

Universidade do Minho
Escola de Direito

Rebaz R. Khdir

**The Jurisdiction of the International Criminal
Court: The Crimes of the Islamic State in
Iraq and Syria**

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UMinho | 2018

June 2018



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Court: The Crimes of the Islamic State in
Iraq and Syria**

Doctoral Thesis in Legal Sciences

Specialisation: Public Legal Sciences

Thesis conducted under the guidance of

Professor Maria Assunção Pereira

June 2018

DECLARATION OF ORIGINALITY

I hereby certify that this submission is entirely my own work. It, to the best of my knowledge, includes no materials from published or unpublished works written by others without due acknowledgement to the authors in question. The thesis partially or entirely has not been presented for a degree at the University of Minho or any other university.

A handwritten signature in blue ink, consisting of a long horizontal stroke with a loop at the end and a smaller, more complex mark below it.

DEDICATION

To You

“My wife, Nawruz; we are newly married and she is pregnant; she is 19 years old. My mother, Shirin. My nine-year-old brother Assa’ad and my three sisters, Manal, 10, Nisrin, 18, and Shukriya, 20. My two stepmothers (my father has three wives), Sari and Shirin. My two stepbrothers, Amjad and Sami, aged 10 and 11. And my eight stepsisters, Gaure, Goule, Maryam, Shaha, ‘Amshe, Samira, Yusra, and Zarifa, aged between nine and 22. What will happen to them? We don’t even know where some of them are, if they are alive or dead. My baby is not even born and is already a prisoner. What can we do to get them back?”

(The Yazidi survivor from the Qiniyah massacre, Mohsen Elias to Amnesty International)

ACKNOWLEDGEMENT

First and foremost, I praise and thank Almighty Allah for giving me the opportunity and strength to start and complete this PhD research project. I acknowledge His blessings and mercy upon myself and reaffirm my complete dependence upon His absolute authority and will.

I would like to take the opportunity to thank every member state of the European Union for funding the valuable programme of the European Region Action Scheme for the Mobility of University Students (ERASMUS)-MARHABA and the University of Santiago de Compostela (Spain) for leading the programme. I extend my gratefulness to the ERASMUS-MARHABA Project Team, particularly to Madam Lorena Barbeito and Marina Buján Prévot for coordinating the programme.

My deepest appreciation and sincerest gratitude to my supervisor, Professor Maria Assunção Pereira for her constant academic guidance, constructive criticisms and recommendations throughout the writing of this thesis. The professor's immense knowledge, precision, perfect discretion, sincerity, motivation and patience have profoundly influenced my personality and developed my research ability to carry out academic projects independently. Besides being an excellent advisor, Professor Maria Assunção has been a friend and a role model for me. I am really honoured to know her and conduct my PhD research project under her academic guidance. I acknowledge that I could never wish to have a more knowledgeable and friendlier advisor. The thesis would never have been completed without her guidance and academic contribution.

My profound thankfulness is due to Professor Patrícia Vink for her academic coordination and methodological contribution to the study. The contribution of Professor Patrícia was not less significant than the academic supervision of professor Maria Assunção Pereira. I acknowledge that Professor Patrícia also coordinated my PhD study successfully and improved my poor methodological ability incredibly. I am extremely thankful for her invaluable contribution as well.

Many thanks to the administrative staff and librarians of the Law School Library and University Central Library for their sincere care and kind help. Among all, Dr. Sandra Amorim, Dr. Ana Ferreira, Dr. Isabel Henriques and Ms. Carmelinda Vilaça deserve special mention and boundless gratitude.

My heartfelt gratefulness goes to Francisco Costa for being my university buddy and true friend. I am also deeply indebted to his father and mother for considering me a family member during my solitary journey.

Finally, I thank my family: my father, Rasul Khdir, my mother, Mryam Hussein, my brothers, Rebar and Rawand and my sisters, Rezhna, Rozhgar and Jihan for their love, good wishes, prayers, financial and moral support.

ABSTRACT

The ICC was established on 1 July 2002, the date on which its Statute entered into force, as a permanent international criminal institution to compliment the national criminal system. The Court exercises its jurisdiction over genocide, crimes against humanity, war crimes and the crime of aggression when they are committed on the territories of the states parties or by their nationals. The jurisdiction of the Court is extended to the territories and nationals of states that lodge declarations to be *ad hoc* members and states that the UN Security Council brings their situations to the Court. ISIS is a radical Islamic group that seized large swaths of territory from Iraq and Syria between 2013 and 2014 and established a so-called 'Islamic Caliphate'. During its military operations and rule on the captured territories, the group committed large-scale atrocities that all fall within the subject matter jurisdiction of the ICC. This thesis discusses all the ICC preliminary considerations and necessary procedural aspects to open investigations and initiate criminal proceedings, on the one hand, and examines the ISIS case in light of the provisions of the ICC Statute to bring the group's responsible members before the Court, on the other hand.

The thesis argues that the principle of complementarity may not prevent the ICC from opening investigations regarding the ISIS criminal cases, as the Iraqi and Syrian national courts are unable to conduct criminal trials genuinely, but neither states are members of the Court nor have they accepted the jurisdiction of the Court regarding their situations. The UN Security Council has similarly not acted according to Chapter VII of the UN Charter to refer the two states' situations jointly or separately to the Court. Although the ICC may still initiate proceedings against the group's responsible foreign fighters who are the member states' nationals, the high-responsible perpetrators of the group are Iraqis and Syrians. Hence, the ICC is now unable to open investigations into the ISIS criminal cases. This thesis concludes that, to trigger the jurisdiction of the ICC, Iraq and Syria must become member states of the Court or accept the Court's jurisdiction regarding their current situations or the UN Security Council must refer the situations together or separately to the Court.

Keywords: The ICC, ISIS, international crimes, Iraqi and Syrian national prosecutions, the principle of complementarity, the ICC and ISIS.

RESUMO

O Tribunal Penal Internacional (TPI) foi estabelecido em 1 de julho de 2002, data em que seu estatuto entrou em vigor, como uma instituição penal internacional permanente para complementar o sistema penal nacional. O tribunal exerce a sua jurisdição sobre os crimes de genocídio, crimes contra a humanidade, crimes de guerra e o crime de agressão quando são cometidos nos territórios dos estados partes ou pelos seus nacionais. A jurisdição do tribunal é estendida aos territórios e nacionais dos estados que apresentam declarações *ad hoc* de aceitação da sua jurisdição e a situações que o Conselho de Segurança das Nações Unidas lhe submeta. O Estado Islâmico no Iraque e Síria (EIIS) é um grupo radical islâmico que apreendeu grandes territórios do Iraque e da Síria entre 2013 e 2014 e estabeleceu o que chamado ‘Califado Islâmico’. Durante as operações militares e a sua governação nos territórios capturados, o grupo cometeu atrocidades em grande escala que se enquadram no âmbito dos crimes sob jurisdição do TPI. Esta tese discute as considerações preliminares e os aspetos procedimentais necessários para que o TPI possa iniciar investigações e instituir processos criminais, por um lado; e examina o caso do EIIS à luz das disposições do Estatuto do TPI para levar os membros responsáveis do grupo perante o Tribunal, por outro lado.

Na tese, argumenta-se que o princípio da complementaridade não pode impedir o TPI de abrir investigações sobre os casos criminais do EIIS, já que os tribunais nacionais iraquianos e sírios são incapazes de realizar julgamentos criminais genuinamente. Além disso, nenhum dos estados em causa é membro do tribunal e nem aceitaram a jurisdição do tribunal em relação às situações em questão. O Conselho de Segurança das Nações Unidas também não agiu de acordo com o Capítulo VII da Carta das Nações Unidas para encaminhar as situações dos dois estados ao Tribunal quer em conjunto ou separadamente. Embora o TPI ainda possa iniciar processos relativamente a combatentes estrangeiros do EIIS que sejam nacionais dos estados parte no Estatuto do TPI, os principais responsáveis do grupo são iraquianos e sírios. Portanto, o TPI não está em condições de iniciar investigações em relação aos casos criminais do EIIS. Conclui-se que, para que a jurisdição do TPI pudesse ser exercida, seria necessário que o Iraque e a Síria se tornassem membros do Estatuto do TPI ou aceitassem a jurisdição do Tribunal em relação às suas situações atuais; ou que o Conselho de Segurança encaminhasse as referidas situações em conjunto ou separadamente para o Tribunal.

Palavras-chave: TPI, EIIS, os crimes internacionais, os processos judiciais nacionais Iraquianos e Sírios, o princípio da complementaridade, TPI e EIIS.

TABLE OF CONTENTS

DECLARATION OF ORIGINALITY	iii
DEDICATION.....	v
ACKNOWLEDGEMENT	ix
ABSTRACT.....	xi
RESUMO	xiii
LIST OF FIGURES	xxi
LIST OF ABBREVIATIONS	xxiii
INTRODUCTION.....	1
CHAPTER I	11
THE INTERNATIONAL CRIMINAL COURT	11
1. The background, legal nature and functionality regime of the Court.....	11
1.1. Historical evolution and background of the Court.....	11
1.2. The legal nature of the Court.....	21
1.3. The functionality regime of the Court.....	23
2. The crimes within the jurisdiction of the Court.....	28
2.1. The crime of genocide.....	29
2.2. Crimes against humanity	32
<i>2.2.1. Elements of the crimes against humanity.....</i>	<i>36</i>
2.3. War crimes	39
<i>2.3.1. Elements of war crimes</i>	<i>46</i>
2.4. The crime of aggression	49
3. The initiation of investigations and criminal proceedings by the Court	54

3.1. The jurisdiction of the Court	54
3.1.1. Subject matter jurisdiction (<i>Jurisdiction ratione materiae</i>)	55
3.1.2. Temporal jurisdiction (<i>Jurisdiction ratione temporis</i>)	55
3.1.3. Territorial jurisdiction (<i>Jurisdiction ratione loci</i>)	57
3.1.4. Personal jurisdiction (<i>Jurisdiction ratione personae</i>)	58
3.2. The trigger mechanisms of the Court.....	58
3.2.1. State referral	59
3.2.2. Referral by the UN Security Council	61
3.2.3. Referral by the Prosecutor	62
3.3. The admissibility criteria before the Court	65
CHAPTER 2	69
THE ISLAMIC STATE IN IRAQ AND SYRIA	69
1.1. The historical background of ISIS	70
1.2. The geography of the ISIS Caliphate	79
1.3. The Ideology of ISIS	83
1.4. The structure of the ISIS Caliphate	85
1.5. The military forces of ISIS.....	88
1.6. The criminal records of the group before adopting the name of ISIS.....	89
2. The crimes of ISIS in Iraq	91
2.1. The crimes against the civilian population.....	95
2.1.1. Murder	95
2.1.2. Extermination	97
2.1.3. Enslavement	99
2.1.4. Enforced disappearance	101

2.1.5. <i>Other inhuman acts of a similar character</i>	102
2.1.6. <i>Persecution of Shabak, Christian and Turkmen minorities and women</i>	104
2.2. The crimes against the Yazidis.....	113
2.2.1. <i>Killing members of the group</i>	115
2.2.2. <i>Causing serious bodily or mental harm to members of the group</i>	117
2.2.3. <i>Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part</i>	119
2.2.4. <i>Imposing measures intended to prevent births within the group</i>	120
2.2.5. <i>Forcibly transferring children of the group to another group</i>	122
2.3. The crimes committed during armed conflict	123
2.3.1. <i>Attacking and murdering civilians</i>	124
2.3.2. <i>Attacking and murdering other protected persons</i>	126
2.3.3. <i>Attacking protected places</i>	129
2.3.4. <i>Executing persons placed hors de combat</i>	134
2.3.5. <i>Using prohibited weapons</i>	137
2.3.6. <i>Passing sentences and carrying out executions and other punishments</i>	139
2.3.7. <i>Displacing civilians</i>	140
2.3.8. <i>Committing rape, sexual slavery and forced pregnancy</i>	141
2.3.9. <i>Recruiting children</i>	141
3. The crimes of ISIS in Syria	143
3.1. The crimes against the civilian population.....	145
3.1.1. <i>Murder</i>	145
3.1.2. <i>Imprisonment</i>	147
3.1.3. <i>Persecution against Christians, Kurds, Alawites and women</i>	148
3.1.4. <i>Enforced disappearance</i>	150

3.1.5. <i>Other inhuman acts of a similar character</i>	150
3.2. The crimes committed during armed conflict	151
3.2.1. <i>Attacking and murdering civilians</i>	152
3.2.2. <i>Attacking other protected people</i>	154
3.2.3. <i>Attacking protected places</i>	155
3.2.4. <i>Executing people placed hors de combat</i>	157
3.2.5. <i>Torture and cruel treatment</i>	158
3.2.6. <i>Taking of hostages</i>	160
3.2.7. <i>Using prohibited weapons</i>	162
3.2.8. <i>Passing sentences and carrying out executions and other punishments</i>	163
3.2.9. <i>Displacing people forcibly</i>	163
3.2.10. <i>Committing rape and sexual slavery</i>	164
3.2.11. <i>Recruiting children</i>	164
CHAPTER 3	165
THE INTERNATIONAL CRIMINAL COURT AND THE ISLAMIC STATE IN IRAQ AND SYRIA	165
3. The ICC and ISIS	165
3.1. National prosecutions and the ISIS criminal cases	165
3.2. The principle of complementarity and the ISIS criminal cases	169
3.3. The ICC and ISIS	170
3.4. The ICC jurisdiction and the ISIS crimes	171
3.4.1. <i>The ICC subject matter jurisdiction and the ISIS crimes</i>	172
3.4.2. <i>The ICC territorial jurisdiction and the ISIS crimes</i>	178
3.4.3. <i>The ICC personal jurisdiction and the ISIS crimes</i>	178

3.5. The ICC trigger mechanisms and the ISIS criminal cases	179
3.6. The ICC admissibility criteria and the ISIS criminal cases	181
CONCLUSION	183
ISSUES AND RECOMMENDATIONS	187
BIBLIOGRAPHY	191

LIST OF FIGURES

Figure 1: The map of the ISIS Caliphate	81
Figure 2: The global map of ISIS	82
Figure 3: The map of Iraq	94
Figure 4: The map of Syria	144

LIST OF ABBREVIATIONS

- AQI** - Al-Qaeda in Iraq
- FSA** - Free Syrian Army
- HM** - *Hilf al-Mutayibīn*
- ICC** - International Criminal Court
- ICJ** - International Court of Justice
- ICRC** - International Committee of the Red Cross
- ICTR** - International Criminal Tribunal for Rwanda
- ICTY** - International Criminal Tribunal for the Former Yugoslavia
- ILC** - International Law Commission
- IQD** - Iraqi Dinar
- ISI** - Islamic State in Iraq
- ISIS** - Islamic State in Iraq and Syria
- JTJ** - *Jama'at al-Tawhid wal-Jihad*
- MSM** - *Majlis Shūrā al-Mujāhidīn*
- SDF** - Syrian Democratic Forces
- SOHR** - Syrian Observatory for Human Rights
- UN** - United Nations
- UNAMI** - United Nations Assistance Mission for Iraq
- UNESCO** - United Nations Educational, Scientific and Cultural Organisation
- UNOHCHR** - United Nations Office of the High Commissioner for Human Rights
- US** - United States
- YPG** - *Yekîneyên Parastina Gel*

INTRODUCTION

1. Background

The concept of international crimes might be new but the phenomenon has existed throughout human history. Although domestic courts have often addressed these crimes, the idea of an international criminal mechanism to try the crimes has also been in mind. However, the idea turned into reality only after the Second World War when the International Military Tribunal for Germany (the Nuremberg Tribunal) and the International Military Tribunal for the Far East (the Tokyo Tribunal) were set up. The Nuremberg and Tokyo tribunals played a significant role and therefore mankind sought to establish a permanent international criminal body. The United Nations (UN) General Assembly charged the International Law Commission (ILC)¹ with drafting ‘the Code of the Crimes against the Peace and Security of Mankind’ in 1949. The ILC submitted the final draft of the code in 1996 and prepared a draft statute for an international criminal court in 1994 on which the Rome Treaty was drawn up, after several years of review and discussions and five weeks of negotiations, at the Rome Conference on 17 July 1998.² The treaty eventually entered into force on 1 July 2002 and established the International Criminal Court (ICC).

The ICC was designed as a permanent international criminal institution. The Court though was founded based on the initiations and efforts made by the UN, it is not a UN organ neither is it dependent on it. The ICC is rather independent and enjoys legal personality. However, the Court may enter into agreements with it and the Security Council plays a substantial role in triggering

¹ The International Law Commission (ILC) is a subsidiary organ of the United Nations (UN) General Assembly. It was established by the General Assembly Resolution No. 174 (II) on 21 November 1947 under articles 22 and 13, paragraph one, sub-paragraph (a) of the UN Charter. According to article one of the ILC Statute annexed to the mentioned resolution, the commission’s object is the promotion of the progressive development and codification of international law. Article 15 of the commission’s statute explains the expressions of progressive development and codification of international law. Accordingly, the progressive development means “the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States” and codification means “the more precise formulation and systematization of rules of international law in fields where there already has been extensive state practice, precedent and doctrine”.

² See Human Rights Watch, “Summary of the Key Provisions of the ICC Statute”, (1 December 1998). Available at: <<https://www.hrw.org/news/1998/12/01/summary-key-provisions-icc-statute>> (Accessed: 25 June 2017); Caroline Fehl, “Explaining the International Criminal Court: A ‘Practice Test’ for Rationalist and Constructive Approaches”, *European Journal of International Relations*, Vol. 10, Issue. 3, 2004, p. 362; Henry T. King and Theodore C. Theofrastous, “From Nuremberg to Rome: A Step Backward for U.S. Foreign Policy”, *Case Western Reserve Journal of International Law*, Vol. 31, Issue. 1, 1999, p. 50.

and deactivating the jurisdiction of the Court. Although the ICC was established to become an instrument of global justice, its function is based on respecting the principles of state sovereignty and national criminal jurisdiction. The Court, in other words, plays a complementary role to the domestic courts of its member states and functions only when the states' national courts are unwilling or unable to try criminals and restore rights to victims.

The ICC is mandated to investigate and prosecute international crimes. The international crimes, however, consist of various offences; the Court is only able to try genocide, crimes against humanity, war crimes and the crime of aggression now. Yet, the Court's Statute could be amended and include other international crimes in the future.³ The crimes that the Court deals with, are defined as the most serious crimes that impact not only the victims but also the whole international community.

The ICC preliminary considerations are the jurisdictional parameters. The Court cannot take any step towards any criminal incident until there is no certainty that the situation or the case satisfies its jurisdictional preconditions. The ICC jurisdiction encompasses subject matter, temporal, personal and territorial parameters. Besides the jurisdictional requirement, the ICC needs the availability of a referral mechanism to bring the situation or the case before it. The Court has three referral mechanisms that are states, its Prosecutor and the UN Security Council. After a case is brought to the Court, the Court raises the admissibility question on its own motion. The ICC considers a case admissible when it has not been or it is not being investigated by a state and the accused has not been or is not being tried by a national court. Additionally, the case must meet the gravity threshold to be admissible before the Court.

³ According to article 121 of the Statute of the International Criminal Court (ICC), states parties can submit proposals to the UN Secretary General regarding the amendment of the Court's Statute after seven years of the entry into force of the statute. The UN Secretary General shall circulate the proposals to the Court's member states. The Assembly of States Parties may at its own meeting, decides to accept or reject the proposals. The Assembly may adopt amendments at its own regular meetings or organise review conferences for the amendments. Yet, any amendment of the Statute requires consensus or at least a two-third majority of the member states. All amendments shall enter into force for all states parties except those that are adopted regarding articles five, six, seven and eight which deal with the crimes within the jurisdiction of the Court. The amendments to the above-mentioned articles shall only enter into force for the states that accept the amendments and after one year from the deposit of instruments of acceptance or ratification to the UN Secretary General. The ICC, in other words, shall not exercise its jurisdiction over the crimes included or excluded from its Statute and committed on the territories of states parties or by nationals of states parties which have not accepted the amendments.

The establishment of the ICC is the most significant development in the global criminal justice system. The Court attempts to protect international humanitarian and human rights law rules. It makes efforts to prevent the commission of international crimes and ensures that once they are committed, the perpetrators do not remain unpunished. The ICC, in other words, combats impunity of the perpetrators of such crimes, who are often political and military leaders or private individuals with political and military potential, by means of justice. The Court moreover establishes legal practices and rules of law through adjudication.

The Islamic State in Iraq and Syria (ISIS)⁴ is a radical Islamic group that has been designated as a terrorist organisation.⁵ The group carried out intensive military operations in the territories of Iraq and Syria between 2013 and 2014. Consequently, the group seized large areas from the two countries and established a so-called 'Islamic Caliphate'. The group follows the ideology of *Wahhabism* which is a sub-school of *Jihādi-Salafism*. After entering the two countries, ISIS forbade the application and enforcement of the Iraqi and Syrian laws and adopted its own criminal and administrative codes based on a radical interpretation of *Sharī'ah* law. The group established its own police forces through which it imposed its rules and inflicted severe punishments upon people who refused to obey the group's rules. ISIS had a large number of military forces that was estimated to be tens of thousands of fighters in 2014. The majority of the groups' fighters were, however, Iraqis and Syrians; the group recruited thousands of foreign fighters from all parts of the world. The name of ISIS is quite new and the group adopted it in April 2013 but the criminal origins of the group trace back to the beginning of this century when the group operated under other names. The group is accused of having caused the killing and wounding of hundreds of thousands of civilians between 2003 and 2013.

