

Accountability for ISIS Fighters

The Possibility of Prosecuting them before an International Criminal
Tribunal for Responsibility of Core International Crimes

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Table of Contents

Declaration	3
Dedication	4
Abbreviations	5
Chapter 1: Introduction	6
1.1: Research outline	7
1.2: Research questions	8
1.3: Research methodology	9
1.4: Background of ISIS	10
Chapter 2: The core international crimes allegedly committed by ISIS	13
2.1: Crime of genocide	16
2.1.1: General overview	16
2.1.2: Yazidi as a protected group	19
2.1.3: Killing members of the Yazidi community	21
2.1.4: Causing serious bodily and mental harm on Yazidi people	24
2.1.5: Deliberately inflicting on the Yazidi community	28
2.1.6: Imposing measures to prevent births and transferring children	29
2.1.7: Mental element	31
2.2: War crimes	34
2.2.1: General overview	34
2.2.2: Armed conflicts	36
2.2.3: Individual acts	39
2.2.3.1: violations of article 3 common to the Geneva Conventions	40
2.2.3.2: Forcibly displacing and attack against civilians	43
2.2.3.3: Attack against protected buildings	44
2.2.3.4: Conflict-related gender-based violence	46
2.2.3.5: Employing prohibited weapons of warfare	49
2.2.3.6: Enlisting children into armed forces	50
2.3: Crimes against humanity	52

2.3.1: General overview	52
2.3.2: Individual acts	54
Chapter 3: Possibility of prosecuting ISIS fighters	56
3.1: Ongoing ISIS fighters' prosecution before the national courts	57
3.1.1: Iraq and Kurdistan Region of Iraq	58
3.1.2: Self-Administration of North East Syria	62
3.2: Possibility of prosecuting ISIS fighters before the ICC	64
3.3: Possibility of prosecuting ISIS fighters before an Ad hoc tribunal	69
3.4: Possibility of prosecuting ISIS fighters before a hybrid court	73
Chapter 4: Conclusion	75
List of references	77
Primary references	77
A: Legal instruments	77
B: United Nations resolutions	77
C: United Nations reports	78
D: Governmental and Non-Governmental organizations reports	79
E: Court cases	80
Secondary references	81
A: Books	81
B: Journals	81
C: Other sources	83

Declaration

I hereby declare that this thesis and the work presented in (Accountability for ISIS Fighters; the Possibility of Prosecuting them before an International Criminal Tribunal for Responsibility of Core International Crimes) is entirely my own. Where I have consulted the work of others, this is always clearly attributed. Where I have quoted from the work of others, the source is always given. I am aware that the thesis in digital form can be examined for the use of unauthorized aid and in order to determine whether the thesis as a whole or in parts may amount to plagiarism. I am aware that a false assurance fulfils the elements of fraud in accord with § 16 ABMStPO/Phil and will result in the consequences proclaimed there, this thesis was not previously presented to another examination board and has not been published.

It is intended to be submitted as partial fulfilment of the requirements for the MA degree in Human Rights at Friedrich Alexander University of Erlangen-Nuremberg, Germany.

Signed

Hawre Ahmed

KRI, July 2020

Dedicated to.

My mother who raised me in a patriarchal society and educated me to respect other's rights equally.

Nadia Murad who became the voice of the voiceless Yazidi girls.

All the victims of ISIS's gender-based crimes.

List of Abbreviations

ANSA	Armed Non-State Actor
ECCC	Extraordinary Chambers in the Courts of Cambodia
IAC	International Armed Conflict
ICC	International Criminal Court
ICJ	International Court of Justice
ICL	International Criminal Law
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
IHRL	International Human Rights Law
IHT	Iraqi High Tribunal
IICIS	Independent International Commission of Inquiry on Syria
IMT	International Military Tribunal at Nuremberg
IMTFE	International Military Tribunal for the Far East
ISIS	Islamic State of Iraq and Syria
KRG	Kurdistan Regional Government
KRI	Kurdistan Region of Iraq
NIAC	Non-International Armed Conflict
OTP	Office of the Prosecutor
SCSL	Special Court for Sierra Leone
SDF	Syrian Democratic Forces
STL	Special Tribunal for Lebanon
UN	United Nations
UNAMI	United Nations Assistance Mission for Iraq
UNGA	United Nations General Assembly
UNITAD	Investigative Team to Promote Accountability for Crimes Committed by Da'esh
UNSC	United Nations Security Council

Chapter 1: Introduction

The Islamic State of Iraq and Syria (ISIS) emerged from the ash of unsolved political, religious and sectarian conflicts in the Middle East that motivated many extreme terrorists around the globe to join their ugly, savage, inexplicable, nihilistic, valueless, barbaric actions¹ by using their self-interpretation and extreme verses of Quran, then became the greatest threat to the humanity in recent years. It started invading a big swath in Iraq and Syria and committing most core international crimes, including the crime of genocide against Yazidi community in 2014, war crimes, crimes against humanity, specifically sexual and gender-based violence, abduction, use of prohibited weapons, extrajudicial killings, torture, indiscriminate attacks, recruitment and use of children, attacks against religious and ethnic groups, displacing civilian people.

As a response to the threat of ISIS, the international community formed a global military coalition to defeat them in Sep 2014, and the United Nation Human Rights Council on 22 Aug 2011 established the Independent International Commission of Inquiry on Syria (IICIS) to investigate all alleged violations of international human rights law since Mar 2011 in Syria, which since the emerging of ISIS, the Commission recorded the crime of genocide, war crimes, and crimes against humanity. Then the United Nations Security Council (UNSC) in 2017 created the United Nations Investigative Team to Promote Accountability for Crimes Committed by Daesh (UNITAD) to support domestic efforts to hold ISIS accountable by collecting evidences in Iraq of acts to war crimes, crimes against humanity and genocide committed by ISIS.

During the fighting against ISIS many ISIS fighters were captured by different states and authorities, the Iraqi and Kurdistan Region of Iraq (KRI) judiciaries convicted at least 7,374 ISIS suspects,² In northeast Syria, the Kurdish-led Syrian Democratic Forces (SDF) hold about 12,000 suspected of ISIS affiliation, including 4,000 foreigners from almost 50 different nationalities.³ Turkey holds 2,280 ISIS members,⁴ and many ISIS-linked suspects were arrested in western countries. All these individuals are being dealt differently according to different legal systems, but none has been convicted for committing core international crimes yet.

¹ John Kerry, USA Secretary of State, 2014, 'statement on murder of James Foley' <https://2009-2017.state.gov/secretary/remarks/2014/08/230772.htm>

² Human Rights Watch, 2017, 'Flawed Justice and Accountability for ISIS Crimes in Iraq'.

³ Human Rights Watch, 2019, 'ISIS Suspect Transfers to Iraq Replete with Risks' <https://www.hrw.org/news/2019/11/01/isis-suspect-transfers-iraq-replete-risks>

⁴ The New York Times, 2019, 'Turkey's Deportations Force Europe to Face Its ISIS Militants' <https://www.nytimes.com/2019/11/17/world/europe/turkey-isis-fighters-europe.html>

1.1: Research Outline

In order to answer the research questions and meet the purpose of this thesis in academic way, the thesis is divided into four chapters. The first chapter is an introduction to the thesis and definition of the ISIS from its emerging until its defeat. The second chapter deals with the core international crimes which allegedly committed by ISIS fighter and goes profoundly to find the evidentiary bases of the crime of genocide, war crimes and crimes against humanity, also this chapter continues with description of these crimes and comparing with the legal instruments, international treaties, customary international law, and case law of international criminal tribunals. The third chapter looks for the prosecutorial options for bringing ISIS fighters into justice by examining the ongoing trial in Iraq and North East Syria, and the possibility of prosecuting the ISIS fighters before the International Criminal Court, an Ad Hoc criminal tribunal or a Hybrid court. The fourth chapter describes conclusion of the thesis.

1.2: Research Questions

This research aims to find answers to questions under the international criminal law jurisprudence which relate to the accountability for the fighters of the Islamic State of Iraq and Syria and the possibility of prosecuting them before an international criminal tribunal for responsibility of core international crimes, specifically tried to find answers for two questions:

1. Did ISIS fighters commit core international crimes? if yes
2. How can the ISIS fighters be brought into justice?

1.3: Research Methodology

This research adopts legal approach to explore the allegedly core international crimes which may have been committed by ISIS fighters, the approach is a descriptive method for explaining what have been done by the ISIS fighters, and a normative method for investigating and comparing the crimes which have been defined by the international criminal law jurisprudence.

The research uses two sources, the primary and secondary, the first source examining legal instruments, reports of United Nations, reports of Governmental and Non-Governmental Organizations, international treaties, customary international law, United Nations resolutions and case law of international courts. The second source consults articles of academics in journals, books, and other relevant publications including internet sources.

The researcher firstly scrutinizes the issues in the international criminal jurisprudence and then comparing with the actions that ISIS fighters have done by evaluating both sources.

1.4: Background of ISIS

The Islamic State of Iraq and Syria (ISIS) or the Islamic State of Iraq and Levant (ISIL), also known as the Islamic State (IS), or in Arabic language acronym (Daesh) which refers to *al-Dawle l-Islamiyah fi Iraq wa Sham* is a Salafi Jihadist military organization in Syria and Iraq, the goal of the organization is to establish an Islamic Caliphate based on its extreme interpretation of Islam and Shariah.⁵ ISIS has its roots in the early 2000s when Al-Qaida in Iraq was founded, which increasingly focused on establishing local bases of operations and acquiring territorial control from which to launch more expansive attacks on what they called the near enemy.⁶

The group originated as an offshoot of the terrorist organization al-Qaeda. Abu Musab al-Zarqawi, a Jordanian, created Jama'at al-Tawhid w'al-Jihad (group of unity and jihad) in 2003, which became Al-Qaida in Iraq in 2004. After a United States airstrike killed Zarqawi in June of 2006, Al-Qaida in Iraq renamed itself to the Islamic State in Iraq (ISI). In 2010, Abu Bakr al-Baghdadi, an Iraqi, took control of ISI,⁷ he expanded ISI's operations into Syria after the Syrian civil war, when ISI gained strength from the counter-insurgency campaign led against the group between 2007 and 2009 in Iraq, Baghdadi in Aug 2011 sent a commander to Eastern Syria to oversee the expansion of ISI, where the Jabhat al-Nusra fought against the Syrian regime which gained credibility and popularity among local populations and armed forces opposed to the regime of Bashar al-Assad, then Baghdadi In Apr 2013 renamed the group to the Islamic State of Iraq and Syria (ISIS).⁸

ISIS is a child of war, because its members came from a movement which combined extreme religious beliefs and military skills as a result of the war in Iraq since the US invasion of 2003 and the war in Syria since 2011.⁹ The United Nations (UN) described the emergence of ISIS as facilitating by the protracted conflicts in Iraq and the Syria and the resulting of political and security instability, as well as by the weakening of State institutions and the inability of the two States to exercise effective control over their territories and borders.¹⁰ After the 2003 US

⁵ Silander. D, Wallace. D, Janzekovic. J, 2017, 'International Organizations and The Rise of ISIL', Wallace. D (ed), London Routledge. p. 2.

⁶ Kumar. C, 2015, 'Islamic State of Iraq and Syria (ISIS) a Global Threat: International Strategy to Counter the Threat' Journal of Social Sciences and Humanities, Vol. 1, No. 4, p. 345.

⁷ Waltman, G. 2016, 'Prosecuting ISIS' Mississippi Law Journal, Vol. 85, No. 3, p. 827.

⁸ Quivooij. R, 2015, 'Policy Report; The Islamic State', S. Rajaratnam School of International Studies. P. 4.

⁹ Cockburn. P, 2015, 'The Rise of Islamic State, ISIS and the new Sunni revolution', verso, London. p.8.

¹⁰ First report of the Secretary General on the threat posed by ISIS to international peace and security and the range of UN efforts in support of Member States in countering the threat (S/2016/92)- 29 Jan 2016, para. 4.

invasion of Iraq, the minority Sunni was removed from power, since then, the majority Shia have largely been in control of the country's security forces and institutions. Over the last few years, the Iraqi majority Shia government launched a campaign of violence and harassment of Iraq's Sunnis, the Human Rights Watch documented abuses including extrajudicial killings, air strikes, torture, and arbitrary arrests,¹¹ that led the Sunni population to look for a chance to confront the Iraqi central government, ISIS easily invested the conflict between Shia and Sunni for its own agenda.

There are some important dates and events relating to activities of ISIS, in the first two weeks of Jan 2014, ISIS fighters encircled Ramadi, they were able to gain control of areas within Fallujah (69 kilometers west of Baghdad), seizing partial control of the main road to Baghdad, in Apr 2014 expanded their operations in other areas of Mosul governorate, attacked the dam on the Euphrates river. On 5 June, ISIS launched attacks across several fronts in the governorates of Salah id-Din, Mosul, and Diyala. on 8 June, advanced east of Mosul seizing other areas of Salah id-Din and Kirkuk governorates. On 11 June entered the town of Baiji where Iraq's largest oil refinery is located, On 29 June, ISIS announced the formation of an Islamic Caliphate via an audio statement posted online, a few days later, on 1 July 2014, ISIS leader Abu Bakr al-Baghdadi called on Muslims worldwide to obey him as the Caliph, and to come to the new Caliphate to defend it. On 3 Aug, ISIS launched intense attacks against the Yazidi community in the Sinjar city, in June 2015, launched offensive against Kurdish forces in northeast Syria in Kobane city, and in Sep 2015 seized a major Syrian oil field in Jazal.¹²

In June 2014, when ISIS controlled Mosul, it stole as much as US\$400 million from the Central Bank of Iraq, and at its peak, it controlled more than 80% of Syria's oil infrastructure, from which it earned around US\$500 million in 2015, contributed to total ISIS revenues of around US\$1 billion. Tens of thousands of non-Syrian and non-Iraqi foreign fighters travelled to the region to join ISIS, at the high-point of ISIS military successes in 2015, they were around 31,500 fighters in mid-2014 and around 25,000 in early 2016. by Aug 2016 only 15,000 to 20,000 fighters left in total.¹³ At its peak in late 2014, the group held more than 100,000 square

¹¹ Human Rights Watch, 2013, 'Executions Surge but No Action on Reform'

<https://www.hrw.org/news/2013/04/25/iraq-executions-surge-no-action-reform>

¹² UNAMI, 2014, 'Report on the Protection of Civilians in Armed Conflict in Iraq' 5 June – 5 July 2014, p. 2-3, Silander. D, Wallace. D, Janzekovic. J, 2017, 'International Organizations and The Rise of ISIL', Wallace. D (ed), London Routledge. p. 49-51, and Cockburn. P, 2015, 'The Rise of Islamic State, ISIS and the new Sunni revolution', verso publisher, London. p. 11-23.

¹³ Council of Europe, 2017, Report from Committee on Legal Affairs, No. 14402, para. 8.

kilometers of territory,¹⁴ with a population of nearly 10 million people were living in the territory under its control.¹⁵

As a response to the threat of ISIS, the international community formed the Global Coalition against Daesh in Sep 2014, which was formed by 82 partners and led by USA, its missions were to encountering ISIS threat, military progressing for military forces who fought against ISIS, stabilizing liberated areas, preventing the movement of foreign terrorist fighters, and tackling ISIS financing,¹⁶ then ISIS lost most of its territory in 2016 and 2017. By the end of Mar 2019, it surrendered its last stronghold of Baghuz, an area of eastern Syria smaller than a square kilometer, after about six weeks of intense fighting.¹⁷

¹⁴ Seth G. Jones, 2017, rolling Back the Islamic State, Rand corporation

¹⁵ BBC, 2018, Islamic State and the crisis in Iraq and Syria in maps, <https://www.bbc.com/news/world-middle-east-27838034>

¹⁶ The global coalition against Daesh website, mission, <https://theglobalcoalition.org/en/mission/>

¹⁷ Diakonia, 2019, 'The legal status of ISIS-affiliated foreign nationals held in detention in North-East Syria', Diakonia Lebanon International Humanitarian Law Resource Desk, p. 5.

Chapter 2: The core international crimes allegedly committed by ISIS

Core international crimes ‘interchangeably the “most serious crimes”’ are inherently related to political violence. Contemporary definitions include conducts by state and non-state actors, every individual is bound under international law to not commit core international crimes.¹⁸ Another term is “atrocities crime” to describe the most serious international crimes which was proposed by David Scheffer, as he defined “a basket of particularly heinous crimes” that are suitable for criminal prosecution before international tribunals and national courts and for which states and certain non-state organizations and groups should be held responsible to protect human rights and the maintenance of international peace and security in an increasingly interdependent and sophisticated global society.¹⁹ In the late nineteenth and early twentieth century international legal responsibility came to be regarded as synonymous with statehood, but changed with the initiation of international criminal responsibility for individuals by prosecuting war criminals of the Second World War. The Nuremberg and Tokyo trials imposed direct international criminal responsibility on individuals.²⁰

Several international courts and tribunals have prosecuted core international crimes since the creation of the UN system in 1945. The first was the International Military Tribunal at Nuremberg (IMT) in Germany, which was established by treaty in Aug 1945, three major categories of crimes had been set up; crimes against peace, war crimes, and crimes against humanity.²¹ The International Military Tribunal for the Far East (IMTFE) in Tokyo for the Japanese war criminals is another example, in which the criminals were tried under similar provisions to those used at Nuremberg.²² In a later era, the International Criminal Tribunal for the Former Yugoslavia (ICTY),²³ and the International Criminal Tribunal for Rwanda (ICTR),²⁴ then the generation of “hybrid” or “internationalized” tribunals were mandated to prosecute both international and domestic most serious crimes, some of these were internationalized courts, including the Special Court for Sierra Leone (SCSL),²⁵ the

¹⁸ Stahn. C, 2019, *A Critical Introduction to International Criminal Law*, Cambridge University press.

¹⁹ Scheffer. D, 2006, ‘Genocide and Atrocities Crimes’ *International Journal of Genocide Studies and Prevention*, Vol. 1, No. 3, p. 235 and 236.

²⁰ Chao. Yi, 2019, ‘The Concept of International Criminal Responsibility for Individuals and the Foundational Transformation of International Law’, Bergsmo. M and Buis. E. J (ed) *philosophical foundations of international criminal law foundational concepts*, Brussels, TOAEP, p. 73.

²¹ The court was established by the London Agreement in Aug 1945, by the government of the USA, France, UK and USSR for the Prosecution and Punishment of the major war criminals of the European Axis.

²² Created by the Supreme Commander of Japan, U.S. General Douglas MacArthur, in Jan 1946.

²³ Created by Security Council resolution 827 (1993), 25 May 1993.

²⁴ Created by Security Council resolution 955 (1994), 8 Nov 1994.

²⁵ Established by an agreement between the UN and the Government of Sierra Leone pursuant Security Council resolution 1315 (2000), 14 Aug 2000.

Extraordinary Chambers in the Courts of Cambodia (ECCC),²⁶ the Special Tribunal for Lebanon (STL).²⁷ Then the most important and permanent court, the International Criminal Court (ICC) was established on the legacy of the courts and international criminal law according to a treaty which is called the Rome Statute,²⁸ the ICC is to prosecute criminals who commit most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance its Statute with respect to the following crimes: (a) The crime of genocide, (b) crimes against humanity, (c) war crimes, and (d) the crime of aggression.²⁹

The UNSC as the most responsible organization around the globe under chapter VII of the Charter of the UN, it is responsible for maintaining peace and security to determine the existence of any threat, and breach of peace.³⁰ The UNSC identified ISIS as a threat to international peace and security.³¹ Which captured, controlled and operated with impunity over large swathes of territory in Iraq, and Syria. The ISIS committed grave abuses of International Human Rights Law (IHRL), International Criminal Law (ICL) and International Humanitarian Law (IHL), its acts that may amount to war crimes, crimes against humanity and genocide.³² ISIS's crimes met the internationally accepted definitions of war crimes and crimes against humanity.³³ It conducted various kind of crimes, including sexual and gender-based violence, abduction, use of prohibited weapons, extrajudicial killings, torture, indiscriminate attacks, recruitment and use of children, attacks against religious and ethnic groups, displacing civilian people,³⁴ and committed widespread and systematic attacks directed against any civilian populations because of their ethnic or political background, religion or belief, which may constitute crimes against humanity.³⁵

Survivors from ISIS's atrocities explain the severity of the inflicts under the ISIS control, Mr. Kachi, as a Yazidi victim of the ISIS's crimes, on 26 Nov 2019 addressed at a UNSC meeting

²⁶ Established by an agreement between the UN and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea, No. 41723, 6 June 2003.

²⁷ Established by an agreement between the UN and the Lebanese Republic pursuant to Security Council resolution 1664 (2006), 29 Mar 2006.

²⁸ The Rome Statute of International Criminal court, 17 July 1998, came into force 1 July 2002.

