

THE EXTENT TO AMOUNT ISIL ACTS AGAINST IRAQI MINORITIES TO GENOCIDE

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This paper explores the status of Iraq's most vulnerable people, who have been disproportionately affected by gross human rights violations, and the applicability of the offence of genocide to such violations following the deterioration of the security situation within Iraqi territories under the control of so-called Islamic State of Iraq and the Levant (ISIL). The paper examines the legal concepts of "genocide" and "minority" at the international and internal levels. It identifies heinous acts committed against Iraqi minorities, characterizes the extent to which such acts can be categorized as genocide, and explores the applicable provisions of international criminal law (ICL). The paper employs an analytical-empirical methodology, for it explains the legal texts, accompanied with case law, and compares them with the on-ground status, in addition to data gathering. In terms of the legal context, the paper looks specifically at ICL; in terms of subject, it is restricted to the large-scale killings and other heinous acts perpetrated by ISIL against certain Iraqi minorities, particularly Yazidis, Christians, Turkmans, Kakayis, and Shabaks, that may amount to genocide or other international crimes such as crimes against humanity or war crimes. It is also restricted geographically and chronologically, to certain northern and central areas of Iraq during the period of armed conflict (2014 to 2017) between the Iraqi and Kurdistan governments on the one hand, and ISIL on the other. The main objective of this paper is to study the situation of Iraqi minorities and to monitor grave violations of their rights, specifically regarding the crime of genocide, in order to identify the best legal and judicial measures for intensifying internal and international cooperation in regard to prosecuting perpetrators, implementing the rules of ICL effectively, and eventually protecting these defenceless minorities by avoiding the future recurrence of such crimes.

Cet article explore le statut des populations les plus vulnérables d'Iraq, qui ont été affectées de façon disproportionnée par de graves violations de leurs droits humains, et l'applicabilité du crime de génocide pour de telles violations suivant la détérioration de la situation sécuritaire sur les territoires irakiens sous contrôle du soi-disant État islamique (EI). Cet article s'intéresse aux concepts juridiques de « génocide » et de « minorité » aux niveaux international et interne. Y sont identifiés des actes haineux commis contre les minorités irakiennes, il est évalué dans quelle mesure ces actes peuvent être catégorisés comme un génocide, et sont explorées les dispositions applicables du droit pénal international (DPI). Cet article mobilise une méthodologie analytique-empirique, puisqu'il vise à expliquer du contenu de textes juridiques, accompagnés de jurisprudence, et les compare avec l'état du terrain, en plus d'une collecte de données. En ce qui concerne le contexte juridique, cet article s'intéresse spécifiquement au DPI. En ce qui concerne le sujet, l'article se concentre sur les meurtres à grande échelle et autres actes haineux perpétrés par l'EI contre certaines minorités irakiennes, particulièrement les Yazidis, les Chrétiens, les Turkmènes, les Kakayis et les Shabaks, qui peuvent être catégorisés en tant que génocide ou autres crimes internationaux tels que des crimes contre l'humanité ou des crimes des guerres. L'article est également circonscrit géographiquement et chronologiquement, à certaines zones du nord et du centre de l'Iraq durant la période de conflit armé (2014 à 2017) entre les gouvernements irakien et du Kurdistan, d'une part, et l'EI d'autre part. L'objectif principal de cet article est d'étudier la situation des minorités irakiennes et d'observer les violations graves de leurs droits, spécifiquement en ce qui concerne le crime de génocide, afin d'identifier les meilleures mesures légales et judiciaires visant à intensifier la coopération interne et internationale afin de poursuivre en justice les auteurs, de mettre en œuvre les règles du DPI de façon efficace et, éventuellement, de protéger les minorités sans défense en évitant la répétition future de tels crimes.

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Este artículo explora la situación de las personas más vulnerables en Iraq que han sido afectadas de manera desproporcionada por graves violaciones de derechos humanos, así como la aplicabilidad del delito de genocidio a tales violaciones tras el deterioro de la seguridad en los territorios iraquíes bajo el control del autoproclamado Estado Islámico de Iraq y el Levante (EIIL). El artículo examina los conceptos legales de “genocidio” y “minoría” a nivel internacional e interno, identifica los actos atroces cometidos contra las minorías iraquíes, caracteriza hasta qué punto estos actos pueden clasificarse como genocidio y explora las disposiciones aplicables del derecho penal internacional (DPI). El trabajo emplea una metodología analítico-empírica, ya que explica los textos legales y su jurisprudencia, y los compara con un trabajo de campo y de recolección de datos. En términos del contexto legal, el artículo se centra específicamente en el DPI; en cuanto al tema, se limita a los asesinatos a gran escala y otros actos atroces perpetrados por el EIIL contra determinadas minorías iraquíes, en particular yazidíes, cristianos, turcomanos, kakayis y chabaquíes, que pueden constituir genocidio u otros delitos internacionales como crímenes contra la humanidad o crímenes de guerra. También está restringido geográficamente y cronológicamente a ciertas áreas del norte y centro de Irak durante el período de conflicto armado (2014 a 2017) entre los gobiernos iraquí y kurdo, por un lado, y el EIIL por otro. El objetivo principal de este trabajo es estudiar la situación de las minorías iraquíes y monitorear las graves violaciones de sus derechos, específicamente en relación con el crimen de genocidio, con el fin de identificar las medidas legales y judiciales que permitan intensificar la cooperación interna e internacional en materia de enjuiciamiento de los perpetradores, implementar las reglas de DPI de manera efectiva y, finalmente, proteger a estas minorías indefensas para evitar la futura repetición de tales delitos.

Genocide was still “a crime without name” when Winston Churchill referred to it as a modern word for an old crime.¹ The mass killing of Armenians by the Ottoman Empire is seen as an early incident of a “genocidal campaign.”² The impunity of the perpetrators of this tragedy, which is still a disputed issue, had a profound effect on Adolf Hitler, who referred to it in his justification of Nazi policy.³ In fact, “genocide is as old as humanity.”⁴ That is to say, it has a long history, for the idea started with the leaders of past times who perpetrated genocides in order to be recorded as heroes.⁵ The legal criminalization of genocide, however, is considerably younger. A majority of historical genocides have gone unpunished practically. This impunity has effectively sheltered the most heinous perpetrators of atrocities and genocides worldwide. The reason for this, generally, is that genocides were committed under the direction of the State or quasi-State in which they took place. Therefore, domestic prosecution was unworkable, except in rare cases where accountability could be considered after the genocidal regime collapsed, as in Germany or Rwanda.⁶

The evolution of international law (IL) in the aftermath of World War II impelled the international community to impose the criminalization of genocide. The first international legal instrument in this respect, the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention)* entered into force in 1951.⁷ Article 1 of this *Convention* mentions that this crime may be committed in times of war and of peace, and that criminal responsibility or

¹ Leo Kuper, *Genocide: Its Political Use in the Twentieth Century* (New Haven, Conn: Yale University Press, 1981) at 12.

² Claus Krefß, “The Crime of Genocide under International Law” (2006) 6:4 Intl Crim L Rev 461 at 463.

³ Iryna Marchuk, *The Fundamental Concept of Crime in International Criminal Law: A Comparative Law Analysis* (Berlin and Heidelberg: Springer-Verlag, 2014) at 82.

⁴ See Jean Paul Sartre, “On Genocide” in Richard A Falk, Gabriel Kolko & Robert Jay Lifton, eds, *Crimes of War* (New York: Random House, 1971) at 534–49.

⁵ An overview of past centuries, from the Middle Ages up to the present, shows a variety of atrocities and genocides committed as totalitarian crimes. Early on, wherever ancient rulers dominated over empires, as a principle, the lives of thousands were at risk, especially in periods of conquest. For example, the name “Genghis Khan” appears frequently in history; during his 1219 capture of Bokhara and Samarkand, he killed thousands of the inhabitants; in 1220, he killed 50,000 in Kazvin and 70,000 in Nessa; in 1221, he slaughtered 1.3 million inhabitants after capturing the Persian city of Merv; in 1258, following the capture of Baghdad, 800,000 inhabitants were slaughtered, etc. Prominent genocides and atrocities in recent history include the Germans against Herero and Mana (1904–1907); the Ottomans against Armenians (1914–1915); Stalinist purges (especially in the thirties); atrocities in the Spanish civil war, due to Franco’s repression (1936–1939); the Japanese against the Chinese (1937); the Nazi-German Holocaust against the Jews (1941–1945); anti-Communists in Korea (1948); the French against Algerians (1955–1962); American massacres during the Vietnam War (1968); atrocities in Uganda (1971); the genocide in Cambodia (1975–1979); the Dirty War in Argentina (1976–1983); repression and massacres in Salvador (1980–1991) and in Guatemala (1980–1996); Chilean repression under General Pinochet (1973–1988); genocide in the Balkans (1992–1999); the Indonesian genocide in East Timor (1975–1999); Rwanda against the Tutsi (1994); in Sierra Leone (1991–2003); in Southern Sudan (1980s); in the Darfur region of Sudan (2003); etc. For more details, see Joachim Savelsberg, *Crime and Human Rights: Criminology of Genocide and Atrocities* (London, UK: SAGE Publications Ltd, 2010) at 11–16, 24–26, 51.

⁶ William Schabas, *Genocide in International Law: The Crime of Crimes* (New York: Cambridge University Press, 2009) at 1.

⁷ *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 September 1948, 78 UNTS 277 (entered into force 12 January 1951) [*Genocide Convention*].

accountability is equal irrespective of whether the crime is committed or attempted. Further, pursuant to Article 4, individuals who commit genocidal acts enumerated in Article 3 are to be sentenced whether they are constitutionally responsible rulers, public officials or private individuals. Article 7 explains that the extradition provisions for political criminals are not applicable to this offence, as it is considered a non-political offence, and penalties are not subject to the principle of a statute of limitations, whatever the date of the crimes.⁸

“The prohibition of genocide is contained in both international treaties and customary international law and gives rise to both individual criminal responsibility and State responsibility.”⁹ Genocide, thus, is not only a crime under international criminal law (ICL), but is also the subject of an international legal prohibition imposed on States.¹⁰ This was emphasized by the International Court of Justice (ICJ)’s judgment in 2006, when it considered the prohibition of genocide as customary in nature, and has an effect of *erga omnes*, i.e. the ICJ announced the prohibition to be *jus cogens*.¹¹

The main question raised in this paper is to what extent acts of the so-called Islamic State of Iraq and the Levant (ISIL) against Iraqi minorities can be characterized as genocide under ICL. The historical background of this issue goes back to 2003, when the United States of America (US) occupied Iraq and overthrew all State institutions (not just the dictatorial regime). This led to, directly or indirectly, the creation of political and security instability, the prevalence of corruption, and signs of racism and sectarianism (such as identity-based violence among Shia, Sunni, Christian, Kurd, etc. communities). Worst of all, the Iraqi army forces were dissolved wholesale in 2003 by the US forces in conjunction with the new Iraqi government, which resulted in the emergence of militias as well as illegal interference by regional or other States in internal Iraqi affairs. This led, subsequently, to the establishment of a safe haven for terrorists from all over the world that resulted in 2014 in the founding of ISIL,¹² who

⁸ *Ibid.*

⁹ Canada, *A Legal Analysis of Genocide: Supplementary Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, (Ottawa, 2019) at 3, online (pdf): <mmiwg-ffada.ca/wp-content/uploads/2019/06/Supplementary-Report_Genocide.pdf>.

¹⁰ Kreß, *supra* note 2 at 468.

¹¹ *Case concerning armed activities on the territory of the Congo (Democratic Republic of Congo v Rwanda)*, [2006] ICJ Rep 6 at para 64.

¹² ISIL is also known as the Islamic State of Iraq and Syria (ISIS) or the Islamic State (IS), and also known by its Arabic language acronym *Da'esh*. It is an armed organization that follows extremist Salafist-Jihadist ideas. The Caliphate was declared on 29 June 2014 by the Iraqi Abu Bakr Al-Baghdadi, nicknamed the Caliph (head of the state). ISIL was formed from Iraqi Sunni Muslims, particularly from remnants of the Former Iraqi Baathist Regime (FIBR) and Al-Qaeda in Iraq, which was originally founded in 2004 by the Jordanian Abu Musab al-Zarqawi, who was involved, together with some officers of the FIBR, in military operations against United States of America (US) forces and successive Iraqi governments following the occupation of Iraq in 2003. After Zarqawi's death from a US airstrike in 2006, the local Sunni forces backed by the US military weakened Al-Qaeda in Iraq, and it was later renamed Islamic State in Iraq (ISI). ISIL elements claim to be striving to restore the “Islamic Caliphate.” They imposed a harsh interpretation of sharia (Islamic law), and fought both civilians and the military, those who disagreed with their views. ISIL described the latter as apostates, infidels, and hypocrites, and maintained that it is necessary to kill them all. During the period 2014 to 2017, approximately eight million people lived under total or partial ISIL control. ISIL's influence spread throughout Iraq and Syria, and in some areas of other countries such as Yemen, Libya, Egypt, Mali, Somalia, north-eastern Nigeria,

seized vast areas of the northern and central provinces of Iraq,¹³ particularly Mosul, i.e. Nineveh Plain,¹⁴ and some parts of the Kirkuk, Anbar, Diyala, and Saladin governorates, where there is a concentration of minorities.

These circumstances allowed ISIL to perpetrate systematic criminal campaigns that may amount to genocide offences or perhaps to other core international crimes, such as crimes against humanity and war crimes, within the framework of ICL,¹⁵ including systematic mass killings, serious bodily or mental harm (slow death) to minority individuals, enslavement of women and recruitment of children in armed conflict, as well as indiscriminate destruction of sacred and heritage sites, pillaging, dispossession of property, etc., that consequently resulted in forcible displacement, and a mass influx of internally displaced persons (IDP) and refugees, amongst which civilians of religious and ethnic minorities were the primary victims. ISIL's acts against Iraqi minorities are not merely an internal crisis with limited side effects, but also have regional and international repercussions, besides their material and moral implications that are reflected in legal, political and social consequences, as will be detailed later on.

Indeed, the violation of Iraqi minority rights has national and international dimensions. There are legal loopholes at the national level; there is no criminal legislation in Iraq (including the Kurdistan region) protecting individuals from genocide, notwithstanding the applicable *Iraqi Penal Code (IPC)*, which lays down the death penalty for ordinary homicide; the *mens rea* in this respect is related to the limited personal grounds of the intended murder. In addition, both Iraqi and Kurdistan anti-terrorism laws sentence to death anyone who commits criminal acts that aim to violate the security situation or create chaos in the State for the purposes of terrorism. The *mens rea* of genocide is different from the above and involves the systematic violation of human rights, i.e., total or partial decimation of national, ethnic, racial or religious groups, as discussed later.

Internationally, despite the existence of a number of conventions protecting the rights of ethnic and religious minorities, for example the *Charter of the United Nations (UN Charter)* in 1945, the 1948 *Universal Declaration of Human Rights*,¹⁶ and the 1992 *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and*

and Pakistan. See Jim Muir, "The 'Full Story' of Islamic State", *BBC News : Middle East* [in Arabic] (27 April 2016), online :

<www.bbc.com/arabic/middleeast/2016/04/160427_islamic_state_group_full_story>;

Gerald Waltman III, *Prosecuting ISIS* (University of Mississippi School of Law, 2014) at 9–10, online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=2537044> [unpublished].

¹³ Florence Gaub, "An Unhappy Marriage: Civil-Military Relations in Post-Saddam Iraq" (13 January 2016) at 1–2, 7–8, online: *Carnegie Endowment for International Peace* <carnegieendowment.org/2016/01/13/unhappy-marriage-civil-military-relations-in-post-saddam-iraq-pub-61955>.

¹⁴ Nineveh Plain refers to Mosul Province and its environs, the second largest governorate in Iraq after Baghdad and the historical home of most Iraqi minorities.

¹⁵ The focus of this paper is primarily on the most serious crime that Iraqi minorities may be confronted with (genocide). Nevertheless, a brief account of the extent to which ISIL's acts can be categorized as crimes against humanity and war crimes is given later. See sections IV.B and IV.C.

¹⁶ *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71.

Linguistic Minorities (UN Minorities Declaration),¹⁷ besides the organs for following up these rights, such as the UN International and Regional Human Rights Commissions, associated governmental and non-governmental organizations, etc., such conventions and mechanisms did not, practically, prevent ISIL militias from acts that could amount to genocide against Iraqi minorities in their controlled areas during the period 2014 to 2017. This points to the inability of the international criminal legal system to prevent those communities from experiencing persecution and extermination. Iraq is not a member of the *Rome Statute of the International Criminal Court*¹⁸ (*ICC Statute* or *Rome Statute*), and this is one of the most important challenges and obstacles to activating ICL in this respect.

