Domesticating International Criminal Law in the Kurdistan Region of Iraq

Conducted by:
Kurdistan Centre for International Law (KCIL)

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International Criminal Law

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Abstract

Following the end of WWII, the development of international criminal law (ICL), and the demand to put an end to the culture of impunity has led to dependence on various ways to prosecute core crimes. In other words, the international community has adopted multiple justice strategies to prosecute war criminals, namely has charged criminals at the Nuremberg and Tokyo tribunals, has established *ad hoc* tribunals by way of the United Nations Security Council (UNSC), has formed hybrid courts and the International Criminal Court (ICC), and has designed internationalised domestic courts.

These institutions have played a key role in framing the bases of substantive and procedural rules of ICL. They have determined the main goals of ICL accordingly, including retribution, deterrence, ending violations and preventing recurrence of international crimes, realising reconciliation, and securing justice for victims. Another crucial aim has been to build domestic capacity. In this regard some states have carried out prosecutions through their national courts

in line with the notion that the future of ICL is domestic.

In the latter case, successful prosecutions of international crimes depend on the country's legal framework and judicial capacity to handle such prosecutions. This book discusses the ability of the Iraqi criminal justice system to deal with core crimes as a mode of internationalising domestic justice in the Kurdistan Region of Iraq (KRI). This is pertinent in order to also determine the main obstacles which face this process and to explore the background of implementing ICL in the domestic courts in KRI.

Introduction

Islamic State of Iraq and Syria (ISIS) has perpetrated international crimes in Iraq and Syria against minorities, as documented by many non-governmental organisations (NGOs). Yet justice has not been realised due to lack of jurisdiction and efficiency to prosecute these crimes and to respond to the suffering of victims, especially to the needs of victims of sexual and gender-based violence. For this reason, it is crucial to analyse the legislative and judicial system in KRI and to identify deficiencies which must be addressed to deal with these international crimes in a suitable and effective manner through the enactment of a specifically tailored legal framework for KRI.

Some scholars argue that ICL is designed to overcome deficiencies in national systems when the state is unable or unwilling to prosecute perpetrators of heinous atrocities and for this reason ICL is a

pragmatic solution to treat ineffective or incapable national legal systems.[1]

According to a contemporary understanding, one of the basic purposes of capacity building is that institutions need to conform to international narratives and structural measures to gain ownership of justice.[2] In addition, various opinions assert that national courts which prosecute core crimes ultimately represent the international community.[3]

Yet every state must act in line with the complementarity principle, i.e., the national penal system must accord priority to prosecuting core international crimes to states which have jurisdiction over the crimes. The ICC is a court of last resort, which means that it has jurisdiction only when the state has no ability to deal with the crimes or real will to deal

[1] G. Werle, *Principles of International Criminal Law* (2nd ed, T.M.C. Asser Press 2009) 124-126.

[2] C. Stahn, *A critical introduction to international criminal law* (Cambridge University Press 2019) 180.

[3] M. G. Aryem and A. Harel, Taking internationalism seriously why international criminal law matters, in K. Heller, F. Megret, S.M. H. Nouwen, J. D. Ohlin, D. Robinson (eds), *The Oxford Handbook of International Criminal Law* (Oxford University Press, 2020) 219.

with the crimes. Hence, states are explicitly and implicitly encouraged to form their own legal and judicial systems to prosecute or extradite perpetrators of international crimes.

States must therefore be the main point of entry for the exercise of criminal jurisdiction and must ultimately act as the guardians of accountability in the long term, i.e., they are under an obligation to investigate and prosecute offenses under ICL, international human rights law (IHRL) and international humanitarian law (IHL).[4]

Aims of the Study

This study concentrates on the legal bases for domesticating ICL by analysing effective features for enforcing ICL. Consequently, the study seeks to show why the KRI ought to be proactive in prosecuting core crimes committed in their territories based on territorial jurisdiction, as well as on other jurisdictional

[4] The Geneva Conventions of 1949 require states to establish universal jurisdiction over grave breaches.

grounds. The study explores the main problems of this process, such as the complexity and distinctive elements of ICL, the constitutional barriers of domesticating ICL, as well as the practical and technical aspects in this regard, including the inability of judges, prosecutors, and lawyers to deal with these crimes. This study also points out other impediments which may be encountered when domesticating ICL and suggests effective ways to overcome these issues.

Accordingly in this research it is analysed what the main obstacles are, and basic issues are discussed which the legislator, judges, prosecutors, and lawyers face in domesticating ICL and by suggesting effective methods to functionalise ICL in KRI. Within this context, it is noteworthy that this legislative process goes beyond ratifying international conventions since Iraq is a dualist state and requires that domestic legislation is enacted to give effect to ratified treaties. Iraq has ratified various multilateral conventions, such as the Geneva Conventions and the Genocide Convention, but Iraq has, nonetheless, failed to enact the required domestic laws to deal with these crimes

within its domestic setting effectively. The overall aim of this study is, therefore, to examine problems that usually occur or could emerge for the legislator in KRI and for judges when implementing ICL and trying offenders. This goal goes beyond only renewing the law, but also could be seen as a way of changing the existing legal culture in KRI by fully transposing international law.

Research Questions

Many questions arise when domesticating ICL: Firstly, it must be asked whether the KRI should adopt penal provisions for war crimes, genocide, and crimes against humanity. The basic legal prerequisites for the domesticating process must be probed, as the criminalisation of genocide, crimes against humanity and war crimes is distinct to homicide, theft, arson, and other domestic crimes due to the collective nature of these core crimes which mostly target groups.

Secondly, it is examined whether it is sufficient to depend on the current penal code to prosecute these crimes.

Thirdly, it is investigated whether the future of ICL is domestic and what is required at the legislative and technical level for transposing and enforcing these crimes domestically.

Hypothesis

This research proceeds on the basis of the following tentative conclusions:

1- The KRI, also the Iraqi government, have been passive in dealing with core crimes at the domestic level.

2- The KRI and Iraqi legal system do not have the adequate legal framework in order to prosecute core crimes.

3- There are many impediments which impede this process, which range from insufficient political will to a lack of a comprehensive understanding of ICL among judges, lawyers, academics, and stakeholders.

Methodology

The traditional doctrinal analysis is employed to explore and interpret the deficiencies of the Iraqi Penal code regarding the transposition of core crimes. The conventional obligations of Iraq, namely, to incorporate these crimes, are studied, i.e., the state of Iraq is party to various international conventions. These conventions are imposing obligations to give effect to the provisions in conventions in respect of core crimes through the enactment of domestic legislation. This research will address suitable and effective ways for implementing legislation for domesticating ICL.

In practicing ICL in the KRI, the present research will mainly concentrate on identifying legal problems, specifically within the field of criminal justice. The study examines the practical and political hurdles that may have an effect on this process. The domestic application also constitutes a political decision of the legislator, and it is worthwhile to take into account the political situation in the KRI when determining this legal step in line with the socio-legal research method

which emphasises the importance of also considering the context underlying a particular legal issue. The study will seek to describe the difficulties with the domesticating process of core crimes and will identify common features and advantages which could arise when enacting a law and enforcing it.

1 - The Iraqi Penal System and the Former Steps to Internalise ICL

1-1 The Main Features of the Iraqi Penal System

The Iraqi penal code has been passed in 1969. This law has transposed many of its provisions from the Egyptian penal code. It contains 506 articles which are divided among four books. The first one spells out general principles of criminal law; the second one deals with crimes which contravene the public interest; the third book deals predominantly with crimes against persons; and the fourth book deals with violations or petty crimes.[5] Accordingly, over 500 articles cover many aspects of substantive criminal law. In addition to the general principles of criminal law, the penal code defines and codifies many crimes, ranging from offenses against public welfare and the security of the state to offenses against private persons and public officials. Moreover, the penal code provides a systematic framework for determining when individuals shall be criminally charged. The adoption

[5] M. R. Hasan, Sharh Qanun Al Ukubat, and Al Qsm Alam, *Commentary on penal code public part* (Sulaymaniyah Yadgar Publishing 2017) 13.

of the penal code was perhaps the most important development in criminal law in Iraq and the penal code (Law No 111 of 1969) has remained in effect to this date. The penal code was amended on numerous occasions in former decades.[6]

Prior to the adoption of the Iraqi penal code, the Baghdadi penal code, which was adopted in 1918, spelled out the substantive criminal law. The law makers of the Baghdadi penal code viewed it a temporary law, and which was implemented by the Iraqi courts which themselves had been established by the military British authorities. Yet it was clear that the Baghdadi penal code would be reviewed and changed in its entirety, though it remained in force for about half a century.

Furthermore, the Iraqi code of criminal procedures 1971 is predicated on civil law - and not common law - and forms part of Iraqi's criminal justice framework that is largely secular and influenced by

[6] Stanford Law School and American University of Iraq Sulaimani, Introduction to the laws of Kurdistan, Iraqi Working Paper Series.

various legal systems.[7] The code of criminal procedure took most of its rules from Egyptian criminal procedural law, as well as from the criminal codes of Syria, Kuwait, Libya, and Somalia.[8] According to the code of criminal procedures, there exist more than five stages in ascertaining the truth about a crime. The law includes 373 articles and the first book deals with initiating procedures,[9] and civil plaintiffs and spells out general rules of prosecution.[10] The second book of the Iraqi code of criminal procedures 1971 deals with the investigation of offences,[11] collecting evidence, contains general provisions about conducting investigations, hearing witnesses,[12] appointing experts,[13] as well as methods of compulsion, such as summons, arrest rules, detention, and release of the accused, and questioning the accused.[14] The third book

[7] C. J. Costantini, Criminal investigations under the Iraqi code of criminal procedures (2011) *Cumberland Law Review*, 41(3), 533, 534.
[8] M. C. Bassiouni and M. W. Hanna, Ceding the High grounds: The Iraqi High Criminal Court Statues and the Trial of Saddam Hussein (2006/2007) *Case Western Reserve Journal of International Law*, 39(1), 21-97, 21&84.
[9] Article 1 of Criminal Procedures No 23 of 1971.
[10] Articles 10-29 of Criminal Procedures No 23 of 1971.
[11] Articles 39-50 of Criminal Procedures No 23 of 1971.
[12] Articles 58-68 of Criminal Procedures No 23 of 1971.
[13] Articles 69-71 of Criminal Procedures No 23 of 1971.
[14] Articles 92-135 of Criminal Procedures No 23 of 1971.

deals with types of penal courts, court procedures[15], general principles to be used during trials[16], as well as judgments and reasonings.[17]

The fourth book consists of methods of reviewing judgments, such as objections to trials in absentia[18], cassation (appeal)[19], correction of cassation decision[20] and the re-trial process and review.[21]

It is important to note that the Iraqi penal code outlaws' crimes, such as murder, rape, torture, kidnapping etc., though the Iraqi legislator considers these crimes typically an ordinary crime and not an international crime. Nevertheless, these ordinary crimes share the same structures as international crimes. While these crimes share objective and subjective elements, there exist also many distinctive features between these two types of criminalisation.

[15] Articles 137-151 of Criminal Procedures No 23 of 1971.
[16] Articles 152-166 of Criminal Procedures No 23 of 1971.
[17] Articles 213-242 of Criminal Procedures No 23 of 1971.
[18] Articles 243-248 of Criminal Procedures No 23 of 1971.
[19] Articles 249-265 of Criminal Procedures No 23 of 1971.
[20] Articles 266-269 of Criminal Procedures No 23 of 1971.
[21] Articles 270-278 of Criminal Procedures No 23 of 1971.

Generally, the law of criminal procedures is consistent with the main principles of IHRL,[22] for instance, includes minimum levels of fair trial guarantees.[23] This raises the question whether it is possible to depend on the current legislative system to prosecute core crimes.

Firstly, crime is a social act or omission that violates the values protected by a state and is thus prohibited by law. Domestic criminalisation depends on many considerations, such as the political philosophy of the state, the social construction of society, the social and cultural traditions, i.e., these considerations impact legal jurisdiction, and the

[22] Constantini supra 537.

[23] The Iraqi constitution of 2005 promulgates the basic features of criminal law principles. For instance, Article 19 of the constitution states: "The accused is innocent until proven guilty in a fair legal trial." Equally, the principle of legality also has been statutorily confirmed in Article 19 which states "there is no crime or punishment except by law" and the article further continues "criminal laws shall not have retroactive effect unless it is to the benefit of the accused." In addition, the constitution confirms various procedural rights for the accused, such as the right to have a public trial, while the right of defence shall be sacred and guaranteed in all phases of the investigation and the trial.

construct of crime is thus shaped by the specific legal environment, history, and social developments.[24]

Yet the domestic criminal law primarily focuses on the question of what the legislature can and should be able to forbid its citizens under threat of punishments. This in turn raises the question which criteria a legislature should employ in order to answer such question, i.e., what behaviour must, and may a state forbid? As mentioned above, the answer to this question depends largely on the value system of a given society.[25]

The criminal legislative system of Iraq ultimately deals with ordinary crimes, such as murder, theft, kidnapping, manslaughter etc. However, the Iraqi penal code and the law of criminal procedures do not address core crimes, i.e., serious international crimes. Nonetheless, the core crimes share communalities with various domestic offences. For instance, offences, such

[24] I. Marchuk, *The fundamental concept of crime in international Criminal Law, A comparative law analysis* (Springer 2014) 69.
[25] K. Ambos, *Treatises on International Criminal Law* (Oxford University Press, 2013) 61.

as torture, rape, and murder have been proscribed by virtue of the domestic criminal code.[26] Yet when it comes to prosecuting these crimes, no recourse has been made to international crimes and the conduct is therefore being prosecuted in accordance with the ordinary criminal provisions. As a result, the distinctive features of core crimes, particularly mass murder as is e.g., the case with crimes against humanity, are not considered. Instead under the ordinary crime-based approach, when conduct is being prosecuted, this is dealt with by viewing it as multiple counts of murder.[27] In this context, some scholars argue that prosecuting atrocities either as core crimes or based on domestic criminal law has no legal significance, as the outcome of the prosecution is what matters. In other words, it is pointed out that when a domestic prosecution results in a sentence that is the

[26] Articles 393-396 of the Iraqi penal code covers acts of rape and other indecent assaults. Further, Articles 405-406 deal with all types of murder, including aggravating circumstances, and impose a penalty that varies between the death penalty or life imprisonment. Article 333 of the penal code also proscribes acts of torture and compulsion by public officials in order to secure confessions from an accused. Despite the fact that the Iraqi penal code criminalises these acts, it fails to view them core crimes.