During its military campaigns and rule in the Iraqi and Syrian territories, ISIS perpetrated many horrendous atrocities that amounted to serious international crimes. The group carried out widespread and systematic attacks against the Iraqi and Syrian civilian populations and committed various offences including murder, extermination, enslavement, imprisonment, persecution of minorities on the grounds of religion and ethnicity and women on the grounds of gender, enforced

⁴ The Islamic State in Iraq and Syria (ISIS) is also known as 'the Islamic State in Iraq and the Levant' or '*Dā'ish*' an acronym to its Arabic name '*al-Dawlah al-Islāmiyah fī'l- 'Irāq wa al-Shām*' or 'the Islamic State' the shorthand of the group to itself '*al-Dawlah al-Islāmiyah*'.

⁵ See the UN Security Council Resolutions ((2170), 15 August 2014), ((2178), 24 September 2014), ((2195), 19 December 2014), ((2249), 20 November 2015).

disappearance and other inhuman acts of similar character. In the course of its military operations against the Iraqi and Syrian military forces, ISIS perpetrated large-scale war crimes including attacking and murdering civilians and other protected persons, attacking protected places, executing *hors de combat* fighters, committing torture and cruel treatment, taking of hostages, using prohibited weapons, sentencing and executing without due process, displacing civilians, committing rape, sexual slavery and forced pregnancy and recruiting children. The group attacked the northern Iraqi governorate of Ninewa which is predominantly inhabited by ethnic and religious minorities. Among the minorities, ISIS attempted to destroy the Yazidi religious minority in whole. The group committed the most horrific atrocities of this century against the Yazidis by killing members of the group, causing serious bodily and mental harm to many others, inflicting on the group conditions of life with intent to bring about its physical destruction, imposing measures to prevent births within the group and by forcibly transferring the group's children to its territories.

The Iraqi and Syrian national courts are truly seeking to prosecute the ISIS responsible fighters but they are unable to carry out criminal trials genuinely. Hence, the principle of complementarity allows the ICC to play its alternative role in order to deal with the ISIS criminal cases. However, the function of the ICC still requires further conditions along with the applicability of the principle of complementarity. The conditions are the existence of one or more of the jurisdictional parameters to establish the jurisdiction of the Court, the availability of a trigger mechanism to refer the cases before the Court and the fulfilment of the cases to the admissibility criteria to enable the Court to initiate proceedings.

The ISIS crimes all fall within the subject matter jurisdiction of the ICC as they meet the definitions and all the necessary material and mental elements of the crime of genocide, crimes against humanity and war crimes but the cases lack normal personal and territorial parameters to establish the jurisdiction of the Court because Iraq and Syria are not states parties to the Court's Statute neither have they lodged any declarations as to the acceptance of the Court's jurisdiction over their situations. In addition, the cases lack normal referral mechanisms of state and the ICC Prosecutor. Yet, there are two other alternative possibilities to activate the jurisdiction of the ICC and refer the cases before it. The first possibility is the prosecution of the ISIS responsible foreign fighters who are the nationals of the Court's member states and the second possibility is the referral of the cases by the UN Security Council under Chapter VII of the UN Charter. Although neither

of the possibilities seem to be very strong in practice, due to various legal and political reasons, they remain open along with the possibilities that Iraq and Syria would become states parties to the Court's Statute or accept the Court's jurisdiction regarding their current situations. If the issue of the jurisdiction and referral mechanism is solved in the ISIS criminal cases for the ICC through one of the possibilities, the cases could possibly meet the admissibility criteria before the Court.

2. Aims and objectives

This thesis aims to find possibilities to bring the ISIS criminal cases before the ICC. To achieve this objective, the thesis is divided into three parts. The first part deals with the Court from its establishment until the initiation of criminal proceedings. In this context, the thesis provides explanations on the background of the Court, nature, functionality regime, crimes within the jurisdiction of the Court, jurisdictional preconditions, trigger mechanisms and admissibility criteria. The second part deals with the ISIS case⁶ from the foundation of the group to the perpetration of its crimes for the establishment of the so-called 'Caliphate'. The thesis, in this part, introduces ISIS, characterizes the group's crimes into widespread and systematic attacks against civilian populations, genocide and war crimes in light of the ICC Statute. The third part of the study examines the ISIS case considering the ICC functionality regime, jurisdictional requirements, referral mechanisms and admissibility criteria.

3. Motivation

The main motivation behind the conducting of this study is the seriousness of the ISIS crimes and the inability of the Iraqi and Syrian national courts to genuinely investigate and prosecute the group's crimes. The ISIS crimes can be defined as the most horrific crimes committed since the beginning of this century but the perpetrators still remain unpunished. As all the group's crimes fall within the jurisdiction of the ICC, the Court would be an alternative mechanism to try the crimes. However, the ICC function requires more than just having perpetrated the crimes within its mandate.

⁶ The word of 'case' in this argument and some other arguments of the study does not mean that the group is responsible as an entity or the group's crimes must be referred to the ICC as a single case. The word is rather used sometimes as a reference to the group's overall criminal situation in Iraq and Syria.

4. Research questions

The thesis is basically conducted to answer some questions regarding the ICC, ISIS and the competence of the ICC in the ISIS criminal cases. The questions are the following: What is the ICC? What is the nature of the Court? How does the Court function, does it supplant national courts or does it only complement the national criminal system? What are the crimes within the jurisdiction of the Court? How is the jurisdiction of the Court established or what are the jurisdictional preconditions of the Court? If the Court exercises its criminal jurisdiction over the territories of the states parties and their nationals, is it similarly able to investigate and prosecute the crimes committed on the territories or by nationals of non-states parties? If not, is there any specific provision in the Court's Statute through which non-states parties can refer their situations to the Court? If the concerned crimes committed on the territories or by nationals of non-states parties and the states are unable to prosecute the crimes domestically as well as unwilling to trigger the jurisdiction of the ICC, what should be done? What are the referral mechanisms of the Court? What are the criteria that make a case admissible before the Court? What is ISIS? Has the group committed the crimes within the jurisdiction of the ICC in Iraq and Syria? If yes, what are the categories of the group's crimes? Are the Iraqi and Syrian national courts willing and able to prosecute the crimes? If not, can the ICC play its role? Do the ISIS criminal cases satisfy the jurisdictional preconditions of the ICC? Is there any referral mechanism to trigger the ICC jurisdiction regarding the ISIS criminal cases? Are the ISIS criminal cases admissible before the ICC?

4. Methodology

The thesis is a descriptive and analytical study in nature. It discusses the initial operation of the ICC and examines the ISIS case in light of the Court's Statute. The study includes an introduction to the ICC, the Court's nature, the regime of the Court's functionality, the crimes within the jurisdictional reach of the Court, the Court's jurisdictional basis, the mechanisms through which the jurisdiction of the Court is triggered and the criteria that cases must meet to be admissible before the Court. The study further entails an introduction to ISIS, the criminal acts of the group, the category of the group's crimes, the examination of the willingness and ability of the Iraqi and Syrian national courts to try the perpetrators, the ICC's jurisdictional requirements to

open investigations in the criminal cases, the referral mechanisms to bring the cases before the Court and the admissibility criteria that enable the Court to initiate proceedings in the cases.

The study has been conducted based on the primary and secondary legal literature. The first primary materials that the thesis has exploited, are international documents. The discussion of the relevant articles of the ICC Statute forms most of the first major part of the research that is devoted to the Court. Besides the ICC Statute, the research has referred to the statutes of the *ad hoc* international criminal tribunals, the draft codes of the ILC, the Geneva and Hague Conventions and the UN Security Council and General Assembly Resolutions. The second primary source of the study is the cases dealt by the ICC and other criminal tribunals. The cases have also contributed to the study, particularly in the discussions on the crimes within the jurisdiction of the Court. The third primary source is the reports of the human rights bodies including the UN Assistance Mission for Iraq (UNAMI)⁷ and the UN Office of the High Commissioner for Human Rights (UNOHCHR)⁸, Human Rights Watch,⁹ Amnesty International¹⁰ and the Independent International Commission of Inquiry on the Syrian Arab Republic¹¹. The study has mentioned many criminal incidents reported by these human rights bodies. The fourth primary source is media reports from newspapers and magazines. This source has benefited the study in the second major part which deals with ISIS and its crimes as the group's attacks were the usual breaking news and covered the front pages of all newspapers and magazines throughout 2013, 2014 and 2015. The research has

⁷ The United Nations Assistance Mission for Iraq (UNAMI) is an advising and assistant mission of the UN in Iraq that was established, at the request of the Iraqi Government, by the Security Council Resolution No. 1500 on 14 August 2003. The UNAMI mandate is advising and assisting Iraq in the national political dialogue and reconciliation, electoral process, regional relationship, economic reform and development, human rights promotion and protection and reform the judicial and legal system.

⁸ The Office of the Higher Commissioner for Human Rights (OHCHR) is a UN human rights agency that was established on 20 December 1993 by the UN General Assembly Resolution No. (48/141). The mission of the agency is promoting and protecting human rights in the world.

⁹ Human Rights Watch is an international non-governmental human rights organisation. The organisation was established in 1978 by the American human rights activist, Robert L. Bernstein. Human Rights Watch defends the rights and freedoms of people, through reporting human rights violations, and pressures governments to reform and deliver justice for victims.

¹⁰ Amnesty International is also a non-governmental human rights organisation. The organisation was founded in 1961 by the British lawyer, Peter Benenson. Amnesty International similarly documents and denounces human rights abuses in the world and demands justice for victims.

¹¹ The Independent International Commission of Inquiry on the Syrian Arab Republic is a specific commission that was formed on 22 August 2011 by the UN Human Rights Council with the resolution No. (S-17/1) at its 17th special session. The mandate of the commission is investigating into the violations of human rights and humanitarian law rules in Syria since March 2003, establishing the facts and circumstance of the crimes and identifying the perpetrators.

also utilized secondary sources including books, academic articles, academic papers and conferences and websites in the arguments related to the ICC and some arguments on ISIS.

5. Delimitations

The study attempts to mention only examples of ISIS crimes and not all the offences that the group has committed in Iraq and Syria. The reasons are that the criminal acts of the group are far more than that that can be the subject of a single research, some of the criminal incidents have not been documented by credible human rights bodies, some have not yet been verified, some others have been committed by the ISIS associated groups¹² and mixed up with the ISIS acts and some have been intentionally exaggerated and spread for political purposes. The thesis, in other words, reports only the most serious criminal acts of ISIS that have been documented by credible human rights organs. The study covers only the internal aspect of the ISIS conflict in Iraq and Syria and does not extend to the groups war crimes against the international forces. I should also mention that the human rights bodies have not reported the complete stories of the criminal incidents and therefore the thesis only focuses on the category of the crimes, the perpetrators, the reasons behind the perpetration of the crimes, the places where the perpetrators have committed the crimes and the time when the crimes have been perpetrated.

6. Structure

The thesis is divided into three chapters and each chapter consists of various sections. The first chapter is a theoretical chapter that addresses the ICC. The second chapter is a mixed theoretical and analytical chapter which discusses ISIS and its crimes in Iraq and Syria. The third chapter is complete analytical and examines ISIS case considering the ICC Statute.

Chapter one consists of three sections. The first section outlines the historical evolution of the ICC from ancient periods to the Rome Conference where the Court was established by the multilateral Treaty of Rome. It describes the legal nature of the Court as a permanent and

¹² The ISIS associated groups are some other *Sunni* groups which operate in Iraq along with ISIS and fight against the Iraqi armed forces and its *Shiite* militia allies. One of the groups is the Iraqi *Ba'ath* Party which currently consists of the loyalists of the former Iraqi President, Saddam Hussein and his *Ba'ath* Regime. The rest of the groups are other Islamic *Jihadi* groups whose organisational structure, ideology and objective are different from ISIS. The most active of the *Jihadi* groups is the Army of the Men of the Naqshbandi Order, also known as the Naqshbandi Army. The groups have no official coalition and operate separately but all fight for a similar cause which is to overthrow the *Shiite*-majority Iraqi Government and establish a *Sunni* Arab state.

independent criminal institution and illustrates the functionality regime of the Court that is based on the principle of complementarity. The second section focuses on the crimes within the jurisdiction of the Court that are genocide, crimes against humanity, war crimes and the crime of aggression and provides explanations on the conceptual evolution, nature and characteristics of each crime. The third section draws specific attention to the jurisdiction, referral mechanisms and admissibility criteria. In this section, the author considers temporal, territorial and personal preconditions that enable the Court to assert its jurisdiction over a situation or a case. The author also refers to the trigger mechanisms of states, UN Security Council and Prosecutor through which the Court can deal with a situation or a case. The author finally discusses the requirements that make a case admissible before the Court.

Chapter two similarly encompasses three sections. The first section is devoted to ISIS background, territory, ideology, Caliphate structure, military size and previous criminal records. In this section, the author traces the origins of the group to the beginning of 2000s and the name of ISIS to 2013. He shows in detail how the group grew, occupied large territories in Iraq and Syria and established its so-called Caliphate. The author describes the theological ideology of the group as the most violent view of the school of *Jihādi-Salafism* and defines the group's war as a political war and not *jihād*. He views the group's Caliphate structure as the traditional Islamic administration. The author estimates, based on some official sources, the size of the group's military forces to be tens of thousands of fighters including foreign *jihādīs* from all parts of the world. He finally provides the group's criminal records before the adoption of the name of ISIS that include hundreds of thousands of casualties. The second section examines ISIS crimes in Iraq. This section reports the acts and categorises them into widespread and systematic acts against the civilian population, genocidal acts against the Yazidi religious minority and war crime acts during battling against the Iraqi military forces. The third section analyses ISIS crimes in Syria. The section similarly reports the criminal acts of the group and refers to them as widespread and systematic offences against civilian populations and war atrocities during the group's armed conflict against the Syrian military forces and the rebel groups.

The third chapter examines ISIS case considering national prosecutions, the complementarity principle, the ICC jurisdictional preconditions, referral mechanisms and admissibility conditions. In this chapter, the author argues that the Iraqi and Syrian courts are unable to genuinely try the ISIS criminal cases and therefore the principle of complementarity

allows the ICC to function. The author finds that the ISIS crimes all fall within the subject matter jurisdiction of the Court but the group's cases do not meet the territorial and personal preconditions of the ICC as Iraq and Syria are not member states of the Court. The ICC Prosecutor may initiate investigations regarding the ISIS foreign fighters who are the nationals of the states parties but most of the responsible members of the group are Iraqis and Syrians. The UN Security Council may also trigger the jurisdiction of the ICC but it also does not seem to refer the cases at the moment as most of its members are sides of the Iraqi and Syrian conflicts. The author further explores that if the ISIS criminal cases are brought before the Court, they could possibly satisfy the admissibility criteria.

CHAPTER I

THE INTERNATIONAL CRIMINAL COURT

1. The background, legal nature and functionality regime of the Court

The history of crime is as ancient as the history of mankind. The crimes that are today known as the core international crimes, have been perpetrated long before their legal concepts, characteristics and statuses. Mankind has always considered these crimes seriously and has attempted to establish effective mechanisms to try the perpetrators but a true international criminal mechanism was not established until the end of the Second World War. The emergence of the Nuremberg and Tokyo tribunals was a turning point in the history of international law as the tribunals established individual criminal responsibility at the international level. The five decades' effort of the ILC along with the law and practice of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) laid the foundations of the ICC. The establishment of the ICC was the most significant and progressive development that has ever been witnessed in the international criminal justice system. The Court, unlike the previous international criminal tribunals, is a permanent and independent criminal institution. However, it is a complementary mechanism to national courts and only functions when the states' national courts are unwilling or unable to carry out investigations and prosecutions genuinely. In this section, I will focus on the ICC historical evolution and background, legal nature and functionality regime.

1.1. Historical evolution and background of the Court

The historical records indicate that mankind has often been faced with barbaric acts which have consequently caused large-scale casualties and destruction. The world has therefore attempted to prevent such acts and hold the perpetrators responsible throughout history. Some scholars believe that the ancient Greeks were the first people who prosecuted criminals for war

crimes¹³ while some others refer to war crime trials even earlier from places such as ancient China, India and Japan.¹⁴

The constitution of the first international criminal body probably dates back to the 15th century¹⁵ when the Roman Empire set up an *ad hoc* criminal tribunal in 1474 to try the Dutchman, Peter Von Hagenbach for ‘crimes against the laws of God and man’ after the occupation of the German city of Breichach on the order of the head of the French state.¹⁶ The tribunal was composed of 28 judges from various locations of the Allied Coalition including Alsace, Rhineland, Switzerland and Austria. It eventually found Peter guilty for war crimes of murder, rape and some other crimes and sentenced him to death.¹⁷ Although Peter claimed that he was executing orders as a military commander, the judging panel did not accept his defence and clearly stated that he must not have obeyed the orders which were against the laws of God and man.¹⁸

The internationality given to the Peter Von Hagenbach’s case has, however, been challenged based on some arguments that, *inter alia*, the crimes were not war crimes as they were committed several years after the occupation of the city and during an uprising, the establishment of the tribunal was not aimed at delivering justice but rather to reject the territorial ambition of Peter’s leader, the judges were all of the states’ leaders of the Roman Empire and the confession of the accused was obtained under torture and not in a proper interrogation process;¹⁹ the case is a

¹³ William A. Schabas, *An Introduction to International Criminal Court*, 2nd ed., (New York: Cambridge University Press, 2004), p. 1; M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*, 2nd revised. ed., (The Hague: Kluwer Law International, 1999), p. 517.

¹⁴ Yves Beigbeder, *Judging War Criminals: The Politics of International Justice*, (New York: St. Martin’s Press, 1999), pp. 4-5; Adriaan Bos, “The International Criminal Court: A Perspective”, In Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results*, (The Hague *et al*: Kluwer Law International, 1999), p. 465.

¹⁵ Laura Barnett, *The International Criminal Court: History and Role*, Background Paper No. 2002-11-E, Library of Parliament, 4 November 2008, p.1. Available at: <<https://lop.parl.ca/Content/LOP/ResearchPublications/2002-11-e.pdf>> (Accessed: 30 October 2015).

¹⁶ M. Cherif Bassiouni, “Perspectives on International Criminal Justice”, *Virginia Journal of International Law Association*, Vol. 50, Issue. 2, 2010, p. 298.

¹⁷ Cenap Cakmak *Historical Background: Evolution of the International Criminal Court, Individual Criminal Accountability and the Idea of a Permanent International Court*”, Working Paper No.30, 13 November 2006. Available at: <<http://www.du.edu/korbel/hrhw/workingpapers/2006/39-cakmak-2006.pdf>> (Accessed: 30 October 2015); William A. Schabas, *supra* note 13, p. 1.

¹⁸ M. Cherif Bassiouni, *supra* note 16, p. 298.

¹⁹ Gregory S. Gordon, “The Trial of Peter Von Hagenbach: Reconciling History, Historiography and International Criminal Law”, In Kevin Jon Heller and Gerry Simpson (eds.), *The Hidden Histories of War Crimes Trials*, 1st ed., (New York: Oxford University Press, 2013), p. 14.

landmark in the history of international criminal law because the judges applied the principle of individual criminal responsibility at an international level for the first time, formulated the crimes of murder and rape as grave crimes of concern to the whole communities within the Roman Empire and rejected the justification of the execution of superior orders.²⁰

In 1863, the Instructions for the Government of Armies of the United States in the Field, known as the Lieber Code,²¹ were drafted by the Columbia University Professor, Francis Lieber at the request of President, Abraham Lincoln to regulate the conducts of war.²² The instructions were, however, national regulations; they had enormous influence on the process of codification of the rules of war and criminalisation of the violations of the rules.²³

The first proposal regarding the establishment of a permanent international criminal court was put forward to the International Committee of the Red Cross (ICRC) in 1872 by one of its founders, Gustave Moynier.²⁴ In his proposal, Moynier recommended an international criminal mechanism to address the breaches of the 1864 Geneva Convention and other rules of war.²⁵ The proposal beyond the establishment of the court, sought to compel the contracting parties to comply with the convention.²⁶ However, the international community did not welcome the proposal due to its radical nature at that time and complicated political situations.²⁷

In 1899 and 1907, The Hague Conferences were finally held by states.²⁸ The participants adopted various conventions including the II and IV Conventions with respect to the Laws and

²⁰ *Ibid*, p. 13.

²¹ Instructions for the Government of Armies of the United States in the Field, prepared by Francis Lieber, promulgated as General Orders No. 100 by President Lincoln, 24 April 1863. Available at: <http://avalon.law.yale.edu/19th_century/lieber.asp> (Accessed: 30 October 2015).

²² Edoardo Greppi, “The Evolution of Individual Criminal Responsibility under International Law”, *International Review of the Red Cross*, No.835, 30/09/1999, p. 2.

²³ The Lieber Code prohibited all inhuman acts during war and provided severe punishments for violations of its rules, as stated in article 47: “[c]rimes punishable by all penal codes, such as arson, murder, maiming, assaults, highway robbery, theft, burglary, fraud, forgery, and rape, if committed by an American soldier in a hostile country against its inhabitants, are not only punishable as at home, but in all cases in which death is not inflicted, the severer punishment shall be preferred”.

²⁴ Jackson Maogoto, “Early Efforts to Establish an International Criminal Court”, In José Doria and Hans-peter Gaser *et al* (eds.), *The Legal Regime of the International Criminal Court*, Vol. 19, (Leiden *et al*: Martinus Nijhoff Publishers, 2009), p. 5.

²⁵ William A. Schabas, *supra* note 13, p. 2.

²⁶ Jackson Maogoto, *supra* note 24, p. 5.

²⁷ William A. Schabas, *supra* note 13, p. 2; Cenap Cakmak, *supra* note 17.

²⁸ In 1874, ‘the Project of an International Declaration concerning the Laws and Customs of War’, known as ‘the Brussels Declaration’, was signed at the Brussels Conference as an attempt to regulate the means and methods of

Customs of War and their annexed Regulations.²⁹ The conventions were aimed at humanizing warfare along with the Geneva Convention of 1864 and its revised version of 1906.³⁰ It is worth mentioning that the Hague Conventions only contained state obligation and not individual criminal liability for violations of the rules of war.

