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'Calling ISIL Atrocities Against the Yezidis by their Rightful Name': Do they Constitute the Crime of Genocide?

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ABSTRACT

In March 2016, both the US House of Representatives and Secretary of State John Kerry designated the alleged crimes committed by ISIL against, *inter alia*, the Yezidis, a small religious minority in Iraq and Syria, as 'genocide.' This article examines the evidence for this designation as emerges from various human rights reports and other publicly available sources, to assess whether ISIL's actions against the Yezidis may be legally characterized as the crime of genocide. The article finds that, while ISIL's actions against the Yezidis in Iraq and Syria may constitute the underlying acts of the crime of genocide, on the basis of information currently available in the public domain, it is not possible to reach a view on whether individuals perpetrators had the *dolus specialis* necessary to commit the crime of genocide. The article, however, outlines a pattern of conduct which could indicate a genocidal plan.

KEYWORDS: Genocide; ISIL; Yezidis; minorities; Iraq; Syria

1. INTRODUCTION

When members of the Islamic State in Iraq and the Levant ('ISIL')¹ attacked the area of Jabal Sinjar in northern Iraq, in August 2014,² they brought to 'the world's attention a little-known people':³ the Yezidis. In response to this attack, Vian Dakhil, a Yezidi member of the Iraqi Parliament, delivered an impassioned appeal for assistance, asserting that 'we are being slaughtered under the banner "there is no god but Allah"...There is now a campaign of genocide being waged on the Yezidi constituent.'⁴ Almost one and a half years later, the US House of Representatives unanimously adopted Res. 75 which resolved that the atrocities perpetrated by ISIL against Christians, Yezidis, and other religious and ethnic

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¹ The organisation known as ISIL has 'renamed and rebranded itself multiple times. It is known as the Islamic State (its most recent self-appellation), but it is also frequently referred to as the Islamic State in Iraq and the Levant (ISIL) or Islamic State of Iraq and al Sham (ISIS), or as Daesh, a derogatory term extracted from its Arabic acronym': Stern and Berger, *ISIS: The State of Terror* (2015) 8. For the purposes of this article, the acronym 'ISIL' is used, as this is also the acronym adopted by the report of the United Nations High Commissioner for Human Rights on the human rights situation in Iraq. UN Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights on the human rights situation in Iraq in the light of abuses committed by the so-called Islamic State in Iraq and the Levant and associated groups*, Doc. A/HRC/28/18, Twenty-eighth session, 13 March 2015 ('UN Human Rights Council Report March 2015').

² Morris, 'Islamic State seizes town of Sinjar, pushing out Kurds and sending Yazidis fleeing' *The Washington Post*, 3 August 2014, available at: <http://www.washingtonpost.com> (Last accessed 1 June 2016).

³ Stansfield, 'The Islamic State, the Kurdistan Region and the future of Iraq: assessing UK policy options' (2014) 90 *International Affairs* 1329, 1337. See also Cockburn, *The Rise of Islamic State: ISIS and the New Sunni Revolution* (2015) 151.

⁴ Dakhil's intervention has been uploaded to Youtube, 'Iraqi Yezidi MP Breaks Down in Parliament: ISIL is Exterminating my People', available at <https://www.youtube.com/watch?v=HdIEm1s6yhY> (Last accessed 1 June 2016).

minorities in Iraq and Syria constitute war crimes, crimes against humanity, and genocide.⁵ This resolution stated that:

all governments, including the United States, and international organizations, including the United Nations and the Office of the Secretary-General, should call ISIL atrocities by their rightful names: war crimes, crimes against humanity, and genocide;⁶

It was the resolution's claim that ISIL had committed 'genocide' which attracted particular media attention.⁷ This claim was reiterated two days later by the US Secretary of State, John Kerry, who declared that '[m]y purpose in appearing before you today is to assert that, in my judgment, [ISIL] is responsible for *genocide* against groups in areas under its control, including Yezidis, Christians, and Shia Muslims.'⁸

Given that 'there is a marked difference between the ordinary, lay meaning of the word 'genocide', or even the concept of genocide in anthropology or other social sciences, and the legal concept of genocide,'⁹ it is pertinent to ask whether 'genocide' in the above statements was used in its legal meaning. Bearing in mind that the use of this designation has, in the past, raised objections and fuelled heated debates,¹⁰ this article aims to explore, with respect to the alleged atrocities of ISIL against the Yezidi minority in Iraq and Syria, whether these may be characterized as the crime of genocide, as this concept is understood in human rights and international law. In addition to the profound implications such a characterisation has for the victims of these atrocities, as well as for the accuracy of the legal-historical record, the genocide designation may also have broader implications for laws on freedom of speech, particularly in the context of genocide denial laws.¹¹

Schabas observes that crime of genocide may be regarded as a specific category of crimes against humanity.¹² In this context, as crimes against humanity are generally easier to prove than genocide as they do not require the high threshold of specific intent,¹³ an important question that needs to be addressed at the outset is whether it matters if ISIL's atrocities are characterized (and prosecuted) as genocide or, otherwise, as crimes against humanity. There are sound pragmatic reasons for labelling atrocities as crimes against humanity, in order to circumvent the probative difficulties associated with specific intent. In this respect, in 2010, a group of legal experts put forward the Crimes Against

⁵ US House of Representatives, H. CON. RES 75 ('Expressing the sense of Congress that the atrocities perpetrated by ISIL against religious and ethnic minorities in Iraq and Syria include war crimes, crimes against humanity, and genocide'), 15 March 2016, at para 1.

⁶ *ibid.*, at para 2.

⁷ See, for instance, Boorstein, 'The U.S. House just voted unanimously that the Islamic State commits 'genocide.' Now what?' in *The Washington Post*, 15 March 2016, <https://www.washingtonpost.com> (Last accessed 1 June 2016).

⁸ US Secretary of State John Kerry, 'Remarks on Daesh and Genocide', Press Briefing Room, Washington, DC, 17 March 2016, available at: <http://www.state.gov/> (Last accessed 1 June 2016) (emphasis added).

⁹ Milanovic, 'State Responsibility for Genocide' (2006) 17 *European Journal of International Law* 553 at 556. This issue was also discussed in the British House of Commons. When asked about the labelling of ISIL's actions towards the Yezidi as genocide, the Prime Minister considered that such labels were always 'done under a legal definition, but there is a very strong case here for saying that it is genocide, and I hope that it will be portrayed and spoken of as such': see HC Deb 4 May 2016, vol 609, col 168.

¹⁰ For instance, Sémelin notes that '[a]pplying the notion of 'genocide' to these very different historical cases has raised a number of objections, and continues to fuel the most heated of debates. The problem the term poses is an almost inextricable one of taxonomy, stemming from the various and sundry meanings invested in this term. Sémelin, *Purify and Destroy: The Political Uses of Massacre and Genocide* (2013) 309.

¹¹ See, for instance, *Perinçek v Switzerland* Application no. 27510/08, Merits, 15 October 2015, at para 196.

¹² Schabas, 'Punishment of Non-State Actors in Non-International Armed Conflict' (2002) 26 *Fordham International Law Journal* 907 at 911.

¹³ Milanovic, *supra* n 9 at 558.

Humanity Initiative,¹⁴ in order to 'do away with the need to engage the thorny issue of intent.'¹⁵ Schabas, for instance, argues that, since the definition of crimes against humanity has been expanded to cover atrocities committed both in times of armed conflict and peacetime,¹⁶ '[d]ebating the precise boundaries of genocide with respect to individual victims now seems a rather sterile exercise.'¹⁷

However, we consider that '[g]enocide and crimes against humanity are simply different as a matter of international law,'¹⁸ not least because the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide ('UNCG') places specific legal obligations on States to prevent and punish genocide.¹⁹ Moreover, we consider that, while the crimes against humanity category encompasses horrific crimes, this category on its own does not fully and adequately capture the specific moral repulsiveness of genocide. In *Krstić*, the ICTY Appeals Chamber underscored that 'the crime of genocide is *singled out* for special condemnation and opprobrium. The crime is horrific in its scope; its perpetrators identify entire human groups for extinction. Those who devise and implement genocide seek to deprive humanity of the manifold richness its nationalities, races, ethnicities and religions provide.'²⁰ For these reasons, genocide has been described as the 'crime of crimes'²¹ and has 'assumed a position at the apex of the hierarchy of international crimes.'²² From the above, we consider that it therefore matters significantly whether or not ISIL's actions against the Yezidis may be characterized as the crime of genocide, both from the perspective of the victims and for the legal-historical record.

