily Kather and Alexander Schwarz, 'First Yazidi Genocide Trial Commences in Germany' (*Just Security*) <https://www.justsecurity.org/69833/first-yazidi-genocide-trial-commences-in-germany/> accessed 10 April 2021.

held that it would be ”an important step for the Yazidi community and other victims of gender-based violence.”[259] Moreover, they asserted that the existing charges were inadequate, as they did not ”reflect the full scope of criminal conduct in question”.[260] This position is supported by scholars, that have contended that by failing to examine and effectively account for persecution on the grounds of religion and gender, the indictment will only reflect a selection, and not the full extent of the crimes the accused has allegedly committed. Prosecutions risks being inadequate and thus allow impunity for the acts of persecution allegedly perpetrated by Taha Al J. With an indictment that does not reflect the full scope of criminal conduct, justice is not fully served to victims.[261]

4.3 Gender-based crimes within the scope of crimes against humanity – an intersectional approach

Against the background of limited avenues for justice elaborated on in Chapter 2.3, it is concerning that national courts have not yet taken a firm grip on gender-based crimes. However, against the painted picture of slow recognition of sexual crimes at the ICTY, ICTR and at the ICC and yet slower recognition of gender-based persecution, it cannot be considered surprising.

As of now, prosecution of gender-based crimes in “non-territorial States” seems to be the only avenue open to obtain justice for Yazidi victims and fight impunity for perpetrators of such crimes. Thus, it is important that Sweden does not repeat the mistakes of failing to reflect the prevalence and magnitude of gender-based crimes in investigations, trials and verdicts. In the light of the above account of developments of the *ad hoc* tribunals and at the ICC, it can be concluded that even if progress has been made, there is much room for case-law development.

This is especially true in Swedish courts, where the investigation, prosecution and adjudication of mass atrocity crimes in general and of gender-based crimes in particular is a novelty in itself. As already mentioned, gender-based crimes have not yet been adjudicated on in accordance with the UCA. Only a few cases in relation to the former law proscribing crimes against international law concern gender-based crimes, exclusively with sexual elements.[262] It has been argued that the low amount of cases in Sweden could be a result of the perception of gender-based crimes as “less severe” than other crimes, such as for example murder, that has been reproduced on the international level. [263] Moreover, the former provision proscribing crimes

[259] Natalie von Wistinghausen, see Yazda and Amal Clooney, ‘Joint Statement by Amal Clooney’s Legal Team and Yazda: Request for the Prosecution of Religious- and Gender-Based-Violence in the Yazidi Genocide Case in Germany’ (*Yazda*) <https://www.yazda.org/post/request-for-the-prosecution-of-religious-and-gbv-in-the-yazidi-genocide-case-in-germany> accessed 10 February 2021.
[260] Amal Clooney, see ibid.
[261] See e.g. Beringola (n 53) 102. Kather and Schwarz (n 238).
[262] SFS 1962:700 Brottsbalken. Chapter 22 section 6. See Maria Sjöholm, ‘Sexuellt Våld Och Genusrelaterade Brott’ in Mark Klamberg (ed), *Lagföring i Sverige av Internationella Brott* (Jure 2020) 282–295.
[263] See Chapter 4.1, and e.g. *Prosecutor v Lukic and Lukic, "Prosecution Motion Seeking Leave to amend the Second amended Indictment* [2008] ICTY Pre Trial Chamber Case No. IT-98-32/1-PT. Para 16. And Sjöholm (n 216) 283.

against international law does not explicitly include any type of gender-based crime, which could also contribute to the lesser judicial focus on such crimes.[264]

The following sections aim to answer the third posed research question in chapter 1.2, how *can* and *should* Swedish legal authorities interpret and apply the law concerning sexual and gender-based violence in the example case of *Taha Al J,* and what contributions can an intersectional interpretation of the law bring in such cases, bearing in mind the objective of the law to "prosecute to the fullest extent possible" perpetrators of mass atrocity crimes? The case of *Taha Al J* included no evidence of sexual violence, and this arguably contributed to the lack of recognition of gender-based crimes by German legal authorities in the case.[265] The following chapters will establish whether the conduct of Taha Al J amounts to persecution as a crime against humanity, and if charges can be brought of persecution based on *intersecting* grounds of gender and religion.

Section two of the UCA regulates crimes against humanity. The crime consists of a *chapeau* element: "the act constitutes or is part of a widespread or systematic attack on a civilian population" and nine underlying prohibited acts; 1) murder, 2) torture and inhumane treatment, 3) serious sexual abuse, 4) forced pregnancy, 5) sexual slavery, 6) forced labour or other such state of coercion, 7) depravation of liberty in contravention of customary international law 8) persecution and 9) enforced disappearance of persons. In contrast with the correlating provision of crimes against humanity in the Statute of the ICTY, the provision in Swedish law (in accordance with the Rome Statute) does not require that the acts were committed with a nexus to an armed conflict. The Statute of the ICTR establishes a discriminatory motive requirement in relation to crimes against humanity, which neither the Swedish provision nor the Rome Statute requires.[266]

Chapter 4.3.1 assesses the meaning and scope of the *chapeau* requirement of crimes against humanity (as it has never been adjudicated on in Sweden) and analyses whether this requirement is satisfied in the example case. Chapter 4.3.2 focuses the analysis on the underlying act of persecution, and assesses whether the provision can encompass the concept of intersectional discrimination. Throughout the analysis, the contributions of an intersectional approach will be highlighted.

4.3.1 Crimes against humanity - the *Chapeau* requirement

In isolation, the acts of Taha Al J are arguably not in themselves enough to "*constitute*" either a widespread or systematic attack. The question is rather whether the specific acts might "*form part of*" a widespread or systematic attack committed by ISIS militants against "a civilian population". In order to establish the chapeau requirement in the example case of *Taha Al J*, it

[264] Sjöholm (n 216) 283.

[265] Compare the case-law development outlined in chapter 4.1 that substantiates the argument that a substantially larger part of judicial attention has been directed towards sexual crimes than gender-based crimes without sexual elements.

[266] Government of Sweden Regeringens proposition 2013/14:146 Straffansvar för folkmord, brott mot mänskligheten och krigsförbrytelser (n 24). 94. See also Guilfoyle (n 38) 242–243.

must first (1) be ascertained whether a civilian population was the object of the alleged crime. Then, it must be ascertained if the acts committed by ISIS towards the Yazidis constitutes (2) "*an attack*" which is either (3) "*widespread or systematic*". The participation of Taha Al J in the attack must then be ascertained as Taha Al J's acts must either (4) "*constitute or form part of*" such attack. Subsequently, the conduct of *Taha Al J* must fall within the scope of one or more prohibited underlying acts, which will be elaborated on in section 4.3.2.

1. A Civilian Population as the Object of the crime. The preparatory documents to the UCA defines "*a civilian population*" as persons that can be defined as a group in some aspect and that the attack is directed against the group as a collective, not against randomly selected individuals. Moreover, the group must predominantly consist of civilians. The existence of some military personnel within the group will not deprive it of its civilian status.[267] If the attack is conducted in the context of an armed conflict, when the law of armed conflict is applicable, civilians constitute all persons who are not lawful to attack (meaning combatants, members of guerrilla forces and persons taking up arms in the conflict, other than in direct self-defence).[268] The ISIS militants targeted Yazidis starting with the invasion of the Sinjar Province in 2014. The Yazidis were targeted as a collective and not as randomly selected individuals, and the Yazidis were not taking part of an armed conflict, meaning that they are civilians within the meaning of the law.[269]

2. An Attack According to the preparatory documents, an "attack" is often carried out with military means, but as a nexus to an armed conflict is not required, military means is not necessary to constitute an "attack" within the meaning of the law. Neither is physical violence required. According to the preparatory documents to the UCA, an attack generally consists of a series of attacks following a certain plan and forming a pattern. Neither do random, isolated acts by individuals nor acts by individuals that relate to a general crime wave constitute an attack.[270] In the present case, Chapter 2.2 has outlined how ISIS perpetrated a series of attacks that formed a pattern according to a certain plan, and these acts cannot be considered neither isolated nor random or part of a general "crime wave". As such, the conduct of ISIS constituted an *attack*.

3. The widespread or systematic character of the attack. The next step in satisfying the *chapeau* requirement entails an analysis and establishment of either a *widespread* or *systematic* character of the *attack*. Most often, an attack consists of a series of attacks following a certain plan and forming a pattern and if so, the criteria of a *widespread* attack is fulfilled.[271] A single attack "of extreme magnitude" can in exceptional cases constitute a widespread attack, for example if weapons of mass destruction are used. Thus, the widespread criteria concerns the

[267] *The Prosecutor v Dario Kordic and Mario Cerkez* [2001] ICTY Trial Judgment IT-95-14/2-T,.
[268] Government of Sweden Regeringens proposition 2013/14:146 Straffansvar för folkmord, brott mot mänskligheten och krigsförbrytelser (n 24) 96. 239.
[269] See Chapter 2.2
[270] Government of Sweden Regeringens proposition 2013/14:146 Straffansvar för folkmord, brott mot mänskligheten och krigsförbrytelser (n 24). 240.
[271] ibid 240.

scale of the attack and number of victims.[272] This reasoning is in line with ICTY case law[273], but differs from the definitions in the ICC Elements of Crimes that requires "a course of conduct involving the *multiple* commission" of prohibited acts.[274] In the ICC case *Gbagbo,* the Pre-Trial Chamber found that an attack was "widespread" as it left 316 persons dead and wounded and because it ""involved a large number of acts;… targeted and victimized a significant number of individuals; **...** extended over a time period of more than four months; and…affected the entire city of Abidjan, a metropolis of more than three million inhabitants"[275] During the invasion of the Sinjar Province, ISIS militants targeted all villages, cities and residential areas that contained a Yazidi population, indicating an attack of a large scale. ISIS moreover controlled an area of territory that was at one point the same size as Jordan. Moreover, the acts of killing, capturing and enslaving targeted at the Yazidi population concerned a large number of persons, more than the 316 persons in the *Gbagbo* case.[276] Thus, the attack can be considered as *widespread*.