[27] *Prosecutor v Thomas Lubanga Dyilo*, Case No. ICC 01/04-01/06 Decision on confirmation of charges, 10 February 2006, p.37.

same or higher than what is prescribed by the Rome Statute or what the ICC has ruled in similar cases, then domestic prosecution is equally effective, irrespective of the categorisation of the crime.[28] while under a broad-brush approach, this view may be accepted, it nonetheless confuses core crimes with domestic crimes, and fails to recognise that the goals of the ICL are different to that of domestic criminal law.

Firstly, core crimes are distinct from domestic crimes due to the context in which they occur. Core crimes occur during an armed conflict, are systematic in nature, the scale of the violations is different, or the contextual elements render them distinct from ordinary crimes.[29] Significantly core crimes have an international dimension. Consequently, the large majority of domestic crimes while serious, do not injure the rights and interests of the international community, do not threaten peace and security of

[28] K. J. Heller, 'A sentence-based theory of complementarity' (2012) *Harvard International Law Journal*, 53(1), 107-130, 107.
[29] Stahn supra-22.

mankind and do not shock the conscience of humanity.[30]

Secondly, the goals of ICL and domestic criminal law are distinct, i.e., the purpose of criminal law has normally two specific aims, namely retribution and deterrence. While these aims also apply to ICL,[31] as asserted by various decisions by *ad hoc* tribunals;[32] ICL has other goals to achieve than domestic criminal law, for instance ICL seeks to strengthen and assert fundamentals values of the international community and protecting basic values of domestic society on the international level.[33]

Despite the distinctive objectives of ICL, national criminal codes contain core crimes and by implementing these crimes as defined by the Rome Statute, their breach constitutes a violation of the local

[30] C. Soler, *The global prosecution of core crimes under international law* (T.M.C Asser Press 2019) 131.
[31] C. Safferling, *International Criminal Procedures* (Oxford University Press 2012) 65.
[32] For instance, see *ICTY Prosecutor v Kupreskic et al,* TC, IT-95-16-T 14 January 2000 Judgment, para.848.
[33] Safferling supra 71.

criminal code, resulting in local prosecution.[34] This is an important development in the enforcement of ICL and which also leads to a more comprehensive evolution of ICL in the context of the legality principle.[35] According to this conceptualisation, the role of criminal law nowadays is not only to criminalise the conduct which affects the basic interests of society, but also it must reflect the interests of the international community and universal values, and this can be realised by prohibiting core crimes (genocide, war crimes and crimes against humanity) and enforcing this prohibition. This view has also been explicitly mentioned in various multiple conventions, as further discussed below in connection with assessing how the Iraqi legal system deals with core crimes.

[34] Soler supra 133.

[35] H. Vander Wilt, Equal standards? On the dialectics between national jurisdiction and the international criminal court (2008) *International Criminal Law Review*, 8(1), 229-272, 252.

1-2 Historic Engagement with ICL in Iraq and KRI

As discussed, the Iraqi penal system does not explicitly or implicitly transpose core crimes, i.e., neither the Iraqi penal code, nor any other special domestic provisions exist to this effect. Hence, no domestic legislation for those crimes was contemplated. Despite this, the state of Iraq and KRI has had some judicial and legislative experiences in dealing with core crimes, as analysed next:

1-2-1 The Iraqi high Tribunal *C*ourt (IHT)

In December 2003, the Statute for the Iraqi Special Tribunal for Crimes against Humanity was adopted and as a result an internationalised judicial institution was created against the backdrop of similar international judicial institutions, such as the International Criminal Tribunal for the former Yugoslavia and the Special Court for Sierra Leone.[36] However, the establishment of the tribunal was criticised since the name was deemed a violation of the Iraqi constitution especially Article 95, which prohibits the establishment of special and extraordinary courts.[37] The court was then named Iraqi high tribunal court (IHT), as approved by the elected general assembly by virtue of Law No. 10 of 2005.[38] Hence, the creation of the IHT was not forced upon the Iraqi people by the occupying authorities but instead was commenced by the Iraqi people and approved by

[36] I. Bantekas, 'The Iraqi Special Tribunal for Crimes against Humanity' (2005) *The International and Comparative Law Quarterly*, 54(1), 237-253, 237.

[37] M. R. Hasan, *Almuqathat an Aljaraeem Aldawleea amam al qaza al jinaee (The Prosecution of International Crimes before the Criminal Court* (The National Center for Legal Publications 2017) 13.

[38] Ibid.

the national political system.[39] However, critics argue that the IHT was a "puppet court of the occupying power."[40] This criticism is also based on the fact that the US had provided funds of around $128 million to the predecessor of the IHT, namely the Iraqi Special Tribunal (IST) and which had been set up at the time the US had chosen the interim government and the prosecutors and judges had been advised by US counsels, thereby giving the impression to some that this court was a sham which did not afford the Ba'athist officials the requisite fair trial safeguards.[41]

Nonetheless, this law represented a significant step forward in transposing international crimes into the Iraqi legal system.[42] Articles 11-13 of the IHT Statute conferred jurisdiction to hear genocide, crimes against humanity and war crimes perpetrated during non-international and international armed conflicts and

[39] Ibid (Newton) 401.
[40] M. P. Scharf, 'Is it international enough? A critique of the Iraqi Special Tribunal in light of the goals of international Justice' (2004) *Journal of International Criminal Justice*, 2(2), 330-337, 331.
[41] Newton (supra) 404.
[42] M. G. Janabi and A. A. Alfatlawi, 'UN efforts to make ISIS accountable for international crimes: the challenges posed by Iraqi s domestic law' (2021) *International Criminal Law Review*, 21(6), 1103-1134, 1114.

were based on the provisions in the Rome Statute.[43] The aim of the IHT was to punish those responsible for the crimes perpetrated by the Ba'athists, including former leader Saddam Hussein, against the Iraqi people during the period of Baath and for the crimes against neighboring states, such as Iran and Kuwait.[44]

The IHT was not part of the regular Iraqi judicial system due to its unique nature, but instead was conceived to be an autonomous organ with its own rules and own administrative capacity, i.e., was a hybrid institution with a hybrid procedural system.[45] Its rules were a combination between international criminal procedures and Iraqi criminal procedures. According to Article 1 of Law No. 10 of 2005, the court has jurisdiction over genocide,[46] crimes against

[43] Ibid.

[44] M. A. Newton, 'The Iraqi High Criminal Court: controversy and contributions' (2006) *International Review of the Red Cross*, 88(862), 399-425, 400-401; M. Newton, 'The Iraqi high criminal court: controversy and contributions' (2006) *International Review of Red Cross*, 88(862), 399-425, 400.

[45] K. Ambos, *Treatise on International Criminal Law, Vol 1 Foundation and General Part* (Oxford University Press 2013) 47.

[46] Article 11 of the Law No. 10 of 2005 reproduces both Article II and Article III of the Genocide convention and also the text is excerpted from Article 5 of the Rome Statute with one minor addition, namely the chapeau of the

humanity,[47] war crimes,[48] and the violation of Iraqi laws.[49] The court was afforded temporal jurisdiction over these crimes when they were committed during the period from 17 July 1968 to 1 May 2003 in the Republic of Iraq or elsewhere. In 2011, the Iraqi parliament ordered the law governing the IHT to be amended, particularly rules relating to administrative and financial aspects of the work of judges and prosecutors.

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provision corresponding to Article II makes express mention of Iraq's 20 January 1959 ratification of the Genocide Convention.

[47] Article 12 of Law No. 10 of 2005 defines crimes against humanity in largely identical manner to the ICC formulation. Although it features some curious additions and omissions, i.e., in the list of underlying offences in Article 12(1) wilful murder is mentioned instead of murder, while enforced sterilisation and apartheid have been omitted: Also see G. Boas, J. Bischoff and N. Red, *International Criminal Law Practitioner, Elements of Crimes in International Law, Volume II* (Cambridge University Press 2008) 132.

[48] Article 13 of Law No. 10 of 2005 deals with genocide and crimes against humanity and also follows the ICC formulation of war crimes, except in respect of some amendments in relation to the definitions and way the crimes have been framed. Firstly, the IHT restricted jurisdiction over war crimes, particularly when committed as part of a plan or policy or as a part of a large-scale commission of such crimes. Secondly, as was the case in respect of the crimes against humanity provisions, some of the listed war crimes have been entirely removed from the IHT statute, such as enforced sterilisation and using weapon projectiles and materials and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering.

[49] Article 14 of Law No. 10 of 2005 also proscribes, for example, the wastage of national resources and squandering public assets and funds.

The IHT has decided cases, for instance, the *Al-Dujail* case,[50] and the *Al Anfal* case.[51] The third trial started in August 2007 and concerned the crushing of an uprising in Southern Iraq in 1991. The fourth trial dealt with the execution of forty-two merchants who were accused of raising their price during a time of economic blockade.

[50] In July 1982, a convoy carrying the President of Iraq, Saddam Hussein, was fired upon by unknown individuals as it was visiting the town of Al Dujail. In response to what the President perceived an assassination attempt, but which did not injure anyone, a systematic attack was launched against the residents of Al Dujail. They were fired upon from an aircraft and their property was destroyed. A Revolutionary Court sentenced 148 residents to death without trial for their alleged involvement in the assassination attempt. Of those that were hanged, the Tribunal identified a number of children. Countless others died in detention as a result of torture at the hands of the Investigation Services, or from malnutrition, lack of access to medical care and poor hygienic conditions. It was against this background that the court reached a decision in the *Al-Dujail* case and which resulted in seven convictions for crimes against humanity in connection with the attack on Al Dujail. Most notably, Saddam Hussein himself was convicted and sentenced to death by hanging along with his brother, Barazan Ibrahim, the head of the Intelligence Services. On 31 July 2005, the defendants, Saddam Hussein Majid, Barazan Ibrahim Hassan, Taha Yassin Ramadan, Awwad Hamad al-Bandar, Mizher Abdullah Kadhim Ruwayid, Abdullah Kadhim Ruwayid, Ali Dayeh Ali, and Muhammad Azzawi Ali al-Marsumi were indicted on 10 charges of crimes against humanity: wilful killing, extermination, enslavement, displacement or forcible transfer of the population, imprisonment, torture, sexual violence, persecution, enforced disappearance and other inhumane acts: *The Public Prosecutor in the High Iraqi Court et al. v. Saddam Hussein Al Majeed et al*., IHT 1/E First/2005, 5 November 2006 <https://www.internationalcrimesdatabase.org/Case/187/Al-Dujail/> accessed 12 June 2022.

[51] Case No. 1/CSecond/2006, Judgment, 501 (Iraqi High Tribunal, 2007).

Following these cases, the court only dealt with cases which are not relevant for the discussion about core crimes. That is to say, it was right to consider these cases ordinary crimes following an investigation and to frame the prosecution accordingly and to thus apply Article 406 of the Iraqi penal code, particularly for arresting people without just cause and unjustified deprivation of personal liberty pursuant to Articles 420, 421, 422, 423, and 424 of the Iraqi penal code.

Overall, the creation of the IHT was controversial for a variety of reasons. For instance, the then Iraqi Prime Minister had intervened in the IHT process after the presiding Judge had implicitly affirmed the important tenet that one is innocent until proven guilty when noting that Saddam Hussein "was not a dictator", but this prompted his removal from the IHT process.[52] Accordingly, the court was criticized for allowing government intervention in its work, this was an essential violation of the rights of the accused. The court thus faced allegations that judges were not impartial since many judges had been selected and

[52] Ibid 4.

politically vetted.[53] Moreover, the defendants were interrogated under coercion, but this evidence was not removed by the IHT.[54]

Also, the trial took place during a period of fragile political and security situation and the court decisions unfortunately led to further secretarial conflict in Iraq, particularly the execution of the former Iraqi president fueled anger among those still supported him. That is to say, Iraq transposed international standards into its national criminal statute and by virtue of these removed immunity which would have otherwise been afforded by the Iraqi constitution to its leaders.[55] Consequently, Article 15 of the Statute for the IHT was drafted in a manner which mirrors the Rome Statute of the International Criminal Court by confirming that *"[t]he official position of any accused, whether as president, chairmen...prime minister...[etc] shall not*

[53] C. Doebbler, M. Scharf, H. Chodosh, 'Will Saddam Hussein get a fair trial, debate between Dr Doebbler and Professor Scharf' (2005) *Case Western Reserve Journal of International Law*, l37(1), 21-40, 23.