It should be noted that, even though the wording of Res. 75 and Secretary of State Kerry's statement refer to other religious and ethnic minorities, such as Christians, this article will focus solely on ISIL's actions against the Yezidis in the period between June 2014 and February 2015.²³ As one report has found, 'even within the context of its persecution of minority groups and Shi'a Muslims, [ISIL] has singled out the Yezidi minority...for particularly brutal treatment.'²⁴ Moreover, the article will focus on ISIL's

¹⁴ Whitney Harris World Law Institute, 'Crimes Against Humanity Initiative', available at: <http://law.wustl.edu/harris/crimesagainsthumanity/> (Last accessed 1 June 2016).

¹⁵ Totten, 'The State and Future of Genocide Studies and Prevention: An Overview and Analysis of Some Key Issues' (2011) 6 *Genocide Studies and Prevention: An International Journal* 211 at 220.

¹⁶ This was posited in *Prosecutor v Dusko Tadic a/k/a 'Dule'*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY Appeals Chamber, 2 October 1995, at para 78, and confirmed under Article 7 of the Rome Statute of the ICC. On this decision, see Hoffmann, 'The Gentle Humanizer of Humanitarian Law: Cassese and the Creation of the Customary Law of Non-International Armed Conflicts' in Stahn and van den Herik (eds.) *Future Perspectives on International Criminal Justice* (2010) 80.

¹⁷ William Schabas, LJIL Symposium: A Comment on Ambrus, *Opinio Juris*, available at: <http://opiniojuris.org/2012/12/20/ljil-symposium-a-comment-on-ambrus/> (Last accessed 1 June 2016).

¹⁸ Milanovic, supra n 9 at 558. The contextual elements required for genocide and crimes against humanity are also different. See Krieb, 'The Crime of Genocide and Contextual Elements: A Comment on the ICC Pre-Trial Chamber's Decision in the Al Bashir Case' (2009) 7 *Journal of International Criminal Justice* 297 at 297.

¹⁹ Article 1 of the UNCG.

²⁰ The Chamber held that 'This is a crime against all of humankind, its harm being felt not only by the group targeted for destruction, but by all of humanity': see *Prosecutor v Radislav Krstić IT-98-33-A*, Judgment, ICTY Appeals Chamber, 19 April 2004, at para 36 (emphasis added).

²¹ *Prosecutor v Kambanda 97-23-S*, Judgment, ICTR Trial Chamber, 4 September 1998, at para 16; See also *Prosecutor vs Serushago 98-39-S*, Judgment, ICTR Trial Chamber, 5 February 1999, at para 15.

²² Dixon and Khan, *Archbold on International Criminal Courts: Practice, Procedure and Evidence*, 3rd ed. (2009) 1078 (at para 13-6). It has also been noted that genocide has 'unmatched rhetorical power': see Albright and Cohen, *Preventing Genocide: A Blueprint for U.S. Policymakers* (2008) xxi.

²³ The sources we had access to generally cover acts allegedly committed in this period.

²⁴ Amnesty International, 'Escape from hell: Torture and sexual slavery in Islamic State Captivity in Iraq', 2014, Available at <http://www.amnesty.org.uk/sites/default/files/escape_from_hell_-_torture_and_sexual_slavery_in_islamic_state_captivity_in_iraq_-_english_2.pdf> (Last accessed 1 June 2016). For instance, a report in the New York Times notes that '[t]he Islamic State's sex trade appears to be based solely on enslaving women and girls from the Yazidi minority. As yet, there has been no widespread campaign aimed at enslaving women from other religious minorities': Callimachi, 'ISIS Enshrines a Theology of Rape', New York Times, 13 August 2015, www.nytimes.com/ (Last accessed 1 June 2016).

actions and will not examine the acts of other armed groups in the region,²⁵ which would require a separate focus.

Gathering information on ISIL's activities, given the 'ongoing conflict and lack of access to key areas,'²⁶ remains challenging.²⁷ We have used data from three main sources in the public domain: (1) reports of the UN and its agencies, as well as of non-governmental organisations; (2) ISIL's own publications; and (3) media reports. In this respect, a key source, is the report of the United Nations High Commissioner for Human Rights ('UN Human Rights Council Report').²⁸ This report is the outcome of a fact-finding mission in Iraq, which conducted interviews with over 100 victims and witnesses.²⁹ This data has been supplemented by reports from other sources, including a joint report of the United Nations Assistance Mission for Iraq and Office of the United Nations High Commissioner for Human Rights on the protection of civilians in the armed conflict in Iraq³⁰ and reports from non-governmental organisations such as Amnesty International³¹ and Human Rights Watch.³²

With respect to ISIL's own publications, the organisation has kept a visual record of many of its atrocities and has disseminated these through social and other media. Indeed, it has been noted that, generally, ISIL 'has not tried to hide or deny its crimes. On the contrary, more than any other group, it has gone to great efforts to publicize gruesome details of the atrocities perpetrated by its members against captured soldiers and civilians alike, giving them ample resonance through videos and statements widely distributed on social media, often in multiple languages.'³³ ISIL's own publications, such as *Dabiq*,³⁴ constitute another important source of evidence of its actions.³⁵

²⁵ UN Human Rights Council Report March 2015, *supra* n 1 at para 50.

²⁶ US Secretary of State John Kerry, *supra* n 8.

²⁷ United Nations Security Council, 'Letter dated 13 November 2014 from the Chair of the Security Council Committee pursuant to resolutions 1267 (1999) and 1989 (2011) concerning Al-Qaida and associated individuals and entities addressed to the President of the Security Council', Doc. S/2014/815, 14 November 2014, at para 5.

²⁸ UN Human Rights Council Report March 2015, *supra* n 1. It should be noted that questions have been raised about the powers of fact-finding bodies to make determinations on individual criminal responsibility: see Labuda, 'What Lies Beneath the 'G' Word? Genocide Labelling And Fact Finding at the UN' *EJIL: Talk!* - Blog of the European Journal of International Law, 28 May 2015, available at: <http://www.ejiltalk.org/> (Last accessed 1 June 2016); and about the evidentiary thresholds they adopt (*ibid.*). We do not consider that these important questions detract from the factual findings set out in the reports.

²⁹ UN Human Rights Council Report March 2015, *supra* n 1 at paras 9-11. In its Methods of Work section, the report states '[t]he mission reviewed all available information, including testimony from witnesses and victims and documentation from the Government of Iraq Member States, and relevant United Nations and non-governmental organisations. It followed up on reports of violations of international human rights and humanitarian law in Iraq to verify their veracity and establish further facts. The mission conducted investigations in Chamchamal, Dohuk, Erbil, Kalar, Suleimaniyah, and Zakho and camps for internally displaced persons (IDPs) in these areas': *ibid.*

³⁰ United Nations, 'Report on the Protection of Civilians in Armed Conflict in Iraq: 6 July – 10 September 2014' UN Assistance Mission to Iraq (10 September 2014) available at: <http://www.ohchr.org/> ('UNAMI Report').

³¹ Amnesty International, *supra* n 24.

³² Human Rights Watch, 'Iraq: ISIS Escapees Describe Systematic Rape', 14 April 2015, <https://www.hrw.org/> (Last accessed 1 June 2016).

³³ Amnesty International, *supra* n 24 at 11.

³⁴ The magazine is named after the location in Syria where ISIL believes the final battle for the world will be fought between Muslims and the Rum (Romans/Christians). See online <http://www.clarionproject.org/news/islamic-state-isis-isil-propaganda-magazine-dabiq> (Last accessed 1 June 2016).

³⁵ According to a letter from the Chair of the UN Security Council Counter-Terrorism Committee, ISIL's 'propaganda...is slick, digital and produced at scale for audiences across the world': United Nations Security Council, 'Letter dated 13 November 2014 from the Chair of the Security Council Committee pursuant to resolutions 1267 (1999) and 1989 (2011) concerning Al-Qaida and associated individuals and entities addressed to the President of the Security Council', Doc. S/2014/815, 14 November 2014, at para 2. See also Cockburn, *supra* n 3 at 127 – 128. However, some videos purporting to show ISIL in action have turned out to be fraudulent (*ibid.* 131).

The article is divided into four sections. The first provides an overview of the Yezidis. Parts two and three examine ISIL's actions in the context of the material and mental elements of genocide. The article concludes that, while ISIL's actions against the Yezidis in Iraq and Syria may constitute the underlying acts of the crime of genocide, in view of the limitations of our sources and, in particular, the lack of access to information on individual perpetrators, we have been unable to reach a view on whether individuals perpetrators had the *dolus specialis* necessary to commit the crime of genocide.