The principal objective of this paper is to study the situation of Iraqi minorities and explore serious violations of their rights, particularly pertaining to the crime of genocide. The aim of doing so is to figure out the best legal and judicial measures for intensifying internal and international cooperation in prosecuting the perpetrators of such violations. This can be done by effectively implementing ICL rules, and will help avoid the future recurrence of such crimes against these vulnerable groups. The paper examines the legal concepts of “genocide” and “minority” at the national and international levels. It identifies heinous crimes committed against Iraqi minorities, explores the extent to which such acts can be characterized as genocide, and outlines the applicable provisions of ICL.

This paper employs an analytical-empirical methodology, explaining the legal texts along with certain examples of case law, and comparing these with the status on the ground, in addition to data gathering. In terms of the legal context, the paper looks specifically at ICL; in terms of subject, it is restricted to the mass killings and other heinous acts perpetrated by ISIL against certain Iraqi minorities, particularly Yazidis, Christians, Turkmans, Kakayis and Shabaks, that may amount to genocide or to other core international crimes, including crimes against humanity and war crimes. It is also restricted territorially to northern and central areas of Iraq, primarily the Mosul, Kirkuk, Anbar, Diyala, and Saladin provinces during the period of armed conflict between the Iraqi and Kurdistan governments together with the international coalition forces on the one hand, and ISIL on the other (2014 to 2017).

The task of gathering data on ISIL’s crimes in Iraq and Kurdistan is an extremely difficult academic task due to the lack of an effective integrated national criminal institution in this area. Therefore, it is important to remark that such heinous acts, as will be indicated later, are supported by compelling evidence, statistics and figures that have been obtained through many visits by the author to relevant institutions, particularly in both the Erbil and Duhok governorates in the Kurdistan region of Iraq. From January 2019 to June 2020, the author conducted 11 interviews with related Kurdistan governmental figures. All sources are anonymized.¹⁹

¹⁷ *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, GA Res 47/135, UNGAOR, 47th Sess, UN Doc A/RES/47/135 (1992) [*Declaration on Minorities*].

¹⁸ *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) [*Rome Statute*].

¹⁹ For details, see the text accompanying notes 116, 148-150, 154, 156-157, 160-161, 203.

I. The Concept of Genocide in International and Domestic Penal Codes

A. The Concept of Genocide in ICL

1. DEFINING GENOCIDE

The term “genocide” did not feature in the Nuremberg Charter, where the judges dismissed the genocide charges levied against the defendants by the prosecution. The charges involved the “extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial or religious groups, in particular Jews, Poles and Gypsies and others.”²⁰ These offences were described using other terms, such as “mass murder,” “annihilation” of specific groups of individuals or populations, etc. The legal justification for this was the absence of any genocide prohibition in IL at that time. The judges sought to demonstrate the devastation of millions of people, but not of specific ethnic, national or religious groups.²¹

Thus, genocide was not called by its proper name until 1944.²² The term “genocide” was coined by Raphael Lemkin from the ancient Greek word *γένος* or *genos* (race, tribe) and combined with *cide* (killing) from the Latin word *caedere* (kill), thus corresponding in its formulation to such words as “tyrannicide”, “homicide”, “infanticide,” etc. It combines old practices with their modern developments.²³ Genocide is the intended destruction of a national or ethnic group by mass killings, disintegration of political, social, and economic institutions, and the destruction of the personal security, culture, language, national feelings, religion, liberty, dignity and health of individuals belonging to such groups. It is directed against a national or ethnic group as an entity, and against individuals for being members of such group.²⁴

Genocide is the systematic mass destruction of a people based on gender, race or religion, and is considered a crime of crimes (the height of criminality) because of its seriousness.²⁵ It is a crime based upon the depersonalization of the victim, who is targeted on account of being a member of a group. For instance, “the

²⁰ The International Military Tribunal, *The Nuremberg Trial of German Major War Criminals: Proceedings of the International Military Tribunal (IMT)*, vol 1 (Nuremberg: The International Military Tribunal, 1947) at 22.

²¹ Marchuk, *supra* note 3 at 88.

²² *Ibid* at 87.

²³ Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Washington, DC: Washington Carnegie Endowment for International Peace, 1944) at 79.

²⁴ *Ibid*.

²⁵ Ziyad Rabeeh, “The crimes of genocide” (2014) 59 J of Intl Studies 95 [in Arabic] at 103–05.

German Federal Court of Justice rightly [considered] in [the] *Jorgić* [case] in 1999 [that] the perpetrators of genocide do not target a person ‘in his[her] capacity as an individual’; they do not see the victim as a human being but only as a member of the persecuted group.”²⁶

Genocide thus is a very specific terminology, referring to violent crimes committed with the intent to destroy the existence of a group. It is a unique act, distinguished from any other crime in the way that its victims are groups rather than individuals, or that they are not targeted for any reason peculiar to them only, but rather for being a member of a specific group. Therefore, targeting individuals forms just one part of a much larger offence, the destruction of the target group, either wholly or partially.²⁷ Many scholars and trial chambers of *ad hoc* tribunals have placed genocide at the top of a hierarchy of core international crimes.²⁸

The brutal acts that make up genocide are done in the name of a government, i.e., ordinary citizens are not committing the crimes, but rather programs of mass destruction are initiated by governments or governments in waiting (*de facto*).²⁹ That is, regardless of conceivable exceptional circumstances, a single person is not capable of destroying a group of people in whole or in part. Thus, the perpetration of genocide entails a collective,³⁰ in which the individual act forms part of systemic criminality. For instance, the District Court of Jerusalem inquired into the overall genocidal campaign as “masterminded by the Nazi leadership.”³¹

Two other attributes can be added to the conception of genocide, namely international and legitimate features. With respect to the international characteristic, ICL, in relation to genocide, primarily protects a collective legal interest, in which particular groups have the right to participate in a pluralistic society.³² This feature distinguishes genocide from domestic offences, and assumes it to have a strong correlation between its perpetrators and the public authorities of the State in question, within the framework of a joint criminal enterprise, where the protected interest has an international character, and those affected by the crime are the international community as a whole.³³ On the other hand, the principal source of the criminalization of genocide is international custom, which in turn derives from the

²⁶ Antonio Cassese, *International Criminal Law*, 2nd ed (New York: Oxford University Press, 2008) at 137.

²⁷ Abdullah O Yassen, “Genocidal Intent: The Case of the Anfal Campaign” (LLM Thesis, LW3061/62 Dissertation, University of Leicester, 2010) at 7, 11.

²⁸ *Ibid* at 11; see also *Prosecutor v Radislav Krstić*, IT-98-33 A, Judgment (19 April 2004) at para 95 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber) [*Prosecutor v Krstić Appeals Chamber Judgment*].

²⁹ Jennifer Balint, *Genocide, State Crime and the Law: In the Name of the State* (New York: Routledge, 2012) ch I at 14.

³⁰ Kreß, *supra* note 2 at 470.

³¹ *Attorney-General of the Government of Israel v Eichmann*, No 40/61, Judgment (11 December 1961) at 79ff (District Court of Jerusalem).

³² Kai Ambos, *Treatise on International Criminal Law: The Crimes and Sentencing*, vol II (Oxford: Oxford University Press, 2014) at 3–5.

³³ Tavga Al-Bustany, *The Principle of Universal Jurisdiction in Penal Law: Comparative, Critical & Analytic Study* [in Arabic] (Erbil: Aras Press, 2009) at 243–46.

rule of justice and morality that made the provisions of the *Genocide Convention* binding on all States, even if they are not ratified by them, in times of war or peace. This is what constitutes the “legitimate feature” of genocide, unlike national penal codes that receive their criminalization purely from written texts, as in the rule of *nulla poena sine lege*.³⁴

The definition of acts constituting genocide is recognized in Article 2 of the *Genocide Convention* and Article 6 of the *ICC Statute*, which both give the following text:

‘genocide’ means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

What is immediately apparent is that Article 6 of the *ICC Statute* considers genocide to be foremost among international criminal offences, in conformity with Article 2 of the *Genocide Convention*. Although there was a time lag of 50 years between the two conventions, there was no further amendment to the statement regarding genocidal acts.³⁵ The statutes of the International Criminal Tribunal (ICT)³⁶ for the Former Yugoslavia (ICTY, 1993) and the ICT for Rwanda (ICTR,

³⁴ *Ibid* at 243; Ambos, *supra* note 32 at 5.

³⁵ Ambos, *supra* note 32 at 2–3; see also Rabeeh, *supra* note 25 at 124.

³⁶ The term International Criminal Tribunal (ICT) refers to international permanent and temporary (*ad hoc*) courts convened for the purpose of deciding cases arising under criminal law (ICL). The permanent court is composed of the International Criminal Court (ICC), which was adopted by the *Rome Statute* on 17 July 1998 and came into force on 1 July 2002. Temporary tribunals include: The Nuremberg Military Tribunals (NMT); the trials of leading German officials before the International Military Tribunal (IMT), the best known of the post-World War II trials, i.e., the War Crimes Trials, established by the victorious powers in 1945 to prosecute those responsible for war crimes and crimes against humanity; The International Military Tribunal for the Far East (IMTFE), also known as the Tokyo War Crimes Tribunal, also an IMT-established by the victorious powers after World War II in 1946, to try the leaders of the Empire of Japan for joint conspiracy to start and wage war, war crimes, and crimes against humanity; The International Criminal Tribunal for Yugoslavia (ICTY), established by the United Nations Security Council (UNSC) in 1993 to prosecute persons responsible for perpetrating war crimes during the conflict of the Balkans in the 1990s; The International Criminal Tribunal for Rwanda (ICTR), established by the UNSC in 1994 to prosecute persons responsible for perpetrating genocide and other violations of international humanitarian law in Rwanda; The Special Court for Sierra Leone (SCSL), established by the government of Sierra Leone and the UN in 1996 to prosecute those responsible for war crimes and crimes against humanity during the civil war in Sierra Leone;

1994) in Sections 4(2) and 2(2), respectively, adopt the same formula for genocide.³⁷

As for the elements (*corpus delicti*) of the crime, while the *Genocide Convention* and *Rome Statute* do not specify them, another convention filled this loophole. The international community released the International Criminal Court (ICC) Elements of Crimes in 2002, produced by the Member States of the *ICC Statute*, which included elements relating to genocide. Article 9 of the *Rome Statute* refers to the announcement of the Elements of Crimes as an assistant to the ICC in the interpretation and application of Articles 6, 7 and 8.³⁸

In short, the structure of genocide may be characterized by three constitutive elements: first is the *actus reus* (objective or physical element) of the crime, which is formed by one or several of the actions enumerated in Article 2 of the *Genocide Convention* and subsequent provisions; the second is the corresponding general *mens rea* (subjective or mental element),³⁹ as described in Article 30 of the *ICC Statute*; and finally, there is an extended mental element (ulterior, *dolus specialis*, or special subjective element), namely the intention to destroy in whole or in part, a national, ethnical, racial or religious group, as such.⁴⁰

The Special Tribunal for Lebanon (STL), established by the UNSC in 2007, the first tribunal of international character in regard to terrorist crimes; responsible for the investigation and prosecution of those responsible for the 14 February 2005 assassination of Rafic Hariri, the former Lebanese prime minister, and the deaths of 21 others.

For details, see United Nations, “International and Hybrid Criminal Courts and Tribunals”, online: *United Nations and the Rule of Law* <www.un.org/ruleoflaw/thematic-areas/international-law-courts-tribunals/international-hybrid-criminal-courts-tribunals/>; Cornell Law School, “International Criminal Tribunals”, online: *Legal Information Institute* <www.law.cornell.edu/wex/international_criminal_tribunals/>.

³⁷ *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (International Tribunal for the Former Yugoslavia)*, SC Res 827, UNSCOR, 3217th meeting, UN Doc S/RES/827 (1993) [*ICTY Statute*]; *Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006)*, SC Res 955 (1994), UNSCOR, 3454th meeting, UN Doc S/RES/955 (1994) [*ICTR Statute*].

³⁸ The ICC Elements of Crimes are reproduced from the International Criminal Court, *Official Records of the Assembly of States Parties to the Rome Statute of the ICC*, ICC-ASP/1/3, 1st Sess, UN Doc ICC-ASP/1/3 and ICC-ASP/1/3/Corr.1 (2002) part II.B [ICC Elements of Crime].

³⁹ It is apparent that *mens rea* is necessary in defining the contextual elements of international crimes; specifically in ICL, the same *actus reus* can be categorized quite differently by differing the *mens rea*. As a general principle in penal law, individual responsibility is identified across two factors: the objective character or harmfulness of the act *per se*, e.g., rape, robbery, or killing; and the intention of the suspect. However, within both deterrence and retribution theories, it is primarily the subjective (mental) elements of crimes, rather than their objective (material) elements, which attach specific degrees of gravity to conduct, and that subsequently determine the degree of punishment to be imposed. For instance, a killing might be accidental, a crime of opportunity, planned carefully in advance, achieved in a particularly sadistic or vicious way, etc. See Payam Akhavan, *Reducing Genocide to Law: Definition, Meaning and the Ultimate Crime* (Cambridge: Cambridge University Press, 2012) at 30.

⁴⁰ Ambos, *supra* note 32 at 5.

2. MATERIAL ELEMENTS (*ACTUS REUS*)

a) *Perpetrators*

The commission of genocide does not necessitate holding a certain position within a State or quasi-State organizational structure in regards to the overall crime plan. Even an individual of the targeted group may perpetrate the genocide.⁴¹

b) *Protected Groups*

In *Prosecutor v Akayesu*, the ICTR Trial Chamber held that “the crime of genocide exists to protect certain groups from extermination or attempted extermination.”⁴² Inescapable membership within such a group makes the individuals associated specifically vulnerable.⁴³ In the definition of “genocide”, however, there is no interpretation of the national, ethnical, racial or religious groups’ characteristics according to international instruments; they have been determined by jurisprudence. A group is understood as a permanent or collective unity of persons, which differs from the rest of the population on the grounds of common attributes shared by its members.⁴⁴

Pursuant to the interpretations of the ICTs, a national group consists of persons who have a common nationality, whereas an ethnic group members share a common language and culture.⁴⁵ Nonetheless, diagnosing protected groups does not presuppose that members of a protected national or ethnic group, according to the definition of “genocide,” will have the nationality of the State they are living in. It is sufficient, and also necessary, that the group is large in number and continuously living in the State’s territory.⁴⁶ In *Prosecutor v Akayesu*, the concept of a national group was confined to the nationals of a State.⁴⁷ Similarly, in *Prosecutor v Krstić*, the Trial Chamber appears to have based its categorization of Bosnian Muslims as a specific and distinct national group on the fact of their formal recognition as a nation.⁴⁸

Racial groups comprise members sharing some hereditary physical characteristics or traits, in such a way that the individual cannot escape from the group, i.e., this understanding therefore reflects most directly the idea of the specific

⁴¹ Kreß, *supra* note 2 at 473.

⁴² *Prosecutor v Akayesu*, ICTR-96-4-T, Judgment (2 September 1998) at para 469 (International Criminal Tribunal for Rwanda) [*Prosecutor v Akayesu*].

⁴³ Kreß, *supra* note 2 at 474.

⁴⁴ Ambos, *supra* note 32 at 5; Carola Lingaas, “Defining the Protected Groups of Genocide through the Case Law of International Courts” (2015) Intl Crimes Database Brief 18 at 2–3, online (pdf): *International Crimes Database* <www.internationalcrimesdatabase.org/upload/documents/20151217T122733-Lingaas%20Final%20ICD%20Format.pdf>.

⁴⁵ Cynthia Enloe, *Ethnic Conflict and Political Development: Varieties of Ethnicity* (Lanham: University Press of America, 1986) at 15–29.

⁴⁶ Kreß, *supra* note 2 at 476.

⁴⁷ *Prosecutor v Akayesu*, *supra* note 42 at para 702.