The large number of acts committed against the Yazidis by ISIS militants starting with the invasion of the Sinjar Province by ISIS militants in August 2014, were not isolated or random but instead formed a specific pattern and followed a certain plan established by ISIS, as elaborated on in Chapter 2.2. This indicates a *systematic* character of an attack, which according to the preparatory documents means that it is planned and executed in an organized and methodical manner, and is not merely random.[277] In the 2014 invasion, multiple ISIS militants formed groups and invaded the province from different directions. Moreover, they controlled vital routes and could hence capture all fleeing persons. After the initial targeting, Yazidi women, men and children were separated and either killed or captured and enslaved on the basis of their age and gender. This pattern was reproduced by all ISIS militants in different areas of the Sinjar Province which indicates a systematic character of the attack. A common pattern indicates a systematic character of the attack according to the Pre-Trial Chamber of the ICC.[278] The attack seems to have followed a premediated policy, which is underscored by publications

[272]ibid., *Prosecutor v Dragoljub Kunarac and others* [2001] ICTY Trial Chamber IT-96-23-T and IT-96-23/1-T. para 428. *The Prosecutor v Jean Paul Akayesu Judgement* [Case No. ICTR-96-4-T] ICTR Chamber I 2 September 1998. Para 580.
[273] *The Prosecutor v. Dario Kordic and Mario Cerkez* (n 272). Para 176. *The Prosecutor v Blaškić Judgement* [2000] ICTY Trial Chambr IT-95-14-T. para 206.
[274]International Criminal Court, *Elements of Crimes* (2011). Introduction to Article 7, para 3.
[275] *The Prosecutor v Laurent Gbagbo Decision on the confirmation of charges against Laurent Gbagbo* [656] ICC Pre-Trial Chamber I 12 June 2014. **Paras 204, 224.**
[276] Valeria Cetorelli and Sareta Ashraph, 'Counting Mass Atrocity: A Demographic Documentation of ISIS's Attack on the Yazidi Village of Kocho' (LSE Middle East Centre 2019) 1. "While crimes committed by ISIS against the Yazidis are now known, the identity of all victims is yet to be established. According to extrapolations from a retrospective household survey, roughly 10,000 Yazidis were either killed or kidnapped during the assault."
[277] Government of Sweden Regeringens proposition 2013/14:146 Straffansvar för folkmord, brott mot mänskligheten och krigsförbrytelser (n 24) 240–241.
[278] *The Prosecutor v. Laurent Gbagbo. Decision on the confirmation of charges against Laurent Gbagbo* (n 281). Para 223. "[The systematic requirement] has been consistently understood in the jurisprudence of the Court as pertaining to the organized nature of the acts of violence and the improbability of their random occurrence.... [A]ccording to the jurisprudence of the Court, the systematic nature of an attack can 'often be expressed through patterns of crimes". *see also The Prosecutor v Ahmad Muhammad Harun ('Ahmad Harun') and Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb') Decision on the Prosecution Application under Article 58(7) of the Statute (2)* [2007] Pre-Trial Chamber I ICC-02/05-01/07-1-Corr.para 63."There are reasonable grounds to believe that the above- mentioned acts [of the Janjaweed] often shared a common pattern.").

from ISIS itself that questions the existence of "infidel" Yazidis and contains rules governing sexual slavery and slave trade as elaborated on in Chapter 2.2. According to Swedish law, there is no requirement of an attack that is pursuant to a governmental or organizational policy, in contrast with the Rome Statute.[279] However, as held by the ICTY Appeals Chamber in *Kunarac*: "It may be useful in establishing that the attack was directed against a civilian population and that it was widespread or systematic (especially the latter) to show that there was in fact a policy or plan [but it is not necessary]"[280]

Worth noting is that the ICTY and the ICTR has held that "only the attack, not the individual acts of the accused, must be widespread or systematic."[281] In *Gacumbitsi,* the ICTR Trial Chamber concluded that there was a "general" widespread and systematic attack against Tutsis, and that rape formed part of such attack because "the victims of rape were chosen because of their Tutsi ethnic origin, or because of their relationship with a person of the Tutsi ethnic group".[282] This reasoning, connecting the individual acts of rape to the broader attack of discrimination against Tutsis, is *especially* important in relation to all acts of SGBV as such acts have often been overlooked as random or isolated incidents, disconnected from the broader ongoing attack. By this reasoning, the ICTR could conclude that the rape amounted to a crime against humanity. This reasoning bears similarities with the intersectional approach, as the ICTR established firstly that the rapes took place in a context of a broader attack underpinned by discrimination against Tutsis and secondly that the rapes were connected to this broader attack by reason of their identity as Tutsis.

The intersectional approach entails making an inquiry into the context where the crimes was committed by asking and answering questions such as for example:

> "What were the identity markers of the victims? What traits of their identities made them vulnerable in the context of crimes? (…)What harms did they experience? Were perpetrators aware of their (vulnerable) identity? How was SGBV victimization compounded with pre-existing discrimination? How were victims' vulnerabilities linked to the general context of criminality? How was their victimization compounded by other violations?"[283]

In relation to the present case, the history of persecution of the Yazidis as a religious group is an important factor as to why ISIS considered them "infidels" and questioned their "continual

[279] According to the ICC Elements of Crimes, the act must be "pursuant to or in furtherance of a State or organizational policy to commit such an attack". Recent case law of the ICC indicates a broad interpretation of the requirement as "the policy need not be formalized" and therefore "an attack which is planned, directed or organized" will satisfy the requirement of a policy. The provision in Swedish law purposefully omits the requirement of a State or organizational policy, by referring to customary international law and the judgement by ICTY in the case of *Kunarac* where the existence of such a requirement is explicitly rejected. Government of Sweden Regeringens proposition 2013/14:146 Straffansvar för folkmord, brott mot mänskligheten och krigsförbrytelser (n 24) 96–97.
[280] *Prosecutor v. Dragoljub Kunarac and others.* (n 277)., Para 98. This was followed in *The Prosecutor v. Dario Kordic and Mario Cerkez* (n 272).para 206.
[281] *The Prosecutor v. Blaškić. Judgement* (n 278)., para. 101, referring to *Prosecutor v Dragoljub Kunarac Appeals Chamber Judgement* [2002] ICTY Appeal Chamber IT-96-23.para. 96; *Prosecutor v Sylvestre Gacumbitsi Judgement* [2004] ICTR Trial Chamber Case No. ICTR-2001-64-T. para. 102 ("At the outset, it bears noting that it is not rape *per se* that must be shown to be widespread or systematic, but rather the attack itself (of which the rapes formed part").
[282] *Prosecutor v. Sylvestre Gacumbitsi. Judgement.* (n 287).para 324.
[283] Beringola (n 53) 97–98.

existence" upon invasion into the Sinjar Province.[284] However, The identity of being a Yazidi cannot fully capture the discriminatory underpinnings and the nature of the crimes the Yazidi women were victims of in the widespread and systematic attack, as Yazidi men were subjected to a different mistreatment and were not enslaved and subjected to sexual violence in the organized manner as the Yazidi women and girls were. However, the identity of being a woman can neither fully capture the nature of the crimes, as only non-Muslim women under ISIS control were held as slaves.[285] Consequently, in the broader attack, Yazidi women and girls were particularly vulnerable to the perpetrated SGBV. The differential treatment of women and men were based on their gender roles as perceived by ISIS. Men and boys were either summarily executed or forced to conduct hard manual labour. Women and girls were enslaved for sexual slavery and/or forced household work. This pattern of crimes relate to the strict gender roles upheld by ISIS, which informs the conclusion that the Yazidi women and men were treated differently on the basis of their perceived gender roles. This conclusion is valuable as it forms the basis for establishing the *nexus* requirement that is elaborated on below.

4. The perpetrator's participation in the attack. As already held, the persecutory acts of Taha Al J must "constitute" or form "part of" the attack (a nexus requirement). As such, a certain participation of the perpetrator is required to satisfy the criteria. If the conduct itself does not *constitute* a widespread or systematic attack, the conduct must form *part of* such attack. At the beginning of this section, an argument was made that the acts committed by Taha Al J does not in isolation *constitute* either a widespread or systematic attack. This argument is substantiated through the analysis of the requirements of what constitutes a widespread or systematic attack above. Thus, it must be established if the individual acts committed by Taha Al J "*form part of*" the broader attack by ISIS directed at the Yazidis that has been established in paragraph 1-3 above. According to the ICC case law, "the existence of this nexus will be determined on the basis of an objective assessment of the characteristics, aims, nature, and/or consequences of the acts concerned"[286]. The individual acts of the accused cannot be *unrelated* to the broader attack, and in this assessment the temporal and geographical proximity of the individual acts in relation to the attack are examples of relevant factors to assess.[287]

The intersectional approach has already guided the understanding of the context of overall discrimination that underpinned the broader attack. The subsequent assessment to be made is whether the individual acts objectively "*form part of*" this broader attack. In relation to the attack against the Yazidis, Chapter 2.2 substantiates an argument that, *inter alia*, SGBV directed

[284]As held by ISIS in the magazine *Dabiq*; see Dabiq, 'The Revival of Slavery before the Hour' (2014) <www.danielpipes.org/rr/2014-10-dapiq.228.pdf>.

[285] Counter Extremism Project, 'ISIS's Persecution of Women' (*Counter Extremism*, 2017) <<https://www.counterextremism.com/content/isiss-persecution-women> accessed 19 April 2021.