2. WHO ARE THE YEZIDIS?

Although there is a substantial body of research on the Yezidis, particularly by scholars who have conducted fieldwork among this minority in Iraq,³⁶ the Yezidis themselves place crucial importance on oral tradition, and amongst their many religious taboos, there is a traditional ban on literacy.³⁷ Allison notes that '[t]hey communicated with their neighbours, and passed on their community history, literature, wisdom and religious texts to their descendants, orally...These traditions are intimately related to the Yezidis' perception of their own identity.'³⁸ This emphasis on an oral tradition means that the available information on the origin and history of Yezidism remains rather vague.³⁹ This may, in part, be the reason why this small, ethno-religious minority has become 'one of the more misunderstood groups of the Middle East.'⁴⁰

The article focuses on the Yezidis in northern Iraq and Syria. While the Yezidis are usually regarded as being of Kurdish ethnicity,⁴¹ this is a complex question.⁴² Maisel observes that 'some communities, particularly in Armenia and the Sinjar Mountains, want to be regarded as Yezidis - as a distinct ethnicity with their own Yezidi language.'⁴³ Their own traditions and myths shed little light on the question of ethnicity.⁴⁴ Throughout history, there have been attempts by non-Yezidis to label them, and attempts by the Yezidis themselves to claim specific ethnic identities, usually in connection with contemporary political factors. One theory views the Yezidis as descendants from the ancient Assyrians.⁴⁵ Another theory provides for a totally Islamic origin for the Yezidis.⁴⁶ And yet another theory, associated with Kurdish nationalism, claims descent from the Medes for the Kurds.⁴⁷ While the question of Yezidi ethnicity is, therefore, contested, the

³⁶ See also Allison, *The Yezidi Oral Tradition in Iraqi Kurdistan* (2001) 3; Açıkyıldız, *The Yezidis: The History of a Community, Culture and Religion* (2010) 1; Harrison (ed), *Religious Freedom Issues in Iraq* (2010) 1; and Maisel, 'Social Change Amidst Terror and Discrimination: Yezidis in the New Iraq' *The Middle East Institute Policy Brief No. 18*, August 2008, 1.

³⁷ Allison, supra n 36 at 3.

³⁸ *ibid.*

³⁹ Açıkyıldız, supra n 36 at 27.

⁴⁰ Allison, supra n 36 at 3. As Empson notes, this is rather a misnomer: Empson, *The Cult of the Peacock Angel: A Short Account of the Yezidi Tribes of Kurdistan* (1928) 23.

⁴¹ Maisel, supra n 36 at 1 (fn 1).

⁴² Empson, supra n 40 at 24. Anthropologists approach the concept of ethnicity as a 'social category linking a group of people who perceive themselves to share ancestry and identity markers (language, food, dress, religion, and so forth). The sense of ancestry is frequently linked to an origin story, which helps provide a sense of solidarity and belonging as well as a sense of difference from other ethnic groups. Ethnic categories are fluid and multiple...': Hinton, 'Critical Genocide Studies' (2012) 7 *Genocide Studies and Prevention: An International Journal* 4 at 5.

⁴³ Maisel, supra n 36 at 2.

⁴⁴ With the possible exception of the traditions that the Yezidis were the children of Adam alone and not of Eve, and thus separate from the rest of humanity: Allison, supra n 36 at 40.

⁴⁵ Allison, supra n 36 at 40-41.

⁴⁶ *ibid.*

⁴⁷ Allison notes that 'This eagerness to embrace an ancient Iranian cultural heritage in part reflects a resistance to attempts, by pan-Turkists in particular, to deny a separate Kurdish identity. The Medes offer a non-Islamic origin distinguishing Kurds from Turks and Arabs. The claim of descent from a people who were not only ancient, but powerful enough to have an empire, may be seen as a claim for power in the contemporary world. Exponents of this view tend to see Yezidism as a form of Zoroastrianism': *ibid.*

most important factor differentiating Yezidis from other groups is their religion.⁴⁸ Allison notes that:

the Yezidis are a religious minority with many taboos and a strict caste system...The Yezidis are neither Muslim, Christian nor Jewish and therefore not 'People of the Book'. This has had important implications in the past for their legal status, and is still a factor in their relationships with their neighbours and with authority. Their religion contains elements originating in various majority religions, but cannot be defined as purely, or even principally, Christian, Islamic or Zoroastrian; it appears to be truly syncretistic.⁴⁹

In the Yezidi religion, power from God is delegated to seven angels and their leader, Tawûsî Melek (the 'Peacock Angel').⁵⁰ It is this association with the Peacock Angel that has led to the Yezidi being misleadingly described as 'devil worshippers'.⁵¹ The next section will explore ISIL's actions against this ethno-religious group within the framework of Article 2 of the UNCG.

3. ISIL'S ACTIONS AND THE MATERIAL ELEMENTS OF GENOCIDE

Article 2 of the UNCG provides:⁵²

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

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

It is widely recognized that 'the law set out in the Convention reflect[s] customary international law and that the norm prohibiting genocide constitutes *jus cogens*.'⁵³ As the Grand Chamber of the European Court of Human Rights ('ECtHR') noted, in *Vasiliauskas*, all references to the crime of genocide in subsequent international law instruments, including the 1998 Statute of the International Criminal Court ('ICC'), describe that crime in similar, if not identical, terms.⁵⁴ However, as neither Iraq nor Syria are members of the ICC, it is the provisions of the UNCG which have to be relied on with respect to ISIL. In this context, in view of the progressive development of international law and human rights law, through which '[n]on-State actors...are increasingly exposed to the threat of accountability and punishment for abuses of human rights,'⁵⁵ we take the view that the

⁴⁸ *ibid* 42. This is also the view adopted by the Report of the UN High Commissioner for Human Rights, who describes the Yezidis as a 'community whose identity is based on their religious beliefs': UN Human Rights Council Report March 2015, *supra* n 1 at para 17.

⁴⁹ Allison, *supra* n 36 at 26.

⁵⁰ Açıkyıldız, *supra* n 36 at 73.

⁵¹ *ibid.*, 79; Maisel, *supra* n 36 at 3.

⁵² For more on the UNCG, see Schabas, *Genocide in International Law* 2nd edn (2009) 3. The UNCG was ratified by both Syria (1955) and Iraq (1959), see ICRC, 'Treaties and State Parties to Such Treaties: Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948', <https://www.icrc.org> (Last accessed 1 June 2016).

⁵³ *Prosecutor v Vidoje Blagojević, Dragan Jokić* IT-02-60-T, Judgment, ICTY Trial Chamber, 17 January 2005, at para 639.

⁵⁴ *Vasiliauskas v Lithuania*, Judgment Application no. 35343/05, Merits, 20 October 2015, at para 170.

⁵⁵ Schabas, *supra* n 12 at 932.

proscription of genocide contained in Article 2 of the UNCG applies 'equally to State and non-State actors,'⁵⁶ such as ISIL.⁵⁷

Genocide as defined in Article 2 of the UNCG comprises both material and mental elements.⁵⁸ This section will examine ISIL's actions in the context of the material elements of genocide. The mental element component will be examined in the next section.

A. Killing

The evidence indicated that ISIL has pursued a campaign of killing targeting minority groups including the Yezidi. One report detailed how ISIL fighters have 'summarily executed' Yezidi men after they had been segregated from the women and children.⁵⁹ There were reports that males over the age of 14 had been shot,⁶⁰ and in at least one instance, all males over the age of 10 had been shot.⁶¹ In a number of cases, Yezidi men were presented by ISIL with the choice of conversion to Islam or death.⁶² However, in some cases, having converted, the Yezidi men were then killed.⁶³ Other reports make reference to mass killings performed by ISIL after which any survivors were buried alive.⁶⁴

ISIL has conducted a campaign of mass killing that has targeted opponents, including Sunnis who refused to swear fealty to ISIL⁶⁵ and those associated with the Iraqi government, such as police officers and members of the Iraq military.⁶⁶ However, it appeared from the evidence available that the Yezidis had been the focus of systematic searches aimed at 'hunting down and killing Yezidi who had remained in their homes.'⁶⁷

In the current context, reliable numbers remain difficult to establish, with some media reports placing the figure of Yezidis killed in early August 2014 at approximately 500.⁶⁸ Other media reports refer to 2,000 deaths in a single day in August 2014.⁶⁹ Meanwhile, the UN estimated that up until October 2014, ISIL had killed approximately 5,000 Yezidis. Subsequent reports refer to additional killings including the murder of 300 Yezidi captives.⁷⁰ The pattern of attacks has occurred throughout the territory controlled by ISIL.

⁵⁶ See *Kadic v Karadzic*: Opinion of 2nd Circuit re: Subject Matter Jurisdiction, United States Court of Appeals for the Second Circuit, Nos. 1541, 1544, 13 October 1995.