⁴⁸ *Prosecutor v Krstić Appeals Chamber Judgment*, *supra* note 28 at para 6.

vulnerability of the group of individuals. Racial groups are frequently identified with a geographical region.⁴⁹

As for religious groups, international case law defines them as a group “whose members share the same religion, denomination or mode of worship.”⁵⁰ A religious group must exist in a stable manner and form a national group simultaneously. It is not required to be organized in a particular manner. Notwithstanding, subdivisions of a society do not constitute religious groups within the definition of genocide, even if their existence is based on religious belief, as in the case of the Indian castes.⁵¹

Thus, genocide distinguishes itself from other international crimes by the destruction of a group.⁵² However, subjective criteria alone are not enough to distinguish such groups, and therefore, objective criteria should not be disregarded. It has been determined internationally that the *Genocide Convention* or the continued jurisprudence of *ad hoc* ICTs does not protect political, economic and cultural groups. This may be deduced from the concept of the phrase “a group, as such”,⁵³ particularly the fact that this concept only covers “stable groups,” distinguishing them from “mobile groups,” which refers to political, economic and cultural groups. The resulting loophole may be addressed by the persecution of the crime, however, which has already been employed in some cases to penalize the alienation of Jews and other groups in Nazi Germany.⁵⁴

c) *Prohibited Acts*

i. Killing⁵⁵

Killing, here, refers to causing the death of one individual of a protected group.⁵⁶

⁴⁹ *Prosecutor v Akayesu*, *supra* note 42 at para 514; *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, UNSCOR, annex, UN Doc. S/2005/60 (2005) 2 at para 494 [*Darfur Report*].

⁵⁰ *Darfur Report*, *supra* note 49 at para 133; see also *Prosecutor v Akayesu*, *supra* note 42 at para 515.

⁵¹ Kreß, *supra* note 2 at 479.

⁵² Ambos, *supra* note 32 at 5–7; Lingaas, *supra* note 44 at 2–3.

⁵³ It is noteworthy that the term “as such” in the definition has been explained to mean that the prohibited act must be committed against a person based on his/her membership of a specific group and particularly because the person belonged to this group, such that the real victim is not merely the person but the group itself. See *Prosecutor v Kajelijeli*, ICTR-98-44A-T, Judgment (1 December 2003) at para 813 (International Criminal Tribunal for Rwanda).

⁵⁴ Ambos, *supra* note 32 at 7–9.

⁵⁵ The ICTR Appeals Chamber decision in the *Kayishema* case referred to the killing, here, as unlawful and intentional killing within the context of genocide (the intent to destroy a group in whole or in part) : *Prosecutor v Kayishema and Ruzindana*, ICTR-95-1-A, Judgment (1 June 2001) at para 150 (International Criminal Tribunal for Rwanda, Appeals Chamber) [*Prosecutor v Kayishema and Ruzindana Appeal Judgment*].

⁵⁶ Kreß, *supra* note 2 at 480; *Darfur Report*, *supra* note 49 at para 491.

ii. Causing Serious Bodily or Mental Harm to Members of the Group

In *Prosecutor v Kayishema and Ruzindana*, the Trial Chamber deemed that the phrase “serious bodily harm” means something that “seriously injures the health, causes disfigurement or causes serious injury to the external, internal organs or senses.”⁵⁷ The ICC Elements of Crimes utilize similarly loose language, in that prohibited conduct “may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment.”⁵⁸ Ultimately, the causing of harm to one member of the protected group suffices, as in the case of killing.⁵⁹

iii. “Deliberately Inflicting on the Group Conditions of Life Calculated to Bring about its Physical Destruction in Whole or in Part”

In *Prosecutor v Akayesu*, the ICTR Trial Chamber said:

the expression deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part should be construed as the methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction.⁶⁰

This trial indicates that the approach may be broadened beyond measures of “slow death” to measures capable of bringing about mental harm or serious bodily harm. For instance, prohibited acts include confining group members in extremely unhygienic or inhuman conditions, subjecting them to a subsistence diet, or reducing essential medical services usable to the group below minimum requirements.⁶¹

iv. “Imposing Measures Intended to Prevent Births Within the Group”

The international consensus reveals that breaching the rights of just one victim suffices to form a complete *actus reus*. This particular prohibited act describes the biological variant of genocide aimed at destroying the group’s reproductive capacity.⁶² In *Prosecutor v Akayesu*, the Trial Chamber construed the terms as including “sexual mutilation, the practice of sterilization, forced birth control, and separation of the sexes and prohibition of marriage.”⁶³

⁵⁷ *Prosecutor v Kayishema and Ruzindana*, ICTR-95-1-T, Judgment (21 May 1999) at para 109 (International Criminal Tribunal for Rwanda, Trial Chamber) [*Prosecutor v Kayishema and Ruzindana Trial Judgment*].

⁵⁸ ICC Elements of Crimes, *supra* note 38.

⁵⁹ Kreß, *supra* note 2 at 481.

⁶⁰ *Prosecutor v Akayesu*, *supra* note 42 at para 503.

⁶¹ *Ibid* at para 504.

⁶² Kreß, *supra* note 2 at 483.

⁶³ *Prosecutor v Akayesu*, *supra* note 42 at para 507.

v. “Forcibly Transferring Children of the Group to Another Group”

The ICC Elements of Crimes stipulate that the

term ‘forcibly’ is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment.⁶⁴

This prohibited act would be completed if just one child has been distanced from the group to which it belongs. This act is positioned at the threshold of so-called cultural genocide, and may also be seen as a more subtle form of “biological genocide,” i.e., genocide by eliminating the group’s reproductive capacity.⁶⁵ The ICC Elements of Crimes determine a child as a person under the age of 18.⁶⁶

3. THE MENTAL ELEMENTS (*MENS REA*)

The principle of culpability is a cornerstone of criminal law; it requires a guilty state of mind in an individual (mental element), which plays a crucial role in proving the commission of genocide, as absence of or defect in *mens rea* prevents the imposition of criminal responsibility. There is no customary law defining *mens rea* standards in ICL. The *mens rea* doctrine, however, has been gradually drafted in ICL on a case-by-case basis, and involves a plethora of *mens rea* standards that originate from IL jurisdictions.⁶⁷

a) *General Intent*

In accordance with the *Rome Statute*, the “mental element” of core international crimes (including genocide) involves crimes committed with intent and knowledge, in relation to engaging in the conduct, and with the aim of causing that consequence or awareness that it will occur in the ordinary course of events. This “knowledge” means awareness that a circumstance exists or that a consequence will occur.⁶⁸

b) *Special Intent (Dolus Specialis)*

The “special intent” or *dolus specialis* (special *mens rea* or genocidal intent) is defined as a constitutive element of the crime which requires that the perpetrator clearly sought to produce the act they have been charged with. In the IL Commission,

⁶⁴ ICC Elements of Crimes, *supra* note 38, s 6(e)/5.

⁶⁵ Kreß, *supra* note 2 at 484.

⁶⁶ ICC Elements of Crimes, *supra* note 38, s 6(e)/5.

⁶⁷ Marchuk, *supra* note 3 at 112–13.

⁶⁸ *Rome Statute*, *supra* note 18, art 30.

however, Juri G. Barsegov stated that “[w]hatever the reasons for its perpetration, whatever the open or secret motives for the acts or measures directed against the life of the protected group, if the members of the group as such were destroyed, the crime of genocide was being committed.”⁶⁹ Deliberate intention in genocide indicates that the prosecution should go beyond establishing that the perpetrator meant to engage in the conduct, or meant to cause the consequence. Where the *dolus specialis* is not established, the act remains punishable, but not as genocide. It may be characterized simply as a crime under ordinary criminal law or it may be a crime against humanity. Moreover, echoing the District Court of Jerusalem in the *Eichmann* case, the IL Commission noted that, where the *dolus specialis* of genocide cannot be adopted, the crime may still meet the conditions of “persecution” or crime against humanity. Thus, proof of a hateful motive will form an integral part of the evidence for the existence of a genocidal policy, and then of an ulterior genocidal intent.⁷⁰

In one of the first judgments of an ICT on the crime of genocide, in *Prosecutor v Kambanda*, a Trial Chamber of the ICTR stated:

The crime of genocide is unique because of its element of *dolus specialis* (special intent) which requires that the crime be committed with the intent “to destroy in whole or in part, a national ethnic, racial or religious group as such”, as stipulated in Article 2 of the Statute; hence the Chamber is of the opinion that genocide constitutes the crime of crimes, which must be taken into account when deciding the sentence.⁷¹

This appropriately conveys the idea that a particular stigma is attached to any conviction for this crime.⁷² For instance, as the ICTY Appeals Chamber put it in *Prosecutor v Krstić*, “[a]mong the grievous crimes this Tribunal has the duty to punish, the crime of genocide is singled out for special condemnation and opprobrium.”⁷³ The particular condemnation and opprobrium have a lot to do with the prime historic example behind the international criminalization of genocide, that is, the extermination of eight million persons, primarily because of their religion, race or ethnicity, by the German Nazis.⁷⁴

Consequently, as stipulated in Article 2 of *Genocide Convention* and subsequent provisions, the meanings of the terms to “destroy” and a group in “whole or in part” form the essential elements of the *dolus specialis*, which are explained further below.

⁶⁹ Schabas, *supra* note 6 at 304–05.

⁷⁰ *Ibid* at 257, 261–62; Cassese, *supra* note 26 at 137.

⁷¹ *Prosecutor v Jean Kambanda*, ICTR-97-23-S, Judgment and Sentence (4 September 1998) at para 16 (International Criminal Tribunal for Rwanda).

⁷² Kreß, *supra* note 2 at 463.

⁷³ *Prosecutor v Krstić Appeals Chamber Judgment*, *supra* note 28 at para 36.

⁷⁴ Kreß, *supra* note 2 at 463.

i. The Meaning of “Destroy”

Prima facie, Lemkin wrote that the “world represents only so much culture and intellectual vigor as are created by its component national groups [...] The destruction of a nation, therefore, results in the loss of its future contributions to the world.”⁷⁵ The prosecution of the crime of genocide, therefore, is intended to protect not only the physical existence of the individual members of the group in question, but the group as a social entity as well. Some broader interpretations conform to the fact that the perpetrators’ intent to destroy may include actual destruction of the group, which begins with vicious assaults on culture, particular languages, religious and cultural monuments and institutions, etc.⁷⁶

In this vein, the Trial Chamber in the *Krstić* case stated that it “recognizes that, despite recent developments, customary international law limits the definition of genocide to those acts seeking the physical and biological destruction of all or part of the group.”⁷⁷ Apparently, the jurisprudence of ICTY concurred in the view, i.e., that a perpetrator of genocide must act with the goal or desire to destroy part of a protected group. This is summarized in the Darfur Report as follows:

This [...] element is an aggravated criminal intent, or *dolus specialis*; it implies that the perpetrator consciously desired the prohibited acts he committed to result in the destruction, in whole or in part, of the group as such[.]⁷⁸

The purpose-based approach essentially implies a subjective demarcation between the two main modes of participation in genocide. There is a potential qualification here, where the applicable law determines a purpose requirement in regards to aiding and abetting, as stated in Section 25(3)(c) of the *Rome Statute*, and this does not entirely exclude individual criminal liability for genocide; it merely excludes the categorization of the individual as a principal perpetrator.⁷⁹

In *Prosecutor v Akayesu*, the Chamber considered that:

it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against the same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding members of other groups, can enable the Chamber to infer intent of a particular act.⁸⁰

Likewise, Claus Kreß states that “the word ‘intent’ means that the perpetrator committed the prohibited act with the knowledge to further thereby a campaign

⁷⁵ Lemkin, *supra* note 23 at 91.

⁷⁶ Ambos, *supra* note 32 at 39–40.

⁷⁷ *Prosecutor v Krstić*, IT-98-33-T, Judgment (2 August 2001) at para 580 (International Criminal Tribunal for the former Yugoslavia) [*Prosecutor v Krstić Trial Judgment*]

⁷⁸ *Darfur Report*, *supra* note 49 at para 491.

⁷⁹ *Prosecutor v Krstić Trial Judgment*, *supra* note 77 at paras 134ff; Kreß, *supra* note 2 at 493.

⁸⁰ *Prosecutor v Akayesu*, *supra* note 42 at para 523.

targeting members of a protected group with the realistic goal of destroying that group in whole or in part.”⁸¹

ii. The Meaning of “in Whole or in Part”

It is important to outline the meaning of the words “in whole or in part” on the basis of genocide’s structure as an offence of intention. The specific *mens rea* of the perpetrator prevails over and exceeds the *actus reus*. The perpetrator, thus, need not objectively destroy a relatively significant number or section of a group “in whole or in part”, but need only intend to do so.⁸² However, a case-by-case approach should be considered and should take into account the quantitative and qualitative criteria.⁸³

Concerning the quantitative element, the UN Expert Report of 1985 referred to “a reasonably significant number, relative to the total of the group as a whole” as sufficient for that purpose.⁸⁴ The UN Expert Report also clearly refers to “a significant section of a group, such as its leadership.”⁸⁵ Further, in the ICTY, the *Prosecutor v Krstić* Trial Chamber affirmed the quantitative element as a “necessary and important starting point.”⁸⁶ This Trial Chamber considered that taking Bosnian Muslim men of military age from the town of Srebrenica represented a sufficient part of the protected Bosnian Muslim group. The Bosnian Serb forces knew that the combination of those killings, along with the forcible transfer of women, children, and the elderly, would inevitably result in the physical disappearance of the Bosnian Muslim population of Srebrenica. This selective destruction of the group would have a lasting impact on the entire group. Thus, this qualifies as an intent to destroy the group in whole or in part.⁸⁷ This analysis was upheld by the *Krstić* Appeals Chamber, which emphatically concluded its reasoning as follows : “[T]he law condemns, in appropriate terms, the deep and lasting injury inflicted, and calls the massacre at Srebrenica by its proper name : genocide.”⁸⁸

⁸¹ Kreß, *supra* note 2 at 498.

⁸² The IL Commission described genocide’s *dolus specialis*, in its Fifth Commentary on the 1996 Draft Code of Crimes Against the Peace and Security of Mankind, as follows : “[T]he crime of genocide requires a specific intent which is the distinguishing characteristic of this particular crime under international law.” The IL Commission also added that genocidal acts would not normally occur by accident or even solely as a result of negligence. Nevertheless, a general intent to commit one of the enumerated acts combined with a general awareness of the potential consequences of such an act with respect to the victim or victims is not sufficient for genocide. The legal definition of this offence requires a specific state of mind or a particular intent with regard to the general findings of the prohibited act. See “Draft Code of Crimes against the Peace and Security of Mankind” in *Yearbook of the International Law Commission 1996*, vol 2, part 2 (New York: UN, 1996) 15 at 44, para 5 (UNDOC. A/CN.4/SER.A/1996/Add.1 (Part 2)).

⁸³ Ambos, *supra* note 32 at 43–44.

⁸⁴ *Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide prepared by Mr. Benjamin Whitaker*, UNESCOR, 38th Sess, UN Doc E/CN.4/Sub.2/1985/6 (1985) at para 29.

⁸⁵ *Ibid* at paras 29, 24, reference 15.

⁸⁶ *Prosecutor v Krstić Appeals Chamber Judgment*, *supra* note 28 at para 12.

⁸⁷ *Ibid* at paras 581–95.

⁸⁸ *Ibid* at para 37.

Genocide's ultimate victim is the group, whose destruction necessitates crimes against its members, that is, against the individuals belonging to that group. Genocide thus aims to destroy the group as a social, supra-individual entity, "as such," and thus to destroy its members as part of this entity.⁸⁹ Consequently, all of the elements of genocide exist solely in relation to the *dolus specialis* of destroying a particular group wholly or partly, whether the crime is performed or not, as long as the intent is to achieve this goal; i.e., whether genocide has occurred by mass murder or not hinges upon the existence in the perpetrator's mind, at the time of the commission of the prohibited act, of a specific intent to destroy, in whole or in part, a protected group by one of the specified methods, alongside the intent to commit the specified act. This characteristic "gives genocide its specialty and distinguishes it from an ordinary crime and other crimes against international humanitarian law."⁹⁰

It is not a requirement of this offence that a citizen commits it against another State; it may occur within a single State. Furthermore, an accomplice aiding or abetting the act, by conspiracy or incitement, is punished as a principal perpetrator according to the *Genocide Convention* and subsequent provisions.⁹¹

B. The Concept of Genocide in the Iraqi Penal Code

There are many countries that list genocide in their national criminal legislation (such as Germany, France, Belgium, the Netherlands, Canada, New Zealand, etc.), depending on the provisions of the *Genocide Convention*. Article 6 of the latter states that the accused should be referred to a court of competent jurisdiction in the State where the genocidal acts were committed or be transferred to a competent ICT.⁹² The *Convention* does not provide a punishment for genocide, but leaves this to the domestic courts. As a general principle, IL seeks assistance from national law in providing accountability for genocide, i.e., the national judiciary has territorial jurisdiction in considering and determining the responsibility of the individual who perpetrated the genocide. This is considered an instance of the principle of complementarity in the context of ICL, where if they cannot or will not do so, then the complementary role of the ICTs will be highlighted. In the same vein, Articles 1 and 17 of the *Rome Statute* indicate that the ICC is not a body above States, for it does not replace national criminal judiciary systems, but rather is complementary to them. The preamble to the *Rome Statute* mentions that the ICC will "complement the jurisdictions of national criminal courts [... and] it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes." The ICC thus only steps in when local courts cannot or will not act.⁹³

⁸⁹ *Prosecutor v Akayesu*, *supra* note 42 at para 521; *Prosecutor v Kayishema and Ruzindana Trial Judgment*, *supra* note 57 at para 97.

