

Prosecuting ISIS under International Criminal Law



Gloria Kirovska
ANR: 505418
Bachelor Thesis
Supervisor: dr. L.D. Yanev
BA Liberal Arts and Sciences – Major Law in Europe
Tilburg University

Abstract

Research question: What possible international venues are there for prosecuting ISIS for the crime of genocide committed against the Yazidi religious and ethnic minority?

This thesis focuses on the prosecution of ISIS members under International Criminal Law. The central question of this research is: “What possible international venues are there for prosecuting ISIS for the crime of genocide committed against the Yazidi religious and ethnic minority?” Two possible international venues for prosecuting ISIS for the crime of genocide committed against the Yazidis will be discussed: before the International Criminal Court (ICC) and before an Ad hoc or Hybrid International Criminal Tribunal. In order to explore the different possibilities of prosecuting ISIS’ atrocities, the identity of ISIS and its crimes against the Yazidis will first be explained. An elaborated explanation on the crime of genocide and the analysis of ISIS’s crimes against the Yazidis will then be provided. The prosecution of ISIS’s international crime of genocide before the International Criminal Court (ICC) will also be explored. An explanation of ICC’s theoretical background will first be given, after which an overview of the jurisdiction of the ICC and the limitations and advantages of prosecuting ISIS’ members before the ICC will be provided. A brief history of United Nation’s international criminal tribunals will be given, focusing on the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), after which the advantages and implications of prosecuting ISIS’s members before an ad hoc or a hybrid international criminal tribunal will be presented. In the conclusion, an overview of the different legal alternatives of prosecuting ISIS members for committing the crime of genocide against the Yazidis will be given by stating the limitations and advantages of each option.

Table of contents

Introduction.....	3
Chapter 1: The Islamic State of Iraq and Syria (ISIS).....	9
1.1 Historical Background.....	9
1.2 Leadership.....	11
1.3 Crimes against the Yazidis.....	19
Chapter 2: Genocide and the crimes against the Yazidis.....	21
2.1 What is genocide?.....	21
2.2 Genocide against the Yazidis.....	28
Chapter 3: Prosecution before the International Criminal Court (ICC).....	35
3.1 Theoretical background on the nature and establishment of the ICC.....	35
3.2 The ICC and the scope of its material jurisdiction.....	36
3.3 Referrals, analyses and investigations.....	37
3.4 Prosecution before the ICC and Jurisdictional Obstacles.....	41
Chapter 4: Prosecution before an International Criminal Tribunal.....	46
4.1 History of United Nations' International Criminal Tribunals.....	46
4.2 Legal basis cited by ICTY and ICTR.....	50
4.3 International Criminal Tribunal for Iraq and Syria.....	51
Chapter 5: Conclusion.....	57
Bibliography.....	61

Chapter 1 Introduction

"There can be no peace without justice, no justice without law and no meaningful law without a Court to decide what is just and lawful under any given circumstance."

-- Benjamin B. Ferencz, a former Nürnberg prosecutor

The rise of the so called Islamic State of Iraq and Syria (ISIS) has caused an unprecedented challenge to international criminal law.¹ In 2014, the militant group, rapidly took control over large amount of the territory of Iraq and Syria² by using sustained and extreme violence. The UN Security Council (UNSC) has regarded the scale and gravity of ISIS's crimes to be a threat to international peace and security.³ ISIS was created in October 2006, as a splinter group of Al Qaeda. The territorial gains in Iraq and Syria were followed by the establishment of a self-proclaimed caliphate. Abu Bakr al-Baghdadi was proclaimed to be the Caliph.⁴ Driven by its goal to create this Islamic Caliphate, ISIS has conducted mass atrocities such as beheadings, mass executions, slaughtering, burning people alive, stonings, abductions, amputations and systematic killings.⁵ ISIS is responsible for mass executions and rapes of various ethnic and religious minorities, including Shias, Christians, and the Yazidis in Iraq.⁶ ISIS conducts an indiscriminate warfare, meaning that they are targeting all non-believers from Iraqi Christians to Turkmen, Shiite Muslims and fellow Sunni Muslims.⁷ After capturing Mosul in 2014, ISIS attacked several towns in the Sinjar area, which is populated by a Kurdish minority known as the Yazidis. During these attacks, ISIS killed thousands of Yazidi men and captured hundreds of Yazidi women and children as slaves. Around 30,000 Yazidis managed to escape and took refuge on Mount Sinjar, after which ISIS cut off their means of escape from the mountain. The Yazidis did not have any access to water and food⁸, as result from which, many died of

¹ Kenny, C. (2017). Prosecuting Crimes of International Concern: Islamic State at the ICC? *Utrecht Journal of International and European Law*, 33(84), 120-145.

²Scharf, M. (2016). How the War Against ISIS Changed International Law. *Journal of International Law*, 48(1), 15-63.

³ United Nations. (2015). *Security Council 'Unequivocally' Condemns ISIL Terrorist Attacks, Unanimously Adopting Text that Determines Extremist Group Poses 'Unprecedented' Threat*. New York: Meetings Coverage & Press Releases.

⁴ Quivooij, R. (2015). *The Islamic State*. Singapore: Nanyang Technological University.

⁵Alexander, Y., & Alexander, D. (2015). *The Islamic State: Combating The Caliphate Without Borders*. London: Lexington Books.

⁶ Esfandiary, D., & Tabatabai, A. (2016). Iran's ISIS policy. *International Affairs*, 91(1), 1-15.

⁷ Lekas, A. (2015). #ISIS: The Largest Threat to World Peace Trending Now. *Emory International Law Review*, 30(1), 313-316.

⁸Scharf, M. (2016). How the War Against ISIS Changed International Law. *Journal of International Law*, 48(1), 15-63.

starvation.⁹ This led to the first U.S. airstrikes against ISIS in attempt to save the lives of the Yazidis people trapped on Mount Sinjar.¹⁰ The crimes committed by ISIS against the Yazidis include ethnic cleansing, mass executions, destruction of temples, forced conversions into Islam, and abduction and enslavement of thousands of Yazidis. Many of the enslaved women and girls suffer from systematic sexual violence committed by ISIS members.¹¹ According to a report of the Independent International Commission of Inquiry (COI) on the Syrian Arab Republic, the crimes committed by ISIS against the Yazidi minority amount to genocide.¹² The Human Rights Watch has also stated that ISIS's abuses against Yazidi women and girls, including abducting them and forcing them to convert to Islam and forcibly marrying them, can be categorized as a genocide against this community.¹³

The Yazidis are one of the oldest ethnic communities of Mesopotamia, who mainly live in northern Iraq. They speak predominantly the Kurdish language, especially the Kurmanji dialect.¹⁴ The Yazidis are one of the world's most endangered religious minorities. They initially occupied a wide area stretching across eastern Turkey, northern Syria, northern Iraq, and western Iran. Nowadays, of these places, only Iraq still has many Yazidi inhabitants, numbering hundreds of thousands. This community mostly comes from the areas of Sheikhan and Sinjar. The Sheikhan consists of a number of villages and towns to the northeast of Mosul. Sinjar is a mountain situated in northwest of the country, close to the border with Syria. These areas seemed stable, before ISIS's attack on Mount Sinjar during which around 350,000 Yazidis were driven into camps for internally displaced persons in the Kurdish region. The Yazidis are targeted by ISIS because of their non-Abrahamic religion. The religion of this community contains elements of Judaism, Christianity, and Islam.¹⁵ However, the beliefs and traditions of Yazidism are based on Zoroastrianism, Shamanism and Islam.¹⁶ Zoroastrianism is one of the oldest living religions in the world. It has its origins in Persia, which is present-day Iran and it exists from the second

⁹ Luongo, M. (2014). *Fighting Back With Faith: Inside the Yazidis' Iraqi Temple*. New York: The Daily Beast Company LLC.

¹⁰ Scharf, M. (2016). How the War Against ISIS Changed International Law. *Journal of International Law*, 48(1), 15-63.

¹¹ Porkka, J. (2017). *The Islamic State and the Case of Yazidis*. Uppsala: Uppsala University.

¹² Wheeler, S. (2016). *UN Panel Reports on ISIS Crimes on Yazidis*. New York: Human Rights Watch.

¹³ Wheeler, S. (2016). *UN Panel Reports on ISIS Crimes on Yazidis*. New York: Human Rights Watch.

¹⁴ Tekin, A. *et al.* (2016). Prevalence and gender differences in symptomatology of posttraumatic stress disorder and depression among Iraqi Yazidis displaced into Turkey. *European Journal of Psychotraumatology*, 7(1), 1-8.

¹⁵ Allison, C. (2017). *The Yazidis*. Oxford: Oxford University Press.

¹⁶ Basci, E. (2016). Yazidis: A community scattered in between geographies and its current immigration experience. *International Journal of Humanities and Cultural Studies (IJHCS) ISSN 2356-5926*, 3(2), 341-342.

millennium BCE.¹⁷ Shamanism is defined as “a religion practiced by indigenous peoples of far northern Europe and Siberia that is characterized by belief in an unseen world of gods, demons, and ancestral spirits responsive only to the shamans.”¹⁸ The Yazidis are often considered to be an ethnic-religious group.¹⁹ There are reasons to believe that the Yazidis are ethnically Kurdish, Arab, or are of Armenian origin. However, the Secretary-General of Yazidi and Progress Party, Jamil Jirido Qasim, claims that the Yazidis are a unique nation that should not be labelled as an ethnic minority.²⁰ Most of the Yazidis consider themselves to be ethnically Kurdish, but they have a separate Yazidi religion. Their religion has a dualistic character. The Yazidis believe in a passive Creator God and the Peacock Angel, which according to them, is an executive organ of divine will. The Yazidis believe that they are children of Adam but not of Eva, which makes them different than other people.²¹ ISIS perceives this religious community as “devil-worshippers”²², since the archangel in Yazidism, Tawûsê Melek (the Peacock Angel), is identified by some religions as Satan and depicted as the angel of evil.²³ Muslims consider the Yazidis as unbelievers and ISIS claims that it is therefore not forbidden to kill them. Yazidism is a closed religion in which conversions are forbidden.²⁴ The religious relationships within this community is determined by birth. It is therefore also forbidden for Yazidi women to marry to non-Yazidi men.²⁵ Their religion is transmitted verbally²⁶ from generation to generation through oral stories. Differently than most religions, the Yazidis do not have an official Holy Book to which they can refer. They do have two sacred books: the Kitab el-Jelwa, or the Book of Revelation, and the Meshef Resh, or The Black Book. They use these books when they need an advice for religious meaning. The Yazidis claim that they have suffered 73 genocides or attempts of annihilation already, which all have included religious violence. Crimes of genocide against this community, has been committed since the rule under the Ottoman Empire. Yazidis are traditionally cultivators and herdsmen.²⁷

¹⁷ Lopez, S. et al. (2017). *The genetic legacy of Zoroastrianism in Iran and India: Insights into population structure, gene flow and selection*. doi:<https://doi.org/10.1101/128272>

¹⁸ Merriam Webster Dictionary. (2017). *Definition of shamanism*.

¹⁹ Porkka, J. (2017). *The Islamic State and the Case of Yazidis*. Uppsala:Uppsala University.

²⁰ Basci, E. (2016). Yazidis: A community scattered in between geographies and its current immigration experience. *International Journal of Humanities and Cultural Studies (IJHCS) ISSN 2356-5926*, 3(2), 341-342.

²¹ Porkka, J. (2017). *The Islamic State and the Case of Yazidis*. Uppsala:Uppsala University.

²² Allison, C. (2017). *The Yazidis*. Oxford: Oxford University Press.

²³ Basci, E. (2016). Yazidis: A community scattered in between geographies and its current immigration experience. *International Journal of Humanities and Cultural Studies (IJHCS) ISSN 2356-5926*, 3(2), 341-342.

²⁴ Porkka, J. (2017). *The Islamic State and the Case of Yazidis*. Uppsala:Uppsala University.

²⁵ Allison, C. (2017). *The Yazidis*. Oxford: Oxford University Press.

²⁶ Tekin, A. et al. (2016). Prevalence and gender differences in symptomatology of posttraumatic stress disorder and depression among Iraqi Yazidis displaced into Turkey. *European Journal of Psychotraumatology*, 7(1), 1-8.

²⁷ Porkka, J. (2017). *The Islamic State and the Case of Yazidis*. Uppsala:Uppsala University.

According to article 1 of the Genocide Convention, the international community has a responsibility to prevent and to punish genocide. Article 4 of the Genocide Convention states that “*persons committing genocide or any of the other acts enumerated in Article 3 shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.*”²⁸ The responsibility to prevent and to stop genocide lies first and foremost with the State on the territory of which, the crime of genocide is committed. However, the sovereignty of States does not halt the duty of the international community to act when the crime of genocide is committed.²⁹ Throughout history, from the Nuremberg trials to the establishment of the International Criminal Court (ICC), the international legal system has increasingly recognized individual criminal liability for waging wars of aggression, crimes against humanity, war crimes and genocide. This progress of international law indicates that there is a commitment to protecting human rights over national sovereignty. Moreover, promoting respect for human rights is a core purpose of the United Nations, which is stated in the preamble of the United Nations Charter. The establishment of the International Criminal Court (ICC) made it possible to bring perpetrators of international crimes to justice.³⁰ Despite the duty of the international community to stop genocide and the continuous commission of mass atrocities by ISIS, no form of accountability has been established yet in order to address the widespread mass abuses committed by this organization.³¹ The Yazidi community continues to be targeted by ISIS. Thousands of Yazidis have been killed, many are missing or are still held captive.³² The international community has focused on defeating ISIS through military intervention, but the question of how ISIS members should be held accountable for their transgressions remains unanswered.³³ Prosecuting ISIS under international criminal law poses various challenges, which will be discussed in this thesis.

Below this research will focus on the crimes committed by ISIS against the Yazidi religious and ethnic minority and on the possible venues for prosecuting ISIS members for these crimes under international criminal law. Although, ISIS is responsible for various international crimes, this

²⁸United Nations. (1948). *Convention on the Prevention and Punishment of the Crime of Genocide*.

²⁹ United Nations. (2010). *Prevention of Genocide*. New York: Office of the Special Adviser on the Prevention of Genocide.

³⁰ Lekas, A. (2015). #ISIS: The Largest Threat to World Peace Trending Now. *Emory International Law Review*, 30(1), 313-316.

³¹ Lattimer, M., Mojtahedi, S., & Anna Tucker, L. (2015). *A Step towards Justice: Current accountability options for crimes under international law committed in Syria*. London: Ceasefire Centre for Civilian Rights.

³²Nicolaus, P., & Yuce, S. (2017). Sex-Slavery: One Aspect of the Yezidi Genocide. *Iran and the Caucasus*, 21(2), 196-229.

³³ Ryngaert, C. M. J., & Hora Siccama, D. W. (2016). *Justice for Sexual Crimes Committed by IS: Exploring Accountability and Compliance Mechanisms*. Utrecht: Utrecht University.

thesis will focus on the international crime of genocide, due to the complexity of its prosecution. The research question of this thesis is as follows: “*What are the possible international venues to prosecute ISIS’s crime of genocide committed against the Yazidi religious and ethnic minority?*” This question will be answered by investigating whether the crimes committed by ISIS against the Yazidis amount to genocide and once these crimes have been categorized as genocide, two different possibilities of prosecuting ISIS for the crime of genocide will be discussed. The two possible venues of prosecution which will be explained in this thesis are before the International Criminal Court (ICC) and before an ad hoc or hybrid International Criminal Tribunal. The implications and advantages of each ground of prosecution will be discussed and an overview of all the different venues will be given at the end. Although the domestic courts of Syria and Iraq also provide a possible venue for prosecuting ISIS’s crimes, this research will not examine this option due to linguistic barriers to investigate the applicable national substantive and procedural law. The purpose of this research is also to raise awareness of the importance of prosecuting ISIS for its atrocities against the Yazidis and to indicate the complexity of the situation.

This qualitative research will be conducted by analysis of primary and secondary sources. Primary sources which will be used in this research include international legal acts such as the UN Charter³⁴, the Rome Statute³⁵, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide³⁶, and the Statutes of the International Criminal Tribunal for Rwanda (ICTR)³⁷ and the International Criminal Tribunal for the former Yugoslavia (ICTY).³⁸ Other primary sources which will be used are various reports published by, for example, the United Nations (UN), the United Nations Security Council (UNSC), the UN International Law Commission (ILC), the International Criminal Court, Human Rights Watch and the Human Rights Council. Case law of the International Criminal Court (ICC), ICTR and ICTY will also be used. The secondary sources which will be used in this thesis are scholarly works such as books, and journal articles and blog posts by renowned scholars, such as the Justice in Conflict blog.

This thesis is organized into 5 chapters. Chapter 1 of this research will shortly look into the historical development of ISIS and the nature of its organization. An overview of ISIS’s leadership, focusing on their nationality and methods of working will also be given. Lastly, the crimes committed by ISIS against the Yazidis will be elaborated on. Some of these crimes include murder, torture, rape and sexual slavery. Chapter 2 will give an explanation on what the crime of genocide is according to various international conventions and statutes. The crime of

³⁴ United Nations. (1945). *Charter of the United Nations*

³⁵ International Criminal Court. (1998). *Rome Statute of the International Criminal Court*

³⁶ United Nations. (1948). *Convention on the Prevention and Punishment of the Crime of Genocide*

³⁷ United Nations. (1994). *Statute of the International Tribunal for Rwanda*.

³⁸ United Nations. (2009). *Updated Statute of the International Criminal Tribunal for the Former Yugoslavia*.

genocide will be explained by stating the requirements under which a crime can be defined as a crime of genocide as stated in Article 6 of the ICC Statute and Article 2 of the Genocide Convention. The crime of genocide requires a material (actus reus) and a mental (mens rea) element. Before an analysis is made on the possibilities of prosecuting ISIS's crimes against the Yazidis, this thesis will first give a motivated reasoning to why these crimes amount to the crime of genocide. Once it has been proven that ISIS's crimes against the Yazidi community indeed amount to the crime of genocide the different international venues of prosecuting ISIS members for the crime of genocide will be explained. Chapter 3 will discuss the possibility of prosecuting ISIS' international crime of genocide against the Yazidis before the International Criminal Court (ICC), by first providing some theoretical background on the nature and establishment of the ICC. ICC's scope of jurisdiction will then be given. After introducing the International Criminal Court (ICC), further research on the limitations of prosecuting ISIS' crime of genocide before the ICC and the possible impact of such prosecution will be provided. Problems which the ICC faces in prosecuting ISIS's members are that Syria and Iraq are not State parties to the Rome Statute, which limits the possibility of the prosecutor to open an investigation under Article 12(2) (a) of the Rome Statute. Another issue caused by the composition of the Security Council is its veto right. Chapter 3 will also look into the possibility of prosecuting ISIS fighters before an Ad hoc or a Hybrid International Criminal Tribunal by first providing a brief history of United Nations International Criminal Tribunals. An ad hoc tribunal can be established by the Security Council pursuant to Chapter VII of the United Nations Charter, while a hybrid tribunal is usually created through agreements between Member States and the UN. This chapter will further explain how the ICTY and ICTR can serve as an example for establishing an ad hoc tribunal in order to prosecute ISIS's crime of genocide. The Statutes of these tribunals defined the crimes of genocide consistently with the definitions in the Rome Statute. In order to prosecute ISIS's crime of genocide, the Security Council should define this crime in the same way in a statute that establishes a tribunal to prosecute the leaders of ISIS. Furthermore, an analysis on the advantages and disadvantages of prosecuting ISIS's members before an ad hoc and a hybrid International Criminal Tribunal for Iraq and Syria will be offered. In chapter 5 a conclusion will be given in which a short overview of the main points of chapter 1 until 4 will be provided and the research question will be answered.

Chapter 1. The Islamic State of Iraq and Syria (ISIS)

1.1. Historical Background

The Islamic State of Iraq and Syria (ISIS or ISIL), also known as the Islamic State (IS), is a Salafi-Jihadist militant organization in Syria and Iraq. The goal of this organization is to establish an Islamic Caliphate based on its extreme interpretation of Islam and Shariah.³⁹

ISIS has its roots in the early 2000s, when al-Qaida in Iraq (AQI), was founded by the Jordanian extremist Abu Musab al-Zarqawi.⁴⁰ The group was first known as Jama'at al-Tawhid wa'al-Jihad (JTJ). This organization was composed of many foreign fighters, mostly coming from Jordan, Syria, Afghanistan, Pakistan and Kurdish regions. After the American invasion in 2003, the group became active in Iraq. JTJ tried to drive U.S. and coalition forces out of Iraq and to stop the government transition by targeting Shiite. JTJ attacked Shiite also because they wanted to incite sectarian conflict in this way. The group was known for its violent tactics and targeting non-combatants, such as aid workers and native Iraqis. JTJ was notorious because of its assassinations and gruesome beheading videos that were published on the Internet after kidnapping and killing non-Arabs in Iraq. In October 2004, Zarqawi formally joined Al Qaeda and renamed his organization to Al Qaeda in Iraq (AQI). At first, many Sunnis in Iraq supported AQI and its goal to drive Americans and coalition forces from Iraq and to prevent a Shiite government takeover. However, the extreme practices of this group, such as suicide bombings and other violent attacks like assassinations, alienated potential supporters. AQI was also criticized because it targeted Iraqis and popular Sunni leaders; because of the presence of foreigners in its membership and leadership; and its intentional incitement of sectarian violence. Many Islamist groups also criticized the fact that Zarqawi's strategy included the killing of large numbers of Shiites and destroying Shiite religious sites to encourage sectarian violence. AQI was forced to join an umbrella group called Majlis Shura al-Mujahidin (MSC) in order to present itself as a more Iraqi group, which was willing to cooperate with other organizations.⁴¹ In 2006, Abu Musab al-Zarqawi was killed by the U.S in an American airstrike.⁴²

The militant organization experienced a decline from 2006 until 2011, due to resistance from the community and increased pressure from U.S. and Iraqi forces. During this period, the group still had as purpose to drive the U.S. out of Iraq and to sabotage the transitional government. After

³⁹ Mapping Militant Organizations. (2017). *The Islamic State*. Stanford: Stanford University.

⁴⁰ K Gulmohamad, Z. (2014). The Rise and Fall of the Islamic State of Iraq and Al-Sham (Levant) ISIS. *Global Security Studies*, 5(2), 1.

⁴¹ Mapping Militant Organizations. (2017). *The Islamic State*. Stanford: Stanford University.

⁴² A Gerges, F. (2014). *ISIS and the Third Wave of Jihadism*. Philadelphia: Current History.