[286]*Situation in the Central African Republic in the case of the Prosecutor v Jean-Pierre Bemba Gombo Trial Judgement* [2016] ICC Trial Chamber III ICC-01/05-01/08. para. 165, and *The Prosecutor v Germain Katanga Judgment pursuant to article 74 of the Statute* [2014] ICC Trial Chamber II ICC-01/04-01/07-3436-tENG.para. 1124; *Situation in the Democratic Republic of the Congo in the case of the Prosecutor v Bosco Ntaganda Judgement* [2019] ICC Trial Chamber VI ICC-01/04-02/06. para 692

[287] *The Prosecutor v Dusko Tadic, , Appeals Judgement* [1999] ICTY Appeals Chamber IT-94- 1-A.Paras 248, 270-271.; *Situation in the Democratic Republic of the Congo in the case of the Prosecutor v Bosco Ntaganda. Judgement.* (n 292).para 692

at Yazidi women and girls was widespread and systematic. This satisfies the nexus requirement in the particular case as ample evidence indicate that the individual persecutory acts of *Taha Al J* objectively fall within the pattern of criminality that constituted the attack. However, it is important to still keep in mind the conclusions from, *inter alia*, *Gacumbitsi,* that the individual acts in themselves that constitute persecution, such as for example rape, does not need to be proven to be widespread or systematic in the attack. This is important because other cases will most likely not include as much evidence of an adopted policy of SGBV against women and girls as in the case of ISIS. Upholding a view that the individual acts of SGBV must be proven to have been widespread or systematic in the broader attack risks setting the evidentiary bar erroneously high in comparison to other violent acts. This could subsequently underscore the perception that for SGBV are individual or random acts that are not connected to the wider attack.[288] In sum, the intersectional approach helps unveiling the objective connections between the individuals acts of Taha Al J and the overall pattern of criminality by shedding light at the discriminatory context and pattern of criminality in the broader attack. From the analysis it is clear that the discriminatory aspects of gender-based violence committed against the victims in the case of Taha al J was neither individual nor random acts but instead formed part of a wider pattern of criminality with discriminatory underpinnings.

Moreover, the *nexus* requirement must be coupled with some insight on the part of the accused that there is an attack on the civilian population and that the individual acts perpetrated by the accused forms part of that attack.[289] This requirement is determined through an objective test and the knowledge can be inferred from the evidence in the case according to the ICTY.[290] The personal motives of the accused are irrelevant. Hence, it does not affect the legal reasoning that the purchase of the Yazidi mother and daughter could have been motivated by a gain of personal benefits from their service in his household.[291] It is enough according to the ICTY that the accused was "wilfully blind" or "knowingly took the risk" that the act of the accused fit within the broader context of an attack.[292] The ICC Elements of Crimes require that "the perpetrator *knew* that the conduct was part of or *intended* the conduct to be part of a widespread or systematic attack against a civilian population [emphasis added]."[293] Instead, it requires knowledge on the part of the accused that his or her act *objectively* fell within a wider attack. Swedish preparatory documents refer to both the case law from the ICTY and to the Rome Statute with regards to the mental element, and concludes that the perpetrator's *mens rea* must encompass the factual circumstances constituting the contextual element, but that the accused does not need to have knowledge about the specific details of the attack or that it constitutes an attack in legal terms to satisfy the requirement.[294]

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[288] Laurel Baig and others, 'Contextualizing Sexual Violence: Selection of Crimes' in Serge Brammertz and Michelle J Jarvis (eds), *Prosecuting conflict-related sexual violence at the ICTY* (First edition, Oxford University Press 2016) 202.
[289] Government of Sweden Regeringens proposition 2013/14:146 Straffansvar för folkmord, brott mot mänskligheten och krigsförbrytelser (n 24) 241.
[290] *The Prosecutor v. Dusko Tadic, , Appeals Judgement.* (n 293). Para 271. *Prosecutor v. Dragoljub Kunarac and others.* (n 277). Para 418.
[291] Compare chapter 4.2 and the circumstances of the case of Taha Al J according to the indictment.
[292] *The Prosecutor v Duško Tadic Judgement* [1997] ICTY Trial Chamber IT-94-1-T. para 657.
[293] International Criminal Court (n 280). Article 7.
[294] Government of Sweden Regeringens proposition 2013/14:146 Straffansvar för folkmord, brott mot mänskligheten och krigsförbrytelser (n 24) 241.

This part of the analysis require evidence from the specific case, which is not available to the public. However, somewhat speculative, it can be argued that *Taha Al J* must have been either been "wilfully blind" or "knowingly taking the risk" that his acts fit within the broader context of an attack. Taha Al J had integrated himself within the structures of ISIS in 2013, and as such he must have had some knowledge of how his conduct related to the objectives of ISIS.

The intersectional analysis of contextualization could inform a conclusion that *Taha Al J* took advantage of the broader context of discrimination against Yazidi women which led to the crimes of their initial capturing and enslavement, when perpetrating the acts of acquiring the Yazidi mother and daughter as slaves and when mistreating them to the point of letting the daughter die. He purchased the two Yazidis on what evidence indicates were highly organized slave trade markets. For example, militants wishing to buy slaves had to "register their names with the admin official of the battalion or sector" and without this registration, access to the slave trade market was denied.[295] As such, *Taha Al J* must have had some insight into the fact that ISIS condoned the buying and selling of captured Yazidi women and that upon purchase, ISIS militants would own them as property. The acts committed by Taha Al J subsequent the purchase of the two Yazidis, is in line with these rules by ISIS governing the slave trade. He exercised ownership control over them by holding them captured within his household and by submitting them to repeated forced labour and abuse. These circumstances substantiate the argument that *Taha Al J* must have had enough knowledge about how his persecutory acts in the specific case fell into the broader attack of ISIS targeted at the Yazidi minority to satisfy the requirement.

4.3.2 The underlying act of Persecution on the basis of gender and religion

The underlying act of persecution is contained in Section 2(8) of the UCA and sets out two requirements (in addition to the *chapeau* requirement): 1) a group of civilians are deprived of their of fundamental rights (*the actus reus*) *and* 2) "on the basis of political, racial, national, ethnic, cultural, religious, gender or other reasons that are prohibited under customary international law" (*the mens rea*).

1) A group of civilians must have been deprived of fundamental rights, in contravention of customary international law. First, it must be ascertained whether the conduct targeted a group or individuals as representatives of a group.[296] ICTY has held that the factual belonging to a group is not necessary, the subjective perception that victims belong to a group on behalf of the perpetrator is decisive.[297] The preparatory documents to the UCA establishes that the

[295] 'Archive of Islamic State Administrative Documents, Released by Jawad Al-Tamimi,11 January 2016 , Speciment 13 Y: Notice on Buying Sex Slaves, Homs Province', (2015) <<https://www.aymennjawad.org/2016/01/archive-of-islamic-state-administrative-documents-1>> accessed 10 April 2021.
[296] Government of Sweden Regeringens proposition 2013/14:146 Straffansvar för folkmord, brott mot mänskligheten och krigsförbrytelser (n 24) 252.
[297] *The Prosecutor v Jadranko Prlić and others Judgement Vol I* [2013] ICTY Trials Chamber IT-04-74-T.para 73.

assessment of what constitute a group must be determined on a case-by case basis, with reference to the discriminatory motives enumerated in the provision.[298] Thus, the kind of group involved can be determined from the discriminatory motives required on behalf of the perpetrator, as discussed below. In the example case, the Yazidi mother and daughter were as evidenced targeted based on their identity as women and Yazidis and this requirement is consequently satisfied.

Second, requirement of a depravation of fundamental rights must be assessed. The ICTY has held in its case law that single and multiple acts, physical, economic or legal in nature, can amount to persecution.[299] The preparatory documents indicates that the fundamental rights referred to are contained in human rights instruments, for example the Universal Declaration on Human Rights[300] and rights under international humanitarian law.[301] Worth emphasising is that all acts that deprive persons of fundamental rights are not considered crimes against humanity. Article 7(1)(g) of the Rome Statute requires that the act constitutes a *severe* depravation of fundamental rights. In case law, the assessment seems to "encompass both the magnitude of the population of whose rights were deprived, and the gravity of the depravations to each individual.".[302] The ICTY has concluded in its case law that "not every denial of a human right may constitute a crime against humanity (…) accordingly, it can be said that at a minimum, acts of persecution must be of an equal gravity or severity to the other acts enumerated Article 5 (crimes against humanity)."[303] The ICTY Trials Chamber concludes by stating that "only gross or blatant denials of fundamental human rights can constitute crimes against humanity."[304] In asserting what can be considered such "gross or blatant" denial of fundamental rights, the ICTY trial chamber holds that "the interests of justice" would not be served by providing a list of included rights, as it would also mean a corresponding list of excluded rights. International customary law has a flexible approach to what acts can constitute persecution, and thus "each case must therefore be examined on its merits."[305] The Swedish preparatory documents refers to both the Rome Statute and to the case law of the ICTY respectively, indicating that Swedish law also contains a certain threshold of severity.[306] The introduced "threshold" can be understood as part of the effort of bringing the dynamic

[298] Government of Sweden Regeringens proposition 2013/14:146 Straffansvar för folkmord, brott mot mänskligheten och krigsförbrytelser (n 24) 252.
[299] *The Prosecutor v. Duško Tadic. Judgement.* (n 299).para 710.
[300] Government of Sweden Regeringens proposition 2013/14:146 Straffansvar för folkmord, brott mot mänskligheten och krigsförbrytelser (n 24) 252–253. The preparatory documents refer to, *inter ali*a, the 1949 UN Universal Declaration of Human Rights, the European Convention on the Protection of Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights .
[301] ibid 116.
[302] Chertoff (n 236) 1105–1106. See e.g. *Prosecutor v Muthaura, Kenyatta and Ali Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute* [2012] ICC Pre-Trial Chamber III ICC-01/09-02/11.para 277. The Pre-Trial Chamber found that a series of "kill- ings, displacement[s], rape[s], serious physical injuries, and acts causing seri- ous mental suffering... constitute[d] severe deprivations of fundamental rights", which according to the Prosecutor's application had left over 1,100 people dead and thousands injured and forcibly displaced and hundreds subjected to sexual violence "
[303] *The Prosecutor v Zoran Kupreškić et al. Trial Judgement* [2000] ICTY Trial Chamber IT- 95-16-T,.paras 618-619.
[304] ibid.para 620.
[305] ibid.para 623.
[306] Government of Sweden Regeringens proposition 2013/14:146 Straffansvar för folkmord, brott mot mänskligheten och krigsförbrytelser (n 24) 252–253.