²⁹ Rome Statute, article (5).

³⁰ The Charter of the United Nations, signed on 26 June 1945, came into force on 24 Oct 1945.

³¹ United Nation Security Council Resolution 2253 (2015), and First report of the Secretary General on the threat posed by ISIL (Da'esh) to international peace and security and the range of UN efforts in support of Member States in countering the threat (S/2016/92) - 29 Jan 2016, para. 13.

³² First report of the Special Adviser and Head of the UNITAD (S/2018/1031), 16 Nov 2018, para. 8, and 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 ISIS and associated groups (A/HRC/28/18), 27 Mar 2015. Para 16.

³³ Waltman, G. 2016, 'Prosecuting ISIS' Mississippi Law Journal, Vol. 85, No. 3, p. 830.

³⁴ UNAMI Report on the Protection of Civilians in Armed Conflict in Iraq (11 Sep to 10 Dec 2014), p. 5.

³⁵ United Nation Security Council Resolution 2170 (2014).

“On 3 Aug 2014, the terrorist gangs of ISIS took control over Sinjar and its villages, causing tens of thousands of the Yazidi population to flee to Sinjar Mountain, approximately 7,000 Yazidi women, children and men were killed and captured at that day”.³⁶

Approximately 1,700 members of the Iraqi armed forces from Camp Speicher in Salah ad-Din governorate were summarily executed on 12 June 2014 by the ISIS fighters.³⁷ ISIS carried out, inspired, or claimed responsibility for terrorist attacks around the world particularly in Bangladesh, Belgium, Egypt, France, Germany, Indonesia, Lebanon, Pakistan, the Russian Federation, Turkey and the United States of America, the attacks have killed over 500 individuals and injured hundreds more, the list does not include attacks and fighting in conflict zones inside Afghanistan, Iraq, Libya, Yemen and Syria.³⁸

ISIS caused to massive displacement of civilians, from Jan. 2014 to Oct. 2016 more than 3.2 million persons were internally displaced,³⁹ including estimated 1 million children under age of seventeen.⁴⁰ During the battle of Mosul, the ISIS fighters allegedly killed civilians who refused to comply with ISIS’s instructions or who previously belonged to the Iraqi security forces, at least 7000 families were abducted including 232 civilians who were reportedly shot to death on one day.⁴¹ After liberating the seized area from ISIS, the United Nations Assistance Mission for Iraq (UNAMI) documented 202 mass graves sites, the victims include women, children, elderly and persons with disabilities, members and former members of the Iraqi armed forces, police and some foreign workers.⁴²

This chapter profoundly will explain and demonstrate the potentiality of the core international crimes which allegedly committed by the ISIS fighters, this chapter is divided into three subchapters for the three core international crimes, crime of genocide, war crimes, and crimes against humanity.

³⁶ The 8675th meeting of the UNSC, (S/PV.8675), 26 Nov 2019.

³⁷ 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 ISIS and associated groups (A/HRC/28/18), 27 Mar 2015. Para 32, and, UNAMI Report on the Protection of Civilians in Armed Conflict in Iraq (10 Dec 2014), p. 41.

³⁸ Second report of the Secretary General on the threat posed by ISIS to international peace and security and the range of United Nations efforts in support of Member States in countering the threat (S/2016/501), 31 May 2016, para. 5.

³⁹ International Organization for Migration (IOM), displacement tracking matrix, DTM Round 56, Oct. 2016.

⁴⁰ Office for the Coordination of Humanitarian Affairs (OCHA), Iraq Crisis, Report No. 41, Apr 2015.

⁴¹ UN Office of the High Commissioner for Human Rights, 2016, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20783&LangID=E>

⁴² UNAMI, 2018, ‘Unearthing Atrocities: Mass Graves in territory formerly controlled by ISIL’, p. 6.

2.1: Crime of Genocide

2.1.1: General overview

Genocide for a long time was a crime without a name. For the first time the term was coined in 1944 by Polish-Jewish lawyer Raphael Lemkin,⁴³ the author originally described the concept to destruction of a nation or of an ethnic group, the term was made from the ancient Greek word *genos* (race, tribe) and the Latin *cide* (killing), thus corresponding in its formation to such words as homicide, infanticide, etc. generally speaking, genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation.⁴⁴ Despite the widespread using of the term, the term is commonly used in particularly reference to campaigns involving the killing of a large number of victims.⁴⁵

The twentieth century is deservedly known as the century of genocide, during this period the world was witnessed at least sixty five genocides,⁴⁶ and in this century the term of genocide was invented, legalized and internationalized, then some states imported the crime of genocide into national laws.⁴⁷

The term of Genocide legally was defined for the first time in the article II in the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), according to the Genocide Convention, genocide is; any of the acts committed with intent to destroy in whole or in part a national, ethnical, racial or religious group. The Genocide Convention numerates the acts as; “(a) killing the members of the group, (b) causing serious bodily or mental harm to members of the group, (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, (d) imposing measures intended to prevent births within the group, and (e) forcibly transferring children of the group to another group”.⁴⁸ Then the term was also legally defined in the ICTY Statute in article 4(2), the ICTR statute in article 2(2), and the Rome Statute in article 6.

The ICTR defined the crime of genocide as “first, one of the acts listed under article 4(2) of the Statute was committed; secondly, this act was committed against a specifically targeted

⁴³ Stahn. C, 2019, A Critical Introduction to International Criminal Law, Cambridge University press.

⁴⁴ Lemkin. R, 1944, Axis Rule in Occupied Europe, Washington, DC: Carnegie Endowment.

⁴⁵ Klamberg. M, 2017, Commentary on the Law of the International Criminal Court, Brussels, Torkel Opsahl Academic EPublisher.

⁴⁶ Rafter. N, 2016, The Crime of all Crimes, Towards a Criminology of Genocide, New York university press.

⁴⁷ Bergmso. M, Harlem. M, Hayashi. N, 2010, Importing Core International Crimes into National Law, TOAEP.

⁴⁸ The Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the general assembly of the United Nations on 11 Dec 1948, GA/Res/96(I), Article. II.

national, ethnic, racial or religious group, as such, and thirdly, the act was committed with intent to destroy in whole or in part the targeted group.”⁴⁹ Also the ICTY defined the crime of genocide as “any criminal enterprise seeking to destroy in whole or in part a particular kind of human group, as such, by certain means, those are two elements of the special intent requirement of genocide: firstly the act or acts must target a national, ethnical, racial or religious group, secondly the act or acts must seek to destroy all or part of that group”.⁵⁰

The objective element of genocide is protected groups, as defined in article 2 in the Genocide Convention, but the Genocide Convention does not protect all types of human groups,⁵¹ it is recognized as commonplace that the criminalization of genocide seeks to protect certain groups’ right to exist, the “existence” of the groups means groups’ physical and biological existence, “physical” usually refers to the human body or in a wider sense, to all elements of the material world, in this respect, a group’s physic is identical to the physical conditions of the human members,⁵² that refers to the four groups; national, ethnical, racial, and religious groups, to determine the crime of genocide that requires victim must be belong to protected groups or be believed to so belong mistaken identities.⁵³

Regarding the four protected groups, the groups are enumerated in the article II of the Genocide Convention, as possible targets of the crime of genocide. The drafters of the Rome Statute during the Rome Conference rejected proposals aimed at enlarging the scope of the list, the linguistic groups were rejected because it was felt that this was redundant, but political, economic and social groups were quite intentionally excluded, because the drafters did not believe that they should be protected by the terms of the Genocide Convention.⁵⁴

The ad hoc tribunals and distinguish scholars explained in further detail the definition of the protected groups, the national group as the first protected group is defined as “a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties”.⁵⁵ Beside the above definition another three approaches can be

⁴⁹ ICTR, Prosecutor v. Athanase Seromba, Case No. ICTR-2001-66-I, Trial Chamber, 13 Dec 2006, Para. 316.

⁵⁰ ICTY, The Prosecutor v. Radislav Krstic, Case No. IT-98-33-T, Trial Chamber, 02 Aug 2001, Para. 550.

⁵¹ Human Rights Watch, 2006, “Genocide, War Crimes and Crimes Against Humanity; A Topical Digest of the Case Law of the International Criminal Tribunal for the Former Yugoslavia”, p. 164.

⁵² Tamas. C, Berster. L, & Schiffbauer. B, 2014, Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary, comments on article (ii), p. 81.

⁵³ Human Rights Watch, 2010, “Genocide, War Crimes and Crimes Against Humanity; A Digest of the Case Law of the International Criminal Tribunal for Rwanda”.

⁵⁴ Triffterer. O, Ambos. K, 2016, Rome Statute of the International Criminal Court, 3rd ed, C.H. Beck, commentary on Article 6, p. 135, para. 16.

⁵⁵ ICTR, The Prosecutor v. Lean-Pawl Akayesu, Case No. ICTR-96-4-T, Trial Chamber, 2 Sep 1998, Para. 512.

considered the national group, that could be; firstly, confined to all citizens of a given State, secondly, the term could be construed in accordance with existing covenants and rules on the protection of ‘national minorities’, which would include expatriate groups, finally, ‘national group’ could be extended even further and also embrace any plurality of persons entitled to found a new state by virtue of the right of self-determination.⁵⁶

The second group is ethnical group, ‘Ethnical’ derives from the Greek word ‘ethnikos’, which has a three-layered meaning in the classical world, having been defined as: firstly adapted to the genius or customs of a people, secondly suited to the manners or language of foreigners, and thirdly heathenish, pagan, alien to the beliefs of the beholder. The ordinary meaning of ‘ethnic’ continues to largely imply these same three elements, reflecting the entirety of cultural, historical, customary, lingual and religious individualities, and the whole way of life and mode of thought of a group which sets it apart from its neighbors, although the term ‘ethnical’ clearly canters around cultural and social aspects.⁵⁷ The ICTR defined “ethnical group” as “one whose members share a common language and culture or a group which distinguishes itself, as such self-identification or a group identified as such by others, including perpetrators of the crimes,⁵⁸ or whose members share a common language or culture.⁵⁹

The third group is racial group which is defined as “based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors”.⁶⁰ The last protected group is religious group which is defined as “religious groups are groups whose members share a deeply entrenched belief in a metaphysical controlling power, and whose activities are focused on the fulfilment of their belief’s maxims”.⁶¹ Also the ad hoc tribunals defined as a group includes denomination or mode of worship or a group sharing common beliefs,⁶² or whose members share the same religion, denomination or mode of worship.⁶³

⁵⁶ Tamas. C., Berster. L, & Schiffbauer. B, 2014, Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary, comments on article (ii), p. 107.

⁵⁷ Id p. 108.

⁵⁸ ICTR, The Prosecutor v. Clement Kayishema and Obed Ruzindana, Case No. ICTR-9S-I-T, Trial Chamber, 21 May 1999, para. 98.

⁵⁹ ICTR, The Prosecutor v. Lean-Pawl Akayesu, Case No. ICTR-96-4-T, Trial Chamber, 2 Sep 1998, Para. 513.

⁶⁰ Id, Para. 514.

⁶¹ Tamas. C, Berster. L, & Schiffbauer. B, 2014, Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary, comments on article (ii), p. 114.

⁶² ICTR, The Prosecutor v. Clement Kayishema and Obed Ruzindana, Case No. ICTR-9S-I-T, Trial Chamber, 21 May 1999, para. 98.

⁶³ ICTR, The Prosecutor v. Lean-Pawl Akayesu, Case No. ICTR-96-4-T, Trial Chamber, 2 Sep 1998, Para. 515.

2.1.2: Yazidi as a protected group

To determine whether the crime of genocide has been committed or not against a specific protected group, the assessing for distinguishing the targeted groups shall be considered, in this regard, Yazidi community as a targeted group by the ISIS is one of the oldest ethnic and religious community and indigenous in the Middle East. The majority of Yazidis live in the north-west of Iraq in areas surrounding Shangel Mountain and Shekhan district, additionally there are some Yazidi villages and towns in Duhok Governorate in KRI,⁶⁴ and in other countries as Syria, Turkey, Armenia, and Georgia. According to their own estimates the Yazidis' number in Iraq is around 560,000, but there is no official statistics, thus, they are considered the second largest religious minority after the Christianity.⁶⁵ Etymologically, some argue that Yazidi refers to (Ezidi) which is derived from the Sumerian root (Êzidî) which means the ones who are on the right path and have the good and unspoiled spirit.⁶⁶ Or Yazidi refers to (Yezi) means God, (Yezdai) means the Creator in Kurdish language, and (Ezdan) means God in Farsi, or Yazidi refers to "slave of the Creator" in Yazidi religion.⁶⁷ Some people argue that, according to the Ottoman archives and unofficial documents, Yazidis are described as 'descendants of "Yezid bin Muaviye" who was the second caliph of the Islamic Umayyad caliphate.'⁶⁸

The Yazidi religion is structured according to social classes and ranks, similar to the Indian caste-system, at the top there is the Mir (Prince) and the Baba Sheikh (the spiritual leader), directly below them are forty sheikhs divided into three factions; Adani, Achammsana and Qatani, there are also forty Pirs, who are tasked with regulating the religious affairs of the followers. Ordinary Yazidis are called Mureed (followers), the Mureed cannot get married to members of the Sheikh and Pir classes, Pirs and Sheikhs cannot intermarry either.⁶⁹ Yazidism requires that a Yazidi child must have two Yazidi parents, theologically impossible mixed marriages.⁷⁰

⁶⁴ Zoonen. D. V, & Wirya. K, 2017, 'The Yazidis, Perceptions of Reconciliation and Conflict', MERI, p. 7.

⁶⁵ Domle. K, 2013, 'Yazidis: A Deep-Rooted Community in an Unstable Present- Minorities in Iraq- Memory, Identity and Challenges', Masarat for Cultural and Media Development (MCMD), p. 66.

⁶⁶ Yazda, 2019, destructing the soul of the Yazidi; Cultural Heritage Destruction During the Islamic State's Genocide Against the Yazidis, p. 29.

⁶⁷ Domle. K, 2013, 'Yazidis: A Deep-Rooted Community in an Unstable Present- Minorities in Iraq- Memory, Identity and Challenges', Masarat for Cultural and Media Development (MCMD), p. 66.

⁶⁸ Basci. E, 2016, 'Yazidis: A community scattered in between geographies and its current immigration experience' International Journal of Humanities and Cultural Studies. Vol. 3, No. 2, p. 341.

⁶⁹ Domle. K, 2013, 'Yazidis: A Deep-Rooted Community in an Unstable Present- Minorities in Iraq- Memory, Identity and Challenges', Masarat for Cultural and Media Development (MCMD), p. 67-8.

⁷⁰ Report of UNHRC on ISIS Crimes Against the Yazidis (They came to destroy): (A/HRC/32/CRP.2), 15 June 2016, para. 19.

Yazidi faith is the belief that Xuada (God) created the world, including Lalish (the holiest place according to the Yazidism) in seven days and entrusted it to seven holy angels, including Tawûsê Melek (the Peacock Angel) who Yazidis believe to be the head of the angels in the Yezidi religion,⁷¹ this association with the Peacock Angel that has led to the Yezidi being misleadingly described as ‘devil worshippers’,⁷² with other factors such as; the perception that the Yazidi religion contains polytheistic elements, and the fact that they have an oral tradition rather than a written scripture.⁷³

Throughout history, there have been some attempts by non-Yezidis to label them and attempts by the Yezidis themselves to claim specific ethnic identities, usually in connection with contemporary political factors. One theory views the Yezidis as descendants from the ancient Assyrians, another theory provides for a totally Islamic origin for the Yezidis, and yet another theory, associated with Kurdish nationalism, claims descent from the Medes for the Kurds.⁷⁴ But Yezidis are a religious minority with many taboos and a strict caste system. The Yezidis are neither Muslim, Christian nor Jewish and therefore not ‘People of the Book’, this has had important implications in the past for their legal status, and is still a factor in their relationships with their neighbors and with the authorities. Their religion contains elements originating in various majority religions, but cannot be defined as purely, or even principally, Christian, Islamic or Zoroastrian.⁷⁵

⁷¹ Yazda, 2019, *deconstructing the soul of the Yazidi; Cultural Heritage Destruction During the Islamic State’s Genocide Against the Yazidis*, p. 29.

⁷² Dakhil. V, Borda. A, & Murray R. J, 2017, ‘Calling ISIL Atrocities against the Yezidis by Their Rightful Name’: *Do They Constitute the Crime of Genocide?* Human Rights Law Review, Vol. 17, No. 2, p. 267.

⁷³ Yazda, 2016, *Mass Graves of Yazidis Killed by the Islamic State Organization or Local Affiliates*, p. 4.

⁷⁴ Dakhil. V, Borda. A, & Murray R. J, 2017, ‘Calling ISIL Atrocities against the Yezidis by Their Rightful Name’: *Do They Constitute the Crime of Genocide?* Human Rights Law Review, Vol. 17, No. 2, p. 267.

⁷⁵ Allison. Ch, 2011, ‘The Yezidi Oral Tradition in Iraqi Kurdistan’, Psychology Press, p. 26.

2.1.3: Killing members of the Yazidi community

Killing members of the group means causing the death or more precisely, diminishing the natural lifespan.⁷⁶ According to the Elements of Crimes, killing a single victim is sufficient to complete the crime of genocide, the term ‘killed’ is interchangeable with the term ‘caused death’ that indicates the death of the victim is a necessary consequence of the perpetrator’s conduct and that a causal link needs to exist between conduct and consequence.⁷⁷ Since the ISIS attacked Sinjar in early Aug 2014, evidences indicate that the ISIS fighters have pursued a campaign of killing and targeting minority groups including the Yazidi.⁷⁸ The ISIS fighters executed at least 2,000 Yazidis and captured another 6,417 whom they imprisoned and subjected to a system of organized forms of torture and ill-treatment.⁷⁹ Those Yazidi who managed to survive from the initial onslaught reported that as soon as they were intercepted by the ISIS fighters, they were told to convert to Islam or be killed, those who refused were killed immediately.⁸⁰

Within the beginning days of the attack, UNAMI gathered evidences that prove ISIS deliberately attacked Yazidi community and killed them, the reports,⁸¹ which were published by the organization show that the systematic approach of the ISIS attacks from different bases, encircling the mountain and emptying the villages within 72 hours.⁸² For instance; on 3 Aug 2014, ISIS chased ten Yazidi families fleeing al-Qahtaniya area, killing the male members and abducting the females and children, on 4 Aug the ISIS fighters killed 60 Yazidi men from Hardan village in Sinjar city, abducting their wives and daughters and taking them, the same day at least 200 Yazidi had been killed in Sinjar city and 60 to 70 more killed in Ramadi area, also ISIS abducted at least 50 women from Tal-Binat area.⁸³ On 4 Aug 2014, approximately 400 males were killed in a mass killing of members of the Yazidi community in Kocho village, and 67 male members of the Yazidi community were killed in a village of Qani, ISIS gathered

⁷⁶ Tamas. C, Berster. L, & Schiffbauer. B, 2014, Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary, commentary on Article II, para 61, p. 116.

⁷⁷ The Elements of Crimes adopted at the 2010 Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May-11 June 2010, article 6 (a).

⁷⁸ Dakhil. V, Borda. A, & Murray R. J, 2017, ‘Calling ISIL Atrocities against the Yezidis by Their Rightful Name’: Do They Constitute the Crime of Genocide?’ Human Rights Law Review, Vol. 17, No. 2, p. 269.

⁷⁹ Human Rights Watch, 2017, ‘Flawed Justice and Accountability for ISIS Crimes in Iraq’.

⁸⁰ UNAMI Report, A Call for Accountability: Yazidi Survivors of Atrocities Committed by ISIL (Aug 2016).

⁸¹ UNAMI published four reports on the protection of civilians in armed conflict in Iraq covering the periods from 5 June to 5 July 2014 (released 18 Aug 2014), 6 July 2014 to 31 Oct 2015 (released on 26 Sep 2014), 11 Sep to 10 Dec 2014 (released on 15 Dec 2014), and 1 May to 31 Oct 2015 (released on 5 Jan 2016).

⁸² Report of UNHRC on ISIS Crimes Against the Yazidis (They came to destroy): (A/HRC/32/CRP.2), 15 June 2016, para 29.