Zarqawi's death, Abu Ayyub al-Masri succeeded. In order to present the group as more Iraqi, Masri convinced several other groups to merge into his when he declared the establishment of the Islamic State of Iraq (ISI). Although the group was renamed to ISI, it also continued to be known as AQL. Masri appointed Abu Umar al-Baghdadi, who was an Iraqi as the head of the ISI. The ultimate goal of this group was to create a caliphate in the Middle East. Despite the fact that there was a decline of foreign fighters in the organization, their presence continued to cause alienation amongst the local Iraqis. Through 2011, the majority of ISIS' leadership were killed by coalition forces, causing a lot of chaos in the militant organization. On April 18, 2010, both Masri and Baghdadi were killed in a joint U.S.-Iraqi raid, after which Abu Bakr al-Baghdadi gained control. After the withdrawal of the Coalition in December 2011, the ISI was rescued.⁴³

From 2012, the group started growing again through its involvement in the Syrian Civil War, which started in 2011. ISI used this war as a training ground and as a means for expansion. During 2012, the number of attacks conducted by ISI, increased significantly. In 2013, the group changed its name to the Islamic State of Iraq and Syria (ISIS).⁴⁴ Zawahiri, who succeeded Bin Laden in 2011 as leader of Al Qaeda⁴⁵, ordered ISIS to limit its operations to Iraq, but Baghdadi refused and ISIS continued to operate in Syria. Moreover, ISIS drew a lot of attention for its public beheadings of Western hostages and its large number of foreign fighters. ISIS carried out attacks against the governments of Iraq and Syria, tribal groups and militias in Iraq, the Kurdish peshmerga, and different rebel groups in Syria. The militant organization achieved large territorial gains which started in January 2014, when it first defeated Iraqi forces and took control of Fallujah. In June, ISIS also captured Mosul. On June 29, 2014, the group changed its name to the "Islamic State" (IS) and declared a Caliphate with its leader Abu Bakr al-Baghdadi as the Caliph. Although the change of the name, the group continues to be known as ISIS/ISIL. In 2014, the U.S. began airstrikes against ISIS, allegedly, in order to help the Yazidis. By November 2014, ISIS's territorial gains slowed, since it started to attack non-Sunni towns, in which the people were more likely to resist ISIS occupation than in towns where the majority were Sunni. In Syria, there were still militant groups which were hostile towards ISIS. In Iraq government forces and Shiite militias continued their campaign against ISIS, and in the north, ISIS faced the Kurdish peshmerga. Tribesmen in Iraq who were both Sunni and Shiite, also made gains against ISIS. Finally, the group's mobility was limited due to the U.S.-led coalition of airstrikes. However, despite this resistance, ISIS managed to maintain its territory and even expanded, by occupying Ramadi, Iraq, the capital of Anbar province, in May 2015. Islamist

⁴³ Mapping Militant Organizations. (2017). *The Islamic State*. Stanford: Stanford University.

⁴⁴ Mapping Militant Organizations. (2017). *The Islamic State*. Stanford: Stanford University.

⁴⁵ Gohel, S. (2017). Deciphering Ayman Al-Zawahiri and Al-Qaeda's Strategic and Ideological Imperatives. *Perspectives on Terrorism*, 11(1), 54-67.

militant groups across the globe started declaring allegiance to ISIS, some even carried out attacks in its name, including Boko Haram of Nigeria. In 2015, the group made use of the domestic instability in Libya and established a stronghold within the nation.⁴⁶

1.2. Leadership

ISIS lost 80% of its leadership between April and June 2010, when many ISIS' leaders were arrested or killed by the American-led Coalition forces or the government in Iraq. Amongst the killed and arrested leaders were the emir, Hamid al-Zawi (Abu Omar al-Baghdadi), and his deputy, Yusuf al-Dardiri (Abu Hamza alMuhajir), an Egyptian who had arrived in Baghdad with IS's founder, Ahmed al-Khalayleh (Abu Musab al-Zarqawi), in May 2002. ISIS had a centralised command structure with decentralised operation cells, but its structure was not strong enough to prevent invasion. After the appointment of the new ISIS' leader in 2010, Abu Bakr al-Baghdadi, the organization was restructured in order to isolate the leadership from spies. The protection of ISIS' leaders was achieved by the strengthening or creation of councils which have tasks with different duties. ISIS's organization structure consists of the Caliph, Shura Council, Military Council, Security and Intelligence Council (SIC), Shari'a Council, Media and Communications Council and a Cabinet.⁴⁷ The organization is led by Iraqi nationals. In 2014, nineteen of the twenty known top ISIS leaders, including the entire cabinet, those serving in the war office, and the governors of Iraqi territory were from Iraq. The only Syrian in the organization was in charge of ISIS's media relations unit.⁴⁸

The Caliph

Ibrahim Awwad Ibrahim Ali Muhammad al-Badri al-Samarrai, who is known as Abu Bakr al-Baghdadi is the Caliph of the Islamic State of Iraq and Syria (ISIS).⁴⁹ The present ISIS's leader is an Iraqi national⁵⁰ was born in Samarra on 1 July 1971.⁵¹ Samarra is an ancient Iraqi city on the eastern edge of the Sunni Triangle north of Baghdad.⁵² He grew up in a lower middle-class, religious, and well-connected farming family and he has three brothers. In 1996, Ibrahim started a master's course at the Saddam University for Islamic Studies. Afterwards, Abu Bakr al-Baghdadi switched to Qur'an studies and while he was graduate school, his paternal uncle Muhammad Hardan who was a veteran of the Afghan jihad convinced him to join the Muslim Brotherhood. After graduating in 1999, he became

⁴⁶ Mapping Militant Organizations. (2017). *The Islamic State*. Stanford: Stanford University.

⁴⁷ Orton, K. (2016). *Profiles of Islamic State Leaders*. London :The Henry Jackson Society.

⁴⁸ Patel, D. (2015). *ISIS in Iraq: What We Get Wrong and Why 2015 Is Not 2007 Redux*. Waltham: Crown Center for Middle East Studies.

⁴⁹ Orton, K. (2016). *Profiles of Islamic State Leaders*. London :The Henry Jackson Society.

⁵⁰ Mapping Militant Organizations. (2017). *The Islamic State*. Stanford: Stanford University.

⁵¹ Orton, K. (2016). *Profiles of Islamic State Leaders*. London :The Henry Jackson Society.

⁵² McCants, W. (2015). *The Believer: How an introvert with a passion for religion and soccer became Abu Bakr al-Baghdadi, leader of the Islamic State*. Washington: The Brookings Institution.

committed to Jihadi-Salafism in its most virulent form.⁵³ Abu Bakr al-Baghdadi received a PhD in Islamic Studies in 2003.⁵⁴ At the top of the command structure is the emirate, which consists of the caliph, Baghdadi and his two deputies, Abu Muslim al-Turkmani and Abu Ali al-Anbari.⁵⁵ Abu Muslim al-Turkmani comes from Tel Afar, Ninawa⁵⁶ and he is responsible for the Iraqi provinces. The second deputy, Abu Ali al-Anbari is responsible for the Syrian provinces⁵⁷ and he comes from the Iraqi town, Anbar.⁵⁸ The caliph's control is more strategically influential than micro-management, although he can organize local operations when needed. ISIS would experience a considerable damage if it lost its caliph, Abu Bakr al-Baghdadi, but the organization and its territorial control would survive. This is due to the reason, that ISIS's institutions are mature enough to find a replacement relatively quickly.⁵⁹ The Russian military claims that it may have killed Abu Bakr al-Baghdadi in an airstrike in Syria in the end of May. However, this claim has not been confirmed yet. The Russian foreign minister, Sergei Lavrov, stated that he cannot prove for sure that ISIS's leaders has been killed. The US-led military coalition fighting ISIS in Iraq and Syria, could not confirm the death of Abu Bakr al-Baghdadi either.⁶⁰

Shura Council

The Shura Council is an advisory body that approves the caliph's appointments, sends leadership directives down the chain of command and makes sure that they are implemented. This council also ensures that ISIS complies with the sharia's and can even remove the caliph if he fails in doing so. If the caliph is removed from power, the council also decides on the caliph's successor. The Shura Council have different sizes depending on different circumstances, but it consist of between 9 and 11 members, of whom almost all are Iraqis. This council functions like a coordination committee where the different heads of "departments" offer advice to the leader. The Shura Council is also responsible for debating policy and recommendation of appointments. The council also monitors other departments and helps in getting central directives down to the ground level, and has to choose the next leader. In practice, the most powerful IS institution is the Military Council. The Shura Council consists of the head of the Shura Council, the head of the Military Council and ISIS's overall deputy, an Official Spokesman, a Chief Religious Advisor, the head of the Media Council, Abdullah al-Ani and Younis al-Mashhadani.⁶¹

⁵³ Orton, K. (2016). *Profiles of Islamic State Leaders*. London :The Henry Jackson Society.

⁵⁴ Lister, C. (2014). *Islamic State Senior Leadership: Who's Who*. Washington: The Brookings Institution.

⁵⁵ Cronin, A. (2015). ISIS Is Not a Terrorist Group: Why Counterterrorism Won't Stop the Latest Jihadist. *Foreign Affairs*, 94(2), 87-98

⁵⁶ Lister, C. (2014). *Islamic State Senior Leadership: Who's Who*. Washington: The Brookings Institution

⁵⁷ Patel, D. (2015). *ISIS in Iraq: What We Get Wrong and Why 2015 Is Not 2007 Redux*. Waltham: Crown Center for Middle East Studies.

⁵⁸ Lister, C. (2014). *Islamic State Senior Leadership: Who's Who*. Washington: The Brookings Institution

⁵⁹ Orton, K. (2016). *Profiles of Islamic State Leaders*. London :The Henry Jackson Society.

⁶⁰ The guardian. (2017). *Russia claims it may have killed Isis leader Abu Bakr al-Baghdadi*. Retrieved from <https://www.theguardian.com/world/2017/jun/16/russia-claims-it-may-have-killed-isis-leader-abu-bakr-al-baghdadi>

⁶¹ Orton, K. (2016). *Profiles of Islamic State Leaders*. London :The Henry Jackson Society.

The head of the Shura Council is Abu Arkan al-Ameri. The birthplace and birthdate of Abu Arkan are unknown.⁶² According to pro-government media in Iraq al-Ameri was killed in December 2015. Although there was no confirmation of his death, he was supposedly replaced by Abu Bakr al-Khatouni. He was the head of the shari'a committees when ISIS was still al-Qaeda in Iraq and was led by Abu Musab al-Zarqawi. Al-Khatouni is an Iraqi and he is from Mosul. His real name is Abdullah Youssef and he is also ISIS's Governor of Mosul.⁶³ The Head of the Military Council and ISIS's overall deputy is Abd al-Rahman al-Qaduli (Abu Ali al-Anbari) is also a member of the Shura Council.⁶⁴

The Official Spokesman of the Shura Council is Taha Falaha (Abu Muhammad al-Adnani). He was born in 1977 in Banash, Syria. His real name is Taha Sobhi Falaha. In 2013, al-Adnani was head of Syrian operations. As ISIS's spokesman, he serves as the voice behind pronouncements such as the declaration of ISIS's caliphate. However, what really makes him important to the organization is the fact that he has an understanding of the inner circle's aims, due to his close relationship with ISIS leaders. Al-Adnani is also the governor of Raqqa of which ISIS took control in 2014, transforming it into the capital of the Islamic State. In January 2016, it was reported that he got wounded in an air strike.⁶⁵ The Chief Religious Advisor is Turki al-Binali. He is also member of the Shura Council and is a Bahraini national, who went to Syria in 2014.⁶⁶

Abdullah al-Ani was born in or around 1954. Al-Ani is a veteran Jihadi-Salafist and associate of al-Qaeda. He joined ISIS in 2004 when it was still a branch of al-Qaeda. Abdullah al-Ani is a close advisor of the caliph and is respected by al-Qaeda's leader, Ayman al-Zawahiri. He is also among the most likely replacements of the caliph in case Abu Bakr al-Baghdadi is killed.⁶⁷

Younis al-Mashhadani was born in or around 1950 in Baghdad. Al-Mashhadani joined ISIS's predecessor in 2006. He comes from the Quraysh tribe and is also known and respected religious scholar who acquired a PhD at the Saddam University for Islamic Studies, which is the same university where Baghdadi received his PhD. These facts make him also a good replacement of Abu Bakr al-Baghdadi if he is killed.⁶⁸

⁶²Nance, M. (2016). *Defeating ISIS: Who They Are, How They Fight, What They Believe*. New York, The United States of America: Skyhorse Publishing.

⁶³Orton, K. (2016). *Profiles of Islamic State Leaders*. London :The Henry Jackson Society.

⁶⁴ Nance, M. (2016). *Defeating ISIS: Who They Are, How They Fight, What They Believe*. New York, The United States of America: Skyhorse Publishing.

⁶⁵ Nance, M. (2016). *Defeating ISIS: Who They Are, How They Fight, What They Believe*. New York, The United States of America: Skyhorse Publishing.

⁶⁶ Nance, M. (2016). *Defeating ISIS: Who They Are, How They Fight, What They Believe*. New York, The United States of America: Skyhorse Publishing.

⁶⁷Orton, K. (2016). *Profiles of Islamic State Leaders*. London :The Henry Jackson Society.

⁶⁸ Orton, K. (2016). *Profiles of Islamic State Leaders*. London :The Henry Jackson Society.

Military Council

The Military Council was established in 2011, when ISIS' military networks were reorganised. Until then, ISIS had a "war minister", who was most of the times a foreigner. After al-Badri became leader, his deputy, Numan al-Zaydi, who was a Moroccan, was the war minister. After al-Zaydi was killed in February 2011, the war minister position was abolished. The chief of staff at the time, who was also the war minister's deputy, Samir al-Khlifawi (Haji Bakr), an Iraqi who became the first head of the Military Council. The Military Council is responsible for making and implementing the ISIS' military strategy. This council is the most important and powerful institution of ISIS. The Military Council consist of the head of the Military Council and the Caliph's Deputy, the Chief of General Staff, two Field Commanders, the Logistics Minister, the Foreign Affairs Minister, the Martyrs Minister and the Explosives Minister.⁶⁹

The head of the Military Council and the Caliph's Deputy is Abd al-Rahman al-Qaduli (Abu Ali al-Anbari). Abu Ali al-Anbari was born in Mosul, Iraq, and resided in Raqqa. He was an ethnic Turkman. He was member of the ISIS intelligence and Security Council. Abu Ali al-Anbari directed Syrian operations and also administered the governors who manage finances, weaponry, legal issues in the twelve Syrian provinces. In 2003, he joined Al-Qaeda in Iraq. When Abu Bakr al-Baghdadi was injured during an airstrike, Abu Ali al-Anbari replaced him as a Caliph until Baghdadi recovered. He was also chosen as successor in case al-Baghdadi died. The Pentagon reported in December 2015 that Abu Ali al-Anbari was killed in November 2015 during an air raid, together with fifteen other terrorists.⁷⁰

The Chief of General Staff is Waleed al-Alwani (Abu Ahmad al-Alwani). In 2015, the Iraqi Interior Ministry claimed that it had killed al-Alwani. In early 2016 this was confirmed by a well-placed observer, who has disclosed many details of ISIS's evolution. Al-Alwani was replaced by Abu Umar alHadithi, about whom little is known.⁷¹

One of the Field Commanders is Tarkhan Batirashvili (Abu Umar al-Shishani): The Chechen, Al-Shishani was born in 1986 in a region of Georgia known as the Pankisi Gorge, which is a breeding ground for separatist rebels where unemployment is 90 percent. He is supposedly ISIS's second in-command and is the top commander of ISIS's Syrian military arm. He is known as a "tactical mastermind" and commands about 1000 Chechen fighters who were very important for the success of ISIS in Syria and Northern Iraq. These Chechen fighters are seen as some of the most brutal combatants in the Syrian conflict. Al-Shishani went to prison for possession of weapons. According to his father, he was not particularly interested in religion in his youth.⁷²

⁶⁹Orton, K. (2016). *Profiles of Islamic State Leaders*. London :The Henry Jackson Society.

⁷⁰Nance, M. (2016). *Defeating ISIS: Who They Are, How They Fight, What They Believe*. New York, The United States of America: Skyhorse Publishing.

⁷¹Orton, K. (2016). *Profiles of Islamic State Leaders*. London :The Henry Jackson Society.

⁷²Nance, M. (2016). *Defeating ISIS: Who They Are, How They Fight, What They Believe*. New York, The United States of America: Skyhorse Publishing.

The other Field Commander is Shaker Wahib al-Fahdawi (Abu Wahib). He was born in 1986. Abu Wahib was arrested in 2006 in the middle of a computer studies course at the University of Anbar because of his membership in IS's predecessor. He was a prisoner in Camp Bucca until 2009 and after this in Tikrit Central Prison. During an attack conducted by his organization, Shaker Wahib al-Fahdawi managed to escape prison. Abu Wahib was killed on 6 May 2016 during a Coalition airstrike. This was confirmed by the Pentagon and by Fahdawi's second wife.⁷³

The Logistics Minister is Fares al-Naima (Abu Shema). Fares al-Naima is responsible for logistics, which includes protecting and distributing ISIS's supplies from their warehouses. He was also a prisoner in Camp Bucca.⁷⁴

The Foreign Affairs Minister is Abdullah al-Mashhadani (Abu Qassem). He is either born in the late 1950s or early 1960s. He is also known by the name Abu Qassem. As a Minister of Foreign Affairs, he is responsible for organizing the arrival of foreign jihadis, specifically from Arab States. Al-Mashhadani has to provide resources for these foreign jihadis to live on and had to arrange their shelter in guest houses. He also serves as ISIS's logistics coordinator and is in charge of moving those foreign volunteers who choose to become suicide bombers to their designated location.⁷⁵ The only thing which is known for sure about the Martyrs Minister, Abu Suja, is that he was detained at Camp Bucca.⁷⁶

The Explosives Minister is Khairy al-Taey (Abu Kifah). Very little is known about this member of the Military Council. He has the duty of creating, directing the use of, and equipping improvised explosive devices (IEDs).⁷⁷

Security and Intelligence Council (SIC)

This council is a subcommittee of the Military Council, but it has considerable autonomy. The SIC was initially created by the same group of former Saddam regime intelligence officers who organised IS's expansion into Syria. The SIC is responsible for providing personal security for the caliph and for enforcing his will by making sure that his subordinates obey his commands and strategic vision. This council is also part of the counter-intelligence architecture that keeps the IS leadership separated from the rank and file and eliminates any attempts to overthrow ISIS. The SIC conducts the kidnappings and assassinations for ISIS, even within ISIS' own ranks. This council is also responsible for the caliphate's mailing system. The SIC coordinates and ensures the security of the communications between the different IS provinces. Members of this council are the Overall Head of the security services, the Sub-commander of the SIC and the Minister of General/Public Security.⁷⁸

⁷³ Orton, K. (2016). *Profiles of Islamic State Leaders*. London :The Henry Jackson Society.

⁷⁴ Orton, K. (2016). *Profiles of Islamic State Leaders*. London :The Henry Jackson Society.

⁷⁵ Orton, K. (2016). *Profiles of Islamic State Leaders*. London :The Henry Jackson Society.

⁷⁶ Orton, K. (2016). *Profiles of Islamic State Leaders*. London :The Henry Jackson Society.

⁷⁷ Orton, K. (2016). *Profiles of Islamic State Leaders*. London :The Henry Jackson Society.

⁷⁸ Orton, K. (2016). *Profiles of Islamic State Leaders*. London :The Henry Jackson Society.

The Overall Head of the security services is Iyad al-Jumaili. He is native and is the leader of the Islamic State's amniyat (security units), which are responsible for internal security and counterintelligence for the caliphate and the caliph. Iyad al-Jumaili was the one who made the decision for the qisas (retribution) video on 23 June 2015, which displayed ISIS burning men alive in a car with an RPG, drowning men in a cage, and beheading prisoners by explosive collars.⁷⁹

The Sub-commander of the SIC is Abu Safwan al-Rifai. He worked closely with Samir al-Khlifawi (Haji Bakr), who was one of the key personnel in ISIS's expansion into Syria in 2012 and 2013. As a deputy of Al-Qaduli, Al-Rifai was important to the process of setting up the SIC and the amniyat (security units).⁸⁰

The Minister of General/Public Security is Abdul Wahid Khutnayer Ahmad (Abu Luay). He was a prisoner in an American detention facility. Aby Luay is in charge of one of the four branches of the State Security and its security units, namely the Amn al-Dakhili or interior ministry.⁸¹

Shari'a Council

This council consists of two departments. The mission of the Shari'a Council is the "prevention of vice and the promotion of virtue". The department which is responsible for the "prevention of vice" manages the religious courts that both arbitrate disputes brought by private citizens and prosecutes those who violate ISIS' interpretation of the Holy Law as enforced through the hisbah (religious police). This department of the Shari'a Council is also known as the Judiciary Council. The Council's second department, deals with the "promotion of virtue," meaning that it engages in dawa (proselytisation), spreading ISIS' worldview in books, videos, songs, and other media, with the purpose to win converts and recruits. The Shari'a Council is famous for the presence of foreigners in senior positions. This council consists of the Chief Religious Advisor, Chief Shar'i, Abu Muhammad al-Ani, Hilmi Hashem, Abu Muslim al-Masri and Abu Bakr al-Qahtani.⁸²

The Chief Religious Advisor is Turki al-Binali. He is one of ISIS's most fierce propagandists. Turki al-Binali was born in September 1984 in Bahrain. As a chief religious advisor, al-Binali is the second-most-important religious authority in ISIS. He is also a member of the Shura Council.⁸³ Chief Shar'i is Abdul Rahman al-Talabani was a member of al-Qaeda and is now believed to be the head the Shari'a Council.⁸⁴

⁷⁹ Orton, K. (2016). *Profiles of Islamic State Leaders*. London :The Henry Jackson Society.

⁸⁰ Orton, K. (2016). *Profiles of Islamic State Leaders*. London :The Henry Jackson Society.

⁸¹ Orton, K. (2016). *Profiles of Islamic State Leaders*. London :The Henry Jackson Society.

⁸² Orton, K. (2016). *Profiles of Islamic State Leaders*. London :The Henry Jackson Society.

⁸³ Orton, K. (2016). *Profiles of Islamic State Leaders*. London :The Henry Jackson Society.

⁸⁴ Orton, K. (2016). *Profiles of Islamic State Leaders*. London :The Henry Jackson Society.

Abu Muhammad al-Ani is a senior official of the Shari'a Council.⁸⁵

Hilmi Hashem is an Egyptian who is a member of the Shari'a Council and a theological advisor to the caliph.⁸⁶ Abu Muslim al-Masri is an Egyptian who is a senior member of the Shari'a Council.⁸⁷

Abu Bakr al-Qahtani is a Saudi national. During ISIS's expansion in Syria in 2012 and 2013, al-Qahtani was ISIS's most senior shar'i and was very important for ISIS in order to connect to jihadi communities outside Syria and Iraq.⁸⁸

Media and Communications Council

This council was found even before the "state" was declared. Its first leader was Abu Maysara al-Iraqi, a Salafi activist who was released by Saddam regime just before its collapse. Abu Maysara was killed sometime in early 2006. The Media Council consists of a web of institutions. These institutions include old outlets like Al-Furqan, radio stations in ISIS-held zones, websites, blogs, and online magazines half a world away in multiple languages, all transmitting ISIS's political and ideological message. ISIS is able to call on its supporters to join the group and to commit attacks in their home countries through this Media Council. The Media Council is also made up of foreign, i.e. non-Iraqi members. Members of this council are the Head of the Media Council, the Media Official, the General Manager of Media, and Nasser al-Ghamdi.⁸⁹

The Head of the Media Council is Amr al-Absi (Abu Atheer al-Absi). The Syrian national, Al-Absi was born in 1979 in Saudi Arabia. He is seen as one of the top five most important members of ISIS leadership and is therefore a serious candidate as Baghdadi's successor. Abu Atheer al-Absi leads a large number of full-time media employees, and due to his efforts, ISIS has become the first organization which understands the impact of social media. ISIS uses strategies such as "Twitter bombs" or conducts recruitment online, especially among foreign fighters and younger fighters. In July 2014, he started a high production value, glossy-style online magazine called Dabiq. He is supposedly responsible for many of the kidnappings in Syria for which ISIS was responsible.⁹⁰

The Media Official is Bandar al-Shaalan who is a former military officer and one of the most senior figures of the Media Council. He promotes ISIS's worldview and message and try to win converts. He was ISIS's representative in Saudi Arabia during ISIS's secret formative period in Syria, from late 2012 to April 2013.⁹¹

⁸⁵ Orton, K. (2016). *Profiles of Islamic State Leaders*. London :The Henry Jackson Society.

⁸⁶ Orton, K. (2016). *Profiles of Islamic State Leaders*. London :The Henry Jackson Society.

⁸⁷ Orton, K. (2016). *Profiles of Islamic State Leaders*. London :The Henry Jackson Society.

⁸⁸ Orton, K. (2016). *Profiles of Islamic State Leaders*. London :The Henry Jackson Society.

⁸⁹ Orton, K. (2016). *Profiles of Islamic State Leaders*. London :The Henry Jackson Society.