development of human rights into conformity with the principle of legality (*nullum crimen sine lege*)."[307] Article 7(1)(h) in the Rome Statute requires that the depravation of fundamental rights is committed "in connection with" a crime within the jurisdiction of the ICC. This nexus requirement was not accepted as an accurate statement of customary international law by the ICTY Trial Chamber in *Kupreškić,* and this is followed in the Swedish provision that does not include such nexus requirement.[308]

Turning to the case of Taha Al J, the preparatory documents to the UCA specifically mentions the fundamental rights to life and family life and the freedom of expression, association and religion are specifically mentioned as important fundamental rights in the preparatory documents.[309] The acts of enslaving the Yazidi mother and daughter and physically and verbally abusing them to the point of killing the daughter constitute a denial of several of these and other fundamental human rights contained in multiple international conventions and instruments, in particular the right to life and liberty and the right to freedom of religion and to be free from enslavement and torture.[310] This conclusion is in line with the determination of ICTY that for example enslavement, torture, cruel and inhumane treatment or subjection to inhumane conditions and constant humiliation and degradation are acts that are encompassed in the crime of persecution. In accordance with ICTY case law, all circumstances in the case should be considered.[311] This allows for a contextual interpretation which could entail taking into account the exacerbated vulnerability of Yazidi women when determining the severity of the individual acts. Taha Al J's alleged treatment of the two Yazidis constitute each of the enumerated acts that ICTY has considered to constitute persecution, and thus the criteria of a depravation of fundamental rights in contravention of customary international law is satisfied in the case.

2.) The nexus with a group element. To constitute persecution, the group of civilians must have been deprived of fundamental rights *on the basis of* any of the protected, enumerated grounds in the provision. The nexus requirement is complex as it requires not only proof of a particular conduct (the depravation of fundamental rights), and an intent to commit the act and produce its consequences as needed for all crimes, it *furthermore* requires that the conduct was carried out with a biased motive on behalf of the perpetrator.[312] The ICTY had defined it as a "specific intent to cause injury to a human being because he belongs to a particular community or group".[313] This requirement is only applicable to the underlying act of persecution, and thus persecution has a distinct character within the scope of crimes against humanity.[314]

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[307] *The Prosecutor v. Zoran Kupreškić et al.. Trial Judgement.* (n 310).para 618.

[308]See *The Prosecutor v. Zoran Kupreškić et al.. Trial Judgement.* (n 310).paras 567-580. Government of Sweden Regeringens proposition 2013/14:146 Straffansvar för folkmord, brott mot mänskligheten och krigsförbrytelser (n 24) 118.

[309] Government of Sweden Regeringens proposition 2013/14:146 Straffansvar för folkmord, brott mot mänskligheten och krigsförbrytelser (n 24) 116.

[310] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR).art 3-5, 18.

[311] Government of Sweden Regeringens proposition 2013/14:146 Straffansvar för folkmord, brott mot mänskligheten och krigsförbrytelser (n 24).116, 253-254. *The Prosecutor v. Zoran Kupreškić et al.. Trial Judgement.* (n 310).paras 617–627.

[312] Werle and Jeßberger (n 1) 428.

[313]*The Prosecutor v Kordić & Čerkez Appeals Judgement* [2004] ICTY Appeals Chamber IT-95-14/2.para. 111. *The Prosecutor v Blaškić Appeals Judgement* [2004] ICC Appeals Chamber IT-95-14). para. 235.

[314] *The Prosecutor v. Dusko Tadic, , Appeals Judgement.* (n 293).para 273 et seq.

Discriminatory intent must not be confused with a persecutory intent on part of the accused, meaning that it is not required to follow a persecutory plan or state policy.[315] Consequently, the perpetrator does not need to subjectively intend or desire the persecution of a group, but must have had an objective knowledge that his or her conduct *in fact* fits into a pattern of discrimination.[316]

The enumerated grounds of discrimination in the Swedish provision correlates to the grounds enumerated in Article 7 of the Rome Statute. The preparatory documents identify that the meaning of a discriminatory motive in relation to the enumerated grounds is not defined in the provision. Instead, the preparatory documents suggest that a determination of discrimination can be made with reference to relevant international treaties[317] such as the International Convention on the Elimination of All Forms of Racial Discrimination[318] for a definition of racial discrimination, the International Covenant on Civil and Political Rights[319] and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).[320] The Committee on the Elimination of Discrimination against Women. a monitoring body of CEDAW, has acknowledged in General Recommendation No 28 that SGBV involves not only single-axis gender discrimination, but also gender ”intersecting” with other forms of discrimination

> Intersectionality is a basic concept for understanding the scope of the general obligations of States parties contained in article 2 [of CEDAW]. The discrimination of women based on sex and gender is 'inextricably linked' with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste, and sexual orientation and gender identity (…) states parties must legally recognize and prohibit such intersecting forms of discrimination and their compounded negative impact on the women concerned.[321]

The reference to CEDAW in relation to the determination of discrimination can thus be used as a gateway by legal authorities to apply an intersectional understanding of persecution based on not only gender, but gender intersecting with religion.

According to the ICC, evidence of an official policy to target and victimise a group covered by the provision can satisfy the nexus requirement.[322] Moreover, as such overt persecutory policy

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[315] *See The Prosecutor v. Dario Kordic and Mario Cerkez* (n 272).para 212. *The Prosecutor v. Kordić & Čerkez. Appeals Judgement.* (n 321). para 111. International Criminal Court (n 280).Art 7 footnote 22.
[316] Ibid.
[317] Government of Sweden Regeringens proposition 2013/14:146 Straffansvar för folkmord, brott mot mänskligheten och krigsförbrytelser (n 24) 116.253-254.
[318] UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195.
[319] UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.
[320] UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13.
[321] Ibid. General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrmination against Women,CEDAW/C/2010/47/GC.2,19 October2010, para. 18.
[322] *See, inter alia, Prosecutor v Bosco Ntaganda V Decision on the Prosecutor's Application under Article 58* [2012] ICC Pre-Trial Chamber III ICC-01/04-02/06. Para 27.
The Prosecutor v William Samoei Ruto and Joshua Arap Sang [2012] ICC Pre-Trial Chamber II ICC-01/09-01/11-373.**Para 273.**

is often difficult to discern, the nexus requirement can be shown through evidence of a pattern of targeting such group.[323] For example, based on evidence that the "Sudanese Armed Forces and the Militia/Janjaweed launched attacks against specific localities believing that they were predominantly inhabited by the Fur population", the ICC Pre-Trial Chamber found "reasonable grounds to believe" *in Prosecutor v Harum* "that the Sudanese government persecuted Fur people on the grounds of ethnicity."[324] The ICTY holds that discriminatory intent can be inferred from the overall discriminatory nature of an attack that is characterized as a crime against humanity "so long as, in view of the facts of the case, circumstances surrounding the commission of the alleged acts substantiate the existence of a discriminatory intent.[325] For example, this can be shown by the "general attitude of the alleged perpetrator of the offence, as shown by his conduct".[326]

Based on a contextual assessment of the example case, and the linking of the individual acts of Taha Al J to such context, Chapter 2.2 found that the persons victimized by Taha Al J were, in the broader attack, targeted because of their identity as Yazidis and because of their gender identity as women/girls. Yazidi women were suffering from a unique and distinct discrimination and harm targeted at their intersectional identities in comparison to other minorities such as Yazidi men or Muslim. The victims belonged to two groups intrinsically interlinked; gender and religion. The subsequent issue is to establish the nexus requirement, entailing an assessment of whether the perpetration of the acts of Taha Al J was motivated by the victims' identities as Yazidi women. This analysis will firstly be made in relation to the grounds of **1)** religion, then **2)** gender, then the **3)** intersecting grounds of gender and religion.

1) Taha Al J allegedly prohibited the Yazidi mother and daughter practicing their own religion, and he forced them to convert to Islam and follow strict religious rules.[327] This indicate that Taha Al J carried out the alleged acts *because* of the victims' identity as Yazidis. This is underscored by evidence that strongly suggest an official policy on behalf of ISIS in targeting Yazidis because they were considered "infidels".[328] The pattern of the broader attack carries clear characteristics of such policy and the acts of Taha Al J is in line with this pattern. Thus, the acts of Taha Al J amounts to persecution on the grounds of religion.

2) In contrast with persecution based on religion, persecution based on gender has never been adjudicated on and the nexus requirement is thus more difficult to establish. Especially because the definition of gender is not clearly established in ICL. As established above, the definition in the Rome Statute refers to both biological sex and gender as a social construct. The drafters

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[323] See, *also*; *The Prosecutor v Charles Blé Goudé Decision on the confirmation of charges against Charles Blé Goudé* [2014] ICC Pre-Trial Chamber I ICC-02/11-02/11-186.para 121. and *Prosecutor v Simone Gbagbo Decision on the Prosecutor's Application Pursuant to Article 58 for a warrant of arrest against Simone Gbagbo* [2012] ICC Pre-Trial Chamber III ICC-02/11-01/12.para 204.

[324] *The Prosecutor v. Ahmad Muhammad Harun ('Ahmad Harun') and Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb'). Decision on the Prosecution Application under Article 58(7) of the Statute (2)* (n 284). Paras 74-75.

[325] *Prosecutor v Milorad Krnojelac Appeals Judgement* [2003] ICTY Appeals Chamber IT-97-25-A. para 184; *Prosecutor v Naletilić & Martinović Appeals Judgement* [2006] ICTY Appeals Chamber IT-98-34.para. 129.

[326] *Prosecutor v. Milorad Krnojelac. Appeals Judgement.* (n 333)., para. 184.