[54] M. Scharf, 'The Iraqi Tribunal: The Post-Saddam Cases', Chatham House, 4 December 2008, 1-10, 4 <https://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/il041208.pdf> accessed 23 July 20224

[55] Ibid 404&406.

relieve such person of criminal penal [responsibility]..." The IHT thus based its jurisdiction to hold officials to account on international law, i.e., any crimes stipulated in the Statute for the period 1968 to 2003 in Iraq and also in other countries in so far as they related to Iraq's wars.[56] Saddam Hussein and various other defendants could thus be convicted for crimes against humanity by the IHT in November 2006 and a death sentence was imposed, namely by hanging, and at the end of December 2006, Saddam Hussein was executed, despite other charges still being outstanding.[57] Yet a death sentence is contrary to the fundamental human right to life, which is one of the most pivotal international human rights.

Furthermore, the United Nations should have helped with the formation of the IHT, including the training of its prosecutors and judges, as without this educational support, the IHT could not meet the requisite international standards.[58] As a result, various

[56] Ibid 407.
[57] C. M. Rassi, 'Lessons Learned from the Iraqi High Tribunal: The Need for an International Independent Investigation' (2007) Case Western Reserve Journal of International Law, 39(1), 215-235, 215-216.
[58] Ibid 232-233.

mistakes were made in respect of international law, for instance, about the joint enterprise doctrine and the *mens rea* condition for genocide.[59] Also, the UN should have conducted an independent investigation into the various crimes.[60]

Arguably, the most significant flaw of the IHT trial process stemmed from the political influence, i.e., the influence exercised by the Presidential Council, the Prime Minister, as well as the US.[61] Accordingly, there existed various issues with the IHT process, and it is important that lessons are learned, and mistakes are not repeated when ICL is domesticated in the KRI.

Put differently, any proposal to domesticate ICL must also overcome these issues which plagued the IHT. To this date, it is still debated what effect these trials had on the judicial system in Iraq. While some scholars argue that it is difficult to assess or assert any lasting impact or benefit to the Iraqi system due to the

[59] Ibid 5.
[60] Ibid.
[61] Ibid 6.

temporary jurisdiction of the court,[62] others espouse that they were not fully devoid of having consequences. The existence of case law issued by the Iraqi judicial system about core crimes certainly marked a step forward.[63] It also opened the horizon to deal with core crimes in the future.

1-2-2- The Legal Responses to ISIS Crimes

The emergence of ISIS in 2014 and its rapid occupation of widespread parts of Iraq and Syria, can be considered a crucial development at the social and political level in Iraq and the region in general and poses challenges to the legal systems.

ISIS or ISIS is the name of the Islamic State of Iraq and al Sham, also called Daeesh, which is a brutal and extreme terrorist group and organisation. ISIS was created in October 2006 as a splinter group of Al-

[62] Janabi and Alfatlawi supra 1115.
[63] H. Baker, 'Name it while you shame it: an assessment of Iraqis legal response to Daesh crimes' p 15. available at https://papers.ssrn.com last visited 9-6-2022.

Qaeeda. Abu Bakr AlBaghdadi was proclaimed to be the Caliph and the aim has been to establish an Islamic Caliphate based on an extreme interpretation of Islam and Sharia.

For scholars, ISIS represents a global Jihad movement and is the most wealthy, influential, and violent terror cult in the history of humanity. ISIS rejects all values and beliefs which originate from non-Muslims societies. ISIS leaders and followers embrace a range of ideas which date back to the Wahhabi movement which is against innovation in religion and development in life. ISIS also prohibits multiculturalism and claims that only a small number of Muslims are true believers. One feature of this radical ISIS philosophy is that it is right for ISIS members to have the right to enslave women from non-Muslim society. By 2014, ISIS had occupied many areas in Iraq and Syria and controlled more than 65,000 square miles in these two countries.

ISIS' ideology also seeks to advance the concept of a transnational Islamic state that would be established in various geographic zones, ideally to the

largest extent. In addition, ISIS aims to implement Sharia law in accordance with the region's ancient past. The main factors behind the growth of this group are that ISIS has been successful in recruiting more than 18,000 Muslims from ninety countries. Furthermore, the Syrian rebellion against Bashar Al Assad can be considered as one of the crucial causes behind the growth of ISIS; and militants were therefore sent into Syria who operated as a quasi-independent group and which culminated in the invasion of Mousil, the biggest city in Northern Iraq.[64]

As mentioned, since June 2014 ISIS was involved in grave and widespread atrocities perpetrated against civilians, combatants, ethnical and religious minorities, i.e., ISIS committed acts of execution, torture, ethno-sectarian attacks, rape, acts of sexual slavery, forced marriage, and forced deportation. The scale and seriousness of the crimes committed by ISIS have been deemed a threat to international peace and

[64] P. Cockborn, The rise of the Islamic state : ISIS and the new Sunni revolution (London Verso 2015); also see L. Shameh and Z. Zoltán, The Rise of Islamic State of Iraq and Syria (ISIS) (2015) *AARMS*, 14(4) 363-378, 363 <https://www.uni-nke.hu/document/uni-nke-hu/aarms-2015-4-shamieh.original.pdf> accessed 2 June 2022.

security by the UNSC which has also noted that "this unprecedented threat" must be "combat[t]ed by all means."[65]

In accordance with the UNSC call to take all necessary actions, many international organisations have documented these crimes and reported about its dangerous nature. The UNSC has also called on "Member States that have the capacity to do so to take all necessary measures, in compliance with international law."[66] However, Iraq and Syria have not ratified the Rome Statute and Iraqi and Syrian citizens cannot be prosecuted in front of the ICC and the other legal challenge is that the ISIS movement cannot satisfy the requirements to be deemed a state, as spelled out by the Montevideo Convention on the Rights and Duties of States 1933.[67] This highlights the issues to prosecute these core crimes effectively at the international level.

[65] UNSC, S/RES/2249, Counter terrorism implementation task force 2015.
[66] Ibid.
[67] A. Van Engeland, 'Statehood, Proto States and International Law: New Challenges, Looking at the Case of ISIS', in J. Crawford, A. Koroma, S. Mahmoudi, A. Pellet (eds), *The International Legal Order: Current Needs and Possible Responses: Essays in Honour of Djamchid Momtaz* (Brill Nijhoff, 2017) 82.

Hence, despite the public outcry by UN agencies and NGOs,[68] little has happened in dealing with these crimes. Put differently, until now no coherent approach has been adopted to properly deal with these crimes, neither by Iraqi judicial authorities, nor through international criminal justice mechanisms. For these reasons, it is pertinent to further investigate how ISIS crimes have been addressed.

[68] For instance, see Resolution adopted by the Human Rights Council at its seventeenth special session, 1-17/1, Situation of human rights in the Syrian Arab Republic <https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/CoISyria/ResS17_1.pdf> accessed 15 September 2022; see also S/RES/2379 (2017) <https://www.un.org/securitycouncil/content/sres2379-2017> accessed 15 September 2022; also see Human Rights Council, "They came to destroy": ISIS Crimes Against the Yazidis, A/HRC/32/CRP.2, 15 June 2016 <https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/CoISyria/A_HRC_32_CRP.2_en.pdf> accessed 15 September 2022.

1-2-2-1 Domestic prosecution of ISIS crimes by virtue of the anti-terror laws of Iraq and KRI

One of the basic principles of international law is that first and foremost jurisdiction is domestic, also since prosecuting core crimes constitutes a legal duty which is imposed on states according to ICL. This idea is also asserted by the ICC preamble which states:

"The states parties to this statue...recalling that it is a duty of every state to exercise *its criminal jurisdiction over those responsible for international crimes..."*

This means that it is the obligation of states to assert territorial jurisdiction and to exercise jurisdiction over cases arising in or involving persons residing within a defined territory.

Article 6 of the Iraqi penal code provides as follows:

"The provisions of this code are enforceable in respect of offences committed in Iraq if a criminal act is committed there or if the consequences of that acts

is realized there. In all circumstances the law applies to all parties to the offences of which all or part occurs in Iraq even though any of those parties are abroad at the time of commission regardless of whether he is a principal or accessory."

This provision highlights that the Iraqi legislature has adopted the territoriality principle and has construed it broadly by adopting a subjective and objective approach towards territoriality. Under a subjective construction of the territoriality principle, courts can assert jurisdiction over offences that started on the territory but were completed outside the territory. Under an objective interpretation of territoriality, courts assert jurisdiction over crimes that began outside of Iraq but were completed within the territory.

Interestingly the ambiguous situation in dealing with ISIS crimes in Iraq and in the Kurdistan region is that judicial authorities often prosecute them according to the Iraqi Anti-Terror Law passed in 2005, as well under another special Anti-Terror Law adopted by the

Kurdistan region in 2006. Article 1 of the KRI Anti-Terrorism Law defines terrorism as

"organized use of violence, or threatening to use violence, or encouraging or glorifying the use of violence to achieve a criminal act either by an individual or groups randomly for the purpose of spreading terror, fear, chaos among the people to sabotage the general system or jeopardize security and safety in the region or the lives of individuals or their freedoms or security or sanctity, and causing damage to the environment or natural resources or public utilities or public or private properties to achieve political, intellectual religious, racist or ethnic aims or goals."

Yet prosecuting ISIS crimes by virtue of the Anti-Terror Law is controversial and should not be done for a variety of reasons. Firstly, the definition of acts of terror is generally overly broad and ambiguous. As observed above, the definition defines acts of terror in a way which violates legal certainty. Various terms in the definition are unclear and not enacted precisely which thereby creates lacunae. For instance, terms,

such as jeopardizing security and safety or sabotaging the general system are not obvious and clear-cut. In the researcher's opinion, such an approach can be considered a violation to the *nullum crimen sine lege* - the principle of legality - because one of the essential requirements of legality is that the prohibited conduct must be clearly defined and must be in line with the principle of specificity, which necessitates absolute precision.

Secondly, another striking feature when dealing with ISIS crimes in Iraq is the flawed description of acts in accordance with IHL and ICL. Most of the crimes committed by ISIS in Iraq are conceptually closest to constituting crimes against humanity, war crimes and genocide. All these crimes have been documented in international reports prepared by international organizations. For instance, ISIS has perpetrated widespread murder, torture, rape, sexual slavery, forced marriage and forced pregnancy and these constitute core crimes which violate principles of ICL, IHL and IHRL. Also, ISIS has committed large scale systematic attacks against civilians and has

thereby pursued a policy or plan which satisfies the characteristics of what can be considered crimes against humanity. The severe and brutal crimes perpetrated against the ethnic-religious minorities, namely the Yazidis, also appear to fulfil the *actus reus* of genocide, such as killing members of the group or causing serious bodily or mental harm, as well as the requisite *mens rea*. Hence, it is tempting to posit that it should be unlawful to label these terror crimes or ordinary crimes due to the existence of the contextual elements of the core crimes.

Thirdly, unfortunately in the last decade and after enacting the Anti-Terror Law, it was used for political reasons by the government against anti-government groups and parties, especially on sectarian grounds. Also, the lack of legal certainty, as mentioned above, has been functionalized intrinsically as a means to violate fundamental rights which leads to more division among the Iraqi people. Moreover, over the last two decades a new human right has emerged, namely the right to truth which means that every people have the inalienable right to know the truth

about past events and about the circumstances and reasons which led to systematic, gross violations of human rights and the perpetration of heinous crimes.[69] Full and effective exercise of the right to truth is essential to avoid any recurrence of violation in the future.

This right also opens the horizon to another right for victims, namely, to change charges against an accused or re-characterization. This was observed by the victims' representatives in the *Lubanga* case brought at the ICC.[70] In their observations, the legal representatives of victims specifically argued that "*changing the characterization of the facts in this way is in the interest of the international public order and the victims' rights to truth in respect of the criminal trial."*[71] This rights thus helps to ensure that the

[69] Y. Naqvi, 'The right to the truth in international law: fact or fiction?' (2006) *International Review of the Red Cross*, 88(862), 245-273, 245.
[70] *Prosecutor v Lubanga Dyilo* (Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and 1/105/06 concerning the 'Directions and Decision of the Appeals Chamber' of 2 February 2007) Appeals Chamber, ICC-01/04-01/06-925 (13 June 2007); K. J. Heller et al, *The Oxford Handbook of International Criminal Law* (Oxford University Press, 2020) 485.
[71] Ibid (*Lubanga).*

accused is brought to justice for a crime which most closely sheds light on the truth and represents the facts which took place.

Fourthly, treating ISIS crimes as terror crimes violates the principle of fairness, as well as the rights of victims to truth which has been recognized by international law.[72] Hence, it should be ensured that accused perpetrators are treated in line with international criminal procedures in order to avoid accusations of selectivity.[73]

Another factor which may account for Iraqi courts opting to deal with ISIS crimes as terrorist offences might be that these crimes are often easier to litigate than core crimes.[74] The reason for this is that it is only required to show a link between the terrorist group and the wrongdoers. In contrast, establishing that a core

[72] Naqvi supra 245.
[73] J. Hafetz, *Punishing Atrocities Through a Fair Trial: International Criminal Law from Nuremberg to the Age of Global Terrorism* (Cambridge University Press 2018) 144.
[74] K. Thynne, 'Better a war criminal or a terrorist? A comparative study of war crimes and counterterrorism legislation' (2022) International Review of the Red Cross No.916-917 <https://international-review.icrc.org/articles/better-a-war-criminal-or-a-terrorist-a-comparative-study-916> accessed16 September 2022.

crime has been committed requires establishing the more complicated legal elements, as spelled out by the Rome Statute. Consequently, despite the existence of rules which are intended to cover acts and crimes perpetrated by ISIS, the Anti-Terror Law fails to acknowledge and recognize the specific crimes, namely that acts took place during an armed conflict, especially gender-based violence, destruction of cultural heritage and systematic and widespread attacks against civilians. By prosecuting perpetrators as terrorists, the gravity of the crimes is disregarded, for instance, that genocide took place since ISIS "intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such."[75]

[75] Article 6(a)(3) of the Rome Statute.