⁹⁰ Orton, K. (2016). *Profiles of Islamic State Leaders*. London :The Henry Jackson Society.

⁹¹ Nance, M. (2016). *Defeating ISIS: Who They Are, How They Fight, What They Believe*. New York, The United States of America: Skyhorse Publishing.

The General Manager of Media is Dr. Wael al-Rawi. Very little is known about this member of the Media Council. He is the head of the media section of ISIS's Shari'a Council.⁹² Nasser al-Ghamdi is a Saudi national, who allegedly manages al-Furqan, which is ISIS's oldest and most important media institution. This institution has moved from Iraq to Syria.⁹³

Cabinet

The Cabinet is composed of the Finance Minister, the Prisoner Affairs Minister, the Governor of Kirkuk, the Governor of Baghdad, Governor of the South and Middle Euphrates, the Governor of Border Provinces, the General Provincial Coordinator and the General Manager.⁹⁴

The Finance Minister is Muwafaq al-Kharmoush (Abu Saleh). He is responsible for the extortion networks that ISIS uses to "tax" the populations under its rule, and for the coordination of the smuggling operations, internally and to the outside world, for oil and antiquities. The U.S.-led Coalition stated that Abu Saleh was killed in an airstrike in late November 2015. However, his death remains unconfirmed. The Prisoner Affairs Minister is Bashar al-Hamadani (Abu Mohamed). He is ISIS's Minister for Prisoner Affairs and is therefore responsible for tracking and when possible securing the release of ISIS jihadists imprisoned by other parties in Syria and Iraq. The Governor of Kirkuk is Nima al-Jibouri (Abu Fatima al-Ansari). Nima al-Jibouri was ISIS's governor of Kirkuk when ISIS took Mosul and occupied areas of central Iraq. After the death of Fadel al-Hiyali in August 2015, al-Jibouri allegedly became the overall ISIS governor in Iraq. Nothing is known about the Governor of Baghdad, Ahmed al-Jazaa (Abu Maysara) and the Governor of the South and Middle Euphrates, Ahmed al-Juhayshi (Abu Fatima). The Governor of Border Provinces is Radhwan al-Hamdani (Abu Jurnas). He was a prisoner at the American detention facility, Camp Bucca. There are rumours that Abu Jurnas was killed in a Coalition airstrike in November 2014, however this has not been confirmed. The General Provincial Coordinator is Mohammed al-Dulaymi (Abu Hajar al-Sufi). Abu Hajar al-Sufi's task is to transmit messages from the local leadership in one area to the leadership in another area, including requests for resources. He was supposedly killed by the Iraqi government on 5 September 2014. However, there is no confirmation of his death either from the United States or from ISIS. The General Manager is Shawkat al-Farhat (Abu Abd al-Kadr). His task is to provide advice to the caliph on ISIS's internal governance.⁹⁵

⁹² Orton, K. (2016). *Profiles of Islamic State Leaders*. London :The Henry Jackson Society.

⁹³ Orton, K. (2016). *Profiles of Islamic State Leaders*. London :The Henry Jackson Society.

⁹⁴Orton, K. (2016). *Profiles of Islamic State Leaders*. London :The Henry Jackson Society.

⁹⁵Orton, K. (2016). *Profiles of Islamic State Leaders*. London :The Henry Jackson Society.

1.3. Crimes against the Yazidis

ISIS committed grave crimes against the Yazidi religious and ethnic minority.⁹⁶ The UN has stated that ISIS has been murdering, torturing, raping and kidnapping members of the Yazidi community.⁹⁷ During the attack on Mount Sinjar in 2014, more than five thousand Yazidi men were killed, and seven thousand Yazidi women were captured and sold as slaves to ISIS fighters.⁹⁸ ISIS has as purpose to destroy the Yazidis through killings, sexual slavery, enslavement, torture and inhuman and degrading treatment. ISIS has also forcibly transferred, and continues to transfer thousands of Yazidi women and children from Iraq into Syria.⁹⁹ When ISIS captures Yazidi women and girls, they usually separate Yazidi women and girls into three groups, namely, married with children; married without children; and young women and girls. There is evidence, that ISIS isolates the elderly of the captured women who are too old to be sold as sex slaves or used for physical labour. These women are then killed and buried in mass graves. The younger women are transferred to various locations in ISIS-controlled territory. These transfers are conducted in an organized and deliberate manner. These women are transported and detained for days or even months. Some of them have been transferred more than 10 times in the period of couple of months. These repeated transfers have as purpose to reinforce ISIS's control over the victims by causing feelings of fear, insecurity and disorientation.¹⁰⁰

ISIS systematically forces Yazidi women and girls into slavery. The group has acknowledged that it restores enslavement practices under Sharia law. One fifth of the Yazidi women and girls who are captured are sent to ISIS leadership as khums, which is a tax on war spoils, and those who remain are divided among ISIS fighters. Yazidi women and girls, some of whom are as young as 11 years old, are inspected by ISIS fighters in order to evaluate their beauty, conduct full-body searches, and force them to visit gynaecologists to see whether they are virgins. Women and girls are also sold to local or foreign ISIS fighters.¹⁰¹

Yazidi women and girls also undergo forced marriages. They are often forced to get married to ISIS fighters. ISIS members also forcibly marry Yazidi women in order not to have to buy them.

⁹⁶ Global Justice Center. (2016). *Daesh's Gender-Based Crimes against Yazidi Women and Girls Include Genocide*. New York: Global Justice Center.

⁹⁷ Office of The United Nations High Commissioner for Human Rights. (2016). *A Call for Accountability and Protection: Yazidi Survivors of Atrocities Committed by ISIL*.

⁹⁸ Moore, J. (2015). *Defying ISIS: Preserving Christianity in the Place of Its Birth and in Your Own Backyard*. Nashville: W Publishing Group.

⁹⁹ Human Rights Council. (2016). *"They came to destroy": ISIS Crimes Against the Yazidis**.

¹⁰⁰ Global Justice Center. (2016). *Daesh's Gender-Based Crimes against Yazidi Women and Girls Include Genocide*. New York: Global Justice Center.

¹⁰¹ Global Justice Center. (2016). *Daesh's Gender-Based Crimes against Yazidi Women and Girls Include Genocide*. New York: Global Justice Center.

ISIS fighters marry Yazidi women in order to purify them. Once they are married, Yazidi women and girls are isolated from public life and are entirely under the control of the ISIS husbands. Women and girls above the age of 10 cannot go to public places without being entirely covered and are not allowed to travel without a male relative. Women are also not allowed to leave the house of their husbands without a punishment, if they have died or disappeared.¹⁰²

Yazidi women and girls are also often subjected to sexual violence. Some victims have reported that they have been raped multiple times by different ISIS fighters. Often, these rapes are combined with other forms of brutality and torture. Yazidi women and girls have reported that they have been raped more than six times per night, beaten, handcuffed, fastened to a bed, given electric shocks and denied food. Many of the victims who have managed to escape ISIS' captivity, have trauma due to the sexual violence which they have experienced or witnessed. Some even commit suicide in order to escape the rapes.¹⁰³ ISIS uses sexual violence in order to subordinate and degrade Yazidis. By placing Yazidi women and girls into sexual slavery, they become, in effect, breeding stock.¹⁰⁴

ISIS members also forcibly and intentionally make Yazidi women and girls pregnant. ISIS fighters then force these women to bear their children. Yazidi women and girls are also forced to convert to Islam.¹⁰⁵ If they refuse to convert, they are being executed.¹⁰⁶

ISIS also forces adult men to convert to Islam and separates Yazidi men and women.¹⁰⁷ A child cannot be Yazidi if his/her parents are not both Yazidi. Therefore by separating Yazidi women and Yazidi men and forcibly impregnating women, ISIS stops another generation of Yazidis to be born. Yazidi women and girls who are pregnant with Yazidi children are also forced to have abortions¹⁰⁸ Moreover, Yazidi children are being transferred from their own families and placed with ISIS fighters in order to cut them off from their beliefs and practices of their own religious community and to erase their Yazidi identity.¹⁰⁹ ISIS separated Yazidi men and boys older than

¹⁰² Global Justice Center. (2016). *Daesh's Gender-Based Crimes against Yazidi Women and Girls Include Genocide*. New York: Global Justice Center.

¹⁰³ Global Justice Center. (2016). *Daesh's Gender-Based Crimes against Yazidi Women and Girls Include Genocide*. New York: Global Justice Center.

¹⁰⁴ Ahram, A. I. (2015). *Sexual Violence and the Making of ISIS*. doi:10.1080/00396338.2015.1047251

¹⁰⁵ Global Justice Center. (2016). *Daesh's Gender-Based Crimes against Yazidi Women and Girls Include Genocide*. New York: Global Justice Center.

¹⁰⁶ Sands, P. (2016). *On Genocide and Trauma*. Chicago: Assyrian International News Agency.

¹⁰⁷ Human Rights Council. (2016). "They came to destroy": *ISIS Crimes Against the Yazidis**.

¹⁰⁸ Global Justice Center. (2016). *Daesh's Gender-Based Crimes against Yazidi Women and Girls Include Genocide*. New York: Global Justice Center.

¹⁰⁹ Human Rights Council. (2016). "They came to destroy": *ISIS Crimes Against the Yazidis**.

12 years old from their families. Those who refused to convert to Islam were killed, in order to destroy their Yazidi identity.¹¹⁰

ISIS also abuses children on a massive scale. Children who are separated from their mothers and transferred to different locations in Iraq and Syria are usually between the ages of 8 and 15. After being transferred, they are sold as slaves, forced to marry to ISIS fighters and to convert to Islam.¹¹¹

Chapter 2 Genocide and the crimes against the Yazidis

2.1. What is genocide?

The international legal recognition of the crime of genocide has its roots in 1948, when the Convention on the Prevention and Punishment of the Crime of Genocide was adopted, in the aftermath of the Holocaust.¹¹² According to Article 2 of the 1948 Convention for the Prevention and Punishment of the Crime of Genocide¹¹³, to which Syria and Iraq are parties¹¹⁴, and article 6 of the Rome Statute, genocide is committed when a person commits a prohibited act with the intention to destroy, in whole or in part, a national, ethnical, racial or religious group as such.¹¹⁵ Prohibited acts which can be defined as genocide are: “(a) *killing members of the group*; (b) *causing serious bodily or mental harm to members of the group*; (c) *deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part*; (d) *imposing measures intended to prevent births within the group*; (e) *forcibly transferring children of the group to another group*”.¹¹⁶ The crime of genocide is defined in the same way also in Article 4(2) of the Statute of the International Criminal Tribunal for the former Yugoslavia¹¹⁷ and Article 2(2) of the Statute of the International Criminal Tribunal for Rwanda.¹¹⁸

The crime of genocide requires a material (actus reus) and a mental (mens rea) element. The actus reus is the objective side of the crime, while mens rea is the subjective side.¹¹⁹ In other

¹¹⁰ United Nations. (2016). *UN human rights panel concludes ISIL is committing genocide against Yazidis*.

¹¹¹ Global Justice Center. (2016). *Daesh's Gender-Based Crimes against Yazidi Women and Girls Include Genocide*. New York: Global Justice Center.

¹¹² Klabbers, J. (2013). *International Law*. Cambridge: Cambridge University Press.

¹¹³ United Nations. (1948). *Convention on the Prevention and Punishment of the Crime of Genocide*.

¹¹⁴ International Committee of the Red Cross. (2017). *Treaties, States Parties and Commentaries*.

¹¹⁵ International Criminal Court. (1998). *Rome Statute of the International Criminal Court*.

¹¹⁶ The International Criminal Court. (1998). *Rome Statute of the International Criminal Court*.

¹¹⁷ United Nations. (2009). *Updated Statute of the International Criminal Tribunal for the Former Yugoslavia*.

¹¹⁸ United Nations. (1994). *Statute of the International Tribunal for Rwanda*.

¹¹⁹ Arnold, R. (2003). The Mens Rea of Genocide under the Statute of the International Criminal Court. *Criminal Law Forum*, 14(2), 127-151.

words the objective side of the crime are the acts of annihilation and the subjective side is the intention behind those acts.¹²⁰ The actus reus element of genocide consists of the 5 genocidal acts which are defined in the statutory definition of genocide¹²¹, as defined in Article 2 of the Genocide Convention¹²² and Article 6 of the Rome Statute.¹²³ Article 2 of the Genocide Convention enumerates these acts which are: the acts of killing, causing serious bodily or mental harm, deliberately inflicting certain conditions of life on the target group, taking measures to prevent births within the group, and forcibly transferring children of the target group.¹²⁴

Only national, ethnic, racial, or religious groups are protected under the definition of the crime of genocide. The element with which a national group is characterized, above all, is shared nationality. People belonging to a particular national group also have a common history, customs, culture and language. A typical example of a national groups are national minorities. The ICTR defines in *Akayesu*, an ethnic group as “a group whose members share a common language or culture”.¹²⁵ In another judgment, *Kayishema and Ruzindana*, the ICTR defines an ethnic group as “one whose members share a common language and culture; or, a group which distinguishes itself, as such (self identification); or, a group identified as such by others, including perpetrators of the crimes (identification of others).”¹²⁶ According to the judgment in the *Prosecutor v. Akayesu*, a racial group shares the same inherited physical traits which are often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors.¹²⁷ In the *Prosecutor v. Akayesu*, the ICTR further defined a religious group as “one whose members share the same religion, denomination or mode of worship”.¹²⁸ Other groups, such as political, social or economic groups, are not considered to be protected groups under the genocide definition. The reason for excluding such groups from the Convention’s protection is that they constantly change their composition and therefore do not have the required stability.

There are certain requirements for the crimes stated in Article 6 of the ICC Statute in order for them to be considered as acts of genocide. The genocidal act of killing, requires that the perpetrator must have caused the death of at least one member¹²⁹ of a particular national,

¹²⁰Moradi, F., & Anderson, K. (2017). *The Islamic State's Êzidî Genocide in Iraq: The Sinjâr Operations*. Toronto: University of Toronto Press

¹²¹ Duarte-Herrera, R., & Iftsits, C. (2017). Genocide against Yazidis. *University of Vienna Law Review*, 1, 1-33.

¹²² United Nations. (1948). *Convention on the Prevention and Punishment of the Crime of Genocide*.

¹²³The International Criminal Court. (1998). *Rome Statute of the International Criminal Court*.

¹²⁴ United Nations. (1948). *Convention on the Prevention and Punishment of the Crime of Genocide*

¹²⁵ ICTR, *The Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (2 September 1998), para. 513.

¹²⁶ ICTR, *The Prosecutor v. Kayishema and Ruzindana.*, Case No. ICTR-95-1-T, Trial Judgment (21 May 1999), para. 98.

¹²⁷ ICTR, *The Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (2 September 1998), paras. 514 and 516.

¹²⁸ ICTR, *The Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (2 September 1998), para. 515.

¹²⁹Werle, G., & Bung, J. (2010). *The Crime of Genocide*. Berlin: Humboldt-Universität

ethnic, racial or religious group.¹³⁰ Causing serious bodily or mental harm means that the perpetrator must have caused serious bodily or mental harm to at least one member of the group. This can include (psychological) torture, mutilation or other serious damage. It is not necessary that the caused harm is permanent or irreversible. However, a merely temporary physical or mental impairment is not sufficient in order to establish an act of genocide. Regarding, inflicting destructive conditions of life, it is required that the perpetrator must have inflicted conditions of life on a group that can cause its physical destruction, in whole or in part. The so-called slow death measures are not included in this provision, since that is conduct which does not kill immediately. Imposing measures to prevent births includes the imposition of measures which have as purpose to prevent births within the specific group and thereby to target its continued biological existence. Examples of such measures are sterilization, forced birth control, prohibitions on marriage, segregation of the sexes, and rape if this leads to the decision of the victim not to reproduce due to the trauma suffered. In the case of forcibly transferring children of the targeted group to another group, the perpetrator starts estranging children from their group. It includes the permanent transfer of children under the age of 18, not only by physical but also by psychological force.¹³¹

The mens rea of genocide is more difficult to analyse¹³² and is one of the hardest things for a prosecutor to prove.¹³³ The crime of genocide has two separate mental elements, namely a ‘general intent’ or dolus, and an additional ‘intent to destroy’, also known as ‘special intent or dolus specialis’. The general intent normally relates to all objective (actus reus) elements of the crime of genocide.¹³⁴ The mental element of the crime of genocide, general intent, means that the perpetrator intends to commit the killing, but not necessarily to destroy the group.¹³⁵ The general intent is defined in international criminal law by Article 30 of the ICC Statute.¹³⁶ According to this article “*unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.*” According to Article 30(2) of the Statute, a person has

¹³⁰ The International Criminal Court. (2011). *Elements of Crimes*.

¹³¹ Werle, G., & Bung, J. (2010). *The Crime of Genocide*. Berlin: Humboldt-Universität

¹³² Arnold, R. (2003). The Mens Rea of Genocide under the Statute of the International Criminal Court. *Criminal Law Forum*, 14(2), 127-151.

¹³³ Goldsmith, K. (2010). The Issue of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide: Toward a KnowledgeBased Approach. *Genocide Studies and Prevention: An International Journal*, 5(3), 238-257.

¹³⁴ Pearlman, A. (2016). Justice by Number: The International Law of Genocide and Its Implications. *The Judges' Journal*, 55(3), 1-6.

¹³⁵ Goldsmith, K. (2010). The Issue of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide: Toward a KnowledgeBased Approach. *Genocide Studies and Prevention: An International Journal*, 5(3), 238-257.

¹³⁶ Ambos, K. (2009). What does ‘intent to destroy’ in genocide mean? *International Review of the Red Cross*, 91, 833-858.

intent where: “(a) *In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.*” According to Article 30(3), “knowledge” means that the perpetrator is aware that a circumstance exists or that a consequence will occur in the ordinary course of events.¹³⁷ The perpetrator must, for example, have the knowledge that his actions target on of the protected groups, since according to this article, the group element is a factual circumstance for the crime of genocide.¹³⁸ According to this so-called knowledge-based approach, while the leaders of a certain group act deliberately towards the destruction of the targeted group, others merely follow orders and do not have specific genocidal intent. In this approach, a certain extent of knowledge is therefore sufficient for the people acting on a lower level of organization.¹³⁹

The UN International Law Commission (ILC), states in the Draft Code of Crimes against the Peace and Security of Mankind commentaries (1996), that a general intent is not sufficient to categorize an act as genocide and that genocide “requires a particular state of mind or a specific intent with respect to the overall consequence of the prohibited act.”¹⁴⁰ The second mental element of genocide, the special intent, thus means that the perpetrator of a crime of genocide has a special intent to destroy, in whole or in part, a protected group.¹⁴¹ This special intent is the element that most distinguishes genocide from other international crimes such as crimes against humanity.¹⁴² This distinction is important, since as it holds genocide above crimes against humanity in relation to the seriousness of the crime.¹⁴³ The Appeals Chambers in the *Prosecutor v. Krstić* refers to the crime of genocide as the “*crime of all crimes*”,¹⁴⁴ which indicates that genocide stands on the top of the hierarchy of international crimes.¹⁴⁵

¹³⁷ International Criminal Court. (1998). *Rome Statute of the International Criminal Court*

¹³⁸ Ambos, K. (2009). What does ‘intent to destroy’ in genocide mean? *International Review of the Red Cross*, 91, 833-858.

¹³⁹ Duarte-Herrera, R., & Iftsits, C. (2017). Genocide against Yazidis. *University of Vienna Law Review*, 1, 1-33.

¹⁴⁰ United Nations. (2005). *Draft Code of Crimes against the Peace and Security of Mankind with commentaries.*, p.44

¹⁴¹ Human Rights Council. (2016). “*They came to destroy*”: *ISIS Crimes Against the Yazidis*.*.

¹⁴² Moradi, F., & Anderson, K. (2017). *The Islamic State's Êzîdî Genocide in Iraq: The Sinjār Operations*. Toronto: University of Toronto Press

¹⁴³ Goldsmith, K. (2010). The Issue of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide: Toward a KnowledgeBased Approach. *Genocide Studies and Prevention: An International Journal*, 5(3), 238-257.

¹⁴⁴ Prosecutor v. Krstić, Case No. IT-98-33-A, Judgement, 19 April 2004 (‘Krstić Appeal Judgement’), Partial Dissenting Opinion of Judge Shahabuddeen, para. 95;

¹⁴⁵ Boas, G., Bischoff, J., & Reid, N. (2013). *International Criminal Law Practitioner Library*. Cambridge, United Kingdom: Cambridge University Press.

Specific Intent (*Dolus Specialis*) means that the perpetrator commits an act with the clear intention to destroy the particular group, in whole or in part.¹⁴⁶ The perpetrator should therefore possess the will and, arguably, also some ability to accomplish the destruction of a national, ethnical, racial or religious group.¹⁴⁷ In the *Akayesu* case, which was the first ad hoc trial chamber to define specific intent, defined it generally as the ‘*specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged.*’¹⁴⁸ It is not necessary for the qualification of a crime as genocide, that the perpetrator intends to destroy the entire protected group. The perpetrator needs to only have the intention to destroy the group ‘in part’.¹⁴⁹ The term ‘in part’ means that the perpetrator should have an intent to destroy a substantial part of a particular group, either numerically or qualitatively.¹⁵⁰ According to *Krstić* Appeal Judgement, in order for an act to constitute genocide, the portion of the protected group that is targeted for destruction by the perpetrator must be ‘significant enough to have an impact on the group as a whole’.¹⁵¹

The Genocide Convention does not provide a threshold requirement for how successful or widespread the destruction of the group should be.¹⁵² However, in 1998, the ICTR determined that genocidal intent can be derived from the general context and claimed that the number of victims, such “the scale of the atrocities committed,” can serve as a factor in finding the requisite specific intent to destroy a group, in whole or in part. Moreover, the ICTY held that genocidal intent may “consist of desiring the extermination of a very large number of the members of the group.”¹⁵³ In 2001, this concept was developed further by the ICTY in the case of *Prosecutor v. Sikirica*. The defendant was the commander of the Keraterm detention camp in the Prijedor municipality in northern Bosnia-Herzegovina. After finding out that between 1,000 and 1,400 Bosnian Muslims and Bosnian Croats died or were murdered at this camp, the court made a mathematical accounting of what proportion that number was from the total self-identified

¹⁴⁶Goldsmith, K. (2010). The Issue of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide: Toward a KnowledgeBased Approach. *Genocide Studies and Prevention: An International Journal*, 5(3), 238-257.

¹⁴⁷Moradi, F., & Anderson, K. (2017). *The Islamic State's Êzidî Genocide in Iraq: The Sinjâr Operations*. Toronto: University of Toronto Press

¹⁴⁸ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement, 2 September 1998 (‘Akayesu Trial Judgement’), para. 498

¹⁴⁹ Boas, G., Bischoff, J., & Reid, N. (2013). *International Criminal Law Practitioner Library*. Cambridge, United Kingdom: Cambridge University Press.

¹⁵⁰ Human Rights Watch. (n.d.). *GENOCIDE (Article 4)*.

¹⁵¹ *Krstić* Appeal Judgement, supra note 9, para. 8.

¹⁵² Pearlman, A. (2016). Justice by Number: The International Law of Genocide and Its Implications. *The Judges' Journal*, 55(3), 1-6.

¹⁵³ *Prosecutor v. Goran Jelisić*, The Trial Chamber Decision (14 December 1999), para 82.