⁹⁰ *Prosecutor v Jelisić*, IT-95-10-T, Trial Judgment (14 December 1999) at para 66 (International Criminal Tribunal for the former Yugoslavia) [*Prosecutor v Jelisić*].

⁹¹ *Genocide Convention*, *supra* note 7, arts 2–3; *Rome Statute*, *supra* note 18, arts 6, 25.

⁹² Nawzad Al-Shwani, *The Jurisdiction Over Genocide Offence* [in Arabic] (Tripoli: Modern Foundation of Book, 2012) at 76–77.

⁹³ *Ibid* at 42–44.

The principle of complementarity emerged during the early efforts to establish an ICT, and is the outcome of two combined factors: respect for national sovereignty and the need to facilitate international criminal justice for the repression of genocide. The conflict between the two desires led to the compromise that is the notion of complementarity.⁹⁴ The initial proposals of the *Genocide Convention* clearly favoured establishing an international tribunal to hear cases if a State is unwilling to try or extradite offenders. This relied largely on the 1937 League of Nations Treaty and was affixed to the associated Secretariat's draft.⁹⁵ The implementation by States of the complementarity principle will contribute to harmonizing their national laws with internationally recognized standards within ICL, and a "degree of cross-fertilization between international and national criminal law contributes to the harmonization of substantive and procedural laws both at the national and international levels."⁹⁶

Nowadays, complementarity is one of the main governing principles upon which the operation of the ICC is premised. The concept is linked to the historical repression of international crimes, where the primary liability for punishing such crimes lay with States, even though the international feature of the crimes encouraged the creation of international mechanisms for their repression. In accordance with the principle of state sovereignty, each State has the right to exercise jurisdiction over any crimes committed in its territory, even crimes of a type that affects the international community; this is the territoriality principle. In international practice, States rarely waive this right, which is inherent to their sovereignty and not based exclusively on international justice, and only occasionally will they accept international intervention in the form of establishing an ICT to punish grave offences of an international character. The compromise reached is complementarity,⁹⁷ which requires the existence of both national and international criminal justice, functioning in a subsidiary manner for the repression of international crimes when local jurisdiction fails to do so. This is when international jurisdiction intervenes, ensuring that there is no impunity.⁹⁸

There is another principle raised here, namely that of "universal jurisdiction," which has become the preferred technique among those seeking to prevent impunity for international crimes. The exercise of this principle is generally reserved for the most

⁹⁴ Mohamed M El Zeidy, "The Principle of Complementarity: A New Machinery to Implement International Criminal Law" (2002) 23:4 Mich J Intl L 869 at 879.

⁹⁵ Schabas, *supra* note 6 at 444–45.

⁹⁶ M Cherif Bassiouni, *International Criminal Law: Sources, Subjects, and Contents*, vol I, 3rd ed (The Hague: Martinus Nijhoff, 2008) at 6.

⁹⁷ The principle of complementarity reconciles two contesting features or jurisdictions. Firstly, there is a state's sovereignty, which claims jurisdiction over its nationals and those offences committed on its territory, even if these offences are of an international character and may fall within international jurisdiction. The second feature only functions in extraordinary conditions and gives an ICT jurisdiction over particularly heinous offences. The *Rome Statute's* procedural aspects either protect national jurisdiction and sovereignty or enhance the ICC's jurisdiction. See El Zeidy, *supra* note 94 at 905–06.

⁹⁸ *Ibid* at 870. In this connection, it is noteworthy that the principle of complementarity is strongly interrelated with the principle *ne bis in idem* that is reflected in Article 17 of the *Rome Statute* and prevents the ICC from asserting jurisdiction when a competent national legal system has already accepted jurisdiction. Further, Article 20 covers cases that have already been tried and sets out the standards for assessing these, even though a domestic prosecution of a case makes it inadmissible before the ICC. See *Rome Statute*, *supra* note 18, arts 17, 20.

serious international crimes, such as genocide, crimes against humanity, and war crimes; however, there may be other international crimes for which an applicable treaty provides for such a jurisdictional ground, as in the case of terrorism.⁹⁹ Indeed, any State could claim the principle of universal jurisdiction and initiate an adjudication before its domestic courts. This coincides with the *Rome Statute*'s spirit and purpose, specifically in respect to the crime of genocide.¹⁰⁰

One could argue that although the principle of universal jurisdiction imposes upon States the additional duty to adjudicate persons implicated in such crimes, the mechanism of universal jurisdiction might conflict with the concept of sovereignty. For instance, one State might prosecute a national of another State who has no links to the former at all, which may negatively affect the relations between the States.¹⁰¹ Indeed, most States are jealous about their powers of criminal prosecution, seeing this as an issue of sovereignty. The rule of complementarity or subsidiarity States that an ICT will only have jurisdiction when the State with territorial jurisdiction could not or had failed to act.¹⁰²

There are a few national penal codes that have provisions allowing their legal systems to practise universal jurisdiction, regardless of the time and place of the crime's occurrence, over any person who has committed a *jus cogens* international crime. Such crimes include piracy, slavery and slave-related practices, genocide, war crimes, crimes against humanity, apartheid, and torture.¹⁰³ States' practice in establishing international judicial organs, including the *Rome Statute*, does not, generally, establish universal jurisdiction. Nevertheless, referrals by the UN Security Council (UNSC) for core international crimes within the jurisdiction of the ICC form a universal jurisdiction, as they can transcend the territoriality of a State party.¹⁰⁴

In this vein, it is clear from Article 6 of the *Genocide Convention* that jurisdiction is territorial, and that only if an ICT is established and if State parties are likewise establishing an ICT can the latter court have universal jurisdiction. This provision hardly justifies the contention that it reflects the theory of the universality of jurisdiction. Nonetheless, customary IL recognizes the universality of jurisdiction for genocide specifically albeit there is no State practice to support that argument.¹⁰⁵ The ICTY's Appeals Chamber in the *Tadic* case, in respect to genocide, held that "universal jurisdiction [is] nowadays acknowledged in the case of international crimes."¹⁰⁶ Likewise, the ICTR stated in the *Ntuyahaga* case that universal jurisdiction exists for the crime of genocide.¹⁰⁷

⁹⁹ M Cherif Bassiouni, "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice" (2001) 42:1 Va J Intl L 59 at 82 [Bassiouni 2001].

¹⁰⁰ El Zeidy, *supra* note 94 at 917.

¹⁰¹ *Ibid* at 881.

¹⁰² *Ibid* at 878.

¹⁰³ Bassiouni 2001, *supra* note 99 at 108.

¹⁰⁴ *Ibid* at 105–06.

¹⁰⁵ *Ibid* at 120–21.

¹⁰⁶ *Prosecutor v Tadic*, IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995) at para 62 (International Criminal Tribunal for the former Yugoslavia) [*Prosecutor v Tadic Judgment*].

¹⁰⁷ *Prosecutor v Ntuyahaga*, ICTR-98-40-T, Decision on the Prosecutor's Motion to Withdraw the Indictment (18 March 1999) (International Criminal Tribunal for Rwanda).

Hence, we come to the most critical question: what is the attitude of the *IPC* in this respect? *Prima facie*, a revision of the Iraqi and Kurdistan penal codes is the point at issue. It shows that they are mainly composed of *IPC* No. 111 of 1969,¹⁰⁸ which currently applies in both Iraq and the Kurdistan Region, and *Iraqi Higher Criminal Court Law (IHCCL)* No. 10 of 2005,¹⁰⁹ in addition to the *Iraqi Anti-Terrorism Law (IATL)* No. 13 of 2005;¹¹⁰ likewise the *Anti-Terrorism Law in the Iraqi Kurdistan Region (ATLIKR)* No. 3 of 2006.¹¹¹

Apparently, Iraq has included genocide, for the first time ever, in its domestic legislation, according to Section 11/I of the *IHCCL*, which stipulates a “genocide” definition pursuant to the *Genocide Convention*, and denotes that Iraq ratified this *Convention* on 20 January 1959. However, in turn, Section 1(2) states that the mandate of the Supreme Iraqi Criminal Tribunal applies to crimes of genocide committed from 17 July 1968 to 1 May 2003,¹¹² i.e., during the reign of the Former Iraqi Baathist Regime (FIBR). This means that this law was issued solely to try the figureheads of the FIBR that ruled Iraq during that period; this, regrettably, does not include the offences under discussion, which occurred after 2003.

As for the *IPC*, it fails to address the issue, as it does not mention “genocide” absolutely; however, there are two sections related to offences that violate religious sensibilities (i.e., that are related to minorities). Article 372 states that anyone who attacks a religious minority or harnesses its religious practices, or anyone who willfully disrupts a ceremony, meeting, or festival of a religious minority, or who willfully obstructs the performance of such a ritual, is punishable by a period of detention not exceeding three years. In part three, entitled “offences against the person”, chapter one, “offences affecting the life and physical safety of others,” section one, “murder (homicide),” Article 405 states that anyone who willfully kills another is punishable by imprisonment for a term of years or life imprisonment.¹¹³

In a similar vein, the *IATL* has adopted the attitude of not mentioning genocide. With reference to Article 1 of the *IATL*, “terrorism” means every criminal act perpetrated by any person or group that targets an individual or a group of individuals, or group of official or unofficial institutions, which damages public or private property, with the aim of disturbing the peace and stability, or creating chaos to achieve terrorist goals.¹¹⁴ A similar position is taken by the Kurdistan legislator in the *ATLIKR*, which identifies the terrorism act in Article 1 as in the *IATL*.¹¹⁵

¹⁰⁸ The applicable “Iraqi Penal Code (No 111 of 1969 with its Amendments No 2)”, 2796, *Al-Waqa’I Al-Iraqiya*, Ministry of Justice, Republic of Iraq, Baghdad (1 January 1995) [IPC].

¹⁰⁹ “Iraqi Higher Criminal Court Law (No 10 of 2005)”, 4006, *Al-Waqa’I Al-Iraqiya: Official Gazette of the Republic of Iraq*, 47th year, Ministry of Justice, Baghdad (18 October 2005) [IHCCL].

¹¹⁰ *Iraqi Anti-Terrorism Law*, No 13 of 2005 (Baghdad: Publications of the Presidency Council of Iraq) [IATL].

¹¹¹ “Anti-Terrorism Law in the Iraqi Kurdistan Region”, No 3 of 2006 [in Kurdish], 61, *Al-Waqai Al-Kurdistania* [*Official Gazette of the Iraqi Kurdistan Region*], Presidency of Kurdistan Region, Erbil (16 July 2006) [ATLIKR].

¹¹² IHCCL, *supra* note 109.

¹¹³ IPC, *supra* note 108.

¹¹⁴ IATL, *supra* note 110.

¹¹⁵ ATLIKR, *supra* note 111.

Consequently, the term “killing” in regard to genocide does not solely refer to ordinary intentional homicide as listed in the *IPC*, as the *mens rea* here is for limited personal reasons, beside the specific intent to kill. As for terrorism, legislated against in the *IATL* and *ATLIKR*, the *mens rea* is spreading terror among people and undermining State security. The *dolus specialis* in the context of genocide, as noted above, is the destruction, wholly or partly, of one or more groups, as part of an organized plan or public policy to commit a widespread or systematic attack directed at a particular group. It follows from the above that the penal codes of Iraq and Kurdistan do not provide a definition or designation of “genocide,” i.e., they do not apply to the subject matter because it is not determined whether such acts are criminal or not in the national legislation of either Iraq or Kurdistan. Subsequently, following legal logic and the rule of legality of *nulla poena sine lege*, the Iraqi and Kurdistan courts are incapable of hearing cases of genocide perpetrated by ISIL against Iraqi minorities, based on current penal codes.

However, there are practical breakdowns in the present judicial pathway in Iraq and Kurdistan, in which the anti-terrorism laws (*IATL* and *ATLIKR*) allow judges to charge and prosecute terrorism in regards to a wide range of ISIL suspects who are, basically, involved in perpetrating international crimes. In particular, there are clear differences among such offences in the course of the *mens rea* element. These ongoing trials represent a serious loophole in domestic penal codes and hinder the implementation of real justice for victims and the principle of a fair trial.¹¹⁶

Pursuant to the *Genocide Convention*, contracting States are under an obligation not only not to commit genocide themselves, but also to prevent genocide being committed by others.¹¹⁷ In 2007, the ICJ in its *Bosnia v Serbia* judgment held that :

A State[’s ...] responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide. In this area the notion of “due diligence”, which calls for an assessment in concreto, is of critical importance. Various parameters operate when assessing whether a State has duly discharged the obligation concerned. The first, which varies greatly from one State to another, is clearly the capacity to influence effectively the action of persons likely to commit, or already committing, genocide. This capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events.¹¹⁸

¹¹⁶ Interview of Ayad Kakayi, Head of Bar Association of Kurdistan, Erbil Branch: Court of Appeal, Erbil (15 January 2019).

¹¹⁷ Article 5 of the *Genocide Convention* states that “[t]he Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III” : *Genocide Convention, supra* note 7.

¹¹⁸ *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Rep 43 at para 430 [*Bosnia and Herzegovina v Serbia and Montenegro*].

Such factors are considered in assessing whether a State has discharged its obligations under the *Genocide Convention*, i.e., the State is said to have the capacity to effectively influence the actions of persons likely to commit genocide. Further, the State's obligation to prevent it and corresponding duty to act "arise at the instant that the State learns of, or should normally have learnt of, the existence of a serious risk that genocide will be committed."¹¹⁹

Thus, in order to determine whether or not the Iraqi government, along with the Kurdistan Regional Government (KRG), have breached their obligations under the *Genocide Convention*, further investigation by the international community is necessary, taking into account all measures applied to prevent such crimes within their power. The crimes here referred to, committed by ISIL, may amount to genocide, crimes against humanity, or war crimes.

II. The Concept of "Minorities" in International and Domestic Law

A. The Concept of Minorities in IL

The term minority is used in social and political sciences to denote a small group within a society living with the majority group of the society, who are not commonly involved in social issues and do not have privileges equivalent to those of the majority of society.¹²⁰

In international legal forums, the Permanent Court of International Justice (PCIJ), in its 1930 advisory opinion, defined a minority as

a group of persons living in a given country or locality having a race, religion, language and tradition in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, ensuring the instruction and upbringing of their children in accordance with the spirit and tradition of their race and mutually assisting one another.¹²¹

The *UN Minorities Declaration*, adopted by consensus in 1992,¹²² refers to minorities, in Article 1, as groups depending on a national, racial or ethnic, cultural, religious, or linguistic identity. In the definition by Francesco Capotorti, Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities of 1977, a minority is

a group numerically inferior to the rest of the population of a state, in a non-dominant position, whose members – being nationals of the state – possess

¹¹⁹ *Ibid* at para 431.

¹²⁰ Fatemeh Mihandoost & Bahman Babajanian, "The Rights of Minorities in International Law" (2016) 9:6 *J Politics & L* 15 at 16–17.

¹²¹ *Interpretation of the Convention between Greece and Bulgaria Respecting Reciprocal Emigration* (1930), Advisory Opinion, PCIJ (Ser B) No 17.

¹²² *Declaration on Minorities*, *supra* note 17.

ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.¹²³

The most significant criterion is a non-dominant position,¹²⁴ where the national minorities, in any country, are distinguished as a group – smaller from the rest of the population of the State – who have a race, religion, or object that they maintain, and who feel solidarity with each other.¹²⁵ Use of the term “minority” in the international community has evolved from the mid-twentieth century to the present, as an international conception settled in the 1994 Vienna Conference, which indicated religious and national minorities as groups that have involuntarily become minorities within internal borders of States as a result of historical events.¹²⁶

To sum up, the term “minority” has a broad sense jurisprudentially, identifying a number of a State’s citizens whose members are connected by one or several objective and subjective elements such as race, ethnicity, language, sex, religion, culture or history, which makes them different from the majority in the same State. Although they are in a non-dominant position, there is a feeling of solidarity in the effort to maintain their identity.