⁸³ UNAMI Report on the Protection of Civilians in Armed Conflict in Iraq (6 July – 10 Sep 2014).

villagers in a school and then took the males in batches to a nearby farm and executed them by gunfire,⁸⁴ the same day about 80 men were killed in Qani.⁸⁵ On 6 Aug, more than 50 bodies with visible signs of torture were seen near Dhola village. 100 were killed in Khana Sor village in Snono sub-district. 250-300 were killed at least ten of were beheaded in Hardan area. On 15 Aug, ISIS gathered all males older than ten years of age at a local school, took them outside a village by pick-up trucks, and shot them, as many as 400 males were killed at that day, dozens of women and children were abducted, possibly as many as 1000 were taken away to unknown destinations in Tal Afar, some people were shot by ISIS while trying to escape, and executed 14 elderly Yazidi men in Sheikh-Mand Shrine, people with disabilities were among the victims.⁸⁶

ISIS fighters divided the captured Yazidis into groups of men and boys and another groups of women and children, the men and boys were executed, ISIS asked the captured men three times to convert to Islam, when having refused to convert, were killed,⁸⁷ the remaining Yazidis were first moved into temporary and afterwards into designated centers far into ISIS controlled areas. Yazidi women divided into groups of married women with children, married women without children as well as unmarried women and girls.⁸⁸ In some cases, the elder women were executed right away.⁸⁹

The ISIS fighters carried out numerous mass killings and buried the bodies into mass graves. After retaking areas under ISIS control, the Iraqi and Kurdistan Regional Government (KRG) authorities as well some organizations confirmed that some mass graves discovered which contain the Yazidi bodies. UNAMI, and Yazda organization published three reports about the investigation of mass graves. For instance, 95 mass grave sites have been found in Mosul, especially in Sinjar district, which is predominately inhabited by members of the Yazidi community. The smallest mass grave was discovered containing the bodies of eight civilians, and the largest is believed to be up to 4,000 persons who have been killed and disposed of at this site.⁹⁰ One of the mass graves of Yazidi women has been documented of executed older

⁸⁴ UNAMI Report on the Protection of Civilians in Armed Conflict in Iraq (11 Sep to 10 Dec 2014).

⁸⁵ 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 ISIS, (A/HRC/28/18), 27 Mar 2015, para. 19.

⁸⁶ UNAMI Report on the Protection of Civilians in Armed Conflict in Iraq (6 July – 10 Sep 2014).

⁸⁷ Beam. A. L, 2019, the last Yazidi Genocide, Andinolfi books.

⁸⁸ 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 ISIS, (A/HRC/28/18)- 27 Mar 2015, para. 36.

⁸⁹ Report of UNHRC on ISIS Crimes Against the Yazidis (They came to destroy): (A/HRC/32/CRP.2), 15 June 2016, para 48.

⁹⁰ UNAMI report on 'Unearthing Atrocities: Mass Graves in territory formerly controlled by ISIL', 6 Nov 2018.

women who were approximately 60 years and older from Kocho at the Solagh Technical Institute.⁹¹ Another five mass graves have been discovered which Yazda organization codifies as (Kocho.1, 2, 3, and 4) contains 45, 50, 13, and 25 people, respectively.⁹² According to another report from Yazda until 28 Jan 2016, in collaboration with Iraqi and KRG authorities discovered 35 mass graves of the Yazidi people who were killed by the ISIS fighters.⁹³ According to the second and the latest report, except the previous mass graves, Yazda organization until 2018 identified another 21 mass graves which all of them contain people belong to the Yazidi community.⁹⁴

As a forensic evidentiary material from mass grave sites, the UNITAD in coordination with Mass Graves Directorate and the Ministry of Health of Iraq, in cooperation with KRG, excavated 17 mass graves in and around the village of Kojo in Sinjar district, the work was conducted in line with international standards, and this work has ensured that evidence from sites that may be crucial to future prosecutions in relation to core international crimes.⁹⁵ European Parliament estimated 5.000 Yazidis have been killed, stated that there is clear evidence of mass graves of Yazidi people abducted by ISIS,⁹⁶ and recognized these systematic killing as an evidence of genocide according the Genocide Convention and the Rome Statute.⁹⁷

International mechanisms have been cautious in determining whether ISIS has committed the specific crime of genocide,⁹⁸ In Aug 2014, the Special Adviser of the UN Secretary-General on the Prevention of Genocide and the Special Adviser on the Responsibility to Protect, noted that “the reports we have received of acts committed by ISIS may amount to crime of genocide”.⁹⁹ It could be said that the acts of ISIS toward members of the Yazidi Community qualify the genocidal acts by killing listed in the Genocide Convention.¹⁰⁰

⁹¹ Report of UNHRC on ISIS Crimes Against the Yazidis (They came to destroy), (A/HRC/32/CRP.2), 15 June 2016, para. 79.

⁹² Yazda, 2018, Documenting Mass Graves of Yazidis Killed by the Islamic State.

⁹³ Yazda, 2016, Mass Graves of Yazidis Killed by the Islamic State Organization or Local Affiliates.

⁹⁴ Yazda, 2018, Documenting Mass Graves of Yazidis Killed by the Islamic State.

⁹⁵ Third report of the Special Adviser and Head of the UNITAD (S/2019/878)- 13 Nov 2019, para 32 and 33.

⁹⁶ European Parliament resolution on the systematic mass murder of religious minorities by the so-called ‘ISIS/Daesh, 2016/2529(RSP), 4 Feb 2016, para. G.

⁹⁷ Id, para. M1 and M2.

⁹⁸ Report from Committee on Legal Affairs to the Council of Europe No. 14402 (2017).

⁹⁹ Statement by Adama Dieng, Special Adviser of the Secretary-General on the Prevention of Genocide, and Jennife Welsh, Special Adviser of the Secretary-General on the Responsibility to Protect, on the situation in Iraq, 12 Aug 2014.

¹⁰⁰ Duarte-Herrera. R & Iftsits. C, 2017 ‘Genocide against Yazidis; Austria’s obligation to prosecute and punish returning ISIS fighters under international and national law’ Vienna Law Review, Vol.1 No.1, p. 9.

2.1.4: Causing serious bodily and mental harm on the Yazidi people

The expression of "serious bodily or mental harm" is not defined in detail in the Genocide Convention, and none of any statute of the ICTR, ICTY, and ICC, but the ICTR Appeals Chamber defined as "the quintessential examples of serious bodily harm, which are torture, rape, and non-fatal physical violence that causes disfigurement or serious injury to the external or internal organs, serious mental harm includes; more than minor or temporary impairment of mental faculties such as the infliction of strong fear or terror, intimidation or threat, to support a conviction for genocide, the bodily harm or the mental harm inflicted on members of a protected group must be of such a serious nature as to threaten its destruction in whole or in part".¹⁰¹ The International Court of Justice (ICJ) acknowledged that systematically victims of massive mistreatment, beating, rape and torture causing serious bodily and mental harm, but said that on the basis of the evidence may amount to war crimes and crimes against humanity, or were committed with the specific intent to destroy the protected group in whole or in part, for finding that genocide has been perpetrated.¹⁰² The Element of Crimes defined Genocide by causing serious bodily or mental harm as "any conduct includes, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment".¹⁰³

ISIS targeted people of the Yazid community and subjecting them to torture. There is conclusive evidence that ISIS has committed genocidal acts including mass serious bodily or mental harm, by way of torture, beatings and inhuman and degrading treatment.¹⁰⁴ According to the report of the Amnesty International, the ISIS fighters in Aug 2014 abducted thousands of Yezidi men, women and children who were fleeing the ISIS takeover from the Sinjar region, hundreds of the men were killed and others were forced to convert to Islam under threat of death, many have been subjected to torture and ill-treatment. Some of the Yazidi women and girls who have escaped ISIS captivity, as well as some of those who remained captive, have given harrowing accounts to Amnesty International of the torture and abuses that they have suffered.¹⁰⁵

¹⁰¹ ICTR, *The Prosecutor v. Athanase Seromba*, Case No. ICTR-2001-66-A, Appeals Chamber, 12 Mar 2008, para 46.

¹⁰² ICJ, *Case concerning application of the Convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v. Yugoslavia [Serbia and Montenegro])*, Judgment, 26 Feb. 2007, para. 319.

¹⁰³ *The Elements of Crimes*, Element (1) of article 6 (b).

¹⁰⁴ Council of Europe, Committee on Legal Affairs and Human Rights, 2017, *Prosecuting and punishing the crimes against humanity or even possible genocide committed by Daesh*, Rapporteur; Mr. Pieter Omtzigt.

¹⁰⁵ Amnesty International, 2014, 'Escape from hell: Torture and sexual slavery in Islamic State Captivity in Iraq'.

The ICTY Trial Chamber found that the women suffered serious mental harm by separating of men which has a profound psychological impact upon the female members of the protected group, separating women from their husbands, sons and other male family members resulted uncertain about their own fate and that of their loved ones, this fear is justified and real.¹⁰⁶ The Yazidi community at the point of capture, Yazidi women and children suffered serious mental harm as a result of being separated from their male relatives and being forced either to bear witness to their murders or to watch them being taken away to an unknown fate, and the ISIS fighters severely beat captured Yazidi women and girls if they resist rapes, attempt to escape, refuse orders to carry tasks for the fighters and their families, or try to prevent ISIS fighters from removing their children or siblings from their care, severe mental anguish is being caused to Yazidi mothers as a consequence of the ISIS fighters taking their daughters to sell into sexual slavery, and their sons to be indoctrinated and recruited in the ISIS forces.¹⁰⁷

Recent research pointed to an increased health strain to the Yazidi population, in a major household study of displaced people, found a high prevalence of non-communicable diseases; 19.4% hypertension, 13.5% musculoskeletal conditions, 9.7% diabetes, and 6.3% cardiovascular diseases, all these diseases are associated with increased stress levels. Around 1100 women joined the German Special Quota Program, whom chosen to join this program in Germany showed a high prevalence of mental disorders in the first examination carried out, 78.1 were diagnosed with Post Traumatic Stress Disorders (PTSD), 63.0% with depression, and 2.7% with an adjustment disorder.¹⁰⁸

It must be “harm” that results in a grave and long-term disadvantage to a person’s ability to lead a normal and constructive life.¹⁰⁹ The Yezidi people in the refugee camps, as the result of ISIS attacks, the people were suffering with restrictions concerning regular and healthy food. The conditions in camps were unhygienic, the educational, social, cultural, and religious needs were met insufficiently, lack of supply and care due to remoteness, bad and poor connection, and material poverty in the camps, the displaced people were provisionally housed in tents or living in containers, these offered barely protection to their inhabitants in the searing heat,

¹⁰⁶ ICTY, *The Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T, Trial Chamber, 12 Dec 2012, para. 756.

¹⁰⁷ Report of UNHRC on ISIS Crimes Against the Yazidis (They came to destroy): (A/HRC/32/CRP.2), 15 June 2016, para 129 & 130.

¹⁰⁸ Jäger. P, Rammelt. C, Ott. N, Brand. A, 2019 ‘Narrative Review: The (Mental) Health Consequences of the Northern Iraq Offensive of ISIS in 2014 for Female Yezidis’ *International Journal of Environmental Research Public Health*, Vol. 16, No. 13, p. 27.

¹⁰⁹ ICTY, *The Prosecutor v. Radislav Krstic*, Case No. IT-98-33-T, Trial Chamber, 02 Aug 2001, para 513.

laundry facilities were not available, diarrheal diseases were widespread, the standard of medical care was quite below the host community.¹¹⁰

Rape and sexual violence constitute genocide if they were committed with the specific intent to destroy in whole or in part, a particular group, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims, one of the worst ways of inflict harm on the victim as he or she suffers both bodily and mental harm. The ICTR Chamber was satisfied that the acts of rape and sexual violence were committed solely against Tutsi women, because they are Tutsi, as humiliation, mutilated, and raped several times, often in public or by more than one assailant, these acts 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 Tutsi women and contributing to their destruction and to the destruction of the Tutsi group as a whole.¹¹¹ The ICC defined the rape which consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent, or reason of the silence or lack of resistance by a victim.¹¹² The ISIS fighters systematically raped Yazidi women and girls as young as nine, there is overwhelming evidence of such rapes occurring from survivors themselves, who display both physical and psychological wounds.¹¹³ The available evidences indicate that ISIS targeted Yazidi women not because they are just women but both Yazidi and women.¹¹⁴ ISIS's sexual enslavement of Yazidi women and girls was extreme because it was deeply institutionalized, mimicked the slave trade of previous centuries which was done openly and treated victims as chattel, and, most importantly, because it was done proudly and explicitly.¹¹⁵

The most horrifying aspect of ISIS's treatment of Yazidis is its systematic sexual and domestic enslavement of thousands of Yazidi women, there are many written evidences that ISIS not only tolerated, but also actively encouraged the rape, torture, and enslavement of Yazidi

¹¹⁰ Jäger. P, Rammelt. C, Ott. N, Brand. A, 2019 'Narrative Review: The (Mental) Health Consequences of the Northern Iraq Offensive of ISIS in 2014 for Female Yezidis' International Journal of Environmental Research Public Health, Vol. 16, No. 13, p. 29.

¹¹¹ ICTR, The Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Trial Chamber, 2 Sep 1998, para 731-2.

¹¹² ICC, Rules of Procedure and Evidence, rule 70.

¹¹³ Report of UNHRC on ISIS Crimes Against the Yazidis (They came to destroy): (A/HRC/32/CRP.2), 15 June 2016, para 114.

¹¹⁴ Chertoff, E. 2017, 'Prosecuting Gender-Based Persecution: The Islamic State at the ICC' Yale Law Journal, Vol. 126, No. 4, p. 1067.

¹¹⁵ El-Masri, S. 2018, 'Prosecuting ISIS for the sexual slavery of the Yazidi women and girls' The International Journal of Human Rights, Vol. 22, No. 8, p. 1052.

women captives, indeed, the ISIS bureaucracy has issued multiple fatwas (religious verdict) dealing with the treatment of women slaves. A manual on women captives issued at the end of 2014 answered a number of questions about relations between ISIS members and women slaves, it stated that “sex with a woman slave, but if the slave is not a virgin, be ensure that she is not pregnant, is permitted”, the manual also regulated various rules, among other things, the appropriate forms of beating "disciplinary beatings" are acceptable.¹¹⁶ Sexual violence was employed by ISIS as a tool of genocide against the Yazidi community. The ISIS fighters have raped women pursuant to a plan of self-perpetuation aimed at transmitting their ideology to a new generation who can be raised in their own image, in this way, women’s bodies are used as “biological weapons” to alter the demography of the region.¹¹⁷ Girls and unmarried women who escaped from ISIS captivity recounted to the investigators that the process by which they were raped and sexually enslaved. ISIS members numbered them or recorded their names on lists, and inspected them to evaluate their beauty, while some were given as “gifts”, others were sold to local or foreign ISIS fighters, Some victims were privy to price negotiations between “vendors” and “buyers”, girls would then be prepared for rape.¹¹⁸

UNAMI received reports of rape and sexual assaults against women and children committed by the ISIS fighters that they herded approximately 450–500 women and girls. 150 unmarried girls and women predominantly from the Yezidi community were reportedly transported to Syria, either to be given to ISIS fighters as a reward or to be sold as sex. Also the organization contacted an interview by an adolescent Yezidi girl who had been abducted by ISIS when they attacked her village, she stated that ISIS took hundred women, the girl stated that she was raped several times by several ISIS fighters before she was sold in a market.¹¹⁹ The Amnesty International in its report (Escape from hell, torture and sexual slavery in Islamic State Captivity in Iraq) interviewed 42 Yazidi women who had been abducted by ISIS and then escaped, they recounted their story under ISIS control, the Yazidi girls stated to the Amnesty International that ISIS abducted many Yazidi girls and women then raped them, some managed to escape, and others were under ISIS captivity or killed.¹²⁰

¹¹⁶ Chertoff, E. 2017, ‘Prosecuting Gender-Based Persecution: The Islamic State at the ICC’ Yale Law Journal, Vol. 126, No. 4, p. 1061-62.

¹¹⁷ Report of the Secretary-General on conflict-related sexual violence (S/2016/361), 20 Apr 2016, para 14.

¹¹⁸ 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 the ISIS (A/HRC/28/18), 27 Mar 2015, para 37.

¹¹⁹ UNAMI, 2014, ‘Report on the Protection of Civilians in Armed Conflict in Iraq’, 6 July – 10 Sep 2014.

¹²⁰ Amnesty International, 2014, ‘Escape from hell: Torture and sexual slavery in Islamic State Captivity in Iraq’.

2.1.5: Deliberately inflicting on the Yazidi community

The ICTR explained the "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part" that includes methods of destruction which do not immediately lead to the death of members of the group or circumstances which will lead to a slow death, for example lack of proper housing, clothing, hygiene and medical care or excessive work, physical exertion, the starving of a group of people, reducing required medical services below a minimum, and withholding sufficient living accommodation for a reasonable period.¹²¹ The Elements of Crimes defined The term "conditions of life" that may include but is not necessarily restricted to deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes.¹²²

ISIS attacked Sinjar city, the city is the main place of the Yazidi community, estimated population was about 300,000, caused bodily harm or/and the mental harm inflicting on members of Yazidi, consequently 96 percent of the population fled.¹²³ On 5 Aug, the United Nations International Child's Fund (UNICEF) reported that families who had fled to Sinjar mount, including up to 25,000 children, were in immediate need of assistance, including drinking water and sanitation services, also reported that around 40 Yezidi children had died as a consequence of hunger, thirst and dehydration.¹²⁴ The Iraqi air force delivered food and relief through a humanitarian airdrop operation over the mountains.¹²⁵ The United Nations High Commissioner for Refugees (UNHCR) reported that estimated 20,000 to 30,000 people remained trapped on Sinjar Mountain without food, water or shelter, access to these families was extremely limited.¹²⁶ The ISIS fighters kept Yazidi women and children in inhumane living conditions forcing them to an inadequate diet and not providing essential medical services. They did not provide essential needs for living to captured Yazidis, they were also dehumanizing them physically, ISIS cannot anyhow see Yazidis as human beings if they offer them insects to eat and forces them to drink from toilets.¹²⁷

¹²¹ ICTR, *The Prosecutor v. Clement Kayishema and Obed Ruzindana*, Case No. ICTR-9S-I-T, Trial Chamber Judgment, 21 May 1999, para 115 and 116.

¹²² The Elements of Crimes, Element (4) of article 6 (c).

¹²³ Nicolaus. P, & Yuce. S, 2017, 'Sex-Slavery: One Aspect of the Yezidi Genocide' Iran and the Caucasus, Vol. 21.

¹²⁴ UNICEF Statement, 5 Aug 2014, https://www.unicef.org/media/media_74676.html

¹²⁵ UNAMI Report on the Protection of Civilians in Armed Conflict in Iraq (6 July – 10 Sep 2014)

¹²⁶ UNHCR Statement, 12 Aug 2014, <https://www.unhcr.org/print/53e9fe2d9.html>

¹²⁷ Jenni Porkka, 2017, *Terrorism and Genocide; The Islamic State and the Case of Yazidis*, master thesis, Uppsala University.

2.1.6: Imposing measures to prevent births and forcibly transferring children of Yazidi

The final two crimes which were enumerated in Article II of the Genocide Convention are linked in the sense that they aimed to destroy the future of a group through the imposition of measures to prevent births or the forcible transfer of children away from the group. The first is the ‘biological’ way of genocide, covering measures directed against the capacity of group members to procreate. These measures can be divided into two different categories, methods devised to destroy the reproductive capacity of a group by physical means, and the setting up of insurmountable psychological obstacles to having children.¹²⁸ In the patriarchal societies, where membership of a group is determined by the identity of the father, during rape, a woman of the protected group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother’s group, that could be a ground of genocide.¹²⁹ Also “imposing measures intended to prevent births” within the group can be mental, for instance, rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate.¹³⁰ Apart from the fact that the offspring of such circumstances is considered as belonging to the father, these children cannot even become members of the Yazidi community according to the Yazidi religion, members of the group require two Yazidi parents, and it is not possible to convert to the Yazidi religion.¹³¹

It has been reported that abortions are being performed on captured pregnant women, one woman recounted that a member of ISIS sat on her stomach to kill her unborn child, saying: ‘this baby should die because it is an infidel’, another witness reported that prior to an abortion performed on two pregnant women, an ISIS fighter stated ‘we do not want more Yazidis to be born’.¹³² The sexual violence against the Yazidi women and girls resulted that the women do not want to marry, or to contemplate relationships with men in the future, this was compounded by a sense that they had lost their honor, in this way, the rapes being perpetrated by the ISIS

¹²⁸ Tamas. C, Berster. L, & Schiffbauer. B, 2014, Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary, commentary on Article II, para 83, p. 126.

¹²⁹ ICTR, The Prosecutor v. Lean-Pawl Akayesu, Case No. ICTR-96-4-T, Trial Chamber Judgment, 2 Sep 1998, para. 508.

¹³⁰ Triffterer. O, Ambos. K, 2016, Rome Statute of the International Criminal Court, 3rd ed, C.H. Beck, commentary on Article 6, para 27, p. 140.

¹³¹ Duarte-Herrera. R & Ifsits. C, 2017 ‘Genocide against Yazidis Austria’s obligation to prosecute and punish returning ISIS fighters under international and national law’, Vienna Law Review, Vol. 1 No. 1, p. 11.