Muslim and Croat populations in the Prijedor municipality. The court then concluded that the number of victims of genocidal acts represented “between 2% and 2.8%” of the broader Muslim population in the area, which “would hardly qualify as a ‘reasonably substantial’ part of the Bosnian Muslim group in Prijedor.” That calculation was considered as a threshold matter for determining specific intent. The court refers to this threshold as the “quantitative criterion.”¹⁵⁴

There is also a qualitative criterion, which is based on whether the people who are targeted have certain skills essential for the future existence of a group and also on other qualitative aspects depending on the circumstances of the particular case. Whether there is an intent to destroy a group ‘in whole or in part’ can, for example, be derived from geographic factors.¹⁵⁵ In the Krstić judgment concerning the Srebrenica massacre, for instance, although only 2.9 percent of the Bosnian Muslim’s population was targeted, the ICTY Appeals Chamber took geographic factors into account. The fact that the Srebrenica area was situated between two disconnected parts of Republica Srpska, was very important, since the capture of Srebrenica was of great significance to the Bosnian Serb leaders and the existence of the Bosnian Muslim group. The Srebrenica area was located between two disconnected parts of Republica Srpska; its capture was thus of great significance to the Bosnian Serb leaders as well as essential to the existence of the Bosnian Muslim group.¹⁵⁶ Under this qualitative criterion, an evidence of the destruction of a significant section of a certain group, such as its leadership, can also considered as a destruction of a substantial part of the particular group.¹⁵⁷

The crime of genocide should be committed against a person because he/she is a member of a particular group and as an additional step in the overall objective of destroying the group.¹⁵⁸ It is not sufficient to establish an intention to destroy the group as such if the perpetrator only has the knowledge of the victim’s membership in a certain group.¹⁵⁹ The ultimate victim of the crime of genocide is the group. The phrase ‘as such’ in the definition of the crime of genocide thus means that for proving that a genocide has been committed, evidence must be established that a group has been targeted, and not merely specific individuals within that group. Although the destruction of a group necessarily requires the commission of crimes against its members, this means that the crime is committed against individuals belonging to that group.¹⁶⁰ The International Law Commission (ILC) in its Draft Code of Crimes against the Peace and Security

¹⁵⁴Pearlman, A. (2016). Justice by Number: The International Law of Genocide and Its Implications. *The Judges' Journal*, 55(3), 1-6.

¹⁵⁵ Duarte-Herrera, R., & Ifsits, C. (2017). Genocide against Yazidis. *University of Vienna Law Review*, 1,1-33.

¹⁵⁶ IT-98-33-A, The Prosecutor v. Radislav Krstic, 19 April 2004, para 15.

¹⁵⁷ Human Rights Watch. (n.d.). *GENOCIDE (Article 4)*.

¹⁵⁸ Human Rights Council. (2016). “*They came to destroy*”: *ISIS Crimes Against the Yazidis**.

¹⁵⁹ ICTY, The Prosecutor v. Radislav Krstic, Case No. IT-98-33-T, Judgement (02 August 2001), para. 561

¹⁶⁰ Human Rights Watch. (n.d.). *GENOCIDE (Article 4)*.

of Mankind of 1996, explained that the decisive criterion in determining the immediate victims of the crime of genocide is the membership of the individual in a particular group rather than the identity of this individual.¹⁶¹ According to jurisprudence from the ICTR and ICTY, the membership of a protected group can also be determined by the belief of those perpetrating crimes.¹⁶² The intent of the commission of genocide can also be inferred from the perpetration of other culpable acts systematically directed against the same group; the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts.

Regarding the destruction of the group, destruction of the culture of the targeted group is not sufficient to prove that genocide has been committed. There should be a physical or biological destruction of a group.¹⁶³ According to the ILC, the underlying offences in subparagraphs (a) through (c) of Article 2 of the Genocide Convention can be considered as ‘physical destruction’, while the offences in subparagraphs (d) and (e) can be considered as ‘biological destruction’.¹⁶⁴ The difference between ‘physical destruction’ and ‘biological destruction’ is that in the case of a ‘physical destruction’, the conduct results in the immediate or eventual deaths of the direct victim, while ‘biological destruction’ results in the eventual disappearance of the targeted group through the natural deaths of the remaining members.¹⁶⁵ Another requirement is that the perpetrator knew, or should have known, that the person or persons were under the age of 18 years. For all crimes listed under Article 6 of the ICC, it is required that the perpetrator committed the act with the intention to destroy the group in whole or in part.

The conduct should also take place in the context of a manifest pattern of similar conduct directed against the particular group or was conducted that could itself effect such destruction.¹⁶⁶ Perpetrators who do not have genocidal intent may also be held criminally responsible as an aider and abettor to genocide.¹⁶⁷ According to Article 2(3) of the ICTR Statute genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide should also be punishable.¹⁶⁸

¹⁶¹ILC. (1996). *Draft Code of Crimes Against the Peace and Security of Mankind (1996)*, UN Doc. A/51/10, Art. 17, Commentary No. 6, p. 45.

¹⁶² ICTR, The Prosecutor v. Gacumbitsi, Case No. ICTR-2001-64-T, Trial Judgment (17 June 2004), para. 254; ICTY, The Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment (2 August 2001), para. 557

¹⁶³Human Rights Watch. (n.d.). *GENOCIDE (Article 4)*.

¹⁶⁴ United Nations. (2005). *Draft Code of Crimes against the Peace and Security of Mankind with commentaries*

¹⁶⁵ Boas, G., Bischoff, J., & Reid, N. (2013). *International Criminal Law Practitioner Library*. Cambridge, United Kingdom: Cambridge University Press.

¹⁶⁶ The International Criminal Court. (2011). *Elements of Crimes*.

¹⁶⁷ Moradi, F., & Anderson, K. (2017). *The Islamic State's Êzîdî Genocide in Iraq: The Sinjār Operations*. Toronto: University of Toronto Press

¹⁶⁸United Nations. (1994.). *Statute of the International Tribunal for Rwanda*

2.2. Genocide against the Yazidis

In March 2016, the United States' Secretary of State, John Kerry, stated that ISIS's crimes against minorities in Iraq and Syria, including the Yazidis, Christians, and Shia Muslims can be categorized as genocide.¹⁶⁹ These acts against the Yazidis can be seen as genocide, since ISIS had as purpose to permanently erase the Yazidis through killing, sexual slavery, enslavement, torture, inhuman and degrading treatment, and forcible transfer causing serious bodily and mental harm.¹⁷⁰ These crimes all categorized as prohibited acts within the meaning of article 6 of the Rome Statute.¹⁷¹

The material elements of genocide

The crimes committed by ISIS towards the Yazidi community constitute all of the actus reus (objective elements) of the crime of genocide¹⁷² listed in Article 6 of the Rome Statute.¹⁷³

Evidence indicates that ISIS has committed the crime of genocide of killing¹⁷⁴ which is stated in Article 6 (a) of the Rome Statute.¹⁷⁵ The terrorist group has conducted a campaign of mass killings of Yazidis and also other minority groups.¹⁷⁶ ISIS has committed mass killings of Yazidi men and boys because they refused to convert to Islam.¹⁷⁷ The Koucho massacre, for example, included the direct killing of particularly Yazidi men.¹⁷⁸ After these mass killings, any survivors were buried alive. Some Yazidi men were also killed even though they agreed with converting to Islam. Many Yazidi men were executed by ISIS fighters after they have been separated from the

¹⁶⁹ The guardian. (2016). *John Kerry: Isis is committing genocide in Syria and Iraq*. Retrieved from <https://www.theguardian.com/world/2016/mar/17/john-kerry-isis-genocide-syria-iraq>

¹⁷⁰E Naby, C. (2017). It's Genocide, Now What: The Obligations of the United States Under the Convention To Prevent and Punish Genocide Being Committed at the Hands of ISIS. *Creighton International and Comparative Law Journal*, 8(1), 73-78.

¹⁷¹ International Criminal Court. (1998). *Rome Statute of the International Criminal Court*.

¹⁷² Moradi, F., & Anderson, K. (2017). *The Islamic State's Êzîdî Genocide in Iraq: The Sinjâr Operations*. Toronto: University of Toronto Press

¹⁷³ International Criminal Court. (1998). *Rome Statute of the International Criminal Court*.

¹⁷⁴ Murray, A., Zammit Borda, A., & Dakhil, V. (2017). 'Calling ISIL Atrocities Against the Yezidis by Their Rightful Name': Do They Constitute the Crime of Genocide? *Human Rights Law Review*, 17(2), 261-283. doi:<https://doi.org/10.1093/hrlr/ngx004>

¹⁷⁵ International Criminal Court. (1998). *Rome Statute of the International Criminal Court*.

¹⁷⁶ Murray, A., Zammit Borda, A., & Dakhil, V. (2017). 'Calling ISIL Atrocities Against the Yezidis by Their Rightful Name': Do They Constitute the Crime of Genocide? *Human Rights Law Review*, 17(2), 261-283. doi:<https://doi.org/10.1093/hrlr/ngx004>

¹⁷⁷ Human Rights Council. (2016). *"They came to destroy": ISIS Crimes Against the Yazidis**.

¹⁷⁸ Moradi, F., & Anderson, K. (2017). *The Islamic State's Êzîdî Genocide in Iraq: The Sinjâr Operations*. Toronto: University of Toronto Press

women and children. Even young boys from the age of 10 and 14 years old had been shot by ISIS fighters. ISIS has also conducted systematic searches aimed at killing Yazidis who had remained in their homes. According to media reports 2,000 Yazidis were killed in a single day in August 2014. Moreover, the UN has stated that up until October 2014, ISIS had killed approximately 5,000 Yazidis. Additional reports prove the murder of 300 Yazidi who were held captive by ISIS.¹⁷⁹

The crimes committed by ISIS against the Yazidis also constitute the crime of causing serious bodily or mental harm¹⁸⁰ as stated in article 6 (b) of the Rome Statute.¹⁸¹ Sexual slavery, forced marriage and forced conversion are crimes which cause serious bodily or mental harm to members of the Yazidi community.¹⁸² There is evidence that ISIS tortured Yazidis in order to cause bodily and mental harm them. The UN has reported that they have found bodies with signs that the individuals concerned had been tortured before they died.¹⁸³ The level of sexual violence to which Yazidi women and girls are subjected cause both physical and mental harm to them. Moreover, women and girls are repeatedly beaten by ISIS fighters while held as sex slaves. This sexual violence experienced by the Yazidis cause long-lasting psychological effects, such as post-traumatic stress disorder. The sexual violence led to many incidents of suicide and attempted suicide among Yazidi women. Some of those suicides were committed in the place where Yazidi women and girls were held captive as sex slaves. There are also reported suicides amongst Yazidis who have managed to escape ISIS captivity.¹⁸⁴ Furthermore, there is evidence that Yazidis who have been held captive as sex slaves had ‘acute emotional distress’.¹⁸⁵ Yazidis who have witnessed the violence to which other women and girls have been subjected while held by ISIS members, also experience mental harm as the result of this. Yazidi women and girls who have been subject to sexual violence indicated that they are ashamed and that they lost their dignity. Some of ISIS’s victims have also been left HIV positive, which resulted in the

¹⁷⁹Murray, A., Zammit Borda, A., & Dakhil, V. (2017). ‘Calling ISIL Atrocities Against the Yezidis by Their Rightful Name’: Do They Constitute the Crime of Genocide? *Human Rights Law Review*, 17(2), 261-283. doi:<https://doi.org/10.1093/hrlr/ngx004>

¹⁸⁰Moradi, F., & Anderson, K. (2017). *The Islamic State's Êzîdî Genocide in Iraq: The Sinjâr Operations*. Toronto: University of Toronto Press

¹⁸¹International Criminal Court. (1998). *Rome Statute of the International Criminal Court*.

¹⁸² Moradi, F., & Anderson, K. (2017). *The Islamic State's Êzîdî Genocide in Iraq: The Sinjâr Operations*. Toronto: University of Toronto Press

¹⁸³United Nations. (2014). *Report on the Protection of Civilians in Armed Conflict in Iraq: 6 July – 10 September 2014*.

¹⁸⁴ Murray, A., Zammit Borda, A., & Dakhil, V. (2017). ‘Calling ISIL Atrocities Against the Yezidis by Their Rightful Name’: Do They Constitute the Crime of Genocide? *Human Rights Law Review*, 17(2), 261-283. doi:<https://doi.org/10.1093/hrlr/ngx004>

¹⁸⁵ Human Rights Watch. (2015). ‘News, Iraq: ISIS Escapees Describe Systematic Rape—Yezidi Survivors in Need of Urgent Care’.

destruction of their pre-existing marriages.¹⁸⁶ In the Yazidi community, female honour has a fundamental value and therefore the female body represents the core of biological reproduction of the group, and expresses social, cultural, and religious purity. ISIS is aware of these fundamental values and it also conquers and violates the Yazidi girl's body as a religious marker. By raping Yazidi women and girls, ISIS destructs the Yazidis as a group of people and their religion.¹⁸⁷

ISIS has also deliberately inflicted conditions of life calculated to destroy the group, as defined in Article 6 (c) of the Rome Statute¹⁸⁸, through trapping tens of thousands of Yazidis on Mount Sinjar without food or water; slavery, rape and sexual violence; and forced religious conversions, under pain of death.¹⁸⁹ When the Yazidis fled to Mount Sinjar in order to escape ISIS's atrocities, ISIS hunted and surrounded them and left them with no food and no water. There was no escape, since all sides of the mountain were sealed off by ISIS militants. There were approximately 40,000 Yazidi men, women and children trapped on that mountain. ISIS threatens these people with the death in case they tried to escape. There was little shelter, except for some trees and caves on that mountain. The temperature was also very high exceeding 42 degrees Celsius. Due to these conditions many women, children and sick and elderly people died on Mount Sinjar from hunger and dehydration.¹⁹⁰ ISIS's crimes against the Yazidis also deliberately inflict conditions of life calculated to destroy the group through forced religious conversions, under pain of death. The forced religious conversions of Yazidis is particularly devastating for them, since they are a religious group in which the Yazidi identity is expressed through religious purity and their difference from other groups. According to interviews conducted by the UNHR, by forcibly converting the Yazidis to Islam, ISIS had as goal to destroy the Yazidi religious identity in order to supplant its own.¹⁹¹

According to the UNHR, the Yazidis have been subjected to 'widespread and systematic enslavement, including selling of women, rape, and sexual slavery, forced transfer of women and

¹⁸⁶ Murray, A., Zammit Borda, A., & Dakhil, V. (2017). 'Calling ISIL Atrocities Against the Yezidis by Their Rightful Name': Do They Constitute the Crime of Genocide? *Human Rights Law Review*, 17(2), 261-283. doi:<https://doi.org/10.1093/hrlr/ngx004>

¹⁸⁷Moradi, F., & Anderson, K. (2017). *The Islamic State's Êzîdî Genocide in Iraq: The Sinjâr Operations*. Toronto: University of Toronto Press

¹⁸⁸ International Criminal Court. (1998). *Rome Statute of the International Criminal Court*.

¹⁸⁹ Murray, A., Zammit Borda, A., & Dakhil, V. (2017). 'Calling ISIL Atrocities Against the Yezidis by Their Rightful Name': Do They Constitute the Crime of Genocide? *Human Rights Law Review*, 17(2), 261-283. doi:<https://doi.org/10.1093/hrlr/ngx004>

¹⁹⁰ Murray, A., Zammit Borda, A., & Dakhil, V. (2017). 'Calling ISIL Atrocities Against the Yezidis by Their Rightful Name': Do They Constitute the Crime of Genocide? *Human Rights Law Review*, 17(2), 261-283. doi:<https://doi.org/10.1093/hrlr/ngx004>

¹⁹¹ Murray, A., Zammit Borda, A., & Dakhil, V. (2017). 'Calling ISIL Atrocities Against the Yezidis by Their Rightful Name': Do They Constitute the Crime of Genocide? *Human Rights Law Review*, 17(2), 261-283. doi:<https://doi.org/10.1093/hrlr/ngx004>

children and inhuman and degrading treatment.’ Approximately 7,000 women were taken captive in August 2014.¹⁹² According to the UN Special Representative on Sexual Violence in Conflict, ISIS attacks villages and separates women from men, after which the men and boys aged 14 and over are being executed. The women and mothers are separated and girls are tested whether they are still virgin. Their breast size and their prettiness is also examined. The youngest and prettiest virgins get a higher price and are sent to Raqqa. Many women and girls were repeatedly transferred to different locations in ISIS-held territory. These repeated transfers and displacement had as purpose to reinforce ISIS control over the victims by instilling feelings of fear, insecurity and disorientation. Since the Yazidis strongly value their environment, they were particularly vulnerable to such transfers. In the Yazidi community, past and present events are closely linked to each other and to their environment. Locations are also associated with past events and are imbued with strong religious meanings. Yazidi women and children suffer from organized rape and sexual assault, sexual slavery and forced marriage. These acts could be considered as deliberately inflicting conditions of life calculated to bring about the destruction of the group. This is the case, since rape and sexual violence are not only crimes against the individual, but they can also be considered as crimes which have as purpose to dishonour the ways that male and female are bound together and thereby to permanently destroy their capacity to rebuild themselves as a community. By committing these crimes against the Yazidis, ISIS destroys the group’s ability to reproduce, since it breaks familiar relationships of Yazidis and some women and girls refuse to reproduce after having been raped for many times. This is the case, since in Yazidism, marriage with people who have different faith and sexual relations outside marriage are not accepted and if such practices occur they are considered to be shameful for the whole family. In the past women and girls who had relations with men of other faiths were even killed¹⁹³, the so-called ‘honour killings’. According to reports by Amnesty International, it is very difficult for Yazidi women to reintegrate in the Yazidi community after being abducted by ISIS. The rape and sexual violence which these women experience have negative social consequences for the future of those women and girls. It is difficult for them to find suitable husbands after being raped by ISIS fighters.¹⁹⁴ The systematic rapes to which the Yazidi women and girls are subjected have long-term impacts on the biological reproduction of the group. This policy is compatible to biological genocide, which means the intentional

¹⁹² Human Rights Council. (2015). *Report of the Office of the United Nations High Commissioner for Human Rights on the human rights situation in Iraq in the light of abuses committed by the so-called Islamic State in Iraq and the Levant and associated groups*.

¹⁹³ Murray, A., Zammit Borda, A., & Dakhil, V. (2017). ‘Calling ISIL Atrocities Against the Yezidis by Their Rightful Name’: Do They Constitute the Crime of Genocide? *Human Rights Law Review*, 17(2), 261-283. doi:<https://doi.org/10.1093/hrlr/ngx004>

¹⁹⁴ Murray, A., Zammit Borda, A., & Dakhil, V. (2017). ‘Calling ISIL Atrocities Against the Yezidis by Their Rightful Name’: Do They Constitute the Crime of Genocide? *Human Rights Law Review*, 17(2), 261-283. doi:<https://doi.org/10.1093/hrlr/ngx004>

destruction of the group by preventing its physical reproduction. By forcing Yazidi women and girls to marry ISIS members and by placing them within a non-Yazidi household the reproduction of the Yazidi culture is endangered, since they cannot practice their culture or religion. These acts thus radically contribute to the destruction of the Yazidi community as the biological and cultural reproduction are essential for the continuation of the group as a separate entity.¹⁹⁵

Furthermore, ISIS is imposing measures intended to prevent births and forcibly transferring children. Measures intended to prevent births include sexual mutilation, sterilization, forced birth control, separation of men and women and the prohibition of marriages. By transferring children away from the Yazidi community, ISIS had as purpose to ensure that the language, traditions and culture of the Yazidi community become or remain unfamiliar to the children. The measures which ISIS imposed in order to prevent births were primarily abortions and systematic rape. The group also undertook measures to forcibly transfer children. By systematically raping Yazidi women and girls, ISIS transmits a new ethnic identity to the born child, thereby preventing births of Yazidi descent. Since, in the Yazidi community both parents of a child have to be Yazidi in order for the child to have the Yazidi identity, by systematically raping Yazidi women and girls and by forcing women who are pregnant with Yazidi child to have abortions, ISIS devastate the Yazidi religious and ethnic community. Thousands of Yazidi children were abducted by ISIS fighters and transferred to different locations in Iraq and Syria. According to UNHCR reports, Yazidi children received religious and military training after they have forcibly been converted. These military training included how to load and unload guns, shoot with live bullets and launch small and medium-sized rockets.¹⁹⁶ This abduction and forced conscription of Yazidi children aim at the destruction of the Yazidis.¹⁹⁷

ISIS's crimes against the Yazidis possess the *actus reus* of the crime of genocide¹⁹⁸, since the crimes committed by ISIS against the Yazidis include the acts of killing, causing serious bodily or mental harm, deliberately inflicting certain conditions of life on the target group, taking measures to prevent births within the group, and forcibly transferring children of the target

¹⁹⁵ Moradi, F., & Anderson, K. (2017). *The Islamic State's Êzîdî Genocide in Iraq: The Sinjâr Operations*. Toronto: University of Toronto Press

¹⁹⁶ Murray, A., Zammit Borda, A., & Dakhil, V. (2017). 'Calling ISIL Atrocities Against the Yezidis by Their Rightful Name': Do They Constitute the Crime of Genocide? *Human Rights Law Review*, 17(2), 261-283. doi:<https://doi.org/10.1093/hrlr/ngx004>

¹⁹⁷ Moradi, F., & Anderson, K. (2017). *The Islamic State's Êzîdî Genocide in Iraq: The Sinjâr Operations*. Toronto: University of Toronto Press

¹⁹⁸ Arnold, R. (2003). The Mens Rea of Genocide under the Statute of the International Criminal Court. *Criminal Law Forum*, 14(2), 127-151.

group.¹⁹⁹ The Yazidis are also a protected religious group within the meaning of Article II of the Genocide Convention, according to which a protected group must be a national, ethnic, racial, or religious group, as such. The Yazidis are a distinct ethno-religious group, since the Yazidis share a common language and culture and the same religion. The crimes committed by ISIS against the Yazidis are also intended at the biological destruction of the Yazidi ethno-religious group.²⁰⁰

The mental elements of genocide

Various ISIS members have stated more than once that the religious beliefs of the Yazidis is the reason to attack and abuse them. Since, the membership of a protected group can also be determined by the belief of those perpetrating crimes²⁰¹, the requirement of targeting an individual of a group because of his/her membership of this group, which is embedded in the term 'as such' in Article 6 of the ICC²⁰² and Article 2 of the Genocide Convention is met.²⁰³ ISIS fighters target the Yazidis, because of their belongingness to the group. This is clearly indicated due to the fact that ISIS specifically targets the Yazidis, as compared to members of other minority groups, such as Christians, whom ISIS views as 'People of the Book'.²⁰⁴ ISIS fighters kill Yazidi men and boys or forces them to convert to Islam, women and girls are subject to enslavement and are continuously being insulted. However, members of other groups such as Christians are tolerated under very precarious and difficult circumstances.²⁰⁵ According to the Independent International Commission of Inquiry on Syria the attacks committed by ISIS towards the Yazidis, suggests that ISIS believes that this religious group does not have the right to exist.²⁰⁶ Moreover, there is evidence that ISIS's sex trade is solely based on enslaving women and girls from the Yazidi minority and there has been no widespread campaign which had as purpose to enslave women or girls from other religious minorities. ISIS justified this distinction

¹⁹⁹ Murray, A., Zammit Borda, A., & Dakhil, V. (2017). 'Calling ISIL Atrocities Against the Yezidis by Their Rightful Name': Do They Constitute the Crime of Genocide? *Human Rights Law Review*, 17(2), 261-283. doi:<https://doi.org/10.1093/hrlr/ngx004>

²⁰⁰ Moradi, F., & Anderson, K. (2017). *The Islamic State's Êzîdî Genocide in Iraq: The Sinjâr Operations*. Toronto: University of Toronto Press

²⁰¹ Human Rights Council. (2016). "They came to destroy": *ISIS Crimes Against the Yazidis**.

²⁰² The International Criminal Court. (1998). *Rome Statute of the International Criminal Court*.

²⁰³ United Nations. (1948). *Convention on the Prevention and Punishment of the Crime of Genocide*.

²⁰⁴ Murray, A., Zammit Borda, A., & Dakhil, V. (2017). 'Calling ISIL Atrocities Against the Yezidis by Their Rightful Name': Do They Constitute the Crime of Genocide? *Human Rights Law Review*, 17(2), 261-283. doi:<https://doi.org/10.1093/hrlr/ngx004>

²⁰⁵ Duarte-Herrera, R., & Ifsits, C. (2017). Genocide against Yazidis. *University of Vienna Law Review*, 1, 1-33.