⁵⁷ In support of this position, see Kunstle, 'Kadic v Karadzic: Do private individuals have enforceable rights and obligations under the Alien Tort Claims Act?' (1996) 6 *Duke Journal Of Comparative & International Law* 319 at 331 and Nowak and Januszewski, 'Non-State Actors and Human Rights,' in Math Noortmann et. al. (eds.), *Non-State Actors in International Law* (2015) 121. For a discussion of the use of national court decisions to interpret rules of international law, Zammit Borda, 'A Formal Approach to Article 38(1)(d) of the ICJ Statute from the Perspective of the International Criminal Courts and Tribunals' (2013) 24 *European Journal of International Law* 649 at 658.

⁵⁸ See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* Merits, Judgment, ICJ Reports 2007, 43, at para 186.

⁵⁹ UN Human Rights Council Report March 2015, supra n 1 at para 18.

⁶⁰ *ibid.*

⁶¹ UNAMI Report, supra n 30 at 12.

⁶² UN Human Rights Council Report March 2015, supra n 1 at para 18; UNAMI Report, supra n 30 at 14.

⁶³ UN Human Rights Council Report March 2015, supra n 1 at para 18.

⁶⁴ Ahmad Rasheed, 'Exclusive: Iraq says Islamic State killed 500 Yazidis, buried some victims alive', Reuters, 10 August 2014. Available at <<http://www.reuters.com/article/2014/08/10/us-iraq-security-yazidis-killings-idUSKBN0GA0FF20140810>> (Last accessed 1 June 2016).

⁶⁵ UNAMI Report, supra n 30 at 7.

⁶⁶ *ibid* 6-7.

⁶⁷ *ibid* 13.

⁶⁸ Milmo and Wright, 'Iraq crisis: Islamic State militants 'kill hundreds' of Yazidi minority as 'women and children buried alive', The Independent, 10 August 2014. Available at <<http://www.independent.co.uk/news/world/middle-east/iraq-crisis-islamic-state-militants-kill-hundreds-of-yazidi-minority-as-women-and-children-buried-9660398.html>> (Last accessed 1 June 2016).

⁶⁹ Levs, 'Will anyone stop ISIS?' CNN, 7 August 2014 Available at <<http://edition.cnn.com/2014/08/07/world/meast/stopping-isis/>> (Last accessed 1 June 2016).

⁷⁰ BBC, 'Islamic State: Militants 'kill 300 Yazidi captives'', 2 May 2015, <<http://www.bbc.co.uk/news/world-middle-east-32565809>> (Last accessed 1 June 2016).

For example, two separate incidents in the Sinjar province led to the deaths of 80 men in the village of Qani and 200 in the village of Kocho.⁷¹

B. Causing serious bodily or mental harm

The evidence indicated that ISIL used torture to cause bodily and mental harm to their victims. According to a UN report, a number of bodies have been discovered that bore signs that the individuals concerned had been tortured prior to their deaths.⁷² Another major cause of both physical and mental harm stemmed from the level of sexual violence inflicted upon Yezidi women and girls. In addition to the trauma associated with rape, reports referred to the administration of beatings by ISIL fighters against Yezidi women held as sex slaves.⁷³ As in Rwanda,⁷⁴ the sexual violence suffered by Yezidi women and girls was likely to have lasting psychological effects. Many reports made reference to a higher incidence of suicide and attempted suicide. Some of this took place in ISIL captivity when Yezidi women and girls were being held as sex slaves.⁷⁵ Suicides have also been reported amongst those who had escaped ISIL captivity.⁷⁶ One report noted that all those who had been held, displayed evidence of 'acute emotional distress'.⁷⁷ This violence had long-lasting consequences for the women and girls concerned, with some reports making reference to victims displaying some symptoms of post-traumatic stress disorder.⁷⁸ Others have reported mental harm stemming from witnessing the treatment of other women and girls while held as captives by ISIL.⁷⁹

The above evidence resonates with the experiences of sexual violence victims in Rwanda. In one study, victims likened their experiences to those of prostitutes, reflecting a sense of shame and loss of dignity.⁸⁰ Other victims reported being left HIV positive, resulting in the destruction of pre-existing marriages.⁸¹

C. Deliberately inflicting conditions of life calculated to destroy the group

In *Karadžić*, the ICTY Trial Chamber recalled that 'when the same acts are charged under Articles 4(2)(b) and 4(2)(c) [of the ICTY Statute], a chamber will consider whether these alleged acts amount to conditions calculated to bring about physical destruction *only* when it does not find them to amount to "causing serious bodily or mental harm"'.⁸² There was considerable evidence that ISIL has deliberately inflicted conditions of life calculated to destroy the Yezidis through, *inter alia*: (1) trapping tens of thousands of Yezidis on Mount Sinjar without food or water; (2) slavery, rape and sexual violence; and (3) forced religious conversions, under pain of death.

(i). Trapping tens of thousands of Yezidis on Mount Sinjar without food or water

⁷¹ UN Human Rights Council Report March 2015, *supra* n 1 at para 19.

⁷² *ibid* at para 14.

⁷³ Human Rights Watch, *supra* n 32.

⁷⁴ Mukamana and Brysiewicz, 'The Lived Experience of Genocide Rape Survivors in Rwanda' (2008) 40 *Journal of Nursing Scholarship* 379.

⁷⁵ Amnesty International, *supra* n 24.

⁷⁶ UN Human Rights Council Report March 2015, *supra* n 1 at para 43.

⁷⁷ Human Rights Watch, *supra* n 32.

⁷⁸ *ibid*.

⁷⁹ Amnesty International, *supra* n 24.

⁸⁰ Mukamana & Brysiewicz, *supra* n 74 at 381 & 383.

⁸¹ *ibid*.

⁸² *Prosecutor v Radovan Karadžić* IT-95-5/18-T, Judgment, ICTY Trial Chamber, 24 March 2016, at para 2583 (emphasis added).

There was evidence that on 2 - 3 August 2014, tens of thousands of Yazidis from the city of Sinjar fled their homes to Mount Sinjar to escape ISIL's advancing forces.⁸³ ISIL hunted and then surrounded the Yazidis as they fled to the mountain 'with no food and no water.'⁸⁴ According to one report, '[a]ll sides of the mountain were sealed off by the jihadist militants leaving no escape.'⁸⁵ Up to 40,000 Yazidi men, women and children were trapped on Mount Sinjar, where they were surrounded by ISIL fighters who had threatened them with death.⁸⁶ The mountain provided little shelter, except for some trees and caves, and the temperatures exceeded 42 degrees Celsius.⁸⁷ In such conditions, '[m]any women and children, as well as the sick and elderly...died on the mountain from hunger and dehydration.'⁸⁸ According to another report, those trapped on the mountain spoke of appalling conditions, with no water, food or medicine, and little shelter apart from lone trees, under which groups huddled together, or caves dotted in the barren, bleak mountainside.⁸⁹ The condition of the trapped Yazidis was so dire that an international coalition had to make emergency airdrops of food and water.⁹⁰ The UN Office for the Coordination of Humanitarian Affairs reported that:

[e]xposed to extreme heat, dehydration and the imminent threat of attack, people there are in desperate need of life-saving assistance, including food, water and shelter...Airdrops of food and water are providing some relief, but the situation on the mountain remains dire.⁹¹

The siege of Mount Sinjar was only lifted following an air campaign against ISIL, which was authorized by the US President and which, together with the intervention of Kurdish forces, allowed the trapped Yazidis to evacuate.⁹²

(ii). *Slavery, rape and sexual violence*

The UNHR report found evidence of 'widespread and systematic enslavement, including selling of women, rape, and sexual slavery, forced transfer of women and children and inhuman and degrading treatment.'⁹³ Although the precise number of Yazidis taken captive was unknown, one estimate had it that 'as many as 7,000 women were taken captive in August 2014.'⁹⁴ According to the UN Special Representative on Sexual Violence in Conflict, ISIL implemented a system whereby:

After attacking a village, IS splits women from men and executes boys and men aged 14 and over. The women and mothers are separated; girls are stripped naked, tested

⁸³ US Bureau of Counterterrorism, 'Country Reports on Terrorism 2014,' United States Department of State Publication, June 2015, p. 170; and UN Office for the Coordination of Humanitarian Affairs, 'Iraq: Humanitarian community responds to Mount Sinjar crisis', 13 August 2014, available at: <http://www.unocha.org> (Last accessed 1 June 2016).

⁸⁴ Stern, supra n 1 at 47.

⁸⁵ Clarion Project, 'Special Report: The Islamic State', 10 May 2015, 27, <https://www.clarionproject.org/sites/default/files/islamic-state-isis-isis-factsheet-1.pdf> (Last accessed 1 June 2016).