¹³² Report of the Office of the United Nations High Commissioner for Human Rights on the human rights situation in Iraq in the light of abuses committed by the so-called Islamic State in Iraq and the Levant and associated groups (A/HRC/28/18)- 27 Mar 2015, para. 39-41.

fighters on Yazidi women and girls themselves constitute a measure to prevent births within the group.¹³³

Relating to forcibly transforming children of a protected group, on 26 Apr 2014, the ISIS leader, Abu Bakr al Baghdadi issued a fatwa “religious verdict” in which he ordered the separation of Yezidi children from their mothers, children as young as 2 years of age were transferred to the Madrassa Jihadia “indoctrination school”, and those over 10 years of age were sent to the Jihadia Institute in Tall-Afar, the women were then transferred within Iraq and to the Syrian and presented to so called “emirs” for sexual exploitation.¹³⁴

¹³³ Report of Human Rights Council on ISIS Crimes Against the Yazidis (They came to destroy): (A/HRC/32/CRP.2), 15 June 2016, para. 147.

¹³⁴ Report of the Secretary-General on conflict-related sexual violence (S/2016/361), 20 Apr 2016, Para. 40.

2.1.7: Mental Element

In addition to the material elements of the crime of genocide, the mental element of the crime also requires that the perpetrators have acted with the specific intent to destroy a protected group. The mental elements consist two separate elements; the general one that could be called ‘general intent’ and an additional ‘intent to destroy’, in the case of genocide, the general intent relates to the acts listed in the offence and the perpetrators must know that his actions target one of the protected groups.¹³⁵ Investigators or prosecutors typically look first to evidence that crimes were committed, then analyze the relationship of the defendant to the crime, it must first be determined whether genocidal acts have occurred, and then it is assessed that the person acted with genocidal intention.¹³⁶ Proving genocidal intent can be extremely difficult if the accused does not confess, but the judges can rely upon some circumstantial evidences like, the gravity of the offence, the existence of a plan or a policy to exterminate a protected group, and the fact that only the members of a particular were attacked, and meaningful accessory actions for example destruction the cultural properties belong to the protected groups.¹³⁷

The term of “Intent” in the Genocide Convention article II, defined by the ICJ, that there must be evidence of acts on a scale that establishes an intent not only to target certain individuals because of their membership to a particular group, but also to destroy the group itself in whole or in part or must be to destroy at least a substantial part of the particular group.¹³⁸ The ICTR used a “wide-scale attack against the targeted group” as a circumstantial evidence to prove intention of perpetrators, and defined the genocidal intent that it does not require the actual destruction of a substantial part of the group, the commission of even a single instance of one of the prohibited acts in the ICTR statute is sufficient, provided that the accused genuinely intends by that act to destroy at least a substantial part of the group.¹³⁹ The ICTY adopted the same approach to determine “genocidal intent” that the de facto destruction of the group may constitute evidence of the specific intent and may also serve to determine the crime of genocide.¹⁴⁰

¹³⁵ Ambos. K, 2009, What does ‘intent to destroy’ in genocide mean? *International Review of the Red Cross*, Vol. 91, No. 876, p. 841.

¹³⁶ Stahn. C, 2019, *A Critical Introduction to International Criminal Law*, Cambridge University press.

¹³⁷ Satsger. H, 2012, ‘*International and European Criminal Law*’, C.H. Beck publisher, Munchen.

¹³⁸ ICJ, application of the convention on prevention and punishment of the crime of genocide (*Croatia v. Serbia*), judgment of 3 Feb 2015, para 138, 139 & 142.

¹³⁹ ICTR, *The prosecutor v. Jean MPAMBARA*, Case No. ICTR-01-65-T, Trial Chamber, 11 Sep 2006, Para. 8.

¹⁴⁰ ICTY, *The Prosecutor v. Padoslav Brdanin*, Case No. IT-99-36-T, Trial Chamber, 1 Sep 2004, Para. 697.

The behavior of ISIS fighters towards the Yazidi community manifested their genocidal intent. The atrocities systematically committed against the Yazidis are inspired by religious ideology. Many reports demonstrate that the ISIS fighters asked the people belong to the Yazidi community to convert into Islam or to be killed. In its 2014 report based on over 300 first-hand victims and witness interview, the IICIS concluded that ISIS's attacks on the Yazidi community considered to be infidels, and finding ISIS's public statements over social media, suggests a denial of this religious group's right to exist.¹⁴¹ Abducted just the Yazidi women and girls then divided as sexual slaves among ISIS fighters.¹⁴² In its 2016 report, IICIS concluded that the ISIS fighters focused their attack on the Yazidis, because they were Yazidis, for instance a Yazidi boy was taken and told by an ISIS commander, "even if you see your father, if he is still Yazidi, you must kill him". The ISIS fighters called the Yazidi people "dirty Yazidi".¹⁴³ In its 2015 report, the Office of the United Nations High Commissioner for Human Rights stated that the information proved the intent of ISIS to destroy the Yezidi as a group when perpetrating those acts and to the existence of a manifest pattern of attacks against Yazidi community, whose identity is based on its religious beliefs.¹⁴⁴

On 29 May 2014, ISIS fighters entered the Yezidi villages, there they began to execute villagers, including women and young children, believing them to be Yazidis, according to survivors, the villagers, desperate to show that they were Muslims, the ISIS fighters asked the victims to recite the verses of the Quran, for example a group of ISIS fighters who did not understand Arabic language, they killed 15 Sunni people because they believed that they were Yazidi before an Iraqi fighter intervened to preventing further killings, the Iraqi fighter translated to the other ISIS fighters that the residents were Sunni Arabs.¹⁴⁵

For legitimizing its intention, the ISIS boasted about subjecting abducted Yezidi women and girls to sexual violence and slavery, seeking to legitimize these abhorrent and criminal practices according to their own interpretation of Islam, after capturing, the Yazidi women were then divided according to the Sharia amongst the fighters of the ISIS, after one fifth of the slaves were transferred to the ISIS's authority to be divided,¹⁴⁶ and then distributed as a part of ISIS

¹⁴¹ Report of the IICIS, Rule of Terror: Living under ISIS in Syria, (A/HRC/27/CRP.3), 19 Nov 2014, Para.37.

¹⁴² Id, Para. 53.

¹⁴³ Report of UNHRC on ISIS Crimes Against the Yazidis (They came to destroy): (A/HRC/32/CRP.2)- 15 June 2016, Para 159, 160.

¹⁴⁴ 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 ISIS (A/HRC/28/18), 27 Mar 2015, Para 17.

¹⁴⁵ Report of the IICIS, (A/HRC/27/60), 13 Aug 2014, para. 56.

¹⁴⁶ Amnesty International, 2014, 'Escape from hell: Torture and sexual slavery in Islamic State Captivity in Iraq'.

salary for its fighters.¹⁴⁷ It could be an apparent evidence to prove that they deliberately with intention committed such crimes, based on the evidences, collected by many sources, the Yazidi community and acts that caused serious bodily or mental harm to members of that group, the information also pointed to the intent of ISIS to destroy the Yazidi as a group when perpetrating those acts and to the existence of a manifest pattern of attacks against that community, whose identity is based on its religious beliefs. Yazidis were considered as infidels,¹⁴⁸ such conduct may amount to genocide.¹⁴⁹

¹⁴⁷ Josie Ensor, "I got four Yazidi virgins as part of my ISIS salary and had sex with a different one every night," Daily Telegraph, July 31, 2017, <http://www.telegraph.co.uk/news/2017/07/31/quivering-isis-suspects-face-investigations-court-mosulatrocities/>

¹⁴⁸ Report of the IICIS, A/HRC/27/CRP.3- 19 Nov 2014.

¹⁴⁹ 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 ISIS, (A/HRC/28/18)- 27 Mar 2015. Para 17.

2.2: War Crimes

2.2.1: General overview

The origins of war crimes can be found in the traditional laws of war which today called IHL, their rules were derived from international conventions and customary international law.¹⁵⁰ War crimes are crimes committed in time of armed conflict,¹⁵¹ which are defined any act or omission committed in an armed conflict that constitute a serious violation of the laws and customs of IHL that has been criminalized by international treaties or customary law. This definition requires at least two conditions qualifying a conduct to a war crime. First, a violation of IHL, and second, the criminalization of the conduct under treaty or customary international law.¹⁵²

The main purpose of the law of armed conflict is to protect combatants and non-combatants from unnecessary suffering and to safeguard the fundamental human rights of persons who are not, or are no longer, taking part in the conflict, that prevents the degeneration of conflicts into brutality and savagery. The law of armed conflict aids the restoration of peace and the resumption of friendly relations between the belligerents.¹⁵³ The oldest category of atrocity crimes, grounded in IHL, regulate the conduct of parties engaged in an armed conflict and seek to minimize suffering and harm, it is based on a balancing between military and humanitarian considerations.¹⁵⁴ The crimes should be committed as part of a plan or policy or as part of a large-scale commission of such crimes,¹⁵⁵ which carry individual criminal liability,¹⁵⁶ but only specific violations of IHL are criminalized.¹⁵⁷

What ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon the armed conflict in which it is committed, it needs not have been planned or supported by some form of policy. The armed conflict needs not have been causal to the commission of the crime, but the existence of an armed conflict has played a

¹⁵⁰ Schwarz. A, 2014, War Crimes, Max Planck Encyclopedia of Public International Law, Oxford Public International Law, Oxford University Press.

¹⁵¹ Klamberg. M, 2017, Commentary on the Law of the International Criminal Court, Brussels, Torkel Opsahl Academic EPublisher.

¹⁵² Schwarz. A, 2014, War Crimes, Max Planck Encyclopedia of Public International Law, Oxford Public International Law, Oxford University Press.

¹⁵³ UK Ministry of Defense, 2004, 'The Manual of the Law of Armed Conflict, Oxford University, para. 1.8.

¹⁵⁴ Stahn. C, 2019, A Critical Introduction to International Criminal Law, Cambridge University press.

¹⁵⁵ The Rome Statute, Art. 8.

¹⁵⁶ Chehtman. A, 2018, 'Revisionist Just War Theory and the Concept of War Crimes' Leiden Journal of International Law, Vol 31, No. 1, p. 181.

¹⁵⁷ Stahn. C, 2019, A Critical Introduction to International Criminal Law, Cambridge University press.

substantial part in the perpetrator's ability to commit it.¹⁵⁸ To determine a specific conduct to amount to a war crime, the following elements are required; existence of an armed conflict, nexus of the conduct to this armed conflict, violation of a specific rule of IHL, is this violation of IHL criminalized under international law, and if so, does the conduct fulfil all requisite material and mental elements of the offence.¹⁵⁹

¹⁵⁸ ICTY, *The Prosecutor v. Dragoljub Kunarac, Radomir Kovac, Zoran Vukovic*, Case IT-96-23 & IT-96-23/1-A, Appeals Chamber Judgment, 12 June 200, para 58.

¹⁵⁹ Triffterer, O, Ambos, K, 2016, *Rome Statute of the International Criminal Court*, 3rd ed, C.H. Beck, commentary on Article 8, para 2, p. 305.

2.2.2: Armed Conflicts

Today, there are two basic types of armed conflicts, to which a certain number of identical and certain number of differentiated rules apply. One type is International Armed Conflicted (IAC) which occurs between states, the other is Non-International Armed Conflicted (NIAC) which is an armed conflict between governmental forces and insurgents or between armed groups.¹⁶⁰ There is no general definition of an armed conflict in the Rome Statute or the Elements of Crimes,¹⁶¹ The ICC has relied on the ICTY jurisprudence to define armed conflict,¹⁶² which is “a conflict exists whenever there is a resort to armed force between States or protracted violence between governmental authorities and organized armed groups or between such groups within a State, the IHL applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached, or in the case of internal conflicts, a peaceful settlement is achieved until that moment the IHL continues to apply in the whole territory of the warring States or in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.”¹⁶³ The distinction between IACs and NIACs matters from the perspective of accountability, the list of war crimes has typically been more extensive in the context of IAC. Moreover, the regime differs in relation to combat immunity. In IAC, parties to a conflict cannot be prosecuted for their engagement in conflict, unless they violate the law. In NIAC, there is no ‘combatant’ or ‘prisoner of war’ status.¹⁶⁴

ISIS is an organized group, it is an Armed Non-State Actor (ANSA) that resorted to armed force in Iraq and Syria,¹⁶⁵ which its attacks would appear to qualify as occurring in the midst of NIAC in cases where the group is engaged in protracted armed conflict with the State in which it is operating (e.g. Syria and Iraq) and the extent of the organization of the parties to said conflict.¹⁶⁶ It could also be said that the presence of foreign States’ armed forces has caused the conflicts to become internationalized, exactly after involving the Global Coalition against

¹⁶⁰ Kolb, R., 2014, ‘Advanced Introduction to International Humanitarian Law’ Edward Elgar publishing Limited.

¹⁶¹ Klamberg, M., 2017, Commentary on the Law of the International Criminal Court, Brussels, Torkel Opsahl Academic EPublisher, General remark on Article 8, p. 65.

¹⁶² ICC, Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Trial Chamber I Judgment, 14 Mar 2012, para. 533.

¹⁶³ ICTY, The Prosecutor v. Dusko Tadic, Case No. IT-94-1-AR72, Appeals Chamber, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 Oct 1995, Para. 70.

¹⁶⁴ Stahn, C., 2019, A Critical Introduction to International Criminal Law, Cambridge University press.

¹⁶⁵ Lekas, A., 2015, ‘ISIS; The Largest Threat to World Peace Trending Now’ Emory International Law Review, Vol. 30, No. 2, pp. 313-351.

¹⁶⁶ Kenny, C., 2017, ‘Prosecuting Crimes of International Concern: Islamic State at the ICC?’ Utrecht Journal of International and European Law, Vol.34, No. 84, pp. 120-145.

ISIS which was formed in Sep 2014, the Coalition's 82 member states were committed to tackling ISIS on all fronts, to dismantling ISIS's networks and countering its global ambitions,¹⁶⁷ in any event, whether deemed international or internal conflicts, certain ISIS's attacks would likely constitute war crimes under article 8 of the Rome Statute.

According to the Rome Statute, to determine NIAC, the Office of the Prosecutor (OTP) must examine to find out; firstly, the armed hostilities reach a certain level of intensity, exceeding that of "internal disturbances and tensions, such as riots, isolated acts of violence or other acts of a similar nature",¹⁶⁸ secondly, the armed hostilities take place within the confines of a State territory, thirdly, the armed hostilities break out either between government authorities and ANSAs or between such actors.¹⁶⁹

Two provisions in the Rome Statute relate to war crimes committed in NIAC, article (8-2-c) and (8-2-e), the first sub-paragraph relates to serious violations of article 3 common to the four Geneva Conventions, which namely, firstly, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria, in particular murder of all kinds, mutilation, cruel treatment and torture. Secondly, taking of hostages, outrages upon personal dignity, in particular humiliating and degrading treatment, and/or, thirdly, passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.¹⁷⁰ The second sub-paragraph (8-2-e) relates to some criminalized violations to NIAC, which its provisions are taken from article (8-2-b) related IAC, but some of them were not taken due to the fact that some of the provisions are by their very nature not applicable to internal warfare or proposed provisions concerning internal armed conflicts were rejected by at least a certain number of States during the Rome Statute drafting.¹⁷¹

¹⁶⁷ The Global Coalition against Daesh website.

¹⁶⁸ The Rome Statute Article 8 (d) which excludes certain situations.

¹⁶⁹ Klamberg. M, 2017, Commentary on the Law of the International Criminal Court, Brussels, Torkel Opsahl Academic EPublisher, General remark on Article 8, p. 108.

¹⁷⁰ Article 3 common to the four Geneva conventions, 12 Aug 1949.

¹⁷¹ Triffterer. O, Ambos. K, 2016, Rome Statute of the International Criminal Court, 3rd ed, C.H. Beck, commentary on Article 8, para 2(c), p. 530.

The conflict in Iraq and Syria between ISIS and other affiliated armed groups, on one side, and Iraqi and Syrian security forces and pro-Government forces or other ANSAs on the other hand constitutes the NIAC, accordingly, the parties are required to comply with the IHL, in particular common article 3 to the Geneva Conventions and rules of customary international law applicable to NIAC.¹⁷² As well the United Nations Human Rights Council Resolution S-22/1 recognized the armed conflict in Iraq is a NIAC.¹⁷³

¹⁷² UNAMI Report on Promotion and Protection of Rights of Victims of Sexual Violence Captured by ISIL/or in Areas Controlled by ISIL in Iraq, 22 Aug 2017, p. 18.

¹⁷³ 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 ISIS (A/HRC/28/18), 27 Mar 2015, Para. 13.

2.2.3: Individual Acts

The material elements of war crimes were numerated generally in article (6-b) in the IMT statute, article 8 in the Rome Statute, article 4 in the ICTR statute, articles 2 and 3 in the ICTY statute, articles 3 and 4 in the SCSL statute, article 6 in the ECCC statute, as well as in many national laws,¹⁷⁴ but specifically the Elements of Crimes which is established according to the article (30-1) in the Rome Statute described the criminal acts, The ‘material elements’ of a crime refer to the non-mental elements of the definition of the crimes, this term refers to the conduct described in the definition, any consequences that may be specified in addition to the conduct, and any circumstances that must exist.¹⁷⁵ Also in order to decide whether the war crimes have been occurred or not, the nexus between armed conflict and individual acts should be examined. In the ICTR and ICTY jurisprudence, it is imperative to find an evident nexus between the alleged crimes and the armed conflict as a whole,¹⁷⁶ but the Rome Statute requires just only having awareness of the factual circumstances that established the existence of an armed conflict that is implicit in the terms took place in the context.¹⁷⁷

ISIS members have committed different war crimes in the context of the NIAC under article (8-2-c and 8-2-e) of the Rome Statute. The acts have been committed against persons by ISIS include killing and wounding persons not involved in combat, mistreatment, sexual violence, hostage taking, and use of child soldiers are the major ones.¹⁷⁸ In Aug 2015, the IICIS stated that the ISIS religious motivation when targeting the Yazidi community, which it regards as pagan and infidel, with violations committed against women and girls, it also reported on patterns of religiously discriminatory attacks against Christian communities, its conclusion that ISIS has committed war crimes, including murder, execution without due process, torture, hostage taking, rape and sexual violence, recruiting and using children in hostilities and attacking protected objects, as well as other serious violations of IHL.¹⁷⁹ The UNSC acting under Chapter VII of the UN Charter, in Aug 2014 deplored and condemned in the strongest terms that the terrorist acts of the ISIS and its violent extremist ideology, and its continuous gross, systematic and widespread abuses the IHRL and violations of the IHL,¹⁸⁰

¹⁷⁴ Iraq enacted the “Iraqi High Tribunal” including war crimes, I discuss in the chapter three in this thesis.

¹⁷⁵ Triffterer. O, Ambos. K, 2016, Rome Statute of the International Criminal Court, 3rd ed, C.H. Beck, commentary on Article 30, p. 1114.

¹⁷⁶ ICTY, The Prosecutor v. Tihomir Blaskic, Case No. IT-95-14-T, Trial Chamber Judgment, 3 Mar 2000, para. 69. And ICTR, The Prosecutor v. Clement Kayishema and Obed Ruzindana, Case No. Case No. ICTR-95-1-T, Trial Chamber Judgment, 21 May 1999.

¹⁷⁷ The Elements of Crimes, article 8.

¹⁷⁸ Report UNHRC, (They came to destroy): (A/HRC/32/CRP.2), 15 June 2016, para. 15.

¹⁷⁹ Report of the IICIS, (A/HRC/30/48), 13 Aug 2015, para 172.

¹⁸⁰ United Nation Security Council Resolution 2170 (2014).

2.2.3.1: Serious violations of article 3 common to the four Geneva Conventions

Article 3 common of the four Geneva Conventions which has been inserted into article (8-2-c) of the Rome Statute protects three groups; persons taking no active part in hostilities ‘civilians’, and another two notions of ‘members of armed forces who have laid down their arms’ and ‘persons placed hors de combat’,¹⁸¹ including medical personnel, or religious personnel. The crimes which this article cover are “murder, mutilation, inflicting severe physical or mental pain, torture, punishment, intimidation or coercion, humiliating, degrading, taking hostages, sentencing or execution without due process”.¹⁸²

By willfully killing, and summarily execute Yazidi people who refused to convert, often within sight of their relatives, the ISIS committed the war crime of killing civilians. Yazidis men, women, and children were also killed by ISIS during their captivity in Iraq and Syria, these killings constitute the war crime of murder.¹⁸³ According to the UNAMI monitoring, a minimum 4,410 civilians were killed and 7,517 others wounded throughout Iraq (excluding Mosul governorate) as a result of armed conflict and acts of terrorism between 1 Jan to 30 June 2014.¹⁸⁴ For instance, ISIS executed former candidates for public office in the areas under its control; two former candidates for the Mosul Provincial Council was killed by ISIS in a military base, the victims were shot in the head after abducting from their home separately, six former candidates for the Iraqi parliamentary elections were executed by firing squad in a military base following a decision of an ISIS self-appointed court, and 53 employees of the Independent High Electoral Commission were abducted 28 of those, including 11 women, were executed in a military base.¹⁸⁵ On 8 Aug 2014, ISIS reportedly executed at least 300 civil servants employed by Independent High Electoral Commission.¹⁸⁶

ISIS took hostages, hostage taking means “the seizure and detainment of one or more protected persons and a threat to kill, injure or continue to detain such person or persons”.¹⁸⁷ ISIS conducted hostage taking by taking 3,200 Yazidi women and girls and deprived their liberty

¹⁸¹ Triffterer. O, Ambos. K, 2016, Rome Statute of the International Criminal Court, 3rd ed, C.H. Beck, commentary on Article 8(2)(c), p. 547, para.879-80.