[327] See Chapter 2.2

[328] See Chapter 2.2.

of the Rome Statute could not agree on either a more restrictive definition of biological sex or a broader definition of gender as a social construct, and consequently the retained definition reflects a ”constructive ambiguity” meaning that the language is deliberately imprecise in order to accommodate the diverging opinions of the drafters.[329] The ICC Prosecutor has contended that the definition should be interpreted as to include both aspects. Act (2014) includes the crime of gender-based persecution. In Swedish, the provision refers to ”*kön*”, a definition pertaining to biological sex.[330] The preparatory documents offers no further guidance as to how the provision should be interpreted, but makes a reference to ”*genus*” meaning gender as a social construct.[331] As such, the preparatory documents offer the prerequisite for making an interpretation in accordance with the interpretation made by the ICC Prosecutor in practice.[332]

The first case to ever include gender-based persecution, the ICC case of *Al-Hassan*, is currently before trial at the ICC. The Prosecutor charged Al-Hassan with persecution based on gender and ethnicity, amongst other charges. In the confirmation of charges, the Pre-Trial chamber confirmed the charges but did not explicitly take a position in the debate regarding the definition of gender. However, the analysis of the Pre-Trial Chamber seems to suggest that it takes into account not only the physical and biological characteristics of the individuals but also the social context. For example, the Pre-Trial Chamber noted that the ”persecution suffered by women has resulted in the loss of their social status among the civilian population of Timbuktu.”[333] It furthermore claimed that violence against women constituted ”persecution on sexist grounds, in that these women were treated as objects.”[334]

This analysis suggest that the women were attacked based on their biological sex, but also on the basis of how they were perceived in the context of the society where they lived – *as objects*. The situation is similar in some aspects to the situation of the Yazidi women. The Yazidi women were targeted not only because of their biological sex but also because of ISIS perceived role of women in society as they were considered sexual objects and/or domestic workers. Evidence suggest that ISIS had an organized slave trade of Yazidi *women*, motivated by the ”right” of ISIS militants to ”have concubines in the possession of the right hand” and to “buy, sell or give as a gift female captives and slaves, for they are merely property.”[335] Yazidi women were treated as *de facto* objects that could be sold and gifted at the will of the owner. Thus, evidence of the organized ISIS policy of slave trade of Yazidi *women* indicate persecution on the grounds of gender. If such official policy cannot be proven, evidence of a nexus can be inferred from

[329] Valerie Oosterveld, ‘Constructive Ambiguity and the Meaning of “Gender” for the International Criminal Court’ [2014] Law Publications. 96.
[330] Act on criminal responsibility for genocide, crimes against humanity and war crimes (2014:406) ‘UCA’. Section 2 Paragraph 8.
[331] Government of Sweden Regeringens proposition 2013/14:146 Straffansvar för folkmord, brott mot mänskligheten och krigsförbrytelser (n 24) 115.
[332] Sjöholm (n 216) 275.
[333] *The Prosecutor v Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* [2019] ICC Pre-Trial Chamber I ICC-01/12-01/18-461-Corr-Red. Para 701 (*my translation*).
[334] Ibid. Para 700 (*my translation*).
[335] ‘Text Posted on a Twitter Account Reporducing Excerpts from an ISIS Pamphlet, Available at: Www.Memrijttm.Org. Information Obtained in the Following Report: Human Rights Watch, "Slavery: The ISIS Rules’. 5 September 2015.’

the apparent pattern of the broader attack, where women and girls captured by ISIS were singled out and subsequently raped, beat and sold on slave markets. Again, the individual acts of Taha Al J fall within the overall patten of discriminatory targeting of women by ISIS and thus, the requirement of persecution on gender grounds can be satisfied.

3) As elaborated on above, the identity of being a women *or* being a Yazidi cannot fully capture the nature of discriminatory motive behind the persecution, as for example only non-Muslim women under ISIS control were held as slaves.[336] The Yazidi women were not targeted as Yazidis and as women but as *Yazidi women*. The ICC has accepted charges of persecution on multiple grounds brought by the Prosecutor. In the case of *Ntganda*, the ICC Trial Chamber noted that one ground of discrimination "will suffice, although a combination of more than one may equally form the basis for the discrimination".[337] From an intersectional approach, this broader interpretation of persecution that includes multiple grounds of discrimination constitutes a welcome step forward, but the reasoning is closer to an additive analysis of several factors than an analysis of intersecting factors. Thus, in *Ntganda*, discrimination is seen through the prisms of gender and religion separately and then charged and adjudicated on in an additive exercise.

Intersectionality prompts that the intersectional experience is greater than the sum of each ground of discrimination which is not reflected by such approach. In the newer ICC case of *Al Hassan* the Prosecutor also brought charges of persecution based on several grounds, but *coupled together*.[338] Based on this phrasing of the charges, scholars has drawn the conclusion that such formulation "puts the Court in a strong position to find that persecution on intersecting grounds is possible, as a matter of law."[339] In the ICTR case of *Akayesu*, the Prosecutor identified the particular vulnerability of displaced Tutsi women to SGBV. The intersecting identity of the victims (although intersectionality was not explicitly used in the indictment) of ethnicity (Tutsi) gender (woman) and status (displaced) formed the discriminatory basis that underpinned and paved way for the SGBV was reflected in the indictment.[340] The judges at the ICTR were provided with a conceptual foundation and understanding of the discriminatory context in which the SGBV was perpetrated and could thus come to the following conclusion that recognizes the intersectional dimension of the crime and thus conclude that the SGBV amounted to the mass atrocity crime of genocide:

> *These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting*

[336] Counter Extremism Project (n 291).
[337] *Situation in the Democratic Republic of the Congo in the case of the Prosecutor v Bosco Ntaganda. Judgement.* (n 287) 1009.
[338] *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud. Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* (n 341). Para 5. "persécution religieuse*, laquelle s'est doublée* d'une persécution sexiste"
[339] Rosemary Gray, 'International Criminal Court Poised to Interpret the Crime of "Gender-Based Persecution" for the First Time' (*INTLAWGRRLS*, 12 April 2018) <https://ilg2.org/2018/04/12/international-criminal-court-poised-to-interpret-the-crime-of-gender-based-persecution-for-the-first-time/> accessed 28 April 2021.
[340] *The Prosecutor v Jean Paul Akayesu. Judgement.* (n 277). para 12-13.

Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole[341]

Although the case concerned sexual violence in the form of genocide, the reasoning encompasses an intersectional understanding and approach, which Swedish courts can draw from in cases when dealing with gender-based crimes within the scope of crimes against humanity, especially persecution as it also contains a discriminatory *mens rea* element.

To ensure that the charges brought reflect the complex discriminatory motive involved in cases where victims are targeted on intersecting discriminatory grounds, prosecutors could firstly identify the intrinsically linked grounds of persecution. Then, the prosecutor could present a "separate" analysis of each intersecting ground of discrimination and subsequently explain how the crime of persecution was compounded by the multiple discriminatory grounds that necessitated the attack. [342] This could be highlighted in the "statement of the criminal act as charged" as this document forms the frame for the subsequent trial. The judges could then "consider persecution without necessarily delinking these grounds."[343]

4.3.3 Amended charges reflecting gender-based crimes in the case of Taha Al J

In addition to charges of gender-based crimes (of persecution) *per se*, the gendered harm should be recognized as an aggravated factor when assessing the crime of torture as a crime against humanity. In order to constitute torture as a crime against humanity the act must reach a certain threshold of severity in terms of pain or suffering of the victim.[344] According to the preparatory documents, an assessment of severity should take into account the objective and subjective contextual circumstances in which the act was perpetrated. Factors relating to the individual victims such as gender and age can thus have legal relevance in the gravity assessment and should thus be examined.[345] The acts that could constitute torture, namely the physical abuse and restricted access to food and water,[346] took place in a context of severe discrimination of Yazidi women in particular. Moreover, the compounded effects of the discrimination underpinning the crimes, based on religion and gender, led to exacerbated effects of harm suffered by the victims. Although the preparatory documents do not explicitly reference to taking into account intersectional factors of discrimination as an aggravating element, it arguably opens up for a broad interpretation through stating that "both objective and subjective" contextual circumstances must be taken into consideration when assessing the severity of the acts. Taking an intersectional approach and applying a contextual and teleological

[341] ibid.Para 731
[342] This argument was made by Valerie Oosterveld in relation to proceedings at the ICC. See Valerie Oosterveld, 'Gender, Persecution, and the International Criminal Court: Refugee Law's Relevance to the Crime Against Humanity of Gender-Based Persecution' 2006 Duke Journal of Comparative &International Law 49.
73.
[343] Ibid. 86.
[344] Government of Sweden Regeringens proposition 2013/14:146 Straffansvar för folkmord, brott mot mänskligheten och krigsförbrytelser (n 24) 241–243.
[345] ibid 101.
[346] ibid 242.

interpretation of the provision, the compounded effect on the harm suffered by the victims because of their intersecting identities could be taken into account and be reflected in the charges brought of torture.

Lastly, in line with the approach taken by the ICC Prosecutor in the Policy Paper , the indictment/"statement of criminal act as charged" should "highlight the gender-related aspects of other crimes." For example, the enslavement of Yazidis had clear gender aspects, as evidence suggest that only women were kept as slaves. Although the Swedish courts are not bound by the legal classification of charges brought by the prosecutor, it is bound by the statement of the criminal act as charged.[347] Reflecting gendered aspects of the conduct in indictments and charges ensures that such conduct is not obscured at trial, and places courts in a good position to adequately examine and punish gender-based crimes.