²⁰⁶ Murray, A., Zammit Borda, A., & Dakhil, V. (2017). 'Calling ISIL Atrocities Against the Yezidis by Their Rightful Name': Do They Constitute the Crime of Genocide? *Human Rights Law Review*, 17(2), 261-283. doi:<https://doi.org/10.1093/hrlr/ngx004>

by claiming that the ‘People of the Book’ could be given the option of paying *jizyah* (tax), while in the case of Yazidis, ‘there was no room for *jizyah* payment.’²⁰⁷

The crimes committed by ISIS fighters towards the Yazidis are thus dictated by religious ideology.²⁰⁸ This ideology is indicated in ISIS’s public statements and in its conduct.²⁰⁹ An article in the ISIS magazine *Dabiq* called ‘The Revival of Slavery Before the Hour’ states, for example, that the Yazidis are considered to a ‘pagan minority’ whose ‘continual existence to this day is a matter that Muslims should question as they will be asked about it on Judgment Day’.²¹⁰ The fact that the Yazidis are specifically targeted by ISIS because of their religious identity is also indicated in the differential patterns of violence that were committed against Yazidis who have converted to Islam in comparison with those who refused and who have fled ISIS captivity.²¹¹ The crimes of genocide committed by ISIS against individual Yazidis because of his or her belonging to the Yazidi group, can be seen as an incremental step in the overall goal of destroying the group.²¹²

A United Nations Commission of Inquiry has determined that the acts committed by ISIS against the Yazidis clearly shows an intent to destroy the Yazidis of Sinjar in whole or in part.²¹³ The impact of the atrocities committed against the Yazidis indicate that destruction of the group can be considered ‘in whole’ as stated in Article 2 of the Convention on Genocide. The majority of the world’s Yazidi population is situated in the Sinjar region in Northern Iraq. Due to the attack on the Yazidis in August 2014, the Sinjar community which was comprised of 400.000 people, was either killed, displaced or was taken captive. More than 3.200 Yazidis are still missing²¹⁴ of whom their families are uncertain whether they are alive or have been captured by ISIS. The Yazidis who survived ISIS’s atrocities are mostly women whose husbands and sons have been killed or have forcibly converted to Islam. These survivors suffer from physical and psychological trauma.²¹⁵

²⁰⁷ Murray, A., Zammit Borda, A., & Dakhil, V. (2017). ‘Calling ISIL Atrocities Against the Yezidis by Their Rightful Name’: Do They Constitute the Crime of Genocide? *Human Rights Law Review*, 17(2), 261-283. doi:<https://doi.org/10.1093/hrlr/ngx004>

²⁰⁸ Duarte-Herrera, R., & Ifsits, C. (2017). Genocide against Yazidis. *University of Vienna Law Review*, 1, 1-33.

²⁰⁹ Human Rights Council. (2016). “*They came to destroy*”: *ISIS Crimes Against the Yazidis**.

²¹⁰ Duarte-Herrera, R., & Ifsits, C. (2017). Genocide against Yazidis. *University of Vienna Law Review*, 1, 1-33.

²¹¹ Moradi, F., & Anderson, K. (2017). *The Islamic State’s Êzîdî Genocide in Iraq: The Sinjâr Operations*. Toronto: University of Toronto Press

²¹² Human Rights Council. (2016). “*They came to destroy*”: *ISIS Crimes Against the Yazidis**.

²¹³ Human Rights Council. (2016). “*They came to destroy*”: *ISIS Crimes Against the Yazidis**.

²¹⁴ Human Rights Council. (2016). “*They came to destroy*”: *ISIS Crimes Against the Yazidis**.

²¹⁵ Duarte-Herrera, R., & Ifsits, C. (2017). Genocide against Yazidis. *University of Vienna Law Review*, 1, 1-33.

Moreover, due to the Yazidi's patriarchal society, these women who are left without male relatives, do not have financial support and the necessary skills to find a job. This means that these survivors have difficulties in living independently. This consequently has influence on the future existence of the whole Yazidi community. Even if the destruction of the Yazidis cannot be considered as 'in whole', it can definitely be considered as a destruction 'in part', as a substantial part of the Yazidi population has certainly been targeted. The crimes committed by ISIS towards the Yazidis constitute therefore the required 'specific intent' to destroy the group.²¹⁶ Regarding the precise content of the specific intent, the previously discussed knowledge-based approach is not needed in order to ascertain ISIS's specific intent to destroy the Yazidi community. This is the case, due to the religious ideology of the group that entails the destruction of the Yazidi group whereby ISIS's members are not a part of a long-existing state mechanism, but instead join the militant group with the clear objective of pursuing this religious ideology. It can therefore be considered that the leaders of ISIS as well as lower ranking soldiers have as ultimate goal to destroy the Yazidi community as such.²¹⁷ According to a report of the UN High Commissioner for Human Rights', there is also a manifest pattern of attacks against the Yazidi community.²¹⁸

Chapter 3 Prosecution before the International Criminal Court (ICC)

3.1. Theoretical background on the nature and establishment of the ICC

The international criminal justice system has a dual character. It deals with the development of norms prohibiting international crimes, but also with holding individuals responsible for committing such crimes. The establishment of the International Criminal Court (ICC) is based on the idea of holding individuals responsible for committing international crimes.²¹⁹ Thus, the ICC, which is a permanent international court, has as purpose to investigate, prosecute and try individuals who are accused of committing very serious crimes against the international community, namely the genocide, crimes against humanity, war crimes and the crime of aggression.²²⁰ It is a court of last resort, meaning that it will only take action, if states fail or are unwilling to do so. Thus states preserve their power to solve international crimes committed by their nationals themselves and can therefore try perpetrators of international crimes that the ICC does not prosecute.²²¹ This is known as the principle of complementarity.²²² The jurisdiction of

²¹⁶ Duarte-Herrera, R., & Ifsits, C. (2017). Genocide against Yazidis. *University of Vienna Law Review*,1,1-33.

²¹⁷ Duarte-Herrera, R., & Ifsits, C. (2017). Genocide against Yazidis. *University of Vienna Law Review*,1,1-33.

²¹⁸ United Nations (2015) *Human Rights Council Report*.

²¹⁹ Simbeye, Y. (2016). *Immunity and International Criminal Law*. New York: Routledge.

²²⁰ International Criminal Court. (n.d.). *Understanding the International Criminal Court*.

²²¹ Simbeye, Y. (2016). *Immunity and International Criminal Law*. New York: Routledge.

²²² International Criminal Court. (n.d.). *Understanding the International Criminal Court*.

the ICC is only binding for the States that have ratified the Rome Statute and is not retrospective.²²³

The Rome Statute of the International Criminal Court, also known as the ICC Statute, was adopted on 17 July 1998 in plenary session with 120 votes, thereby establishing the International Criminal Court. The United States, China, Israel, Iraq, Libya, Yemen, and Qatar, voted against the Statute and 21 countries abstained. By the deadline set in the ICC Statute, which was 31 December 2000, 139 states had signed the Statute and on 11 April 2002, Bosnia and Herzegovina, Bulgaria, Cambodia, the Democratic Republic of the Congo, Ireland, Jordan, Mongolia, Niger, Romania, and Slovakia ratified the Statute. The ratifications then exceeded 60, which was the requirement under Article 126 of the ICC Statute. On 1 July 2002, the Statute went into effect and by January 2014, it had been ratified by 122 states.²²⁴ States accepted thus for the first time in history the jurisdiction of a permanent international criminal court in order to prosecute perpetrators of the most serious crimes committed in their territories or by their nationals.²²⁵ The Statute has been ratified by all countries of the European Union and many South American and African countries. Up until now, not many Asian countries have ratified the Statute. The ICC Statute is a fundamental document of international criminal law nowadays, which sets out the legal bases of the International Criminal Court and develops its procedure. The ICC Statute contains comprehensive rules on the general principles of international criminal law. This was not the case with the Statute's predecessors, which contained only fragmentary provisions of international criminal law.²²⁶

3.2. *The ICC and the scope of its material jurisdiction*

As stated in Article 1 (1) of the Rome Statute, the International Criminal Court (ICC) is located in The Hague, Netherlands.²²⁷ According to Article 3 (3) of the ICC Statute, the Court is able to sit elsewhere, whenever it considers it desirable.²²⁸ The ICC can also open field offices for investigations in other countries and decide to hold hearings in a place which is closer to the place of the crime committed than The Hague.²²⁹ Pursuant to Article 34 of the Rome Statute, the ICC consists of four organs, namely, the Presidency, the Chambers, the Office of the Prosecutor

²²³ Hassan, S. (2010). Establishment of the International Criminal Court and the Role of USA: A Legal Appraisal. *Northern University Journal of Law*, 1, 52.

²²⁴ Jeßberger, F., & Werle, G. (2014). *Principles of International Criminal Law*. Oxford: Oxford University Press.

²²⁵ International Criminal Court. (n.d.). *Understanding the International Criminal Court*.

²²⁶ Jeßberger, F., & Werle, G. (2014). *Principles of International Criminal Law*. Oxford: Oxford University Press.

²²⁷ International Criminal Court. (1998). *Rome Statute of the International Criminal Court*.

²²⁸ International Criminal Court. (1998). *Rome Statute of the International Criminal Court*.

²²⁹ Hassan, S. (2010). Establishment of the International Criminal Court and the Role of USA: A Legal Appraisal. *Northern University Journal of Law*, 1, 52.

and the Registry.²³⁰ These four organs all have a specific role and mandate.²³¹ According to article 5 of the Rome Statute, the crimes which fall within the material jurisdiction of the International Criminal Court (ICC) are the crime of genocide, war crimes, crimes against humanity, and the crime of aggression.²³² The mandate of the ICC is to try individuals rather than States responsible for these serious crimes against the international community.²³³ As stated in Article 11 of the Rome Statute²³⁴, the Court has jurisdiction only for crimes committed after the entry into force of the Rome Statute, which happened on July 1, 2002.²³⁵ According to the principle of non-retroactivity *ratione personae*, which is embedded in Article 24 of the Rome Statute, no person can be held criminally responsible for a crime committed prior to the entry in force of the Stute.²³⁶ As already proven, the crimes committed by ISIS against the Yazidis amount to the international crime of genocide, which is a crime that falls within the material jurisdiction of the International Criminal Court.²³⁷ ISIS atrocities towards the Yazidis started in August 2014 with the attack on the Yazidis in the Sinjar area in northern Iraq, which is after July 1, 2002. The Court can thus exercise jurisdiction over these crimes.²³⁸

3.3. Referrals, analyses and investigations

Article 13 of the Rome Statute states the situations in which, the Court can exercise its jurisdiction with respect to a crime listed in Article 5 of the Statute.²³⁹ According to article 14 of the Rome Statute²⁴⁰ the ICC Prosecutor can initiate an investigation on the basis of a referral from any State Party or from the United Nations Security Council (UNSC). The Prosecutor is also able to start investigations under the prosecutor's discretion (*proprio motu*) as stated in Article 15 (1) of the Rome Statute.²⁴¹ He/She can do so without a prior referral, on the basis of reliable information received from individuals or organizations concerning crimes that are within

²³⁰ International Criminal Court. (1998). *Rome Statute of the International Criminal Court*.

²³¹ International Criminal Court. (n.d.). *Understanding the International Criminal Court*.

²³² International Criminal Court. (1998). *Rome Statute of the International Criminal Court*.

²³³ International Criminal Court. (n.d.). *Understanding the International Criminal Court*.

²³⁴ International Criminal Court. (1998). *Rome Statute of the International Criminal Court*

²³⁵ Wallace, D., & Silander, D. (2015). *International Organizations and the Implementation of the Responsibility to Protect*. New York: Routledge.

²³⁶ International Criminal Court. (1998). *Rome Statute of the International Criminal Court*.

²³⁷ Silander, D., Wallace, D., & Janzekovic, J. (2017). *International Organizations and The Rise of ISIL: Global Responses to human security threats*. New York: Routledge.

²³⁸ Murray, A., Zammit Borda, A., & Dakhil, V. (2017). 'Calling ISIL Atrocities Against the Yezidis by Their Rightful Name': Do They Constitute the Crime of Genocide? *Human Rights Law Review*, 17(2), 261-283. doi:<https://doi.org/10.1093/hrlr/ngx004>

²³⁹ International Criminal Court. (1998). *Rome Statute of the International Criminal Court*.

²⁴⁰ International Criminal Court. (1998). *Rome Statute of the International Criminal Court*.

²⁴¹ International Criminal Court. (1998). *Rome Statute of the International Criminal Court*

the jurisdiction of the ICC.²⁴² However, before initiating an investigation on the basis of such circumstances, the Prosecutor must, in accordance to Article 15 (3) of the Rome Statute, first ask for authorization from the Pre-Trial Chamber judges.²⁴³ According to Article 12 (2) (a) and 12 (2) (b) of the Rome Statute²⁴⁴, in the case of a referral by a State Party or the Prosecutor's exercise of proprio motu authority, the ICC can only exercise jurisdiction, if the State on the territory of which the crime was committed, or if the State of the accused, is a Party to the Statute. A state that is not a party to the Rome Statute can choose to accept the exercise of jurisdiction by the ICC with respect to a specific crime in question.²⁴⁵ A non-State Party can do so in accordance with Article 12 (3) of the Statute.²⁴⁶ A State which is no party to the Rome Statute can accept the jurisdiction the ICC, if the crimes are committed in its territory or by one of its nationals. If a State chooses to do so, it can request the Office of the Prosecutor to carry out an investigation.²⁴⁷

When a situation is referred to the ICC for investigation, the Prosecutor should determine whether, the Court has jurisdiction over the alleged crimes. After a thorough analysis of the available information, the Prosecution decides whether there is a reasonable ground to continue with an investigation. The Prosecution, must determine whether the alleged crimes can be categorized as the crime of genocide, crimes against humanity or war crimes and whether they were committed after 1 July 2002.²⁴⁸ Pursuant to Article 17 (1) (a) of the Rome Statute, the Prosecution should also look into whether any national authorities are conducting a genuine investigation or trial of the alleged perpetrators of the crimes.²⁴⁹ The ICC Prosecutor is obliged to do so by the Complementarity principle, which is enshrined in Article 1 and Article 17 of the Rome Statute.²⁵⁰ According to Article 18 (1) of the Statute, the Prosecutor should also inform the State Parties and other States which may have jurisdiction of the jurisdiction of the Prosecution to start an investigation.²⁵¹

The Office of the Prosecutor conducts an investigation by sending its investigators to gather evidence in areas where crimes are alleged to have been committed. In doing so, the

²⁴²Wallace, D., & Silander, D. (2015). *International Organizations and the Implementation of the Responsibility to Protect*. New York: Routledge.

²⁴³ International Criminal Court. (1998). *Rome Statute of the International Criminal Court*

²⁴⁴ International Criminal Court. (1998). *Rome Statute of the International Criminal Court*

²⁴⁵Wallace, D., & Silander, D. (2015). *International Organizations and the Implementation of the Responsibility to Protect*. New York: Routledge.

²⁴⁶ International Criminal Court. (1998). *Rome Statute of the International Criminal Court*

²⁴⁷ International Criminal Court. (1998). *Understanding the International Criminal Court*.

²⁴⁸ International Criminal Court. (1998). *Understanding the International Criminal Court*.

²⁴⁹ International Criminal Court. (1998). *Rome Statute of the International Criminal Court*

²⁵⁰ International Criminal Court. (1998). *Rome Statute of the International Criminal Court*

²⁵¹ International Criminal Court. (1998). *Rome Statute of the International Criminal Court*.

investigators must make sure that no risk is brought to the victims and witnesses of the crimes. The Office of the Prosecutor also asks States and international organizations to assist them and to cooperate with them during the investigation. The investigators should find out whether the alleged perpetrator is guilty or innocent by find evidence that could prove their guilt or innocence.²⁵²

The ICC cannot prosecute all persons suspected of committing serious international crimes. The Office of the Prosecutor only focuses on prosecuting the perpetrators who bear the greatest responsibility for the committed crimes.²⁵³ The phrase “greatest responsibility” is not included in the ICC statute, but it is purely a prosecutorial policy. There is thus no explicit limitation on the ICC’s personal jurisdiction. However, it appears that most states prefer a broader personal jurisdiction for the ICC rather than a narrower one. Despite this preference, the ICC Prosecutor has interpreted this reference to personal jurisdiction as allowing a focus only on those “who bear the greatest responsibility”.²⁵⁴ Article 5 (1) of the Rome Statute does limit the jurisdiction of the Court by requiring that only the most serious crimes of concern to the international community as a whole can be prosecuted by the ICC.²⁵⁵

According to the Rome Statute, the Office of the Prosecutor should also take into account the gravity of the crime when deciding on the initiation of investigations. In accordance with this limitation, the Office developed a policy of focused investigations and prosecutions, which is adopted in the 2009-2012 Prosecutorial Strategy document of the Court. This means that the ICC will investigate and prosecute those who bear the greatest responsibility for the most serious crimes, based on the evidence that emerges in the course of an investigation. “Who bear the greatest responsibility” according to this policy means prosecuting only high-ranking perpetrators with the highest echelons of responsibility. These high-ranking perpetrators include those who ordered, financed, or otherwise organized the alleged crimes.

If the ICC decides not to prosecute a particular individual, this does not mean that he is granted impunity. In accordance with the complementarity principle of the ICC, the Office supports national investigations of alleged crimes which cannot be prosecuted by the ICC. According to this policy of focused investigations, the cases inside a situation are selected according to gravity and factors such as the scale, nature, manner of commission, and impact of the alleged crimes are taken into account. According to this policy, the ICC cannot prosecute lower-ranking

²⁵² International Criminal Court. (n.d.). *Understanding the International Criminal Court*.

²⁵³ International Criminal Court. (n.d.). *Understanding the International Criminal Court*.

²⁵⁴ Jalloh, C. (2013). Prosecuting Those Bearing 'Greatest Responsibility': The Lessons of the Special Court for Sierra Leone. *Marquette Law Review*, 96, 864-911.

²⁵⁵ International Criminal Court. (1998). *Rome Statute of the International Criminal Court*.

individuals.²⁵⁶ As this is simply a policy, it can be changed at any time without having to make amendments to the Rome Statute.²⁵⁷ According to the 2012-2015 Strategic Plan of the ICC's Office of the Prosecutor, however, the ICC is willing to abandon this focus on the "most responsible" perpetrators if prosecuting lower-level perpetrators helps the Court to build cases against those most responsible.²⁵⁸ This is also adopted in the ICC's Policy Paper on Sexual and Gender-Based Crimes.²⁵⁹ The individuals who bear the 'greatest responsibility' are usually also the ones who are the most difficult to deter, as they are usually people in senior leadership positions.²⁶⁰

However, prosecuting lower-ranking perpetrators of international crimes could have various advantages. Prosecuting low-ranking individuals could set an example that mass atrocities do not remain unpunished when prosecuting high-ranking individuals is not possible. Moreover, it is usually very difficult to find a link between crimes committed on the ground and decisions made by these senior leaders. This could cause a delay of prosecution and such delay could have significant negative consequences for the victims of international crimes, especially if the conflict is still ongoing. It could therefore be beneficial to, at least, initially prosecute low-ranking perpetrators. Prosecution of low-ranking militants can also be advantageous due to the nature of the alleged crime.²⁶¹ For example, in the case of sexual violence, it is better from the perspective of the victims to not just prosecute a few senior leaders but also those lower down the chain of command individuals who actually committed the sexual abuses.²⁶²

Carla del Ponte believes that prosecuting lower ranking perpetrators is important since "[f]or the local people, the victims and the survivors, it was these people who brought their world to an end, not the remote governmental architects of the overall policy of genocide"²⁶³ Moreover, not limiting ICC's prosecution to only big fish perpetrators is consistent with the main goal of the ICC, which is to end impunity. In order to diminish impunity, the intervention of the ICC is desirable and necessary, even if the Court prosecutes low-level perpetrators.²⁶⁴ Furthermore,

²⁵⁶ International Criminal Court (2010). *Prosecutorial Strategy 2009 - 2012*.

²⁵⁷ Jalloh, C. (2013). Prosecuting Those Bearing 'Greatest Responsibility': The Lessons of the Special Court for Sierra Leone. *Marquette Law Review*, 96, 864-911.

²⁵⁸ International Criminal Court (2013). *Strategic plan June 2012-2015*.

²⁵⁹ International Criminal Court (2014). *Policy Paper on Sexual and Gender-Based Crimes*.

²⁶⁰ Cronin-Furman, K. (2013). Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity. *The International Journal of Transitional Justice*, 7(3), 434-454.

²⁶¹ Human Rights Watch. (2006). *The Selection of Situations and Cases for Trial before the International Criminal Court*.

²⁶² Human Rights Watch. (2006). *The Selection of Situations and Cases for Trial before the International Criminal Court*.

²⁶³ Office of the Prosecutor. (2001). *ICTY, Statement by the Prosecutor addressed to the UN Security Council*.

²⁶⁴ Zakerhossein, M. (2016). To Bury a Situation Alive – A Critical Reading of the ICC Prosecutor's Statement on the ISIS Situation. *International Criminal Law Review*, 16(4), 613-641.

specifically for the crime of genocide, it could be necessary to prosecute more than just a few senior leaders in order to clearly demonstrate how genocide operated in a particular conflict. By prosecuting the individuals who directly engaged in the commission of international crimes, who are usually low-ranking militants, the ICC could also identify the high ranking leaders responsible for the committed crimes. Prosecuting the direct perpetrators could therefore also help the prosecution of perpetrators in senior positions.²⁶⁵

The recent *Al Mahdi* case²⁶⁶ is an example in which the ICC prosecuted a low-ranking perpetrator. Al Mahdi was a member of Ansar Dine who pleaded guilty to the war crime of destroying religious sites in Timbuktu, during the 2012 civil war in Mali. This prosecution by the ICC was criticized, since Al Mahdi is not a senior-level perpetrator.²⁶⁷ This was the first case before the ICC, in which war crimes for the destruction of cultural heritage was prosecuted. Despite this criticism, the ICC prosecuted this low-ranking individual in order to send a signal to the international community that crimes against cultural heritage must be taken seriously, because of their correlation with other more tangible crimes that are also under the jurisdiction of the Court.²⁶⁸ The ICC Prosecutor stated that in this case “*the destroyed mausoleums were important, from a religious point of view, from an historical point of view, and from an identity point of view*”²⁶⁹

3.4. Prosecution before the ICC and Jurisdictional Obstacles

The International Criminal Court (ICC) is a possible venue for prosecuting the crimes committed by ISIS against the Yazidis.²⁷⁰ The Security Council resolution 2170 asks Member States to take all necessary and appropriate measures with their obligation under international law in order to stop instigation of terrorist acts, committed by individuals or entities associated with ISIS and bring them to justice.²⁷¹ Moreover, the UN Human Rights Council adopted Resolution S/22-1

²⁶⁵ Human Rights Watch. (2006). *The Selection of Situations and Cases for Trial before the International Criminal Court*.

²⁶⁶ The International Criminal Court. (2015). *Al Mahdi*.

²⁶⁷ Kersten, M. (2016). *Big Fish or Little Fish — Who Should the International Criminal Court Target?*.

²⁶⁸ Casaly, P. (2016). Al Mahdi before the ICC: Cultural Property and World Heritage in International Criminal Law. *Journal of International Criminal Justice*, 14(5), 1199-1220.

²⁶⁹ Office of the Prosecutor. (2016). *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at the opening of the confirmation of charges hearing in the case against Mr Ahmad Al-Faqi Al Mahdi*.

²⁷⁰ Powell, C. (2017). *Rape as a Tactic of Terror: Holding the Islamic State Accountable (Unpublished Draft on File with Author)*.