Theoretically, minority rights have become an international issue more than an internal matter in light of contemporary IL. The emergence of minority rights violations in a given State, under a lack of effective mechanisms for protecting them internally, may constitute a serious threat to international peace and security. This means that there is an international legal justification for interfering in the internal affairs of that State due to the lack of national protection there. After the collapse of the Soviet bloc and the eruption of armed conflict in Yugoslavia in the nineties, for example, the international community had to react and evolve strategies to address these matters with the aim of eliminating discriminative policies against minorities. Respecting the rights of minorities in any society will have a positive influence on the international community’s interest in general, and above all on the well-being of that State *per se*, where stability and peaceful coexistence will be realized.¹²⁷

Certain types of violence against minorities may amount to genocide, which is the gravest human offence, in absolute terms, and is committed specifically against minorities. History is witness that most genocides have been perpetrated against

¹²³ Francesco Capotorti, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities*, UNACOR, 1979, UN Doc E/CN.4/Sub.2/384/Rev.1 at para 568.

¹²⁴ *Ibid.*

¹²⁵ Satish Chandra, *Minorities in National and International Laws* (New Delhi: Deep & Deep Publications, 1985) at 21–30.

¹²⁶ Alaa Al-Shabbani, “International Protection of the Minorities Rights in Public International Law: Applied Study on the Status of Iraq” [in Arabic] (Master’s thesis, University of Al-Qadisiya, 2017) at 20.

¹²⁷ See Delshad Darwesh, “Legal Protection of Religious Minorities in the Light of the Growing Religious Extremism: A Study in the Framework of Iraqi Law and the International Convention” [in Arabic] (Master’s thesis, Salahaddin University, 2015) at 1.

minorities, such as that in Bosnia and Herzegovina, by Serb forces against Muslims at Srebrenica in 1995¹²⁸ and many other areas of the world.

B. The Concept of Minorities in Iraqi Domestic Law

Iraq is made up of a diverse mixture of nationalities, races and religions. Its population was estimated at more than 38 million in 2018,¹²⁹ the majority of which are Arab Muslims (Sunni and Shia) and Kurds, followed by Turkmen, Christians, as well as Yazidis, Shabaks, Kakayi-Yarsanism, and other nationalities, such as Armenians, Circassians, Palestinians, Egyptians, Syrians and Sudanese, in addition to the Kurds of Turkey, Iran and Syria.¹³⁰

Article 3 of the Iraqi *Constitution* lays down that “Iraq is a country of multiple nationalities, religions, and sects.”¹³¹ However, it seems evident that not all Iraqi minorities are determined in the constitution, except by naming some religious minorities in reference to their rights. For instance, Section 2(2) denotes that the constitution will ensure “the full religious rights to freedom of religious belief and practice of all individuals such as Christians, Yazidis, and Mandaean Sabaeans.”¹³²

More explicitly, Section 1(2) of the *Law of Protecting the Rights of Components in Kurdistan – Iraq (LPRCKI)*¹³³ names minorities as:

Components: national groups (Turkmen, Chaldo-Assyrian-Syriacs and Armans), Religious groups (Christians, Yazidis, Mandaie Sabians, Kakayis, Shabak, Faylie, Zardashti and others) who are the citizens of Iraqi Kurdistan.¹³⁴

Generally, the aforesaid are the most significant Iraqi minorities, and mostly reside, geographically, in the Kurdistan region. A brief definition of the most prominent minorities who were affected by the ISIL’s attacks are sequentially outlined below.

1. YAZIDIS

The Yazidi or Yezidi are one of the officially recognized religious communities in Iraq, belonging to the Kurdish ethnicity and originating from the ancient Indo-European nation, although they are influenced by their surroundings,

¹²⁸ *Prosecutor v Krstić Trial Judgment, supra* note 77 at para 581ff.

¹²⁹ Ministry of Planning of the Republic of Iraq, “Demographic Statistics” (last visited 2 October 2018), online: *Central Statistical Organization* <www.cosit.gov.iq/en>.

¹³⁰ Rasheed Al Kheyoun, *Religions and Creeds in Iraq*, 2nd ed [in Arabic] (Köln: Al-Kamel Press, 2007) at 5–10.

¹³¹ The applicable *Constitution of the Republic of Iraq*, (Baghdad: Publications of the Iraqi Council of Representatives, 2005).

¹³² *Ibid.*

¹³³ *Law of Protecting the Rights of Components in Kurdistan – Iraq* [in Kurdish], No. 5 of 2015 (Erbil: Kurdistan Parliament Publications, 2015).

¹³⁴ *Ibid.*

which are made up of Arab and Syriac cultures. The majority of them speak the Kurdish-Kurmanji language and a few of them speak Arabic. Geographically, they are settled within the Dohuk and Mosul governorates (in the Sinjar,¹³⁵ Tilkeef, Bahshiqa, Bahzani, Sumeil, Zakho, and Shekhan districts). Some of them have also spread into northern Syria, eastern Anatolia/Turkey, the former Soviet Union, Europe, America and other parts of the world. Yazidi is regarded as one of the oldest religions in the world; their most prominent conviction is theistic and their belief is in one God, but they have no prophet and their central religious Kiblah (direction of prayer) is Lalish in Kurdistan, Iraq, where the Holy Shrine of Sheikh Adi, the Yazidis' religious reformer, is located.¹³⁶

2. CHRISTIANS

The identity of Christians in Iraq can be determined on the basis of religion, ethnicity, and sectarian divisions. They are doctrinal, divided into Orthodox, Catholic, Protestant, and Evangelical. Ethnically, they include Armenians, Chaldeans, Syriac, and Assyrians. Most of them are concentrated in Baghdad, Erbil, and Mosul; Christians of Iraq are called "Chaldean Assyrian Syriac people" as a single component, regardless of their ethnic and sectarian backgrounds.¹³⁷

3. TURKMENS

Turkmens make up the third major national group in Iraq after Arabs and Kurds. They have their own language, and the majority of them are Sunni and Shia Muslims, while others are Christian. Nowadays, the Turkmen population is estimated to be around 14 % to 16 % of the Iraqi population. Turkmens are descendants of the Oghuz tribes who originally came from Central Asia.¹³⁸

4. KAKAYIS

The term "Kakayi" is affiliated to the word *kaka*, which means "elder brother" in Kurdish; they are also called Yarsanism, which means "the God lovers." They speak Kurdish in the famous dialect "Maju." It is a religious doctrine influenced by special

¹³⁵ Sinjar is a district of Mosul Province, located in north-west Iraq, close to the Iraqi-Syrian border. The region is known as a home to the majority of the world's Yazidis.

¹³⁶ Ministry of Human Rights of the Republic of Iraq, *Iraqi Spectrums: Its National Wealth Source* [in Arabic] (Baghdad: Publications of Minority Rights Section - Performance Monitoring and Rights Protection Service, 2011) at 19–20.

¹³⁷ Saad Salloum, *Protection of Religious, Ethnic and Linguistic Minorities in Iraq: Analytical Study in International: Regional and National Frameworks* [in Arabic] (Baghdad: Iraqi Al-Amal Association, 2017) at 123–24.

¹³⁸ Ali Kayili, "The Iraqi Turkmens: 1921–2005" (Master's thesis, Bilkent University, 2005) at 4–7; Mofaq Salman Kerkuklu, "Turkmens of Iraq" (Dublin, 2007) at 8–13, online (pdf): <www.turkmen.nl/1A_Others/Turkmen_of_Iraq_Part_I.pdf>.

Shia-Islam and represents a religious group that resides mostly in southern Kurdistan (Iraq), particularly in Mosul, Kirkuk, Khanaqin, Mandali, Jalawla, Erbil, Sulaymaniyah, and Halabja.¹³⁹

5. SHABAKS

The Shabak represent a national minority who speak a special language that is distinct from Arabic and Kurdish. They are mostly Muslims, 70 % Shia, and the rest are mostly Sunni, while a small percentage are Christians. They live, with other minorities, in Nineveh Plain, particularly in the Tall-Keef, Bashiqa, Bartalah and Tall-Afar districts. Followers of this group exist solely in Iraq.¹⁴⁰

In accordance with the above definitions, Iraqi minorities are religious groups, including Yazidis, Christians, and Kakayis, as well as national groups, including Turkmens and Shabaks. Thus, the aforesaid minorities qualify for the “groups” description in Article 2 of the *Genocide Convention* and subsequent provisions. Such communities are national and religious groups rather than political, economic, linguistic or cultural groups, which are excluded from taking advantage of legal protection.

III. ISIL’s Acts Against Iraqi Minorities

The conflict in Iraq and the country’s instability since the US occupation in 2003 have had negative implications for minority group members, who were subjected to widespread violations of their rights through various types of crimes, including physical and moral assaults.¹⁴¹ Such crimes took a deeper course in the form of mass atrocities and “ethnic cleansing”¹⁴² during ISIL’s seizure of some Iraqi lands (2014–2017), especially those where minorities were concentrated. The world has witnessed, in these ISIL affected areas, unprecedented levels of violent extremism, manifested in a series of systematic mass killings, public executions, abductions, torture, harassment, rape, sexual trafficking, forcible conversion of people to Islam, looting of homes, property, shops and places of worship, and forcible deportation.¹⁴³ ISIL also took to oil smuggling in addition to kidnapping and looting

¹³⁹ Abbas Al-Azzawi, *Al-Kakayi in History* [in Arabic] (Baghdad: Trade and Printing Corporation Ltd, 1949) at 5–10; see also Aseema Janu, “My Malek Tawus (The Peacock Angel of Yazidis)”, (7 September 2015), online (blog): <ossaymajanou.blogspot.com/2015/09/kakai-people-yarsanism.html>.

¹⁴⁰ Salloum, *supra* note 137 at 145–46.

¹⁴¹ United Nations Office of the High Commissioner for Human Rights & United Nations Assistance Mission for Iraq (UNAMI) Human Rights Office, *Report on Human Rights in Iraq: July–December 2013* (Baghdad: UNAMI Human Rights Office/OHCHR, 2014) at 20–23, online (pdf): <www.ohchr.org/Documents/Countries/IQ/HRO_July-December2013Report_en.pdf>.

¹⁴² The phrase “ethnic cleansing” need not amount to genocide *per se*; it would only do so if the perpetrators intended to destroy a protected group in order to render the territory ethnically homogeneous. Even without the special genocidal intent, ethnic cleansing remains punishable, as a crime against humanity (Section 7I(d)), and a war crime (Section 8(2)(b)(viii) *Rome Statute*). See Ambos, *supra* note 32 at 15-16

¹⁴³ Salloum, *supra* note 137 at 141–42.

museums, libraries, and religious sites, as their most important source of funding.¹⁴⁴ The minorities most directly affected by ISIL attacks are sequentially explained below.

The Yazidis make up the lion's share of victims of mass killings by ISIL, owing to their religious identity. They were the most prominent, recognized internally and internationally, when they were systematically targeted on 3 August 2014; that fateful day will remain in Kurdistan memory for many generations to come, and is called in Kurdistan "Yazidi Genocide Remembrance Day", when ISIL broke into Sinjar District¹⁴⁵ in an aggressive, barbaric manner and immediately killed hundreds of innocent civilians, particularly the locals of Kujou Village and Sinjar Compound.¹⁴⁶ ISIL fighters targeted this unarmed and defenceless group, uprooting them from their lands and even religiously cleansing them through killing their men, and taking many of their women captive or turning them into slaves, i.e., war wives.¹⁴⁷

According to the latest update to the approved statistics issued by the General Directorate of Yazidi Affairs at the Ministry of Endowment and Religious Affairs (MERA) in the KRG, the casualty figures as a result of ISIL's attack against areas inhabited by Yazidis are as follows.¹⁴⁸

Since the first day of the invasion, the number of Yazidis in Iraq was about 550,000 people; after the invasion, the casualty figures in the early days of the invasion reached 1,293. The number of children orphaned by the invasion was 2,745. The number of mass graves discovered so far is 81, in addition to dozens of individual grave sites. The number of abductees has reached 6,417, including 3,548 females and 2,869 males. The number of survivors of ISIL prisons is 3,524: 1,197 women, 339 men, 1,038 female children and 950 male children. More serious, however, is that the number of others under the detention of ISIL so far is 2,893: 1,313 females

¹⁴⁴ *Ibid.*

¹⁴⁵ ISIL fighters faced little or no resistance when they moved into Sinjar. Peshmerga (Kurdish forces) withdrew in the face of the ISIL advance, leaving much of the Sinjar population defenceless, and did not communicate any evacuation order. Most of the population were initially unaware of the collapse of the security situation. The Yazidis who fled early to reach Mount Sinjar were besieged by ISIL, precipitating a major humanitarian crisis. Thus, hundreds of Yazidis died in spite of the international allies' efforts, led by the US, on 7 August 2014, to provide the Yazidis trapped on Mount Sinjar with supplies in airdrops. See United Nations Human Rights Council, *Fact-Finding Mission's Report on "They came to destroy": ISIL Crimes Against the Yazidis*, UNHRCOR, 32nd Sess, UN Doc A/HRC/32/CRP.2 (2016) at paras 24, 27–28 [UNHRC Yazidis Report].

¹⁴⁶ Formally, on 4 August 2019, the Kurdistan Parliament issued a Resolution (No 11) to designate 3 August, yearly, as a "Yazidi Genocide Remembrance Day", and calling on the Iraqi Federal Government to make reparations to the survivors and victims' families, under the provisions of the Iraqi Constitution. See Kurdistan Parliament, "Kurdistan Parliament passes Resolution on Yazidi Genocide Remembrance Day" (3 August 2019), online: *Parliament* <www.parliament.krd/english/parliament-activities/latest-news/posts/2019/august/kurdistan-parliament-passes-resolution-on-yazidi-genocide-remembrance-day/>.

¹⁴⁷ Hussain Shaban, "On the Yazidi Women Captivity" [in Arabic], *International Zaman Newspaper* (31 January 2016), online: <www.azzaman.com/?p=144423>.

¹⁴⁸ Interview of Khairi Bozani, General Director of Yazidis Affairs, MERA's Cabinet, Erbil (20 November 2019).

and 1,580 males. The number of IDP produced by the invasion has reached around 360,000 and the number of Yazidis who took refuge in other States is 100,000.¹⁴⁹

The second group of victims, in terms of the casualty figures and the extent of the damage, are the Christians. As a result of ISIL's invasion of Christian areas in Nineveh Plain, the latest formal statistics, issued on 29 August 2018 by the Council of Ministers of the KRG, the High Committee to Evaluate and Respond to International Reports (HCERIR) and the General Directorate of Christian Affairs at the MERA, state that the number of Christian martyrs reached 250. The number of abductees reached 62. The number of survivors of detention by ISIL detention was 23. The number of IDP produced by the invasion reached nearly 136,196. There has been unprecedented mass migration of Christians from 2014 until the present time, due to their need to evade desperate situations in various political, economic and security aspects.¹⁵⁰

Religious minorities, in particular Christians, have been subject to the worst intimidation and threatening behaviour by ISIL, who forced them to make one of the hardest choices. After their occupation of Mosul on 10 June 2014, ISIL fighters put an "N" sign on the front doors of Christians' houses, which, in Arabic, symbolizes that the owner of the house is a Nasrani (Christian), and the houses were reserved for ISIL members. ISIL leadership then formally issued a proclamation which included new instructions¹⁵¹ whereby the Christian people in Mosul were instructed either to convert to Islam, pay proper *jizyah* (tribute), or leave without taking anything of their property within three days, and Christian property would be confiscated by ISIL; otherwise, murder would be the sole option.¹⁵²

In that regard, the Yazidis have suffered more injustice, in that ISIL kidnapped their women from residential areas and forced them to convert to Islam and marry ISIL fighters; this is a duplicate insult and crime towards Yazidi followers according to one of the Yazidis' marriage laws, which prohibits women from marrying followers of other faiths.¹⁵³ Furthermore, documentary information confirmed by some Kurdistan legislators has shown that ISIL adopted systematic killing, used banned lethal weapons against these groups in large areas of Iraq, and together with human traffickers transferred many victims, including children and young Yazidi women, into sexual slavery in remote areas, i.e., to other States, such as Syria, Libya, Russia, Turkey, Africa, the Caucasus, and Chechnya, to give to ISIL leaders as presents or to trade. This is in addition to the slow death that faced Christian populations through ISIL

¹⁴⁹ These data and figures are also documented and affirmed by Interview of Ayman Khalid, Judge of the Commission for Investigation and Gathering Evidence (CIGE), the High Committee on Recognition of Genocide against Yazidis and Other Religious and Ethnic Communities, Council of Ministers, Dahuk Governorate (27 June 2019).