⁸⁶ Russia Today, 'Hundreds of Yazidi minority women taken captive by ISIS in Iraq', 8 August 2015, available at: <http://www.rt.com> (Last accessed 1 June 2016).

⁸⁷ Williams et al., 'They have vicious plans for them': Fears for hundreds of Yazidi 'slave' women captured by ISIS fanatics in Iraq as America wipes out terrorist convoy after launching SECOND round of bombing', The Telegraph, 8 August 2014, available at: <http://www.telegraph.co.uk/> (Last accessed 1 June 2016).

⁸⁸ Russia Today, supra n 86.

⁸⁹ Williams, supra n 87.

⁹⁰ Stern, supra n 1 at 47.

⁹¹ UN Office for the Coordination of Humanitarian Affairs, 'Iraq: Humanitarian community responds to Mount Sinjar crisis', 13 August 2014, available at: <http://www.unocha.org> (Last accessed 1 June 2016).

⁹² Arango, 'Backed by U.S. Airstrikes, Kurds Reverse an ISIS Gain,' New York Times, 18 December 2014, available at: <http://www.nytimes.com/> (Last accessed 1 June 2016).

⁹³ UN Human Rights Council Report March 2015, supra n 1 at para 35.

⁹⁴ Stern, supra n 1 at 216. See also Barber, 'Islamic State Officially Admits to Enslaving Yazidi Women' Syria Comment Blog, 12 October 2014, available at: <http://www.joshualandis.com/> (Last accessed 1 June 2016).

for virginity and examined for breast size and prettiness. The youngest, and those considered the prettiest virgins fetch higher prices and are sent to Raqqa, the IS stronghold," she said.

There is a hierarchy: sheikhs get first choice, then emirs, then fighters. They often take three or four girls each and keep them for a month or so, until they grow tired of a girl, when she goes back to market. At slave auctions, buyers haggle fiercely, driving down prices by disparaging girls as flat-chested or unattractive.⁹⁵

One incident was particularly telling, as it demonstrated how religious arguments were used by ISIL members to dehumanize Yezidi women and girls and to 'justify' their destruction through slavery:

Along with 24 other girls and young women, the 15-year-old was driven to an army base in Iraq. It was there in the parking lot that she heard the word "sabaya" for the first time.

"They laughed and jeered at us, saying 'You are our sabaya.' I didn't know what that word meant," she said. Later on, the local Islamic State leader explained it meant slave.

"He told us that Taus Maille" - one of seven angels to whom the Yazidis pray – "is not God. He said that Taus Malik is the devil and that because you worship the devil, you belong to us. We can sell you and use you as we see fit."⁹⁶

There was also evidence that many of the women and girls held in captivity were repeatedly transferred to different locations in ISIL-controlled territory, 'with some victims transferred to more than 10 different locations during a four-month period. These repeated transfers and displacement were apparently aimed at reinforcing ISIL control over the victims by instilling feelings of fear, insecurity and disorientation.'⁹⁷ The Yezidis were particularly vulnerable to such repeated transfers because of the strong value that they placed on their environment:

[f]or the Yezidis in particular, whose whole way of life is integrated into their religion, past and present events are closely linked to each other and to their environment. Locations are not only associated with past events, but also imbued with strong religious meanings.⁹⁸

Many of the women and girls were regarded as chattels, imprisoned in houses and held in sexual slavery.⁹⁹ Human Rights Watch has documented a system of organized rape and sexual assault, sexual slavery, and forced marriage¹⁰⁰ by ISIL forces.¹⁰¹ As with enslavement, there was evidence that religious 'justifications' had been accepted and followed by ISIL members to dehumanize Yezidi victims and rape them. Such a pattern emerged in the following cases:

⁹⁵ Times of Israel, 'UN envoy 'sickened' by rampant IS sexual violence', 23 May 2015, available at: <http://www.timesofisrael.com/> (Last accessed 1 June 2016).

⁹⁶ Callimachi, *supra* n 24.

⁹⁷ UN Human Rights Council Report March 2015, *supra* n 1 at para 36. See also Callimachi, *supra* n 24.

⁹⁸ Allison, *supra* n 36 at ix.

⁹⁹ United Nations, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic: Rule of Terror: Living under ISIS in Syria' UN Human Rights Council (19 November 2014) A/HRC/27CRP.3 ('UN Report Living under ISIS in Syria') at para 53.

¹⁰⁰ In the trial of Charles Taylor, the SCSL Trial Chamber took issue with the expression 'forced marriage' because of the risk that this act could be confused with arranged or traditional marriages. In this context, the Chamber preferred the term 'conjugal slavery,' which was a distinctive form of the crime of sexual slavery: see *Prosecutor v Charles Taylor*, Judgment, SCSL-03-01-T, SCSL Trial Chamber, 18 May 2012, at para 424-429.

¹⁰¹ Human Rights Watch, *supra* n 32.

In the moments before he raped the 12-year-old girl, the Islamic State fighter took the time to explain that what he was about to do was not a sin. Because the preteen girl practiced a religion other than Islam, the Quran not only gave him the right to rape her -it condoned and encouraged it, he insisted.

He bound her hands and gagged her. Then he knelt beside the bed and prostrated himself in prayer before getting on top of her.

When it was over, he knelt to pray again, bookending the rape with acts of religious devotion.¹⁰²

In another case, a 15-year-old girl was raped in similar circumstances:

"Every time that he came to rape me, he would pray," said F, a 15-year-old girl who was captured on the shoulder of Mount Sinjar one year ago and was sold to an Iraqi fighter in his 20s.

"He kept telling me this is ibadah," she said, using a term from Islamic scripture meaning worship.

"He said that raping me is his prayer to God..."¹⁰³

While these acts primarily constituted bodily or mental harm, they could also constitute deliberately inflicting conditions of life calculated to bring about the destruction of the group. In *Kayishema et al.*, the ICTR Trial Chamber underscored that 'the conditions of life envisaged include rape.'¹⁰⁴ Cherif Bassiouni notes that, under Islamic law, women who have had sexual relations outside of marriage are not marriageable.¹⁰⁵ Research undertaken in the field of gender studies indicates that enslavement, rape and sexual violence should be viewed not only as crimes against the individual; they should also be viewed as 'intended to desecrate the ways that members of collectivities - male and female - are bound together and thereby to permanently destroy their capacity to rebuild themselves as stable and active collective agents in human history.'¹⁰⁶ This is because, as a consequence of these crimes, familial relationships break down and the victims of these crimes become ostracized or lose their 'marriageable' status¹⁰⁷ and/or refuse to reproduce. These insights lead us to 'recognize something that the perpetrators of genocide have known for centuries: that one can destroy a group by destroying that group's ability to reproduce.'¹⁰⁸ The Yezidis were particularly vulnerable to this because of the high value the Yezidi religion places on endogamy:

[a]ccording to Yezidi customs, marriage with members of other faiths and sexual relations outside marriage are not accepted. Such practices are considered to be shameful for the whole family, and in the past women and girls believed to have had relations with men of other faiths have been victims of so-called "honour killings".¹⁰⁹

¹⁰² Callimachi, supra n 24.

¹⁰³ *ibid.*

¹⁰⁴ *Prosecutor v Kayishema and Ruzindana* ICTR-95-1, Judgment, ICTR Trial Chamber, 21 May 1999, at para 116.

¹⁰⁵ Bassiouni and Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (1995) 586; Schabas, supra n 52 at 170.

¹⁰⁶ von Joeden-Forgey, 'Gender and the Future of Genocide Studies and Prevention' (2012) 7 *Genocide Studies and Prevention: An International Journal* 89 at 95.

¹⁰⁷ Le Roux and Muhire, 'The status of acts of sexual violence in international criminal law' (2009) 1 *South African Journal of Criminal Justice* 69 at 70 (fn 5).

¹⁰⁸ Joeden-Forgey, supra n 106 at 94.

¹⁰⁹ Amnesty International, supra n 24 at 13. Allison, supra n 36 at 31-32.