The 1899 Hague Convention I established the Permanent Court of Arbitration as a judicial mechanism for the pacific settlement of international disputes. The court was mandated to facilitate arbitration for the inter-state disputes that could not be settled through diplomacy.³¹

During the 1907 Hague Conference, some proposals were submitted to establish an international court to hear prize cases. On 18 October 1907, the Convention relative to the Creation of an International Prize Court (The Hague Convention XII) was adopted. The court would consider the differences that might arise during naval war regarding the decisions of national prize courts. The court, in other words, would function as a court of appeal against the judgments of national prize courts on prize cases. But the convention did not enter into force and the court never came into existence.³²

Following the end of World War I, demands to try those who initiated the war in violation of the international treaties and those who committed crimes during the war, arose.³³ The first major effort in respect of the creation of an international criminal court, was made at the Paris Peace Conference in January 1919.³⁴ The Victorious Powers decided to address the crimes committed during the war. Hence, they appointed a specific commission known as ‘the Commission on the Responsibility of the Authors of the War and on Enforcement of Punishment’

warfare. The declaration never entered into force but led the Institute of International Law to adopt ‘the Manual on the Laws of War on Land’, known as ‘the Oxford Manual’, in 1880. The Oxford Manual eventually became part of the bases for the codification of the war rules at the 1899 and 1907 Hague Conferences.

²⁹ Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land (adopted 29 July 1899, entered into force 4 September 1900) 187 Consol. TS 429; Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 205 Consol. TS 277.

³⁰ Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (adopted 22 August 1864, entered into force 22 June 1865) 129 CTS 361; Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (adopted 6 July 1906, entered into force 9 August 1907) 11 LNTS 440.

³¹ Convention for the Pacific Settlement of International Disputes (Hague I) (adopted 29 July 1899, entered into force 4 September 1900) 187 CTS 410, Art. 20.

³² See the Convention (XII) Relative to the Creation of an International Prize Court (adopted 18 October 1907) 205 CTS 381, Arts. 1-57.

³³ William A. Schabas, *supra* note 13, p. 3.

³⁴ Jackson Maogoto, *supra* note 24, pp. 10-11.

to inquire into the responsibility of the authors of the war, the war crimes committed by the German officials in Europe, crimes against humanity of the Turkish officials against Armenians and the constitution of an appropriate tribunal.³⁵ The commission in March 1919, submitted a report which specified the crimes and proposed the establishment of an international court to prosecute those crimes.³⁶

The Allied and Associate Powers signed the Treaty of Versailles with Germany on 28 June 1919 and the Treaty of Sèvres with Turkey on 10 August 1920.³⁷ The treaties recognised the right of the Allies to try the German and Turkish nationals who were responsible for the violations of the laws and customs of war or any criminal acts against the Allies' nationals before a special tribunal or their military tribunals.³⁸ However, the two countries refused to surrender their nationals and passed legislation to establish national jurisdiction over them. The perpetrators were eventually prosecuted by the German and Turkish national courts.³⁹

The consequences of World War I made the international community intensify efforts in finding alternative mechanisms to settle international disputes and prosecute those who would commit grave crimes.⁴⁰ In 1922, the Permanent Court of International Justice was established.⁴¹ The court was mandated to resolve inter-state disputes and give advisory opinions on international legal issues.⁴² Although some proposals were submitted to the League of Nations throughout the second decade of the 20th century to establish a criminal division within the court, all proposals were ignored.⁴³

³⁵ *Ibid*, p. 11.

³⁶ American Society of International Law, "Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties", *The American Journal of International Law*, Vol. 14, Issue. 1, 1920, pp. 95-154.

³⁷ See the Treaty of Peace with Germany (Treaty of Versailles) (adopted 28 June 1919, entered into force 10 January 1920) 225 CTS 188; The Treaty of Peace with Turkey (Treaty of Sèvres) (adopted 10 August 1920) 28 LNTS 226.

³⁸ The Treaty of Versailles, *supra* note 37, Arts. 227,228, 229; The Treaty of Sèvres, *supra* note 37, Arts. 226,227, 230.

³⁹ Jackson Maogoto, *supra* note 24, pp. 17-19.

⁴⁰ William A. Schabas, *supra* note 13, pp. 4-5.

⁴¹ The Court was established based on article 14 of the Covenant of the League of Nations. The article provided: "[t]he Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice".

⁴² The Statute of the Permanent Court of International Justice, (adopted 16 December 1920, entered into force 20 August 1921) 6 LNTS 389, Arts. 36, 65.

⁴³ Leila Sadat Wexler, "The Proposed Permanent International Criminal Court: An Appraisal", *Cornell International Law Journal*, Vol. 29, Issue. 3, 1996, pp. 670-671.

The failure of the attempts made to establish an international criminal court after the First World War contributed to the occurrence of the humanitarian catastrophes of the Second World War. The world then understood that the rules and customs would not prohibit crimes if there was not an international mechanism to impose criminal responsibility.

The large-scale atrocities committed during World War II by the Nazi Regime led the Allied Powers, United States (US), France, United Kingdom (UK) and the Soviet Union to be responsive with criminal liability. They claimed for the prosecution of the Nazi's political and military leaders in the Moscow Declarations in 1943⁴⁴. They constituted a special commission known as 'the United Nations War Crimes Commission' to establish 'the United Nations War Crimes Court'.⁴⁵ As the commission could not fulfil its mission, the Allies concluded the 'London Agreement' to establish another criminal mechanism on 8 August 1945. In the agreement, the Allies decided:

"There shall be established after consultation with the Control Council for Germany an International Military Tribunal for the trial of war criminals whose offences have no particular geographical location whether they be accused individually or in their capacity as members of the organizations or groups or in both capacities".⁴⁶

The Allies adopted the statute of the tribunal, also known as 'the Nuremberg Tribunal', as an annex to the London Agreement. The tribunal was composed of four judges and four other alternates.⁴⁷ The jurisdiction of the tribunal covered crimes against peace, war crimes and crimes against humanity.⁴⁸ The applicable laws before the tribunal were the Hague Conventions and the Kellogg Briand Pact.⁴⁹ The tribunal eventually tried 22 Germans. It, among them, acquitted three,

⁴⁴ Moscow Declarations were the Joint Four-Nation Declaration on General Security, the Declaration on Italy, the Declaration on Austria and the Declaration on Atrocities committed by the Nazi Regime. They were signed by the Governments of the United States (US), United Kingdom (UK), Soviet Union and China at the Moscow Conference on 30 October 1943. The Declaration on the Atrocities included that all the responsible Germans would be judged by the countries in which they had committed their crimes and those whose crimes had no particular geographical location would be punished by a joint decision of the Allies.

⁴⁵ William A. Schabas, *supra* note 13, p. 5.

⁴⁶ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement) (adopted 8 August 1945, entered into force 8 August 1945) 82 UNTS 279. Art. 1.

⁴⁷ Charter of the International Military Tribunal (The Charter of the Nuremberg Tribunal), annexed to the London Agreement, Art.2.

⁴⁸ *Ibid*, Art 6.

⁴⁹ William A. Schabas, *supra* note 13, p. 6. Kellogg Briand Pact, also known as the Pact of Paris, was an international agreement that was concluded among states on 27 August 1928, to condemn and renounce war and settle international

sentenced three to life imprisonment, 12 to death, the rest to a term of imprisonment ranging from ten to 25 years and one of the defendants committed suicide.⁵⁰ In December 1946, the Allies adopted, based on the original Charter of the Nuremberg Tribunal, ‘the Control Council Law No.10’. The law aimed to establish a similar legal basis to conduct criminal trials against the lower ranking perpetrators in the occupied zones by the military tribunals of the Allied and Associate Powers as well as by German national courts.⁵¹ Acting under the Control Council Law No.10, the US, France, Canada and Israel tried many perpetrators and the German national courts also prosecuted war criminals for some decades.⁵²

The Allies, US, UK and the Soviet Union also established a similar international military tribunal, known as ‘the Tokyo Tribunal’, on 19 January 1946 for the serious crimes committed in the Far East by Japan. The tribunal was established by the proclamation of the supreme commander of the Allies, General Douglas MacArthur⁵³ “for the just and prompt trial and punishment of major war criminals in the Far East”.⁵⁴ The concrete legal bases for the foundation of the tribunal⁵⁵ were the Cairo Declaration 1943,⁵⁶ the Potsdam Declaration 1945,⁵⁷ the Instrument of Japanese

disputes through peaceful means. Although the agreement eventually entered into force on 25 July 1929 and was ratified by a total of 62 states, it could not stop the occurrence of the Second World War (See *infra* 2.4 of this chapter).

⁵⁰ Cenap Cakmak, *supra* note 17.

⁵¹ Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, 20 December 1945, *Official Gazette of the Control Council for Germany*, No. 3, 31 January 1946, pp.50-55.

⁵² William A. Schabas, *supra* note 13, pp. 6-7; Cenap Cakmak, *supra* note 17.

⁵³ International Military Tribunal for the Far East (Special Proclamation by the Supreme Commander for the Allied Powers) (adopted 19 January 1946, entered into force 19 January 1946) 4 USTIA 20.

⁵⁴ Charter of the international Military Tribunal for the Far East (The Charter of the Tokyo Tribunal), annexed to the Special Proclamation by the Supreme Commander for the Allied Powers, Art. 1.

⁵⁵ Special Proclamation by the Supreme Commander for the Allied Powers, *supra* note 53; Jackson Maogoto, *supra* note 24, pp. 24, 25.

⁵⁶ The Cairo Declaration was a mutual statement issued by the US President, Franklin Roosevelt, the President of the Republic of China, Chiang Kai-Shek and the UK Prime Minister, Winston Churchill at the end of the Cairo Conference on 27 November 1943. The declaration included the agreement of the Allies on conducting military operations by land, sea and air against Japan to expel it from all the territories that had occupied since 1914.

⁵⁷ The Potsdam Declaration was also a statement that was issued by the US President, Harry S. Truman, the UK Prime Minister, Clement Attlee and the President of China, Chiang Kai-Shek in Potsdam, Germany on 26 July 1945. The declaration included two choices for Japan. The choices was either unconditional surrender of the Japanese armed forces to the Allies or a prompt and complete destruction of the country. One of the terms of the declaration was the prosecution of the Japanese war criminals or those who had treated the Allies’ prisoners with cruelty.

Surrender 1945⁵⁸ and the Moscow Communique 1945⁵⁹. The Tokyo Tribunal was composed of eleven judges from eleven Allied and Associate States,⁶⁰ although it, based on its Charter, should have consisted of no more than nine judges.⁶¹ It was empowered to try crimes against peace, conventional war crimes and crimes against humanity.⁶² The tribunal prosecuted the high-profile Japanese politicians and military commanders. It, among them, charged 28 Japanese with crimes against peace, about 5,700 others with war crimes and crimes against humanity and released almost 50 suspects between 1947 and 1948.⁶³

The principles and crimes formulated at Nuremberg laid the foundation for a permanent international criminal court. The UN General Assembly on 11 December 1946, passed a resolution (General Assembly Resolution (95)) in which reaffirmed the international law principles recognised by the Nuremberg Charter. In another resolution (General Assembly Resolution (177)) on 21 November 1947, the General Assembly charged the ILC with codifying the principles and crimes of the charter and judgments of the Nuremberg Tribunal and the commission completed the task in 1950.⁶⁴ On the other hand, a set of treaties were adopted that codified many customs, among them: Convention on the Prevention and Punishment of the Crime of Genocide, also known as ‘Genocide Convention’ on 9 December 1948,⁶⁵ Geneva Conventions of 12 August 1949⁶⁶ and

⁵⁸ The Instrument of Japanese Surrender was the formal declaration of the Japanese Empire on the acceptance of the terms and conditions that were set forth in the Potsdam Declaration by the Allies. The Instrument was signed by the Emperor of Japan in Tokyo on 2 September 1945 and contained the unconditional surrender of the Japanese imperial headquarters, all the Japanese armed forces and all the other armed forces which were under the control of Japan to the authority of the Allies.

⁵⁹ Moscow Communique of 1945 was signed by the foreign ministers of the Soviet Union, UK and US at the Moscow Conference on 27 December 1945. The ministers agreed to establish the Far Eastern Commission to replace the Far Eastern Advisory Commission. One of the functions of the commission was the formulation of policies, principles and standards according to which Japan would fulfil its obligation of surrender. The communique also established an Allied council under the chairmanship of the Allies’ supreme commander to offer advice and consultation, concerning the implementation of the terms of surrender of Japan, to the supreme commander.

⁶⁰ Laura Barnett, *supra* note 15, p. 4.

⁶¹ The Charter of the Tokyo Tribunal, *supra* note 54, Art. 2.

⁶² *Ibid*, Art. 5.

⁶³ Denisa Barbu, “The Importance of the International Military Tribunals at Nuremberg and Tokyo”, *Revista Academiei Fortelor Terestre*, Vol. 20, Issue 1, 2015, p. 37.

⁶⁴ “Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal”, *Yearbook of the International Law Commission*, Vol. II, (New York: United Nations, 1950), para. 97.

⁶⁵ Convention on the Prevention and Punishment of the Crime of Genocide (The Genocide Convention) (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277.

⁶⁶ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31; Geneva

the two Additional Protocols of 8 June 1977⁶⁷ were the most significant treaties. The most remarkable efforts regarding the establishment of an international criminal court were perhaps made by ILC. As the General Assembly had asked the commission to prepare a draft code on the ‘Crimes against the Peace and Security of Mankind’ since 1949, the commission submitted the first draft in 1954.⁶⁸ Along with the work of the ILC in the 1950s, the General Assembly established a special committee to prepare a draft statute for an international criminal court. The committee submitted the required draft in 1952.⁶⁹ The General Assembly created another committee to review the prepared statute of the previous committee and the new committee submitted the revised statute in 1954.⁷⁰ However, the General Assembly suspended the work due to the lack of the definition of the crime of aggression until the 1970s.⁷¹

From the beginning until the end of the Cold War, international criminal law was gradually and constantly being developed, even though it was noticeable from the states that they still lacked “will and ability” to apply the rules and principles.⁷²

After the end of the Cold War, numerous crimes were committed on the territory of the former Yugoslavia. In response to them, the UN Security Council established the ICTY, on 25 May 1993 by the resolution (827) under the authority of Chapter VII of the UN Charter, as a measure to restore international peace and security.⁷³ The tribunal was mandated to try the high-responsible political and military leaders for the crimes committed on the territory of the former

Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva Convention II) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention III) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287.

⁶⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609.

⁶⁸ “Draft Code of Offences against the Peace and Security of Mankind”, *Yearbook of the International Law Commission*, Vol. II, (New York: United Nations, 1954), pp.7-135.

⁶⁹ “Report of the Committee on International Criminal Court Jurisdiction”, UN Doc. A/2135 (1952).

⁷⁰ “Report of the Committee on International Criminal Court Jurisdiction”, UN Doc. A/2645 (1954).

⁷¹ UN General Assembly Resolution, 897 (IX), 4 December 1954.

⁷² Gerhard Werle, *Principles of International Criminal Law*, (Hague: T.M.C Asser Press, 2005), p.15.

⁷³ The Statute of the International Criminal Tribunal for the Former Yugoslavia (The ICTY Statute) (adopted 25 May 1993, as amended 6 September 2016) UN Doc. S/Res/827.

Yugoslavia since 1 January 1991.⁷⁴ The ICTY was an *ad hoc* tribunal, empowered to prosecute grave breaches of the Geneva Conventions of 1949⁷⁵ and violations of the laws and customs of war,⁷⁶ the crime of genocide⁷⁷ and crimes against humanity.⁷⁸ The jurisdiction of the ICTY extended to cover the crimes committed during both international⁷⁹ and non-international armed conflicts.⁸⁰ Besides some criticism, the ICTY played a significant role in the process of developing international criminal law through its law and practice.⁸¹

Similar to the ICTY, the UN Security Council established the ICTR, on 8 November 1994 by the resolution (955) under the authority of the same chapter (Chapter VII of the UN Charter), in response to the atrocities committed on the territories of Rwanda and neighbouring countries by Rwandans between 1 January 1994 and 31 December 1994.⁸² The ICTR was also an *ad hoc* tribunal and designed to prosecute persons responsible for the crime of genocide,⁸³ crimes against humanity⁸⁴ and violations of article 3 common to the Geneva Conventions and Additional Protocol II.⁸⁵ Though the ICTR also became the subject of criticism in some respects as were all the other international criminal tribunals, it did “pioneering work, particularly in developing the definition of genocide”.⁸⁶

The ILC, upon the request of the General Assembly, resumed its work on the Code of the Crimes against the Peace and Security of Mankind and started drafting a statute for an international criminal court from the beginning of the 1990s. The commission submitted the final draft statute in 1994 and the final draft code in 1996.⁸⁷ The General Assembly decided, by the resolution

⁷⁴ *Ibid*, Art. 1.

⁷⁵ *Ibid*, Art. 2.

⁷⁶ *Ibid*, Art. 3.

⁷⁷ *Ibid*, Art. 4.

⁷⁸ *Ibid*, Art. 5.

⁷⁹ *Ibid*, Art. 2.

⁸⁰ *Ibid*, Art. 3.

⁸¹ Lilian A. Barria and Steven D. Roper, “How Effective are International Criminal Tribunals? An Analysis of the ICTY and the ICTR”, *The International Journal of Human Rights*, Vol. 9, No. 3, 2005, pp. 349-368.

⁸² The Statute of the International Criminal Tribunal for Rwanda (The ICTR Statute) (adopted 8 November 1994, as amended 16 December 2009) UN Doc. S/Res/ 955, Art.1.

⁸³ *Ibid*, Art. 2.

⁸⁴ *Ibid*, Art. 3.

⁸⁵ *Ibid*, Art. 4.

⁸⁶ Gerhard Werle, *supra* note 72, p.18.

⁸⁷ “Draft Code of Crimes against the Peace and Security of Mankind”, *Yearbook of the International Law Commission*, Vol. II, (New York: United Nations, 1996) Part Two; “Draft Statute for an International Criminal Court” *Yearbook of the International Law Commission*, Vol. II, (New York: United Nations, 1994) Part Two.

(52/160) of 15 December 1997, to hold a diplomatic conference of plenipotentiaries on the establishment of an international criminal court. The conference was held in Rome from 15 June to 17 July 1998 and about 160 States, 17 inter-governmental organisations and more than 250 non-governmental organisations attended and observed it.⁸⁸ The outcome of the conference was the adoption of a treaty which is known as the Rome Treaty. The Rome Treaty came into force on 1 July 2002, by which the ICC was established, and became the Statute of the Court.⁸⁹

1.2. The legal nature of the Court

The Rome Conference established the ICC by virtue of the codified criminal rules and principles adopted from Nuremberg to the ICTR. The distinct characteristic of the ICC is its permanent nature,⁹⁰ unlike the previous mechanisms which were all *ad hoc* and limited for a specific conflict and period. Another particularity of the ICC nature is that the Court is not an organ within an organisation but rather an independent body that enjoys legal personality.⁹¹

International organisation can be defined as “an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality”.⁹² International law sets forth some conditions regarding the international legal personality; the conditions are as follows: there must be a group of states and the states constitute an association; the association must form an organisation; the organisation must be independent from the member states; the organisation must be capable of exercising legal powers internationally; and there must be a lawful purpose in the formation of the organisation.⁹³

The ICC was established in an international forum by the multilateral Rome Treaty which manifested the will of states on the foundation of the Court. The Court is not a subsidiary organ of the Security Council as were the previous *ad hoc* international tribunals nor is dependent on a

⁸⁸ Gerhard Werle, *supra* note 72, p.20.

⁸⁹ See the Rome Statute of the ICC (The ICC Statute) (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90.

⁹⁰ *Ibid*, Art. 1.

⁹¹ *Ibid*, Art. 4 (1).

⁹² “Draft Articles on the Responsibility of International Organizations”, *Year Book of the International Law Commission*, Vol. II, (New York: United Nations, 2011), Part II, Art. 2 (a).

⁹³ Sascha Rolf Lüder, “The Legal Nature of the International Criminal Court and the Emergence of Supranational Elements in International Criminal Justice”, *International Review of the Red Cross*, Vol. 84, No.845, 2002, p. 84.

treaty with the UN as were/are the hybrid courts⁹⁴. Rather, it is based on the states' membership and desire.⁹⁵ However, the organs of the Court function independently from the states. The Court is mandated to exercise jurisdiction over the most serious international crimes as such: the crime of genocide, crimes against humanity, war crimes and the crime of aggression.⁹⁶ The Court aims to ensure that the perpetrators of such crimes would not go unpunished and it will put an end to their impunity.⁹⁷

The Statute, in article four paragraph one, recognises the international legal personality of the Court, as states: “[t]he Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes”. Besides this explicit acknowledgement, the international legal personality of the ICC is *erga omnes*⁹⁸ because the International Court of Justice has recognised the international legal personality of the UN in its advisory opinion on the reparation for injuries suffered in the service of the UN on 11 April 1949.⁹⁹ Moreover, the Court is capable of entering into cooperation agreements with the UN according to article two and with states according to article three paragraph two, article 87 paragraph five (a) and rule 16, sub-rule four of the Rules of Procedure

⁹⁴ Hybrid courts are, also known as internationalized courts, the third generation of the international criminal bodies, the Nuremberg and Tokyo tribunals were the first generation and the ICTY, ICTR and ICC were the second generation, emerged at the end of the previous century and the beginning of this century. The hybrid courts are normally established based on agreements between the UN and states. They are *ad hoc* and have a mixed national and international nature. These courts, like all the other international criminal bodies, address the violations of the humanitarian and human rights law rules. They are composed of domestic and international staff and apply international and domestic substantial and procedural rules. The examples of the hybrid courts are the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia and the Special Tribunal for Lebanon.

⁹⁵ The ICC Statute, *supra* note 89, Art. 12.

⁹⁶ *Ibid*, Art. 5.