¹⁵⁰ Interview of Badraddin Bakir, Liaison Officer, Office of the KRG Coordinator for International Advocacy, HCERIR, Erbil (20 February 2019); Interview of Khalid Albert, General Director of Christian Affairs, MERA's Cabinet, Erbil (17 February 2019).

¹⁵¹ Shlomo Organization, *A Comprehensive Report* (Ainkawa, Erbil, 10 September 2016) at 6.

¹⁵² Darwesh, *supra* note 127 at 71–72.

¹⁵³ Minority Rights Group International, *From Crisis to Catastrophe: The Situation of Minorities in Iraq* (London, UK: Minority Rights Group International and Ceasefire Centre for Civilian Rights, 2014) at 11 [MRGI Report].

disconnecting water services to their towns and townships, as well as the demobilization of employees at the beginning, then forcing them to convert to Islam or be murdered.¹⁵⁴

In respect to the Turkmen minority, they come third in terms of casualty figures, after they were subjected to a large attack by the ISIL fighters that ran the Tal-Afar district during June and July 2014, which is inhabited by the majority of the Turkmens in Nineveh Plain. ISIL militias killed and kidnapped hundreds of people belonging to this national minority.¹⁵⁵ The latest formal survey states that the number of Turkmen martyrs of the ISIL invasion reached 120. The number of abductees reached 416. There was just one survivor of ISIL custody. All of this has resulted in the displacement of about 500,000 Turkmens to the Kurdistan region and to the central and southern areas of Iraq, as well as many refugees to other countries.¹⁵⁶

The Kakayi (Yarsani) religious minority constitutes the fourth victim in the casualty figures that resulted from ISIL's invasion of Iraqi areas where Kakayi are concentrated, particularly Nineveh Plain and Kirkuk. The latest formal statistics confirm that the number of Kakayi martyrs of ISIL's invasion reached 212. The number of abductees was 22. Again, there was just one survivor of ISIL custody. The number of IDP produced by the invasion reached 19,700, as well as 5,518 refugees who left Iraq.¹⁵⁷

The fifth minority in terms of victims is the Shabak, who were subjected to a severe attack by ISIL fighters on 10 June 2014, where they lost many of their followers and much of their property.¹⁵⁸ The Shabak, unlike other minorities, were the only minority whose entire territory was controlled by ISIL. Around 200,000 Shabaks were forcibly displaced to Kurdistan and central and southern regions of Iraq.¹⁵⁹ The most terrible disasters, tragedies, and genocide took place in Sada Bahweezah village, north-east of Mosul, where ISIL slaughtered four entire Shabak families and kidnapped then killed 50 men (both young and old) from Omar Kan village, which is located south-east of Mosul. Recently, three mass graves of Shabak civilians were found in the Al-Hawi, Sinjar, and Al-Guwair districts that lead to Mosul; the total number of martyrs was 76. ISIL also abducted around 300 Shabaki people; some of them were placed in ISIL's Badush prison and others were transferred to the Raqqa prisons in Syria.¹⁶⁰

¹⁵⁴ Interview of Valla Fareed, Speaker of the Kurdistan Parliament (5 April 2019); Interview of Wahdi Ali, Parliament Advisor for Civil Society & Minorities Affairs, Erbil (5 April 2019).

¹⁵⁵ Salloum, *supra* note 137 at 144–45.

¹⁵⁶ Nahla Al-Hababi (Iraqi Parliamentarian), "Turkmens kidnapped by ISIS", *The Middle East Monitor (MEMO)* (8 April 2015), online: <www.middleeastmonitor.com/20150408-iraqi-mp-416-turkmens-kidnapped-by-isis>. This statistic was also ratified in an interview of Amir Mawlaw, Director of Coexistence of Religions, Representative of Turkmen Affairs at MERA's Cabinet, Erbil (30 January 2019). See also Dave van Zoonen, *Turkmens in Tal-Afar: Perceptions of Reconciliation and Conflict* (Erbil: Middle East Research Institute, 2017) at 10–12.

¹⁵⁷ Interview of Rajab Kakayi, Representative of Kakayi Affairs at the MERA, Erbil (24 January 2019).

¹⁵⁸ Salloum, *supra* note 137 at 145–46.

¹⁵⁹ Muhammed Al-Shabaki, "Shabak: Victims of ISIL Neglected by the Media", *Al-Nabaa Foundation for Culture and Information* [in Arabic] (28 December 2014), online: <annabaa.org/arabic/local/354>.

¹⁶⁰ Interview of Diya Boutros, President of the Independent Human Rights Commission in the Kurdistan Region (IHRCKR) (10 August 2019); Interview of Kirmanj Othman, Ministry Advisor in IHRCKR,

For a summary of all of the information discussed above, see Table 1.

Table 1. Official Statistics of Iraqi Minorities Victims by ISIL, 2014–2017

<i>Minority</i>	<i>Mass Graves</i>	<i>Martyrs</i> ¹⁶¹	<i>Abductees</i>	<i>IDP</i>	<i>Refugees</i>	<i>Survivors of Capture by ISIL</i>
Yazidis	81	1,293	6,417	360,000	100,000	3,524
Christians	None	250	62	136,196	-	23
Turkmens	None	120	416	500,000	-	None
Kakayis/ Yarsans	None	212	22	19,700	5,518	1
Shabak	3	76	300	200,000	-	None

However, there are many more crimes committed by ISIL that are so far unrecorded, perhaps due to unwillingness on the part of the victims, who are afraid of ISIL or ashamed of their conservative community, or maybe due to the inability of the official authorities to document them.

IV. Characterization of ISIL's Acts

It is important to note the legal characterization of ISIL, as mentioned above.¹⁶² ISIL is an armed militia group; it may be regarded as a non-state actor in the arena of international relations, and it has no formal personality as a State in light of the provisions of IL. Although ISIL temporarily acquired some cornerstone elements of a *de facto* State by force, such as territory, people, and political authority (besides its self-declaration as State), it is not considered a State from the perspective of public IL. Thus, it has no international legal personality. As for creating a new State, that cannot

Erbil (10 August 2019); see also Kadhim Habeeb, "Plights and Disasters of the Shabak in Iraq" [in Arabic], *The Iraqi Voice* (31 August 2018), online: <www.sotaliraq.com>.

¹⁶¹ These numbers are ratified in an interview of Baravan Hamdi, Deputy Minister, General Director of Statistics in Ministry of Martyrs and Anfal Affairs, KRG, and Chairman of the High Committee on Recognition of Genocide against Yazidis and Other Religious and Ethnic Communities, Council of Ministers, Erbil (8 September 2019).

¹⁶² Muir, *supra* note 12.

be isolated from observing and implementing the IL system and associated charters, such as the capability of acquiring rights and obligations under the *UN Charter*, and instating external relations with other States.¹⁶³ No State officially recognizes ISIL so far. Attaining recognition by other States has become a requirement of strengthening a new State's legitimacy within contemporary international relations.¹⁶⁴

Although ISIL is unrecognized as a *de jure* entity in the realm of IL,¹⁶⁵ it is still subject to the latter in terms of keeping international peace and security. The UNSC issued resolution No. 2170 on 15 August 2014, condemning ISIL's practices as terrorist acts in the context of human rights violations and stating that the perpetrators must be accountable before competent criminal tribunals.¹⁶⁶ Most importantly, the international community, according to UNSC *Resolution 2249 (2015)*, strongly condemned ISIL, stating that it "constitutes a global and unprecedented threat to international peace and security," and calling upon the UN member States to take "all necessary measures" to prevent and suppress its terrorist acts on territory under its control in Iraq and Syria. The UNSC has pointed out that ISIL is an extremist group that has committed terrorist acts against civilians who have different religious or ethnic backgrounds, in violation of international humanitarian law, has control over important territories and natural resources in Iraq and Syria, and has recruited foreign fighters, and that the threat posed by ISIL affects all regions and States, even those away from conflict areas.¹⁶⁷

As stated previously,¹⁶⁸ ISIL fighters have committed various types of heinous acts that may well amount to "core international crimes",¹⁶⁹ including genocide, war crimes and crimes against humanity. Hence, while the focus here will primarily be on characterizing those of ISIL's serious acts against Iraqi minorities that may amount to genocide, nevertheless, multiple other acts have been perpetrated by ISIL against Iraqi

¹⁶³ *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7, arts 4, 136.

¹⁶⁴ For details, see James Crawford, *The Creation of States in International Law*, 2nd ed (Oxford: Oxford University Press, 2006) at 37–93; Ahmed Abou-El-Wafa, *The Mediator in the Public International Law*, 5th ed [in Arabic] (Cairo: Dar Al-Nahda Al-Arabia, 2010) at 225, 423.

¹⁶⁵ The legal characterization of ISIL is related to its essence and conduct, which makes its position complex in the context of contemporary IL, and highlights the possible need to enact new international legal norms to deal with and counter this new phenomenon, which resembles mercenary movements in some respect. ISIL is a movement, having a group of fighters worldwide; most of them are Sunni Arabs, remnants of the FIBR and Al-Qaeda, who confronted severe discrimination and sectarianism in Iraq and Syria before founding ISIL. It expresses a philosophy that has many victims, in which the Islamic religion is used in pursuit of political agendas, exploiting the enthusiasm and passion of young people, and convincing them into perpetrating several serious crimes, deadly attacks on civilians, and attempts to impose its identity on them or forcibly deport them. See Abdullah Al-Ashaal, "ISIL Under International Law: Legal Analysis" [in Arabic], (11 February 2015), online: *AlJazeera* <www.aljazeera.net/news/humanrights//2015/2/11/>.

¹⁶⁶ *Security Council Resolution 2170 (2014) [on threats to international peace and security caused by terrorist acts by Al-Qaida]*, SC Res 2170, UNSCOR, 7242nd meeting, UN Doc S/RES/2170 (2014).

¹⁶⁷ See the full text of *Resolution 2249 (2015) [on terrorist attacks perpetrated by ISIL also known as Da'esh]*, SC Res 2249, UNSCOR, 7565th meeting, UN Doc S/RES/2249 (2015) [*Resolution 2249 (2015)*].

¹⁶⁸ *Supra* note 15.

¹⁶⁹ The term "core international crimes" includes genocide, crimes against humanity, war crimes, and aggression, as stipulated in Article 5 of the *Rome Statute*; *ICTY Statute*, *supra* note 37, arts 2–5; *ICTR Statute*, *supra* note 37, arts 2–4; Marchuk, *supra* note 3 at 1ff.

minorities, which may amount to crimes against humanity or war crimes. Thus, a brief account of these latter crimes will be given later as well.

A. The Extent of the Applicability of the Crime of Genocide to ISIL's Acts

Characterizing ISIL's conduct towards Iraqi minorities and the extent to which it can be categorized as genocide, in the light of ICL (*Genocide Convention* and subsequent provisions), necessitates pointing to genocidal elements and comparing ISIL's acts to case law, as well as clarifying certain facts that demonstrate the inference to be drawn about the existence of the genocidal intent.

1. THE APPLICABILITY OF THE MATERIAL ELEMENT OF GENOCIDE TO ISIL'S CONDUCT

The crime in question, as discussed elsewhere, is any positive action or negative attitude that would lead to the destruction of certain human groups, totally or partially. ISIL's prohibited acts against Iraqi minorities as protected groups, and the extent to which the physical element of genocide applies in these cases or not, are explained below.

a) *Applicability of "Protected Groups" to Iraqi Minorities*

Generally, minorities are different from those groups listed in the definitions of the *Genocide Convention* and subsequent provisions, as the term "minorities" is broader and more comprehensive than "protected groups", which are limited solely to national, ethnical, racial and religious groups. Consequently, it can be said that every protected group is a minority, but not every minority is a protected group. Some minorities can potentially be political, cultural, linguistic or economical, which are excluded from the advantages of judicial protection contained in the definition of genocide. Along these lines, as specified earlier in defining Iraqi minorities,¹⁷⁰ the latter qualify for the "protected groups" description. More accurately, Iraqi minorities are religious groups, including Yazidis, Christians, and Kakayis,¹⁷¹ as well as national groups, including Turkmens and Shabaks.¹⁷² Those Iraqi groups who have been victims of genocide are national and religious groups rather than political, economic, linguistic or cultural ones, which are excluded from taking advantage of legal protection. Ultimately, the members of such Iraqi groups who are under research here as victims

¹⁷⁰ See sections II B.1 to B.5.

¹⁷¹ International case-law has determined "religious groups" as those whose members share the same religion or mode of worship and which exist in a stable manner. See *Prosecutor v Akayesu*, *supra* note 42 at para 515; *Darfur Report*, *supra* note 49 at para 133.

¹⁷² According to the interpretations of the ICTR, a "national group" consists of persons who have a common nationality and continuously live in a single state territory. See *Prosecutor v Akayesu*, *supra* note 42 at para 702.

of genocide qualify for the description of “protected groups,” as contained in Article 2 of the *Genocide Convention* and subsequent provisions, in order to prosecute those ISIL fighters who were implicated before competent criminal courts.

b) *The Applicability of the Prohibited Acts to ISIL’s Conduct*

i. Killing Members of Protected Groups

As discussed and documented before, ISIL fighters intentionally committed the prohibited act of killing hundreds of protected religious (Yazidi, Christian, and Kakayi) and national (Turkmen and Shabak) Iraqi minority groups as part of their attack policy. That these killings occurred is based on accounts of multiple credible sources and inferred from formal statistics that reported a number of execution sites and mass graves.¹⁷³

ii. Causing Serious Bodily or Mental Harm to Members of the Group

As detailed before, acts resulting in serious bodily or mental harm may include, but are not restricted to, torture, rape, sexual violence, or inhuman or degrading treatment.¹⁷⁴ ICTR and ICTY jurisprudence has repeatedly held that such harm can mean torture, as well as inhuman and degrading treatment. The physical or mental harm does not need to be permanent or irremediable.¹⁷⁵ The findings of the ICTR Chamber in the *Akayesu* case found that rape and sexual violence form serious harm on both a physical and mental level, and if achieved with *dolus specialis* to destroy, in whole or in part, a protected group, constitute genocide. The Chamber stated that:

These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.¹⁷⁶

This is the case for the Yazidi: there is overwhelming evidence that ISIL militias systematically raped Yazidi women and girls as young as nine. Such rapes were inferred from Yazidi women and girl survivors who showed signs of both physical and psychological wounds. This is a clear step in the process of the destruction of the protected group’s spirit will to live and life.¹⁷⁷ Within days of the attack on Sinjar, ISIL

¹⁷³ See Table 1.

¹⁷⁴ See section I.A.2c) ii.

¹⁷⁵ *Prosecutor v Akayesu*, *supra* note 42 at paras 502, 504; *Prosecutor v Krstić Trial Judgment*, *supra* note 77 at para 513; see also *Prosecutor v Karadžić et al*, IT-95-5/18-T, Trial Judgment (11 July 1996) at para 93 (International Criminal Tribunal for the former Yugoslavia).

¹⁷⁶ *Prosecutor v Akayesu*, *supra* note 42 at para 731.

¹⁷⁷ UNHRC Yazidis Report, *supra* note 145 at paras 122–23.

systematically committed almost unimaginable acts against the Yazidis, the men being killed or forced to convert; women and girls, some as young as nine, sold at market and held in sexual slavery by ISIL fighters; and the boys ripped from their families and forced into ISIL training camps.¹⁷⁸

In an announcement on 17 July 2014, presented together with Christian and Yazidi female slaves' pricing, pursuant to significant legal documents (age documents), ISIL stated that:



In the Name of Allah, the Gracious, the Merciful

Sub/Loots Selling Prices¹⁷⁹

We were reported that women and loots selling market witnessed a huge declining and that affects on the incomes of Islamic State and the funding of the onslaughts of the jihadists in the State.