Although the Yezidi community took measures to reintegrate women victims,¹¹⁰ the stigma attached to such women is far-reaching, as evidenced by the testimony provided by some of the relatives of abducted Yezidi women and girls interviewed by Amnesty International, who expressed concern:

not just about the suffering inflicted on their captured relatives, but also about the negative social consequences of the abductions for the future of these women and girls. Some said that it would be difficult to find suitable husbands for those who had been abducted, even if they had not been victims of sexual violence, because it was assumed that all those abducted had been raped.¹¹¹

(iii). *Forced religious conversions, under pain of death*

The UNHR report found that '[n]umerous Yezidi witnesses provided credible and consistent accounts, involving separate incidents and attacks, detailing how they were forced to convert to Islam or face death.'¹¹² Forced religious conversions were particularly devastating for a religious group such as the Yezidis, particularly given that Yezidi identity 'is expressed in terms of religious purity and of difference from other groups.'¹¹³ The UNHR report went on to observe '[s]ome victims and witnesses added that they had been asked to convert to Islam and that the men who refused were killed, while in other instances even the men who converted were still summarily executed.'¹¹⁴

ISIL implemented a systematic policy of forced conversions of the Yezidis, which was described and justified in issues 3 and 4 of *Dabiq*. There were numerous testimonies which corroborated the findings of the UNHR report above. Many captured Yezidis were forced to convert their religion, including in mass ceremonies, or face death.¹¹⁵ The following testimony, of a 13-year-old girl who was held captive by ISIL, was particularly telling as it exposed ISIL's underlying goal of destroying the Yezidi religious identity in order to supplant its own:

[w]hen they came to select the girls, they would pull them away. The girls would cry and faint, they would have to take them by force. They made us convert to Islam and we all had to say the shahada [Islamic creed]. They said, "You Yezidis are kufar [infidels], you must repeat these words after the leader." They gathered us all in one place and made us repeat after him. After we said the shahada, he said *you have now been converted to our religion and our religion is the correct one*. We didn't dare not say the shahada.¹¹⁶

D. Imposing measures intended to prevent births and forcibly transferring children

The final two crimes found in Article 2 of the UNCG were linked in the sense that they aimed to destroy the future of a group through either the imposition of measures to prevent births or the forcible transfer of children away from the group.¹¹⁷ In the first instance, measures might include sexual mutilation, the practice of sterilization, forced

¹¹⁰ Baba Sheikh, a Yezidi religious leader, issued a statement on 6 September 2014 welcoming escaped women back into the community and stating that no one should harm them: Human Rights Watch, *supra* n 32.

¹¹¹ Amnesty International, *supra* n 24 at 13. See also Human Rights Watch, 'Iraq: Forced Marriage, Conversion for Yezidis', 11 October 2014, <https://www.hrw.org/> (Last accessed 1 June 2016).

¹¹² UN Human Rights Council Report March 2015, *supra* n 1 at para 17.

¹¹³ Allison, *supra* n 36 at ix-x.

¹¹⁴ UN Human Rights Council Report March 2015, *supra* n 1 at para 18.

¹¹⁵ UNAMI Report, *supra* n 30 at 20, and Human Rights Watch, *supra* n 32.

¹¹⁶ Human Rights Watch, *supra* n 32 (emphasis added).

¹¹⁷ However, while the former does not require proof of a result, the latter does: see Schabas, *supra* n 52 at 177.

birth control, separation of the sexes and prohibition of marriages.¹¹⁸ It was also noted in *Akayesu* that the effects of such measures could be mental as well as physical if the person affected 'refuses subsequently to procreate'.¹¹⁹

The transfer of children away from the group sought to ensure that the 'language, traditions and culture of their [original] group become or remain alien to the children.'¹²⁰ With respect to the Yezidis, there was evidence that ISIL imposed measures intended to prevent births primarily through abortions and systematic rape, and also undertook measures to forcibly transfer children.

(i). *Abortions and systematic rapes*

The UNHR report found evidence that an ISIL doctor 'conducted abortions on two [Yezidi] women in a school in Ba'aj, Ninewa, who were two and three months pregnant, respectively... Both women received an injection and were made to take pills.'¹²¹ With respect to rapes, although falling under Article 2 (b) and (c) of the UNCG, the ICTY Trial Chamber held in *Karadzic* that '[t]he systematic rape of women...is in some cases intended to transmit a new ethnic identity to the child,'¹²² thereby preventing births of Yezidi descent. Similarly, in *Akayesu*, the ICTR Trial Chamber held:

[i]n patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group.¹²³

Such measures may be 'ancillary to a genocidal plan or programme.'¹²⁴ ISIL's systematic rape of Yezidi women was particularly devastating to the Yezidis on account of their deep-rooted religious beliefs in caste and group membership. Membership of a Yezidi caste came from both parents and could not be changed.¹²⁵ On this point, Allison notes:

the borders between Yezidi and non-Yezidi are clearly defined. Birth of Yezidi parents is the criterion for membership of the Yezidi community, and Yezidi custom in Northern Iraq dictates that if one marries a non-Yezidi one forfeits one's right to membership of the community.¹²⁶

(ii). *Forcible transfer of children*

The UNHCR report found evidence, which was corroborated by other sources, that:

[i]n August 2014, following the abduction of thousands of Yezidis by ISIL fighters, children aged between eight and 15 were separated from their mothers and transferred to different locations in Iraq and Syria, including a school in Tel Afar and a school on the outskirts of Raqqa, Syria. Children recounted how they received religious and military training following their forced conversion. Training lasted from

¹¹⁸ *Prosecutor v Akayesu* ICTR-96-4-T, Judgment, ICTR Trial Chamber, 2 September 1998, at para 507.

¹¹⁹ *ibid* at para 508.

¹²⁰ Jessberger, 'The Definition and Elements of the Crime of Genocide' in Gaeta (ed), *The UN Genocide Convention* (2009) 103.

¹²¹ UN Human Rights Council Report March 2015, *supra* n 1 at para 41.

¹²² *Prosecutor v Karadzic & Mladic* IT-95-5-R61/IT-95-18-R61, Review of the Indictments Pursuant to Rule 61 of the rules of Procedure and Evidence, ICTY Trial Chamber, 11 July 1996, at para 94.

¹²³ *Akayesu* Judgment, *supra* n 118 at para 507.

¹²⁴ Schabas, *supra* n 52 at 201.

¹²⁵ Allison, *supra* n 36 at 30.

¹²⁶ *ibid* at 26.

13 days to three weeks and included how to load and unload guns, shoot using live bullets and launch small and medium-sized rockets. Boys reported being forced to watch videos of beheadings several times. When they refused, they were severely beaten.¹²⁷

The testimony of one survivor, in particular, served to underscore the forcible nature of these transfers of children:

[a]t some point between August 22 and 24 [2014], she said, she watched from the prison courtyard as Islamic State fighters took more than 100 boys, some as young as 6, from their mothers:

They took the small boys from their mothers. If the mothers refused, they grabbed the children by force. They slapped protesting mothers, shot their guns in the air, and said, "We'll kill you if you don't [let your children go]."¹²⁸

4. THE MENTAL ELEMENT

In order for the above acts to constitute the underlying acts of genocide, they have to be 'intentional or volitional acts,' and must be accompanied by the necessary mental elements.¹²⁹ In addition, however, the crime of genocide requires the *dolus specialis* that these acts have been committed 'with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.' Milanovic notes that '[i]t is the extreme *mens rea* of genocide which draws the distinction between genocide and crimes [against] humanity as a *genus*.'¹³⁰ Indeed, even though the mental element may be established from circumstantial evidence,¹³¹ the probative threshold is usually very high.

The official reports and other sources we examined did not generally identify individual perpetrators and we otherwise did not have access to information on the roles played by individual perpetrators. For these reasons, we have been unable to reach a conclusive view as to whether, in committing the atrocities described in section 3, the individual perpetrators possessed the necessary *dolus specialis* required for the crime of genocide. We have limited our analysis to outlining a pattern of conduct which may be indicative of the existence of a genocidal plan on the part of ISIL members against the Yezidis.¹³²

In *Karadžić*, the ICTY Trial Chamber relied on a consistent pattern of conduct undertaken by Bosnian Serb Forces in Srebrenica, including the movement of prisoners, the vast scale of the executions and the horrendous manner in which they were carried out, to infer that '[a]ll of these killings were carried out...in circumstances which demonstrated clear co-ordination between multiple layers and branches of the Bosnian Serb Forces.'¹³³ The Chamber concluded that 'the only reasonable inference on the basis of such evidence is that members of the Bosnian Serb Forces orchestrating this operation intended to destroy the Bosnian Muslims in Srebrenica as such.'¹³⁴ While in some cases, therefore, international judges have relied on patterns of conduct to infer the mental element for genocide, it is acknowledged that assessing whether individual perpetrators

¹²⁷ UN Human Rights Council Report March 2015, supra n 1 at para 45. See also UNAMI Report, supra n 30; and Human Rights Watch, supra n 111.

¹²⁸ Ibid.

¹²⁹ International Court of Justice, supra n 58 at para 186.

¹³⁰ Milanovic, supra n 9 at 558.

¹³¹ Dixon and Khan, supra n 22 at 1081 (13-16).

¹³² In so doing, we are aware that 'this argument [...] moves from the intent of the individual perpetrators of the alleged acts of genocide complained of to the intent of higher authority': see International Court of Justice, supra n 58 at para 371.

¹³³ *Prosecutor v Radovan Karadžić*, supra n 82 at para 5668.