⁹⁷ *Ibid*, Preamble, para 5.

⁹⁸ *Erga omnes* is a legal term which literally means ‘towards all’. The term is used as a reference to rights, obligations and statuses that have already been established by court decisions. The court decisions are valid and have binding effect for all and against everyone and not only for the people or entities which are the subject of litigation. The example of an *erga omnes* right is the right to self-determination and the instance of an *erga omnes* obligation is the prohibition of torture. The International Court of Justice (ICJ) recognised the international legal personality of the UN in an advisory opinion on “the Reparation for Injuries suffered in the Service of the United Nations”. The court, in the advisory opinion, stated: “the members of the United Nations created an entity possessing objective international legal personality and not personality merely recognized by them alone”. The ICJ advisory opinion is also valid regarding the international legal personality of the ICC.

⁹⁹ *Reparation for Injuries suffered in the Service of the United Nations*, Advisory Opinion, International Court of Justice, 11 April 1949.

and Evidence¹⁰⁰. Hence, the ICC meets all the conditions to be an international organisation and enjoy international legal personality.

1.3. The functionality regime of the Court

During the negotiations on drafting the ICC Statute, there was a controversy regarding the relationship of the ICC with the states' national courts. A group of states with some international non-governmental organisations submitted proposals to grant the ICC universal jurisdiction. The proposals entailed the argument that since states can exercise universal jurisdiction over the core crimes, the ICC should likely be able to prosecute international crimes based on the same universal jurisdiction.¹⁰¹

Universal jurisdiction is a principle of the criminal justice system whose origin belongs to the crime of piracy because first, piracy is a crime which is often committed on the high seas where it is outside of the states' territorial jurisdiction and every state can navigate on according to 'the principle of the freedom of the high seas'¹⁰² and second, pirates are against all states and their acts

¹⁰⁰ The Rules of Procedure and Evidence is an instrument which was reproduced from the official records of the Assembly of States Parties and adopted based on article 51 of the ICC Statute in 2002. The instrument includes specific rules that govern the ICC from its composition to the judgment process. However, the rules play a subordinate role to the Court's Statute and the Statute prevails in case of the conflict between the two.

¹⁰¹ Christopher Keith Hall, "The Third and Forth Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court", *The American Journal of International Law*, Vol. 92, Issue. 1, 1998, p.131; "Extract from Informal Discussion Paper submitted by Germany to the Sixth Session of the Preparatory Committee on the Establishment of an International Criminal Court", held from 16 March to 3 April 1998, UN Doc. A/AC.249/1998/DP.2, In Christopher Keith Hall, "The Sixth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court", *The American Journal of International Law*, Vol. 92, Issue. 1, 1998, p. 549; Amnesty International, *The International Criminal Court: Making the Right Choices- Part 1: Defining the Crimes and Permissible Defences and initiating a Prosecution*, Position Paper, AI Index: IOR 40/001/1997, 1 January 1997, pp. 15-17. Available at: <<https://www.amnesty.org/en/documents/ior40/001/1997/en/>> (Accessed: 4 November 2015); Amnesty International, *The International Criminal Court: Making the Right Choices-Part V: Recommendations to the Diplomatic Conference*, Position Paper, AI Index: IOR 40/010/1998, 30 April 1998, p. 30. Available at: <<https://www.amnesty.org/en/documents/ior40/010/1998/en/>> (Accessed: 4 November 2015).

¹⁰² The freedom of the high seas is a principle in international law that regulates navigation on the oceans between states. The UN Convention on the Law of Sea in article two, defines the high seas as any areas of the seas that are beyond the territorial seas, internal and territorial waters and archipelagic waters in archipelagic states. The convention illustrates the freedom of the high sea in article 87, as:

- (a) freedom of navigation;
- (b) freedom of overflight;
- (c) freedom to lay submarine cables and pipelines...;
- (d) freedom to construct artificial islands and other installations permitted under international law...;
- (e) freedom of fishing...;
- (f) freedom of scientific research....

are against all people and thus they can be punished by every state.¹⁰³ Universal jurisdiction has been practiced since the Nuremberg trials. After the adoption of the Control Council Law No 10, numerous criminal trials were conducted by national courts in parallel to the Nuremberg trials. A part of the trials was based on the principle of universal jurisdiction.

Universal jurisdiction is defined as “a legal principle allowing or requiring a state to bring criminal proceedings in respect of certain crimes irrespective of the location of the crime and the nationality of the perpetrator or the victim”.¹⁰⁴ The principle of universal jurisdiction heavily relies on two ideas: first, the seriousness of the crimes that harms the interests of all mankind; and second, the perpetrators of the crimes who are often state authorities or governmental actors and go unpunished.¹⁰⁵

The principle of universal jurisdiction might have been articulated into international treaties but the relevant treaty rules only bind states parties. However, the principle is also a part of the customary international law. Though there is not a specific accepted list, customary international law allows states to prosecute the crimes of piracy, slavery, war crimes, crimes against humanity, genocide and torture under universal jurisdiction.¹⁰⁶ The principle allows states to assert their criminal jurisdiction over the above-mentioned crimes without any traditional jurisdictional requirements such as territorial connection, nationality of the perpetrator or the victim. As several states and even international criminal bodies may concurrently establish their jurisdiction on the same crime under universal jurisdiction, jurisdictional disputes may arise. In this case, states and criminal institutions shall make their decision to try or extradite the accused on the basis of the following:

According to articles 87 and 88 of the convention, every state is entitled to use the high seas peacefully and exercise the freedoms on. However, states must respect the interests of other states and must not obstruct other activities in the area. Article 105 of the convention allows all states to seize pirate ships and aircrafts and prosecute persons who are involved in piracy based on the principle of universal jurisdiction.

¹⁰³ Mallesons Stephen Jaques and Quang Trinh *et al*, *Topic 2 (a): The Principle of Universal Jurisdiction*, Research Paper, The Australian Red Cross, 3 September 2010, p. 8. Available at: http://www.redcross.org.au/files/2010The_Principle_of_Universal_Jurisdiction.pdf (Accessed: 4 November 2015).

¹⁰⁴ Xavier Philippe, “The Principles of Universal Jurisdiction and Complementarity: How do the two Principles intermesh?”, *International Review of the Red Cross*, Vol. 88, No. 862, 2006, p. 377.

¹⁰⁵ Leila Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium*, 2002, p.109.

¹⁰⁶ *The Princeton Principles on Universal Jurisdiction*, (New Jersey: Program in Law and Public Affairs, 2001), p. 29.

- (a) multilateral or bilateral treaty obligations;
- (b) the place of commission of the crime;
- (c) the nationality connection of the alleged perpetrator to the requesting state;
- (d) the nationality connection of the victim to the requesting state;
- (e) any other connection between the requesting state and the alleged perpetrator, the crime, or the victim;
- (f) the likelihood, good faith, and effectiveness of the prosecution in the requesting state;
- (g) the fairness and impartiality of the proceedings in the requesting state;
- (h) convenience to the parties and witnesses, as well as the availability of evidence in the requesting state; and
- (i) the interests of justice.¹⁰⁷

In contrast to the support of the principle of universal jurisdiction at the Rome Conference, the second group of states was endorsing the principle of complementarity so that the Court would not replace national courts and undermine state sovereignty.¹⁰⁸ The majority of states were in favour of the complementarity principle and therefore complementarity was eventually incorporated into the Statute as a satisfactory compromise between state sovereignty and domestic jurisdiction, on the one hand and international criminal jurisdiction, on the other hand.¹⁰⁹

The first reference to the principle of complementarity appears in the preamble of the ICC Statute. The preamble in paragraph six, implicitly refers to the principle and provides: “it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes”. The paragraph recognises the right and responsibility of the states to investigate and prosecute international crimes and bring the perpetrators of such crimes before their national courts.

The most explicit reference regarding the complementarity principle is made in paragraph ten of the preamble which emphasises: “the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions”.

¹⁰⁷ *Ibid*, p. 32.

¹⁰⁸ Susan Hannah Farbstain, *The Effectiveness of the Exercise of Jurisdiction by the International Criminal Court: The Issue of Complementarity*, Working Paper # 12, European Centre for Minority Issues, August 2001, p. 20. Available at: <http://www.ecmi.de/uploads/tx_ifpubdb/working_paper_12.pdf> (Accessed: 6 November 2015).

¹⁰⁹ *Ibid*, p. 51.

The principle is also a part of article one of the Statute, as states: "...[i]t [the Court] shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions..."

Both paragraph ten of the preamble and article one illustrate that the ICC does not supplant domestic judicial systems as long as national courts conduct the criminal proceedings efficiently and effectively in respect of the prohibited crimes. The ICC is therefore defined as "the court of last resort".¹¹⁰

Another reference to the principle is made in article 17 of the Statute. The article clarifies that the principle of complementarity is not only related to jurisdiction but has more interrelation with the admissibility conditions. The article includes a set of criteria on which the Court determines a case is admissible. The criteria are if the case has not been or is not being investigated or prosecuted before national courts, the concerned person has not been or is not being tried by national courts and the case satisfies the sufficient gravity requirement (the argument of admissibility will be discussed in detail in section three of this chapter). The article reaffirms the primacy of national jurisdiction over the jurisdiction of the ICC.

The Statute refers to the principle of complementarity in some other articles including article 18 on the preliminary rulings regarding admissibility and article 19 on the challenges to the jurisdiction of the Court or the admissibility of a case. Article 18 explains that state members may assert criminal jurisdiction over a crime when it is referred to the Court under article 13(a). Article 19 mentions some grounds to challenge the jurisdiction of the ICC by the accused to whom the warrant or summons has been issued, a member state that asserts jurisdiction over a case by declaring that the case is being or has been tried by its national courts and a state whose acceptance to the ICC jurisdiction is required under article 12.

Article 20 of the ICC Statute, however, mentions another inadmissibility ground of the case before the Court; it is implicitly a reference to the complementarity principle. The ground that the article serves is *ne bis in idem*. The *ne bis in idem* is a legal principle which is possibly found in all modern legal systems and it is a basic human right these days. The *ne bis in idem* is literally translated as "not again about the same". The principle prohibits courts from the prosecution of

¹¹⁰ Richard Dicker, "ICC: The Court of Last Resort", *Human Rights Watch*, (29 June 2012). Available at: <<https://www.hrw.org/news/2012/06/29/icc-court-last-resort>> (Accessed: 8 November 2015).

people twice for the same crime.¹¹¹ The principle, in relation to the ICC, means that the ICC shall not investigate and prosecute a person who has already been convicted or acquitted by a national court for a crime within article five, which normally establishes the jurisdiction of the Court, for the same crime unless the national proceedings have aimed to shield the person from criminal liability for international crimes and not to deliver justice or the proceedings have been carried out dependently and partially and the due process rights and fair trial have not been guaranteed as required. It is worth mentioning that the characterization of an international crime as an ordinary crime by national courts forms no exception under the principle of *ne bis in idem*. Therefore, the ICC cannot retry a person who is responsible for an international crime but has been tried for an ordinary crime before a national court.¹¹²

The Statute also refers to the principle of complementarity in article 53 on the initiation of investigation. The article explains that the Prosecutor examines the information which is available to him or her and considers the reasonable basis to initiate investigation. The Prosecutor, in his or her evaluation, determines whether the concerned crime is within the article five? Is the case admissible under article 17? Does the crime meet the requirement of the gravity threshold? And does the investigation serve the interests of justice? If the Prosecutor finds reasonable basis, the investigation is initiated. If not, then he or she informs the Pre-Trial Chamber that there is no factual basis to start investigation in the case.

Complementarity is now a basic principle that governs the relationship between the ICC and national courts. The principle prioritizes national courts to carry out investigations and prosecutions of the international crimes genuinely but once the states' national courts are unwilling or unable to do so, the ICC as a legitimate criminal body, replaces them. The principle, in other words, fills criminal gaps that appear from the failure of the states' national courts in criminal proceedings. In case of jurisdictional conflicts between the ICC and national courts, the national courts always have primacy over the ICC unless they are unwilling or unable to exercise jurisdiction, unlike the *ad hoc* international criminal tribunals which had primacy over domestic courts and exclusive jurisdiction over the concerned crimes.

¹¹¹ Gerard Conway, "Ne Bis in Idem in International Law", *International Criminal Law Review*, Vol. 3, No. 3, 2003, p. 217.

¹¹² Julio Bacio Terracino, "National Implementation of ICC Crimes: Impact on National Jurisdictions and the ICC", *Journal of International Criminal Justice*, Vol. 5, Issue. 2, 2007, p. 438.

Since the ICC functions based on the state membership or state desire to the ICC investigation and prosecution or the referral authority of the UN Security Council, one can argue that the jurisdiction of the ICC is also universal. However, the universality of the ICC is completely different from the essence of the principle of universal jurisdiction. The ICC jurisdiction is restricted to the territories and nationals of the member states except the referrals by the Security Council (the referral mechanisms will be addressed in section three of this chapter).¹¹³ In addition, the ICC must function within the boundaries of the complementarity principle. Hence, the universal jurisdiction of the ICC is statute based and the Court functions as far as complementarity allows while the principle of universal jurisdiction is crime based regardless of the territory where it is committed, the nationality of the criminal and the victim.

Although the principle of complementarity may play a critical role in respect of the ICC, its implementation has many advantages at the national level. Complementarity strengthens national criminal justice as it encourages states to combat impunity, impose criminal responsibility and use national criminal capacity to carry out investigations and prosecutions genuinely. Complementarity provides the victims with more chances at justice since national courts can present witnesses, collect evidence and arrest the accused easily. National prosecutions are usually conducted much easier and faster procedurally and are cheaper compared with the ICC prosecutions. Complementarity much effectively enables states to solve and prevent conflicts and build reconciliation through the realisation of national justice.

2. The crimes within the jurisdiction of the Court

The ICC jurisdiction covers the crimes that are known as the international crimes. The international crimes arguably consist of many crimes but the Court's Statute recognises genocide, crimes against humanity, war crimes and the crime of aggression so far.¹¹⁴ The Statute defines these crimes as "the most serious crimes of concern to the international community as a whole"¹¹⁵ that "deeply shock the consciences of humanity".¹¹⁶ Under international law, these four crimes attract direct criminal responsibility. Although efforts have been made to add some other crimes,

¹¹³ The ICC Statute, *supra* note 89, Arts. 12, 13.

¹¹⁴ *Ibid*, Art. 5.

¹¹⁵ *Ibid*, Preamble, para. 4.

¹¹⁶ *Ibid*, Preamble, para. 2.

including terrorism, drug trafficking and piracy, to the ICC list, they have all failed so far.¹¹⁷ In this section, I will address the crimes within the jurisdiction of the Court and discuss a brief history of their legal concepts, nature and characteristics.

2.1. The crime of genocide

Genocide as a phenomenon is not new in international law but the term was coined in 1944 by the lawyer, Raphael Lemkin.¹¹⁸ Lemkin used the term in respect of the crimes that the Nazi Regime committed against the Jews.¹¹⁹ He derived the term from the Greek word ‘*genos*’ which means race or origin and the Latin word ‘*caedere*’ which means killing or elimination.¹²⁰ The term rapidly spread and became an international crime. In 1948, the UN General Assembly adopted the ‘Genocide Convention’. During the 1990s, the crime was incorporated into the Statutes of the ICTY, ICTR and ICC.

The crime of genocide was first defined by the Genocide Convention¹²¹ and the same definition was later copied in the Statute of the ICC. The ICC Statute, in article six, defines genocide as the commission of one or more specific acts “with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such:

- (a) Killing members of the group;¹²²
- (b) Causing serious bodily or mental harm to members of the group;¹²³

¹¹⁷ Gerhard Werle, *supra* note 72, pp. 26, 27.

¹¹⁸ William A. Schabas, *supra* note 13, p. 36. Raphael Lemkin was born to a Polish-Jewish family in Poland in 1901. He served as a professor, public prosecutor and member of the ‘Committee on the Codification of the Laws’ in Poland. In 1933, Lemkin made a presentation about ‘the crime of barbarity’ in a conference, organised by the Legal Council of the League of Nations on international criminal law, in Madrid and proposed to criminalise the acts of barbarism. He used the term for the crimes that the Turks had committed against Armenians during World War I and the Kingdom of Iraq had committed against Assyrians in 1933. Lemkin published a book which was entitled ‘Axis Rule in Occupied Europe’ in 1944. He developed the term into ‘genocide’ and applied it to describe the crimes of the Nazi Regime against the Jews, in the book. After the establishment of the Nuremberg Tribunal in 1945, Lemkin became the advisor of the Chief of the Nuremberg Trials, Robert H. Jackson. In 1959, he died of a heart attack in the US.

¹¹⁹ Gerhard Werle, *supra* note 72, p. 190.

¹²⁰ Marif O. Gul, *Genocide against Kurds in Light of International Law*, Translated by: Aso Ahmed Sheilch, 1st ed., (Kurdistan Region: Directorate of House of Translation, 2013), p. 9.

¹²¹ The Genocide Convention, *supra* note 65, Art. II.

¹²² The crime of killing members of the group is causing death to one or more members of the group.

¹²³ The crime of causing seriously bodily or mental harm to members of the group may include the criminal acts of torture, rape, sexual violence, inhuman or degrading treatment or any other act of a similar character against one or more 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;¹²⁴
- (d) Imposing measures intended to prevent births within the group;¹²⁵
- (e) Forcibly transferring children of the group to another group”¹²⁶.

The Genocide Convention also considers the following acts punishable: “(a) genocide; (b) conspiracy to commit genocide; (c) direct and public incitement to commit genocide; (d) attempt to commit genocide; (e) complicity in genocide”.¹²⁷

The genocide definition explicitly requires the fulfilment of two basic conditions. Accordingly, no act shall be genocidal unless it meets *actus reus* (material element) and *mens rea* (mental element). The material element of the crime is the commission of one or more of the specified acts to destroy a group, mentioned within the definition, in whole or in part. The mental element of all the crimes within the ICC jurisdiction, is found in article 30 of the ICC Statute. Accordingly, the element consists of the perpetrator’s intent and knowledge during the commission of the act.¹²⁸ Intent is related to the perpetrator’s conduct and its consequence¹²⁹ while knowledge is the awareness of the perpetrator to the consequence or the circumstance that results from the act.¹³⁰ The mental element of the crime of genocide, in other words, means the perpetrators’ complete intent¹³¹ and knowledge on the conducts, against members of a national, ethnical, racial,

¹²⁴ The crime of deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part may include the deprivation of the group members from resources that are indispensable for their survival, such as food or medical services or systematic expulsion of the group members from their homes. The crime may also include any other act of a similar character.

¹²⁵ The crime of imposing measures intended to prevent births within the group is the process of facing one or more members of the group with certain criminal conditions that consequently prevent births within the group.

¹²⁶ The crime of forcibly transferring children of the group to another group is taking, kidnapping or abducting children from a group and transferring them to another group. The process of transference must not necessarily be done by physical force but also by the threat of force or coercion or by abusing power.

¹²⁷ The Genocide Convention, *supra* note 65, Art. III.

¹²⁸ The ICC Statute, *supra* note 89, Art. 30 (1).

¹²⁹ *Ibid*, Art. 30 (2) (a), (b).

¹³⁰ *Ibid*, Art. 30 (3).

¹³¹ Intent in the crime of genocide, consists of general intent and special intent. General intent is related to the material element of the crime. The perpetrator intends to perpetrate one or more of the prescribed acts against one or more members of a protected group but he or she does not seek to destroy the group in whole or in part. Thus, general intent of the perpetrator does not sufficiently categorise the crime as genocide. Genocide moreover requires a special intent which is related to the consequence of the act. Special internet, in other words, means that the perpetrator commits one or more of the prescribed acts against one or more individuals with the specific intention of destroying their group in whole or in part.

or religious group, that cause destruction to the group in whole or in part. The mental element is, however, difficult to be realised during the investigations and prosecutions; it plays a significant and distinctive role in the determination of the crime of genocide. If the concerned acts lack intent and knowledge of the group destruction, they may be dealt with as crimes against humanity or war crimes and not genocide.¹³²

Genocide may be committed in different forms such as physical, biological or cultural destruction. Physical genocide is committed through the first three paragraphs of article six that may include killing, torture, sexual violence, inhuman and degrading acts, deprivation from food and medical treatment, systematic displacement or any other act of a similar character.¹³³ The second form of genocide is biological destruction which is perpetrated under paragraph (d) of article six, as provides “[i]mposing measures intended to prevent births within the group”. The third form of genocide is known as cultural genocide. Cultural genocide was the most problematic genocidal form during the adoption of the Genocide Convention. Therefore, it was decidedly excluded from the genocide definition by the drafters of the convention. However, the contemporary interpretation of the convention seems to include it along with the other forms.¹³⁴ Cultural genocide is basically committed under article six (e) which is transferring children from a group to another group by physical force, coercion or abuse of power¹³⁵ but scholars add some other acts such as banning people from their native language, distorting historical facts and events, eliminating national distinctions, destroying artifacts, historical monuments, cultural sites or anything else that is regarded historical or cultural heritage.¹³⁶ It is worth mentioning that the crime of genocide may be committed in wartime or in peacetime.¹³⁷

The expression ‘in whole or in part’ requires that the act must target individuals as members of a group.¹³⁸ In addition, victims must be a substantial part of the group.¹³⁹ Based on a

¹³² William A. Schabas, *supra* note 13, p. 38.

¹³³ Elements of Crimes (adopted 9 September 2002, entered into force 9 September 2002) ICC-ASP/1/3, pp. 2-3.

¹³⁴ William A. Schabas, *supra* note 13, p. 38.

¹³⁵ Elements of Crimes, *supra* note 133, p. 3.

¹³⁶ Marif O. Gul, *supra* note 120, pp. 11-12.

¹³⁷ The Genocide Convention, *supra* note 65, Art. I.