²⁷¹ Security Council. (2014). Resolution 2170.

which requires Member State to coordinate in order to avoid impunity and ensuring full accountability.²⁷²

At first sight, prosecution before the ICC seems ideal, since according to the principle of complementarity, the ICC can exercise jurisdiction when states are unwilling or unable to conduct the investigation or prosecution. It is not likely that the Iraqi and Syrian courts would be able to prosecute ISIS for the alleged crimes against the Yazidis due to their relative lack of resources and expertise with such crimes.²⁷³ Since the lack of jurisdiction in Iraq and Syria, State Parties to the Rome Statute might decide to prosecute their nationals who committed crimes in Syria and Iraq. These states mostly prosecute nationals who cause a domestic threat by being involved in recruitment or supporting activities for ISIS within their State or fighters who have returned to their country after fighting for ISIS. However, states might decide not to try ISIS members, due to security reasons. Given the magnitude of the widespread atrocities committed by ISIS and the lack of prosecution against these crimes, the ICC would be a justifiable option for prosecuting members of ISIS.²⁷⁴

However, the question is whether the ICC has jurisdiction over the crimes committed in Syria and Iraq. Although the crimes committed against the Yazidis fall within the scope of material jurisdiction of the ICC, since they qualify as genocide²⁷⁵, there are some major problems of prosecuting ISIS' crimes before the ICC. The main obstacle of prosecuting ISIS is that ISIS's crimes against the Yazidis are committed in Iraq and Syria, none of which are a Parties to the Rome Statute.²⁷⁶ There are also no indication that these countries will ratify the Rome Statute.²⁷⁷ In April 2015, ICC's Chief Prosecutor, Fatou Bensouda, publicly stated that the jurisdiction of the ICC for opening a preliminary examination into the alleged crime of genocide committed by ISIS is too narrow at this stage.²⁷⁸

²⁷² Human Rights Council. (2014). *S-22/1 The human rights situation in Iraq in the light of abuses committed by the so-called Islamic State in Iraq and the Levant and associated groups*.

²⁷³ Powell, C. (2017). *Rape as a Tactic of Terror: Holding the Islamic State Accountable (Unpublished Draft on File with Author)*.

²⁷⁴ Kenny, C. (2017). Prosecuting Crimes of International Concern: Islamic State at the ICC.. *Utrecht Journal of International and European Law*, 33(84), 120-145.

²⁷⁵ Murray, A., Zammit Borda, A., & Dakhil, V. (2017). 'Calling ISIL Atrocities Against the Yezidis by Their Rightful Name': Do They Constitute the Crime of Genocide? *Human Rights Law Review*, 17(2), 261-283. doi:<https://doi.org/10.1093/hrlr/ngx004>

²⁷⁶ Kenny, C. (2017). Prosecuting Crimes of International Concern: Islamic State at the ICC.. *Utrecht Journal of International and European Law*, 33(84), 120-145.

²⁷⁷ Hora Siccama, D., & Ryngaert, C. M. J. (2016). *Justice for Sexual Crimes Committed by IS : Exploring Accountability and Compliance Mechanisms*. Utrecht: Utrecht University.

²⁷⁸ International Criminal Court. (2015). *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the alleged crimes committed by ISIS*.

In theory, Iraq and Syria could accept limited ICC jurisdiction with respect to the committed crimes under Article 12(3) of the Rome Statute, according to which non-party to the statute are able to accept the jurisdiction of the court.²⁷⁹ If Iraq and Syria accept limited jurisdiction of the Court, the ICC could exercise jurisdiction over the crimes committed there from July 1, 2002 onwards.²⁸⁰ However, there are no indications that these countries will sign a declaration accepting the jurisdiction of the Court.²⁸¹

Foreign fighters from Europe who went to fight for ISIS in Syria and Iraq could, for example, be prosecuted by the ICC. If the Court only prosecutes nationals of state parties to the ICC Statute, the impact of its investigations and prosecutions will be limited, since ISIS's leaders could then not be prosecuted as most of them are Iraqi nationals. Moreover, if the ICC brings cases against nationals of States which are not parties to the Statute, these cases might be inadmissible²⁸² according to Article 17 of the Rome Statute, which enshrines the complementarity principle.²⁸³ This could be the case, since states tend to carry out investigations and prosecutions regarding the crimes committed by their nationals abroad themselves. This would make it impossible for the ICC to exercise jurisdiction.²⁸⁴

Theoretically, the crimes committed by ISIS against the Yazidis, could also be referred to the ICC by the United Nations Security Council.²⁸⁵ In this case, the fact that Iraq and Syria are not State Parties to the Rome Statute would not be an obstacle.²⁸⁶ Such a referral has already been done twice, namely for Sudan in 2005 and for Libya in 2011.²⁸⁷ However, a referral of the situation in Syria and Iraq could be challenged by the veto right of the permanent members of the Security Council, since various members of this council have reasons to vote against such

²⁷⁹ International Criminal Court. (1998). *Rome Statute of the International Criminal Court*.

²⁸⁰ Powell, C. (2017). *Rape as a Tactic of Terror: Holding the Islamic State Accountable (Unpublished Draft on File with Author)*. New York: Fordham University School of Law.

²⁸¹ Hora Siccama, D., & Ryngaert, C. M. J. (2016). *Justice for Sexual Crimes Committed by IS : Exploring Accountability and Compliance Mechanisms*. Utrecht: Utrecht University.

²⁸² Hora Siccama, D., & Ryngaert, C. M. J. (2016). *Justice for Sexual Crimes Committed by IS : Exploring Accountability and Compliance Mechanisms*. Utrecht: Utrecht University.

²⁸³ International Criminal Court. (1998). *Rome Statute of the International Criminal Court*.

²⁸⁴ Hora Siccama, D., & Ryngaert, C. M. J. (2016). *Justice for Sexual Crimes Committed by IS : Exploring Accountability and Compliance Mechanisms*. Utrecht: Utrecht University.

²⁸⁵ Hora Siccama, D., & Ryngaert, C. M. J. (2016). *Justice for Sexual Crimes Committed by IS : Exploring Accountability and Compliance Mechanisms*. Utrecht: Utrecht University.

²⁸⁶ M Brennan, A. (2015). Prosecuting ISIL before the International Criminal Court: Challenges and Obstacles. *The American Society of International Law*, 19(21), 1.

²⁸⁷ Hora Siccama, D., & Ryngaert, C. M. J. (2016). *Justice for Sexual Crimes Committed by IS : Exploring Accountability and Compliance Mechanisms*. Utrecht: Utrecht University.

referral due to concerns about their own potential liabilities.²⁸⁸ The United States, which is a permanent member of the Security Council, has recently launched military operations in Iraq and Syria in attempt to stop the threat caused by ISIS.²⁸⁹ The U.S. might therefore object to a referral by the Security Council, since ICC jurisdiction over Iraq could place scrutiny on U.S. soldiers.²⁹⁰ The U.S. and also other permanent members of the council could therefore urge that an exclusion of jurisdiction clause for their own nationals should be included.²⁹¹ This was also the case with the referral on Darfur²⁹² and also with the referral of the situation in Libya.²⁹³ Due to the current political situation, it is also likely that Russia and/or China will use their veto right in order to stop the referral of the Security Council.²⁹⁴ Russia and China have vetoed in total four resolutions regarding the situation in Syria. They also recently vetoed the resolution referring the situation in Syria to the ICC for investigation.²⁹⁵ Therefore, in 2014, this resolution to refer the situation in Syria to the ICC failed by a vote of thirteen in favour and two against.²⁹⁶ This was the first time that the veto right was used regarding a proposed referral to the Court.²⁹⁷ There is therefore a big chance that a Security Council referral of the situation in Syria and Iraq would fail again due to geopolitical reasons.²⁹⁸

Another venue for taking action against ISIS's crime of genocide against the Yazidis is through initiating an investigation by the Prosecutor of the ICC based on information on crimes within

²⁸⁸Powell, C. (2017). *Rape as a Tactic of Terror: Holding the Islamic State Accountable (Unpublished Draft on File with Author)*. New York: Fordham University School of Law.

²⁸⁹ M Brennan, A. (2015). Prosecuting ISIL before the International Criminal Court: Challenges and Obstacles. *The American Society of International Law*, 19(21), 1.

²⁹⁰ M Brennan, A. (2015). Prosecuting ISIL before the International Criminal Court: Challenges and Obstacles. *The American Society of International Law*, 19(21), 1.

²⁹¹ M Brennan, A. (2015). Prosecuting ISIL before the International Criminal Court: Challenges and Obstacles. *The American Society of International Law*, 19(21), 1.

²⁹²Powell, C. (2017). *Rape as a Tactic of Terror: Holding the Islamic State Accountable (Unpublished Draft on File with Author)*. New York: Fordham University School of Law.

²⁹³ M Brennan, A. (2015). Prosecuting ISIL before the International Criminal Court: Challenges and Obstacles. *The American Society of International Law*, 19(21), 1.

²⁹⁴ Hora Siccama, D., & Ryngaert, C. M. J. (2016). *Justice for Sexual Crimes Committed by IS : Exploring Accountability and Compliance Mechanisms*. Hora Siccama, D., & Ryngaert, C. M. J. (2016). *Justice for Sexual Crimes Committed by IS : Exploring Accountability and Compliance Mechanisms*. Utrecht: Utrecht University.

²⁹⁵ Webb, P. (2014). Deadlock or Restraint? The Security Council Veto and the Use of Force in Syria. *Journal of Conflict & Security Law*, 19(3), 1-2. doi:<https://doi.org/10.1093/jcsl/kru018>

²⁹⁶M Brennan, A. (2015). Prosecuting ISIL before the International Criminal Court: Challenges and Obstacles. *The American Society of International Law*, 19(21), 1.

²⁹⁷ Webb, P. (2014). Deadlock or Restraint? The Security Council Veto and the Use of Force in Syria. *Journal of Conflict & Security Law*, 19(3), 1-2. doi:<https://doi.org/10.1093/jcsl/kru018>

²⁹⁸ M Brennan, A. (2015). Prosecuting ISIL before the International Criminal Court: Challenges and Obstacles. *The American Society of International Law*, 19(21), 1.

the jurisdiction of the Court.²⁹⁹ The Prosecutor is able to do this according to Article 15(1) of the ICC Statute.³⁰⁰ However, since Iraq and Syria are not parties to the Rome Statute, the prosecutor would not have territorial jurisdiction based on article 12(2) (a) of the Rome Statute³⁰¹, to start such an investigation.³⁰²

The Office of the Prosecutor of the ICC has gathered information, which indicates that ISIS has several thousand foreign fighters. Significant numbers of these foreign fighters come from countries which are State Parties, including Tunisia, Jordan, France, the United Kingdom, Germany, Belgium, the Netherlands and Australia. According to the Office a few of those individuals have even published their crimes on social media.³⁰³ Moreover, in September 2015, Yazidi activists worked with Luis Moreno Ocampo, who is the former ICC prosecutor, in order to petition the court on the question of genocide in Sinjar since August 2014. According to this petition there are Islamic State militants who come from countries that are state parties to the ICC Statute. These countries include Australia, Georgia, and Tunisia. They were involved in fundraising, training, and committing crimes against Yazidi women and girls.³⁰⁴ The ICC could therefore, in theory, start an investigation over alleged perpetrators who are nationals of these countries based on article 12(2) (b) of the Rome Statute³⁰⁵, if pursuant to the Prosecutor's policy, these perpetrators are high-ranking members of ISIS.³⁰⁶

However, ISIS is primarily led by nationals of Iraq and Syria. Therefore, at this stage, investigating and prosecuting those who are most responsible, within the leadership of ISIS, is limited.³⁰⁷ If the prosecutor, opts to prosecute mid-ranking leaders of ISIS if they are nationals of a State Party to the Rome Statute, this would probably be criticized by the international community, since the highest members of the militant organization would not be prosecuted.³⁰⁸ Despite this criticism, since prosecution by the ICC of high-ranking ISIS leaders is not possible, the Court should prosecute lower-ranking ISIS members in order to set an example that an action

²⁹⁹ Powell, C. (2017). *Rape as a Tactic of Terror: Holding the Islamic State Accountable (Unpublished Draft on File with Author)*. New York: Fordham University School of Law.

³⁰⁰ International Criminal Court. (1998). *Rome Statute of the International Criminal Court*.

³⁰¹ International Criminal Court. (1998). *Rome Statute of the International Criminal Court*.

³⁰² M Brennan, A. (2015). Prosecuting ISIL before the International Criminal Court: Challenges and Obstacles. *The American Society of International Law*, 19(21), 1.

³⁰³ International Criminal Court. (2015). *ICC Weekly Update #239*.

³⁰⁴ Powell, C. (2017). *Rape as a Tactic of Terror: Holding the Islamic State Accountable (Unpublished Draft on File with Author)*. New York: Fordham University School of Law.

³⁰⁵ International Criminal Court. (1998). *Rome Statute of the International Criminal Court*.

³⁰⁶ M Brennan, A. (2015). Prosecuting ISIL before the International Criminal Court: Challenges and Obstacles. *The American Society of International Law*, 19(21), 1.

³⁰⁷ International Criminal Court. (2015). *ICC Weekly Update #239*.

³⁰⁸ M Brennan, A. (2015). Prosecuting ISIL before the International Criminal Court: Challenges and Obstacles. *The American Society of International Law*, 19(21), 1.

has to be undertaken against such widespread atrocities as those committed by ISIS against the Yazidis.³⁰⁹ Moreover, especially due to the sexual violence committed against Yazidi women and girls, the ICC should prosecute the low-ranking ISIS members who are the direct perpetrators of the crimes, rather than the leaders who give the orders. There is evidence that the victims of such crimes blame lower-level perpetrators just as much as the high-level perpetrators who gave the orders for committing the atrocities.³¹⁰

Furthermore, according to the Rome Statute, the primary responsibility for the investigation and prosecution of individuals who have committed international crimes, lies in the first instance, with the national authorities.³¹¹ States such as the U.K have, for example, already taken legislative measures addressed to nationals who have joined ISIS and have also started prosecutions against nationals who allegedly committed international crimes.³¹² The Court could thus in theory start an investigation on the genocide against the Yazidis.³¹³ However, such an investigation would be very limited.³¹⁴

Chapter 4 Prosecution before an International Criminal Tribunal

4.1. History of United Nations' International Criminal Tribunals

Throughout history, the Security Council of the United Nations has established two ad hoc international criminal tribunals³¹⁵, namely the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). These tribunals were created in order to prosecute individuals accused of “grave breaches” of the Geneva Convention of 1949, war crimes, genocide, and crimes against humanity.³¹⁶

The ICTY was created in 1993 in order to prosecute international criminal violations in the former Yugoslavia conflict. On 3 May 1993, the Secretary-General produced a draft ICTY. This was the first ad hoc International Criminal Tribunal since the 1945 Nuremberg and Tokyo

³⁰⁹ Committee on Legal Affairs and Human Rights. (2017). *Prosecuting and punishing the crimes against humanity or even possible genocide committed by Daesh*.

³¹⁰ Chertoff, E. (2017). *Prosecuting Gender-Based Persecution: The Islamic State at the ICC*. New Haven: Yale University.

³¹¹ International Criminal Court. (2015). *ICC Weekly Update #239*.

³¹² M Brennan, A. (2015). Prosecuting ISIL before the International Criminal Court: Challenges and Obstacles. *The American Society of International Law*, 19(21), 1.

³¹³ Powell, C. (2017). *Rape as a Tactic of Terror: Holding the Islamic State Accountable (Unpublished Draft on File with Author)*. New York: Fordham University School of Law.

³¹⁴ International Criminal Court. (2015). *ICC Weekly Update #239*.

³¹⁵ Waltman, G. (2014). *PROSECUTING ISIS*. Oxford: University of Mississippi - School of Law.

³¹⁶ Waltman, G. (2014). *PROSECUTING ISIS*. Oxford: University of Mississippi - School of Law.

Tribunals. It was also the first time that an ad hoc tribunal was established pursuant to Chapter VII of the UN Charter. This was an unusual procedure, since the ICTY was not based on a state consent treaty but it was instead an enforcement measure in accordance to Chapter VII of the UN Charter. It was believed that by establishing such a tribunal, international peace and security could be restored and violations of international humanitarian law could be redressed.³¹⁷ In order to remove threats to international peace and security, the UN Charter gave the Security Council the power to order military interventions, embargos, and sanctions. The Security Council then decided that the powers stated in Chapter VII of the UN Charter include also the capacity to establish an international criminal tribunal. In order to be able to establish such a tribunal, the Security Council had to make a crucial link between peace and justice. This council could not use its powers under Chapter VII to establish the ICTY without recognizing it as a mechanism for restoring peace in the former Yugoslavia.³¹⁸

This ability of the Security Council to establish such an international criminal tribunal was challenged in the ICTY Tadić case. The Trial Court decided that the ICTY could not review the Security Council's decision to establish the tribunal and that the question was not justiciable since it was a political issue. The Appellate Chamber disagreed with the decision of the trial chamber and found that a tribunal had the power to determine its competence to hear a case. A tribunal could do that as part of its "incidental or inherent jurisdiction".³¹⁹ According to the Appellate Chamber, Tadić's challenge was justifiable. The Appellate Chamber decided that the Security Council had the power to create an international criminal tribunal under Chapter VII of the United Nations Charter, although this power was not expressly stated. This decision of the appellate chamber in Tadić case, helped for the creation and implementation of the ICTR.³²⁰

According to the Appeals Chamber of the ICTY, the Security Council can establish an international criminal tribunal based on three grounds.³²¹ The first ground is that the Security Council has been given wide powers, stated in Articles 39-42 of the UN Charter, in order to deal with a threat to the peace, a breach of the peace or an act of aggression. Moreover, this list is not

³¹⁷ Knoops, G. J. A. (2014). *An Introduction To The Law Of International Criminal Tribunals*. Leiden, The Netherlands: Koninklijke Brill NV

³¹⁸ Goldstone, R. (2017). The Role of the United Nations in the Prosecution of International War Criminals. *Journal of Law and Policy*, 5, 119-127.

³¹⁹ ICTY, *The Prosecutor v. Dusko Tadic a/k/a "DULE"*, *Judgement (2 octobre 1995)*, para. 18

³²⁰ Waltman, G. (2014). *PROSECUTING ISIS*. Oxford: University of Mississippi - School of Law.

³²¹ *Prosecutor v Duško Tadić aka "Dule" (Decision on the Defence Motion for Interlocutory Appeals on Jurisdiction)* Case No IT-94-1-A (2 Oct 1995) paras 33-48

exhaustive and is wide enough to include the creation of an international criminal tribunal.³²² Furthermore, although, the Security Council is not a judicial body and has no judicial powers, this is of no consequence for the establishment of an ad hoc tribunal, since it did not delegate any of its functions to the ad hoc tribunal. The Security Council established a subsidiary organ instead. This subsidiary entity did not have a separate juristic personality and was entrusted with judicial powers in order to prevent a threat to international peace and security.³²³ The Security Council gave its tribunals the power to enforce only universally recognized criminal laws, being violations of the Genocide Convention, crimes against humanity and war crimes that had become customary norms, and, in the case of the ICTY, grave breaches of the Geneva Conventions.³²⁴ The Security Council had thus the power to do create such tribunal. Furthermore, the rule that a court should be established by law as applied in municipal setting does not apply in international law. “*Established by law*” in an international context means that the tribunal must be created in accordance with the rule of law. This means that “*it must provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognized human rights instruments.*”³²⁵

The Appeals Chamber decision of 2 October 1995 in the Tadić case, dealt also with other challenges to the jurisdiction of the ICTY.³²⁶ The defence in the Tadić case claimed that there was a lack of subject matter jurisdiction, since the crimes stated in article 3, violations of the laws or customs of war, were allegedly restricted to an internal armed conflict.³²⁷ The appellate chamber ruled that, the existence of an international armed conflict was not a requirement for the exercise of jurisdiction under Article 2, 3 or 5 of the Statute.³²⁸ Tadić also claimed that the Tribunal lacked primacy over national courts. According to article 9(1) of the ICTY Statute, the Tribunal and national courts have concurrent jurisdiction to prosecute persons’ for serious violations of IHL committed in the former Yugoslavia. Article 9(2) of the Statute states that the ICTY ‘shall have primacy over national courts’ and that it can direct national courts ‘to defer to

³²² *Prosecutor v Duško Tadić aka "Dule" (Decision on the Defence Motion for Interlocutory Appeals on Jurisdiction)* Case No IT-94-1-A (2 Oct 1995) paras 33-36.

³²³ *Prosecutor v Duško Tadić aka "Dule" (Decision on the Defence Motion for Interlocutory Appeals on Jurisdiction)* Case No IT-94-1-A (2 Oct 1995) paras 37-38

³²⁴ Goldstone, R. (2017). The Role of the United Nations in the Prosecution of International War Criminals. *Journal of Law and Policy*, 5, 119-127.

³²⁵ *Prosecutor v Duško Tadić aka "Dule" (Decision on the Defence Motion on Jurisdiction)* Case No IT-94-1-T (10 Aug 1995) para 45

³²⁶ A. Schabas, W. (2016). *The Cambridge Companion to International Criminal Law*. Cambridge, United Kingdom: Cambridge University Press.

³²⁷ *Prosecutor v Duško Tadić aka "Dule" (Decision on the Defence Motion for Interlocutory Appeals on Jurisdiction)* Case No IT-94-1-A (2 Oct 1995) para 65

³²⁸ Greenwood, C. (2017). International Humanitarian Law and the Tadic Case Symposium: The International Tribunal for Former Yugoslavia Comes to Age.. *European Journal of International Law*, 19, 256-283.

the competence' of the ICTY. The Appeals Chamber dismissed the appeal regarding the primacy over national courts.³²⁹

The ICTR was created in 1994, when the Security Council used its powers to create an ad hoc tribunal again pursuant to Chapter VII of the UN Charter. This tribunal was established in order to prosecute individuals who committed violations of international humanitarian law on the territory of Rwanda during the Rwandan conflict.³³⁰ The ICTR prosecuted for the first time the crime of genocide.³³¹ By establishing this tribunal, the Security Council created a subsidiary body³³² in accordance with Article 29 of the UN Charter.³³³ A subsidiary body can be established by resolution of the organ whose functions they are asked to carry out. The ICTY and ICTR are thus subsidiary organs of the Security Council whose powers serve as a means of executing the primary function of the Security Council to maintain international peace and security.³³⁴

Compared to tribunals established more recently, the ICTY and ICTR have unique origins. The Special Court for Sierra Leone, was for example established in a different manner. This special court was established when the UN and the Government of Sierra Leone entered into an agreement to establish such a court. This agreement was made on 16 January 2003. The Sierra Leone Government agreed with the establishing of this court, while still maintaining its sovereign rights, while the ICTY and ICTR had primacy over national courts of all UN member states. Hybrid courts have primary jurisdiction only over the national courts of the country that signed an agreement with the UN.³³⁵ Tribunals like the ICTY and ICTR are known as stand-alone international tribunals or ad hoc tribunals, while tribunals such as the Special Court for Sierra Leone (SCSL), are known as hybrid or mixed national-international entities. Stand-alone international tribunals are established by Security Council resolutions and the judges, officials, and staff that make up the courts are usually international experts not from the countries where the crimes have been committed. These tribunals have also been situated outside the countries

³²⁹M.H. Nouwen, S., & A Becker, M. (2017). *Tadić v Prosecutor: International Criminal Tribunal for the former Yugoslavia, 1995*.

³³⁰ Knoops, G. J. A. (2014). *An Introduction To The Law Of International Criminal Tribunals*. Leiden, The Netherlands: Koninklijke Brill NV.

³³¹ White, E. (2017). *THE PRECEDENT OF THE CRIME OF GENOCIDE IN THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA*. Durham: Duke University.

³³² Knoops, G. J. A. (2014). *An Introduction To The Law Of International Criminal Tribunals*. Leiden, The Netherlands: Koninklijke Brill NV.