For the abovementioned reason, the money house committee put terms and prices concerning women and loots selling and we oblige all the workers in this field to commit to the instructions, otherwise every disobeyer will be executed:

The Prices	The Items
(75,000) Iraqi Dinars (65 \$)	30 – 40 years old female / Yazidi / Christians

¹⁷⁸ In the process of capture and deportation, ISIL fighters systematically separated Yazidis into three distinct groups, “men and boys aged approximately 12 and above; women and children; and later, drawn from the pool of male children who had remained with the women, boys aged seven and above. Each group suffered distinct and systematic violations, sanctioned under ISIL’s ideological framework” (UNHRC Yazidis Report, *supra* note 145 at para 31). After separating Yazidi women and children from their male relatives aged 12 and above, ISIL fighters forcibly transferred them between multiple holding sites in Syria. In each holding site, there were hundreds, sometimes thousands, of Yazidi women and children, guarded by ISIL fighters. All were overcrowded, received little food with dirty water, and no medical care was provided. ISIL regarded captured Yazidi women and girls as property, *sabaya* or slaves, and they were forced to take birth control by pills and injections. Insults were particularly directed at their faith, such as that they “worshipped stones” or were “dirty infidels” and “devil-worshippers”. Boys aged seven and above were forcibly taken to the training centres and removed from their remaining families to teach them to be Muslims and to train them to fight. This separation was systematic, and they were treated as ISIL recruits. These boys were forced to attend military training sessions. After finishing training, the boys were distributed as needed. Some were recruited to the battlefield while others were deployed to guard ISIL bases or to perform other duties as required. Such acts were incremental steps in the destruction of the individual (they obliterated the boys’ identity) and ultimately the group. The torture and inhuman and degrading treatment caused serious physical and psychological harm to Yazidis. See *ibid* at paras 42, 51, 55, 69, 74, 90, 93–96, 128–30, 133.

¹⁷⁹ The origin version translated from Arabic to English: Shlomo Organization, *supra* note 151 at 7.

(100,000) Iraqi Dinars (84 \$)	20 – 30 years old female / Yazidi / Christians
(150,000) Iraqi Dinars (126 \$)	10 – 20 years old female / Yazidi / Christians
(50,000) Iraqi Dinars (42 \$)	40 – 50 years old female / Yazidi / Christians
(200,000) Iraqi Dinars (168 \$)	for all children from 1 – 9 years old / Yazidi / Christians
No one is allowed to purchase more than three loots, except for the Turkish, Syrians, and Arabian Gulf Foreigners.	



Islamic State of Iraq and the Levant

21st Dhu al-Hijja, 1435 AH (15th October, 2014 AD)

Furthermore, ISIL forcibly transferred thousands of Iraqi minorities outside their place of origin, resulting in many IDP and refugees.¹⁸⁰ This caused serious mental harm to these communities which, based on ICTY and ICTR judgments, constitute a prohibited act in the context of destroying them wholly or partly.¹⁸¹

¹⁸⁰ See Table 1.

¹⁸¹ *Prosecutor v Tolimir*, IT-05-88/2-A, Appeals Judgment (8 April 2015) at para 209 (International Criminal Tribunal for the former Yugoslavia); *Prosecutor v Krstić Appeals Chamber Judgment*, *supra* note 28 at para 33; *Prosecutor v Krstić Trial Judgment*, *supra* note 77 at para 519. See also *Prosecutor v Karadžić et al*, IT-95-5/18, Trial Judgment (24 March 2016) at para 545 (International Criminal Tribunal for the former Yugoslavia). The latter states that “[w]hile forcible transfer does not of itself constitute an act of genocide, depending on the circumstances of a given case, it may cause such serious bodily or mental harm as to constitute an act of genocide under Article 4(2)(b)”. Further, the *Blagojević* Trial Chamber stated that “the physical or biological destruction of the group is the likely outcome of a forcible transfer of the population when this transfer is conducted in such a way that the group can no longer reconstitute itself, particularly when it involves the separation of its members”; *Prosecutor v Vidoje Blagojević et al*, IT-02-60-T, Judgment (17 January 2005) at para 666 (International Criminal Tribunal for the former Yugoslavia).

Looking at the conduct of ISIL's fighters described above, it can be deduced that ISIL has committed the prohibited act of causing serious bodily or mental harm to the protected Iraqi minority groups.

iii. Deliberately Inflicting on the Group Conditions of Life Calculated to Bring About its Physical Destruction in Whole or in Part

As aforementioned in regards to the jurisprudence of the ICTR in the *Akayesu* case, this act of genocide does not immediately kill the members of the group, but ultimately seeks their physical destruction. The "conditions of life" referred to here include deliberate deprivation of resources for survival, such as food or medical services, or systematic expulsion from homes.¹⁸² ISIL fighters practised such slow death against Christian populations by disconnecting water services to their towns and demobilizing their employees during the initial stages of their occupation, then forced them to convert to Islam, pay tribute, and leave their homes without taking anything of their property or face being murdered. After their occupation of Mosul in June 2014, ISIL leadership formally issued a proclamation which included instructions to subject religious minorities to the worst intimidation and threatening conduct, represented by forcing them to make such hard choices.¹⁸³ Even more harshly, ISIL fighters besieged the vulnerable Yazidis who had fled to the upper slopes of Mount Sinjar on 3 August 2014, and deliberately cut those stranded on the mountain off from food, water, and medical care in temperatures that rose above 50 degrees Celsius.¹⁸⁴

In the *Kayishema* case, the ICTR Trial Chamber determined that rape was also a method of destruction that does not lead immediately to the death of group members.¹⁸⁵ ISIL fighters practised this heinous act against Iraqi minorities, especially against Yazidi women and girls, who were subjected to organized sexual abuse on a massive scale in the context of their sexual enslavement.¹⁸⁶

iv. Imposing Measures Intended to Prevent Births within the Group

This prohibited act describes biological genocide by eliminating a group's reproductive capacity, i.e., sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriage.¹⁸⁷ This applies especially in the case of the Yazidis, where ISIL statements indicated that ISIL did not countenance the existence of Yazidis within its territory. The first action taken by ISIL upon capturing Yazidis in August 2014 was to separate men from women. Hundreds of Yazidi men were killed on capture or forced to convert to Islam. Women

¹⁸² See section I.A.2.c)iii.

¹⁸³ See section III.

¹⁸⁴ UNHRC Yazidis Report, *supra* note 145 at para 138.

¹⁸⁵ *Prosecutor v Kayishema and Ruzindana Trial Judgment*, *supra* note 57 at para 116.

¹⁸⁶ UNHRC Yazidis Report, *supra* note 145 at para 140.

¹⁸⁷ See section I.A.2.c)iv.

were held separately from their husbands and from other Yazidi men. Eventually, ISIL imposed measures intended to prevent births within the group.¹⁸⁸

v. Forcibly Transferring Children of the Group to Another Group

As aforesaid, the word “forcibly” includes physical force in addition to the threat of force or coercion, caused by fear of violence, duress, detention or psychological oppression. This prohibited act would be achieved if a child is distanced from the group to which it belongs. It may constitute “cultural genocide.”¹⁸⁹ In this context, ISIL intentionally sought to destroy Yazidi children’s conception of themselves as Yazidi and to erase their affiliation to their religion, indoctrinating them in ISIL ideology. ISIL forcibly transferred Yazidi children away from their group in two ways, depending on their sex. Girls, on reaching the age of nine, were taken from their mothers and sold as sex slaves to ISIL fighters in Iraq and Syria. Yazidi boys, once they reached the age of seven, were also taken from their mothers and sent to ISIL training bases in Iraq and Syria, where they were instructed on how to follow Islam as interpreted by ISIL, and on how to fight. Later, trained and “converted” Yazidi boys fought in battles as part of ISIL forces.¹⁹⁰

Thus, in accordance with genocide’s legal definition contained in the *Genocide Convention*, along with subsequent provisions and ICT judgments, ISIL fighters who performed one of the above-mentioned can be described as having performed prohibited genocidal acts, so long as they were exercised with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.

2. THE APPLICABILITY OF *DOLUS SPECIALIS* TO ISIL FIGHTERS

As previously stated, the principle of culpability in ICL plays a crucial role in proving the commission of genocide, where absence of or a defect in *mens rea* prevents the assigning of criminal responsibility. Genocidal intent (*dolus specialis*) is deemed a constitutive element of the crime, which necessitates that the perpetrator clearly sought to produce the act they have been charged with as part of a wider plan to destroy the group in question.¹⁹¹ “The underlying crime or crimes must be characterized as genocide when committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such [...] and as an incremental step in the overall objective of destroying the group[.]”¹⁹² Some other case law indicates that this element is an aggravated criminal intent. This means the perpetrator’s intent was to destroy, and that they consciously desired the prohibited acts, which may include actual (physical and biological) destruction of all or part of

¹⁸⁸ UNHRC Yazidis Report, *supra* note 145 at 143–44.

¹⁸⁹ See section I.A.2e)v.

¹⁹⁰ UNHRC Yazidis Report, *supra* note 145 at paras 147–48.

¹⁹¹ See the beginning of section I.A.3b).

¹⁹² *Prosecutor v Jelisić*, *supra* note 90 at para 66.

the group, including vicious assaults on culture, particular languages, religious and cultural monuments and institutions, etc.¹⁹³

The special intent to destroy has often been inferred from conduct, including statements, i.e., it can be evidenced by the perpetrator's deeds and rhetoric considered together, besides the general context of the perpetration of other acts systematically directed against a particular group. The ICTR considered evidence such as patterns of purposeful action, methodical planning, a systematic manner of killing, physical targeting of the group or their property, use of derogatory language towards members of the targeted group, the general nature of atrocities committed and their scale, etc.¹⁹⁴

In this connection, ISIL fighters' *dolus specialis* can be explicitly inferred from their official proclamations regarding the targeting of certain Iraqi groups. ISIL holds its abuse of Yazidis and Christians to be mandated by its religious interpretation, and its public statements¹⁹⁵ have provided a crucial source directly demonstrative of its intent. ISIL has not sought to hide or reframe its heinous acts.¹⁹⁶

The most interesting topic in this vein is that these Iraqi communities, separately and differently, have become the object of unfair prejudices on the part of ISIL in an intensive form of systematic hate speech, through advocacy for and incitement to discrimination or hostility against them, in the creation of illusions, stereotyping and mental consolidation, designed to specifically target Iraqi minorities. One of the most significant stereotypes against them, for instance, is that the Yazidis are non-believers and Satanists, devil worshippers or a heretical Muslim sect, and ISIL claims that it is not forbidden to kill them, since they do not have the right to exist, therefore the genocide against them is ISIL's religious obligation.¹⁹⁷

ISIL also argues that Christians are the remnants of the Crusaders, and that they had a great deal of responsibility for the US occupation of Iraq, which justifies targeting them as they have the same religion and bad faith as the occupiers. As for the Turkmens, a portion of them are regarded as followers of Shi'ism; the criterion of their identity is this external affiliation, and this offensive portrayal reflects the hostility of social memory; for that reason, ISIL fights them. Kakayi-Yarsanism is considered, in ISIL's

¹⁹³ See the end of section I.A.3b)i).

¹⁹⁴ *Prosecutor v Rutaganda*, ICTR-96-3-T, Trial Judgment (6 December 1999) at para 62 (International Criminal Tribunal for Rwanda); *Prosecutor v Akayesu*, *supra* note 42 at para 523; *Prosecutor v Kayishema and Ruzindana Trial Judgment*, *supra* note 57 at para 93.

¹⁹⁵ "The public statements and conduct of ISIS strongly indicate that ISIS intended to destroy the Yazidis of Sinjar, composing the majority of the world's Yazidi population, in whole or in part": UNHRC Yazidis Report, *supra* note 145 at para 163.

¹⁹⁶ See text accompanying notes 151-152, 179. The conception of ISIL-interpreted Islam as a purifying force is present throughout all ISIL fighters' words and actions, particularly in regards to the Yazidis. They repeatedly told captured Yazidis held as slaves that they were "dirty infidels". The *Dabiq* article continues: "Their creed is so deviant from the truth that even cross-worshipping Christians for ages considered them devil worshippers and Satanists, as is recorded in accounts of Westerners and Orientalists who encountered them or studied them. It is ultimately ironic that Obama cites these devil worshippers as the main cause for his intervention in Iraq and Shām"; see Islamic State of Iraq and the Levant, "The Revival of Slavery Before the Hour", *Dabiq* 4 (October 2014) at 14ff, online (pdf): <clarionproject.org/docs/islamic-state-isis-magazine-Issue-4-the-failed-crusade.pdf>.

¹⁹⁷ Salloum, *supra* note 137 at 152-55.

beliefs, a heretical religious sect based on secrecy and habits which are alien to the dominant culture, and this means they are infidels and hypocrites, and so they must be killed. As far as the Shabaks are concerned, the stereotypical ISIL view of them is that they are remnants of the Safavid Persian invaders, and so it is necessary to be sceptical of their Islamic faith, as their origin is external, and they are not even Iraqis, and thus ISIL will fight against them.¹⁹⁸

Such rulings were published in mass media by ISIL, who regard all these groups and their ideas as conspiracies against Islamic society, and as representing the real reasons for the existence of political and social problems, and therefore they must be combated. This is conducive, directly or indirectly, to inciting and committing violations against minorities, ranging from discrimination and social exclusion through ostracism, which threatens their existence and eliminates the religious and ethnic diversity that has characterized Iraq; the result is the perpetration of heinous crimes and the destruction of protected groups that may amount to genocide or other core international crimes.

On the other hand, the special genocidal intent of ISIL fighters is also fuelled by deeds that include multiple other motives, such as capture of territory, economic advantage, sexual gratification and the spreading of terror.¹⁹⁹

Another indication of genocidal intention may be seen in the destruction of religious shrines and cultural sites. In this context, the ICTY in the *Krstić* trial judgment upheld this position, stating:

Where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of intent to physically destroy the group. In this case, the Trial Chamber will thus take into account as evidence of intent to destroy the group, the deliberate destruction of mosques and houses belonging to members of the group.²⁰⁰

The jurisprudence of the ICTY Appeals Chamber in the same case reiterated that : “The destruction of cultural property may serve evidentially to confirm an intent, to be gathered from other circumstances, to destroy the group, as such.”²⁰¹ This judgment was endorsed in 2007 by the ICJ in the case of *Bosnia and Herzegovina v Serbia and Montenegro*.²⁰²

Within this framework, according to official statistics, affirmed by the General Director of the Iraqi Institute for Conservation of Antiquities and Heritage, KRG, a number of religious buildings and shrines, including temples, churches, mosques and archaeological sites belonging to Iraqi minorities, were destroyed with explosives by ISIL fighters during the period 2014 to 2017 (see Table 2 below).

¹⁹⁸ *Ibid*; Darwesh, *supra* note 127 at 69.

¹⁹⁹ UNHRC Yazidis Report, *supra* note 145 at paras 151, 154.

²⁰⁰ *Prosecutor v Krstić Trial Judgment*, *supra* note 77 at para 580.

²⁰¹ *Prosecutor v Krstić Appeals Chamber Judgment*, *supra* note 28 at paras 25–26.

²⁰² *Bosnia and Herzegovina v Serbia and Montenegro*, *supra* note 118 at para 344.

Table 2. Official Statistics of Religious Buildings and Shrines Destroyed by ISIL (2014–2017)²⁰³

<i>Minority</i>	<i>Religious Buildings and Shrines Destroyed</i>
Christian	126
Yazidi	68
Turkmen	20
Shabak	15
Kakayi	6

Such evidence irrefutably establishes that ISIL fighters were implicated in the destruction of holy sites in the general context of destroying these Iraqi groups, and may serve evidentially to confirm a special *mens rea*.

The above-mentioned utterances and deeds by ISIL, and a clear ulterior genocidal intent in the general context of the perpetration of other culpable acts systematically directed against Iraqi minority groups, can be considered together as proof of a hateful motive, and constitute an integral part of the evidence for the existence of a genocidal policy. Consequently, considering the case-by-case approach and the quantitative and qualitative criteria, one can say that ISIL has committed the prohibited acts with the intent to destroy, in whole or in part, these Iraqi minorities, and, therefore, committed the crime of genocide.

B. The Extent to which ISIL’s Acts Amount to Crimes Against Humanity

Crimes against humanity are also often referred to as “crimes against civilization and humanity” or “atrocities.”²⁰⁴ According to Section 7(1) of the *Rome Statute*, crimes against humanity contain a physical element, which includes the commission of any of the following underlying criminal acts : murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment, torture, grave forms of sexual violence, persecution, enforced disappearance of persons, the crime of apartheid, and other inhumane acts.²⁰⁵ The contextual element determines that crimes against humanity

²⁰³ The formal data of this table is documented in an interview of Dr Abdullah Kh Qadir, General Director of the Iraqi Institute for Conservation of Antiquities and Heritage – Erbil Governorate, Interior Ministry, KRG, and Chairman of Kurdistan Archaeologists Association (28 May 2020).