1-2-2-2- The UNITAD Mechanism

The anti-terror laws in both Iraq and KRI have had a rather passive effect on the prosecution process and has not aided the right to truth. In other words, many international organizations have exerted pressure on the Iraqi legislator by criticizing the prosecution process of ISIS members. As a result, the Iraqi government sought to create a new imagine about the way in which it deals with the issue by seeking assistance from the international community, especially the UN. In August 2017, following the liberation of Mosul by the Iraqi government, Iraq asked for assistance from the UNSC to ensure that effective measures are put in place for the prosecution process. Specifically, the Iraqi government sent a letter addressed to the UNSC, in which Iraq indicated a distinct preference for utilizing domestic criminal proceedings and noted:

"it is .... important to bring to justice in accordance with Iraqi law members of the terrorist gangs of ISIS who have committed such crimes ... Iraq must maintain its national sovereignty and retain

jurisdiction and its law must be respected both when negotiating and implementing the resolution."[76]

The letter also emphasized that crimes which have been committed by ISIS are crimes against humanity. In this letter, the government of Iraq thus called upon the international community to assist in ensuring that ISIS members are held accountable for their crimes in Iraq (S/2017/710). The international community responded to this call, i.e., the UNSC unanimously adopted resolution 2379 (2017), by which it requested the Secretary-General to establish an investigative team, headed by a Special Adviser, to support domestic efforts to hold ISIS accountable by collecting, preserving, and storing evidence in Iraq of acts that might amount to war crimes, crimes against humanity and genocide committed in Iraq. The UNSC also called for the drafting of terms of reference that are acceptable to the government which gives the Iraqi

[76] Letter dated 14 August 2017 from the Chargé d'affaires a.i. of the Permanent Mission of Iraq to the United Nations addressed to the President of the Security Council, S/2017/710, 16 August 2017 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N17/259/92/PDF/N1725992.pdf> accessed 15 September 2022.

government discretionary power in the scope of the work to be performed by the Iraqi investigative team.

Pursuant to this resolution, the Secretary-General established the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIS (UNITAD) and appointed the first Special Adviser and Head of Team to commence work on 31 May 2018. Currently, the team is headed by Special Adviser Christian Ritscher.[77]

UNITAD has been bestowed with mandates which are all related to ISIS crimes, for instance, it is responsible for supporting national authorities by strengthening the law enforcement and judicial system and promoting the investigation capacity to deal with ISIS crimes in accordance with international standards. The UNITAD also works with all victims' communities in Iraq which have been affected by mass atrocities, deals with civil society organizations and representatives of minorities and more recently its

[77] UNITAD, "Special Adviser Christian Ritscher", 2022 <https://www.unitad.un.org/content/our-leadership> accessed 16 September 2022.

work has also focused on supporting victims of sexual and gender-based violence. In addition, UNITAD offers psychological support,[78] and enhances the capability of judges in Iraq. In implementing its mandate, UNITAD should be impartial, independent, and credible and should act consistent with the Charter of the UN and UN best practice, and relevant international law, including IHRL.[79]

In keeping with Iraqi preferences, the UNSC clearly indicated that the Iraqi courts take precedence over the investigative team.[80] However, it is unclear how any UN evidence will facilitate future prosecutions, also because various issues impede the work of UNITAD. For instance, UN policy prohibits assisting processes that could lead to the imposition of a death penalty or violate the fair trial principle. UNSC resolution 2379, which established UNITAD, also

[78] UNITAD, "Psychosocial Support", 2022 <https://www.unitad.un.org/content/psychosocial-support> accessed 16 September 2022.

[79] UNITAD, "Our Mandate", 2022 <https://www.unitad.un.org/content/our-mandate> accessed 15 September 2022.

[80] B. Van Schaack, 'The Iraqi investigative team and prospect for justice for the Yazidi genocide' (2018) *Journal of International Criminal Justice*, 16(1), 113-139, 121.

makes explicit reference to the due process principle, which has always been a controversial issue in respect of the Iraqi judicial system. Apart from this, domestic prosecutions may not satisfy the Yazidi community's demand for justice. Yazidi victim groups and their advocates originally focused on involving the ICC.[81]

Until now, UNITAD issued eight reports in which it discussed developments in its work in respect of collecting, storing, and preserving evidence as well promoting ISIS accountability mechanisms.[82] In June 2022, the Special Advisor presented examples of progress of the Team's structural investigations, which aim to cover ISIS crimes against all affected communities: "Yazidis, Shia, Sunni, Christian, Kaka'i, Shabak and Turkmen Shia."[83] For instance, UNITAD's investigation teams investigated ISIS's development and use of chemical and biological

[81] Ibid 139.

[82] UNSC, "Iraq: UNITAD Briefing", 7 January 2022 <https://www.securitycouncilreport.org/whatsinblue/2022/06/iraq-unitad-briefing-2.php> accessed 16 September 2022.

[83] UNITAD, "Special Adviser Ritscher Briefs Security Council on UNITAD Investigative Progress: Cooperation with Iraq is Key", 10 June 2022 <https://www.unitad.un.org/SC%20briefing%208th> accessed 16 September 2022.

weapons, i.e., it helped to gather new information through testimonies, and by collecting digital and documentary evidence pertaining to the manufacturing and use of these weapons. Special Adviser Ritscher stressed that

"Our investigations will look more closely at the underlying procurement system for these weapons and related financial flows. *This entails focusing on the involvement of specific individuals, including those involved in conducting human tests with chemical agents on detained persons."*[84]

Highlighting future priority areas for the work of the team, Special Adviser Ritscher said that UNITAD intends to intensify its investigations pertaining to crimes committed in Mosul, the capital of the so-called "caliphate" of Da'esh/ISIS.[85] He also mentioned that UNITAD plans to expand investigations into ISIS's destruction of cultural heritage, particularly since "ISIS's vicious destruction of cultural heritage was an

[84] Ibid.
[85] Ibid.

attempt to erase Iraq's diverse cultural history."[86] He expressed his devastation after seeing the magnitude of the destruction of some of the cultural heritage sites which he visited recently, while also acknowledging Iraq's continuing endeavors to reinstate sites.[87]

Nonetheless, despite the efforts by UNITAD it is apparent that the state of Iraq and the KRI have been reluctant to prosecute perpetrators of core crimes and have failed to develop a permanent legal framework for this purpose.[88] This research therefore spells out a strategy for Iraq and the KRI to create a firm legislative framework, so that also future atrocities which may arise can be prosecuted as core crimes. In other words, this research proposes that special provisions are adopted for core crimes or that the Iraqi penal code is

[86] Ibid.
[87] Ibid.
[88] Despite the lack of an explicit strategy in dealing with ISIS crimes, various draft laws have been introduced by the Iraqi parliament and by the government of the Iraqi Kurdistan region government. For instance, in April 2021 the KRG prepared a draft statue with the assistance of UNITAD, which contains rules of procedures and thereby spells out a mechanism for the prosecution of ISIS members. While the draft law was discussed by the parliament, unfortunately it has not been adopted due to the fact that the Iraqi constitutional court deemed it unconstitutional for many reasons, including that KRI lacked the jurisdiction.

amended. To this end, it must be also investigated how it can be ensured that courts in the KRI have jurisdiction and the next part thus seeks to cast light on the legal bases for domesticating core crimes into the Iraqi legal system.

2- The Legal Bases for Domesticating ICL in the Laws of Iraq and Kurdistan Region

In respect of Iraq, it appears appropriate to refer to the saying that 'necessity is the mother of invention', i.e., it is imperative to examine how the legal system can ensure that core crimes are prosecuted domestically. In the previous sections, the impediments were outlined which have plagued the prosecution of core crimes in Iraq to this present day. Also, it was discussed why recent legislative initiatives by virtue of the Iraqi penal code and the Anti-Terror Law are inadequate. The legislator in Iraq and KRI must, therefore, recognize the legal vacuum which exists in dealing with core crimes, namely grave and prohibited conduct which affects significant international interests, and which is offensive to the commonly shared values of the world community.[89]

In other words, it has become recognised that some acts which have occurred within a state are so

[89] M. C. Bassiouni, *International Criminal Law, Sources, Subjects and Contents, Volume 1* (3rd ed, Martinus Nijhoff Publisher 2008) 133.

egregious as to breach international law.[90] As the most serious crimes took place in Iraq and the KRI, it is pertinent that steps are taken to outlaw and punish the most serious international crimes.[91] While accountability for international crimes is particularly facilitated by the concept of universal jurisdiction and *ad hoc* tribunals and the ICC can play a pivotal role to end impunity, there exist legal and practical limitations, for instance, these bodies lack the resources to pursue all perpetrators.[92] For this reason, it is crucial that national authorities step in to close the "impunity gap", so that more perpetrators of serious international crimes can be brought to justice.[93] Hence, it is argued that Iraq should equip the domestic judiciary, including in the KRI, with the competence to prosecute individuals who have allegedly perpetrated serious international crimes, for example, torture,

[90] H. M. Osofsky, 'Domesticating International Criminal Law: Bringing Human Rights Violators to Justice' (1997) *The Yale Law Journal*, 107, 191-226, 194.
[91] Ibid 194&196.
[92] Centre for Constitutional Rights, "Factsheet: Universal Jurisdiction", 7 December 2015 <https://ccrjustice.org/home/get-involved/tools-resources/fact-sheets-and-faqs/factsheet-universal-jurisdiction> accessed 18 July 2022.
[93] Ibid.

crimes against humanity, war crimes, and genocide, despite the victims or suspects not being nationals or the crime having been committed abroad, in line with various other countries which have already taken steps to that end.[94] Yet some scholars even argue that core crimes are punishable regardless of whether they have been incorporated in domestic law since they entail individual criminal responsibility and violate the norms of international law.[95]

The next section highlights the obligatory nature of the obligation to prosecute serious international crimes in accordance with the maxim *aut dedere aut judicare* pursuant to contemporary international law by contextualizing its nature, scope, and conventions.

[94] Human Rights Watch, Universal Jurisdiction in Europe, The State of the Art, Volume 18, No. 5(d), June 2006, 1-101, 1.
[95] G. Werle, *Principles of International Criminal Law* (Martin Nijhuff Publishers 2013) 353.

2-1 The Duty to Prosecute Core Crimes (ADAJ): Legal Base and Definition

Pursuant to international treaty and customary international law, serious international crimes constitute violations of peremptory norms of international law (*jus cogens*).[96] According to principles of international law, the state and its organs are under various kinds of obligations towards the international community, specifically to prosecute core crimes domestically committed in its territory. Such an obligation is an indispensable principle since it results in the indirect application of ICL.

However, a cursory review of recent scholarly literature highlights that there exists no agreed set of criteria in describing the legal nature of ADAJ. Reydams, for instance, considers the duty a general principle of law which bestows rights and obligations bilaterally on the state where an offender is present, and the state directly linked to the offence.[97] Other

[96] Y. Naqvi, *Impediments to Exercising Jurisdiction over International Crimes* (T.M.C Asser Press 2009) 26.

[97] L. R. Dams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford University Press 2003) 115.

scholars, such as Enache-Brown, typically view ADAJ an obligation which is specifically derived from the UN Charter.[98] In contrast, El-Zeidy argues that ADAJ is a corollary of the principle of complementarily.[99] The debate about the nature of ADAJ is also ongoing at the judicial level, i.e., international courts and tribunals have adopted various descriptions in respect of this duty. For example, the ICTY Appeal Chamber has described ADAJ as being a customary obligation of international law.[100] Equally, the ICJ has classified ADAJ a principle of customary international law.[101]

ADAJ has also been incorporated in many treaties which highlights that there exists international consensus that perpetrators should not go unpunished

[98] C. Enche-Brown and A. Fried, 'Universal crime, jurisdiction and duty: the obligation of Aut dedere aut judicare in international law' (1998) *Mc Gill Law Journal*, 43(2), 613-633, 633.

[99] M. Al Zeidy, *The Principle of Complementarity in International Criminal Law: Origins, Developments and Practice* (MNP, 2008) 220-221.

[100] *Prosecutor v Tihomir Blaskic*, Judgment on the request of the republic of Croatia for review of the decision of the trial chamber II of 18 July 1997, Case No IT-95-14-AR 108 bis para.29.

[101] *Case concerning question of interpretation and application of the 1971 Montreal convention arising from the aerial incident at Lockerbie request for the indication of provisional measures (Libyan Arab Jamahiriya v USA)* ICJ, Provisional Measures Order of 14 April 1992, dissenting opinion of Judge Weeramantry ICJ REP 1992, p.114.

irrespective of the place where they are located after the commission of the crime. The international community through all its bodies and agents - states or organizations - must thus prosecute and punish perpetrators of these crimes, namely by exercising jurisdiction courts serve as agents of the international community.[102]

Not only has ADAJ a base in various treaties, as further discussed below, this theory is also affirmed in the legal writings of scholars which argue that conventions designed to prevent core crimes have secured a substantial degree of ratification and that this has led to a general pattern of treaty practice and hence a rule of customary law.[103] Hence, the principle of ADAJ can be defined as legal and judicial ability of the state to prosecute a person found in its territory if the person is suspected of certain crimes.[104] This principle was first articulated by Hugo Grotius in the early 17th

[102] Aryem and Harel supra 227.
[103] Soler supra 323.
[104] S. Weiwei and Z. Yueyao, 'The Aut dedere aut judicare provision in the proposed convention on crimes against humanity: Assessment from a Chinese perspective', in M. Bergsmo and S. Tianying (eds), *On the Proposed Crimes against Humanity Convention* (Torkel Opsahl Academic Publisher 2014) 345.

century.[105] It underpins the goals of ICL to end impunity and to establish a culture of accountability by rendering domestic prosecution of core crimes mandatory and may play an important role in preventing core crimes and guaranteeing deterrence, as well as providing justice and truth for victims and ensuring adherence to fair procedures.