¹³⁸ Scholars interpret the phrase of ‘as such’ as being related to the ultimate victim of the crime of genocide. Accordingly, the target must be the group and not individuals. Individuals must be targeted based on their group identity and not individual identity.

¹³⁹ William A. Schabas, *supra* note 13, p. 39.

court judgment, ‘in part’ also implies attacking the group’s members in a small area.¹⁴⁰ Although it is not necessary that the act be part of a widespread or systematic attack, “the existence of a plan or policy may become important in most cases”.¹⁴¹

The targeted group must be among the specified groups which are national, ethnic, racial and religious groups. A national group is “a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties”.¹⁴² An ethnic group is a group “whose members share a common language and culture”.¹⁴³ A racial group differs from the other groups “based on the hereditary physical traits often identified with a geographical region irrespective of linguistic, cultural, national or religious factors”.¹⁴⁴ A religious group is defined as a group “whose members share the same religion, denomination or mode of worship”.¹⁴⁵

The Genocide Convention identifies people who possibly commit the crime of genocide: “whether they are constitutionally responsible rulers, public officials or private individuals”.¹⁴⁶ Hence, the majority of genocide scholars highlight the possible role of state and official authorities in committing genocidal acts.

In brief, genocide is one of the most serious international crimes mentioned in the ICC Statute. The crime is committed through one or more of the genocidal acts along with the intent and knowledge of the perpetrators. Genocide may be committed as physical, biological or cultural distraction. The target of the crime is national, ethnic, racial, or religious groups. The purpose of genocide is to eliminate the groups in whole or in part. The victims of genocide must constitute a considerable part of the targeted group. The perpetrators of the crime are possibly state actors and public officials.

2.2. Crimes against humanity

Crimes against humanity are serious crimes that target civilian populations. Although the origins of these crimes trace back to ancient history, the term of crimes against humanity emerged

¹⁴⁰ *Ibid*, p. 40.

¹⁴¹ *Prosecutor v. Jelusic*, (Case No. IT-95-10-A), ICTY (Appeals Chamber), Judgment, 5 July 2001, para. 48.

¹⁴² *Prosecutor v. Akayesu*, (Case No-96-4-T), ICTR (Trial Chamber), Judgment, 2 September 1998, para. 512.

¹⁴³ *Ibid*, para 513.

¹⁴⁴ *Ibid*, para 514.

¹⁴⁵ *Ibid*, para 515.

¹⁴⁶ The Genocide Convention, *supra* note 65, Art. IV.

in 1915, following the start of the mass atrocities against Armenians by the Ottoman Empire.¹⁴⁷ After the Second World War, crimes against humanity were explicitly included in the Charters of the Nuremberg and Tokyo tribunals. The Charters defined the crimes as:

“[N]amely, murder, extermination, enslavement, deportation, and other inhuman acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated...”.¹⁴⁸

The relevant articles of the Nuremberg and Tokyo Charters explicitly provided that the crimes were only considered crimes against humanity when they were committed as part of a plan or policy of war or in connection with war crimes and crimes against peace.

In 1945, when the Allies passed Control Council Law No.10, they included crimes against humanity in the law. The law defined the crimes as:

“Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhuman acts committed against any civilian population, or persecutions on political, racial, or religious grounds whether or not in violation of the domestic laws of the country where perpetrated”.¹⁴⁹

The law modified the classical definition of crimes against humanity and eliminated the connection of such crimes with war crimes and crimes against peace. Thus, under the Control Council Law No. 10, the above-mentioned crimes were crimes against humanity even if they were committed during peacetime.

Following the commission of the grave crimes in Yugoslavia and Rwanda, the crimes against humanity were again placed in the Statutes of both the ICTY and ICTR.¹⁵⁰ Although the

¹⁴⁷ William A. Schabas, *supra* note 13, p. 41. In May 1915, the Ottoman Empire passed a law which allowed the deportation of the Armenian population from Eastern Anatolia. The deportation was accompanied with mass killings and systematic starvation. The campaign continued until the end of 1916. Consequently, between 600,000 and 1,000 000 Armenians died. The mass atrocities of the Ottoman Empire against the Ethnic Armenian minority have been recognised as genocide by many countries today.

¹⁴⁸ The Charter of the Nuremberg Tribunal, *supra* note 47, Art. 6 (c); The Charter of the Tokyo Tribunal, *supra* note 54, Art. 5 (c). The only difference between the relevant articles of the Nuremberg and Tokyo Charters is that the Tokyo Charter mentioned persecution only on political and racial grounds but the Nuremberg Charter included also religion along with the other grounds.

¹⁴⁹ Control Council Law No.10, *supra* note 51, Art. 2 (1) (c).

¹⁵⁰ The ICTY Statute, *supra* note 73, Art. 5; The ICTR Statute, *supra* note 82, Art. 3.

so-called ‘nexus’ of the crimes with armed conflict was still required in the ICTY Statute, it was just an element of jurisdiction and not the crime element.¹⁵¹ But the ICTR Statute completely abandoned the nexus.

In 1998, after the ICC Statute was adopted, crimes against humanity appeared again among the core international crimes and article seven of the Statute was devoted to them.

The ICC Statute defines crimes against humanity as “any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”. The acts are the following: murder;¹⁵² extermination;¹⁵³ enslavement;¹⁵⁴ deportation or forcible transfer of population;¹⁵⁵ imprisonment or other forms of severe deprivation of physical liberty;¹⁵⁶ torture;¹⁵⁷ rape,¹⁵⁸ sexual slavery,¹⁵⁹ enforced

¹⁵¹ *Prosecutor v. Tadić*, (Case No, IT-94 -1-A), ICTY (Appeals Chamber), Judgment, 15 July 1999, para. 249.

¹⁵² Murder is defined as the unlawful deprivation of a human from the right of life. The ICC Statute only mentions murder as a crime against humanity without defining it. The Document of Elements of Crimes explains what constitutes the crime before the ICC. Accordingly, murder is the killing of or causing death to one or more persons as part of a widespread or systematic attack against a civilian population.

¹⁵³ Extermination is the killing of people on a large scale without a lawful justification or excuse. According to the ICC Statute and the Document of Elements of Crimes, extermination is the killing of one or more persons directly or indirectly, such as by denying the population access to food and medicine. The conduct of extermination must constitute or be part of a mass killing within a widespread or systematic attack against a civilian population.

¹⁵⁴ Enslavement is the act of subjecting a human being to the state of slavery. The ICC Statute and the Document of Elements of Crimes refer to this crime as the exercise of the right of ownership over a person or more, such as by allowing to buy, sell, lend, barter or any similar deprivation of liberty including forced labour, reducing someone to a servile status and human trafficking as part of a widespread or systematic attack against a civilian population.

¹⁵⁵ Deportation or forcible transfer of population is the act of deporting or displacing a person or some persons, lawfully residing in a place, to another state or place forcibly without a lawful reason as part of a widespread or systematic attack against a civilian population. It is worth mentioning that deportation and forcible transfer of population may be perpetrated by physical force or coercion or by the abuse of power.

¹⁵⁶ Imprisonment or other severe deprivation of physical liberty can be defined as the act of imprisoning or depriving someone from his or her physical liberty. The Document of Elements of Crimes refers to this crime as the subjection of one or more persons to the state of imprisonment or any other form of deprivation from physical liberty, in violation of international law, as part of a widespread or systematic attack against a civilian population.

¹⁵⁷ Torture is the act of inflicting serious and severe physical or mental pain or suffering upon someone or some persons while they are in the custody or under the control of the perpetrator. Although it is not necessary that torture be committed for a specific purpose, it must be outside of the process of lawful sanctions and be part of a widespread or systematic attack against a civilian population.

¹⁵⁸ Rape is the invasion of the body of one or more persons by conduct that involves sexual penetration as part of a widespread or systematic attack against a civilian population. Rape may be committed by the use of physical force, coercion, abuse of power or by taking advantage of the incapability of a person or some persons to give a valid consent, such as because of unconsciousness, incapacity, intellectual disability or being under the legal age of consent.

¹⁵⁹ Sexual slavery is the deprivation of one or more persons from liberty by exercising the right of ownership, such as by buying, selling, lending or bartering or imposing any other similar deprivation of liberty on the victim or victims, such as forced labour, servile conditions or human trafficking as part of a widespread or systematic attack against a

prostitution,¹⁶⁰ forced pregnancy,¹⁶¹ enforced sterilisation,¹⁶² or any other form of sexual violence of comparable gravity¹⁶³; persecution against any group on political, racial, national, ethnic, cultural, religious, gender or other grounds;¹⁶⁴ enforced disappearance;¹⁶⁵ the crime of apartheid;¹⁶⁶ and other inhuman acts of a similar character¹⁶⁷.

civilian population. Additionally, the perpetrator must force the victim or victims to engage in one or more acts of a sexual nature.

¹⁶⁰ Enforced prostitution is the crime of forcing someone or some persons to engage in an act or more acts of a sexual nature in exchange for pecuniary or other advantage as part of a widespread or systematic attack against a civilian population. This crime may similarly be perpetrated through physical force, coercion or abuse of power or against someone who is incapable of giving genuine consent.

¹⁶¹ Forced pregnancy is the act of forcible confinement of one or more women to get pregnant with the purpose of reproduction and affection of the ethnic constitution of a civilian population. The crime must be committed as part of a widespread or systematic attack against a civilian population.

¹⁶² Enforced sterilisation is the deprivation of someone or some persons from the capacity of biological reproduction as part of a widespread or systematic attack against a civilian population. The act must not be justified by medical treatment or based on the genuine consent of the victim or victims.

¹⁶³ The crime of sexual violence includes any act of a sexual nature that the perpetrator commits against the victim or victims or forces the victim or victims to engage in through the use of physical force, coercion, abuse of power or through taking advantage of the incapacity of the victim or victims to give a valid consent. The act must be of a similar gravity of the other acts such as rape, sexual slavery, enforced prostitution and forced pregnancy and committed as part of a widespread or systematic attack against a civilian population.

¹⁶⁴ The ICC Statute and the Document of Elements of Crimes further include an explanation as to the crime of persecution. Accordingly, persecution is the deprivation of a person or some persons, contrary to international law, from basic rights, through the perpetration of or in connection with one or more of the criminal acts known as crimes against humanity or other crimes within the ICC jurisdiction, based on political, racial, national, ethnic, cultural, religious or gender identity as part of a widespread or systematic attack against a civilian population.

¹⁶⁵ Enforced disappearance is the act of arrest, detention or abduction of one or more persons and refusing to acknowledge the act or giving information regarding the fate or whereabouts of the victim or victims. The crime must be committed in the ordinary course of events, as part of a widespread or systematic attack against a civilian population, by or with the authorisation or support of a state or a political organisation to remove the victim or victims from legal protection for a long time.

¹⁶⁶ The crime of apartheid, according to the ICC Statute and the Document of Elements of Crimes, is defined as the perpetration of any inhuman act, mentioned in article seven, paragraph one of the ICC Statute or has a similar character, by a racial group against another racial group or other racial groups “in the context of an institutionalized regime of systematic oppression and domination” to maintain the regime. The crime must be part of a widespread or systematic attack against a civilian population.

¹⁶⁷ Other inhuman acts of a similar character are any act of a similar nature and gravity to the other criminal acts mentioned in article seven, paragraph one through which the perpetrator inflicts great suffering or serious injury to body, mental or physical health of one or more persons within a widespread or systematic attack against a civilian population.

2.2.1. Elements of the crimes against humanity

As we mentioned above, the ICC Statute defines crimes against humanity as the perpetration of some specific acts as a widespread or systematic attack against any civilian population with knowledge of the perpetrators about the extensity or systematicity of the attack. The crimes, in other words, must similarly satisfy the material and mental elements.

2.2.1.1. Material Element

The specified acts that the Statute mentions in article seven, constitute the material element of crimes against humanity but they must meet the following conditions:

a) There must be an attack

The ICC Statute, in the definition of crimes against humanity, specifies that there must be a widespread or systematic attack against a civilian population. The Statute defines the ‘attack’ as “a course of conduct involving the multiple commission of acts ...”.¹⁶⁸ As the ICC Statute does not require any nexus between the crimes against humanity and armed conflict, the attack does not need to be a military attack or take place in the course of an armed conflict. The attack may, in other words, occur in peacetime.¹⁶⁹

b) The acts must be part of the attack

Based on the ICC definition, crimes against humanity require a link between the individual acts and the primary attack. Accordingly, the individual acts must be part of the main attack. The significance of the link regarding the crimes is that the link affects the attack to be severe and makes the perpetrator be aware of his act and the main attack.¹⁷⁰ Thus, if the acts are isolated and committed outside of the main attack, they do not constitute crimes against humanity.¹⁷¹

¹⁶⁸ The ICC Statute, *supra* note 89, Art. 7 (2) (a).

¹⁶⁹ *Prosecutor v. Tadić*, *supra* note 151, para. 251.

¹⁷⁰ *Prosecutor v. Mrkšić et al*, (Case No. IT-95-13/1-A), ICTY (Appeals Chamber), Judgment, 5 May 2009, para. 41.

¹⁷¹ *Prosecutor v. Kunarac et al*, (Case No. IT-96-23& IT-96-23/1-A), ICTY (Appeals Chamber), Judgment, 12 June 2002, para. 100.

c) The attack must be directed against any civilian population

The commission of some certain acts alone does not constitute crimes against humanity unless they are directed against any civilian population.¹⁷² The pronoun of ‘any’ implies that the attack must be carried out against civilians regardless of their statuses.¹⁷³ The word of ‘civilian’ means individual members that constitute a civilian population together. Thus, crimes against humanity must target a civilian population in large. However, it does not mean that the whole population must be the subject of the attack.¹⁷⁴ In case of armed conflict, the attack must be primarily directed against non-combatants or people who have no direct participation in the hostilities.¹⁷⁵ The presence of some people who do not fulfil the conditions of being civilians, like armed members of resistance groups or combatants who have laid down their weapons, does not change the civilian character since the population is still civilian predominantly.¹⁷⁶ The attack against civilian populations may be carried out in wartime or in peacetime.

d) The attack must be widespread or systematic

The ICC definition on crimes against humanity, further requires that the attack must be widespread or systematic. This requirement is based on the quality and quantity of the acts that constitute the concerned attack.¹⁷⁷ ‘Widespread’ means “a massive, frequent, large-scale action...with considerable seriousness...against a multiplicity of victims”.¹⁷⁸ ‘Systematic’ is the implementation of a “methodical plan” in conducting the acts.¹⁷⁹ In other words, the criterion of widespread refers to the scale and seriousness of the acts and the number of victims while systematic refers to a regular pattern in committing the specified acts. The widespread or systematic requirement implies that crimes against humanity may be committed either as a serious large-scale attack that causes many victims or based on a regular plan that results in fewer victims.

¹⁷² *Prosecutor v. Akayesu*, *supra* note 142, para. 582.

¹⁷³ *Prosecutor v. Tadić*, (Case No. IT-94-1-T), ICTY (Trial Chamber), Judgment, 7 May 1997, para. 635.

¹⁷⁴ *Prosecutor v. Baglishema*, (Case No. 95-IA-T), ICTR (Trial Chamber), Judgment, 7 June 2001, para. 80.

¹⁷⁵ *Prosecutor v. Tadić*, *supra* note 173, para. 639.

¹⁷⁶ *Prosecutor v. Akayesu*, *supra* note 142, para. 582.

¹⁷⁷ Gerhard Werle, *supra* note 72, p. 225.

¹⁷⁸ *Prosecutor v. Akayesu*, *supra* note 142, para. 580.

¹⁷⁹ *Prosecutor v. Tadić*, *supra* note 173, para. 648.

e) The attack must be based on a state or organisational policy

The ICC Statute provides: “pursuant to or in furtherance of a State or organizational policy to commit such attack”.¹⁸⁰ The ICC Document of Elements of Crimes¹⁸¹ also includes a similar provision which states: ““policy to commit such attack” requires that the state or organisation actively promote or encourage such an attack against a civilian population”.¹⁸² According to the above-mentioned provisions, the attack must be carried out on the basis of a specific plan or policy and such a plan or policy may be adopted by a state or an organisation. For the purpose of this requirement, state is an entity that exercises governmental power and organisation means a group that exercises a *de facto* power in a particular territory and is capable of carrying out a widespread or systematic attack against a civilian population.¹⁸³ Though the existence of a plan or policy is required, it does not need that the highest position of the state or organisation adopts them.¹⁸⁴ It is worth mentioning that the Trial Chamber of the ICTY in the *Tadic* case diminished the significance of such a requirement and stated that since the attack is widespread and systematic, it is indirectly carried out based on a policy and therefore such a policy is not necessary to be formalised.¹⁸⁵

2.2.1.2. Mental Element

The mental element of crimes against humanity consists of intent and knowledge. The ICC definition includes that the attack must be accompanied by the knowledge of the perpetrators. Article 30 of the Statute requires intent along with knowledge. Accordingly, the perpetrators must intentionally commit one or more of the specified acts and cause a criminal consequence. In addition, they must be aware that their acts are part of a widespread or systematic attack directed against a civilian population. However, it is not required that the perpetrators have knowledge

¹⁸⁰ The ICC Statute, *supra* note 89, Art. 7 (2) (a).

¹⁸¹ The Document of Elements of Crimes was reproduced from the official records of the Assembly of States Parties and adopted in 2002 based on article nine of the ICC Statute. The document elaborates the crimes mentioned in articles six, seven and eight of the ICC Statute. It includes a set of elements for each crime through which it certifies and clarifies the crimes and provides bases for the adjudication process. The document, in other words, assists the ICC in the process of the interpretation and application of articles on the crimes within the jurisdiction of the Court.

¹⁸² Elements of Crimes, *supra* note 133, p. 5.

¹⁸³ Gerhard Werle, *supra* note 72, p. 228.

¹⁸⁴ *Prosecutor v. Tihomir Blaškić*, (Case No. IT-95-14-T), ICTY (Trial Chamber), Judgment, 3 March 2000, para. 205.

¹⁸⁵ *Prosecutor v. Tadić*, *supra* note 173, para. 653.

about the entire plan or policy of the state or organisation.¹⁸⁶ The absence of intent or knowledge makes the crimes ordinary or war crimes based on the circumstance in which they are committed.

2.3. War crimes

The term of war crimes is used to describe the serious offences that are committed during armed conflict. War crimes are the oldest of the four crimes under the jurisdiction of the ICC that have been perpetrated in history.¹⁸⁷ They are also the first international crimes that have been tried by an international tribunal. War crimes are defined as serious breaches of international humanitarian law applicable during armed conflict.

International humanitarian law is a set of rules and principles that regulate the conduct of war by protecting those who are not or are no longer combatants and forbid certain means and methods of warfare. Though the origins of the rules and principles date back to the ancient religions and civilizations,¹⁸⁸ the modern international humanitarian law was established by the codification of the war customs in the 19th century.¹⁸⁹ In 1864, the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field was adopted. Several years after the adoption of the convention, proposals were submitted, by the ICRC, to revise it but the convention was not revised until 1906.¹⁹⁰

The 1899 and 1907 Hague Convention II and IV with Respect to the Laws and Customs of War along with their annexed Regulations were eventually concluded among states. The signatories of the conventions recognised that “the right of the belligerents to adopt means of injuring the enemy is not unlimited”.¹⁹¹ The conventions, in other words, addressed the means and methods of warfare by establishing state obligations.

¹⁸⁶ Elements of Crimes, *supra* note 133, p. 5.

¹⁸⁷ William A. Schabas, *supra* note 13, p. 51.

¹⁸⁸ Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, Vol.1, 2nd ed., (Geneva: International Committee of the Red Cross, 2006), pp. 121-122.

¹⁸⁹ Theodor Meron, *Bloody Constraint: War and Chivalry in Shakespeare*, (New York et al: Oxford University Press, 1998), p.12.

¹⁹⁰ Philippe Abplanalp, “The International Conference of the Red Cross as a Factor for the Development of the International Humanitarian Law and the Cohesion of the International Red Cross and Red Crescent Movement”, *International Review of the Red Cross*, No. 308, 1995.

¹⁹¹ Regulations respecting the Laws and Customs of War on Land (Hague Convention II), *supra* note 29, Art. 22; Regulations respecting the Laws and Customs of War on Land (Hague Convention IV), *supra* note 29, Art. 22.

In 1906, the 1864 Geneva Convention was revised and replaced by the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field which was later revised again in 1929¹⁹² and 1949 and replaced by the 1949 Geneva Convention I.¹⁹³ In 1929, the Geneva Convention relative to the Treatment of Prisoners of War was also adopted.¹⁹⁴ The convention was similarly revised in 1949 and replaced by the Geneva Convention III.¹⁹⁵ Besides the revision of the previous conventions, the Geneva Convention regarding the Protection of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (the Geneva Convention II) along with the Geneva Convention relative to the Protection of Civilian Persons in Time of War (the Geneva Convention IV) were firstly concluded in 1949.¹⁹⁶ The 1949 Geneva Conventions did not only regulate international armed conflict but also the conflicts of internal character in their common article three¹⁹⁷. In 1977, two protocols were additionally adopted to the Geneva Conventions. Additional Protocol I was to protect the victims of international armed conflict and Additional Protocol II was to protect the victims of non-international armed conflict.¹⁹⁸ The Geneva Conventions eventually established a humanitarian law which is commonly known as the Geneva law. Each of the conventions encompasses a set of rules that protect a certain category of people during armed conflict.

It should also be mentioned that besides the Geneva Conventions and Protocols, there are several other conventions which have been concluded based on the Hague Conventions. The conventions are, *inter alia*, the 1954 Convention for the Protection of Cultural Property in the

¹⁹² Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (adopted 27 July 1929, entered into force 19 June 1931) 118 LNTS 330.

¹⁹³ Geneva Convention I, *supra* note 66.

¹⁹⁴ Convention Relative to the Treatment of the Prisoners of war (adopted 27 July 1929, entered into force 19 June 1931) 118 LNTS 343.