¹³⁴ *ibid* at para 5669.

acted 'with the *goal* or *desire* to contribute to the (partial) destruction of the targeted group'¹³⁵ (the purpose-based approach) from the actions of a collective entity is near impossible, without assessing the particular mental state of the individuals involved.¹³⁶

In its 2014 report based on over 300 interviews with victims and witnesses, the Independent International Commission of Inquiry on Syria concluded that '[t]he nature of [ISIL's] attacks on the Yazidis, taken together with ISI[L]'s public statements over social media, suggests a denial of this religious group's right to exist.'¹³⁷ This view was further corroborated in 2015, when the UN High Commissioner for Human Rights' report found evidence 'point[ing] to the intent of ISIL to destroy the Yezidi as a group...and to the existence of a manifest pattern of attacks against this community...'¹³⁸ This report identified 'a manifest pattern of conduct aimed at the destruction of the [Yezidis]',¹³⁹ and concluded that '[m]embers of ISIL may have perpetrated genocide against the Yezidi community by killing, causing serious bodily or mental harm and forcibly transferring members of the group, including children.'¹⁴⁰

In his remarks, US Secretary of State Kerry noted that, on the basis of a review of the information gathered by the US State Department, by the intelligence community, and by outside groups, he had reached the view that 'Daesh is genocidal by self-proclamation, by ideology, and by actions – in what it says, what it believes, and what it does.'¹⁴¹ Our analysis of ISIL's pattern of conduct tended to support the above.

The ISIL leadership had made clear its intentions against the Yazidis by issuing a *fatwa*, or religious ruling, that 'Yazidis should be killed wherever found.'¹⁴² This genocidal policy against the Yazidis was further corroborated by statements and 'justifications' published in ISIL's propaganda magazine, *Dabiq*.¹⁴³ In issue 3 of this magazine, a report detailing ISIL's incursions in the north-western regions of Iraq stated:

[s]ome of these regions were inhabited by the devil worshipping Yazīdiyyah. Alhamdulillah, hundreds of them turned to Allah, declared their Islam, and repented from their kufr. As for those who insisted upon their shirk, then they fled with the Peshmergan [Kurdish] apostates.¹⁴⁴

¹³⁵ Kreß, 'The ICC's First Encounter with the Crime of Genocide: The Case against Al Bashir' in Stahn (ed.), *The Law and Practice of the International Criminal Court* (2015) 694. This approach was adopted by the ICTR in *Akayesu* and has generally been the predominant approach. The ICTR Chamber held that '[s]pecial intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator *clearly seeks* to produce the act charged': see *Akayesu* Judgment, supra n 118 at para 498.

¹³⁶ Kreß expresses support for the alternative 'knowledge-based approach' to intent, where the perpetrator acts with knowledge, but not necessarily with desire, that the goal or manifest effect of the campaign was the destruction of the group in whole or in part: see Kreß, supra n 135 at 694.

¹³⁷ UN Report Living under ISIS in Syria, supra n 99 at para 57.

¹³⁸ UN Human Rights Council Report March 2015, supra n 1 at para 17.

¹³⁹ *ibid* at para 78.

¹⁴⁰ *ibid*.

¹⁴¹ US Secretary of State John Kerry, supra n 8.

¹⁴² Immigration and Refugee Board of Canada, *Iraq: Situation of religious minorities, including practitioners of "Zoroastrianism" and [Yazidi]; treatment by other groups (including the Islamic State of Iraq and al Sham, ISIS) and the government; state protection (2011-July 2014)*, 10 July 014, IRQ104909.E, available at: <http://www.refworld.org/docid/54bf62684.html> (Last accessed 1 June 2016), at para 3 (Treatment of Religious Minorities (2011-2013)). See also Alissa J. Rubin, 'Persecuted Sect in Iraq Avoids Shrine,' *The New York Times*, 14 October 2007, available at: <http://www.nytimes.com/> (Last accessed 1 June 2016). Since the 12th century AD, Muslim clergymen have periodically issued religious fatwas justifying the annihilation of the Yazidis: Shalev, 'U.S.- Jihadist Clash in Iraq Could Change Perceptions of Israel's Gaza Campaign' 8 August 2014, available at: <http://www.haaretz.com/blogs/west-of-eden/.premium-1.609539> (Last accessed 1 June 2016).

¹⁴³ Weiss and Hassan, *ISIS: Inside the Army of Terror* (2015) 174. *Dabiq* is published by Al Hayat Media Centre: Stern, supra n 1 at 119.

¹⁴⁴ *Dabiq* vol. 3, 'Military Conquests in Ninawā and ar-Raqqah', p. 18, available at:

<http://www.clarionproject.org/news/islamic-state-isis-isil-propaganda-magazine-dabiq> (Last accessed 1 June 2016).

In issue 4 of *Dabiq*, ISIL confirmed that the Yazidis had to be treated as *mushrikīn* (polytheists),¹⁴⁵ and it elaborated its religious 'justification' for the policy of annihilation, rape, sexual slavery and forced conversions of the Yazidis:

[u]pon conquering the region of Sinjar in Wilāyat Nīnawā, the Islamic State faced a population of Yazidis, a pagan minority existent for ages in regions of Iraq and Shām. *Their continual existence to this day is a matter that Muslims should question as they will be asked about it on Judgment Day, considering that Allah had revealed Āyat as-Sayf (the verse of the sword) over 1400 years ago. He ta'ālā said, {And when the sacred months have passed, then kill the mushrikīn wherever you find them, and capture them, and besiege them, and sit in wait for them at every place of ambush. But if they should repent, establish prayer, and give zakah, let them [go] on their way. Indeed, Allah is Forgiving and Merciful.}* [At-Tawbah: 5].¹⁴⁶

This report was unapologetic with respect to the violence that ISIL members have committed specifically against the Yazidis as a distinct group, who were further differentiated from the Jews and Christians:

[a]ccordingly, the Islamic State dealt with this group [the Yazidis] as the majority of fuqahā' have indicated how mushrikīn should be dealt with. Unlike the Jews and Christians, there was no room for jizyah payment. *Also, their women could be enslaved unlike female apostates who the majority of the fuqahā' say cannot be enslaved and can only be given an ultimatum to repent or face the sword. After capture, the Yazidi women and children were then divided according to the Sharī'ah amongst the fighters of the Islamic State who participated in the Sinjar operations, after one fifth of the slaves were transferred to the Islamic State's authority to be divided as khums...* The enslaved Yazidi families are now sold by the Islamic State soldiers.¹⁴⁷

The report proceeded to provide some of ISIL's 'theological justification for sexual slaves and how to keep them.'¹⁴⁸ This was further expanded on in issue 9, which provided another religious 'justification' for the sexual enslavement of Yazidi women and other women from communities regarded as *kufaar* (infidels). Following the news of thousands of Yazidi women and children being taken into sexual slavery, and the international condemnation that ensued, the writer remained unapologetic of, and indeed relished in, ISIL's actions with respect to these women and girls:

... after the kāfir media touched upon the State's capture of the Yazīdī women... I write this while the letters drip of pride. Yes, O religions of kufr altogether, we have indeed raided and captured the kāfirah women, and drove them like sheep by the edge of the sword.¹⁴⁹

The above statements reflected an attempt by ISIL to dehumanize the Yazidis, whom they perceived as mushrikīn, and to construct a religious 'justification' for the the destruction of this group. As outlined in section 3 (above), there was considerable evidence that these directions and 'justifications' were accepted and carried out in practice. With respect to killings, one report found that '[a]dolescent boys were told to lift up their shirts,

¹⁴⁵ See entry for mushrikun in Oxford Islamic Studies Online, available at:

<http://www.oxfordislamicstudies.com/article/opr/t125/e1869> (Last accessed 1 June 2016).

¹⁴⁶ *Dabiq* vol. 4, 'The Revival of Slavery Before the Hour', p. 14, <http://www.clarionproject.org/news/islamic-state-isis-isil-propaganda-magazine-dabiq> (Last accessed 1 June 2016) (emphasis added).

¹⁴⁷ *Dabiq* vol. 4, 'The Revival of Slavery Before the Hour', p. 15, <http://www.clarionproject.org/news/islamic-state-isis-isil-propaganda-magazine-dabiq> (Last accessed 1 June 2016) (emphasis added).

¹⁴⁸ Stern, *supra* n 1 at 216.