³³³ United Nations. (1945). *Charter of the United Nations*.

³³⁴ Van der Vyver, J. D. (2015). THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE UNAUTHORISED CONDUCT OF INTERNATIONAL INSTITUTIONS. *Potchefstroom Electronic Law Journal*, 18(5), 1302-1330.

³³⁵ Knoops, G. J. A. (2014). *An Introduction To The Law Of International Criminal Tribunals*. Leiden, The Netherlands: Koninklijke Brill NV.

where the crimes took place. In the case of the hybrid or mixed national-international entity, the courts have typically been created through agreements with the UN.³³⁶

These courts have been composed of both international and domestic judicial officials and they have been situated in the countries where the crimes were committed.³³⁷ Hybrid courts have the legitimacy of a domestic court and the objectivity of an international court. These courts can also be created within the existing domestic court structure of a state. In this way there is no need for the establishment of a completely new court.³³⁸ Other examples of mixed national-international courts are the Extraordinary Chambers in the Court of Cambodia (ECCC), which was established with an agreement between the UN and the government of Cambodia on 17 March 2003; The UNTAET (East Timor) Serious Crimes Panel which was established with the Security Council Resolution 1272 of 25 October 1999; The Kosovo Internationalized Panels; The Special Tribunal for Lebanon (STL), which was established by United Nations Security Council Resolution 1757, pursuant to a request from the Lebanese government; and the Bangladesh War Crimes Tribunal, which was established in 2009 in order to investigate and try suspects for war crimes committed in 1971 during the independence movement in Bangladesh.³³⁹

4.2. Legal basis of ICTY and ICTR jurisdictions

The ICTY had the power to prosecute war crimes, crimes against humanity and genocide.³⁴⁰ According to article 2 and article 3 of the ICTY Statute, the ICTY had jurisdiction over war crimes, which consist of grave breaches of the Geneva Conventions and violations of the laws or customs of war.³⁴¹ According to article 5 of the ICTY Statute, the tribunal could prosecute crimes against humanity.³⁴² The tribunal could prosecute the crimes of genocide based on article 4 of the ICTY Statute.³⁴³ The ICTR had the power to prosecute the same crimes as the ICTY.³⁴⁴ The ICTR was able to prosecute individuals responsible for war crimes according to article 4 of

³³⁶ Human Rights Watch. (2013). *Syria: Criminal Justice for Serious Crimes under International Law*.

³³⁷ Human Rights Watch. (2013). *Syria: Criminal Justice for Serious Crimes under International Law*.

³³⁸ Ryngaert, C. M. J., & Hora Siccama, D. W. (2016). *Justice for Sexual Crimes Committed by IS: Exploring Accountability and Compliance Mechanisms*.

³³⁹ Knoops, G. J. A. (2014). *An Introduction To The Law Of International Criminal Tribunals*. Leiden, The Netherlands: Koninklijke Brill NV.

³⁴⁰ Knoops, G. J. A. (2014). *An Introduction To The Law Of International Criminal Tribunals*. Leiden, The Netherlands: Koninklijke Brill NV

³⁴¹ United Nations. (2009). *Updated Statute of the International Criminal Tribunal for the Former Yugoslavia*.

³⁴² United Nations. (2009). *Updated Statute of the International Criminal Tribunal for the Former Yugoslavia*.

³⁴³ United Nations. (2009). *Updated Statute of the International Criminal Tribunal for the Former Yugoslavia*.

³⁴⁴ Knoops, G. J. A. (2014). *An Introduction To The Law Of International Criminal Tribunals*. Leiden, The Netherlands: Koninklijke Brill NV

the ICTR Statute, genocide according to article 2 of the ICTR Statute and crimes against humanity based on article 3 of the Statute.³⁴⁵

4.3. *International Criminal Tribunal for Iraq and Syria*

The establishment of an ad hoc international criminal tribunal or a hybrid criminal tribunal is another theoretical venue for prosecuting the international crime of genocide committed by ISIS against the ethnic-religious group of the Yazidis.³⁴⁶

The crime of genocide committed by ISIS against the Yazidis can be prosecuted by creating an ad hoc international criminal tribunal, like the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). This kind of tribunal is set up for specific situations and usually has jurisdiction that has limited duration. These two tribunals were established by the United Nations, since the international community did not have faith in the domestic judicial systems of the states where the crimes had been committed. Prosecuting ISIS before an ad hoc tribunal would be better than prosecution before the ICC, in the sense that an ad hoc tribunal can have broad jurisdiction, which is not limited to the core international crimes. Ad hoc tribunals have also heard more cases than the ICC. The ICTY has, for example, dealt with more than 120 cases, while the ICC has only heard 34 cases so far. An ad hoc tribunal for ISIS could also be situated in the region. In this way, there will be a good access to witnesses and documentation. This ad hoc tribunal could have jurisdiction over crimes committed by ISIS in both Syria and Iraq.³⁴⁷ The Security Council could define the crime of genocide the same way, like the ICTY and ICTR, in a statute that establishes a tribunal to prosecute the leaders of ISIS for genocide that they have committed against the Yazidis.³⁴⁸

In order to establish an ad hoc international criminal tribunal for Iraq and Syria, this tribunal needs to be created by the Security Council, just like the ICTY and the ICTR were created.³⁴⁹ The Security Council can create such tribunal in accordance with Chapter VII of the UN Charter.³⁵⁰ The situation with ISIS satisfies the requirements for the Security Council to establish an ad hoc tribunal under Chapter VII.³⁵¹ According to article 39 of the UN Charter, before the

³⁴⁵ United Nations. (1994). *Statute of the International Tribunal for Rwanda*.

³⁴⁶ Hora Siccama, D., & Ryngaert, C. M. J. (2016). *Justice for Sexual Crimes Committed by IS : Exploring Accountability and Compliance Mechanisms*. Utrecht: Utrecht University.

³⁴⁷ Hora Siccama, D., & Ryngaert, C. M. J. (2016). *Justice for Sexual Crimes Committed by IS : Exploring Accountability and Compliance Mechanisms*. Utrecht: Utrecht University.

³⁴⁸ Waltman, G. (2014). *PROSECUTING ISIS*. Oxford: University of Mississippi - School of Law.

³⁴⁹ Hora Siccama, D., & Ryngaert, C. M. J. (2016). *Justice for Sexual Crimes Committed by IS : Exploring Accountability and Compliance Mechanisms*. Utrecht: Utrecht University.

³⁵⁰ United Nations. (n.d.). *Chapter VII*.

³⁵¹ Waltman, G. (2014). *PROSECUTING ISIS*. Oxford: University of Mississippi - School of Law.

Security Council can establish an ad hoc international criminal tribunal, is should determine the existence of any threat to the peace, breach of the peace or act of aggression.³⁵² The Council determined range of situations as causing threats to the peace. These situations include country specific situations such as inter- or intra-State conflicts or internal conflicts with a regional or sub-regional dimension. The Security Council considers also potential or generic threats, such as terrorist acts, the proliferation of weapons of mass destruction or the proliferation and illicit trafficking of small arms and light weapons, as threats to international peace and security.³⁵³ The United Nations (UN) has condemned ISIS as an “unprecedented threat to international peace and security”.³⁵⁴ In 2014, the Security Council acting under Chapter VII of the UN Charter, deplored and condemned "in the strongest terms the terrorist acts of ISIL and its violent extremist ideology, and its continuous gross, systematic and widespread abuses of human rights and violations of international humanitarian law"³⁵⁵ The goal of this terrorist group is namely to establish a worldwide caliphate, and to incite a global war using mass atrocities in order to accomplish its objectives. These goals are threat to every nation’s sovereignty and continued existence. Moreover, ISIS has been proclaimed as a terrorist organization by various countries, such as, the United States, Australia, Canada, Turkey, Saudi Arabia, the United Kingdom and Israel.³⁵⁶ The UN has stated that ISIS is public enemy number one and has urged Member States to “take all necessary measures” to combat the group.³⁵⁷ This was done by means of the Security Council’s Resolution of 15 August 2014.³⁵⁸ Although, to “take all necessary measures” can include armed force, it was generally understood that the resolution did not have as purpose to authorise an armed intervention.³⁵⁹ The Security Council can thus, in theory, establish an Ad hoc International Criminal Tribunal for Iraq and Syria in order to prosecute ISIS’s crime of genocide committed against the Yazidis. Iraq and Syria are also members of the United Nations, which means that they would be required to cooperate and abide by the decisions of this tribunal.³⁶⁰

³⁵² United Nations. (1945). *Charter of the United Nations*.

³⁵³ United Nations. (n.d.). *Actions with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression (Chapter VII)*.

³⁵⁴ United Nations. (2015). Security Council ‘Unequivocally’ Condemns ISIL Terrorist Attacks, Unanimously Adopting Text that Determines Extremist Group Poses ‘Unprecedented’ Threat.

³⁵⁵ SC Res 2170 (2014).

³⁵⁶ Van der Vyver, J. D. (2015). THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE UNAUTHORISED CONDUCT OF INTERNATIONAL INSTITUTIONS. *Potchefstroom Electronic Law Journal*, 18(5), 1302-1330.

³⁵⁷ E Schemenauer, S. (2016). *Using the Rule of Law to Combat the Islamic State*. Medford: The Fletcher School of Law and Diplomacy.

³⁵⁸ Security Council. (2014). *Security Council Adopts Resolution 2170 (2014) Condemning Gross, Widespread Abuse of Human Rights by Extremist Groups in Iraq, Syria*.

³⁵⁹ Van der Vyver, J. D. (2015). THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE UNAUTHORISED CONDUCT OF INTERNATIONAL INSTITUTIONS. *Potchefstroom Electronic Law Journal*, 18(5), 1302-1330.

³⁶⁰ Waltman, G. (2014). *PROSECUTING ISIS*. Oxford: University of Mississippi - School of Law.

However, this venue of prosecution has similar obstacles to an ICC prosecution.³⁶¹ Just like with prosecution before the ICC, Russia and China could form an obstacle for the establishment of an ad hoc tribunal for Syria and Iraq. As permanent members of the Security Council, if Russia and China do not agree with the establishment of an ad hoc tribunal, such an establishment would not be possible.³⁶² According to Del Ponte, who is a former Chief Prosecutor of two United Nations international criminal tribunals³⁶³, there is a chance that Russia and China would agree with an establishment of an ad hoc tribunal for Syria and Iraq, since an ad hoc tribunal focuses on the more extremist elements of the opposition rather than on members of the regime.³⁶⁴ In this sense, an establishment of an ad hoc tribunal by a UNSC Resolution under Chapter VII would be more realistic than a referral by the UNSC to the ICC, since the potential statute of such ad hoc tribunal could be modified in such a way as to exclude US and Russian nationals from prosecution.³⁶⁵ However, it is also likely, that the Syrian regime would ask for guarantees that its members will not be prosecuted, in return for cooperation with the tribunal. Moreover, a disadvantage of this option for prosecution, is that ad hoc tribunals are usually established after the conflict is already finished. This is the case, since it is difficult to investigate and prosecute criminals during the conflict. The effective functioning of an ad hoc tribunal for Syria and Iraq can thus be depended on the ending of the conflict.³⁶⁶ Another disadvantage of establishing an ad hoc tribunal is that the establishment of such highly complex institution, like the ICTY and ICTR, can take a very long time, since they require an enormous amount of political will and resources from the international community.³⁶⁷ It takes time to determine a sound legal framework, to find appropriate facilities, to recruit competent personnel or to ensure that a State cooperates with the tribunal. Arranging these things can cause considerable challenges and it will probably be more costly than if a permanent institution investigate and prosecute members of ISIS. This possible delay in creating an ad hoc tribunal can stop any potential deterrent effect that could be achieved by examining crimes in Syria and Iraq at the moment, as ISIS continues to commit mass abuses.³⁶⁸

³⁶¹ E Schemenauer, S. (2016). *Using the Rule of Law to Combat the Islamic State*. Medford: The Fletcher School of Law and Diplomacy.

³⁶² United Nations. (n.d.). *Voting System and Records*.

³⁶³ United Nations. (n.d.). *Independent International Commission of Inquiry on the Syrian Arab Republic*.

³⁶⁴ The guardian.(2015). *Call for special tribunal to investigate war crimes and mass atrocities in Syria*.

³⁶⁵ Kersten, M. (2013). *Searching-in-vain-perfect-justice-in-syria/Searching in Vain: Perfect Justice in Syria*.

Retrieved from <https://justiceinconflict.org/2013/11/10/searching-in-vain-perfect-justice-in-syria/>

³⁶⁶ Hora Siccama, D., & Ryngaert, C. M. J. (2016). *Justice for Sexual Crimes Committed by IS : Exploring Accountability and Compliance Mechanisms*. Utrecht: Utrecht University.

³⁶⁷ E Schemenauer, S. (2016). *Using the Rule of Law to Combat the Islamic State*. Medford: The Fletcher School of Law and Diplomacy.

³⁶⁸ Human Rights Watch. (2013). *Syria: Criminal Justice for Serious Crimes under International Law*.

Furthermore, the ICTY and the ICTR were very limited in terms of time, space and scope. That would not be the case with ISIS due to its sheer volume, range, type, and transnational nature of the crimes and offenders. This means that there will be thousands potential accusations, even if only limited to one or two geographic regions.³⁶⁹ Furthermore, the negotiations within the UN Security Council for the establishment of an ad hoc international criminal tribunal would also require time. Therefore, even if in theory, the Security Council could establish an ad hoc tribunal while the conflict is still ongoing, negotiations might take too much time or lead to very limited result.³⁷⁰

International Criminal Tribunal for Iraq and Syria can also be established in the form of a hybrid or mixed court. Such a hybrid court has already been established once in Iraq, namely when the Iraqi High Tribunal, which convicted Saddam Hussein and other individuals for committing, among other crimes, genocide and some domestic crimes, was established.³⁷¹

The creation of an international criminal tribunal for the prosecution of the crimes committed by ISIS has been discussed by scholars and practitioners, and a proposal for a draft Statute for a Syrian tribunal to prosecute ISIS's atrocities has even been approved.³⁷² This draft Statute for a Syrian tribunal, provides different jurisdictional options for the potential tribunal. According to Article 17 (a) of the Draft Statute, The tribunal could have personal jurisdiction over “*any individuals accused of atrocity crimes within Syria.*”; “*any individuals who bear the greatest responsibility for atrocity crimes within Syria*”; “*any Syrian nationals or residents of Syria accused of atrocity crimes within Syria*” or “*any Syrian nationals or residents of Syria who bear the greatest responsibility for atrocity crimes within Syria*”³⁷³ According to Article 17 (b) the potential tribunal will also have jurisdiction over the crime of genocide. Article 18 of this draft Statute defines the crime of genocide in accordance with Article 2 of the Convention on the

³⁶⁹ E Schemenauer, S. (2016). *Using the Rule of Law to Combat the Islamic State*. Medford: The Fletcher School of Law and Diplomacy.

³⁷⁰ European Parliament. (2016). *Public International Law Perspectives on the Prosecution of Daesh Crimes Against Women And Girls*.

³⁷¹ Hora Siccama, D., & Ryngaert, C. M. J. (2016). *Justice for Sexual Crimes Committed by IS : Exploring Accountability and Compliance Mechanisms*. Utrecht: Utrecht University.

³⁷² European Parliament. (2016). *Public International Law Perspectives on the Prosecution of Daesh Crimes Against Women And Girls*.

³⁷³ United Nations. (2014). *DRAFT STATUTE FOR A SYRIAN [EXTRAORDINARY][SPECIAL] TRIBUNAL TO PROSECUTE ATROCITY CRIMES*.

Prevention and Punishment of the Crime of Genocide.³⁷⁴ However, there are some major obstacles for the creation of a hybrid tribunal for Syria and Iraq.³⁷⁵

In order to establish a hybrid tribunal, the territorial state, in this case Syria and Iraq, or the Security Council would have to give their consent.³⁷⁶ It is however, not likely that Syria and Iraq would agree with the establishment of a hybrid court since there are currently in a politically unstable situation.³⁷⁷ Due to the ongoing violence and instability, a hybrid tribunal could not be situated in Syria.³⁷⁸ A major challenge of creating a hybrid international tribunal in Syria, would be to retain the support of the major actors in the Syrian civil war, many of whom would be prosecuted for the crimes that they have committed.³⁷⁹ A hybrid tribunal, could in theory, be placed in Iraq. However, there is no indication that Baghdad would agree to this. Iraqi authorities would not be willing to consent to an establishment of such tribunal in Iraq, since this tribunal could target its own military or government officials for their role in combating the Islamic State.³⁸⁰ The only potential option for establishing such a tribunal would therefore be in the Kurdistan region, which is a semiautonomous province in Iraq. This region has an advantageous location, since it is close to the evidence, as well as to victims, survivors and witnesses of the crimes committed in Syria and Iraq. This region is also relatively stable and could therefore provide the security measures necessary to host an internationalized court. However, a challenge in this case could be the fact that the capital of the Kurdistan region, Irbil and its Western allies, especially the U.S., might not agree with investigation in Baghdad over crimes committed in Syria and Iraq.³⁸¹ An agreement between the UN and the territorial state would also require long negotiations.³⁸² If the territorial states do not give their consent for the establishing of an international criminal tribunal, the UN General Assembly is able to sign a treaty with a neighbouring state which is willing to exercise its universal jurisdiction over crimes committed in Syria and Iraq. Through the support of the international community, this jurisdiction can then be made 'hybrid'.

³⁷⁴ United Nations. (2014). *DRAFT STATUTE FOR A SYRIAN [EXTRAORDINARY][SPECIAL] TRIBUNAL TO PROSECUTE ATROCITY CRIMES*.

³⁷⁵ Hora Siccama, D., & Ryngaert, C. M. J. (2016). *Justice for Sexual Crimes Committed by IS : Exploring Accountability and Compliance Mechanisms*. Utrecht: Utrecht University.

³⁷⁶ Hora Siccama, D., & Ryngaert, C. M. J. (2016). *Justice for Sexual Crimes Committed by IS : Exploring Accountability and Compliance Mechanisms*. Utrecht: Utrecht University.

³⁷⁷ European Parliament. (2016). *Public International Law Perspectives on the Prosecution of Daesh Crimes Against Women And Girls*.

³⁷⁸ Kersten, M. (2016). *Calls to Prosecute War Crimes in Syria are Growing. Is international justice possible?*.

³⁷⁹ Kersten, M. (2016). *Calls to Prosecute War Crimes in Syria are Growing. Is international justice possible?*

³⁸⁰ Kersten, M. (2016). *Calls to Prosecute War Crimes in Syria are Growing. Is international justice possible?*.

³⁸¹ Kersten, M. (2016). *Calls to Prosecute War Crimes in Syria are Growing. Is international justice possible?*.

³⁸² European Parliament. (2016). *Public International Law Perspectives on the Prosecution of Daesh Crimes Against Women And Girls*.

However, there are disadvantages of signing such treaty. One drawback is that it can cause huge political consequences. Another problem is that the implementation of this option can be very expensive.³⁸³ Cost is also a factor. The funding of mixed or hybrid courts can cause a problem, since tribunals are very expensive and states are not obliged to financially contribute to such courts.³⁸⁴ If, for example, a hybrid tribunal is established in the Kurdistan, this region would not be able to finance such a tribunal on its own. It is therefore highly likely that Kurdistan would have to rely on funding from Western powers. The potential tribunal could therefore be influenced by the interests of these Western states.³⁸⁵ Financial constraints can therefore undermine the ability to effectively and independently provide justice for victims.³⁸⁶ There are also concerns about the impartiality and independence of courts in neighbouring states.³⁸⁷ The example in Cambodia of the ECCC indicates that internationalized tribunals which are integrated in the national justice system are likely to be exposed to undue influencing which can prevent the impartial delivery of justice. Regarding Syria, due to the current security situation, it would be difficult to establish a hybrid court and Syria would probably also not fully respect its independence.³⁸⁸

In order to establish an international criminal tribunal, the international community needs to first be convinced that the creation of such a tribunal is urgent. The extent of the committed crimes can be presented to the international community, either via the media, or in a more objective and appropriate way by an independent international fact-finding commission. Fact-finding commissions usually have a UN mandate and they investigate the perpetration of core international crimes and recommend corrective measures. Fact-finding commissions can advance compliance with human rights through their investigations. They can also help in ensuring accountability by gathering evidence, and providing possibilities of justice for victims.

Such commissions have, for example, been established in order to investigate crimes committed in the former Yugoslavia, Darfur, and Libya. Due to the reports of these commissions, international criminal tribunals have been established and situations have been referred to the ICC. The UN Human Rights Council has established an Independent Commission of Inquiry on

³⁸³ Hora Siccama, D., & Ryngaert, C. M. J. (2016). *Justice for Sexual Crimes Committed by IS : Exploring Accountability and Compliance Mechanisms*. Utrecht: Utrecht University.

³⁸⁴ Human Rights Watch. (2013). *Syria: Criminal Justice for Serious Crimes under International Law*.

³⁸⁵ Kersten, M. (2016). *Calls to Prosecute War Crimes in Syria are Growing. Is international justice possible?*.

³⁸⁶ Human Rights Watch. (2013). *Syria: Criminal Justice for Serious Crimes under International Law*.

³⁸⁷ Hora Siccama, D., & Ryngaert, C. M. J. (2016). *Justice for Sexual Crimes Committed by IS : Exploring Accountability and Compliance Mechanisms*. Utrecht: Utrecht University.

³⁸⁸ Human Rights Watch. (2013). *Syria: Criminal Justice for Serious Crimes under International Law*.

the Syrian Arab Republic (UNCOI).³⁸⁹ This Commission was established on 22 August 2011 in order to investigate all violations of International Human Rights Law in Syria since March 2011. However, this Commission is not allowed to enter Syria and it is dependent on local actors who can help its investigations.³⁹⁰ Nevertheless, the Commission has managed to conduct over 1400 interviews with witnesses outside Syria or through Skype. The Commission has written four reports based on this information. It has spread the atrocities committed by ISIS through social media by uploading photos and videos. The Commission did this with the purpose of creating public awareness and to provide prosecutors with interesting leads. In June 2016, for example, the Commission explicitly addresses that ISIS has committed crimes sexual violence. In its report, the Commission also recommended that the Security Council should refer the situation in Syria to the ICC or an ad hoc tribunal and that Syria should do everything in its power to rescue the Yazidis.³⁹¹

Chapter 5 Conclusion

Beyond any doubt, ISIS constitutes a great threat to the international peace and security. The group was officially created in October 2006, as a splinter group of Al Qaeda, but it started to grow rapidly in 2014, when it conquered large amount of the territory of Iraq and Syria. In 2014, the current ISIS's leader, Abu Bakr al-Baghdadi, established a self-proclaimed Islamic Caliphate. ISIS has a complex organization structure, which consists of the Caliph, Shura Council, Military Council, Security and Intelligence Council (SIC), Shari'a Council, Media and Communications Council and a Cabinet. ISIS leadership is comprised of mainly Iraqi nationals.

Since its establishment, this terrorist group has committed mass atrocities including beheadings, mass executions, slaughtering, rape, stonings and abductions, towards various religious minorities in pursuing its goal of creating an Islamic Caliphate. ISIS is targeting, in particular, the Yazidi religious and ethnic minority. The crimes against this minority started with ISIS's attack on the Sinjar area in 2014, during which the group killed thousands of Yazidi men and captured hundreds of Yazidi women and children as slaves. ISIS perceives the Yazidis as nonbelievers and "devil-worshippers" and claims that it is not forbidden to kill them, since they do not have the right to exist. The crimes committed by ISIS against the Yazidis amount to the

³⁸⁹ Hora Siccama, D., & Ryngaert, C. M. J. (2016). *Justice for Sexual Crimes Committed by IS : Exploring Accountability and Compliance Mechanisms*. Utrecht: Utrecht University.