¹⁸² The Elements of Crimes, elements of article 8(2)(c)(I),(II),(III) and (IV).

¹⁸³ Report of UNHRC Crimes Against the Yazidis (They came to destroy): (A/HRC/32/CRP.2)- 15 June 2016, para. 169 & 170.

¹⁸⁴ UNAMI, 2014, ‘Report on the Protection of Civilians in Armed Conflict in Iraq’, 5 June – 5 July 2014, p. 7.

¹⁸⁵ UNAMI, 2015 ‘Report on the Protection of Civilians in Armed Conflict in Iraq’ 1 May to 31 Oct 2015, p. 8.

¹⁸⁶ Id. p. 9

¹⁸⁷ Klamberg. M, 2017, Commentary on the Law of the International Criminal Court, Brussels, Torkel Opsahl Academic EPublisher, General remark on Article 8 (2)(c)(III), p. 114.

and sold repeatedly for the purpose of being sexually abused.¹⁸⁸ Moreover, 16 Georgian civilian contractors who worked for an Iraqi communications company were taken in Mosul by ISIS, 40 Indian nationals worked for an Iraqi construction company operating were taken as hostages, 32 Turkish truck drivers and employees also were kidnapped in the Turkish consulate in Mosul, 44 foreign workers (Turkish, Nepalese, Bangladeshi, and Turkmenistani) who worked for a Turkish company in Tikrit were kidnapped by the ISIS fighters.¹⁸⁹

ISIS carried out massacres by executing war captives “without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable”.¹⁹⁰ The article (8-2-c-iv) of the Rome Statute guarantees certain minimum due process rights before a sentence is passed or an execution against a protected person takes place, the protect interests in this regard are person or persons were either “hors de combat”, or were civilians, medical personnel or religious personnel who take no active part in the hostilities.¹⁹¹ The Elements of Crimes distinguishes three separate criminal acts by judgment without a regular court, namely, first; there was no previous judgment pronounced by a court, second; the court was not regularly constituted, and third; the court that rendered judgment did not afford other generally recognized judicial guarantees.¹⁹² Also article (8-2-e-x) of the Rome Status covers the offence that committed a crime by taking no prisoners behind or no survivors in the warfare, the material element of this article will typically be fulfilled by a declaration that any surrender shall be refused even if it is reasonable to accept.¹⁹³

ISIS allegedly committed war crimes by mutilation, torture, humiliating, cruel and degrading treatment, and severe deprivation of liberty against civilians by beating and flogging, pulling out nails, electrocution, and crucifixion,¹⁹⁴ or outrages upon personal dignity, and passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court,¹⁹⁵ and amputating hands as a punishment for theft, the amputation

¹⁸⁸ Report of UNHRC on ISIS Crimes Against the Yazidis (They came to destroy): (A/HRC/32/CRP.2), 15 June 2016, para. 171.

¹⁸⁹ UNAMI, 2014, ‘Report on the Protection of Civilians in Armed Conflict in Iraq’ 5 June – 5 July 2014, p. 11.

¹⁹⁰ The Rome Statute, article 8 (2)(c)(iv).

¹⁹¹ The Elements of Crimes, element (2) of article 8(2)(c)(iv).

¹⁹² Klamberg. M, 2017, Commentary on the Law of the International Criminal Court, Brussels, Torkel Opsahl Academic EPublisher, General remark on Article 8 (2)(c)(iv), p. 114.

¹⁹³ Klamberg. M, 2017, Commentary on the Law of the International Criminal Court, Brussels, Torkel Opsahl Academic EPublisher, General remark on Article 8 (2)(e)(x), p. 143.

¹⁹⁴ Muhammadin. F. M, 2016, ‘Comparing International Humanitarian Law and Islamic Law on War Captives: Observing ISIS’, Dauliyah Journal of Islamic and International Studies, Vol. 1, No.2, p. 132.

¹⁹⁵ 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 ISIS, (A/HRC/28/18), 27 Mar 2015, para. 76.

usually were improperly performed, that causing immense suffering to the victims and distress to the crowd who had been urged to watch.¹⁹⁶ ISIS justified its violation and execution by religious law. The victims stated that detainees in ISIS prisons have no access to lawyers and are afforded none of the due process rights inherent in a fair trial there are reasonable grounds to believe that ISIS has committed the war crime of execution without due process.¹⁹⁷

Based on interviews with survivors, the UNAMI reported that approximately 1,500 to 1,700 members of the Iraqi armed forces after captured and being captive from Camp Speicher in Salah ad-Din governorate on 12 June 2014 and on 10 June 2014 more than 600 inmates of Badush prison were summarily executed by ISIS.¹⁹⁸ the UNITAD confirmed in its third report that it has been provided with access to a wide range of relevant material held by the judicial commission to investigate that the Speicher crimes committed by ISIS, such access has enabled the UNITAD to draw on key elements of existing evidence, including analytical products, witness statements, autopsy reports, judicial decisions and other underlying materials.¹⁹⁹

¹⁹⁶ Report of the IICIS, (A/HRC/27/60), 13 Aug 2014, para. 66.

¹⁹⁷ Id, para. 35 and 36.

¹⁹⁸ 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 ISIS, (A/HRC/28/18)- 27 Mar 2015, para. 28 to 34.

¹⁹⁹ Third report of the Special Adviser and Head of the UNITAD, (S/2019/878)- 13 Nov 2019, para. 27.

2.2.3.2: Forcibly displacing and attack against civilian population

Forcibly displacing and attacking against civilian population are another form of war crime. Article (8-2-e-I) of the Rome Statute prohibits attacking against civilians, the conduct should be taken place in the context which was associated with an armed conflict not of an international character.²⁰⁰ The article requires parties to a conflict at all times to distinguish between civilians and combatants, the attack does not need to lead to civilian casualties, it is sufficient to prove that the author directed the attack towards the civilian population or individual civilians.²⁰¹ Forcibly displacing civilian population according to article (8-2-e-viii) means the order for displacement which is not justified by the security of the civilians involved or by military necessity, and the perpetrator shall be in a position to effect such displacement by giving such order.²⁰² The term “displacement” shall be interpreted in light of the IHL as to include the evacuation of the civilian population both within and outside the national territory.²⁰³ ISIS violations impacted on the civilian populations which has led to the displacement of millions of people, and forced displacement of members of minority groups.²⁰⁴ Some Kurdish civilians were forcibly displaced from their lands and suffered from an earlier forcible displacement. The ISIS fighters ordered that civilians leave cannot be justified on the grounds either of the security of the civilians involved or of military necessity. Such conduct amounts to the war crime of forcible displacement.²⁰⁵ The Yazidi community of Sinjar has been devastated by the ISIS attack. In its aftermath, no free Yazidis remained in the Sinjar region. The 400,000-strong community had all been displaced.²⁰⁶ As the operation to retake Mosul began, the ISIS started forcibly evacuating civilians under their control with its fighters apparently using them as human shields.²⁰⁷

²⁰⁰ The Elements of Crimes, element (3) of article 8(2)(e)(I).

²⁰¹ Klamberg. M, 2017, Commentary on the Law of the International Criminal Court, Brussels, Torkel Opsahl Academic EPublisher, General remark on Article 8 (2)(e)(I), p. 122.

²⁰² The Elements of Crimes, element (2 and 3) of article 8(2)(e)(viii).

²⁰³ Klamberg. M, 2017, Commentary on the Law of the International Criminal Court, Brussels, Torkel Opsahl Academic EPublisher, General remark on Article 8 (2)(e)(viii), p. 141.

²⁰⁴ United Nation Security Council Resolution 2170 (2014), Para. 2.

²⁰⁵ Report of the IICIS, (A/HRC/27/60), 13 Aug 2014, para. 134-5.

²⁰⁶ Report of UNHRC on ISIS Crimes Against the Yazidis (They came to destroy): (A/HRC/32/CRP.2), 15 June 2016. Para. 175.

²⁰⁷ Human Rights Watch, 2017, “world report, events 2016”, p.341.

2.2.3.3: Attack against protected buildings

Buildings which are dedicated to religion, education, art, science or charitable purposes or historic monuments have special protection under international criminal law, they may not be intentionally targeted, unless they become a legitimate military objective, key example is the protection of cultural property.²⁰⁸ The attack against protected objects does not make a distinction as to whether it was carried out in the conduct of hostilities or after the object had fallen under the control of an armed group. The Rome Statute makes no such distinction of religious, cultural, historical, and similar objects.²⁰⁹

The first major international tribunal addressing crimes against cultural property was the IMT at Nuremberg, article (6-b) of its Charter vested it with jurisdiction over war crimes, including ‘plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.’²¹⁰ In the Rome Statute the object of the offence that has to be specially protected that can be classified into four main categories; cultural objects, places for the collection of those in need (for example, hospitals), institutions dedicated to religion and others dedicated to education.²¹¹

As ISIS fighters controlled the Sinjar region in early Aug 2014, they began to destroy Yazidi temples and shrines, for instance, the shrines of Sheikh Mand in Jiddala village, Sheikh Hassan in Gabara, Malak Fakhraddin in Sikeeniya, and Mahma Rasha located in Solagh were all destroyed in the period following the attack.²¹² Sunni and Shi’a mosques, Christian churches and monasteries, Kaka’e shrines, Sufi shrines and other religious, historical or cultural significant sites have all been targeted.²¹³ The ISIS destruction of cultural property brought the UNSC attention which resulted unanimously passed a resolution to addresses ISIS's destruction of cultural property and condemned the destruction of cultural heritage in Iraq and Syria.²¹⁴ Then the United Nations General Assembly (UNGA) adopted another resolution which specifically addressed the destruction and looting which carried out by the ISIS, stated that the cultural heritage of Iraq, as a cradle of the Mesopotamian civilization, found in its museums,

²⁰⁸ Stahn. C, 2019, *A Critical Introduction to International Criminal Law*, Cambridge University press. p. 84.

²⁰⁹ ICC, *Prosecutor v. Al Mahdi*, Case No. ICC-01/12–01/15, Trial Chamber VIII, 27 Sep 2016, para. 15.

²¹⁰ Vlastic. M & Turku. H, 2016, ‘Blood Antiquities - Protecting Cultural Heritage beyond Criminalization’ *Journal of International Criminal Justice*, Vol. 14, No. 5, p. 1184.

²¹¹ Klamberg. M, 2017, *Commentary on the Law of the International Criminal Court*, Brussels, Torkel Opsahl Academic EPublisher, General remark on Article 8 (2)(e)(iv), p. 130.

²¹² Report of UNHRC on ISIS Crimes Against the Yazidis (They came to destroy): (A/HRC/32/CRP.2), 15 June 2016, para. 98.

²¹³ UNAMI, 2014, ‘Report on the Protection of Civilians in Armed Conflict in Iraq’ 6 July – 10 Sep 2014, p. 9.

²¹⁴ United Nation Security Council Resolution 2199 (2015).

libraries, archives and archaeological sites, places of worship, including mosques, shrines and churches, and of religious and cultural artefacts, which are irreparable losses for Iraq and for humanity as a whole, that affirms attacks intentionally directed against buildings dedicated to religion, education, art, science or charitable purposes, or historic monuments, these acts may amount to war crimes.²¹⁵

²¹⁵ United Nation General Assembly Resolution A/RES/69/281 (2015).

2.2.3.4: Conflict-related gender-based violence

Gender violence is another form of war crime under international criminal law, the IMT recognized rape as a crime against humanity, but it did not expressly prosecute sexual violence.²¹⁶ The ICTY and ICTR were the first tribunals to prosecute gender-based violence during armed conflicts,²¹⁷ while the prohibition of rape in armed conflicts which has been long recognized in international treaty law as well as in customary international law.²¹⁸

Under the Rome Statute, rape is a war crime ‘when committed as part of a plan or policy or as part of a large-scale commission of such crimes. The Rome Statute criminalized some specific sexual violence as a war crime such as; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization.’²¹⁹ According to the Elements of Crimes, each violence has its own nature within NIAC, rape is defined as “invasion the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body”,²²⁰ also sexual slavery is defined as “exercising any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty with engaging in one or more acts of a sexual nature”,²²¹ and forced pregnancy defined as “confining one or more women forcibly made pregnant, with the intent of affecting the ethnic composition”.²²²

The UN secretary-general annual report to the UNSC about conflict related sexual violence for years of (2015,16,17,18, and 19),²²³ all mentioned reports addressed many sexual violations which have been committed by the ISIS fighters, expressed that following seizure of Mosul and surrounding areas in June 2014, ISIS instituted a pattern of sexual violence, slavery, abduction and human trafficking “three cases of forced abortion perpetrated because of the ethnicity of the victim were documented”, young women are being “sold” in open markets or

²¹⁶ Stahn. C, 2019, A Critical Introduction to International Criminal Law, Cambridge University press. P. 62.

²¹⁷ Lokot. M, 2019, ‘Challenging Sensationalism: Narratives on Rape as a Weapon of War in Syria’ International Criminal Law Review, Vol. 19, No. 5, p. 848.

²¹⁸ Human Rights Watch, 2006, “Genocide, War Crimes and Crimes Against Humanity; A Topical Digest of the Case Law of the International Criminal Tribunal for the Former Yugoslavia”, p. 85.

²¹⁹ The Rome Statute, article 8(2)(e)(vi).

²²⁰ The Elements of Crimes, element (1) of article 8(2)(e) (vi-1).

²²¹ The Elements of Crimes, element (1 and 2) of article 8(2)(e) (vi-4).

²²² The Elements of Crimes, element (1) of article 8(2)(e) (vi-2).

²²³ The reports respectively are (S/2015/203), (S/2016/361), (S/2017/249), (S/2018/250) and (S/2019/280).

“given” to ISIS fighters as gifts,²²⁴ and stated that ISIS conducted sexual exploitation, trafficking and trading to force the payment of ransoms, they gained around one million American dollars for releasing of 200 abducted Yezidis women, ransom payments to ISIS from the Yezidi community amounted to between \$35 million and 45\$ million, and described the capture and enslavement of “infidel” women and children as an inevitable consequence of its conquest of new territory and seeks to regulate and codify sexual slavery.²²⁵ The UNSC on 23 Apr 2019 hold a meeting to adopt a Resolution²²⁶ which was sponsored by Germany for recognizing the use of sexual violence as a tactic and weapon of war and terrorism.²²⁷ The threat of sexual violence has been a “push” factor driving forced displacement of civilians, and the offer of wives and sex slaves has been a strategic “pull” factor for the recruitment of men and boys, inducing both local youths and foreign fighters to join ISIS, they described the capture and enslavement as “infidel” women and children as an inevitable consequence of its conquest of new territory and sought to regulate and codify sexual slavery, this tactic is the explicit justification of sexual enslavement.²²⁸

Nadia Murad, the Nobel Peace Prize laureate is one of the survivors of ISIS sexual slave, she recounted the suffering which was inflicted by the ISIS to the Yazidi women “Once the ISIS captured victims, they took all their possessions, money, gold and mobiles and then separated the men from the women, then, they transported us to Rambusia, then to Baaj, before taking us to an agricultural area in Kabuseh, At Kabuseh, at gun point, they separated me and my three sisters from our parents. The four of us were taken to Baaj and detained in a single room. One evening, the Wali (ISIS mayor of Mosul) came with a group of men and each man took a girl for himself, one of the men, called Abu Al Hassan Al-Iraqi, took me, one of my sisters was taken by Abu Salih, the other by Abu Ghofran, and the fourth one by Abu Aysha Sharia, Al-Iraqi took me to Kocho village and married me, I was sold six times before my uncle secured my release by paying some money in May 2015.”²²⁹

ISIS conducted individual rapes of victims, deprived of their liberty, and sold repeatedly for the purpose of being sexually abused. The ISIS members exercised rights of ownership over the women and girls that they use to subject the women and girls to sexual violence, by doing

²²⁴ Report of the Secretary-General on conflict-related sexual violence (S/2015/203) 23 Mar 2015, para. 28-9.

²²⁵ Report of the Secretary-General on conflict-related sexual violence (S/2016/361) 20 Apr 2016, para. 20-21.

²²⁶ United Nation Security Council Resolution 2467 (2019).

²²⁷ The 8514th meeting of the United Nation Security Council (S/PV.8514), 23 Apr 2019.

²²⁸ Second report of the Secretary General on the ISIS to international peace and security and the range of UN efforts in support of Member States in countering the threat (S/2016/501)- 31 May 2016, para 44.

²²⁹ United Nation Human Rights Office, Human Rights Report for 2018, p. 306.

so, the ISIS members have committed the war crimes of rape, sexual violence, and sexual slavery.²³⁰ Despite the numerous and well-documented acts of sexual violence committed by members of ISIS and its affiliates, there have been no prosecutions for crimes of sexual violence by terrorist groups in Iraq and Syria.²³¹

The UN Secretary General urged the UN Member States that they should support the Government in its efforts to recover from the devastating impact of sexual violence perpetrated by ISIS on Iraqi communities. Member States should ensure the legal recognition of children conceived through rape as victims of sexual violence and put in place special birth registration procedures to protect them from becoming stateless and provide them with opportunities to obtain essential services. Religious and traditional leaders were strongly encouraged to alleviate stigma and support the reintegration of women and their children into communities.²³²

Captured Yazidi women and girls are deemed property of ISIS and are openly termed “Sabaya” or slaves. ISIS gave the women and girls to its fighters for individual purchase, the apportioning being drawn directly from religious interpretation. The ISIS sells Yazidi women and girls in slave markets “Souk sabaya” or as individual purchases to fighters who come to the holding centers, in some instances, an ISIS fighter might buy a group of Yazidi females in order to take them into rural areas without slave markets where he could sell them individually at a higher price.²³³ As an indirect impact of these sexual violence which suffered by Yazidi women and girls was likely to have lasting psychological effects, many reports made reference to a higher incidence of suicide and attempted suicide, some of this took place in ISIS captivity when Yazidi women and girls were being held as sex slaves.²³⁴ Over one hundred girls and women chose suicide over torture and rape at the hand of ISIS, some experienced unbearable torture and repeated gang raping, one girl who managed to call her father told him she had been raped eighteen times in one day and she would commit suicide as soon as she had the opportunity.²³⁵ Allegedly four women who were raped by members of ISIS committed suicide in Mosul.²³⁶

²³⁰ Report of UNHRC, (They came to destroy): (A/HRC/32/CRP.2)- 15 June 2016. Para. 171.

²³¹ Eighth report of the Secretary General on the threat posed by ISIS to international peace and security and the range of UN efforts in support of Member States in countering the threat (S/2019/103)- 1 Feb 2019, para. 69, and Report of the Secretary-General on conflict-related sexual violence (S/2019/280) 29 Mar 2019, para. 25.

²³² Ninth report of the Secretary General on the ISIS to international peace and security and the range of United Nations efforts in support of Member States in countering the threat (S/2019/612)- 31 July 2019, para. 68.

²³³ Report of UNHRC, (They came to destroy): (A/HRC/32/CRP.2), 15 June 2016, para. 55.

²³⁴ Dakhil. V, Borda. A, & Murray R. J, 2017, ‘Calling ISIL Atrocities against the Yezidis by Their Rightful Name’: Do They Constitute the Crime of Genocide?’ Human Rights Law Review, Vol. 17, No. 2, pp. 271.

²³⁵ Beam. A. L, 2019, the last Yazidi Genocide, Andinolfi books.

²³⁶ UNAMI, 2014, ‘Report on the Protection of Civilians in Armed Conflict in Iraq’ 5 June – 5 July 2014, p. 11.