¹⁹⁵ Geneva Convention III, *supra* note 66.

¹⁹⁶ Geneva Convention II and IV, *supra* note 66.

¹⁹⁷ Common article three established conventional humanitarian rules for internal armed conflict for the first time. The article requires the contracting parties to protect civilians, combatants laid down their weapons or placed *hors de combat* and refrain from causing violence to their life and person, taking them hostage, committing outrage upon their personal dignity and from passing sentences from irregular courts and carrying out executions on them. It further requires the state parties to collect and care for the wounded, sick and shipwrecked.

¹⁹⁸ Additional Protocol I, *supra* note 67; Additional Protocol II, *supra* note 67.

Event of Armed Conflict,¹⁹⁹ the 1972 Convention on the Use of Biological Weapons,²⁰⁰ Convention on the Use of Conventional Weapons of 1980,²⁰¹ the 1993 Convention on Chemical Weapons,²⁰² Convention on Anti-Personal Mines of 1997,²⁰³ the 2000 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts²⁰⁴. The Hague and other relevant Conventions have also established a law which is traditionally known as the Hague law in international humanitarian law.

The rules of the Hague, Geneva and other Conventions are not only treaty rules that merely bind states parties but are also a part of the customary humanitarian law today. The rules are, in other words, applicable to all states, even non-states parties, states that withdraw from the conventions and irregular armed groups.²⁰⁵ The violation of the international humanitarian rules, either codified or customary, in international or internal armed conflicts, leads to the establishment of criminal responsibility before national and international courts.

As we discussed before, the first international tribunal was established in 1474 to try murder, rape and other crimes against the laws of God and man. In 1920, the German Supreme Court at Leipzig prosecuted German military officials for their war crimes during the First World War. After World War II, the Nuremberg and Tokyo tribunals were founded to try the major German and Japanese military and political officials responsible for war crimes along with crimes against humanity and crimes against peace during the war. In the 1990s, the ICTY and ICTR were formed and mandated to prosecute international crimes including war crimes on the territories of Yugoslavia and Rwanda. After the adoption of the ICC Statute in 1998, the war crimes were

¹⁹⁹ Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 240.

²⁰⁰ Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (adopted 10 April 1972, entered into force 26 March 1975) 1015 UNTS 163.

²⁰¹ Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (adopted 10 October 1980, entered into force 2 December 1983) 1342 UNTS 137.

²⁰² Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (adopted 13 January 1993, entered into force 29 April 1997) 1974 UNTS 317.

²⁰³ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personal Mines and on their Destruction (adopted 18 September 1997, entered into force 1 March 1999) 2056 UNTS 211.

²⁰⁴ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts (adopted 25 May 2000, entered into force 12 February 2002) 2173 UNTS 222.

²⁰⁵ Gerhard Werle, *supra* note 72, p. 275.

included as grave international crimes and the Court was empowered to try people responsible for the commission of such crimes.

The ICC Statute refers to war crimes in article eight. Accordingly, “The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes”. The article establishes the jurisdiction of the Court with regard to four categories of crimes. Article eight, paragraph two (a) includes grave breaches of Geneva Conventions of 1949. Article eight, paragraph two (b) addresses the other serious violations of the laws and customs of war applicable in international armed conflict. Article eight, paragraph two (c) encompasses serious violations of article three common to the four Geneva Conventions. Article eight, paragraph two (e) entails other serious violations of the laws and customs applicable in armed conflict not of an international character.

The article, in other words, refers to the crimes committed as the result of the violations of international humanitarian law during armed conflicts and distinguishes between crimes committed in international and non-international armed conflicts. International armed conflict is defined as a conflict which takes place between the armed forces of two states or more,²⁰⁶ or between the armed forces of a state and a national liberation movement fighting for their right to self-determination.²⁰⁷ Non-international armed conflict is a conflict between a state and a rebel group, or between two or more armed groups within a state.²⁰⁸ A conflict could also be a mixed international and non-international armed conflict when a state intervenes in an internal conflict or a side of an internal conflict acts on behalf of another state.²⁰⁹

²⁰⁶ *Prosecutor v. Tadić*, *supra* note 151, para. 84.

²⁰⁷ Additional Protocol I, *supra* note 67, Art. 1 (4).

²⁰⁸ Antonio Cassese, *International Criminal Law*, 2nd ed., (New York: Oxford University Press, 2008), p 88.

²⁰⁹ *Prosecutor v. Tadić*, *supra* note 151, para. 84.

Grave breaches of Geneva Conventions are: wilful killing;²¹⁰ torture²¹¹ or inhuman treatment²¹²; wilfully causing great suffering or serious injury; extensive destruction and appropriation of property;²¹³ compelling a prisoner or other protected person to serve in the ranks of a hostile power; wilfully depriving a prisoner or other protected person from the rights of fair and regular trial;²¹⁴ unlawful deportation, transfer²¹⁵ or confinement²¹⁶ and taking of hostages²¹⁷.

In respect of the other serious violations of the laws and customs of war applicable during international armed conflict, the crimes listed are intentionally directing attacks against civilian populations,²¹⁸ civilian objects,²¹⁹ personnel, installations, material, units or vehicles involved in

²¹⁰ Wilful killing is the act of willfully causing death to one or more persons. The act must be committed during or in connection with international armed conflict. The person or persons must be protected under one or more of the 1949 Geneva Conventions.

²¹¹ According to the Document of Elements of Crimes, torture as a war crime, must be committed during or in association with armed conflict whether international or internal and for the purpose of confession, obtaining information, punishment, intimidation or any other similar reason regardless of that the victim or victims are in the custody or under the control of the perpetrator. It is worth mentioning that article eight, paragraph two (a) mentions torture as a war crime that takes place during or because of international armed conflict against one or more persons who are protected under one or more of the 1949 Geneva Conventions.

²¹² Inhuman treatment is defined as torture for no specific purpose mentioned in the definition of torture. The act must be committed against someone or some persons, protected under one or more of the 1949 Geneva Conventions, during or in connection with international armed conflict.

²¹³ The extensive destruction and appropriation of property is the act of extensively destroying or appropriating certain property, protected under one or more of the 1949 Geneva Conventions, without the justification of military necessity and during or in association with international armed conflict.

²¹⁴ The deprivation of a prisoner or other protected persons from the right of fair and regular trial is the act of denial of such people from judicial guarantees that the Geneva Convention III, in articles 99-108, and Geneva Convention IV, in articles 71-74, provide. The person or persons must be protected under one or more of the 1949 Geneva Conventions and the act must be perpetrated during or because of international armed conflict.

²¹⁵ The definition of the war crime of unlawful deportation or transfer of people is the same with the definition of crime against humanity of deportation or forcible transfer of population. However, the act as a war crime, must be committed against one or more persons protected under one or more of the 1949 Geneva Conventions during or in connection with international armed conflict.

²¹⁶ Unlawful confinement is the crime of confining or continuing to confine someone or some persons, protected under one or more of the 1949 Geneva Conventions, to a certain place and during or in association with international armed conflict.

²¹⁷ Taking hostage is the act of capturing, detaining or holding hostage one or more persons, protected under one or more of the 1949 Geneva Conventions, during or because of international armed conflict. Taking hostage is usually accompanied with the threat of killing, causing physical or mental harm or continuing to hold the victim or victims. The purpose of hostage taking is compelling a state, an organisation, a natural or legal person or a group of persons to carry out a pacific act or refrain from doing an act in a particular way as a condition for the release of the victim or victims.

²¹⁸ The term of 'civilian population' means individual civilians who do not participate directly in hostilities.

²¹⁹ Civilian objects are the properties that belong to individual civilians and are not used by military forces as military objects.

a humanitarian assistance or peacekeeping mission, towns, villages, dwellings or buildings which are not military objectives; attacks cause excessive incidental death, injury or damage;²²⁰ killing or wounding people *hors de combat*;²²¹ improper use of a flag of truce, of a flag, insignia or uniform of the enemy army or of the UN as well as of emblems of the Geneva Conventions;²²² transferring parts of civilian population by the occupying power from its territory to the occupied territory; attacking religious, educational, art, scientific or charitable buildings, historical monuments, hospitals or places where the sick and wounded are collected; subjecting persons to physical mutilation,²²³ scientific or medical experiments which are not justified by medical, dental and hospital treatment; treacherously killing or wounding individuals belonging to the hostile nation or army;²²⁴ denying quarter;²²⁵ destroying or seizing the adversary's property without any military necessity; depriving the nationals of the adversary power from rights or actions;²²⁶ compelling the nationals of the hostile party to participate in war against their own country; pillage;²²⁷ using poison or poisoned weapons, prohibited gases, liquids, materials, devices, bullets or any other weapon which causes "superfluous injury or unnecessary suffering"; outrage upon personal dignity;²²⁸ rape, sexual slavery, enforced prostitution, forced pregnancy, enforced

²²⁰ Attacks cause excessive incidental death, injury or damage must be directed against civilians, civilian objects or environment and must result in such an excessive death, injury or damage during or in connection with international armed conflict.

²²¹ People *hors de combat* are combatants who have laid down their weapons, no longer have any means of defence or have surrendered to the belligerent party at discretion.

²²² The perpetrator must use a flag of truce, a flag or insignia or uniform of the enemy army or of the UN or the emblems of the Geneva Conventions as a military plan which eventually results in death or serious injury in the ranks of the adversary army. Such conducts must take place during or in association with international armed conflict.

²²³ Mutilation means disfiguring or disabling someone permanently or removing an organ or appendage from someone. The act must cause death or seriously endanger the physical or mental health of the victim. Additionally, the act must be committed during or because of international armed conflict.

²²⁴ The crime of treacherously killing or injuring is defined as killing or injuring someone or some persons belonging to a hostile army or nation through betraying or the use of confidence or belief of the victim or victims during or in connection with international armed conflict.

²²⁵ The crime of denying quarter is the act of declaring or ordering that there will be no survivor by someone in an effective position to threaten the enemy army during or in association with international armed conflict.

²²⁶ The deprivation may include abolition, suspension or termination of the rights or actions of the nationals of a hostile power in a court of law during or because of international armed conflict.

²²⁷ Pillage is the act of appropriating a certain property from someone and using it "for private or personal use" without the owner's consent and justification of the military necessity during or in connection with international armed conflict (see the Document of Elements of Crimes).

²²⁸ The crime of outrage upon personal dignity is the act of severe humiliation, degrading or serious violation of the dignity of someone or some persons, alive or dead, during or in association with international armed conflict.

sterilisation and any other form of sexual violence;²²⁹ using the presence of civilians²³⁰ or civilian starvation²³¹ as a warfare method; attacking people and objects using the emblems of the Geneva Conventions; and conscripting or enlisting children below the age of 15.

The crimes listed in the ICC Statute as to non-international armed conflict are violations of the common article three that consist of the acts committed against persons who do not take part or no longer have direct participation in hostilities²³² including: murder,²³³ mutilation, cruel treatment²³⁴ and torture; outrages upon personal dignity; taking of hostages; and sentencing and executing people without due process rights²³⁵.

As some of the applicable laws and customs are similar in international armed conflict and non-international armed conflict, violations taking place in non-international armed conflict are also the same with the violations occur in international armed conflict and therefore the Statute just repeats the violations in article eight, paragraph two (e). The violations are: intentionally directing attacks against civilian populations, civilian objects, personnel, installations, material, units or vehicles involved in humanitarian assistance or peacekeeping missions, buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected; pillage; rape and other forms of sexual violence; conscripting or enlisting children who are under 15 years of age; displacing the civilian

²²⁹ The crimes of rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation and any other form of sexual violence are defined as war crimes when they are committed during or because of armed conflict. However, armed conflict in the context of article eight, paragraph two (b), is meant to be of an international character.

²³⁰ Utilising the presence of civilians is taking advantage of the civilian locations to protect military objects or prevent military operations of the enemy army during or in connection with international armed conflict.

²³¹ Civilian starvation is the deprivation of one or more civilians of objects that are indispensable to survival such as food, water and medicine as a method of warfare during or in association with international armed conflict.

²³² According to the Document of Elements of Crimes, the protected people are *hors de combat* fighters, civilians, medical or religious personnel that have no active participation in hostilities.

²³³ The Document of Elements of Crimes interprets murder as killing or causing death in or outside the context of armed conflict.

²³⁴ The definition of ‘cruel treatment’ is similar to ‘inhuman treatment’. However, article eight, paragraph two (c) mentions ‘cruel treatment’ in the context of armed conflict not of an international character.

²³⁵ Sentencing and executing without due process is taking decisions on the fate of one or more persons, protected under international humanitarian law such as civilians, *hors de combat* fighters or any other person who has no active or direct part in hostilities, by the belligerent party without referring to regular constituted courts and guaranteeing due process rights which are regarded indispensable under international law.

population;²³⁶ treacherously killing or wounding adversary combatants; denying quarter; subjecting persons to physical mutilation, medical or scientific experiments not justified by the medical, dental or hospital treatment; destroying or seizing the enemy's property; and employing poison, poisoned weapons, prohibited gases, liquids, materials, devices or bullets.

Historically, the rules of the international humanitarian law included in additional protocol II and applicable in internal conflict have been less recognised and adhered to than those included in additional protocol I and applicable during international conflict. Therefore, the customary international humanitarian law has established criminal responsibility much more than the codified rules on the crimes committed during internal conflicts.²³⁷ However, Protocol II has also become universal and ratified by 168 states of 174 states parties of the Protocol I today.

2.3.1. Elements of war crimes

The elements that distinguish war crimes from ordinary crimes are material and mental elements like genocide and crimes against humanity.

2.3.1.1. Material element

The material elements of war crimes are the above-mentioned individual acts during armed conflict and shall meet the following requirements:

a) The existence of armed conflict

International humanitarian law is applicable only during armed conflict. Armed conflict takes place when there is a recourse to armed force.²³⁸ According to the ICC Statute, the war crimes are committed in the course of either international or non-international armed conflict. It is, therefore, necessary to examine the conflict whether it is really international or internal in character. As the conflicts sometimes may be mixed in nature, the acts must be considered

²³⁶ Displacement is the act of forcing a civilian population to leave its place or expelling civilians from their homes. The displacement must not be justified by the security of civilians or military necessity. Additionally, the crime must be committed during or because of armed conflict not of an international character.

²³⁷ Gerhard Werle, *supra* note 72, pp. 282, 285.

²³⁸ *Prosecutor v. Tadić*, (Case No. IT-94-1), ICTY (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70.

independently based on the conflicts in which they are committed.²³⁹ The requirement of armed conflict does not mean that both sides of the conflict equally fight each other, “invasions that meet no resistance, aerial bombing, an unauthorized border crossing by armed forces” also amount to armed conflicts.²⁴⁰ The conflict is ongoing “until a general conclusion of peace is reached or in the case of internal conflicts, a peaceful settlement is achieved”.²⁴¹ However, war crimes may also be committed after the end of the war, especially regarding the treatment and the repatriation of the prisoners of war.²⁴²

b) The crime must be committed against the protected persons and protected properties.

The occurrence of armed conflict does not constitute war crimes. Rather, the military acts must violate humanitarian rules applicable during armed conflict. The violation of humanitarian law is attacking people and properties that are protected under humanitarian customs and treaty rules. The protected persons are: civilians, combatants who are wounded, sick and shipwrecked and those who have laid down their weapons and prisoners of war. The protected properties include: civilian objects, cultural and scientific properties, hospitals, medical facilities and ambulances. Thus, armed conflict must be accompanied by attacking protected people and properties to establish individual criminal liability under international law. It is worth mentioning that humanitarian law also protects combatants from unnecessary suffering or superfluous harm that is caused by the use of the prohibited weapons.

c) The nexus between the criminal acts and armed conflict

All crimes that are committed during armed conflict are not considered war crimes but only those which have nexus to the conflict.²⁴³ The conflict, whether it is international or internal in character, must play “a substantial part in the perpetrator’s ability to commit it, his decision to commit it, the manner in which it was committed, or the purpose for which it was committed”.²⁴⁴

²³⁹ *Prosecutor v. Tadić*, *supra* note 151, para. 84.

²⁴⁰ Robert Cryer, Hakan Friman *et al*, *An Introduction to International Criminal Law and Procedure*, 2nd ed., (New York *et al*: Cambridge University Press, 2010), p. 279.

²⁴¹ *Prosecutor v. Tadić*, *supra* note 238, para. 70.

²⁴² William A. Schabas, *supra* note 13, p.56.

²⁴³ *Prosecutor v. Tadić*, *supra* note 238, para. 70.

²⁴⁴ *Prosecutor v. Kunarac et al*, *supra* note 171, para 58.

Nexus is broad in definition and it is based on a close relation of the act to the conflict.²⁴⁵ In other words, the act is not necessary to be committed within the conflict but rather because of the conflict. The criterion of a close relation is met, “if...the crimes are committed in the aftermath of the fighting, and until the cessation of combat activities in a certain region, and are committed in furtherance or take advantage of the situation created by the fighting”.²⁴⁶ With regard to the breaches of the rules on means of warfare, the nexus must also exist.²⁴⁷

d) The violation of the applicable treaty or customary rules of international humanitarian law

As we discussed before, international humanitarian law consists of the Geneva Law and the Hague law. The laws are applicable during international and internal armed conflict and thus serious violations of their rules generally constitute war crimes, “International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached or in the case of internal conflicts, a peaceful settlement is achieved”.²⁴⁸

This requirement is based on the violation of specific applicable treaties’ or customary rules depending on the nature of the conflict and crime. In other words, in order for an act to constitute a war crime, it must violate a rule of international humanitarian law whether it is treaty or customary. Additionally, it must contain the individual criminal responsibility of the perpetrator.²⁴⁹

e) The crimes must be serious

The war crimes must be serious to be the subject of criminal prosecution. The seriousness of a crime simply means “it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim”.²⁵⁰ The breaches of technical regulations

²⁴⁵ *Prosecutor v. Tadić*, *supra* note 238, para. 70.

²⁴⁶ *Prosecutor v. Kunarac et al.*, (Case No. IT-96-23-T and IT-96-23/1-T), ICTY (Trial Chamber), Judgment, 22 February 2001, para. 568.

²⁴⁷ Gerhard Werle, *supra* note 72, p. 295.

²⁴⁸ *Prosecutor v. Tadić*, *supra* note 238, para. 70.

²⁴⁹ *Ibid.*, para. 94.

²⁵⁰ *Ibid.*

and other elements included in humanitarian law do not constitute serious crimes.²⁵¹ Therefore, the ICC jurisdiction only covers serious violations of humanitarian rules and customs which entail individual criminal liability.

2.3.1.2. Mental element

The mental element of war crimes, like the other international crimes, is found in article 30 of the ICC Statute and the Document of Elements of Crimes. Accordingly, war crimes must be committed with intent and knowledge. Intent means that the perpetrator commits one of the prescribed acts and the act causes a criminal consequence or the perpetrator is aware that the act occurs in the ordinary course of armed conflict.²⁵² The Statute uses the word of wilfulness to determine the intent of the perpetrator. However, scholars interpret wilfulness broadly and as recklessness in some cases.²⁵³ Thus, intent may include purposeful and reckless acts. Knowledge means the awareness of the perpetrator about the factual circumstances that create armed conflict and perpetrating an act or more within the course of or in association with the conflict.²⁵⁴ However, the perpetrator is neither required to have a legal evaluation regarding the existence of the armed conflict nor is he or she required to have any awareness about the facts that characterise the conflict as internal or international.²⁵⁵

2.4. The crime of aggression

Aggression is the act of unlawful use of military force by a state against another state. Before the 20th century, the use of force was a permissible means for states in pursuing their interests and therefore aggression had many times led to bloody wars among states. Although states had often concluded agreements as to the prohibition of war, war remained as a political tool and was not completely prohibited under international law until the second half of the 20th century.²⁵⁶

²⁵¹ Giulia Guagliardi, *War Crimes in Non International Armed Conflict*, SCRIBD, 16 November 2016, p. 5. Available at: <<https://www.scribd.com/document/331270880/War-crimes-in-non-international-armed-co-docx>> (Accessed: 20 May 2016).

²⁵² The ICC Statute, *supra* note 89, Art. 30 (2) (a), (b).

²⁵³ Gerhard Werle, *supra* note 72, p. 298.

²⁵⁴ The ICC Statute, *supra* note 89, Art. 30 (3).

²⁵⁵ Elements of Crimes, *supra* note 133, p. 14.

²⁵⁶ Gerhard Werle, *supra* note 72, pp. 385-389.

The Hague Conventions of 1899 and 1907 were particularly adopted to settle international disputes through pacific means and regulate the conducts of armed conflict and not to prevent war. However, limitation of the right of states to initiate war was for the first time discussed during the adoption of the conventions.²⁵⁷ After the foundation of the League of Nations in 1919, war became the subject of concern to all the member states of the League. Therefore, the League included the obligation of not resorting to war upon states in the preamble of its Covenant. Moreover, the Covenant mentioned aggression as a legal concept in article 10, as provided:

“The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled”.

But the Covenant was not totally complete and entailed some loopholes. States could resort to war to impose an arbitral award and a unanimous decision of the Council of the League on a dispute. In case the Council of the League could not reach a unanimous decision regarding a dispute submitted to it, states could take action after three months including war.²⁵⁸

The most effective instrument which was ever adopted in respect of a comprehensive prohibition of war was the Kellogg-Briand Pact in 1928.²⁵⁹ The state members under the pact concluded to “condemn recourse to war for the solution of international controversies”²⁶⁰ and no settlement of disputes should be “sought except by pacific means”.²⁶¹ The pact apparently prevented all wars including self-defence and those which were consistent with the League of Nations’ Covenant. Therefore, such a formulation later became the subject of some reservations by states.²⁶² The pact though was generally accepted by many states, it still could not prevent the Second World War.²⁶³

²⁵⁷ *Ibid*, p. 386.