³⁹⁰ Elliott, I. (2017). 'A Meaningful Step towards Accountability?': *A View from the Field on the United Nations International, Impartial and Independent Mechanism for Syria*. doi:<https://doi.org/10.1093/jicj/mqx012>

³⁹¹ Hora Siccama, D., & Ryngaert, C. M. J. (2016). *Justice for Sexual Crimes Committed by IS : Exploring Accountability and Compliance Mechanisms*. Utrecht: Utrecht University.

international crime of genocide as defined in Article 6 of the Rome Statute and Article 2 of the 1948 Convention for the Prevention and Punishment of the Crime of Genocide.

The crimes committed against this minority could be considered as genocide, since they possess all of the *actus reus* (objective elements) and *mens rea* (mental elements) of the crime of genocide. The crimes conducted against the Yazidis include the acts of killing, causing serious bodily or mental harm, deliberately inflicting certain conditions of life on the target group, taking measures to prevent births within the group, and forcibly transferring children of the target group. These crimes are all considered as prohibited acts within the meaning of article 6 of the Rome Statute and thereby the crimes against the Yazidis meet the *actus reus* element of the crime of genocide. Moreover, the Yazidis are a distinct ethno-religious group, since they share a common language and culture and the same religion. The crimes committed by ISIS against the Yazidis are also intended at the biological destruction of the Yazidis. ISIS fighters target the Yazidis, because of their belongingness to the Yazidi community. This is clearly indicated through ISIS's religious ideology. Moreover, the crimes committed by ISIS against the Yazidis have the required 'special intent', since the nature and impact of the acts conducted by the terrorist group against the Yazidis clearly shows an intent to destroy them in whole or in part. ISIS has also caused the destruction of a 'substantial' part of the Yazidi community, as tens of thousands Yazidis have been killed by ISIS and the ones who survived are mostly women who have difficulties in ensuring the existence of the Yazidi community.

In answering the research question: *“What possible international venues are there for prosecuting ISIS for the crime of genocide committed against the Yazidi religious and ethnic minority?”* There are two potential international venues for prosecuting ISIS members for the crime of genocide committed against the Yazidis. ISIS members could be prosecuted before the International Criminal Court (ICC) or before an Ad hoc or Hybrid International Criminal Tribunal which could be established for Iraq and Syria. Both of these venues have its advantages, but they also pose some major obstacles. The main obstacle of prosecuting ISIS before the ICC is that ISIS's crimes against the Yazidis are committed in Iraq and Syria, none of which are a State Party to the Rome Statute and therefore the Court would have very limited jurisdiction. Iraq and Syria, could in theory, accept limited ICC jurisdiction with respect to the committed crimes under Article 12(3) of the Rome Statute. However, it is not likely that these countries will sign a declaration accepting the jurisdiction of the Court.

Theoretically, the crime of genocide committed by ISIS towards the Yazidis, could also be referred to the ICC by the United Nations Security Council. However, a referral of the situation in Syria and Iraq is most likely to be challenged by the veto right of the permanent members of the Security Council, since due to the current political situation, Russia or China will probably use their veto right in order to stop such a referral. The most visible option for prosecuting ISIS

members before the ICC could be through an investigation initiated by the Prosecutor of the ICC under Article 15(1) of the ICC Statute. As, Iraq and Syria are not parties to the Rome Statute, the prosecutor would not have territorial jurisdiction based on article 12(2) (a) of the Rome Statute, to start such an investigation. However, the ICC could start an investigation over ISIS members who are nationals of State Parties, as stated in Article 12(2) b) of the Rome Statute. According to the policy of the Court, these perpetrators should be high-ranking members, as the ICC prosecutes only the perpetrators who bear the greatest responsibility. This is not the case with ISIS, as it is primarily led by Iraqi nationals. Therefore, currently, investigating and prosecuting those who are most responsible, within the leadership of ISIS, is limited. However, despite the possible criticism of the international community, the ICC should prosecute lower-ranking ISIS's leaders who are nationals of a State Party to the Rome Statute. The ICC should pursue such prosecution in order to set an example that the international community should do everything in its power to stop such widespread atrocities, even if it only has a limited impact. Moreover, prosecution of low-ranking ISIS members who are usually the direct perpetrators of the committed crimes, could be of importance to the victims.

The establishment of an ad hoc international criminal tribunal or a hybrid criminal tribunal is another venue for prosecuting the international crimes committed by ISIS against the Yazidis. The crime of genocide committed by ISIS against the Yazidis, could in theory, be prosecuted in an ad hoc international criminal tribunal modelled after the ICTY or the ICTR, since the situation with ISIS satisfies the requirements for the Security Council to establish an ad hoc tribunal under Chapter VII. As the UN has condemned ISIS as an “unprecedented threat to international peace and security”, the situation also meets the requirement of Article 39 of the UN Charter. If the Security Council manages to establish an ad hoc International Criminal Tribunal for Iraq and Syria, Iraq and Syria would have to cooperate abide by the decision of this tribunal, since they are members of the United Nations. However, similar to an ICC prosecution, Russia and China, as permanent members of the Security Council, could form an obstacle for the establishment of an ad hoc tribunal for Syria and Iraq. Moreover, the effective functioning of an ad hoc tribunal for Syria and Iraq can thus depend on the ending of the conflict, as it is difficult to investigate and prosecute perpetrators of crimes during the conflict. Furthermore, the establishment of an ad hoc tribunal, like the ICTY and ICTR, can take a very long time and can be very costly. A further delay in creating an ad hoc tribunal for Syria and Iraq can stop any potential deterrent effect. Such an ad hoc international criminal tribunal could also have a limited impact, as it was the case with the ICTY and ICTR.

International Criminal Tribunal for Iraq and Syria could also be established in the form of a hybrid or mixed court. However, in order to establish a hybrid tribunal, Syria and Iraq, or the Security Council would have to give their consent. It is however, not likely that Syria and Iraq would agree with this, since there are currently in a politically unstable situation. This venue for

prosecution would also take a long time, since an agreement between the UN and the territorial state would require long negotiations. The UN General Assembly could also sign a treaty with a neighbouring state which is willing to exercise its universal jurisdiction over crimes committed in Syria and Iraq. However, signing such treaty can cause huge political consequences. The implementation of this option can also be very expensive. A Hybrid International Criminal Tribunal for Iraq and Syria would probably not be impartial and independent, since tribunals with international elements which are integrated in the national justice system are likely to be exposed to undue influencing.

Bibliography

- Alexander, Y., & Alexander, D. (2015). *The Islamic State: Combating The Caliphate Without Borders*. London: Lexington Books.
- Allison, C. (2017). *The Yazidis*. Oxford: Oxford University Press.
- Ambos, K. (2009). What does 'intent to destroy' in genocide mean? *International Review of the Red Cross*, 91, 833-858.
- Arnold, R. (2003). The Mens Rea of Genocide under the Statute of the International Criminal Court. *Criminal Law Forum*, 14(2), 127-151.
- Basci, E. (2016). Yazidis: A community scattered in between geographies and its current immigration experience. *International Journal of Humanities and Cultural Studies (IJHCS) ISSN 2356-5926*, 3(2), 341-342.
- Behrens Henham, P., & Henham, R. (2013). *Elements of Genocide*. New York, United States of America: Routledge.
- Boas, G., Bischoff, J., & Reid, N. (2013). *International Criminal Law Practitioner Library*. Cambridge, United Kingdom: Cambridge University Press.
- M Brennan, A. (2015). Prosecuting ISIL before the International Criminal Court: Challenges and Obstacles. *The American Society of International Law*, 19(21), 1.
- Burnham, G., Cetorelli, V., & Sasson, I. (2017). *Mortality and kidnapping estimates for the Yazidi population in the area of Mount Sinjar, Iraq, in August 2014: A retrospective household survey*.
- Casaly, P. (2016). Al Mahdi before the ICC: Cultural Property and World Heritage in International Criminal Law. *Journal of International Criminal Justice*, 14(5), 1199-1220.
- Chertoff, E. (2017). *Prosecuting Gender-Based Persecution: The Islamic State at the ICC*. New Haven: Yale University.
- Committee on Legal Affairs and Human Rights. (2017). *Prosecuting and punishing the crimes against humanity or even possible genocide committed by Daesh*.

- Cronin, A. (2015). ISIS Is Not a Terrorist Group: Why Counterterrorism Won't Stop the Latest Jihadist. *Foreign Affairs*, 94(2), 87-98
- Cronin-Furman, K. (2013). Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity. *The International Journal of Transitional Justice*, 7(3), 434-454.
- Duarte-Herrera, R., & Ifsits, C. (2017). Genocide against Yazidis. *University of Vienna Law Review*, 1, 1-33.
- Elliott, I. (2017). 'A Meaningful Step towards Accountability'? : A View from the Field on the United Nations International, Impartial and Independent Mechanism for Syria. doi:<https://doi.org/10.1093/jicj/mqx012>
- Esfandiary, D., & Tabatabai, A. (2016). Iran's ISIS policy. *International Affairs*, 91(1), 1-15.
- Kronin, A. (2015). *ISIS Is Not a Terrorist Group: Why Counterterrorism Won't Stop the Latest Jihadist*.
- European Parliament. (2016). *Public International Law Perspectives on the Prosecution of Daesh Crimes Against Women And Girls*.
- A Gerges, F. (2014). *ISIS and the Third Wave of Jihadism*. Philadelphia :Current History.
- Global Justice Center. (2016). *Daesh's Gender-Based Crimes against Yazidi Women and Girls Include Genocide*. New York: Global Justice Center.
- Gohel, S. (2017). Deciphering Ayman Al-Zawahiri and Al-Qaeda's Strategic and Ideological Imperatives. *Perspectives on Terrorism*, 11(1), 54-67.
- Goldsmith, K. (2010). The Issue of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide: Toward a KnowledgeBased Approach. *Genocide Studies and Prevention: An International Journal*, 5(3), 238-257.
- Goldstone, R. (2017). The Role of the United Nations in the Prosecution of International War Criminals. *Journal of Law and Policy*, 5, 119-127.
- Greenwood, C. (2017). International Humanitarian Law and the Tadic Case Symposium: The International Tribunal for Former Yugoslavia Comes to Age.. *European Journal of International Law*, 19, 256-283.

Hassan, S. (2010). Establishment of the International Criminal Court and the Role of USA: A Legal Appraisal. *Northern University Journal of Law*, 1, 52.

Hora Siccama, D., & Ryngaert, C. M. J. (2016). *Justice for Sexual Crimes Committed by IS : Exploring Accountability and Compliance Mechanisms*. Utrecht: Utrecht University.

Human Rights Watch. (n.d.). *GENOCIDE (Article 4)*.

Human Rights Watch. (2006). *The Selection of Situations and Cases for Trial before the International Criminal Court*. Retrieved from https://www.hrw.org/news/2006/10/26/selection-situations-and-cases-trial-international-criminal-court#_Toc149368798

Human Rights Watch. (2010). *Genocide, War Crimes and Crimes Against Humanity*.

Human Rights Watch. (2015). 'News, Iraq: ISIS Escapees Describe Systematic Rape—Yezidi Survivors in Need of Urgent Care'.

Human Rights Council. (2015). *Report of the Office of the United Nations High Commissioner for Human Rights on the human rights situation in Iraq in the light of abuses committed by the so-called Islamic State in Iraq and the Levant and associated groups*.

Human Rights Council. (2016). *"They came to destroy": ISIS Crimes Against the Yazidis**.

Human Rights Council. (2014). *S-22/1 The human rights situation in Iraq in the light of abuses committed by the so-called Islamic State in Iraq and the Levant and associated groups*.

Human Rights Watch. (2013). *Syria: Criminal Justice for Serious Crimes under International Law*.

ICTR, The Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment (2 September 1998).

ICTY, The Prosecutor v. Dusko Tadic a/k/a "DULE", Judgement (2 octobre 1995).

ICTR, The Prosecutor v. Gacumbitsi, Case No. ICTR-2001-64-T, Trial Judgment (17 June 2004), para. 254

ICTR, The Prosecutor v. Kayishema and Ruzindana., Case No. ICTR-95-1-T, Trial Judgment (21 May 1999), para. 98.

ICTY, *The Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgment (2 August 2001).

ILC. (1996). *Draft Code of Crimes Against the Peace and Security of Mankind (1996)*, UN Doc. A/51/10, Art. 17, Commentary No. 6, p. 45.

International Committee of the Red Cross. (n.d.). *THE GENEVA CONVENTIONS OF 12 AUGUST 1949*.

International Committee of the Red Cross. (2017). *Treaties, States Parties and Commentaries*.

International Criminal Court. (n.d.). *Understanding the International Criminal Court*.

International Criminal Court. (1998). *Rome Statute of the International Criminal Court*

International Criminal Court. (2015). *ICC Weekly Update #239*.

International Criminal Court (2010) *Prosecutorial Strategy 2009 - 2012*.

International Criminal Court (2014). *Policy Paper on Sexual and Gender-Based Crimes*

International Criminal Court. (2015). *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the alleged crimes committed by ISIS*.

International Criminal Court (2013). *Strategic plan June 2012-2015*.

Jalloh, C. (2013). Prosecuting Those Bearing 'Greatest Responsibility': The Lessons of the Special Court for Sierra Leone. *Marquette Law Review*, 96, 864-911.

Jeßberger, F., & Werle, G. (2014). *Principles of International Criminal Law*. Oxford: Oxford University Press.

Kenny, C. (2017). Prosecuting Crimes of International Concern: Islamic State at the ICC? *Utrecht Journal of International and European Law*, 33(84), 120-145.

Kersten, M. (2016). *Calls to Prosecute War Crimes in Syria are Growing. Is international justice possible?*

Kersten, M. (2016). *Big Fish or Little Fish — Who Should the International Criminal Court Target?*

- Kersten, M. (2013). *Searching-in-vain-perfect-justice-in-syria/Searching in Vain: Perfect Justice in Syria*. Retrived from <https://justiceinconflict.org/2013/11/10/searching-in-vain-perfect-justice-in-syria/>
- Klabbers, J. (2013). *International Law*. Cambridge: Cambridge University Press.
- Knoops, G. J. A. (2014). *An Introduction To The Law Of International Criminal Tribunals*. Leiden, The Netherlands: Koninklijke Brill NV
- K Gulmohamad, Z. (2014). The Rise and Fall of the Islamic State of Iraq and Al-Sham (Levant) ISIS. *Global Security Studies*, 5(2), 1.
- Lattimer, M., Mojtahedi, S., & Anna Tucker, L. (2015). *A Step towards Justice: Current accountability options for crimes under international law committed in Syria*. London: Ceasefire Centre for Civilian Rights.
- Lekas, A. (2015). #ISIS: The Largest Threat to World Peace Trending Now. *Emory International Law Review*, 30(1), 313-316.
- Lister, C. (2015). *The Islamic State: A Brief Introduction*.
- Lister, C. (2014). *Islamic State Senior Leadership: Who's Who*. Washington: The Brookings Institution
- Lopez, S. et al. (2017). *The genetic legacy of Zoroastrianism in Iran and India: Insights into population structure, gene flow and selection*. doi:<https://doi.org/10.1101/128272>
- Luongo, M. (2014). *Fighting Back With Faith: Inside the Yezidis' Iraqi Temple*. New York: The Daily Beast Company LLC.
- Merriam Webster Dictionary. (2017). *Definition of shamanism*.
- McCants, W. (2015). *The Believer: How an introvert with a passion for religion and soccer became Abu Bakr al-Baghdadi, leader of the Islamic State*. Washington: The Brookings Institution.
- Moore, J. (2015). *Defying ISIS: Preserving Christianity in the Place of Its Birth and in Your Own Backyard*. Nashville: W Publishing Group.

- Moradi, F., & Anderson, K. (2017). *The Islamic State's Êzîdî Genocide in Iraq: The Sinjār Operations*. Toronto: University of Toronto Press
- Murray, A., Zammit Borda, A., & Dakhil, V. (2017). 'Calling ISIL Atrocities Against the Yezidis by Their Rightful Name': Do They Constitute the Crime of Genocide? *Human Rights Law Review*, 17(2), 261-283. doi:<https://doi.org/10.1093/hrlr/ngx004>
- Nicolaus, P., & Yuce, S. (2017). Sex-Slavery: One Aspect of the Yezidi Genocide. *Iran and the Caucasus*, 21(2), 196-229.
- M.H. Nouwen, S., & A Becker, M. (2017). *Tadić v Prosecutor: International Criminal Tribunal for the former Yugoslavia, 1995*.
- Office of The United Nations High Commissioner for Human Rights. (2016). *A Call for Accountability and Protection: Yezidi Survivors of Atrocities Committed by ISIL*.
- Office of the Prosecutor. (2016). *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at the opening of the confirmation of charges hearing in the case against Mr Ahmad Al-Faqi Al Mahdi*.
- Office of the Prosecutor. (2001). *ICTY, Statement by the Prosecutor addressed to the UN Security Council*.
- Nance, M. (2016). *Defeating ISIS: Who They Are, How They Fight, What They Believe*. New York, The United States of America: Skyhorse Publishing
- Orton, K. (2016). *Profiles of Islamic State Leaders*. London :The Henry Jackson Society
- Patel, D. (2015). *ISIS in Iraq: What We Get Wrong and Why 2015 Is Not 2007 Redux*. Waltham: Crown Center for Middle East Studies.
- Pearlman, A. (2016). Justice by Number: The International Law of Genocide and Its Implications. *The Judges' Journal*, 55(3), 1-6.
- Porkka, J. (2017). *The Islamic State and the Case of Yazidis*. Uppsala:Uppsala University.
- Powell, C. (2017). *Rape as a Tactic of Terror: Holding the Islamic State Accountable (Unpublished Draft on File with Author)*. New York: Fordham University School of Law.
- Prosecutor v. Goran Jelusic, The Trial Chamber Decision (14 December 1999), para 82.

Prosecutor v Duško Tadić aka "Dule" (Decision on the Defence Motion for Interlocutory Appeals on Jurisdiction) Case No IT-94-1-A (2 Oct 1995) paras 37-38

Prosecutor v Duško Tadić aka "Dule" (Decision on the Defence Motion on Jurisdiction) Case No IT-94-1-T (10 Aug 1995) para 45

Quivooij, R. (2015). *The Islamic State*. Singapore: Nanyang Technological University.

Ryngaert, C. M. J., & Hora Siccama, D. W. (2016). *Justice for Sexual Crimes Committed by IS: Exploring Accountability and Compliance Mechanisms*. Utrecht: Utrecht University.

Sands, P. (2016). *On Genocide and Trauma*. Chicago: Assyrian International News Agency.

Scharf, M. (2016). How the War Against ISIS Changed International Law. *Journal of International Law*, 48(1), 15-63.

A.Schabas, W. (2016). *The Cambridge Companion to International Criminal Law*. Cambridge, United Kingdom: Cambridge University Press.

Security Council. (2014). Resolution 2170.

E Schemenauer, S. (2016). *Using the Rule of Law to Combat the Islamic State*. Medford: The Fletcher School of Law and Diplomacy.

Security Council. (2014). *Security Council Adopts Resolution 2170 (2014) Condemning Gross, Widespread Abuse of Human Rights by Extremist Groups in Iraq, Syria*.

Silander, D., Wallace, D., & Janzekovic, J. (2017). *International Organizations and The Rise of ISIL: Global Responses to human security threats*. New York: Routledge.

Simbeye, Y. (2016). *Immunity and International Criminal Law*. New York: Routledge.

Mapping Militant Organizations. (2017). *The Islamic State*. Stanford: Stanford University.

Tekin, A. *et al.* (2016). Prevalence and gender differences in symptomatology of posttraumatic stress disorder and depression among Iraqi Yazidis displaced into Turkey. *European Journal of Psychotraumatology*, 7(1), 1-8.

The guardian. (2016). *John Kerry: Isis is committing genocide in Syria and Iraq*. Retrieved from <https://www.theguardian.com/world/2016/mar/17/john-kerry-isis-genocide-syria-iraq>

The guardian. (2017). *Russia claims it may have killed Isis leader Abu Bakr al-Baghdadi*. Retrieved from <https://www.theguardian.com/world/2017/jun/16/russia-claims-it-may-have-killed-isis-leader-abu-bakr-al-baghdadi>

The guardian.(2015). *Call for special tribunal to investigate war crimes and mass atrocities in Syria*. Retrived from <https://www.theguardian.com/world/2015/mar/17/call-for-special-tribunal-to-investigate-war-crimes-and-mass-atrocities-in-syria>

The Internationall Criminal Court. (2015). *Al Mahdi*.

The International Criminal Court. (2011). *Elements of Crimes*.

United Nations. (1945). *Charter of the United Nations*.

United Nations. (n.d.). *Chapter VII*.

United Nations. (2014). *DRAFT STATUTE FOR A SYRIAN [EXTRAORDINARY][SPECIAL] TRIBUNAL TO PROSECUTE ATROCITY CRIMES*.

United Nations. (n.d.). *Voting System and Records*.

United Nations. (n.d.). *Independent International Commission of Inquiry on the Syrian Arab Republic*.

United Nations. (2015). *Security Council ‘Unequivocally’ Condemns ISIL Terrorist Attacks, Unanimously Adopting Text that Determines Extremist Group Poses ‘Unprecedented’ Threat*.

United Nations. (1994). *Statute of the International Tribunal for Rwanda*.

United Nations. (n.d.). *Actions with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression (Chapter VII)*.

United Nations. (1948). *Convention on the Prevention and Punishment of the Crime of Genocide*.

- United Nations. (2005). *Draft Code of Crimes against the Peace and Security of Mankind with commentaries.*, p.44
- United Nations (2015) *Human Rights Council Report.*
- United Nations. (2009). *Updated Statute of the International Criminal Tribunal for the Former Yugoslavia.*
- United Nations. (2010). *Prevention of Genocide.* New York: Office of the Special Adviser on the Prevention of Genocide.
- United Nations. (2014). *Report on the Protection of Civilians in Armed Conflict in Iraq: 6 July – 10 September 2014.* Retrieved from http://www.ohchr.org/Documents/Countries/IQ/UNAMI_OHCHR_POC_Report_FINAL_6July_10September2014.pdf
- United Nations. (2015). *Security Council ‘Unequivocally’ Condemns ISIL Terrorist Attacks, Unanimously Adopting Text that Determines Extremist Group Poses ‘Unprecedented’ Threat.* New York: Meetings Coverage & Press Releases.
- Van der Vyver, J. D. (2015). THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE UNAUTHORISED CONDUCT OF INTERNATIONAL INSTITUTIONS. *Potchefstroom Electronic Law Journal*, 18(5), 1302-1330.
- J Veintimilla, D. (2016). *Islamic Law and War Crimes Trials: The Possibility and Challenges of a War Crimes Tribunal against the Assad Regime and ISIL.*
- Wallace, D., & Silander, D. (2015). *International Organizations and the Implementation of the Responsibility to Protect.* New York: Routledge.
- Waltman, G. (2014). *PROSECUTING ISIS.* Oxford: University of Mississippi - School of Law.
- Webb, P. (2014). Deadlock or Restraint? The Security Council Veto and the Use of Force in Syria. *Journal of Conflict & Security Law*, 19(3), 1-2. doi:<https://doi.org/10.1093/jcsl/kru018>
- Werle, G., & Bung, J. (2010). *The Crime of Genocide.*
- Human Rights Watch. (2016). *UN Panel Reports on ISIS Crimes on Yezidis.* Wheeler, S. (2016). *UN Panel Reports on ISIS Crimes on Yezidis.* New York: Human Rights Watch.

Weiss, M., & Hassan, H. (2016). *ISIS: Inside the Army of Terror (Updated Edition)* (2nd ed.). New York, United States of America: Regan Arts.

White, E. (2017). *THE PRECEDENT OF THE CRIME OF GENOCIDE IN THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA*. Durham: Duke University.

Zakerhossein, M. (2016). To Bury a Situation Alive – A Critical Reading of the ICC Prosecutor’s Statement on the ISIS Situation. *International Criminal Law Review*, 16(4), 613-641.