Furthermore, by rendering the state responsible where the alleged criminal is found, it is ensured that state sovereignty is respected, and messy jurisdictional issues are avoided. Such an approach also allows greater witness participation and makes justice more visible for victims. The next section studies treaties which explicitly refer to ADAJ and which Iraq has also ratified and thereafter it is assessed how customary law has framed ADAJ. The aim of the following sections is to show why the state of Iraq and the KRI ought to be proactive in prosecuting core crimes committed in their territory or abroad. Accordingly, Iraq and its

[105] I. Kennedy, 'The Proposed Convention on Crimes against Humanity and Aut dedere aut judicare', in M. Bergsmo and S. Tianying (eds), *On the Proposed Crimes against Humanity Convention* (Torkel Opsahl Academic Publisher 2014) 329.

respective organs have an international responsibility to domesticate core crimes.

2-1-1 The Treaty Bases of ADAJ

As pointed out, the existence of the duty to prosecute serious international crimes obligates states to assert jurisdiction in order to deal with these crimes. Treaty law imposes such a duty in respect of the crime of genocide, grave breaches as defined in the Geneva Conventions, torture and forced disappearance, as discussed next:

2-1-1-1 ADAJ in the Genocide Convention

Genocide constitutes the ultimate attack upon the right to life and has been addressed in a separate convention, namely the Convention on the Prevention and Punishment of the Crime of Genocide 1948. The crime of genocide consists of the physical destruction of a national, ethnic, racial, and religious group. At the first session in 1946, the United Nations General

Assembly described genocide *"as a denial of the right of entire human groups as homicide is the denial of the right to live of individuals human beings.*"[106] The duty to prosecute the crime of genocide has been enshrined accurately in the Convention, specifically in Article I, V and IV. Article I states

"The contracting parties confirm that genocide, whether *committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish."*

Accordingly, Article I impose upon parties' a legal obligation relating to genocide. Firstly, the duty to punish necessitates that criminal sanctions are imposed on individuals responsible for acts of genocide.[107]

Within this context, Article V of the convention states

[106] W. Schabas, *The Customary International Law of Human Rights* (Oxford University Press, 2021) 114.
[107] C. J. Tams, L. Berster and B. Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (C.H. Beck Hart Nomos 2014) 39.

"The convention 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 parsons guilty of genocide or of any of the other acts enumerated in Article III."*

This article provides an explicit obligation on state parties to give effect to the Convention in their domestic settings by enacting proper legislation.

Crucially, the obligation contained in this provision goes beyond the mere obligation to ratify the Convention itself.[108] Article VI of the Convention importantly stipulates

"Persons charged *with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the state in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction* with *respect to those*

[108] Ibid 217.

contracting parties which shall have accepted its jurisdiction."

From this article, it is obvious that the Convention mentions trying genocidaires in national courts based on territorial jurisdiction. Nonetheless, the Article does not mention other grounds of jurisdiction. Yet this does not mean that the Convention is territorially limited.[109] Also, the wording of this article imposes an obligation due to the use of the word '*shall*' which is affirmative, and which leaves no discretion to the domestic legislator.

In respect of Iraq, its worthy to note that Iraq became a State party to the Genocide Convention via accession on 20 January 1959. Iraq is therefore bound by Article V of the Convention. Yet unfortunately, Iraq did very little to enforce the Convention provisions domestically. Iraq may thus be considered a bystander state which has not taken active steps to combat international crimes such as genocide, and the current

[109] R. Cryer et al, *Prosecuting International Crimes, Selectivity and the International Criminal Law Regime* (Cambridge University Press 2005) 102.

Iraqi Penal Code puts Iraq in violation of its obligations under the Genocide Convention.[110] Iraq and the KRI and its legislative authority in the KRI have failed to enact the necessary domestic legislation to give effect to the country's obligations under Article V of the Genocide Convention, and in turn to provide the necessary domestic legal basis to give effect to the provisions of the Genocide Convention.

2-1-1-2 ADAJ in the Geneva Conventions of 1949

The Geneva Conventions and their Additional Protocols form the basic rules of IHL. The Conventions and Additional Protocol I criminalized most brutalities, so-called called grave breaches which can also be deemed war crimes. These treaties crystallize the duty to prosecute war crimes in an affirmative manner by employing the term '*shall*.'[111] The grave breach system is phrased in a distinctive way:

[110] A. Abraham, T. Etwell, A. Z. Borda, *State Responsibility and the Genocide of Yazidis* (YJC, 2022) 1.

[111] Geneva Convention I, Article 49; Geneva Convention II, Article 50; Geneva Convention III, Article 129; Geneva Convention IV, Article 146.

*"*Each *high contracting party shall be under the obligation to search for persons alleged to have committed or to have ordered to be committed, such grave breaches and shall bring such persons regardless of their nationality before its court."*[112]

All of the four Geneva Conventions provide for this type of accountability, so that a duty is imposed on ratifying State parties in respect of the commission of war crimes. States must search for the accused persons and thus conduct an investigation and must prosecute and hold a trial in their national courts. State parties are explicitly obliged to enact criminal provisions for conduct stipulated therein.

The Convention obligations exclusively deal with grave breaches and apply to international conflicts as opposed to internal conflicts. However, this assertion is not entirely accurate due to the fact that Rule 158 on customary IHL provides for the duty to prosecute war crimes to apply to both international and internal

[112] See Article 146 of Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.

armed conflicts.[113] As mentioned, Iraq has ratified the Geneva Conventions pursuant to Law No 24 of 1955, though regrettably no criminal provisions have been enacted yet to deal with these crimes.

2-1-1-3 ADAJ under Customary International Law

The relationship between treaties and customary international law remains a highly debated topic in international law when treaties and customary law share particularly the same subject matter.[114] Nonetheless, treaty provisions which mandate or have been interpreted as requiring states parties to investigate, prosecute and punish those convicted of serious human rights violations only bind states parties, and only for the conduct that took place after the relevant treaty had entered into force.[115] While treaties are thus only binding upon ratification,

[113] M. N. Schmitt, *Essays on Law and War at the Fault Lines* (TMC Asser Press 2012) 601.
[114] Y. Tan, *The Rome Statues as Evidence of Customary International Law* (Brill Nijhoff 2021) 1.
[115] J. R. di Sarsina, *Transnational Justice and State Responsibility to Mass Atrocity: Reassessing the Obligation to Investigate and Prosecute* (Asser Press 2019) 90.

customary international has not got this limitation since it binds states irrespective of them being state parties to treaties. International custom is defined in Article 38 of the Statute of the ICJ as evidence of a general practice accepted as law. Also, it is noteworthy that customary international law is identified by the presence of two elements, namely the objective element (state practice) and the subjective element (*opinio juris*).[116] The two elements have been recognised by large number of scholars,[117] and spelled out in various international documents and in cases.[118]

The first element is sometimes defined as a general state practice which includes verbal and physical acts, and is not limited to, *"diplomatic acts and correspondence, conduct in connection with resolutions* adopted *by an international organization or at an intergovernmental conference, conduct in connection with treaties, executive conduct including operational conduct on the ground, legislative and*

[116] J. Puschmann, *Law-Making and Legitimacy in International Humanitarian Law* (Edward Elgar 2021) 179.
[117] Schabas supra 71; Tan supra 34, Cryer et al supra 105&106.
[118] See *Germany v Denmark and the Netherlands* [1969] ICJ 1 para.74 (North Sea Continental Shelf cases); Pushmann supra 179.

administrative acts, and decisions of national courts."[119] Thus, it is safe to say that state practice can be inferred by an act or omission, statements made, adoption of resolutions, domestic legislation and conduct of international organisations.[120] Furthermore, state practice must be both extensive, uniform[121] and constant.[122] The ICJ has also confirmed that state practices should be a settled practice.[123]

The second element for an international customary rule to form is a rather subjective requirement, namely that there is a sense of obligation and which is frequently referred to by the Latin phrase *opinio juris*.[124] In other words, it must be shown that a state has a belief that certain conduct and practices are

[119] K. Hulme, *Core Documents on International Law 2021-22* (Macmillan Education 2021) 425.
[120] M. Dixon, *Textbooks in International Law* (7th ed, Oxford University Press 2013) 32.
[121] Kennedy supra 331.
[122] *Germany v Italy, Greece intervening (Jurisdictional immunities of the state case)*, Judgment of 3 February 2012, ICJ, ICJ reports 2012, 99, para.55.
[123] Ibid.
[124] S. Hassen and M. Roux, 'Legal certainty and international crimes: A public international law perspective', in C. Hugo, T. M. J. Mollers (eds), *Legal Certainty and Fundamental Rights, A cross disciplinary approach to constitutional principle in German and south African law* (Nomos Verlagsgesellschaft 2020) 111.

required by law or that certain conduct should become law, or the state assumes that the practice is required by virtue of international law with mandates the practice in order to realize legality.[125] Consequently, the formation of custom has a psychological element.[126] Within this context, it is noteworthy that the International Law Commission has also supported this two elements approach and has noted that

"To determine the existence and content of a rule of customary international *law, it is necessary to ascertain whether there is a general practice that is accepted as law."*[127]

Apart from this issue, it must be explored how customary rules of ICL are identified and whether it is possible to consider ADAJ a customary rule. Some scholars have theorized in order to crystallize the features of customary international criminal law. For

[125] T. Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege* (Springer International Publishing 2017) 95.
[126] Schabas supra-71.
[127] United Nations General Assembly, Report of the International Law Commission, Seventieth session
(30 April–1 June and 2 July–10 August 2018) A/73/10, 1-334, 119.

instance, Theodor Meron proposes a "core right" theory which postulates that the content of customary law can be inferred from the core values of the international community.[128] Similar to Meron, Christian Tomuschat suggests that the content of customary international law in ICL can be deduced from the basic values cherished by the international community.[129] Thus, any violations to human dignity and universally accepted values intrinsic to humanity can be considered a violation of customary ICL. In the same frame, other scholars argue that ICC crimes are international customary crimes based on international customary rules.[130]

Accordingly, it is safe to assume that core crimes are indeed crimes which have customary status, as also affirmed *inter alia*, in many decisions by international criminal tribunals.[131]

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[128] Tan supra 35.

[129] C. Tomuschat, 'Obligations Arising for States without or against Their Will' (1993) 241 *Recueil des cours* 195, 305.

[130] J. K. Kleffinerm, *Complementarity in the Rome Statues and National Criminal Jurisdictions (*Oxford University Press 2003) 15.

[131] *Prosecutor v Dusko Tadic*, ICTY Appeal Chamber, Decision on the defence motion for interlocutory appeal on jurisdiction, 2 October 1995, Case No. IT-94-1-AR72; also, see *Prosecutor v Zejnil Delalic et al*

As mentioned in the former sections, core crimes for the purpose of this current study are limited to crimes against humanity, war crimes, genocide, and the crime of aggression, therefore when reference is made to the customary nature of crimes it is consequently framed within the mentioned ones. In various international and national decisions explicit reference is also made to the customary nature of these crimes. For instance, in 1951 the ICJ said that genocide was contrary to moral law and that the principles underlying the Genocide Convention are principles which are recognized by civilized nations which are binding on all states, even without any Convention obligation.[132] In another decision the ICJ classified the prohibition of genocide as a *jus cogens* norm from which derogation is not permitted.[133]

Also, the crime of genocide has been cited in connection with the seminal *erga omnes* principle. The

(Celebici case), ICTY trial chamber, 16 November 1998, Case No. IT -96-21-T.

[132] *Advisory Opinion Concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, I.C.J. Reports 1951, p. 15.

[133] *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Preliminary Objections, I.C.J. Reports 1964, p. 9, 12, para.34.

ICJ has observed that *erga omnes* is *"a duty owed towards the international community as a whole."*[134] Subsequently, the European Court of Human Rights has also confirmed that the genocide prohibition has *jus cogens* status.[135] Indeed, the crime of genocide has been largely recognized as a *jus cogens* violation by scholars[136] and judges alike.[137]

Similarly, many scholars argue that crimes against humanity are one of the core crimes which are

[134] Ibid para.32.

[135] *Jorgic v Germany*, European Court of Human Rights, Application no 74613\01 s 68 ECHR 2007-III.

[136] R. Cryer et al supra 203&204; M. C. Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* (Cambridge University Press 2011) 264; J. Quigley, *The Genocide Convention: An International Law Analysis* (Ashgate Publishing Limited 2006)15; B. D. Lepard, *Customary International Law: A new Theory with Practical Application* (Cambridge University Press 2010) 432.