2.2.3.5: Employing prohibited weapons of warfare

The prohibition of employing weapons, ammunition, materials, and methods of warfare of a nature to cause unnecessary suffering to members of the armed forces and civilians who directly participate in hostilities is another principle of regulating warfare.²³⁷ It is amount to war crime if the perpetrator employed a gas, substance, device or a weapon that releases a substance as a result of its employment, the substance causes death or serious damage to health in the ordinary course of events, through asphyxiating or toxic properties.²³⁸ The UNAMI received information that ISIS used, or attempted to use, chlorine gas in attacks, reportedly fired a chemical mortar that struck sandbag fortifications at a Kurdish military position near Mosul Dam, causing several Kurdish fighters near where it landed to become ill. ISIS allegedly used another chemical weapon against Peshmerga forces stationed on the Gwer frontline in Erbil. German military intelligence supported the claims that Peshmerga elements had been exposed to mustard gas.²³⁹ The Organization for the Prohibition of Chemical Weapons voiced serious concern over the reports of possible use of chemical weapons in Iraq by ISIS. The Director of the organization recalled that States Parties to the Chemical Weapons Convention regard the use of chemical weapons by anyone under any circumstances as reprehensible and completely contrary to the legal norms and standards of the international community.²⁴⁰

Human Rights Watch reported that ISIS launched at least three chemical attacks on the Iraqi town of Qayyarah, south of Mosul. And noted that the use of toxic chemicals as a means of warfare is a serious threat to civilians and combatants and is a war crime,²⁴¹ several witnesses, as well as a number of other sources provided information to Leadership Panel of the (Organization for the Prohibition of Chemical Weapons-United Nations Joint Investigative Mechanism) that Marea town was bombarded by artillery shells, several of which were filled with sulfur mustard,²⁴² and also the chemical weapons have been used in the town of Umm Hawsh by ISIS,²⁴³ these information verified by the IICIS,²⁴⁴ and by the Office of the United Nations High Commissioner for Human Rights.²⁴⁵

²³⁷ Stahn. C, 2019, A Critical Introduction to International Criminal Law, Cambridge University press. P. 89.

²³⁸ The Elements of Crimes, element (1 and 2) of article 8(2)(e) (xiii and xiv).

²³⁹ UNAMI, 2015 'Report on the Protection of Civilians in Armed Conflict in Iraq' 1 May to 31 Oct 2015, p. 17.

²⁴⁰ OPCW, 2015, Director General concerned over alleged chemical weapons use in Iraq.

²⁴¹ Human Rights Watch, 2017, "world report, events 2016", p. 341.

²⁴² United Nation Security Council Resolution S/2016/738 (2016), p. 98.

²⁴³ United Nation Security Council Resolution S/2017/904 (2017), p. 7.

²⁴⁴ Report of the IICIS (A/HRC/30/48), 13 Aug 2015, para. 39.

²⁴⁵ 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 ISIS (A/HRC/28/18)- 27 Mar 2015, para. 47.

2.2.3.6: Enlisting children into armed forces

The recent addition to the prohibited methods of warfare is the use of child soldiers,²⁴⁶ there is no express regulation of the participation of children in armed conflicts in any of the four Geneva Conventions, but both Additional Protocols of 1977 of the Geneva Conventions, the Convention on the Rights of the Child and the first Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict include provisions regulating the recruitment of children and their participation in armed conflict.²⁴⁷ The SCSL in article (4-c) in its statute criminalized conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.²⁴⁸ Article (8-2-e-vii) of the Rome Statute prohibits conscripting and enlisting one or more persons into an armed force or group or using one or more persons to participate actively in hostilities, which the person or persons are under the age of 15 years.²⁴⁹ In its second report, the UN Secretary-General on children and armed conflict in Iraq to the UNSC which covered violations from Jan 2011 to June 2015 stated that throughout the reporting period, children were recruited, trained and used by armed groups to take direct and indirect part in hostilities. Children were used to act as spies and scouts, to transport military supplies and equipment, to conduct patrols, to man checkpoints, to videotape attacks for propaganda purposes and to plant explosive devices, as well as to actively engage in attacks or combat situations.²⁵⁰ In 2015 alone, the UN verified 274 cases of children having been recruited by ISIS in Syrian, and the UN verified the existence of centers in rural Aleppo, Dayr al-Zawr and rural Raqqah that provided military training to at least 124 boys between 10 and 15 years of age, verification of the use of children as foreign fighters has increased significantly, with 18 cases involving children as young as 7 years of age. The use of children as child executioners was reported and appeared in video footage.²⁵¹ In 2016 ISIS kidnapped between 800 and 900 children in Mosul for religious and military training.²⁵² The ISIS established training camps to recruit children into armed roles under the guise of education, according to an account about an ISIS training camp in Aleppo, ISIS actively recruited children from the ages of 14 or 15 to undergo the same training as adults,

²⁴⁶ Stahn. C, 2019, A Critical Introduction to International Criminal Law, Cambridge University press. P. 92.

²⁴⁷ Happold. M, 2000, "Child Soldiers in international Law: The Legal Regulation of Children's Participation in Hostilities" Netherlands International Law Review, Vol.47, No.1, p. 29.

²⁴⁸ The Statute of the Special Court for Sierra Leone, UNSC resolution 1315 (2000) of 14 Aug 2000.

²⁴⁹ The Elements of Crimes, element (1 and 2) of article 8(2)(e)(vii).

²⁵⁰ Second Report on children and armed conflict in Iraq (S/2015/852), 9 Nov 2015, para. 29.

²⁵¹ Report on Children and armed conflict (A/70/836-S/2016/360), 20 Apr 2016, para. 65, 149 and 150.

²⁵² Human Rights Watch, 2017, "These are the Crimes we are Fleeing: Justice for Syria in Swedish and German Courts", p. 341.

offered financial rewards, at the camps, the children received weapons training and religious education, the existence of such camps seemed to indicate that ISIS systematically provided weapons training for children. They were active combat during military operations, including suicide-bombing missions. In Raqqa, children from the age of 10 were recruited and trained in ISIS camps. By recruitment and use of children, ISIS has violated IHL and IHRL in using children below the age of 15, the group may have committed war crime.²⁵³

²⁵³ Report of the IICIS Republic (A/HRC/27/60), 13 Aug 2014, para. 95.

2.3: Crimes against humanity

2.3.1: General overview

Unlike the crime of genocide, crimes against humanity have never been codified in a wide accepted treaty, as a result, negotiations to define the crimes against humanity at the Rome Conference included the specific acts which numerated in article 7, such as murder, extermination, torture, rape sexual slavery, and persecution.²⁵⁴ The crimes against humanity are attacks on civilian populations that are at risk because of their presence in the targeted population. The basic idea is that a crime is no longer simply an ordinary crime under domestic law, but an international crime, where the collective action of an organization causes harm to the civilian population which reaches the threshold of widespread or systematic violence.²⁵⁵

The crimes against humanity consist of two parts; the underlying acts of murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment or severe deprivation of physical liberty, torture, rape and other sexual offences, persecution, enforced disappearance, apartheid and other inhumane acts, and a contextual part, international criminal law requires proof that one or more underlying acts took place within the context of a widespread or systematic attack on a civilian population.²⁵⁶ The definition of the crimes against humanity is distinct from the definition of genocide in several ways, but both may take place in peace time or during armed conflict, and both may be committed by state or non-state actors.²⁵⁷

Crimes against humanity for the first time emerged in a response to the massacre of Armenian population by Turkey in 1915, through a joint declaration by France, Great Britain and Russia which described the massacre as a ‘crime against humanity and civilization.’²⁵⁸ Following the conclusion of the Second World War, crimes against humanity were codified for the first time in the Charter of the Nuremberg Tribunal.²⁵⁹ More recently, international criminal tribunals

²⁵⁴ Novak. A, 2015, ‘The International Criminal Court, An Introduction’, Springer International Publishing Switzerland, p. 45.

²⁵⁵ Stahn. C, 2019, A Critical Introduction to International Criminal Law, Cambridge University press. P. 54.

²⁵⁶ Centre for International Law Research and Policy (CILRAP), 2017, ‘Crimes Against Humanity’, p. 6.

²⁵⁷ Novak. A, 2015, ‘The International Criminal Court, An Introduction’, Springer International Publishing Switzerland, p. 45.

²⁵⁸ Triffterer. O, Ambos. K, 2016, Rome Statute of the International Criminal Court, 3rd ed, C.H. Beck, commentary on Article 7, p. 153, para. 1.

²⁵⁹ Charter of the International Military Tribunal, Article 6 (c).

have applied crimes against humanity as an international crime, as seen in the ICTY,²⁶⁰ ICTR,²⁶¹ SCSL,²⁶² ECCC,²⁶³ and the ICC.²⁶⁴

The terms “widespread or systematic attack” were defined as; “widespread” refers to the large scale of an attack, involving many victims, and “systematic” refers to an organized pattern of conduct, as distinguished from random or unrelated acts.²⁶⁵ However, the perpetrator should know that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population, this element should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization.²⁶⁶

²⁶⁰ The ICTY Statute, Article. 5.

²⁶¹ The ICTR Statute, Article. 3.

²⁶² The SCSL Statute, Article. 2.

²⁶³ The ECCC Statute, Article. 5.

²⁶⁴ The Rome Statute, Article. 7.

²⁶⁵ ICTR, The prosecutor v. Jean Mpambara, Case No. ICTR-01-65-T, Trial Chamber, 11 Sep 2006, para. 11.

²⁶⁶ The Elements of Crimes, the last element of all sub-articles of article. 7.

2.3.2: Individual Acts

Crimes against humanity consist of two types of offences the first are so-called murder-type offences, some but not all of them are criminal offences in national legal systems, they are banned internationally because of their cruelty and barbarity, including murder, extermination, enslavement, deportation or forcible transfer of population, torture, acts of sexual violence or enforced disappearance of persons, the second type of the offence is ‘persecution’-related, these may not be criminal or even prohibited in national legal systems, they are typically geared at persecution of a specific group of people on racial, religious or political grounds.²⁶⁷

Murder has been included as the first crime against humanity in every instruments which is defining the crimes against humanity.²⁶⁸ Murder as a crime against humanity within the meaning is not defined in the Rome Statute, but according to the Elements of Crimes, element of murder is that the perpetrator killed or caused the death of one or more persons,²⁶⁹ ISIS killed and abducted scores of civilians, victims include those perceived to be opposed to ISIS ideology and rule, persons affiliated with the Government, such as former Iraqi security forces, police officers, former public officials and electoral workers, professionals, such as doctors and lawyers, journalists; and tribal and religious leaders, many have been subjected to adjudication by ISIS self-appointed courts which in addition to ordering the murder of countless people.²⁷⁰ ISIS’s Diwan al-Hisba (Moral Policing Administration) and online media apparatuses publicly announced 27 executions of allegedly gay men, at least nine of them in Iraq, the main method ISIS used to execute these men has been to throw them off the roofs of high-rise buildings.²⁷¹ ISIS allegedly carried out several politically motivated killings, at least 602 members of the Albu-Nimr tribe were allegedly killed in six separate incidents between Sep 2014 and Jan 2015 in Anbar province,²⁷² and violence against the civilian population under its control in Ar-Raqqah and eastern Aleppo governorates, the widespread and systematic attack on the civilian population and the unlawful killings in Ar-Raqqah governorate and in identified localities in Aleppo governorate form part of the attack, those killings could be amount of committing the crime against humanity of murder.²⁷³

²⁶⁷ Stahn. C, 2019, A Critical Introduction to International Criminal Law, Cambridge University press. P. 58.

²⁶⁸ ICTR article 3(a), ICTY article 5(a), SCSL article 2(a), ECCC article 5(a), ICC article 7 (a).

²⁶⁹ The Elements of Crimes, element (1) of article 7(1)(a).

²⁷⁰ UNAMI, 2015 ‘Report on the Protection of Civilians in Armed Conflict in Iraq’ 1 May to 31 Oct 2015.

²⁷¹ HRW, 2017, “These are the Crimes we are Fleeing: Justice for Syria in Swedish and German Courts”.

²⁷² 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 ISIS (A/HRC/28/18), 27 Mar 2015, para. 31.

²⁷³ Report of the IICIS, (A/HRC/27/60), 13 Aug 2014, para. 38.

Enslavement is another form of crime against humanity. Enslavement like murder has been included as a crime against humanity in all mentioned statutes, which is defined as exercising any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty,²⁷⁴ and sexual slavery, as a crime against humanity, is defined by article (7-1-g) of the Rome Statute in addition to the above definition of enslavement, the perpetrator must cause such person or persons to engage in one or more acts of a sexual nature,²⁷⁵ ISIS's Aug 2014 attack on Sinjar and its subsequent abuse of captured Yazidis, including the sexual and physical violence directed against Yazidi women and children transferred into Syria, constitute a direct attack on the Yazidis and on civilian population who was the primary target of the attack may amount to crime against humanity.²⁷⁶

Torture as a crime against humanity defined as intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused, except that torture shall not include pain or suffering arising only from inherent lawful sanctions.²⁷⁷ ISIS inflicted severe physical or mental pain or suffering on civilian populations in areas under its control, a continuation of the previously identified widespread and systematic attack on the civilian population that could be amount of crime against humanity ,²⁷⁸

ISIS allegedly committed the crime against humanity of murder and extermination, in its sexual enslavement, and beating of Yazidi women and girls, committed the crimes of sexual slavery, rape, sexual violence, enslavement, torture, other inhumane acts, and severe deprivation of liberty by forcing Yazidi men and boys to labor on ISIS projects and by beating them for refusing to so labor, these crimes were committed against the Yazidis on discriminatory grounds based on their religion, and as such they also amount to the crime against humanity of persecution.²⁷⁹

²⁷⁴ The Elements of Crimes, element (1) of article 7(1)(c).

²⁷⁵ The Elements of Crimes, element (2) of article 7(1)(g).

²⁷⁶ Report of UNHRC on ISIS Crimes Against the Yazidis (They came to destroy): (A/HRC/32/CRP.2)- 15 June 2016, para. 166.

²⁷⁷ Klamberg. M, 2017, Commentary on the Law of the International Criminal Court, Brussels, Torkel Opsahl Academic EPublisher, General remark on Article 7 (1)(f), p. 48.

²⁷⁸ Report of IICIS (A/HRC/27/60), 13 Aug 2014, para. 73.

²⁷⁹ Report of UNHRC on ISIS Crimes Against the Yazidis (They came to destroy): (A/HRC/32/CRP.2)- 15 June 2016, para. 168.

Chapter 3: Possibility of prosecuting ISIS fighters

Throughout the modern history the most serious crimes and violations of IHRL, IHL, ICL and customary international law have become a focus of many scholarship, official, and interstate debates, resulted establishing some institutions for bringing international perpetrators into justice, the efforts to develop an effective and just system of international accountability started genuinely after creating IMT especially for ending impunity for persons who committed an act which constitutes a crime under international law, even the head of states or responsible government official which did not relieve them from responsibility under international law.²⁸⁰ Then the UNGA adopted the Genocide Convention of 1948, the convention left some serious weaknesses regarding another violations which resulted to adopting the four Geneva Conventions of 1949, and their Additional Protocols of 1977, The Ad hoc and hybrid tribunals brought another strengths to the international justice for accountability of core international crimes, and the most recent attempt concluded establishing a permanent criminal court at Rome Conference in 1998.

As I explained in chapter two, ISIS's crimes against the Iraqi, Syrian and in some cases foreign peoples may amount to war crimes, crimes against humanity, and genocide, therefore the international community should prosecute ISIS fighters for its crimes, and the international obligations oblige national judicial system to prosecute international criminals or extradite,²⁸¹ this notion demands Iraq and Syria to bring the ISIS perpetrators into justice in its national courts, other countries can prosecute them by using theory of extraterritorial jurisdiction which grants jurisdiction over the offender based on the victim's nationality, or by applying universal jurisdiction.

There are four possibilities for prosecuting ISIS's core international crimes: firstly, before the national courts, secondly before the ICC, thirdly before an Ad Hoc tribunal, and finally before a Hybrid court, this chapter respectively will discuss these prosecutorial options.

²⁸⁰ Principles of International Law, Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal (Nuremberg Principles), 1950, Principle III.

²⁸¹ International Law Commission, 2014, The obligation to extradite or prosecute.

3.1: Ongoing ISIS fighters' prosecution before national courts

At the most basic level, international criminal justice is a part of a law that overlain on the domestic and regional criminal justice system of the world, domestic and international criminal justice system are intertwined and overlapped in many ways, international criminal law absorbs characteristics among domestic systems, and the domestic system in turn look to the international law in prosecuting international crimes in domestic courts.²⁸² There are four justifications for states to exercise domestic jurisdiction over actors whose actions may have international consequence; territoriality, nationality, protection, and universality,²⁸³ which are the fundamental and widely accepted basis for prosecuting criminals, these principles come from the state's sovereignty which the state has jurisdiction over all persons within its territory, here is a difference between 'pure' territoriality, when acts or offenses are commenced within the state's territory regardless of whether or not they were also concluded and the 'objective' territoriality applied to offenses or acts commenced outside the state's territory, but completed within its territory or causing serious and harmful consequences to the social and economic order within its territory.²⁸⁴

With respect to the ISIS fighters, national courts investigate and prosecute the crimes that have been committed based on the principle of territoriality and nationality. The most important point in this regard is 'easier' for national investigators and prosecutors to collect evidence and have access to the accused if the crimes have been committed on their territory. This notion has been applied in some countries, for instance; Iraq, KRI, Self-Administration of North East Syria or (Rojava), Canada, United Kingdom, Belgium, Norway, The Netherlands, Germany, Finland etc.²⁸⁵

²⁸² Novak. A, 2015, 'The International Criminal Court, An Introduction', Springer International Publishing Switzerland.

²⁸³ Solis. A, 2015 'Only [] Can Judge: Analyzing Which Courts Have Jurisdiction over ISIS', Southern Illinois University Law Journal, Vol. 40, No. 1, p. 73.

²⁸⁴ Cassese. A, 2013, International Criminal Law, Oxford, Oxford University Press.

²⁸⁵ Mehra. T, 2018, 'Bringing (Foreign) Terrorist Fighters to Justice in a Post-ISIS Landscape Part II: Prosecution by Foreign National Courts', <https://icct.nl/publication/bringing-foreign-terrorist-fighters-to-justice-in-a-post-isis-landscape-part-ii-prosecution-by-foreign-national-courts/>

3.1.1: Iraq and Kurdistan Region of Iraq

The Federal Republic of Iraq has a mixed legal system of both civil and Islamic law. Under the 2005 Constitution, in its Preamble, the constitution recounted some of the mass atrocity crimes “ravage of the holy cities, mass graves, sufferings of racial oppression in the massacres of Halabja, Barzani, Anfal and the Fayli Kurds” which had been committed by the former regime against the peoples of Iraq.²⁸⁶ The Iraqi law does not have provisions to criminalize core international crimes in its judicial system, while all core international crimes have been committed on the Iraqi soil, but after the fall of Saddam Hussein in 2003, the Iraqi High Tribunal (IHT) was established by the Iraqi National Assembly,²⁸⁷ the IHT had a subject matter jurisdiction over core international crimes,²⁸⁸ which covered almost all recognized international crimes, but has limited temporal jurisdiction “during the period from 17 July 1968 until 1 May 2003”.²⁸⁹

There are some problems for prosecuting ISIS fighters by the IHT Statute, firstly the temporal jurisdiction is not covered the crimes after May 2003, secondly, the ISIS agents committed the crimes in the territories of both Iraq and Syria, and it is questionable whether either country can properly exercise territorial jurisdiction over the crimes,²⁹⁰ and thirdly which is retroactivity, in Article 19 of the Iraqi Constitution provides guarantees that crime and punishment shall be treated under the law, and ‘punishment shall only be for an act that the laws considers a crime when perpetrated’.

The Iraqi Federal Government and the KRI are applying anti-terrorism laws in 2005²⁹¹ and 2006²⁹² respectively with the Iraqi Criminal Procedures Code²⁹³ against suspected ISIS affiliated, 4 both anti-terrorism laws constitute separate pieces of legislation with different content, both laws are characterized by a broad definition of ‘terrorism’. Article 1 of the Iraqi anti-terrorism law defines terrorism as “Every criminal act committed by an individual or an organized group that targeted an individual or a group of individuals or groups or official or unofficial institutions and caused damage to public or private properties, with the aim to disturb

²⁸⁶ Iraq’s Constitution 2005, preamble.

²⁸⁷ Iraqi High Tribunal Law No. (10) 2005, Oct 18, 2005.

²⁸⁸ IHT Statute, article 11 “the crime of genocide”, article 12 “crimes against humanity”, article 13 “war crimes”, article 14 “violations of certain Iraqi laws”.

²⁸⁹ IHT Statute, article 1 (2).

²⁹⁰ Waltman, G. 2016, ‘Prosecuting ISIS’ Mississippi Law Journal, Vol. 85, No. 3, p. 836.

²⁹¹ Iraqi Anti-Terrorism Law, Number (13) for the year 2005.

²⁹² KRI Anti-Terrorism Law, Number (3) for the year 2006.