4.4 Concluding remarks - the impact of the intersectional approach beyond the example case

Gender-based crimes deserve recognition and attention within the scope of ICL, and this chapter has provided a framework for analysis that is applicable beyond the specific research subject. For example, if Sweden decide to repatriate ISIS affiliated mothers from the SDF led holding sites, intersectionality could serve as a framework for understanding both active and passive roles women had in the organization. For example, as indicated in Chapter 4.2, the wife of Taha Al J was a "moral police" tasked with ensuring that women complied with the rules of conduct and clothing established by ISIS.[348] Such conduct could potentially constitute persecution on the intersecting grounds of gender and religion as a crime against humanity. The intersectional approach refuses a narrative of "*women* as vulnerable victims" which is important to not fall into gender stereotypes that obscures the fact that gender-based crimes can be committed by men and women alike.

Furthermore, the contributions of the intersectional approach is not limited to cases involving ISIS militants and Yazidi victims. Tragically, conflicts that carry similar characteristic are ongoing worldwide and the importance of identifying, prosecuting and ultimately adjudicating on gender-based crimes lies in the best interest of justice, as it ensures non-impunity for perpetrators of such crimes. The above section has outlined how an intersectional approach is a useful and valuable tool for legal authorities in fighting impunity by holding perpetrators of gender-based crimes accountable, which is the objective of ICL in general and the UCA in particular.[349] Including charges of genocide against the Yazidis for the first time in the indictment against Taha Al J is a great leap forward in terms of justice for the Yazidi victims, however justice is not truly served if indictments and subsequent convictions only reflect *some parts* of the criminal conduct. In the example case of Taha Al J, the Prosecutor should have

[347] SFS 1942:740. The Swedish Code of Judicial Procedure. Chapter 30 Section 3.
[348] Ibid.
[349] Government of Sweden Regeringens proposition 2013/14:146 Straffansvar för folkmord, brott mot mänskligheten och krigsförbrytelser (n 24) 75.

cumulated charges and included persecution as a crime against humanity. Persecution should not be subsumed in charges of genocide, as it is a separate crime against humanity that warrant separate legal attention. Cumulative charges and convictions based on the same acts are allowed according to the preparatory documents to the UCA, and has been practiced by Swedish courts when adjudicating on international crimes before.[350]

The persecution of especially women and girls on the basis of their gender is a global concern, both in peace time and in conflict. The persecution can, but must not, have sexual elements. Establishing a strong norm against gender-based crimes, in particular against gender-based persecution, in ICL is "critically important" and the exacerbated harms at the intersection of identities deserve increased recognition in ICL.[351] As courts in "non-territorial States" are practically the only avenue left for obtaining justice for victims and fighting impunity for ISIS mass atrocity crimes in Iraq and Syria, Sweden plays an important role in establishing such norm. This would set an important blueprint for categorizing, charging and adjudicating on conduct as gender-based crimes in coming cases in Sweden, but would also set an important standard for domestic adjudication of mass atrocity crimes that could have ripple effect in national courts of other Rome Statute State Parties that apply rules of ICL in a similar capacity. Moreover, decisions from national courts applying rules of international law is a subsidiary legal source for the ICC.[352] State Parties to the Rome Statute can thus have an impact on the consolidation of a norm against gender-based persecution internationally.

[350]ibid 224., Fredrik Björklund, 'Brottskonkurrens' in Mark Klamberg (ed), *Lagföring i Sverige av internationella brott* (Jure 2020) 185.
[351] Compare argument made by Emely Chertoff in relation to the ICC, see Chertoff (n 236) 1064.
[352] Statute of the International Court of Justice 1946.Article 38(d).

5. Reflections and conclusions

5.1 Positioning the intersectional approach in relation to the objectives of International Criminal Justice

Chapter 4 has outlined how an intersectional approach can benefit the Swedish legal authorities in investigations, prosecutions and adjudication of gender-based crimes. Summarized, the main contribution is that an intersectional approach allows legal authorities to contextualize individual acts and relate them to the over-all pattern of discrimination and criminality in a given context. Bringing cumulative charges and verdicts including charges of gender-based crimes, in addition to charges of other mass atrocity crimes and for example charges of terrorism when appropriate, ensures that charges and verdicts reflect the full scope of criminal conduct and thus ensures accountability for *all* mass atrocity crimes. This is in line with the objective of fighting impunity for perpetrators of mass atrocity crimes pursued by both international criminal justice and the Swedish legislator.

As established in Chapter 3.1 the objectives of the law should guide the interpretation and application of a certain rule. As argued by Klamberg, the objectives identified in international criminal justice can however "pull in different directions" which can create both tensions and a fragmentation of the procedural system as there is no "universal and fixed hierarchy" of objectives.[353] Thus, proposing an intersectional approach with the motivation of fighting impunity does not make a convincing argument if such approach stands in tension or contravenes any other identified objective. The potential tension closest to mind is with the overarching aim of ensuring legal certainty in criminal procedure. This aim is formulated in, *inter alia*, the principle of legality, *nullum crimen [nulla peona] sine lege*, meaning "no crime and no penalty without law". The following section will assess if the intersectional approach violates the principle of legality. In subsequent sections, a reflection will be made of the how the intersectional approach relate to the other enumerated objectives of international criminal justice.

5.1.1 The principle of legality

The principle of legality is a well-established principle which forms part of customary international law and is recognized by both the *ad hoc* tribunals of ICTR and ICTY and by the ICC.[354] In Swedish law, several provisions embody the principle.[355] The meaning of the principle is that the existence of a crime at any given point depends on the existence of legislation that criminalizes the conduct in question. Moreover, in order to impose a specific penalty for an offence, the existing legislation at the time of the commission must include the

[353] Klamberg (n 122).
[354] The Rome Statute (n 2).Articles 22-24. Werle and Jeßberger (n 1) 48–49.
[355] The principle is embodied in the Swedish Instrument of the Government Chapter 2 Section 10 pargraph 1, Chapter 1 Section 1 Brb and Article 7 of the European Convention on Human Rights and Fundamental Freedoms.

penalty as one of the possible sanctions for the crime. The purpose of the principle is to make sure that the legislation is predictable and specific so individuals can reasonably foresee the legal consequences of their conduct.[356] The principle encompasses the principle of non-retroactivity (meaning that the law cannot be applied retroactively), the principle of specificity (specificity, certainty, foreseeability and the prohibition of ambiguity in criminal legislation) , and the prohibition of analogy (the legislation cannot by analogous application be extended beyond what the wording allows).[357]

The principle of legality relates to the topic of the research because interpretation of the law must be conducted with respect to the principle, which entails a restrictive construction of the law. The point of departure is that a provision should be applied according to its wording, which should be specific according to the principle of specificity. However, the principle of legality does not bar legal authorities from interpreting the law. It is impossible to create a law that covers every situation, thus the law will always contain a certain degree of (accepted) uncertainty that necessitates interpretation. Legal authorities must interpret the law in accordance with the motives of the legislator, which are usually laid out in the preparatory documents to the law.[358] If multiple interpretations of a rule is possible, the legal authorities should exercise caution and only in exceptional cases interpret the law in a manner that is less favourable than the option to the accused.[359] The prohibition of analogy entails that judges cannot interpret the law in a manner that contradicts the wording of the rule, or in a manner that creates new law.[360] When applying the intersectional approach of interpretation, potential tensions could occur in the demarcation between permissible interpretation and impermissible analogy. Does the intersectional approach entail the prohibited creation of a new crime or criminal conduct under existing law through analogy?

Mass atrocity crimes are regulated in Swedish law, but in order to define the meaning and scope of the provisions, legal authorities must resort to customary international law as multiple provisions proscribes conduct "in contravention of customary international law".[361] The preparatory documents to the UCA state that "international criminal law in this field thus constitutes the framework for both the formulation and application of national law and ultimately sets the limits for what is to be punishable." [362] Against this background, the UCA carries an inherent (acceptable) uncertainty that necessitates interpretation when applying its provisions.

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[356]Magnus Ulväng, 'Comment to Brottsbalken Chapter 1 Section 1' (*Lexino*, 1 September 2017). ICRC, 'General Principles of International Criminal Law' (ICRC 2014) 03/2014 </general-principles-of-criminal-law-icrc-eng%20(1).pdf> accessed 10 May 2021.

[357] Ulväng (n 363).

[358] Se bl.a. RF 1 kap 1 § där allt makt utgår från folket. Folkvalda riksdagen stiftar lagar och det åligger domstolarna att tillämpa dessa lagar.

[359] *NJA 1994 s 480* [1994] Supreme Court of Sweden 'Högsta Domstolen' B1156-92., *NJA 2012 s 764* [2012] Swedish Supreme Court 'Högsta Domstolen' B2535-11.

[360] Petter Asp, Magnus Ulväng and Nils Jareborg, *Kriminalrättens Grunder* (Iustus Förlag 2010) 62–63.

[361] Act on criminal responsibility for genocide, crimes against humanity and war crimes (2014:406) 'UCA'. See*, inter alia*, Section 2 Paragraph 4, 5, 6, 7, 8.

[362] *NJA 1994 s. 480* (n 366).

A strictly textual interpretation of the provisions proscribing persecution and torture as a crime against humanity does not assist in defining the meaning and scope of the criminalized conduct. Instead, as elaborated on in the previous chapter, the preparatory work states that legal authorities can seek guidance in International Human Rights Conventions, for example in CEDAW that explicitly recognizes intersectional discrimination, when determining what constitutes discrimination within the scope of persecution. Moreover it instructs legal authorities to employ a contextual interpretation of the gravity of torture, which entails taking into account that victims' multiple factors of vulnerability increases the gravity a certain conduct. Lastly, the preparatory documents instruct legal authorities to interpret the law with consideration to the ICL framework and how such rules "have been interpreted and applied by for example international tribunals and in particular the International Criminal Court".[363] This has been confirmed by the Swedish Supreme Court.[364]

Thus, Swedish legal authorities can draw on the developments and findings of *ad hoc* tribunals and the ICC in cases that encompass an understanding of how discrimination on multiple or intersecting grounds underpin the commission of gender-based crimes, for example the above mentioned ICTR cases of *Akayesu and Gacumbitsi* and the case *Al Hassan* which is currently before trial at the ICC.