¹⁴⁹ *Dabiq* vol. 9, 'Slave-girls or Prostitutes?', p. 46, <http://www.clarionproject.org/news/islamic-state-isis-isil-propaganda-magazine-dabiq> (Last accessed 1 June 2016).

and if they had armpit hair, they were directed to join their older brothers and fathers. In village after village, the men and older boys were driven or marched to nearby fields, where they were forced to lie down in the dirt and sprayed with automatic fire.¹⁵⁰ This suggested that young men were not being killed as potential combatants, which is a common defence against genocide charges; the presence of a high number of adolescent boys 'seems to point to an attempt to destroy the ability of the group to organize and reproduce itself in the future.'¹⁵¹

With respect to the 'widespread and systematic enslavement, including selling of women, rape, and sexual slavery, forced transfer of women and children and inhuman and degrading treatment,'¹⁵² the UN Special Representative on Sexual Violence in Conflict found that these atrocities were not being committed randomly by individual militants but were a key tactic used by ISIL 'to advance their radical ideology.'¹⁵³

Another element of this pattern of conduct was ISIL's system of forced religious conversions, under pain of death. This issue has not directly arisen in the jurisprudence of the ad hoc Tribunals or the ICC. However, the Group of Experts for Cambodia held that the Khmer Rouge's attacks on the Buddhist monkhood, which constituted a religious group, and in particular the Khmer Rouge's executions of 'recalcitrant monks', furnished evidence of genocidal intent.¹⁵⁴ While, from one perspective, forced conversions could be categorized as cultural destruction, rather than physical destruction, it has to be recalled that religious faith constitutes the very cohesive force that binds a religious group together. ISIL's systematic forced conversions, under pain of death, of the Yezidis¹⁵⁵ were intended to strike at the heart of this cohesive force, inflicting conditions calculated to destroy this group. Commenting on the psychological violence experienced by the forced converts (in the context of the Armenians), one author observes that 'the dehumanization they experienced was inseparable from the erasure of their religious identity.'¹⁵⁶

The available evidence also suggested a pattern of abductions of Yezidi children aged between eight and 15. Many Yezidi children were separated from their mothers, transferred to different locations in Iraq and Syria, forced to convert to ISIL's interpretation of Sharia law and given religious and military training.¹⁵⁷ They were forced to watch videos of beheadings several times. This pattern pointed towards the goal of destroying the Yezidi identity of the abducted children and replacing it with ISIL's identity, as indicated by what one child was told: 'this is your initiation into jihad, you have to be strong, because you will do this when you will go to jihad for the Islamic State; you are an Islamic State boy now.'¹⁵⁸ In another case, when the older brothers of some of the children asked where the children were being taken, an ISIL fighter said, '[d]on't worry, we will feed and take care of them. We will take them to a base to teach the Quran, how to fight, and how to be jihadis.'¹⁵⁹

¹⁵⁰ Callimachi, *supra* n 24.

¹⁵¹ Joeden-Forgey, *supra* n 106 at 100.

¹⁵² UN Human Rights Council Report March 2015, *supra* n 1 at para 35.

¹⁵³ See interview in Times of Israel, 'UN envoy 'sickened' by rampant IS sexual violence', 23 May 2015, available at: <http://www.timesofisrael.com/> (Last accessed 1 June 2016).

¹⁵⁴ 'Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135', UN Doc. A/53/850, UN Doc. S/1999/231, annex, at paras 63-64.

¹⁵⁵ Various testimonies point to the fact that these forced conversions were carried out under pain of death. For instance, one victim states 'They asked us, "Is there anyone who does not want to convert to Islam?" Of course we all kept silent, because if anybody refused, he or she would be killed': Human Rights Watch, *supra* n 111.

¹⁵⁶ Balakian, 'Raphael Lemkin, Cultural Destruction, and the Armenian Genocide' (2013) 27 *Holocaust and Genocide Studies* 57 at 71-72.

¹⁵⁷ UN Human Rights Council Report March 2015, *supra* n 1 at para 45.

¹⁵⁸ *ibid.*

¹⁵⁹ Human Rights Watch, *supra* n 111.

The epithets perpetrators shouted before attacking members of the Yezidi group also constitute important indicators of genocidal intent.¹⁶⁰ For instance, in the context of the killing in Kocho of at least 700 Yezidi men, an ISIL fighter reportedly shouted: 'you will see now what will happen to you, you pagans and peacock worshippers'.¹⁶¹ Moreover, in the context of the forcible abortions conducted on two Yezidi women, an ISIL fighter reportedly stated: 'we do not want more Yezidis to be born.'¹⁶² And in the context of a mass ceremony relating to the forced marriage of about 60 Yezidi female captives, ISIL fighters told the group to 'forget about your relatives, from now on you will marry us, bear our children, God will convert you to Islam and you will pray.'¹⁶³

Finally, in committing these atrocities, ISIL appeared to discriminate specifically against the Yezidis, as compared to members of other minority groups, such as Christians, whom it viewed as 'People of the Book'. In issue 4 of *Dabiq*, ISIL articulated a religious 'justification' for discriminating between the Yezidis, on the one hand, and Jews and Christians, on the other. According to that 'justification,' whereas the 'People of the Book' could be given the option of paying jizyah (tax), in the case of Yezidis, 'there was no room for jizyah payment.'¹⁶⁴ Moreover, according to one report, ISIL's sex trade appeared 'to be based solely on enslaving women and girls from the Yazidi minority. As yet, there has been no widespread campaign aimed at enslaving women from other religious minorities.'¹⁶⁵ In this respect, one incident was especially telling:

In Kojo, one of the southernmost villages on Mount Sinjar and among the farthest away from escape, residents decided to stay, believing they would be treated as the Christians of Mosul had months earlier. On Aug. 15, 2014, the Islamic State ordered the residents to report to a school in the center of town.

When she got there, 40-year-old Aishan Ali Saleh found a community elder negotiating with the Islamic State, asking if they could be allowed to hand over their money and gold in return for safe passage.

The fighters initially agreed and laid out a blanket, where Ms. Saleh placed her heart-shaped pendant and her gold rings, while the men left crumpled bills.

Instead of letting them go, the fighters began shoving the men outside, bound for death.

Sometime later, a fleet of cars arrived and the women, girls and children were driven away.¹⁶⁶

5. CONCLUSION

¹⁶⁰ Blum et al. "Ethnic cleansing' bleaches the atrocities of genocide' (2007) *European Journal of Public Health* 1 at 4. Hagan notes that Katz's research on the "righteous slaughter" in family-based domestic assaults may be relevant in understanding these epithets in the context of intent: '[t]hey curse, not in the superficial sense..., but...to effect degrading transformations...Symbolically transforming the offending party into an ontologically lower-status...Curses draw on the communal language and its primordial sensibility about the relationship between the sacred and the profane...Cursing sets up violence to be a sacrifice to honour the attacker as a priest representing the collective moral being': see Hagan and Raymond-Richmond, *Darfur and the Crime of Genocide* (2009) 8.

¹⁶¹ UN Human Rights Council Report March 2015, supra n 1 at para 19. This view is further corroborated by the remarks of an ISIL fighter during a Skype conversation organised by Weiss and Hassan. This fighter, upon learning that his brother counted Yezidis among his friends, held 'You have Yazidis next to you?...Kill them and get closer to God': Weiss, supra n 143 at 157.

¹⁶² UN Human Rights Council Report March 2015, supra n 1 at para 41.

¹⁶³ Human Rights Watch, supra n 32.

¹⁶⁴ *Dabiq* vol. 4, 'The Revival of Slavery Before the Hour', p. 15, <http://www.clarionproject.org/news/islamic-state-isis-isis-propaganda-magazine-dabiq> (Last accessed 1 June 2016).

¹⁶⁵ Callimachi, supra n 24.

¹⁶⁶ *ibid.*

In the course of this analysis, we have found a consistent and coordinated pattern of atrocities committed by ISIL members against the Yezidis. While this pattern seemed to indicate the existence of genocidal intent within ISIL ranks, in view of the limitations of our sources and, in particular, the lack of access to information on individual perpetrators, we have not been able to reach a view on whether individuals perpetrators had the *dolus specialis* necessary to commit the crime of genocide. In this context, we have had to limit ourselves to outlining a pattern of conduct which could indicate a genocidal plan.

We concur with the US Secretary of State Kerry's remarks that, ultimately, the full facts of, *inter alia*, the Yezidi's plight should 'be brought to light by an independent investigation and through formal legal determination made by a competent court or tribunal.'¹⁶⁷ In its legal characterisation of ISIL's violence, the prosecutor(s) of such a court or tribunal should be wary of trying to circumvent the probative difficulties associated with specific intent by charging only war crimes and/or crimes against humanity. We consider that, subject to the evidence and depending on the circumstances of each case, ISIL's acts should also be characterized as the crime of genocide. It is only then that ISIL's atrocities against the Yezidis will truly be called by their rightful name.

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¹⁶⁷ US Secretary of State John Kerry, *supra* n 8.