²⁹³ Criminal Procedure Code, Number (23) for the year 1971.

the peace, stability, and national unity or to bring about horror and fear among people and to create chaos to achieve terrorist goals”, and article 1 of the KRI anti-terrorism law defines terrorism as “organized use of violence, or threatening to use violence, or encouraging or glorifying the use of violence to achieve a criminal act either by an individual or groups randomly for the purpose of spreading terror, fear, chaos among the people to sabotage the general system or jeopardize security and safety in the region or the lives of individuals or their freedoms or security or sanctity, and causing damage to the environment or natural resources or public utilities or public or private properties to achieve political, intellectual religious, racist or ethnic aims or goals”.

The terrorist crimes in both laws vary from ‘use of violence to spread fear’ to ‘any act with terrorist motives that threatens the national unity of the State’ to ‘damage to public property’, the KRI anti-terrorism law explicitly criminalizes ‘membership’ of a terrorist organization as just ‘joining’²⁹⁴ but there is no such explicit provision prohibiting ‘membership or association’ in the Iraqi anti-terrorism law.

The Human Rights Watch in its 82-pages (2017) report (Flawed Justice and Accountability for ISIS Crimes in Iraq) recorded the ongoing ISIS prosecutions under the anti-terrorism laws, the report is based on information gathered from Nov 2016 to July 2017, which four researchers visited two prisons holding 1,200 ISIS suspects, as well as a reformatory holding women and children accused of being ISIS members. They visited the Mosul counterterrorism court twice and the Erbil counterterrorism chamber once, interviewed with counterterrorism judges. They concluded that both Iraqi and KRI authorities do not have a national strategy for ISIS prosecutions that will ensure the credible prosecution of those responsible for core international crimes committed by ISIS, and there is widespread arbitrary detention of ISIS suspects, numerous allegations of torture in the course of security forces interrogations.

The UNAMI in its report in 2020 (Trials under the anti-terrorism laws and implications for justice, accountability and social cohesion in the aftermath of ISIS), covered from 1 May 2018 to 31 Oct 2019, based on monitoring of 794 terrorism-related criminal court hearings, which 23 cases with female defendants, 44 cases involving defendants who were children at the time of the commission of the offence and 28 cases involving foreign defendants from 11 different countries of origin. The UNAMI observation concerned equality before courts and fairness of hearings that some problematic area should be focused such as adequate time and facilities to

²⁹⁴ KRI Anti-Terrorism Law, Number (3) for the year 2006, article 3 (7).

prepare defense, effective legal representation, reliance on anonymous informants and intelligence or security reports, confessions and claims by torture or ill-treatment, capital punishment, and severe punishment which all rights have been protected according to the international human rights instruments that the Iraqi government ratified.²⁹⁵

In Aug 2017, following the retaking of Mosul, the Government of Iraq requested assistance from the UNSC in ensuring accountability for core international crimes committed by ISIS, the letter indicated preference of domestic criminal proceedings under Iraqi law, noting that “the crimes committed by the terrorist organization ISIS, against civilians and its destruction of infrastructure and antiquities in Iraq are crimes against humanity, it is therefore important to bring them into justice, in accordance with Iraqi law”.²⁹⁶ Then in response to the Iraqi request, the UNSC asked the UN Secretary-General to establish an Investigative Team (UNITAD) to “support domestic efforts to hold ISIS accountable by collecting, preserving, and storing evidence in Iraq of acts that may amount to war crimes, crimes against humanity and genocide committed by the terrorist group ISIS in Iraq”.²⁹⁷ The problem here is the collection of potential evidence of crimes against the Yazidi people, and other minorities, and evidence of full-scale persecutions will depend on overdue domestic legal reforms and the existence of political will among prosecutorial authorities in Iraq and KRI, additional potential obstacles to a full accounting for the genocide may arise due to the poor state of the Iraqi legal system, including significant gaps in the Iraqi Penal Code when it comes to the ability to charge all the relevant international crimes, including genocide.²⁹⁸

Since the appointment of Karim Asad Ahmad Khan as the Special Adviser and Head of the UNITAD on 13 July 2018, significant preparatory steps have been taken in pursuit of the implementation of the mandate, he submitted four reports to address the Investigative Team activities.²⁹⁹ In its final report which submitted to the UNSC on 11 May 2020, UNITAD collected 23.9 Terabyte of evidentiary data, 2 million call data records from Iraqi telephone services related to the crimes committed against the Yazidi community in Sinjar, autopsy

²⁹⁵ Iraq ratified eight human rights instruments including International Covenant on Civil and Political Rights (ICCPR) 25 Jan 1971, and Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT) 07 Jul 2011.

²⁹⁶ UNSC, letter from the permanent mission of Iraq to the United Nations addressed to the president of the Security Council (S/2017/710) 16 Aug 2017.

²⁹⁷ United Nations Security Council Resolution 2379 (2017).

²⁹⁸ Schaack, B. 2018, ‘The Iraq Investigative Team and Prospects for Justice for the Yazidi Genocide’ *Journal of International Criminal Justice*, Vol. 16, No. 1, p. 118.

²⁹⁹ First report (S/2018/1031)- 16 Nov 2018, Second report (S/2019/407)- 17 May 2019, Third report (S/2019/878)- 13 Nov 2019, Fourth report (S/2020/386)- 11 May 2020.

reports, forensic materials, mass graves reports, testimonial evidences.³⁰⁰ UNITAD has been working intensively by collecting, preserving and storing evidence in Iraq of crimes that may amount to war crimes, crimes against humanity and genocide.³⁰¹

There are many evidences as explained in the chapter two in this research, that ISIS may have committed core international crimes, the international mechanism to investigate the ISIS crimes is active that stored many evidences to assisting any potential court to prosecute the core international crimes, the ongoing domestic prosecutions as observed by the international organizations are flawed, corruption is prevalent in the Iraqi judicial system, prisoners were extorted up to one hundred dollars in order to take a shower, with the corruption infiltrating the judicial systems, grave concerns overshadow Iraq's ability to try ISIS defendants to the due process standards acceptable to the international community.³⁰² these inability and partiality of the Iraqi and KRI courts are demanding the accountability for ISIS fighters to be send to another prosecutorial options.

³⁰⁰ Fourth report of the Special Adviser and Head of the UNITAD, (S/2020/386)- 11 May 2020, para. 24-44.

³⁰¹ Second report of the Special Adviser and Head of the UNITAD (S/2019/407)- 17 May 2019, para. 4.

³⁰² Solis. A, 2015 'Only [] Can Judge: Analyzing Which Courts Have Jurisdiction over ISIS', Southern Illinois University Law Journal, Vol. 40, No. 1, p. 83.

3.1.2: Self-Administration of North East Syria

In Syria, the Syrian Democratic Forces (SDF) has primarily undertaken the fight against ISIS on the ground, backed by the United States. It consists of an alliance of Arab and Kurdish armed groups, since 2016, the SDF has assumed the military branch of the Self-Administration of North East Syria or (Rojava), which since 2012 has progressively acquired de facto autonomy in administrating North-Eastern territories in Syria. It has its own constitution, provides governmental-like services to the local population, and engages in international relations.³⁰³

In 2016 the SDF in accordance with the international laws and costumes of war published ten rules for regulating its conducts during the time of conflicts, such as “respect and defend humanitarian and medical aid workers, prohibition massive destruction, respect the principles of distinction and proportionality, prohibition extrajudicial killing, respect the rule of law to ensure fair trials by taking all necessary measures for an independent and impartial judiciary, respect prisoner rights according to IHL and IHRL in correspondence with religions and traditions, and all forms of torture, violence, abuse, insult and disrespecting the human dignity of prisoners are illegal”.³⁰⁴

The Social Contract of the Democratic Federation of Northern Syria which is an agreement between all national, ethnic, and religious components in Rojava, it is seen as Rojava Constitution, provides the legal bases for establishing its own judicial system that every canton has the right to build and develop its justice system which shall not be contradicted with the social contract for prosecuting criminals and solving social problems.³⁰⁵

Based on the provisions of the Social Contract, Rojava passed anti-terrorism law in Sep 2014 for prosecuting local ISIS suspects who captured by the military and security forces. The law defined “Terrorism” in article one as ‘any criminal act of an individual or a group that aims to spread panic, terror and chaos and to disrupt public security, or to harm public or private property, by using weapons, including explosives, epidemiological, chemical or incendiary

³⁰³ Tanya Mehra, 2017, ‘Bringing (Foreign) Terrorist Fighters to Justice in a Post-ISIS Landscape Part I: Prosecution by Iraqi and Syrian Courts’, <https://icct.nl/publication/bringing-foreign-terrorist-fighters-to-justice-in-a-post-isis-landscape-part-i-prosecution-by-iraqi-and-syrian-courts/>

³⁰⁴ General Command of the Syrian Democratic Forces, 3 Nov 2016, Rule No 1,2, 5, 9 and 10, <https://www.ypgrojava.org/SDF-calls-opposition-to-act-in-accordance-with-humanitarian-principles>

³⁰⁵ Social Contract of the Democratic Confederation of Northern Syria, 29 Dec 2016, article 67 and 68, <https://rojavainformationcenter.com/storage/2019/12/2016-Social-Contract-of-the-Democratic-Federation-of-Northern-Syria.pdf>

weapons, or any weapon that achieves this purpose”, the sentences ranged from a year’s detention for those coerced into low-level, 1-5 years for those involved in auxiliary or administrative positions, up to 20 years for front-level fighters, emirs and so on; and life imprisonment for those guilty with big-scale of atrocities or crimes, and there is no capital punishment in the law.³⁰⁶

Despite the authorities of Rojava expressed their willingness to prosecute ISIS foreign fighters, but they requested to the international community’s support in expertise and funds, while their position on the legality for ISIS-affiliated women and children prosecution remains unclear.³⁰⁷ Rojava judges receive threats and are wanted for arrest by the Syrian government for having established a parallel legal system.³⁰⁸ These obstacles with many other challenges such as; continuing threats and military incursion by Turkey, lack of experiences, and funds, hosting millions of ISIS families in refugee camps, lack of provisions for core international crimes in its judicial system may endanger the ongoing ISIS prosecution. Here, like Iraq and KRI, the ISIS prosecution should be sent into another prosecutorial options.

³⁰⁶ North and East Syria’s Anti-Terrorism Act, <https://rojvainformationcenter.com/2020/05/translation-north-and-east-syrias-anti-terrorism-act-used-to-try-local-isis-suspects/>

³⁰⁷ Diakonia, 2019, ‘The legal status of ISIS-affiliated foreign nationals held in detention in North-East Syria’, Diakonia Lebanon International Humanitarian Law Resource Desk, p. 8.

³⁰⁸ Jane Arraf, 2019, ‘Kurdish Courts In Northeastern Syria Take On ISIS Cases’, <https://www.npr.org/2019/05/29/727511632/vengeance-is-for-the-weak-kurdish-courts-in-northeastern-syria-take-on-isis-cases>

3.2: Possibility of prosecuting ISIS fighters before the ICC

The international community in 1998 came together and created framework for the ICC with the purpose of ending impunity for the perpetrators of atrocities, after World War II nearly 170 million deaths and 250 conflicts occurred, the ICC was considered revolutionary because it was a permanent and independent international court that could hold individuals responsible for core international crimes, and a legal mechanism to respond further atrocities.³⁰⁹ The Rome Statute of the ICC is a treaty, adopted at diplomatic conference, attended by representatives from 161 states and from intergovernmental and non-governmental organizations, the member states of the ICC currently are 123 states.³¹⁰

the actual jurisdiction that the ICC possesses is sharply limited by the negotiated compromises made at the Rome Conference which the ICC has three types of jurisdiction:

Firstly, subject matter jurisdiction; the Court has jurisdiction over four ‘most serious crimes of concern to the international community’,³¹¹ they are Crime of Genocide, War crimes, Crimes against Humanity and Crime of Aggression, the first three crimes were discussed in the chapter two of this thesis, the subject matter jurisdiction is undeniable over ISIS crimes, since the summer of 2014, the OTP has been receiving and reviewing disturbing allegations of widespread atrocities committed in Syria and Iraq by the ISIS fighters. In its statement, the Prosecutor of the ICC, Fatou Bensouda, described the crimes which have been committed by ISIS as “crimes of unspeakable cruelty have been reported, such as mass executions, sexual slavery, rape and other forms of sexual and gender-based violence, torture, mutilation, enlistment and forced recruitment of children and the persecution of ethnic and religious minorities, wanton destruction of cultural property, and the commission of the crime of genocide has also been alleged”.³¹²

Secondly, temporal jurisdiction; under the Rome Statute, the Court only has jurisdiction over crimes committed after the statute entered into force, which was 1 July 2002, or after a state party ratifies the Rome Statute,³¹³ or UNSC refers jurisdiction over non-party to the

³⁰⁹ Solis. A, 2015 ‘Only [] Can Judge: Analyzing Which Courts Have Jurisdiction over ISIS’, Southern Illinois University Law Journal, Vol. 40, No. 1, p. 78.

³¹⁰ Silander. D, Wallace. D, Janzekovic. J, 2017, ‘International Organizations and The Rise of ISIL’, Wallace. D (ed) international criminal court, London Routledge, p. 121.

³¹¹ The Rome Statute, article 5.

³¹² Office of the Prosecutor of ICC, 8 Apr 2015, ‘Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the alleged crimes committed by ISIS’ <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-08-04-2015-1&ln=en>

³¹³ The Rome Statute, article 11.

prosecutor,³¹⁴ or a non-party State accepted the exercise of jurisdiction by the Court with respect to the crime in question,³¹⁵ authorizing retroactive jurisdiction needs the acceptance of the state party or UNSC but should not be prior to 1 July 2002,³¹⁶ this type of jurisdiction is applicable with respect to the ISIS crimes, as the ISIS committed the crimes after the Rome Statute came into force.

Thirdly, personal and territorial jurisdiction; the Court only considers cases were committed within the territory of a state party to the Rome Statute (territorial jurisdiction), or by a national of a state party (personal jurisdiction), the Court cannot consider cases involving non-parties unless the situation is referred to the prosecutor by the UNSC or a non-party state specifically request the court to investigate its own territory or nationals.³¹⁷ The UNSC referred two situations involving non-members of the Rome Statute such as Libya and Sudan, those referrals did not include crimes committed by Libyan or Sudan nationals on the territories of other non-party state. And the Rome Statute permits prosecution only on natural persons over age 18.³¹⁸

Unlike the ad hoc tribunals of the ICTY and the ICTR which enjoyed primacy of their jurisdiction over national proceedings.³¹⁹ the Prosecutor of the ICC must pursue an investigation according the principle of complementarity, the situation is inadmissible when that is being or has been investigated or prosecuted by a state that the ICC has jurisdiction over the situation, unless the State is “unwilling or unable genuinely to carry out the investigation or prosecution”.³²⁰ personal and territorial jurisdiction over ISIS fighters are controversial, which I will discuss in this subchapter.

ISIS is not a recognized state according to the international community and UN Charter, it is not a member of the Rome Statute and not bound by the Rome Statute. The triggering mechanisms are not workable in this regard, any triggering mechanism options would involve Iraq and Syria territorial sovereignty, while Iraq is not a party to the Rome Statute, and Syria is a signatory, but has not ratified the treaty and it is unlikely that the ICC would have the authority to initiate investigation for crimes that occurred in Iraqi or Syrian territory under the

³¹⁴ The Rome Statute, article 13.

³¹⁵ The Rome Statute, article 12.

³¹⁶ Novak. A, 2015 ‘The International Criminal Court, An Introduction’, Springer International Publishing, p. 50.

³¹⁷ The Rome Statute, article 12.

³¹⁸ Novak. A, 2015 ‘The International Criminal Court, An Introduction’, Springer International Publishing, p.49.

³¹⁹ Silander. D, Wallace. D, Janzekovic. J, 2017, ‘International Organizations and The Rise of ISIL’, Wallace. D (ed) international criminal court, London Routledge, p. 125.

³²⁰ The Rome Statute, article 17(1).

OTP authority.³²¹ The ICC does not have jurisdiction over individuals who are nationals of Iraq and Syria for committing crimes in Iraq and Syria territory. However, this is not the end of the matter, the ICC may still prosecute those members of either faction who are citizens of other countries that are parties to the Rome Statute, ISIS in particular has numerous members who are nationals of countries such as France, Great Britain, Germany, the Netherlands, Belgium, Australia, Tunisia, and Jordan, all of which are parties to the Rome Statute.³²²

The OTP in its statement emphasized that “Syria and Iraq are not Parties to the Rome Statute, the Court has no territorial jurisdiction over crimes committed on their soil, 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”, as a scenario, if Iraq or Syria was a member state of the ICC, under the principle of complementarity, the ICC likely retains jurisdiction to prosecute ISIS in Syria because the Assad regime fails to actively combat the terrorist group that operates within its territorial bounds, and Syria is unwilling or unable to prosecute the ISIS fighters, the ICC should have the right to prosecute the militants, furthermore, even though Iraq is working to prosecute the ISIS fighters, the State’s weak government may be unable to adequately prosecute the perpetrators, permitting prosecution in the ICC,³²³ and because lacking a system of justice in Syria, Iraq, KRI and Rojava which does not criminalize core international crimes that may be amount to initiate investigation by the OTP according inability theory under the principle of complementarity, which says “in order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system”.³²⁴

International law permits a state to claim jurisdiction over its nationals if they commit a crime, even outside of the territory of that state, this kind of personal jurisdiction is called the ‘active personal jurisdiction’,³²⁵ that is recognized by the Rome Statute, if the person accused of the crime is a national of a State Party to the Rome Statute, the jurisdiction of the Court may be exercised.³²⁶ The OTP refused to open preliminary examination despite the ICC may have

³²¹ The Rome Statute, article 15.

³²² Veintmilla. Julian D, 2016 ‘Islamic Law and War Crimes Trials: The Possibility and Challenges of a War Crimes Tribunal against the Assad Regime and ISIL” Cornell International Law Journal, Vol. 49, No. 2, p. 512.

³²³ Lekas. A, 2015, ‘ISIS; The Largest Threat to World Peace Trending Now’ Emory International Law Review, Vol. 30, No. 2, p. 347.

³²⁴ The Rome Statute, article 17 (3).

³²⁵ Zakerhossein. M. Hadi, 2016, ‘To Bury a Situation Alive – A Critical Reading of the ICC Prosecutor’s Statement on the ISIS Situation’ international criminal law review, Vol. 16, No. 4, p. 616.

³²⁶ The Rome Statute, article 12(2)(b).

exercise personal jurisdiction over alleged perpetrators who are nationals of a State Party but claimed that this jurisdictional basis for opening a preliminary examination into this situation is too narrow, because investigating and prosecuting those most responsible within the leadership of ISIS, appeared limited.³²⁷ The notion behind this statement has been criticized because the OTP has confused the legal notion of jurisdiction with the concept of admissibility, her argument did not allow her to take into count the nationality of mid-level or low-level perpetrators, this argument is weak, this policy is a matter of admissibility assessment rather than jurisdiction determination.³²⁸ By issuing this statement, the OTP sealed one of the potential triggering mechanisms which the ICC could have used its jurisdiction through the nationality of the foreign perpetrators.

Another means of triggering mechanism is a referral by the UNSC. The ICC may exercise its jurisdiction with respect to a crime. If a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the UNSC acting under Chapter VII of the UN Charter.³²⁹ This triggering mechanism has already been done twice, namely for Sudan in 2005 and for Libya in 2011.³³⁰ The UNSC composed 15 members, five permanent and ten elected from the UNGA for two year terms. The UNSC requires nine votes to adopt a resolution without a veto from one of the five permanent members (United States, United Kingdom, Russia, China, and France). The referral in this regard should be within the ICC temporal jurisdiction that crimes were not committed before 1 July 2002.³³¹

Despite the fact that the UNSC unanimously adopted a resolution which acknowledged that the ISIS constituted a global threat to international peace and security through its acts, and called the ISIS violent extremist ideology, systematic and widespread attacks directed against civilians that violated the IHL and IHRL.³³² This triggering mechanism has never been used to prosecute ISIS fighters. Here, there are some possibilities for not using this type of triggering mechanism; firstly, as such a referral would relate to the entire situation, in which the crimes were committed. Since serious allegations have been made concerning the actions of certain

³²⁷ Office of the Prosecutor of ICC, 8 Apr 2015.

³²⁸ Zakerhossein. M. Hadi, 2016, 'To Bury a Situation Alive – A Critical Reading of the ICC Prosecutor's Statement on the ISIS Situation' international criminal law review, Vol. 16, No. 4, p. 626-7.

³²⁹ The Rome Statute, article 13(b).

³³⁰ Ryngaert. C.M.J. & Siccama. D.W. Hora, 2016, 'Justice for Sexual Crimes Committed by IS: Exploring Accountability and Compliance Mechanisms' Report for the European Parliament, Committee on Legal Affairs, Utrecht University, p. 6.

³³¹ Novak. A, 2015, 'The International Criminal Court, An Introduction', Springer International Publishing, p.52.