Turning to the analysis of the example case in Chapter 4, the intersectional approach contributed to *discerning* conduct that is already criminalized as persecution and torture as a crime against humanity. Taking into account intersectional discrimination, meaning charging and adjudicating on persecution on *intersecting* grounds of gender and religion and taking into account such factors when assessing torture, arguably constitutes a permissible clarification of the provisions in line with international human rights law developments and international case law developments. As argued by Maučec in relation to implementing intersectionality at the ICC, *nullum crimen sine lege*

> cannot be understood as disallowing the gradual clarification of international criminal provisions on individual criminal responsibility and on elements of international crimes through more progressive and flexible legal interpretation from case to case, as long as the resultant reasoning is consistent with the essence of the international criminal offence and could reasonably be foreseen.[365]

This view is supported by the ICTY, as the Appeals Chamber held in *Aleksovski* that the principle of legality

> does not prevent a court, either at the **national** or international level, from determining an issue through a process of interpretation and clarification as to the elements of a particular crime; nor

[363] Government of Sweden Regeringens proposition 2013/14:146 Straffansvar för folkmord, brott mot mänskligheten och krigsförbrytelser (n 24) 71.
[364] *Högsta Domstolens dom i mål B 5595-19* Swedish Supreme Court 'Högsta Domstolen' 5 May 2021.para 6.
[365] Maučec, 'The International Criminal Court and the Issue of Intersectionality—A Conceptual and Legal Framework for Analysis' (n 53) 25–26.

> does it prevent a court from relying on previous decisions which reflect an interpretation as to the meaning to be ascribed to particular ingredients of a crime [emphasis added].[366]

Against this background, this research argues, in line with the conclusions of Maučec in relation to the ICC, that an intersectional approach can be taken by national legal authorities without violating the principle of legality. As the approach does not entail creating new crimes or criminal conduct and as it is consistent with the essence of the provision, such interpretation could thus provide a reasonable and foreseeable clarification of the law.[367] The findings of ICC's Chambers are not binding on the IC in future cases, and thus Maučec argues that the intersectional approach can be introduced through progressive case law development.[368] In the Swedish context, this underscores the importance of setting a blueprint for the effective prosecution and adjudication of gender-based crimes from start. Swedish Courts are not legally obliged to adjudicate in accordance to precedents but in practice, lower instances perceive precedents from the Supreme Court as more or less binding.[369]

5.1.2 The contributions of the intersectional approach to the objective of prevention and promoting the interests of the victim

How does the intersectional approach relate to the other objectives of international criminal justice enumerated in Chapter 3.1 of this research? As already established, the explicitly mentioned objective of the UCA in the preparatory documents is to fight impunity for perpetrators of mass atrocity crimes. The preparatory documents also briefly mentions the objective of preventing mass atrocity crimes as it states that "serious violations of international law must, to the furthest extent possible, be prevented and punished".[370] However, the preparatory documents does not elaborate on the meaning and scope of the preventative function of applying rules of ICL in Swedish courts. Moreover, the preparatory documents does not mention or discuss any of the other enumerated objectives relating to, *inter alia*, a broader construction of justice for victims including creating a historical record, giving a voice to victims and promote reconciliation.[371]

Holm argues that Sweden has obligations that go beyond the crime control logic of retribution and prevention. When implementing obligations under international law, as in this case the

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[366] *Prosecutor v Zlatko Aleksovski, Appeals Judgement* [2000] ICTY Appeals Chamber it-95-14/1-A.para. 127. A similar approach was adopted in D*elalić: Prosecutor v Zejnil Delalić et al Appeals Judgement* [2001] ICTY Appeals Chamber it-96-21-A.para. 173.

[367] *See* Maučec, 'The International Criminal Court and the Issue of Intersectionality—A Conceptual and Legal Framework for Analysis' (n 53) 27.

[368] Maučec, 'Law Development by the International Criminal Court as a Way to Enhance the Protection of Minorities—the Case for Intersectional Consideration of Mass Atrocities' (n 53).

[369] Åklagarmyndigheten, 'Prejudikat' (*Åklagarmyndigheten*) <https://www.aklagare.se/ordlista/p/prejudikat/> accessed 10 May 2021.

[370] Government of Sweden Regeringens proposition 2013/14:146 Straffansvar för folkmord, brott mot mänskligheten och krigsförbrytelser (n 24) 75.

[371] Fanny Holm, 'Om Den Internationella Straffrättens Ändamål i Sverige', *Festskrift till Örjan Edström* (Umeå Universitet 2019) 186–189.

ratification of a treaty, the considerations made by the Contracting States should also be considered as a basis for the implementation of the instrument nationally. The lack of discussion of the objectives indicate, according to Holm, that conformity is assumed to exist.[372] This would mean that the application of rules of ICL through the UCA in Swedish courts aim to for example "give victims justice" beyond the logic of punishing the perpetrator. Holm argues that the lack of discussion of such objectives indicate that the legislator has not reflected on the purpose of applying rules of ICL in Swedish courts and how such application relate to the international criminal law system in general and the context in which the crimes are committed, and concludes that this "this unreflective approach risks having consequences for how well the system lives up to its purposes." [373] She requests a discussion of how the objectives of international criminal justice can and should be pursued nationally. [374]

This paper argues that the intersectional approach could make a valuable contribution to the investigation, prosecution and adjudication of gender-based crimes not only by operationalizing the objective of fighting impunity, but also by providing a framework for analysis of how Swedish criminal procedures can contribute to the objectives of prevention and justice for victims. This could potentially bridge the conceptual gaps between the objectives of applying the norms in national and international courts. Ensuring that both national and international courts pursue the same objectives in the capacity each system has could entail a more coherent application and an improved global fight against mass atrocity crimes in general and gender-based crimes in particular. Consequently, if the intersectional approach can contribute to the achievement of several objectives of international criminal justice, without interfering with the principle of legality, the argument that national courts *should* interpret rules relating to gender-based crimes with such approach is substantiated. The following section will highlight and reflect on areas where intersectionality can contribute to the, by Holm, requested discussion of how the objectives of international criminal justice *could* be pursued domestically by Swedish courts.

5.1.2.1 The objective of prevention

The Swedish criminal procedure is guided by, *inter alia,* the objective of punishing perpetrators and preventing new crimes.[375] One purpose of punishing perpetrators for committing crimes is to deter the individual and other potential perpetrators from committing such crimes again. Close to this argument of prevention lies the "educating function" of international criminal justice, where international courts and tribunals communicate that a certain conduct is wrongful and criminal. This public condemnation is important as it can internalize within the public moral and thus prevent the commission of new crimes.[376] Thus, the criminal proceedings have a significant value in *operationalizing* the statement that "the most serious crimes of concern to

[372] ibid 189–190.
[373] Ibid. 190
[374] Ibid.
[375] Ibid 186.
[376] Holm, 'Den Internationella Straffrättens Ändamål' (n 125) 49. *The Prosecutor v. Dario Kordic and Mario Cerkez. Appeals Judgment.* (n 128).

the international community as a whole must not go unpunished."[377] The communicative function has been considered in academia as the most prominent and important objective of international criminal law.[378] Bearing in mind this function, it is yet more concerning that gender-based crimes has received so little judicial attention at both the international and national level. The preparatory documents to the UCA briefly mentions the "special character" of mass atrocity crimes, and in this context states that "it should be recalled that there is a specific obligation to convey information and educate about the rules of international law within this field."[379] This is mentioned in relation to the motivation of regulating mass atrocity crimes in a separate Act, and the educative function is not discussed any further in neither the preparatory documents nor the case law. [380] As argued in Chapter 4, the intersectional approach can assist in directing attention towards gender-based crimes in investigations, indictments and verdicts. It is of crucial value that the condemnation of gender-based crimes is not merely taking form in Statutes, Acts or Policy Papers, but is operationalized through case law by prosecuting and adjudicating on such crimes. The establishment of a strong norm against gender-based persecution in case law would send the clearest and strongest message of deterrence to the public, meaning that Sweden, as the example state, does *not* accept gender-based crimes and actually intends to *do* something about it.[381]

5.1.2.2 The objective of ensuring justice beyond retribution

The Rome Statutes Preamble acknowledges "that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity". This statement indicates a shift towards a more victim-centred approach, in contrast with the Nuremberg Trials and the ICTY and ICTR that was gaining much criticism for a lack of focus on victims needs and concerns.[382] Against this development, scholars have discerned an underlying idea of a broader construction of justice beyond retribution that includes a focus on the victims at the ICC. This shift is generally noticeable in relation to both "domestic" crimes and mass atrocity crimes. Scholars have described this idea of justice as ""providing victims with redress, which in some ways compensates them for the harm they have suffered and the losses incurred"[383], "official acknowledgement of past injustices and the sufferings of victims"[384] and "collective reconciliation and reparations to victims".[385] These objectives are connected to the "special character" of mass atrocity crimes and are not generally pursued by criminal law.

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[377] The Rome Statute (n 2). Preamble (4)

[378] Anthony Duff, 'Authority and Responsibility in International Criminal Law. Samantha Besson & John Tasioulas' in Samantha Bessom and John Tasioulas (eds), *he Philosophy of International Law,* (2010).

[379] Government of Sweden Regeringens proposition 2013/14:146 Straffansvar för folkmord, brott mot mänskligheten och krigsförbrytelser (n 24) 75.

[380] Holm, 'Om Den Internationella Straffrättens Ändamål i Sverige' (n 378) 188.

[381] Compare argument by Emely Chertoff in relation to establishing such norm at the ICC: Chertoff (n 236). 1069-1075.

[382] Christine Evans, 'Reparations for Victims in International Criminal Law', *The Right to Reparation in International Law for Victims of Armed Conflict* (Cambridge University Press 2012).82-122.

[383] Cherif Bassiouni (n 120) 124.125.

[384] William Schabas, *An Introduction to the International Criminal Court* (Cambridge University Press 2007).s. 327-28.