[137] For instance, the Federal Court of Australia in *Nulyrimma v Thompson* (1999) 96 FCR 153 stated that the prohibition of genocide is a peremptory norm of customary international law which gives rise to a non-derogable obligation which bins each nation state. The same idea has been affirmed in *Prosecutor v Kupreškić et al*, ICTY-95-16-A, Appeal Judgment (23 October 2011) by the International Criminal Tribunal for the former Yugoslavia (ICTY) in which the trial chamber held that genocide is a peremptory norm and is a jus cogens and thus a non-derogable norm which has overriding character. Also, this view has been affirmed in Application for Revision of the Judgment of 11 July 1996 in the *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)*, Preliminary Objections, Judgment of 11 July 1996.

customary in nature. That is to say, the prohibition of crimes against humanity can be considered a peremptory norm of customary international law since it constitutes 'manifestly unlawful' conduct as recognized by the principal legal systems of the world.[138] It is clear that crimes against humanity were a new type of crime in the Nuremberg Charter of 1945.[139] Despite this, the Charter did not explicitly require investigation and prosecution at the domestic level.[140] But some scholars have taken the view that customary international law establishes mandatory jurisdiction over perpetrators of crimes against humanity. For these scholars the Nuremberg and Tokyo precedents are thus relevant to infer a customary international law obligation to investigate and prosecute those responsible for crimes against

[138] R. Dubler and M. Kalyk, *Crimes against Humanity in the 21st Century, Law Practice and Threat to International Peace and Security* (Brill Nijhoff 2018) 991.

[139] M. E. Barad, 'From the Nuremberg Charter to the Rome Statute: Defining the Elements of Crimes against Humanity' (2004) *San Diego International Law Journal*, 5, 73-144, 82.

[140] T. Rosen, "The Influence of the Nuremberg Trial on International Criminal Law", Robert H. Jackson Center, 2022 <https://www.roberthjackson.org/speech-and-writing/the-influence-of-the-nuremberg-trial-on-international-criminal-law/> accessed 18 September 2022.

humanity.[141] For instance, Bassiouni has argued that the duty to prosecute is clearly established by conventions and customary law, also because crimes against humanity have been included in the national laws of more than fifty-five states, which clearly evidences that the international obligation has found concomitant application in internal law and practice of a large number of states.[142] This assertion has been referred to in the fourth report on the obligation to extradite or prosecute (ADAJ) by the International Law Commission which states that

"[i]n recent years, several leading scholars including *C. Bassiouni, L. Sadat, C. Edelenbos, D. Orentlicher, and N. Roht-Arriaza have argued that there is a customary international law duty to prosecute persons accused of crimes against humanity. These scholars recognize that there is a great deal of State practice embracing amnesties and exile arrangements but focus on resolutions by the United*

[141] M. C. Bassiouni, 'Accountability for violations of international humanitarian law and other serious violations of human rights', in C. M. Bassiouni (ed), *Post Conflict Justice* (Transnational Publishers 2002) 12, 13&25.

[142] Bassiouni (Crimes against Humanity) supra 276.

Nations General Assembly, hortative declarations of international conferences, and reports of the United Nations Secretary-General, as evidence of an emerging rule requiring prosecution of those who commit crimes against humanity."[143]

Mandatory domestic prosecution for crimes against humanity serve the function of guaranteeing deterrence.[144] Also, during a 2009 U.N. General Assembly session, delegations from Hungary, Mexico, Cuba, Iran, and Uruguay all explicitly declared that the duty to prosecute crimes against humanity can be considered a legal obligation of states all over the world.

Furthermore, in respect of war crimes it is safe to assume that there exists a customary law obligation to repress grave breaches. This duty extends to all aspects relevant to prosecuting war crimes, including the search of accused persons, and their prosecution, i.e.,

[143] Z. Galicki, Fourth report on the obligation to extradite or prosecute, International Law Commission, Special Rapporteur, Geneva, 31 May 2011, 17 <https://digitallibrary.un.org/record/707752?ln=en> accessed 15 September 2022.
[144] Di Sarsina supra 94.

states are thus obligated to uphold individual criminal responsibility. Yet grave breaches obligations are limited to international conflict without possible application to internal conflicts. Yet contemporary international law expressly recognises serious violations which occur during non-international armed conflicts as a category of war crimes.

From all of these interpretations it is apparent that it is unnecessary to question whether customary international law prescribes the duty to prosecute core crimes.[145] Consequently, states are obliged from time to time to demonstrate their desire ensure that core crimes do not go unpunished. This customary rule also applies to Iraq and the KRI, as discussed next.

[145] R. Steenberghe, 'The Obligation to Extradite or Prosecute, Clarifying its nature' (2011) *Journal of International Criminal Justice*, 9, 1089-1116, 1089.

3 - Effective ways of Implementing ICL in Kurdistan

The discussion in the previous section highlights that authorities in the KRI should domesticate ICL due to the customary nature of the ADAJ obligation in respect of core crimes. There should exist no contradiction between implementing ICL on the one hand and enforcing the Iraqi constitution on the other hand. Within this context, Article 121 of the Iraqi constitution is by far the most important and delicate provision since it determines the validity of domesticating ICL in the KRI.

"[t]he regional powers shall have the right to exercise executive, legislative, and judicial powers in accordance with this Constitution, *except for those authorities stipulated in the exclusive authorities of the federal government."*

The next section discusses important pre-conditions for domesticating universal jurisdiction, which legislators must bear in mind in order to create an environment where ICL is not just domesticated by virtue of a law, but also effectively enforced.

3-1 Modes of Domestication

As a general rule, international criminal rules, both in its substantive and procedural aspects needs to be implemented in order to be operative. especially in dualist states such as Iraq in which there is no ability to enforce international law by self-executing (direct application of international law)., due to the fact that the domestic legal system is separate from international law.[146] Accordingly, the international conventions (has no effect in the domestic legal system unless it is given effect by domestic legislation, consequently Iraq has no jurisdiction over core crimes, whether established by treaty or in customary law, unless and until legislation has been implemented in order to apply the crimes or the right in domestic law.

[146] according to the article 61 of the constitution of Iraq: (the council of representative shall be competent in the following: …… D: Regulating the ratification process of international treaties and agreements by a law, to be enacted by a two-thirds majority of the members of the Council of Representatives)). Also, according to article 73 of the constitution the president of the republic shall assume the following powers: (…. Second: To ratify international treaties and agreements after the approval by the Council of Representatives. Such international treaties and agreements are considered ratified after fifteen days from the date of receipt by the President

The above-mentioned means that the conventions in situation of implementation have the same effect of the domestic legislations. Thus, the conventions must be consistent with the constitution.

Unfortunately, the problem is that the state of Iraq has ratified various treaties but have not provided for them in national legislation. thus, because most international conventions are not self-executing and because of the legality principle. It's necessary to adopt an effective legislation in order to provide for the establishment of the crimes, as well as penalties in domestic law.

As we elaborated in the previous sections that the KRI, imperatively and legally, has the right and the duty to deal with core crimes. For doing that it's important to assess the effective legislative method.

As its clear that there is no uniform and abstract method for this process, and states implement the provisions of ICL in different ways. thus, we are going to clarify these methods. then suggest the most suitable method for doing so in KRI.

3-1-1 Minimalist Approach[147]

According to this method the state deals with the core crimes as an ordinary crime such as murder, torture, bodily or mental harm, etc… In this approach, the domestic criminal law does not integrate international crimes but merely applies its categorisations to the conduct[148].

However, the core crimes share structural resemblances with domestic offences. They normally encompass two classical elements known from the domestic legal system namely actus reus and mens rea [149]. But it would be absurd to assume the rationality and validity of prosecuting core crimes as an ordinary crime in national legal system. Typically, the core crimes are inherently Related to political violence and ethnic and religion conflicts, also its meaning evolved over time. In addition, as we mentioned in the

[147] Ovo Catherine Imoedemhe, ((The complementarity regime of the international criminal court, national implementation in Africa)), Springer international publishing. Switzerland. 2017 p 72.
[148] Ibid p72
[149] Carsten Stahn, supra-2. p 22

beginning of this study there is a wide distinctive feature between core crimes and ordinary crimes such as the context in which they occur. it's clear that the core crimes require the contextual elements such as the existence of armed conflict or the systematic attack or widespread nature of atrocities that marks the differences to ordinary crimes[150]. This approach increasingly accepted by ICC. in Saif Al Islam AL Qaddafi. Libya for instance depended on this imagine in its admissibility challenge, in Saif Al Islam Al Qaddafi, and the result was a decision by the PTCI that Libya was unable to investigate and prosecute Saif Al-Islam based on Libyan criminal code. It is maintained that the ordinary crimes for which Libya proposed to prosecute Saif Al-Islam are not the same as the crimes against humanity of murder and persecution, for which he is indicted before the ICC. [151]

Furthermore, this approach gives rise to a number of problematic issues in connection with prosecution

[150] See the first section of this study .p 26.

[151] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Hussein ICC-01/11-01/11-344-Red Decision of the Pre-Trial Chamber I on the Admissibility of the case against Saif Al-Islam Gaddafi 31 May 2013. http://www.icc-cpi.int/iccdocs/doc/doc1599307.pdf (Saif Al-Islam case)*

process. due to the fact that it was various legal consequences based in core crimes description. for instance, one of the elements of core crimes proper is the right of any state to exercise universal jurisdiction, thus the prosecution core crimes as an ordinary crime does not generally provide for universal jurisdiction. also, in such situations the prosecution on the ADAJ principle would be problematic and insufficient.

3-1-2 Domestication by Adopting ICC Provisions without Amendments

this approach also called the static approach by some scholars,[152] the main characteristic of this approach is transcription of core crimes which have

[152] For instance Mads Harlem, ((importing war crimes into Norwegian legislation)) in Morten Bergsmo , Mads Harlem and Nobuo Hayashi (eds),(Importing core international crimes into national criminal law)) Second edition, Torkel Opsahl Academic E Publisher, Oslo , 2010 . See also Joseph Rikhhof , ((Fewer places to hide ? The impact of domestic war crimes prosecution on international impunity)) in Morten Bergsmo (edt), ((Complemaentarity and the Exercise of universal jurisdiction for core international crimes)) ,First edition Torkel Opsahl Academic E Publisher, Oslo , 2010 . See also Ovo Catherine Imoedemhe op.cit p73.

been adopted in the Rome statutes. consequently, it's an internalizing process of ICL in domestic setting according to the same provisions and definitions of the crime of genocide, crimes against humanity and war crimes as set out in article 6,7 and 8 of Rome statues.

Many states depend on this method in dealing with core crimes. for example, United Kingdom,[153] and Malta reproduced the Rome statues. other countries using the static model do not copy the texts of statues, but only make reference to them. this can be seen in legislation of New Zealand,[154] South Africa,[155] and Netherlands.[156] In the other side some states not only reproduced the Rome statues but also the ICC elements of crimes which contains the elements and entire

[153] United kingdom ,international criminal court act 2001 part 5 article 50,51 .available at : https://www.legislation.gov.uk/ukpga/2001/17/section/50 last visited : 2\ 10\2022

[154] New Zealand, the International Crimes and International Criminal Court (Amendment) Act 2002. Articles 9, 10 and 11 define international crimes by reference to the Rome Statute. available at https://www.legislation.govt.nz/act/public/2000/0026/latest/DLM63091.html#DLM63090 last visited 2-\10\2022

[155] South Africa internaional criminal court implementation act of 2002.

[156] Netherlands international criminal act 2003 available at : https://documents.law.yale.edu/sites/default/files/netherlands_-_international_crimes_act_english_.pdf .last visited 10-10-2022

definitions of the crimes and its distinctive features. such as Australia.

In assessing the domestication by adopting ICC provisions, it's safe to assume that the internal criminal law by adopting such crimes at domestic level recognizes the specific characteristics of core crimes and its aspects which are typically different from the ordinary crimes, thus it can be consider as a step forward to recognize these international crimes domestically.

In addition, this model can provide a clear guidance to the essential elements of core crimes both by using the ICC texts as well as by getting benefit from the jurisprudence of ICC157 . also, this model will be compatible with principle of legality and legal certainty.

In contrast this model has drawback in application, for example it cannot take into account the new developments in ICL. apparently various types of

[157] Joseph Rikhof, supra note 152.p 24.

crimes have been recognized in international arena namely the war crimes of slavery, forced labour, terrorism and the crime forced marriage. also, this approach does not take into account the remaining international treaty and customary law which states are bound.

3-1-3 Domestication by Adopting ICC Provisions with Amendments

Many states have substantially extended the scope of domesticating to widespread sphere rather than the Rome statues. in this model the core crimes are redrafted and amended to be suitable and fit with the national legislative context. domestic lawyers and judges and prosecutor have their own system of practice, a body of internal protocols and assumptions, including characteristics behaviours and self-sustaining values considering in the domestication process.[158] this is the case for instance of Germany,

[158] Thamas Hoffmann, ((The crime of genocide in its (nearly) infinite domestic society)) in Marco Odello and Piotr Lubinski (edt) (the concept of genocide in international criminal law, developments after Lemkin)) Routledge, Newyork first edition , 2020 p 93.

Finland, France, the Netherlands Portugal, Spain, and Switzerland.