³³² United Nation Security Council Resolution 2379 (2017).

permanent members of the UNSC or their allies, they may be reluctant to authorize the ICC to open an investigation that could examine not only the crimes of ISIS, but also possible offences committed by other actors in the course of the conflict.³³³ On 22 May 2014, a draft resolution by the UNSC to refer the situation in Syria to the ICC was vetoed by Russia and China, which was backed by 13 other Council members.³³⁴ Secondly, the vetoed attempts at UNSC referral to the ICC were to protect the Assad regime in a specific referral related to attempt prosecuting ISIS fighters.³³⁵ Since starting the Syrian conflict in 2011, Russia and China 14 times vetoed the UNSC resolutions regarding the Syrian situation.³³⁶ Thirdly, beside legal and political reasons against the use of the ICC to prosecute ISIS fighters, more practical concern is the expense of the proceedings,³³⁷ while the ICC requires that the UN should pay the expenses related to cases referred by the UNSC.³³⁸

As explained above, the accountability for ISIS fighters at the ICC is a dilemma. Even though the subject matter jurisdiction and the temporal jurisdiction of the ICC are met, but the triggering mechanisms are problematic at this stage, Iraq and Syria are not member state of the ICC, the UNSC seems not to refer the situation to the ICC, and both states have not accepted the jurisdiction of the ICC by accepting the ICC jurisdiction over ISIS within their territory, that might lead to further involvement in both states, as in Iraq the Shi'a militias have committed atrocities against the Arab Sunni population. By agreeing to refer the ISIS situation to the ICC, the Iraqi Federal Government may face unrest from the Iraqi Sunni population demanding that the conduct of the Shi'a militias should be scrutinized by the ICC.³³⁹ and in Syria, that could lead to involvement Asad regime.

³³³ Report from Committee on Legal Affairs to the Council of Europe No. 14402 (2017), para. 37.

³³⁴ UN news, Russia, 2014, 'China block Security Council referral of Syria to International Criminal Court', <https://news.un.org/en/story/2014/05/468962-russia-china-block-security-council-referral-syria-international-criminal-court>

³³⁵ Silander. D, Wallace. D, Janzekovic. J, 2017, 'International Organizations and The Rise of ISIL', Wallace. D (ed, London Routledge, p. 130.

³³⁶ Reuters, 2019, 'Russia, backed by China, casts 14th U.N. veto on Syria to block cross-border aid' <https://www.reuters.com/article/us-syria-security-un/russia-backed-by-china-casts-14th-u-n-veto-on-syria-to-block-cross-border-aid-idUSKBN1YO23V>

³³⁷ Solis. A, 2015 'Only [] Can Judge: Analyzing Which Courts Have Jurisdiction over ISIS', Southern Illinois University Law Journal, Vol. 40, No. 1, p. 87.

³³⁸ Novak. A, 2015, 'The International Criminal Court' Springer International Publishing Switzerland, p. 52.

³³⁹ Nicolaus. P, & Yuce. S, 2017, 'Sex-Slavery: One Aspect of the Yezidi Genocide' Iran and the Caucasus, Vol. 21, p. 220.

3.3: Possibility of prosecuting ISIS fighters before an Ad hoc Tribunal

The first half of the 1990s was a period of wide support for international criminal law and international courts. Under chapter VII of the UN charter, the UNSC created two ad hoc tribunals, namely the ICTY and the ICTR to prosecute individuals accused of "grave breaches" of the Geneva Conventions of 1949, war crimes, crime of genocide, and crimes against humanity,³⁴⁰ these two tribunals were designed to response the specific situations, their functions were temporary, narrow subject-matter and limited territorial jurisdiction.³⁴¹ The desire for justice and punishment through international courts came out of an objective lack of faith for the national judicial systems which were too weak to address the atrocities.³⁴²

The ICTY was created to response the complex crimes which happened in the former Yugoslavia, the Serbian nationalist government in Serbia headed by Slobodan Milosevic prompted Croatia and Slovenia to declare their independence, the Bosnian Serbs under the leadership of their self-style president immediately launched attacks against the Croatian and Muslim population in northeast and southern Bosnia, with a few moths the Serbs expelled, killed, or imprisoned 90 percent of the 1.7 million non-Serbs who lived in Serbian-held areas of Bosnia.³⁴³ Finally on 25 May 1993 the UNSC adopted a resolution to establish "an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 Jan 1991 and a date to be determined by the Security Council upon the restoration of peace".³⁴⁴ The ICTY had primacy over national courts and could try genocide, war crimes, and crimes against humanity. The tribunal had eleven judges, elected from around the world, and included three principal organs; the office of the prosecutor, the registry, and the judiciary, consisting of two trial chambers and one appeals chamber, The ICTY ultimately arrested 161 perpetrators, of whom 74 were convicted and sentenced, 18 were acquitted, and 13 were transferred to domestic courts in Bosnia, Serbia, or Croatia.³⁴⁵

³⁴⁰ The ICTY and ICTR Statutes.

³⁴¹ Veintmilla. Julian D, 2016 'Islamic Law and War Crimes Trials: The Possibility and Challenges of a War Crimes Tribunal against the Assad and ISIL" Cornell International Law Journal, Vol. 49, No. 2, p. 507.

³⁴² Solis. A, 2015 'Only [] Can Judge: Analyzing Which Courts Have Jurisdiction over ISIS', Southern Illinois University Law Journal, Vol. 40, No. 1, p. 76.

³⁴³ Scharf. M, Sterio. M, 2019, 'Introduction', Scharf. M, Sterio. M (ed) 'the Legacy of Ad Hoc Tribunals in International Criminal Law', Cambridge University press, p. 2.

³⁴⁴ United Nations Security Council Resolution S/RES/827 (1993), para. 2.

³⁴⁵ Novak. A, 2015, 'The International Criminal Court, An Introduction', Springer Publishing, p. 13.

The ICTR was created to respond a genocidal conflagration which was ignited in the small African nation of Rwanda by the death of its Hutu president when his plane was shot down on 6 Apr 1994, nearly 800,000 people mostly of the minority Tutsi were slaughtered during the next hundred days, when the massacre began in Rwanda the UNSC's first reaction was to withdraw nearly all UN peacekeeping troops, and then established a Commission of Experts, the commission issued a report on 2 Oct 1994 confirmed that the crime of genocide had been committed by Hutu against Tutsi, recommended to establish an international criminal tribunal to prosecute the perpetrators.³⁴⁶ Finally on 8 Nov 1994 the UNSC adopted a resolution to establish "an international tribunal for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighboring States, between 1 Jan 1994 and 31 Dec 1994".³⁴⁷ The ICTR indicted a total of 95 individuals of whom 59 perpetrators convicted.³⁴⁸ That had its own trial chamber in Arusha, Tanzania, but share the Prosecutor and the Appeals Chamber of the ICTY.³⁴⁹

The ISIS situation satisfies the requirements for the UNSC to act under Chapter VII of UN Charter to establish an international criminal tribunal for Iraq and Syria to prosecute crimes against humanity, war crimes, and crime of genocide which allegedly have been committed by ISIS fighters, similar the situation in Rwanda and establishing a Truth Commission which was the Commission of Experts in Rwanda, the UNSC on 21 Sep 2017 established an Investigation Team (UNITAD) to hold "ISIS accountable by collecting, preserving, and storing evidence in Iraq of acts that may amount to war crimes, crimes against humanity and genocide committed".³⁵⁰ The UNITAD already published four reports in this regard, and collected millions of evidences. The United Nations Human Rights Council on 22 Aug 2011 established the IICIS to investigate all alleged violations of international human rights law since Mar 2011 in Syria, which since the emerging of ISIS, the IICIS published many reports that documented

³⁴⁶ Scharf. M, Sterio. M, 2019, 'Introduction', Scharf. M, Sterio. M (ed) 'the Legacy of Ad Hoc Tribunals in International Criminal Law', Cambridge University press, p. 3.

³⁴⁷ United Nations Security Council Resolution S/RES/955 (1994), para. 1.

³⁴⁸ Novak. A, 2015, 'The International Criminal Court, An Introduction', Springer International Publishing Switzerland, p. 14.

³⁴⁹ Scharf. M, Sterio. M, 2019, 'Introduction', Scharf. M, Sterio. M (ed) 'the Legacy of Ad Hoc Tribunals in International Criminal Law', Cambridge University press, p. 3.

³⁵⁰ United Nations Security Council Resolution 2379 (2017), para. 2.

ISIS's crimes, the most famous report is "they came to destroy"³⁵¹ that recorded the crimes of genocide, war crimes, and crimes against humanity. The reports by the IICIS widely have been used in this thesis.

Carla Del Ponte, who is a Swiss and international prosecutor and diplomat, she is a former Chief Prosecutor of the ICTY and ICTR, from Sep 2012 to Aug 2017 served as a Commissioner of the IICIS, when she was a commissioner she suggested that an ad hoc tribunal would be the best solution for the Syria situation, believed that an ad hoc tribunal would be more efficient and work faster than the ICC, her argument for creating an ad hoc is "the ICC would prosecute only three, four, five perpetrators, not more, but an ad-hoc tribunal could prepare a list of over a hundred, like the tribunal for the former Yugoslavia, An ad-hoc tribunal could also be based near the region, facilitating access of witnesses, documentation and so on".³⁵² politicians such as some of the US congressmen drafted a resolution and demanded creating Syrian war crimes tribunal, in their draft resolution they suggested that the tribunal should have jurisdiction over the involvement of other groups.³⁵³ And the Netherlands' Foreign Minister in 2019 mad a proposal to the UNSC to establish a tribunal to try ISIS members.³⁵⁴

There are some advantages for creating an ad hoc tribunal for prosecuting ISIS fighters, this type of tribunal is more flexible and adaptable, the creation of an ad hoc tribunal would be limited in jurisdictional scope such as time and personal jurisdiction, this option is also attractive because ideally a single ad hoc court could deal with ISIS defendants both from Iraq and Syria similar to how the ICTY could hear cases of defendants from the Kosovo and Bosnia and Herzegovina.³⁵⁵ The ad hoc tribunal could be adapted and harmonized according to the Islamic principles which (Veintmilla. Julian D) and (Fajri Matahati Muhammadin) in their articles explained.³⁵⁶ An ad hoc tribunal would have the flexibility to compel the production of

³⁵¹ Report of UNHRC on ISIS Crimes Against the Yazidis (They came to destroy): (A/HRC/32/CRP.2), 15 June 2016.

³⁵² Julian Borger, 2019, 'Call for special tribunal to investigate war crimes and mass atrocities in Syria', <https://www.theguardian.com/world/2015/mar/17/call-for-special-tribunal-to-investigate-war-crimes-and-mass-atrocities-in-syria>

³⁵³ USA House of representative's resolution No. 51 (113th), 2013, 'Immediate Establishment of Syrian War Crimes Tribunal Resolution', <https://www.govinfo.gov/content/pkg/BILLS-113hconres51ih/pdf/BILLS-113hconres51ih.pdf>

³⁵⁴ The Arab weekly, 2019, 'Netherlands wants tribunal to try some ISIS members' <https://thearabweekly.com/netherlands-wants-tribunal-try-some-isis-members>

³⁵⁵ Solis. A, 2015 'Only [] Can Judge: Analyzing Which Courts Have Jurisdiction over ISIS', Southern Illinois University Law Journal, Vol. 40, No. 1, p. 85.

³⁵⁶ Veintmilla. Julian D, 2016 'Islamic Law and War Crimes Trials: The Possibility and Challenges of a War Crimes Tribunal against the Assad Regime and ISIL' Cornell International Law Journal, Vol. 49, No. 2, pp. 498-518, & Muhammadin. F. M, 2016, 'Comparing International Humanitarian Law and Islamic Law on

the defendants from any member country in which they may be found, to alleviate some of the difficulty of trying such a potentially large number of defendants, the UNSC could draft a statute in such a way that it allows the international tribunal to prosecute ISIS leaders and commanders while allowing domestic courts to try the low-level rank and file ISIS members.³⁵⁷

Despite the fact that this type of tribunal is more applicable in relation to prosecuting the ISIS fighters, yet the answer of the question has not been given if the UNSC tends to create this type of tribunal while establishing the ad hoc tribunal needs adopting a Resolution by the UNSC.

War Captives: Observing ISIS' *Dauliyah Journal of Islamic and International Studies*, Vol. 1, No.2, pp. 124-145.

³⁵⁷ Waltman, G. 2016, 'Prosecuting ISIS' *Mississippi Law Journal*, Vol. 85, No. 3, p. 841.

3.4: Possibility of prosecuting ISIS fighters before a Hybrid court

Hybrid courts are mixed national and international courts that operate as independent criminal institutions outside the traditional realm of domestic jurisdiction. They are created by an international legal instrument, apply elements of international and domestic law, and have a mix of local and foreign judges. The hybrid courts seem to reach a balance between the legitimacy of domestic courts and the neutrality and objectiveness of international cooperation.³⁵⁸

The hybrid courts have usually been created to some extent through agreements with the UN, they have concluded by negotiations both international and domestic officials.³⁵⁹ The first example for the hybrid courts is SCSL which was born out at June 2000 request by the president of Sierra Leone to the UN for assistance in prosecuting the leaders of the Revolutionary United Front, then in Mar 2002, the parliament of Sierra Leone ratified the proposal to establishing the court, and a year later, the prosecutor issued indictments for 13 individuals, including former President Charles Taylor of Liberia. Then in 1997, Cambodia sought the assistance of the UN in establishing a framework for the prosecution of those responsible for the atrocities committed by the former Khmer Rouge regime between 1975 and 1979. In 2004, the ECCC was established to prosecute only the most senior leaders, rather than low-ranking or middle-ranking perpetrators.³⁶⁰ Another example is STL which was established with a narrower focus, namely the murder of former Lebanese Prime Minister Rafiq Hariri in a car bomb explosion on 14 Feb 2005, and related to political attacks and terrorism, the main reasoning was to signal that political assassination cannot go unpunished.³⁶¹

The establishment of a hybrid court for prosecuting ISIS fighters has its own advantages and seems that would be the best prosecutorial option. Jurisdictionally, the hybrid court could include prosecuting the core international crimes, which we have not seen at the domestic level jurisdiction in Iraq and Syria.³⁶² Financially, the hybrid courts do not need huge amount of

³⁵⁸ Stahn. C, 2019, *A Critical Introduction to International Criminal Law*, Cambridge University press, p. 198.

³⁵⁹ The SCSL was established by an agreement between the UN and the Government of Sierra Leone pursuant Security Council resolution 1315 (2000) of 14 Aug 2000, the ECCC was established by an agreement between the UN and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea, No. 41723, 6 June 2003, and the ISL was established by an agreement between the UN and the Lebanese Republic pursuant to Security Council resolution 1664 (2006), 29 Mar 2006.

³⁶⁰ Novak. A, 2015, 'The International Criminal Court, An Introduction', Springer International Publishing, p. 16.

³⁶¹ Stahn. C, 2019, *A Critical Introduction to International Criminal Law*, Cambridge University press, p. 201.

³⁶² As explained in the subchapter "Ongoing ISIS fighters' prosecution before the national courts" which the courts in Iraq, KRI, and Rojava are prosecuting the ISIS fighter under anti-terrorism laws.

money, the ECCC has operated on a three-year budget \$56.3 million and the SCSL has operated on a budget of around \$100 million during that same time, meanwhile, the ad hoc courts of the ICTY and ICTR operated on a budget of approximately \$270 million each per year.³⁶³ Practically, the Middle East already has its experiences with hybrid models such as STL in Lebanon and IHT in Iraq, this kind of tribunal in the same way as ad hoc tribunal could be flexible and adaptable according to the regional and local legal system, and politically, there is a potentiality to establishing a hybrid court, the president of Iraq on 7 July 2020 in a meeting with UNITAD agreed that “efforts should be made to condemn the ISIS’s crimes and the perpetrators must stand trial in front of a specialized international tribunal to hold them accountable”,³⁶⁴ Rojava called on the international community to establish a special international tribunal in northeast Syria to prosecute terrorists.³⁶⁵ And the president of KRI supported to reactivate the IHT for prosecuting the ISIS core international crimes.³⁶⁶

³⁶³ Solis. A, 2015 ‘Only [] Can Judge: Analyzing Which Courts Have Jurisdiction over ISIS’, Southern Illinois University Law Journal, Vol. 40, No. 1, p. 87.

³⁶⁴ Iraqi presidency website, 2020, ‘the president stressed that those who are involved with crimes committed by ISIS should be bring to specialized international tribunal’, <https://presidency.iq/EN/Details.aspx?id=1949&fbclid=IwAR1rhHir0P97B9ZXibhwBESI9NdiBTFb6PTdjVjsu23hAGYYPOI5tulY5Ql#gsc.tab=0>

³⁶⁵ Joanne Stocker, 2019, ‘SDF calls for international tribunal to try ISIS members in Syria’ <https://www.thedefensepost.com/2019/03/25/syria-sdf-international-court-isis/>

³⁶⁶ UNITAD, 2020, Special Adviser Meets KRI President, <https://www.unitad.un.org/news/special-adviser-meets-krp-president>

Chapter 4: Conclusion

ISIS exploited and invested the political instability after US invasion of 2003 in Iraq, then gained power through Sunni community in Iraq and expanded its hegemony by siding the opposition military groups against Bashar Al-Asad in Syria after the Syrian civil war. ISIS by using their self-interpretation and extreme verses of Quran became the most powerful religious motivated military group in the region, established state-like structure system to govern around ten million people on one hundred square kilometers in the Middle East.

The acts of ISIS against its population and the wide range of its enemy may amount to core international crimes. They imposed a deliberate with intention campaign against the religious Yazidi community as a protected group according to the Genocide Convention which ISIS identified them as an “unbeliever community” according to its ideological perspective, the acts towards the Yazidi community including deliberate killing of the community, causing serious bodily or mental harm to members of the community, inflicting their life conditions to bring physical and psychological death to the victims of them, preventing births within the Yazidi community, and transferring Yazidi children that may amount to crime of genocide.

During its fighting against both Iraqi and Syrian state apparatus and other military groups within Iraqi and Syrian territory made the conflict “NIAC”. ISIS fighters used the forbidden means of warfare as part of a plan or policy, specifically they seriously violated article 3 common to the four Geneva Conventions and other serious violations of the laws and customs applicable in armed conflicts which then inserted into article 8 in the Rome Statute, namely, murdering, mutilation, cruel treatment, torture, humiliating and degrading treatment upon personal dignity, taking of hostages, and passing of sentences and the carrying out of executions without previous judgement against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, as well as ISIS fighters violated the laws and customs of war by enlisting children under the age of fifteen years into armed forces, employing forbidden weapons, directing attacks against the civilian population and enforcing them to be displaced, directing attacks against protected buildings which have been dedicated to the religion, education, art, science, charity, historic monuments, and hospitals, during the conflict, ISIS fighters widely committed gender based violence such as rape, sexual slavery, forced pregnancy and using women as a weapon of war that all may amount to war crimes.

ISIS fighters committed acts as part of a widespread or systematic attack directed against civilian population within its control, they committed murder, enslavement, forcibly transfer of population, imprisonment or other severe deprivation of physical liberty, torture, enforced disappearance, persecution on political, racial, national, ethnic, cultural, religious groups under its control which all may amount to crimes against humanity.

Despite the fact that all the above-mentioned crimes have been committed by the ISIS fighters but still there is no court to prosecute the ISIS perpetrators for crime of genocide, war crimes, and crimes against humanity. There are some prosecutorial challenges in bringing the ISIS perpetrators to justice, On national level, the courts in Iraq, KRI and Rojava are prosecuting the ISIS fighters not for core international crimes but for terrorism crimes, it appears the ongoing trials are flawed, corrupted, and the domestic legal systems are not able to prosecute the ISIS fighters because of lacking provisions for criminalizing the core international crimes. these obstacles require the ISIS case to be prosecuted before an international criminal tribunal.

The prosecutorial options on the international level are three options, the possibility of prosecuting the ISIS fighters before the ICC, an Ad Hoc tribunal, and a Hybrid tribunal, for the first option, the subject matter and temporal matter jurisdiction are met for the crimes which have been committed by ISIS fighters, but the triggering mechanism is the challenge, since Iraq and Syria are not parties to the Rome Statute, without consenting of Russia and China in the UNSC there is no chance for the Council's referral, and the OTP stated that personal jurisdiction is too narrow to opening a preliminary examination, it seems that prosecuting ISIS fighters before the ICC is not viable at this stage. The second prosecutorial option is prosecuting ISIS fighters before an ad hoc tribunal, this option seems impossible for the reason that this type of tribunal needs to be established by the UNSC. The last and most applicable tribunal is a hybrid tribunal, in conclusion, this kind of the international tribunal could be established for the prosecuting ISIS fighters, and could be based in Iraq, KRI or Rojava as three of them welcomed the idea.

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