[385] Rolf Einar Fife, 'Article 77 – Applicable Penalties' in Otto Triffterer (ed), *In Commentary on the Rome Statute of the International Criminal Court: Observers Notes, Article by Article* (2008).

In an international comparison, victims of a crime obtain a strong position the criminal procedure in Sweden. Moreover, the legislator has increasingly recognized vulnerable groups such as for example those subjected to domestic violence and children, as subjects and not objects in legal contexts which has resulted in a development and integration of a victim considerations.[386] Law enforcement agencies have in reports increasingly referred to international norms and rights that relates to the rights and concerns of victims of crimes, to the extent that scholars have indicated a current trend towards an *emphasis* of the victim perspective.[387] The discussions are centred around which measures should be taken in order to support the victims and improve their situation, especially in relation to vulnerable groups such as victims of domestic violence, children and victims of hate crime.[388] This development, in combination with the strong focus on victims noticeable in the Rome Statute, makes it even more remarkable that these discussions and measures do not stretch to the victims of mass atrocity crimes. A discussion or mention of victims' rights and concerns is completely absent in the preparatory documents to the UCA.[389] Holm concludes that issues pertaining to victims' rights and concerns and mass atrocity crimes are not discussed in conjunction in Sweden.[390] This can be problematic as mass atrocity crimes, including sexual and gender-based crimes, have a special and distinct character from domestic crimes. This necessitates a discussion of what measures can and should be taken in relation to victims of such crimes.

The intersectional approach is considered "victim-centred" and could thus serve as a framework for analysis of how the broader objectives of obtaining justice for victims pursued by international criminal justice can be ensured domestically in Swedish courts. A common reason to inaction with regards to mass atrocity crimes, in particular sexual and gender-based crimes, is that it is difficult to obtain evidence.[391] Research has indicated that this is partly due to the fact that SGBV is highly stigmatized and victims are afraid to speak about their experiences.[392] The intersectional approach could help, as argued by Kather in relation to Germany, Sweden to reflect on the special support systems for victims of such crimes that needs to be implemented from a victim-centred perspective, including "legal, medical, psychosocial and community support."[393] As Kather asserts, "it does not make sense to have a universal jurisdiction framework in place, if the appropriate protective measures and support structures are missing."[394]

[386] Anna Kaldal and Helena Sutorius, *Bevisprövning Vid Sexualbrott* (Nordsteds Juridik 2003). 190.
[387] Fanny Holm, 'Brottsoffer' in Mark Klamberg (ed), *Lagföring i Sverige av internationella brott* (Jure 2020).
[388] ibid 337–338.
[389] ibid 339.
[390] Ibid.
[391] See, inter alia, Human Rights Watch, '"These Are the Crimes We Are Fleeing" Justice for Syria in Swedish and German Courts' (2017) <https://www.hrw.org/report/2017/10/04/these-are-crimes-we-are-fleeing/justice-syria-swedish-and-german-courts> accessed 10 April 2021.
[392] Ibid.
[393]Alexandra Lily Kather quoted in: Hannah El-Hitami, 'Syrian and Yazidi Trials: Why Victims' Lawyers Want Sexuxal Violence Considered' (5 February 2021) <https://www.justiceinfo.net/en/73307-syrian-and-yazidi-trials-sexual-violence.html> accessed 10 May 2021.
[394] Ibid.

Supporting victims in coming forth and telling their stories, and subsequently bringing charges and verdicts in Swedish courts that adequately reflect the gender-based crimes committed by ISIS against the Yazidis is in line with the broader perception of justice for victims pursued by international criminal justice. It would contribute to the objective of giving victims a voice and would at the time contribute to the objective of "seeking the truth" and creating a historical record as instances of gender-based crimes would not be obscured in the legal procedure. Moreover, the intersectional analysis could assist legal authorities in evaluating if any special measures should be taken relating to reparations to victims. As of now, if the convicted person is unable to pay reparations, victims of crimes committed outside the territory of Sweden can only obtain reparations from the state if the victim was domiciled in Sweden at the time of commission of the crime.[395] This effectively excludes victims of mass atrocity crimes, which is a flaw that was highlighted by the victim's council in the case of *Arklöv* who requested the establishment of a special fund for victims.[396]

Lastly, reconciliation is an identified objective pertaining to the broader construction of justice pursued by international criminal justice. As identified by Holm, the objective of reconciliation is not traditionally pursued by Swedish courts. At first glance, reconciliation might seem most relevant in contexts characterized by a transition from war to peace and have little relevance for legal procedures in "non-territorial States". However, as already mentioned, the increased attention to the investigation and prosecution of alleged perpetrators of mass atrocity crimes in Sweden is to a large extent based on the influx of refugees and asylum seekers. This brings the need for a consideration of how legal procedure could and should contribute to reconciliation close to home, as the group likely includes both perpetrators and victims which will live side by side in Sweden. Holm argues that this situation might create tensions, and as such the situation should be recognized and appropriate measures for victim-support that complements the criminal procedure should be discussed by the legislator and other relevant actors in society.

5.2 Conclusions

The research conducted in this paper has aimed to first answer in what capacity Swedish courts can exercise jurisdiction over mass atrocity crimes. The second and third research questions that has guided the research relate to which law govern gender-based crimes against humanity and how the provision *can* and *should* be interpreted and applied by Swedish legal authorities.

As the research has shown, the issue is thorny. Swedish courts have unconditional universal jurisdiction over mass atrocity crimes, however in practice some nexus between the suspect and Sweden must exist for legal authorities to initiate investigations. A conclusion can be drawn that Sweden does not shoulder the role of a "global enforcer" of international criminal justice, but rather ensures that Sweden is no "safe-haven" for perpetrators of mass atrocity crimes. The UCA is a new law, and crimes against humanity has never been adjudicated on in a Swedish court. As Swedish legal authorities are gathering experience and competence in dealing with

[395] SFS 2014:322 Brottskadelag. Section 2 paragraph 2.
[396] Holm, 'Brottsoffer' (n 394) 341.

mass atrocity crimes, new prosecutorial activities such as structural investigations has been introduced. This indicates a shift towards a "complementary preparedness" approach. These developments are important against the fact that domestic courts are the primary fora for the adjudication of mass atrocity crimes and that domestic courts of "non-territorial" States constitute the only avenue available to fight impunity for mass atrocity crimes in situations such as the one elaborated on in this paper. It can thus be concluded that the thesis formulated in Chapter 1.2, that Sweden, as a "non-territorial State" play an important role in fighting impunity for perpetrators of sexual and gender-based crimes, is substantiated.

International Criminal justice has failed to adequately reflect the magnitude and prevalence of gender-based crimes committed around the world in charges and verdicts. Thus, when the idea of fighting impunity for perpetrators of mass atrocity crimes comes close to home in domestic courts of "non-territorial states", identifying and addressing gender-based crimes constitute another complexity as the international jurisprudence is scarce and to some extent underdeveloped. To counteract international conceptual shortcomings and advance the fight against impunity for gender-based crimes, this research has proposed that Swedish courts should take an intersectional approach.

Why does this research hold that it is so important to recognize and address gender-based crimes? It matters because violence against in particular women and girls in contexts characterized by conflicts has a profound impact on victims lives, a suffering that also extends to victims' families and communities. Conflicts are often characterized by racial, religious or political tensions. It would be an oversimplification of reality to believe that the gender-based crimes that are carried out in such contexts is only underpinned by discrimination on gender grounds. The crimes committed by ISIS against the Yazidis is both a clear and a poignant example of how victims are targeted, not because of a distinct, separate part of their identity, but on the grounds of the intersecting facets of, in this case, gender and religion that constitute the identity of the individual. When legal authorities miss to make these connections, gendered aspects of committed mass atrocity crimes are obscured. Sexual crimes such as, inter alia, rape, are conceptually delinked from the over-all discriminatory context and thus considered "opportunistic" and unrelated. The fact that persecution on the basis of gender was not recognized as worthy of international attention by ICTR and ICTY, and as only one case before the ICC has included such charges, indicates that the impunity gap is not yet nearly about to be closed for such crimes.

The intersectional approach equips legal authorities with tools to understand the context in which an attack was carried out in by paying attention to the victims' identities and the relation between the identities of victims and the commission of the attack. Against this analysis, legal authorities can connect the individual acts perpetrated by the accused to such context and by this effort potentially recognize SGBV that qualifies as sexual and gender-based mass atrocity crimes to a higher degree than what international criminal justice has done thus far. Hence, the second limb of the thesis formulated in chapter 1.2, that Swedish legal authorities should employ an intersectional approach in order to "prosecute to the fullest extent possible" perpetrators of mass atrocity crimes, is substantiated.

It is perhaps not likely that Sweden will adopt an approach of a "global enforcer" of international criminal justice, but it is important that Swedish legal authorities, and their equivalents in other "non-territorial" States, ensure that adequate attention is directed to investigating, prosecuting and adjudicating gender-based crimes. The effects of contributing to the establishment of a strong norm against gender-based persecution in Swedish case law, that is sensitive to discrimination on intersectional grounds, could have ripple effects far beyond the example situation analysed in this paper. As the adjudication of mass atrocity crimes are coming closer to the national courts of EU member States, legal authorities are likely to look to legal developments in neighbouring States when grappling with the complex issue of interpreting and applying rules pertaining to mass atrocity crimes.[397] Condoning impunity for perpetrators of gender-based crimes stands in direct violation of the foundational values of the international human rights system, international humanitarian law and international criminal law. Justice is not obtained through enacting laws proscribing gender-based crimes, if such laws are not applied in practice. Sweden plays an important role in advancing the global fight against impunity for perpetrators of gender-based crimes through setting a blueprint for the investigation, prosecution and adjudication of such crimes in domestic courts, and the intersectional approach could help legal authorities in this pursuit.

[397]The Swedish Supreme Court holds that domestic verdicts from other States can have relevance for the interpretation of Swedish law. *Högsta Domstolens dom i mål B 5595-19* Swedish Supreme Court 'Högsta Domstolen' 5 May 2021.para 17.

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