²⁵⁸ Covenant of the League of Nations (adopted 28 June 1919, entered into force 10 January 1920) 108 LNTS188. Arts. 12, 15.

²⁵⁹ Kellogg-Briand Pact (adopted 27 August 1928, entered into force 24 July 1929) 94 LNTS 57.

²⁶⁰ *Ibid*, Art. I.

²⁶¹ *Ibid*, Art. II.

²⁶² Nicolaos Strapatsas, “Aggression”, In William A. Schabas and Nadia Bernaz (eds.), *Routledge Handbook of International Criminal Law*, (London *et al*: Routledge, 2011), p. 155.

²⁶³ Michael J. Glennon, “The Blank-Prose Crime of Aggression”, *The Yale Journal of International Law*, Vol. 35, Issue.1, 2010, p. 74.

Following the establishment of the UN in 1945, the concept of war and aggression were formulated again. The UN Charter prohibited the threat or use of force among its member states,²⁶⁴ even though it recognised the individual and collective right of self-defence.²⁶⁵ The Charter moreover established a strong collective system which empowered the Security Council to take military action against any state or group of states which would jeopardize international peace and security through the commission of aggression.²⁶⁶ However, the UN Charter lacked the definition of aggression and left it to the Security Council.

Some few months after the adoption of the UN Charter, the London agreement was concluded by which the Nuremberg Tribunal was established and crimes against peace as a traditional name of aggression was included in the Tribunal's Charter. The Charter defined crimes against peace as: "namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances or participation in a common plan or conspiracy for the accomplishment of any of the forgoing".²⁶⁷

Eventually, the tribunal found that the Nazi Regime had either waged aggressive war or perpetrated aggressive acts against 11 European countries and convicted a handful of officials for committing crimes against peace.²⁶⁸ The significance of the Nuremberg Charter in respect of aggression was that the individual criminal liability of the crime was established for the first time.²⁶⁹ The Nuremberg article of crimes against peace was later incorporated into the Charter of the Tokyo Tribunal.²⁷⁰ The Tokyo Tribunal similarly found that the Japanese Empire had directed aggressive war against seven countries and convicted many responsible Japanese for perpetrating crimes against peace.²⁷¹

As we discussed before, the ILC, upon the request of the General Assembly, adopted the Nuremberg Principles in 1950. The principles included crimes against peace as punishable crimes under international law.²⁷² Four years later, the commission drafted the Code of Offences against

²⁶⁴ The UN Charter (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16, Art. 2 (4).

²⁶⁵ *Ibid*, Art. 51.

²⁶⁶ *Ibid*, Arts. 39, 42, 43.

²⁶⁷ The Charter of the Nuremberg Tribunal, *supra* note 47, Art. 6 (a).

²⁶⁸ Nicolaos Strapatsas, *supra* note 262, p. 157.

²⁶⁹ Gerhard Werle, *supra* note 72, p. 391.

²⁷⁰ The Charter of the Tokyo Tribunal, *supra* note 54, Art. 5 (a).

²⁷¹ Nicolaos Strapatsas, *supra* note 262, p. 157.

²⁷² "Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal", *supra* note 64, Art. VI (a).

the Peace and Security of Mankind and submitted it to the General Assembly. The code also entailed aggression along with the other crimes.²⁷³ However, it was a difficult task and took four special committees and about 20 years²⁷⁴ until the General Assembly could eventually adopt the resolution No. 3314(XXIX) of 14 December 1974 by which aggression was defined for the first time. The General Assembly defined the act of aggression as: “the use of armed forces by a state against territorial integrity or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations”.²⁷⁵

The resolution determined seven acts which each qualified as an aggressive act.²⁷⁶ However, the list of the acts is not exhaustive and other acts may also be regarded as aggression.²⁷⁷ The definition does not outlaw the war which is lawful under the UN Charter including self-defence and the war of people for their right to self-determination.²⁷⁸ After the adoption of the definition, the General Assembly called the ILC to update the Draft Code of Offences against the Peace and Security of Mankind and the final version of the code was submitted in 1996. The ILC defined aggression as “an individual who, as leader or organizer, actively participates in or orders the planning, preparation, initiation, or waging of aggression committed by a state”.²⁷⁹

Following the adoption of the ICC Statute, aggression was listed among the grave crimes under international law.²⁸⁰ The Statute, however, lacked definition and jurisdictional regime regarding the crime; it was amended at the Kampala Conference in 2010 based on article 123 of the Statute. The amendment included in the Statute a definition and conditions for exercising the Court’s jurisdiction regarding the crime. The conference defined aggression as:

“[T]he planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations”.²⁸¹

²⁷³ “Draft Code of Offences against the Peace and Security of Mankind”, *supra* note 68, Art. 2.

²⁷⁴ Nicolaos Strapatsas, *supra* note 262, p. 158.

²⁷⁵ General Assembly Resolution, 3314 (XXIX), 14 December 1974, Art. 1.

²⁷⁶ *Ibid*, Art. 3.

²⁷⁷ *Ibid*, Art. 4.

²⁷⁸ *Ibid*, Arts. 6, 7.

²⁷⁹ “Draft Code of Crimes against the Peace and Security of Mankind”, *supra* note 87, Art. 16.

²⁸⁰ The ICC Statute, *supra* note 89, Art. 5 (d).

²⁸¹ *Ibid*, Art. 8*bis* (1).

With regard to the act of aggression, the states parties adopted the same definition of the General Assembly and defined aggressive act as: “the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations”.²⁸²

The definition also lists the seven aggressive acts of the General Assembly definition of aggression. The acts are the following: any military invasion or attack, any military occupation or annexation by armed forces of a state against the territory of another state; bombardment or the use of any weapons by a state against the territory of another state; the blockade of the ports and coasts; an attack on the land, sea or air forces, or marine and air fleets by a state against another state; the use of armed forces of a state which are in the territory of another state by an agreement or extension of their presence within the country in violation of the rules of the agreement; the act of allowing the territory of a state to be used by another state that perpetrating an act of aggression against a third state; and sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries to carry out military attacks in the territory of another state.²⁸³

The ICC could only exercise its jurisdiction over the crime when at least 30 member states had accepted or ratified the amendment. However, it was to be decided by the majority of states parties at any time after 1 January 2017.²⁸⁴ On 14 December 2017, the Assembly of States Parties adopted the resolution (ICC-ASP/16/Res.5) by which activated the jurisdiction of the ICC over the crime as of 17 July 2018. Yet, the Court only exercises its jurisdiction on the territories and nationals of the states parties that have accepted or ratified the amendments one year after the deposit of their acceptance or ratification.²⁸⁵

The material element of aggression is the commission of one or more of the aggressive acts. The element requires “a certain degree and intensity” of force²⁸⁶ and the perpetrators must be political or military leaders.²⁸⁷ The mental element of the crime is intent and knowledge of the perpetrators. Intent means that the use of force by a state against sovereignty, territorial integrity or political independence of another state must constitute a manifest violation of the UN Charter.²⁸⁸

²⁸² *Ibid*, Art, 8*bis* (2).

²⁸³ *Ibid*.

²⁸⁴ *Ibid*, Art. 15*bis* (2), (3).

²⁸⁵ *Ibid*, Art. 121 (5).

²⁸⁶ Gerhard Werle, *supra* note 72, p. 396.

²⁸⁷ Antonio Cassese, *supra* note 208, p.159.

²⁸⁸ The ICC Statute, *supra* note 89, Art. 8*bis*.

Knowledge means that the perpetrator must be aware of the aggressive aim of annexation or subjugation or the factual circumstances created the violation.²⁸⁹ However, the perpetrators are not required to make a legal evaluation that the use of force is contrary to or a manifest breach of the UN Charter.²⁹⁰

3. The initiation of investigations and criminal proceedings by the Court

The ICC opens investigations after the situation or the case obviously meets its jurisdictional requirements and initiates criminal proceedings after the situation or the case is referred to it through one of the trigger mechanisms. The jurisdiction of the ICC consists of subject matter, temporal, territorial and personal parameters.²⁹¹ The referral of criminal situations and cases can be made by states, UN Security Council and the Court's Prosecutor.²⁹² However, the ICC cannot deal with any case unless it meets the admissibility criteria.²⁹³ In this section, I will illustrate the ICC jurisdiction with all its legal parameters, the referral mechanisms that activate the Court's jurisdiction and the criteria that make a case admissible before the Court.

3.1. The jurisdiction of the Court

Jurisdiction is generally defined as "the power of the state to regulate its affairs pursuant to its laws".²⁹⁴ However, the definition is more complicated with regards to a non-sovereign entity like the ICC. The ICC Appeals Chamber provided a definition for jurisdiction in the *Thomas Lubanga Dyilo*'s case. Accordingly, jurisdiction is the Court's "competence to deal with a criminal case or matter under the Statute".²⁹⁵

Jurisdiction is related to the legal parameters of the function of the court. The international criminal tribunals connected jurisdiction with the matters of time, place and nature of the crime committed.²⁹⁶ The ICC similarly bases its jurisdiction on the serious nature of the crime, the time

²⁸⁹ Gerhard Werle, *supra* note 72, p. 399.

²⁹⁰ Elements of Crimes, *supra* note 133, p. 43.

²⁹¹ The ICC Statute, *supra* note 89, Arts. 5, 11, 12.

²⁹² *Ibid*, Art. 13.

²⁹³ *Ibid*, Art. 17.

²⁹⁴ Robert Cryer, Hakan Friman *et al*, *supra* note 240, p. 43.

²⁹⁵ *Prosecutor v. Lubanga Dyilo*, (Case No. ICC-01/04-01/06 (OA4), ICC (Appeals Chamber), Judgment, 14 December 2006, para. 24.

²⁹⁶ *Prosecutor v. Tadić*, *supra* note 238, para. 10.

when the crime has occurred, the territory where the crime has been committed and the nationality of the perpetrator.²⁹⁷

The scope of the ICC jurisdiction is narrower than the jurisdiction exercised by the states' national courts due to the complementarity regime but it is more expansive in comparison with the previous *ad hoc* international criminal tribunals. The previous criminal tribunals were either based on the subject-matter jurisdiction,²⁹⁸ territorial jurisdiction²⁹⁹ or personal jurisdiction³⁰⁰ but the ICC jurisdiction covers all these parameters. However, the ICC can only investigate and prosecute the crimes that have been perpetrated after its Statute entered into force.³⁰¹

3.1.1. Subject matter jurisdiction (*Jurisdiction razione materiae*)

The ICC subject matter jurisdiction consists of some specific crimes that attract individual criminal responsibility under international law. The Court's Statute describes the crimes as the most serious crimes of concern to the whole international community in paragraph four of its preamble. The Statute, in article five, refers to the crimes and limits the jurisdiction of the Court to them. The crimes are genocide, crimes against humanity, war crimes and the crime of aggression. The above-mentioned crimes, in other words, constitute the subject matter jurisdiction of the Court and the Court can only prosecute these crimes. The crimes have been discussed in the second section of this chapter.

3.1.2. Temporal jurisdiction (*Jurisdiction razione temporis*)

Temporal jurisdiction was a specific date from which the ICC could exercise its jurisdiction over the concerned crimes which was when its Statute entered into force on 1 July 2002. Thus, the ICC is defined as a prospective court and contrary to the previous *ad hoc*

²⁹⁷ The ICC Statute, *supra* note 89, Arts. 5, 11, 12.

²⁹⁸ The Nuremberg and Tokyo Tribunals were established to try the most serious crimes of the Second World War (See the Charter of the Nuremberg Tribunal, *supra* note 47, Art.1; The Charter of the Tokyo Tribunal, *supra* note 54, Art. 1).

²⁹⁹ The ICTY was designed to prosecute the international crimes committed on the territory of Yugoslavia (See the ICTY Statute, *supra* note 73, Art.1).

³⁰⁰ The ICTR was formed to try the horrific crimes perpetrated on the territory of Rwanda and the Rwandans who were responsible for committing such crimes on the territories of neighbouring countries. Hence, the jurisdiction of the ICTR was based on territorial and personal jurisdictions (See the ICTR Statute, *supra* note 82, Art. 1).

³⁰¹ The ICC Statute, *supra* note 89, Arts. 11, 24.

international criminal tribunals that were established to try the crimes committed before their existence.³⁰²

The Statute refers to temporal jurisdiction in article 11 paragraph one, as states: “[t]he Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute”. The ICC temporal jurisdiction, in other words, is based on the principles of ‘*nullum crimen, nulla poena sine lege*’ which means there is no crime and punishment without a law.³⁰³

The Statute determined the date when it would enter into force in article 126, as provides: “the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations”. The Statute received 60 ratifications from the states that had already signed it on 1 July 2002 and entered into force.

The Statute also refers to temporal jurisdiction in article 11, paragraph two, as states:

“If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3”.

This paragraph illustrates that the ICC may exercise its jurisdiction only over the crimes committed after a state ratifies the Statute unless it lodges a declaration by which it accepts the jurisdiction of the Court on the crimes committed after 1 July 2002 and prior to the ratification of the Statute. In the case of Darfur which was referred by the UN Security Council to the ICC Prosecutor, the ICC only dealt with the events that occurred after 1 July 2002.³⁰⁴

Article 24, paragraph one, on non-retroactivity is also interrelated with article 11 in a way that during the drafting process of the Statute, the combination of these two articles was proposed by the chair of the working group on general principles.³⁰⁵ The article states: “[n]o person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute”.

³⁰² Fernanda Emilia Cota Campos, “The International Criminal Court: The Principle of Complementarity, The Question of Surrender and the Resent Request sent by the ICC to the STF”, *Revista Eletrônica de Direito Internacional*, Vol. 7, 2010, p. 142.

³⁰³ Guillaume Endo, “*Nullum Crimen, Nulla Poena Sine Lege* Principle and the ICTY and ICTR”, *Revue Québécoise De Droit International*, Vol. 15, Issue. 1, 2002, pp. 206-216.

³⁰⁴ The UN Security Council Resolution, (1593), 13 March 2005.

³⁰⁵ William A. Schabas, *supra* note 13, p. 69.

This article, in other words, forbids the ICC from prosecuting a person who has committed a crime prior to 1 July 2002.

Besides their interrelation, non-retroactivity and temporal jurisdiction should be considered differently. Non-retroactivity is a principle which prohibits the ICC from the prosecution of a person responsible for a conduct which was not deemed a crime by existing law when the person committed it but temporal jurisdiction does not allow the Court to prosecute the crimes committed before 1 July 2002.³⁰⁶

It is worth mentioning that temporal jurisdiction does not remove criminal liability regarding the crimes committed before the ICC Statute entered into force but the perpetrators may or should be tried by national or other international or hybrid courts instead.³⁰⁷

3.1.3. Territorial jurisdiction (Jurisdiction *ratione loci*)

One of the most ordinary bases to exercise jurisdiction by the ICC is territorial jurisdiction. Territorial jurisdiction essentially means the power of the ICC to exercise jurisdiction over the international crimes committed on the territories of the states parties or states that have made an *ad hoc* declaration under article 12, paragraph three, regardless of the nationality of the perpetrators. The Statute mentions territorial jurisdiction in article 12 (2) which states: "...the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court...". The ICC may also exercise territorial jurisdiction, when the prohibited crimes appear to have been committed, in respect of any state even if it is not a member party or has not accepted the jurisdiction of the Court, when the situation is referred to it by the UN Security Council under article 13 (b).

Article 12 paragraph two (a) explains what does territorial jurisdiction actually cover and provides: "[t]he State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft". This paragraph defines territory as the whole state land including on board a vessel or aircraft registered in a state party. Some scholars argue that the territory should extend to air space, territorial water and possibly exclusive economic zone.³⁰⁸

³⁰⁶ *Ibid*, p. 70

³⁰⁷ Lynn Gentile, "Understanding the International Criminal Court", In Max Du Plessis (ed.), *African Guide to International Criminal Justice*, (Tshwane: Institute for Security Studies, 2008), p. 101.

³⁰⁸ William A. Schabas, *supra* note 13, p. 69.

It should be mentioned that the nationality of the perpetrator is not taken into consideration as far as territorial jurisdiction is concerned. In other words, the ICC can prosecute anyone who is responsible for committing an international crime on the territory of a state party even if he is a national of a non-state party.

3.1.4. Personal jurisdiction (*Jurisdiction ratione personae*)

Personal jurisdiction is another basis on which the ICC can exercise its criminal power over the crimes mentioned in article five. Accordingly, the ICC can prosecute states parties' nationals who are responsible for committing international crimes regardless of where the crimes are committed whether on the territories of the states parties or non-states parties. However, personal jurisdiction only applies to natural persons.³⁰⁹ The Statute refers to personal jurisdiction in article 12, paragraph two (b) which provides: “[t]he State of which the person accused of the crime is a national”.

Again, under article 12, paragraph three, the ICC can exercise personal jurisdiction over the nationals of non-states parties after the states accept its jurisdiction through a declaration as well as under article 13 (b) when the UN Security Council refers the states' situations or cases to it.

The international crimes that are committed by nationals of states parties on the territories of non-states parties similarly fall within the personal jurisdiction of the Court. Although the ICC cannot prosecute persons who are less than 18 years of age at the time when the crimes are committed,³¹⁰ they can be prosecuted by national courts instead. The Court similarly is unable to exercise its personal jurisdiction over persons that the UN Security Council defers their investigations and prosecutions or excludes them from being investigated or prosecuted.³¹¹

3.2. The trigger mechanisms of the Court

During the Rome negotiations, there were extensive debates regarding the means of triggering the ICC jurisdiction. The question which dominated the debate was who should have

³⁰⁹ The ICC Statute, *supra* note 89, Art. 25 (1).

³¹⁰ *Ibid*, Art. 26.

³¹¹ *Ibid*, Art. 16.

the authority to refer cases before the ICC.³¹² In the original draft Statute of the ILC, only states parties and the Security Council could bring cases before the Court.³¹³ The conference eventually decided on three referral means, referral by states, referral by the Security Council under Chapter VII of the UN Charter and referral by the Prosecutor on his or her own initiative. States and the Security Council may refer situations to the Court and the Prosecutor may refer specific cases. Article 13 of the Statute provides as follows:

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

- (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
- (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
- (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

3.2.1. State referral

Article 13 in paragraph (a), addresses a situation which is referred by a state to the ICC Prosecutor. The process of lodging a complaint, at the office of the ICC Prosecutor, by a state is known as state referral. States parties may refer any situation, in which one or more crimes within the Court's jurisdiction might have been committed, to the Prosecutor in order for him or her to open investigations.³¹⁴ The alleged crimes do not need to be committed on the territories or by nationals of the referring state but on the territories or by nationals of a state party.³¹⁵

The states which are not the member parties to the Statute may also refer specific situations to the Prosecutor but they first must make a declaration by which they accept the jurisdiction of

³¹² William A. Schabas, *supra* note 13, pp. 119-121.

³¹³ "Draft Statute for an International Criminal Court", *supra* note 87, Arts. 22, 23.

³¹⁴ The ICC Statute, *supra* note 89, Art. 14 (1).

³¹⁵ Daniel D Ntanda Nsereko, "Triggering the Jurisdiction of the International Criminal Court", *African Human Rights Law Journal*, Vol. 4, No. 2, 2004, p. 266.

the Court. The referral of these states is limited to the crimes committed on their own territories or by their own nationals.³¹⁶

The referring state must, as far as possible, specify the circumstance and provide the Prosecutor with all the documentation available to it.³¹⁷ The facts and evidence enable the Prosecutor to determine reasonable bases and assert the jurisdiction of the Court over the referring situation. The Prosecutor may not commence investigations unless the procedural requirements are met.

It should be mentioned how the complementarity regime does not allow the Prosecutor to commence investigations with regard to all situations that are referred to him or her by states parties, the Security Council may also defer the investigation of situations based on the fact that the investigation process jeopardizes international peace and security.³¹⁸

So far, some states have referred situations to the ICC regarding one or more crimes, within the jurisdiction of the Court, committed on their territories or by their nationals. Uganda was the first state that referred its situation concerning the Lord's Resistance Army³¹⁹ to the ICC in December 2003 and authorised the Court's Prosecutor to investigate into the crimes committed by the group on its territory.³²⁰ The Democratic Republic of Congo referred a situation in March 2004 with regard to the crimes committed during the Second Congo War and its aftermath³²¹ since 1 July 2002, the date on which the Rome Statute entered into force.³²² The Central African

³¹⁶ *Ibid.*

³¹⁷ The ICC Statute, *supra* note 89, Art. 14 (2).

³¹⁸ *Ibid.*, Art. 16.

³¹⁹ The Lord's Resistance Army is a guerrilla group which was established by the self-proclaimed prophet, Joseph Rao Kony in Uganda in 1987. The group fought the Ugandan military forces to establish a government that would rule the country based on the Ten Commandments of the Bible and its ethnic Acholi nationalism. It is though no longer active in Uganda, it operates in neighbouring countries. The group has been listed as a terrorist group and accused of war crimes and crimes against humanity against Ugandans by the ICC.

³²⁰ *Situation in Uganda*, (Case No. ICC-02/04), ICC (Presidency), Decision assigning the Situation in Uganda to Pre-Trial Chamber II, 5 July 2004.

³²¹ The Second Congo war started in August 1998 mainly between the Democratic Republic of Congo and Rwanda but almost nine African countries intervened in support of or against the two countries besides the participation of about 20 rebel groups in the war. Although peace agreements were officially signed between the conflicting parties in 2002, the war continued for a long time. The war and its aftermath caused the death of 5,4 million people, mainly from the disease and starvation, and the displacement of two million others.

³²² *Situation in the Democratic Republic of Congo*, (Case No. ICC-01/04), ICC (Presidency), Decision assigning the Situation in the Democratic Republic of Congo to Pre-Trial Chamber I, 5 July 2004.