Consequently, many states expanding the scope of application of the crime of genocide by including additional groups such as political group.[159] other states added the social group in their criminal legislations.[160] also, this harmonization can be found in crimes against humanity. especially when some of the acts of crimes against humanity in the statues are vague or imprecise as a result of depending on customary international law and the lack of legal consensus in the

[159] . Art. 101 of the Criminal Code of the Republic of Colombia of 2000. 163 Art. 3(2)(c) of International Crimes (Tribunals) Act 1973 (Bangladesh). 164 Art. 382 of the Criminal Code of Costa Rica of 1998. 165 Art. 137 of the Criminal Code of Côte d'Ivoire of 1981. 166 Art. 79 of the Criminal Code of the Republic of Ecuador of 2014. 167 Art. 269 of the Criminal Code of the Federal Democratic Republic of Ethiopia of 2004. 168 Art. 99 of the Criminal Code of the Republic of Lithuania. 169 Art. 484 of the Criminal Code of the Republic of Nicaragua of 2007. 170 Art. 440 of the Criminal Code of the Republic of Panama of 2007. Interestingly, the Code simply lists it as one of the Crimes against the International Law of Human Rights (Delitos contra el Derecho Internacional de los Derechos Humanos) without specifying the term "genocide." 171 Art. 118 of the Criminal Code of the Republic of Poland of 1997. 172 Art. 264 of the Criminal Code of the Swiss Confederation of 1937. 173 Art. 143 of the Criminal Code of the Togolese Republic of 2015. 174 Art. 16 of the Law on Cooperation with the International Criminal Court in the Fight against Genocide, War Crimes and Crimes against Humanity of the Republic of Uruguay.

[160] Art. 319 of the Criminal Code of the Republic of Paraguay of 1997. 176 Art. 90 of the Criminal Code of the Republic of Estonia of 2001

Rome conference. such as the other inhumane acts and the gender-based persecution. thus, the process of diverging national definitions of core crimes might often be the result of legal socialization and the necessity to adapt international norms into domestic legal environment by considering cultural and constitutional arrangements.

In the similar vein it's important to recognize more legislative experience in dealing with core crimes by this way. Germany for instance included in its code of crimes against international law -which has been passed in 2002-not only ICC crimes but also crimes clearly established and defined by international humanitarian law and customary international law.[161] at the same frame several domestic laws have included war crimes that are not present in article 8 of Rome statues. For example, acts such as the devaluation of domestic currency, the unlawful issuance of money,

[161] The German code of crimes against international law contains many provisions in a different method .for instance the code has it its distinctive definition for crimes against humanity and war crimes .it also contains other criminal acts such as the crime of violation of duty of supervision and omission to report crime for more details see : https://www.gesetze-im-internet.de/englisch_vstgb/englisch_vstgb.html last visited 3-10 -2022

and the forced conversion to another nationality or religion, constitute war crimes in Bosnia and Herzegovina's new Criminal Code.[162] Furthermore, several states define as a war crime the act of inflicting starvation on civilians as a method of warfare in non-international armed conflicts.[163]

Finally, it should be noted also asserted that the state is in principle, free to criminalize whatever conduct it wishes to criminalize as long as it exercises territorial jurisdiction.

Apart from that surely the KRI -according to the constitutional bases and provisions explicitly has the right to enact the suitable legislation in order to deal with mass atrocities in situation of its happening in future, for doing so we believe the best way is depending on ICC provisions and elements of crimes as well as the rules of procedures in a special code with taking account the domestic needs and specific legal aspect of KRI.

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[162] Article 173 on criminal code of Bosnia and Herzegovina

[163] Article 10 of the law of implementation of the Rome statues of the ICC 2006.

3-2 Important pre-conditions

Public awareness through education is unarguably the first step in domesticating ICL, and this starts with emphasising the importance of putting an end to perpetrators committing serious international crimes with impunity. The public must be told about the crimes which men, women and children have been subjected to, so that the political desire to bring perpetrators to justice becomes strengthened. Academic training in ICL is also pertinent to ensuring that an appropriate understanding is being cultivated, also in order to create the necessary human capital to investigate, prosecute and punish perpetrators of core crimes.

When deliberating about how to implement ICL in the KRI, consultations must take place, so that numerous stakeholders can contribute to proposals about draft legislation and also the enforcement

process of the law.[164] For example, meetings should be scheduled during which the legislator should seek the views of stakeholders, particularly victims, as well as citizens and other stakeholders, such as the police and judges, about the legislative proposal to transpose ICL and this may also gather subsequent support for the domesticated ICL statute.[165] An inclusive participation approach should therefore be adopted, the consultation must be open and transparent, stakeholders must be consulted when their view still matters, and consultation processes must also be coherent.[166] It must be clear what the objective is of the consultation, who the target groups are who should be consulted, awareness should be raised through various communication methods, including through publication, there must be a time limit and after which participation can no longer be possible and participants should also receive feedback.[167]

[164] Europa, 'Chapter VII, Guidelines on Stakeholder Consultation', 67-97, 68 <https://ec.europa.eu/info/sites/default/files/better-regulation-guidelines-stakeholder-consultation.pdf> accessed 23 July 20022.
[165] Ibid.
[166] Ibid 69.
[167] Ibid 69-70.

Another significant pre-condition for investigating and prosecuting offenders of serious international crimes is to adequately address new challenges which arise for the police and other authorities. For instance, cases may not be reported by victims to the police, witnesses may be based in different countries, evidence may not be accessible due to the state where the crime occurred not being cooperative in assisting with any investigation, and without a strong commitment to rendering universal jurisdiction cases a priority, law enforcement personnel and courts may opt to neglect these cases.[168] Ideally, specialised departments should therefore be created which are tasked with the investigation and prosecution of international crimes and such departments require adequate resources, and staff must also possess the requisite knowledge and training.[169]

[168] Human Rights Watch (supra) 5.

[169] Policy Department for External Relations, 'Workshop, Universal jurisdiction and international crimes: Constraints and best practices', European Parliament, September 2018, 1-60, 11-12 <https://www.europarl.europa.eu/RegData/etudes/STUD/2018/603878/EXPO_STU(2018)603878_EN.pdf> accessed 20 July 2022.

Gender expertise is also crucial in order to investigate and prosecute perpetrators involved in gender-based and sexual crimes and to ensure that officers understand in a nuanced manner how gender-based and sexual crimes can be linked to premeditated violence and guidance can be obtained, for instance, from a policy paper published by the Office of the Prosecutor of the ICC which discusses gender-based and sexual crimes.[170] Also, as highlighted by the IHT process, lawyers, judges, and academics must be experts in ICL and for this purpose require specialised training, so that ICL is correctly domesticated in accordance with ICL standards.

Furthermore, investigators must secure evidence which can be obtained within the territory of the state, even when the perpetrators are unknown; and evidence must be shared with national courts or courts in other countries and international courts; and cases which may go against powerful states must also be investigated.[171] Not just evidence in respect of

[170] Ibid 12.
[171] Ibid 14.

previous crimes, but also potential future crimes must be collected.[172]

These units must also cooperate with international and regional organisations, as well as national agencies, particularly immigration authorities and other agencies in charge of anti-money laundering, counterterrorism, and migrant smuggling.[173] Bilateral agreements which provide for mutual legal assistance are also important.[174]

The legislator must also adopt practices and policies which aid victims, i.e., universal jurisdiction cases must benefit victims, and this necessitates that they are being heard and the legislator could consider the approach adopted by EU Directive 2012/29/EU on victims' rights.[175]

[172] Ibid 17.
[173] Ibid 12.
[174] Ibid 19.
[175] Ibid 13-14&16.

3-3 Legislative Reform Proposals

It is pertinent for Iraq to domesticate provisions contained in international treaties which define international crimes through the adoption of a law, which could, for instance, be labelled International Crimes Law. In other words, the domestic legal system should define what constitutes grave breaches which give rise to universal jurisdiction. For this purpose, the legislator should make particular recourse to Article 11, as well as Article 85(3)-(5) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977.[176] The crimes stipulated in the Rome Statute of the International Criminal Court 1998 (the Rome Statute), namely in Articles 5-8 bis must also be transposed by the domestic legal system. Additionally, war crimes as contained in further IHL conventions and which constitute customary international law must be

[176] J. Bankole Thompson, *Universal Jurisdiction: The Sierra Leone Profile* (TMC Asser Press, 2015) 123.

domesticated, in so far as existing domestic law has not already transposed these crimes.[177]

3-*3*-1 Crimes which should trigger universal jurisdiction

When deciding which international crimes should trigger universal jurisdiction, it is useful to consider the Dutch International Crimes Act 2003, which was enacted in order to ensure that the Netherlands fully transposes the Rome Statute following the Netherlands' accession in 2001.[178]

The Dutch law stipulates that the following crimes trigger universal jurisdiction, albeit it is up to the prosecutor to determine whether an investigation should be launched and there exists no duty to do so:[179] Genocide, including its incitement, conspiracy to

[177] Ibid 123-124.
[178] A. Guterres, Secretary-General of the United Nations, Permanent Mission of the Kingdom of the Netherlands to the United Nations, 13 May 2021, 1-3, 1 <https://www.un.org/en/ga/sixth/76/universal_jurisdiction/netherlands_e.pdf> accessed 19 July 2022.
[179] Open Society Justice Initiative, Universal Jurisdiction Law and Practice in the Netherlands, Briefing Paper, April 2019, 1-31, 4.

commit and attempted genocide[180]; crimes against humanity as defined in Article 7(1)(a)-(k) of the Rome Statute and as further clarified by the definitions in Article 7(2)(a)-(i) of the Rome Statute; war crimes, as defined in the 1949 Geneva Conventions, the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of an Armed Conflict 1999, and Article 8 of the Rome Convention, and any breaches of the customs and laws of war in respect of non-international and international armed conflicts; enforced disappearance in accordance with the International Convention for the Protection of All Persons from Enforced Disappearance 2007; as well as the crime of torture either as crime against humanity or as war crime in line with Article 7(2)(3) of the Rome Statute and the wider definition contained in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1985, Article 1.

When enacting new provisions which criminalise these offences, it must be ascertained whether there are

[180] Also see Article 6 of the Rome Statute.

any incongruencies between existing domestic definitions in respect of war crimes and international law definitions, especially pertaining to slavery, murder, rape, enforced prostitution and sexual slavery.[181]

3-*3*-2 Types of liability

Liability can be imposed on a perpetrator who either directly or indirectly is involved in attempting or perpetrating the crime, as well as on co-perpetrators who closely collaborate in a conscious manner with other co-perpetrators, and also on accessories and instigators.[182]

Furthermore, the Iraqi legislator should also impose liability on the basis of the superior or command responsibility doctrine in accordance with the Rome Statute and this necessitates that available domestic defences are aligned with the way defences to international crimes are framed by international

[181] Bankole Thompson (supra) 124.
[182] Open Society Justice Initiative (supra) 6-7.

law.[183] As explicated in the *High Command* case,[184] *"under basic principles of command authority and responsibility, an officer who merely stands by while his subordinates execute a criminal order of his superiors which he knows is criminal violates a moral obligation under international law. By doing nothing he cannot wash his hands of international* responsibility.*"*[185] This approach has also influenced Article 86(2) of Protocol I to the Geneva Conventions 1949,[186] which states that

*"[t]*he *fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and*

[183] Bankole Thompson (supra) 124.
[184] *United States v Wilhelm von Leeb et al., Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, Vol. XI* (US Govt. Printing Office, Washington, 1950).
[185] Ibid at 1230 &1303.
[186] J. A. Williamson, 'Some considerations on command responsibility and criminal liability' (2008) *International Review of the Red Cross*, 90(870), 303-317, 305.

if they did not take all feasible measures within their power to prevent or repress the breach."

Williamson further observes that the command/superior responsibility doctrine amounts to customary international law and any state must therefore abide by this principle by pursuing criminal prosecution against superiors and commanders who have failed to punish or stop subordinates from perpetrating international humanitarian breaches.[187] However, the requisite jurisprudence must also be developed in order to address thorny issues, particularly to what extent a commander can be rendered responsible for the acts of subordinates during a battle and in which cases subordinates should not follow orders.[188]

In relation to command responsibility, it is also noteworthy that countries have transposed this doctrine in different ways, for instance, Canada and Germany deem superior/command responsibility a distinct crime, whereas the UK, Spain, Finland and the

[187] Ibid 317.
[188] Ibid.

Netherlands consider it as indirect participation.[189] In essence, it is debated whether command/superior responsibility can be viewed as a separate crime as a commander/superior can be convicted despite him/her being unaware of the crimes of his/her subordinates on the basis that the *mens rea* is premised on *"should have known."*[190] In contrast, others argue that command/superior responsibility is a type of accessorial liability and that the other approach imposes strict liability on commanders/superiors and that this is wrong and that a distinction should be made because an accessory may have a different *mens rea* than a perpetrator.[191]

Under Dutch law, liability for serious international crimes can also be imposed on legal

[189] T. Einarsen and J. Rikhof, *A Theory of Punishable Participation in Universal Crimes* (Torkel Opsahl Academic EPublisher, 2018) 500.

[190] H. van der Wilt, "Justice in Extreme Cases Symposium: Some Observations on the 'Genius of Command Responsibility', As Understood by Darryl Robinson", Opinio Juris, 1 April 2021 <http://opiniojuris.org/2021/04/01/justice-in-extreme-cases-symposium-some-observations-on-the-genius-of-command-responsibility-as-understood-by-darryl-robinson/> accessed 19 July 2022.

[191] Ibid.

entities.[192] However, there exists challenges in holding corporations criminally liable[193], including because corporations are not subjects of international law and the ICC does not possess jurisdiction in respect of corporations and only officers of corporations can be pursued.[194] Most countries also only impose civil liability on companies based on tort law, such as the United States' Alien Tort Statute.[195] The legislator must thus consider whether it wants to go further than current international law and impose criminal liability and if so, which theories it may employ to form the basis of a claim, such as the identification rule, as adopted by the UK in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co.*[196]

[192] Article 51 of the Dutch Criminal Code; Open Society Justice Initiative (supra) 8-9.
[193] D. French et al, *Mayson, French & Ryan on Company Law* (30th ed, Oxford University Press, 2013) 648.
[194] P. Lambridis, 'Corporate Accountability: Prosecuting Corporations for the Commission of International Crimes of Atrocity' (2021) *International Law and Politics*, 53, 144-151, 144-145.
[195] Ibid.
[196] (1915) AC 705, at 713; C. N. Nana, *Revisiting the Question of Imputation in Corporate Criminal Law* (Cambridge Scholars Publishing, 2010) 74.