²⁰⁴ Marchuk, *supra* note 3 at 83.

²⁰⁵ *Rome Statute*, *supra* note 18.

involve either large-scale violence in relation to the number of victims, the extension of violence over a broad geographic area (widespread) or a methodical type of violence (systematic). This excludes random, accidental or isolated acts of violence.²⁰⁶

Section 7(2)(a) of the *Rome Statute* determines that such crimes must be committed in furtherance of a State or organizational policy to commit an attack. This policy or plan does not need to be explicitly stipulated or formally adopted and can, thus, be inferred from the totality of the circumstances. Nevertheless, the *ICTY Statute* did not refer to the necessity of “a widespread or systematic attack” as prerequisite to crimes against humanity;²⁰⁷ later, the ICTY in the *Tadic* trial decision of 7 May 1997 interpreted the phrase “directed against any civilian population” as meaning “that the acts must occur on a widespread or systematic basis, that there must be some form of a governmental, organizational or group policy to commit these acts and that the perpetrator must know of the context within which his actions are taken.”²⁰⁸ This jurisprudence was noted in *Akayesu* as well.²⁰⁹

In contrast to genocide, crimes against humanity do not need to target a particular group. Instead, the victim of the attack may be any civilian population, regardless of its affiliation, and it is not necessary to prove that there is an overall specific intent. The simple intent to commit any of the acts listed is sufficient, with the exception of the act of persecution, which needs additional discriminatory intent. The perpetrator should also act with knowledge of the attack against the civilian population and that the action is part of a broader attack. Notwithstanding, crimes against humanity do not need to be linked to an armed conflict and can also occur in peacetime, like genocide.²¹⁰ It is also worth noting that “any act of genocide by definition will constitute also a crime against humanity, although the reverse is clearly not the case.”²¹¹

ISIL’s widespread and systematic attack on Nineveh Plain (Mosul province and its environs) in August 2014, and its subsequent abuse directed against civilian populations, most of which are vulnerable Iraqi minorities, occurred within the furtherance of an organizational policy to commit such attacks. ISIL members committed sexual and physical violence directed against women and children, sexual slavery, rape, enslavement, torture, other inhumane acts and severe deprivation of liberty, which constitute a direct attack on defenceless civilian populations who were the primary target of the attacks. Therefore, ISIL has committed some offences that may amount to crimes against humanity.²¹²

²⁰⁶ *Ibid.*

²⁰⁷ *ICTY Statute*, *supra* note 37, art 5.

²⁰⁸ *Prosecutor v Tadic*, IT-94-1-AR72, Trial Judgment (14 July 1997) at paras 644, 112 (International Criminal Tribunal for the former Yugoslavia) [*Tadic Trial Judgment*].

²⁰⁹ *Prosecutor v Akayesu*, *supra* note 42 at para 580.

²¹⁰ United Nations Office on Genocide Prevention and the Responsibility to Protect, “Definition: Crimes Against Humanity” (last visited 14 May 2020), online: *United Nations* <www.un.org/en/genocideprevention/war-crimes.shtml>.

²¹¹ Malcolm Shaw, *International Law*, 6th ed (Cambridge: Cambridge University Press, 2008) at 438.

²¹² MRGI Report, *supra* note 153 at 11ff; also, see the precedent that approximately detailed the same underlying acts of persecution and atrocities in the *Tadic* case (*Tadic Trial Judgment*, *supra* note 208 at paras 704–09), and how this court remembered the persecution of the Jewish minority by the Nazis. The

C. The Extent to which ISIL's Acts Amount to War Crimes

The term “war crimes” refers to offences committed in the context of an armed conflict that endanger protected persons or objects, or breach important values. Such acts are, essentially, serious violations of the rules of customary and treaty law concerning international humanitarian law (1949 *Geneva Conventions*), otherwise known as the law governing armed conflicts.²¹³ Article 8 of the *Rome Statute* categorizes war crimes as the following : murder; torture or other cruel or inhuman treatment (including mutilation); taking hostages; intentionally directing attacks against the civilian population; intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historical monuments or hospitals; pillage ; rape and other forms of sexual violence; conscription or enlisting children under the age of 15 years into armed forces or using them to participate actively in hostilities; unlawful deportation, transfer or confinement of protected persons.²¹⁴

Unlike the crimes of genocide and crimes against humanity, war crimes must always take place within an armed conflict, either international or non-international. The Appeals Chamber decision in the *Tadic* case noted that “an armed conflict exists whenever there was a resort to armed force between States or protracted armed violence between government authorities and organized armed groups or between such groups within a State.”²¹⁵ Several provisions, including Article 8 of the *Rome Statute*, not only deal with international conflict but also apply to internal conflicts. The mental element of war crimes contains the intent and knowledge both with regard to the individual act and to the contextual element.²¹⁶

The ISIL acts at issue, as aforementioned in regard to the research methodology, are restricted to the period of armed conflict (2014 to 2017) between the Iraqi and Kurdistan governments together with the international coalition forces, on the one hand, and ISIL on the other. The 2015 Annual report of the United Nations High Commissioner for Human Rights states that “[h]uman rights law and international humanitarian law are applicable to Iraq. The events [...] amount to an armed conflict of a non-international character.”²¹⁷ This report added that ISIL members may have perpetrated war crimes including murder, mutilation, outrages upon personal dignity, taking of hostages, cruel treatment and torture, directing attacks against the civilian population, the passing of sentences and the carrying out of executions without previous

court mentioned that with Hitler’s rise to power, “the persecution of Jews became official policy and assumed the quasi-legal form of laws and regulations published by the Government of the Reich in accordance with legislative powers delegated to it by the Reichstag on March 24, 1933 (Session 14 at p 71) and of direct acts of violence organized by the regime against the persons and property of Jews”: *Ibid* at para 710.

²¹³ Marchuk, *supra* note 3 at 71; see also Shaw, *supra* note 211 at 433.

²¹⁴ *Rome Statute*, *supra* note 18.

²¹⁵ *Prosecutor v Tadic Judgment*, *supra* note 106 at para 70.

²¹⁶ United Nations Office on Genocide Prevention and the Responsibility to Protect, “Definition: War Crimes”, online: *United Nations* <www.un.org/en/genocideprevention/war-crimes.shtml>.

²¹⁷ United Nations Human Rights Council, *Report of the Office of the UN 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*, UNHCROR, 28th session, UN Doc A/HRC/28/18 (2015) at para 13.

judgment pronounced by a regularly constituted court, directing attacks against buildings dedicated to religion and historic monuments, pillaging towns, ordering the displacement of the civilian population, destroying or seizing property, rape, sexual slavery, and other forms of sexual violence, and conscripting or enlisting children under the age of 15 years or using them to participate actively in hostilities.²¹⁸

ISIL fighters did indeed perpetrate such acts against unarmed Iraqi religious and national groups during the armed conflict period (2014–2017). These communities were originally civilian populations that were not taking part in hostilities, yet they were the primary object of ISIL’s attacks on Nineveh Plain, where most of them were concentrated, and they became a source of non-international armed conflict; as such, ISIL’s acts may amount to war crimes.

Lastly, it is apparent that the Yazidis made up the largest portion of the victims affected by ISIL’s various heinous acts, more than the other minorities such as Christians, Turkmans, Kakayis, and Shabaks. Such acts may amount to genocide or to other core international crimes, including crimes against humanity and war crimes. Whatever the associated case law, interpretations and jurisprudence, the final verdict regarding the specification of such crimes type and their penalties must, certainly, be the prerogative of a prospective criminal court, if established.

The *Genocide Convention*, together with the *Rome Statute* and the ICC Elements of Crimes, are regarded as cornerstones in the protection of minorities from genocide, notwithstanding that they do not explicitly mention the term “minority,” but identify the target groups of such offences as victims due to their affiliation within the framework of groups defined earlier, namely national, ethnical, racial or religious groups,²¹⁹ which, however, apply to Iraqi minorities as protected groups. Genocide may affect a minority with particular characteristics, with the objective of destroying them wholly or partly. In respect to Iraq, the historical analysis has proved that minorities were the primary target of this crime, which has so far gone unpunished.

Jurisprudentially, it can be concluded that ISIL’s crimes against Iraqi minorities, in light of the compelling evidence presented by official sources gathered in this paper,²²⁰ can fully and irrefutably be described as “genocide”, pursuant to the description set out in Article 2 of *Genocide Convention* and subsequent provisions.²²¹ ISIL’s heinous acts possess the requisite *actus reus* (objective elements) and *mens rea* (mental elements) to be categorized as genocide. ISIL committed prohibited acts by adopting a systematic

²¹⁸ *Ibid* at para 78.

²¹⁹ See section I.A.2b).

²²⁰ See Table 1.

²²¹ Further, as mentioned earlier, some other ISIL crimes do not amount to genocide and may be defined internationally as other core international crimes, which include crimes against humanity and war crimes, for their committing of the most appalling atrocities and crimes against innocent civilians of the Iraqi religious and national minorities in the context of non-international armed conflict. In any case, whatever the aforesaid associated legal analysis, the final judgment in terms of specifying the type of such crimes and their penalties will be made by the prospective criminal court, if established.

policy of individual and mass killing against unarmed communities, torturing their members by causing serious bodily or mental harm, deliberately inflicting certain conditions of life on the target groups, taking measures to prevent births within the groups, and forcibly transferring their children to ISIL strongholds. These acts were conducted with the intent to destroy protected Iraqi groups, including religious groups (Yezidis, Christians, and Kakayis) and some national groups (Turkmens and Shabak).

As a principle in ICL, within the framework of Article 1 of the *Rome Statute*, which specifies that the ICC shall be complementary to national criminal jurisdictions, i.e., where there is no national protection against minority genocide, the intervention of international protection becomes an emergency requirement in the protection of victims. This applies to the case of Iraq pursuant to the rule of *nulla poena sine lege*, where there are no texts in current domestic penal codes for criminalizing genocide, neither in Iraq nor in the Kurdistan region. A national criminal judiciary, in this regard, is not competent to hear such cases, and ISIL fighters have to date not been prosecuted for committing genocide. This failure by the Iraqi and Kurdistan judiciary is ongoing so far, even within anti-terrorism legislation (*IATL* and *ATLIK*) which allows judges to adjudicate on a wide range of ISIL suspects who were, originally, involved in perpetrating core international crimes. There is a particularly clear difference between such crimes in terms of the special *mens rea*. Those trials, predominately, form a serious loophole in domestic penal codes and hinder the implementation of real justice for both victims and perpetrators.

In effect, there is another crisis pertaining to the non-existence of real commonalities or clear specific coordination between the KRG and the federal government of Baghdad in dealing effectively with ISIL's crimes, whether in investigating, information-sharing, collecting evidence, or the judicial process. Despite the absence of the necessary vision and coordination among those responsible for documenting ISIL's crimes, there are governmental and civic bodies, and other civil society organizations, as well as international organizations, all of which are, separately, working in the same direction, albeit without an institutional plan for joint action; i.e., there is a lack of an effective integrated national institution. Some of those parties may take advantage of this issue in order to pursue material gain through evidence-trafficking. This may lead to inaccuracies in the documentation process or perhaps loss or blurring of many features of the crimes committed.

Generally, despite all the tragic atrocities suffered by Iraqi minorities, addressing their problems can be done through diagnosing their root causes, which mostly lie in the lack of political willingness on the part of the ruling class due to poor governance, unstable security, rampant corruption, and so forth. This has increased the suffering of the affected communities, and may even contribute to ISIL regrouping and repeating the perpetration of such offences.

Recounting humankind's appalling history of genocides and atrocities, and seeing that "never again" stands as one of the central pledges of the international community following the end of World War II, embodied in many international instruments, the reality has proved that the international community is incapable of effectively preventing the occurrence of further genocides worldwide. The international

community has known what was happening in many countries, but decided not to act in a preventive manner. There has been a repeated failure to protect the victims of mass murder, as long as powerful actors intervene solely to pursue their own interests. Nevertheless, the human conscience and moral imperative to act on behalf of genocidal victims does not require elaborate justification in instinctively moving to help them. Some experts advocate a different approach to supporting the downtrodden through identifying key actors, e.g., governments, international institutions, the media, civil society, and individuals, and exploring the relative promise of different means to prevent genocide, e.g., criminal accountability, civil disobedience, shaming, and intervention.²²²

V. Recommendations

After thorough analysis and in-depth evaluation of the characterization of ISIL's acts against Iraqi minorities, this research makes certain recommendations and suggestions:

ISIL members who are under suspicion of committing core international crimes should receive no impunity. They must take personal criminal responsibility and be prosecuted before a competent court, in order to ensure that justice is done on behalf of the downtrodden, compensating the latter fairly and allaying the fear of the recurrence of those offences against them. It is thus recommended that the international community immediately establish a legal mechanism to initiate accountability through the UNSC,²²³ possibly referring this situation to the ICC directly,²²⁴ or by establishing an *ad hoc* ICT,²²⁵ since Iraq is not a party to the *Rome Statute*,²²⁶ although it is a signatory of the *Genocide Convention*.

It is recommended that Iraqi authorities rectify this situation through spreading political and social justice equally among all parties, and most importantly by establishing a stable security situation, in order to build

²²² For more details, see René Provost & Payam Akhavan, *Confronting Genocide: Ius Gentium – Comparative Perspectives on Law and Justice*, vol VII (London: Springer, 2011) at 2, 9–10.

²²³ Considering that the situation meets the requirements of Chapter 7 of the *UN Charter*, given the recognized threat of ISIL as “a global and unprecedented threat to international peace and security”, previously set out in *UNSC Resolution 2249 (2015)*, *supra* note 167.

²²⁴ This type of investigation has a significant impact, as it is mandatory under Chapter 7, which obliges States to cooperate with the ICC. The referral to the ICC by the UNSC was applied in Libya under *Resolution 1970 (2011)*, since Libya is not a party to the *Rome Statute*. See *Security Council Resolution 1970 (2011) [on establishment of a Security Council Committee to monitor implementation of the arms embargo against the Libyan Arab Jamahiriya]*, UNSCOR, 6491st meeting, UN Doc S/RES/1970 (2011).

²²⁵ This is modelled after ICTY or ICTR, since the situation with ISIL satisfies the requirements for the UNSC to establish an *ad hoc* tribunal under Chapter 7. If the UNSC manages to establish such a tribunal, Iraq will be bound to cooperate with it, since Iraq is a member of the UN.

²²⁶ The ICC Prosecutor noted that “[t]he atrocities allegedly committed by ISIS undoubtedly constitute serious crimes of concern to the international community”. Nevertheless, the ICC does not have territorial jurisdiction to initiate an investigation in Iraq as it is not a party to the *Rome Statute*. This limitation is the reason so far that the ICC has not been able to open a preliminary examination into ISIL's crimes. See International Criminal Court, “ICC Weekly Update #239” (6 to 10 April 2015), online (pdf): *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the Alleged Crimes Committed by ISI* <www.icc-cpi.int/iccdocs/PIDS/wu/ED239_ENG.pdf>, at 3.

confidence among minorities and ensure future inviolability. There is furthermore a need for accountability on the part of ISIL members in regards to serious crimes, and this must be done in cooperation with the international community, in order to get fair satisfaction for victims, and genuine support for the rehabilitation of survivors, including returning their property, and reconstructing their homes and the infrastructure of their destroyed cities, which will bring transitional justice. It is further recommended that Iraq suspend the implementation of the terrorism laws in trying ISIL members, since this is a waste of justice and does not legally apply to these cases. In order to avoid the recurrence of such atrocities, it is necessary that Iraq join and ratify the *Rome Statute*, in addition to amending the current or enacting a new penal code to criminalize such grievous offences based on the principle of complementarity that facilitates the appropriate punishment of perpetrators, as contracting states are obliged to do under Article 5 of *Genocide Convention*.

The KRG needs to redouble its efforts to prepare staff to document such offences in the context of dealing with the effects of genocide. This can be done by sending Kurdistan investigators to European countries and/or recruiting international consultants to the region to supply the necessary experience. In the field of dealing with the downtrodden, the inspectors should be trained to encourage the former to hand over evidence related to genocide through sexual offences. Further, the KRG needs to preserve individual and mass graves as valuable proof of and vivid witnesses to the genocides. These measures can be resorted to by a competent national and/or international judiciary in the future.