3-*3*-3 Enacting Universal Jurisdiction Conditions

Numerous countries have enacted provisions which provide for universal jurisdiction and the following section spells out provisions which the KRI could enact in order to domesticate ICL and which are inspired by the laws enacted by different countries.

Universal jurisdiction at its core is when courts exercise extraterritorial jurisdiction, despite existing no robust link to the crime and this constitutes a way to end impunity when serious human rights violations are perpetrated and helps victims to obtain a remedy for their harm suffered.[197] The concept is pertinent "to stimulate, to collect evidence, and...to exercise political pressure."[198]

However, the precise contours of universal jurisdiction are unclear, including whether universal jurisdiction amounts to customary international law.[199] However, when states evoke universal jurisdiction in respect of the core crimes, namely crimes against

[197] Policy Department for External Relations (supra) 7.
[198] Ibid 18.
[199] Ibid 8.

humanity, war crimes and genocide, they become "agent[s] of the international community" and thereby facilitate "international criminal justice."[200] Universal jurisdiction can be construed narrowly on the basis of a "no safe haven approach" or more broadly if viewed through the lens of a "global enforcer approach", as Belgium had done initially before repealing its far-reaching universal jurisdiction law.[201]

Pursuant to Belgium's initial law passed in 1993, Belgium courts were granted extraterritorial jurisdiction to charge any suspect of crimes against humanity, genocide and war crimes, irrespective of whether there existed a connection to Belgium and the crime, to the victim or the perpetrator.[202] The Belgium law was the most comprehensive approach adopted by a state and this, coupled with a different Belgium law which allowed any person to pursue criminal cases,

[200] Ibid 9.

[201] Ibid; Human Rights Watch, "Belgium: Universal Jurisdiction Law Repealed", 1 August 2003 <https://www.hrw.org/news/2003/08/02/belgium-universal-jurisdiction-law-repealed> accessed 21 July 2022.

[202] M. Halberstam, 'Belgium's Universal Jurisdiction Law: Vindication of International Justice or Pursuit of Politics?' (2003) *Cardozo Law Review*, 25(1) 247-266, 247.

resulted in several cases being initiated, including problematic cases, for instance, against previous US Secretary of State Colin Powell, President George H. W. Bush, and Vice President Dick Cheney for their involvement in the Guld War in 1991.[203]

However, in 2003 this law was repealed and as a result the jurisdiction of Belgium courts has been curtailed to cases where the accused has Belgium nationality or his/her main residence in the country; the victim has resided in Belgium for a minimum of three years from when the crimes occurred, or the victim is Belgium.[204] It also falls on the state prosecutor to determine whether a complaint should proceed, except in cases where the accused mainly resides in Belgium or is Belgium.[205] Accordingly, a much more restrictive approach towards universal jurisdiction has been adopted.

[203] Ibid 247-248.
[204] Human Rights Watch, "Belgium: Universal Jurisdiction Law Repealed", 1 August 2003 <https://www.hrw.org/news/2003/08/02/belgium-universal-jurisdiction-law-repealed> accessed 21 July 2022.
[205] Ibid.

A slightly wider approach has been adopted by the Netherlands, namely the Dutch International Crimes Act 2003 equips courts with universal jurisdiction in respect of three circumstances,[206] namely firstly when any of the stipulated crimes mentioned in the law are committed outside the territory of the Netherlands, but the suspected perpetrator is present in the country; or secondly if a Dutch national has been a victim of the crime, despite it having taken place not within the territory of the Netherlands; or thirdly a Dutch national perpetrates the said crimes not within the territory of the Netherlands.

The Kurdish legislator could enact similar provisions which confer universal jurisdiction, despite the crimes having taken place outside the country, so long as the accused is present in Iraq. Yet universal jurisdiction could only be evoked in cases where the suspect stays in the country while an investigation is conducted, but if s/he leaves then the jurisdiction would cease, and as a result some cases may be

[206] Article 2(1)(a)-(c) of the International Crimes Act 2003.

dismissed.[207] However, the law should also provide that a suspect who leaves after a prosecution has been commenced can still be charged *in absentia*, though with caveats, and in any event typically an accused will be held in custody from the moment s/he is charged.[208]

Furthermore, the legislator should not adopt the double criminality principle pursuant to which it would be required that the state where the offence took place or where the suspect comes from criminalises the act.[209] Instead, it should suffice that the accused has perpetrated the international crime.[210]

3-3-3-1 The Power of the Prosecutor

The department in charge of prosecuting serious international crimes may need to be afforded discretion when determining whether an accused should be prosecuted after perusing the evidence which the police gather during an investigation.[211] Within this context, it is useful to provide guidance to the office of

[207] Open Society Justice Initiative (supra) 11.
[208] Ibid 11-12.
[209] Ibid 12.
[210] Ibid.
[211] Ibid.

prosecution, for instance, that prosecutors should consider how successful the case may be, whether it is possible to gather evidence if the police visit the country where the alleged crime took place, whether documentary evidence is available and can be obtained; and whether witnesses are available and in which location, i.e., where it is overly cumbersome to gather evidence a prosecutor may not start criminal proceedings.[212]

The Dutch law also confers the power on the Justice Minister to request that a crime is prosecuted or not to bring a prosecution and when the prosecutor is requested not to prosecute the parliament must be instantly notified.[213] Yet affording such political power may be problematic and ideally, it should be ensured that the separation of powers doctrine is strengthened, i.e., political influence should be removed from the judicial process.[214]

[212] Ibid.
[213] Ibid 13-14.
[214] Bankole Thompson (supra) 125.

Also, the Kurdish legislator should allow a directly interested person, including a legal entity, to challenge the prosecutor's decision to proceed or dismiss a case or not launch an investigation.[215]

3-3-3-2 Temporal Jurisdiction

The domestic law must respect the principle of non-retroactivity, which means that only international crimes perpetrated after the Kurdish law will enter into force can be prosecuted.[216] Equally, the ICC Statute, Article 11 stipulates that the ICC only has jurisdiction from 1st July 2002 - the date the ICC Statute became effective; or when a state party accedes to the ICC Statute at a later date, it becomes effective 60 days after the notification of the accession[217]; or when a state has not acceded, it can nonetheless declare that the ICC has jurisdiction and jurisdiction is thereby conferred from this date.[218] The Dutch law also respects the principle

[215] Ibid.
[216] Bankole Thompson (supra) 124.
[217] Article 126(2) of the ICC Statute.
[218] Article 11(2) and Article 12(3) of the ICC Statute.

of retroactivity,[219] but when an international resolution or treaty provision prohibits a crime, the principle may be set aside.[220]

Moreover, the Kurdish legislator must ascertain whether genocide, crimes against humanity, war crimes, torture and enforced disappearance are already deemed criminal offences under Iraqi law and these crimes could be prosecuted from the respective dates these acts were rendered illegal.

3-3-3-3 Limitation Periods

Furthermore, the Convention on the Non-Applicability of Statutory Limitations for War Crimes and Crimes Against Humanity 1968, as well as Rome Statute, Article 29 provide that there is no limitation period which can be evoked in relation to serious international crimes, and domestic limitation periods

[219] Article 1(1) of the Dutch International Crimes Act 2003; Article 16 of the Dutch Constitution.
[220] Article 94 of the Dutch Constitution; Open Society Justice Initiative (supra) 9.

which may exist must therefore be brought in line.[221] Although the Dutch law provides a limitation period when claims are brought on the basis of command responsibility and for this has set the limitation period at 12 years.[222] The Kurdish legislator could also consider removing liability for commanders/superiors after a certain number of years, particularly in light of the concerns discussed above that an overly strict concept of command responsibility imposes strict liability.

3-3-3-4 Other Auxiliary Legal Considerations

The law must clearly state that immunity cannot be pleaded in respect of serious international crimes by heads of state or other government officials.[223] When it appears that the home country of the accused is better placed to bring a prosecution, the domestic court should apply the principle of subsidiarity and allow the accused to be extradited, in so far as fair trial

[221] Bankole Thompson (supra) 124.
[222] Article 70(1) of the Dutch International Crimes Act 2003; Open Society Justice Initiative (supra) 11.
[223] Bankole Thompson (supra) 124.

guarantees will also be afforded to the accused.[224] In essence, while universal jurisdiction is premised on disregarding the territorial jurisdiction and asserting extraterritorial jurisdiction, this should only be done in a complementary manner and when the state where the crime has taken place investigates in good faith and prosecutes an accused, it is best to defer to the other state.[225]

The domestic law must also confer suitable statutory rights for victims when civil and criminal proceedings are being pursued.[226]

Steps must also be taken to facilitate cooperation in criminal matters, including in respect of extradition; immigrants must be screened, so that perpetrators can be identified more easily; and as mentioned above departments must be formed which are specifically tasked with investigating serious international crimes and with prosecuting international crimes in a way

[224] Open Society Justice Initiative (supra) 14.
[225] Policy Department for External Relations (supra) 30.
[226] Bankole Thompson (supra) 124.

which accords with the Rome Statute, Article 1 concept of complementarity.[227]

Moreover, the judiciary must pay close attention to the way in which international norms are being interpreted, so that the national counterparts of the international norms remain largely identical, despite being adjudicated by domestic courts.[228] In other words, there should not be broad national variations in respect of domesticated international crimes and related concepts and divergence may be minimised by national courts taking into account international decisions which deal with the matter, as opposed to primarily focusing on domestic law.[229] That is not to say that the domestic judiciary should not take into account diverse perspectives in order to reach decisions which accord with the values of the local

[227] Ibid 125.
[228] A. Nollkaemper, 'The Power of Secondary Rules to Connect the International and National Legal Orders', in in T. Broude and Y. Shany (eds), Multi-Sourced Equivalent Norms in International Law (Hart Publishing, 2011) 46.
[229] Ibid 47.

population, albeit within the confines of international law.[230]

[230] J. I. Turner, 'Nationalizing International Criminal Law' (2005) *Stanford Journal of International Law*, 41(1), 1-51,1.

4 – Concluding Observations and Recommendations

The study has discussed the Iraqi penal system which has particularly brought to the fore the need to domesticate ICL in a way which overcomes issues which previously arose when the IHT was established. This is particularly pressing due to the ISIS crimes which have been committed in Iraq and neighbouring Syria and to thus combat future commission of serious international crimes in Iraq and the wider region. Currently, ISIS crimes are being prosecuted either by evoking the Iraqi penal code and the therein spelled out ordinary crimes or the Anti-Terror Law of 2005. However, as has been discussed the objectives of ICL are different to ordinary criminal law, while application of the Anti-Terror Law is also fraught with difficulties, including due to its lack of specificity and inappropriateness when core crimes are being perpetrated.

The creation of the UNITAD mechanism is a useful innovation through which the international

community can assist the Iraqi judiciary. Yet the interplay between UNITAD investigations and domestic prosecutions of core crimes must be further clarified, particularly when submission of UNITAD evidence may result in alleged perpetrators being convicted of the death penalty.

There exists a duty to prosecute core crimes (ADAJ) by way of treaty law and by virtue of customary international law, so that the Iraqi government is not only bound to prosecute core crimes due to the Conventions it has ratified, namely the Genocide Convention and the Geneva Conventions, but also since customary international law mandates this.

However, the criticism surrounding the IHT highlights that the transposition of ICL into domestic law can pose formidable challenges and it is for this reason pertinent that important pre-conditions are addressed, so that the domestication of ICL does not only result in the passing of a law but also in the effective enforcement of it. Various suggestions were made, for example, that the public must be educated

about the crimes which have been perpetrated, broad stakeholder consultations must take place when a draft legislation which transposes core crimes is being prepared, and the police must be trained in investigating core crimes and have the necessary resources and ideally a specialized department is needed to deal with investigating core crimes. Judges must also receive adequate training.

Most significantly Iraq and KRI must pass a statute to achieve full compliance with their duty to prosecute core crimes. This law must spell out which crimes should trigger universal jurisdiction. Types of liability must be clarified, particularly the concept of command/superior responsibility and the legislator must determine whether this concept should be broadly defined, so that strict liability is imposed or whether a restrictive approach is preferable based on accessorial liability. Additionally, the legislator must scrutinize whether it wants to also impose criminal liability on legal entities which perpetrate or assist in the commission of core crimes or whether civil liability based on tort law should be imposed on corporations.

The legislator must also succinctly stipulate the conditions which give rise to universal jurisdiction, and this firstly requires determining whether a broad or narrow approach should be adopted. Furthermore, when drafting a domesticating statute, it must be statutorily stipulated which power the prosecutor possesses, temporal jurisdiction must be honoured, and it should be confirmed that there exists no time limitation for the prosecution of core crimes, except for possibly being an accessory. Additionally, the law should address other auxiliary matters, including that immunity does not provide a defines. Victim rights must be statutorily described and within this context, the right to truth and the right to recharacterization of offences may provide an innovative approach towards combating a culture of impunity and for realizing the goals of ICL. It must also be explored how international cooperation can be facilitated, so that investigations and prosecutions are facilitated.