Republic similarly referred a situation³²³ in December 2004, in respect of the grave crimes committed on its territory since 1 July 2002.³²⁴

There are some advantages with regard to the state referral mechanism. Firstly, this mechanism assures the cooperation of the states parties with the ICC Prosecutor. Secondly, the respect for the state sovereignty and political independence is no longer the subject of the Prosecutor's reluctance to commence investigations. Thirdly, the Prosecutor does not need any authorisation from the Pre-Trial Chamber to initiate investigations.³²⁵

3.2.2. Referral by the UN Security Council

At the Rome Conference, the majority of delegates agreed that the UN Security Council should be able to trigger the ICC jurisdiction and refer situations to the Court's Prosecutor.³²⁶ The UN Charter has entrusted the Security Council to maintain international peace and security and the ICC has been designed to prosecute persons responsible for committing serious crimes of concern to the whole international community. Thus, the mandate of the two bodies is interrelated.

The ICC Statute, under article 13, paragraph two, empowers the UN Security Council to refer a situation to the Prosecutor when one or more crimes, listed in article five, appear to have been committed. The Security Council deals with such a situation as a threat to or breach of the peace or an act of aggression and therefore it refers the situation to the ICC as a measure that is to be taken to maintain or restore international peace and security.³²⁷ The authority of the Security Council can also defer situations to the ICC based on the same purpose.

The Security Council's referral is unlike the other referral mechanisms. The ICC Prosecutor does not need the consent of neither the state of the accused's nationality nor the state

³²³ The situation that the Central African Republic referred to the ICC in 2004 was related to the grave crimes which had been committed during the civil war between the government forces and various rebel groups that had united under the Union of Democratic Forces for Unity. The civil war started in 2004 and ended in 2007. According to Human Rights Watch, the war caused the death of hundreds of civilians, the burning of more than 10,000 houses and the internal displacement of 212,000 people.

³²⁴ *Situation in the Central African Republic*, (Case No. ICC-01/05), ICC (The Presidency), Decision assigning the Situation in Central African Republic to Pre-Trial Chamber III, 19 January 2005.

³²⁵ Daniel D Ntanda Nsereko, *supra* note 315, p. 267.

³²⁶ *The UN Security Council and the International Criminal Court: How Should they relate?*, Report of the Twenty-Ninth United Nations Issues Conference, New York, 20-22 February 1998, p. 2. Available at: <<https://www.stanleyfoundation.org/publications/archive/Issues98.pdf>> (Accessed: 10 January 2015).

³²⁷ The UN Charter, *supra* note 264, Art. 39.

on whose territory the crime is committed. The only possibility for the concerned state is just challenging the admissibility of the case under article 19 of the Statute.

After a situation is referred to the ICC by the Security Council, the Prosecutor follows the same procedure as does in the case of state referral. He or she firstly determines whether a reasonable basis exists to commence investigations. Secondly, the Court ensures that the situation falls within its jurisdiction. If the Prosecutor decides to proceed with the situation, the Court may consider any question regarding the jurisdiction. If the Prosecutor rejects the consideration of the situation, the Court may only under specific circumstances, challenge the decision of the Prosecutor.³²⁸

To date, the Security Council has referred two situations to the ICC. The first was the situation of Darfur in 2005³²⁹ with the resolution (1593) on 31 March 2005. The second was the situation of Libya in 2011³³⁰ with the resolution (1970) on 26 February 2011.

The Security Council's trigger mechanism also has some advantages. First, the Security Council refers situations to the ICC regardless of the fact that states are not member parties to the Statute or they have not accepted the jurisdiction of the Court. Second, the states are more obliged and forced to cooperate with the Court.³³¹ Third, if the Security Council was not among the referral mechanisms, the ICC would be a mere criminal body of the states parties.³³²

3.2.3. Referral by the Prosecutor

Besides the referrals by states and the UN Security Council, the Statute, in article 13, paragraph (c), empowers the Prosecutor to commence investigations *proprio motu* on the basis of serious information regarding the commission of one or more crimes, within the jurisdiction of the

³²⁸ The ICC Statute, *supra* note 89, Arts. 18, 19.

³²⁹ The situation of Darfur was a civil war between the Government of Sudan and the rebel groups of the Sudan Liberation Movement and the Justice and Equality Movement in the region of Darfur in Sudan. The war began in 2003 by the military attacks of the rebels against the government forces for oppressing Non-Arab ethnic groups in Darfur. In response, the government forces launched a campaign of ethnic cleansing in the region. The Darfur war caused the death of hundreds of thousands of civilians and the displacement of millions of people to neighbouring countries.

³³⁰ The situation of Libya referred to the civil war that occurred between the government forces loyal to the country's former President, Muammar Qaddafi and various rebel groups that had united and established an interim government, known as National Transitional Council, in February 2011. The Qaddafi forces used heavy weapons including tanks, artillery, warplanes and helicopters against civilians and committed many war crimes and crimes against humanity.

³³¹ *The UN Security Council and the International Criminal Court: How Should they relate?*, *supra* note 326, p. 2.

³³² *Ibid*, p. 3.

Court, on the territory of a state party or by nationals of a state party.³³³ The Prosecutor may receive information from states, UN organs, inter-governmental and non-governmental organisations or any other sources that are deemed appropriate.³³⁴ The Prosecutor may also receive oral and written testimony from victims, relatives of victims and eyewitnesses.³³⁵

The Prosecutor must first analyse the information to find a reasonable basis and later may request for the Pre-Trial Chamber's authorisation to proceed with the case.³³⁶ Yet, before seeking the authorisation of the Pre-Trial Chamber, there are some other preliminary steps that must be taken by the Prosecutor. If the Prosecutor determines that there are sufficient bases to commence investigation, he or she notifies states parties and the states which possibly assert jurisdiction over the crime in question. The process of notification may be done confidentially to protect persons, preserve evidence from destruction and prevent the accused from absconding and may even limit the scope of the available information to the states.³³⁷

If a state, following the notification of the Prosecutor, decides to prosecute the case, it may inform the Prosecutor within one month that it is investigating or has investigated the case within its jurisdiction.³³⁸ If the investigation is conducted genuinely by the state, then the Prosecutor, at the request of the state, may defer to the state's investigation of the case and may ask the state to inform him or her periodically regarding the progress and results of the investigation.³³⁹

The Prosecutor may review its own previous decision regarding the deferral after six months or at any time in case the concerned state appears to be unwilling or unable to carry out investigations or prosecutions genuinely.³⁴⁰ In this case, the Prosecutor may request the authorisation of the Pre-Trial Chamber to initiate investigations. However, the Pre-Trial Chamber may not authorise the Prosecutor unless there are reasonable bases and the case completely falls within the jurisdiction of the Court.³⁴¹

³³³ The ICC Statute, *supra* note 89, Art. 15 (1).

³³⁴ *Ibid*, Art. 15 (2).

³³⁵ *Ibid*.

³³⁶ *Ibid*, Art. 15 (3).

³³⁷ *Ibid*, Art. 18 (1).

³³⁸ *Ibid*, Art. 18 (2).

³³⁹ *Ibid*, Art. 18 (5).

³⁴⁰ *Ibid*, Art. 18 (3).

³⁴¹ *Ibid*, Art. 15 (4).

Both the Prosecutor and the state which asserts jurisdiction over the crime may challenge the decisions of the Pre-Trial Chamber before the Appeals Chamber.³⁴² If the state does not succeed in challenging the decision of the Pre-Trial Chamber, it may later challenge the admissibility of the case under article 19.

If the Prosecutor determines that there is no reasonable basis to proceed with the case, he or she informs those who provided the Prosecutor with the information in this regard. However, this does not mean that the Prosecutor may not receive new facts and evidence regarding the same case in the future again.³⁴³

On 26 November 2009, the Prosecutor for the first time requested authorisation from the Pre-Trial Chamber³⁴⁴ to investigate the 2007-2008 Kenyan crisis³⁴⁵. Before that time, all the investigations had been initiated based on either state referrals or the referral of the UN Security Council. On 23 June 2011, the Prosecutor for the second time submitted a request to the Pre-Trial Chamber for authorisation to proceed with the case of Côte d'Ivoire³⁴⁶ regarding the crimes allegedly committed there.³⁴⁷

The advantage of the Prosecutor referral is that since the Court is a judicial body, it is better to be directed by a legal power than by political entities. The Prosecutor is an impartial and independent person who decides on the investigation and prosecution without interference from

³⁴² *Ibid*, Art. 18 (4).

³⁴³ *Ibid*, Art. 15 (6).

³⁴⁴ *Situation in the Republic of Kenya*, (Case No. ICC-01/09), ICC (Pre-Trial Chamber), Request for Authorization of an Investigation Pursuant to Article 15, 26 November 2009.

³⁴⁵ The 2007-2008 Kenyan Crisis was a political and humanitarian crisis that began on 27 December 2007. The crisis arose as the consequence of an ethnic conflict due to the electoral manipulations of the country's presidential elections. The conflict started following the announcement of the election results and victory of Mwai Kibaki, the Leader of the Party of National Unity, over Raila Odinga, the President of the Orange Democratic Movement. The sides of the conflict were the country's ethnic groups who supported each of the candidates. The conflict resulted in the killing of about 1000 people and the displacement of around 500,000 others. The crisis ended after the two candidates signed an agreement and established a power-sharing government on 28 February 2008.

³⁴⁶ The case of Côte d'Ivoire was the gross humanitarian and human rights violations committed during the country's civil war between 2010 and 2011. In 2010, presidential elections were held between the former President, Laurent Gbagbo and the country's opposition candidate, Alassane Ouattara. The result of the elections was the victory of Ouattara but Gbagbo refused to recognise the results and leave office. The political tensions turned to a violent conflict between the opposition forces and the security forces and militias loyal to Gbagbo. The consequence was the killing of more than 1000 Ivoirians, the forcible displacement of 500,000 others and more than 94,000 other Ivoirians fled from violence to neighbouring countries. The conflict ended on 11 April 2011 after the Ouattara's forces controlled most of the country and captured Gbagbo.

³⁴⁷ *Situation in the Republic of Côte D'Ivoire*, (Case No. ICC-02/11), ICC (Pre-Trial Chamber), Request for Authorization of an Investigation Pursuant to Article 15, 23 June 2011.

any political source. Thus, the initiation of an investigation by the Prosecutor ensures the effectiveness and fairness of the international criminal justice regime compared with the other referral mechanisms.³⁴⁸

3.3. The admissibility criteria before the Court

As we discussed before, the ICC function is based on the principle of complementarity. Complementarity is related to the issue of jurisdiction of the Court, on the one hand, and the issue of admissibility of the cases, on the other hand. In respect of jurisdiction, complementarity makes the ICC the court of the last resort and with regard to admissibility; complementarity enables the ICC to be a competent body to litigate cases.

Jurisdiction deals with the nature of the crime, time of the commission, territory where the crime occurs and nationality of the perpetrator while admissibility is a ground to exercise jurisdiction and initiate the litigation process. The ICC Pre-Trial Chamber has defined admissibility as “the criterion which enables the determination, in respect of a given case, whether it is for a national jurisdiction or for the Court to proceed”.³⁴⁹

Admissibility criteria are set forth in article 17 of the ICC Statute where it is determined that under which circumstances the Court is unable to investigate and prosecute international crimes. The article provides that:

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
 - (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
 - (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

³⁴⁸ *The International Criminal Court Trigger Mechanism and the Need for an Independent Prosecutor*, A position Paper of the Lawyers Committee for Human Rights, July 1997. Available at: <http://www.iccnw.org/documents/LC_HRTriggerMechanism.pdf> (Accessed:15 January 2015).

³⁴⁹ *Prosecutor v. Kony et al*, (Case No.ICC-02/04-01/05), ICC (Pre-Trial Chamber II), Decision on the Admissibility of the Case under Article 19 (1) of the Statute, 10 March 2009. para. 34.

- (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
- (d) The case is not of sufficient gravity to justify further action by the Court.

The criteria generally imply inadmissibility and not admissibility of the case. In other words, if the case does not meet the criteria, the ICC is competent to try it. The article first illustrates the interrelation between the principle of complementarity and admissibility based on paragraph 10 of the preamble and article one which both refer to the fact that the ICC is intent on complementing national courts and not to replace them. The article then mentions four grounds based on which the case is inadmissible before the ICC. The first ground is a situation in which a national court is willing and able to carry out investigations and prosecutions genuinely. The willingness and ability of the national court makes the case inadmissible before the ICC. Here, questions arise with regards to the meaning of the terms of ‘unwillingness’, ‘inability’ and ‘genuine’.

Unwillingness means conducting criminal proceedings by a national court without a real intention to try the accused or conducting a sham trial to shield and bar the accused from subsequent trials based on the rule of double jeopardy.³⁵⁰ Unwillingness also arises when there is an unjustified delay in criminal trials regarding the accused that implies the person is not intended to be brought to justice.³⁵¹ The lack of impartiality, independence and anything else which is inconsistent with the true intent of criminal justice also signifies that the state is unwilling to investigate and prosecute the crime.³⁵² The situation in Yugoslavia in 1990s is a good instance in this regard because Yugoslavia had criminal law, police and a judicial system but lacked willingness to try those who were responsible for the heinous crimes committed there.³⁵³

Inability means that the state is unable to investigate and try the perpetrators due to the lack of judicial system, judiciary staff, procedural law, having amnesty law or immunity and the lack of access to the accused, necessary evidence and testimony.³⁵⁴ The situation of Rwanda after

³⁵⁰ The ICC Statute, *supra* note 89, Art. 17 (2) (a); William A. Schabas, *supra* note 13, p. 86.

³⁵¹ The ICC Statute, *supra* note 89, Art. 17 (2) (b).

³⁵² *Ibid*, Art. 17 (2) (c).

³⁵³ Jo Stigen, *The relationship Between the International Criminal Court and National Jurisdictions*, Vol.34, (Leiden *et al*: Martinus Nijhoff Publishers, 2008), p.1.

³⁵⁴ The ICC Statute, *supra* note 89, Art. 17 (3); ICC-OTP, *Informal Expert Paper: The Principle of Complementarity in Practice*, 2003, p. 15. Available at: <https://www.icc-cpi.int/RelatedRecords/CR2009_02250.PDF> (Accessed: 17 January 2015).

1994 is a good example of the inability of the national judicial system because the national courts of the Tutsi Government³⁵⁵ were willing to conduct criminal trials in respect of the criminals but the crimes that had been committed there, particularly genocide had made the judicial system collapsed and therefore the courts were unable to do so.³⁵⁶

Genuine is defined as “having the supposed character, not sham or feigned”.³⁵⁷ The term has a link to both unwillingness and inability. The national courts are willing or able to investigate and prosecute the crimes but not as adequately as required. The courts, in other words, do not guarantee complete due process rights and fair trials.³⁵⁸

The second ground for inadmissibility of the case before the ICC is a situation in which a national court has conducted the investigation genuinely, without shielding the person from subsequent trials, and decided not to prosecute the person. Thus, the decision of the national court makes the case inadmissible before the ICC. The purpose behind these two grounds is to protect the right of sovereign states and ensure the function of the complementarity regime between national courts and the ICC.³⁵⁹

The third ground is a situation when a national court has already punished the person for the conduct and therefore any investigation and prosecution by the ICC is contrary to the principle of *ne bis in idem* which is embodied in article 20 of the Statute. The principle ensures that no person shall be tried again by another court for the same conduct. Therefore, this situation also makes the case inadmissible before the ICC. The purpose behind this ground is to protect the rights of the accused.³⁶⁰

The fourth ground of the admissibility is the gravity threshold of the case. Gravity threshold is related to the scale, nature, manner and impact of the crimes. The crimes, in other

³⁵⁵ Tutsi is an ethnic group which resides in Rwanda, Burundi and some other African countries. The group constituted a minority in Rwanda but it ruled the country until 1959 when the majority Hutu group overthrew the Tutsi monarchy. In 1994, the Tutsi armed group of the Rwandan Patriotic Front launched intensive military operations against the Hutu Government military forces in response to the group’s genocidal campaign against the Tutsis. The Tutsi group eventually captured all of Rwanda and established a new government.

³⁵⁶ Jo Stigen, *supra* note 353, p. 1.

³⁵⁷ ICC-OTP, *supra* note 354, p. 8.

³⁵⁸ *Ibid.*

³⁵⁹ Markus Benzing, “The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity”, In A. von Bogdandy and R. Wolfrum (eds.), *Max Planck Yearbook of United Nations Law*, Vol. 7, 2003, p. 601.

³⁶⁰ Lorraine Finlay, “Does the International Criminal Court Protect against Double Jeopardy: An Analysis of Article 20 of the Rome Statute”, *UC Davis Law Review*, Vol. 15, No. 2, 2009, p. 226.

words, must be committed on a large scale, with a serious nature, in a systematic manner and has impact beyond the victims and their family members.³⁶¹ The purpose behind this ground is to ensure that the Court only deals with the most serious crimes and not ordinary crimes.³⁶²

The issue of admissibility is examined by the ICC on its own motion even if the parties do not raise it. The admissibility of the case can be challenged by the following:

- (a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58;
- (b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or
- (c) A State from which acceptance of jurisdiction is required under article 12.³⁶³

In brief, admissibility is a ground which allows the ICC to exercise jurisdiction over an international crime and start the litigation process.

³⁶¹ *Situation on Registered Vessels of Comoros, Greece and Cambodia, Article 53(1) Report*, The ICC (The Office of the Prosecutor), 6 November 2014, para 136, 138, 139, 140, 141.

³⁶² Human Rights Watch, "A Summary of the Case Law of the International Criminal Court", 2007, pp. 2-3. Available at: <<https://www.hrw.org/legacy/backgrounder/ij/icc0307/icc0307web.pdf>> (Accessed: 18 January 2016).

³⁶³ The ICC Statute, *supra* note 89, Art. 19 (1), (2).

CHAPTER 2

THE ISLAMIC STATE IN IRAQ AND SYRIA

1. The historical background, territory, ideology, Caliphate structure, size of military forces and previous criminal records of the group

ISIS is a *Sunni*³⁶⁴ extremist Islamic group that has been listed as a terrorist organisation. The group was established in Jordan in 2000 but its members moved to Iraq in 2002 and adopted the name of ISIS in 2013.³⁶⁵ ISIS started intensive military campaigns in Iraq and Syria between 2013 and 2014 and captured large territories from the two countries that extended from the Syrian northern governorate of Aleppo to the Iraqi north-eastern governorate of Diyala. The group established an ‘Islamic state’³⁶⁶ and administratively structured it based on its understanding of the traditional Islamic ‘*Khilāfah*’ (Caliphate)³⁶⁷. The ISIS military forces consisted of tens of thousands of fighters in 2014. Although the majority of the group’s militants were Iraqi and Syrian

³⁶⁴ *Sunni* is one of the two major sects of Islam today. The name of *Sunni* comes from the Islamic phrase of ‘*Ahl al-Sunnah*’ (the people of tradition). The *Sunnis* believe that they follow the traditions of the Prophet Muhammad in practicing Islam. The difference between the *Sunnis* and *Salafis* is that all the *Salafis* are *Sunnis* but not all the *Sunnis* are *Salafis*. The *Salafis* are the radical *Sunnis*. There is, however, not a clear statistic as to the community members of the *Sunni* denomination; they constitute the great majority of the world Muslims. The statistics estimate the figure from 85 to 90%. The Islamic countries with *Sunni* majority are Egypt, Saudi Arabia, Jordan, Turkey, etc. The *Sunnis* are a minority in Iraq. They mostly reside in the central, northern and western governorates of the country such as Nienewa, Salahaddin, Diyala and Anbar.

³⁶⁵ Ahmed S. Hashim, *From Al-Qaeda Affiliate to the Rise of the Islamic Caliphate: The Evolution of the Islamic State of Iraq and Syria (ISIS)*, Policy Report, S. Rajaratnam School of International Studies (Nanyang Technological University), December 2014, pp. 2-11. Available at: <http://www.rsis.edu.sg/wp-content/uploads/2014/12/PR141212_The_Evolution_of_ISIS.pdf> (Accessed: 21 January 2016).

³⁶⁶ Muhammad al-Adnani, “This is the Promise of Allah”, In *Sunni Rebels declare New ‘Islamic Caliphate’*, *Al-Jazeera*, (30 June 2014). Available at: <<http://www.aljazeera.com/news/middleeast/2014/06/isil-declares-new-islamic-caliphate-201462917326669749.html>> (Accessed: 21 January 2016).

³⁶⁷ Islamic *Khilāfah* (Caliphate) is a traditional name to the Islamic state that has historically been ruled by the successors of the Prophet Muhammad. The Prophet Muhammad established an Islamic state through the unification of the Arab and non-Arab tribes of the Arabian Peninsula in the second decade of the 7th century. After he died in 632, he was succeeded by his close companions. The reign of the companions of the Prophet is known as the *al-Khilāfah al-Rāshidūn* (*al-Rāshidūn* Caliphate) (632-661). Besides the *al-Rāshidūn* Caliphate, three other major Caliphates have existed in the history of Islam. The Caliphates were the Umayyad Caliphate (661–750), the Abbasid Caliphate (750–1258-1517) and the Ottoman Caliphate (1517-1924).

nationals, thousands of foreign fighters also joined its ranks from all around the world.³⁶⁸ ISIS has a long criminal background in Iraq. The group's predecessors were accused of killing and wounding thousands of Iraqis between 2003 and 2013.³⁶⁹ This section clarifies the ISIS historical background, territory, ideology, Caliphate structure, size of military forces and criminal records before the adoption of its current name.

1.1. The historical background of ISIS

ISIS originated from a group that was known as '*Jama'at al-Tawhid wal- Jihād*' (the Organisation of Monotheism and *Jihād*) (JTJ).³⁷⁰ The JTJ was a *jihādi* group that was founded in 2000 by the Jordanian extremist, Abu Musab al-Zarqawi. The goal of the group was initially to topple the Jordanian monarch and establish an Islamic state to rule by *Sharī'ah* law³⁷¹. However, the group failed in the realisation of its goal in Jordan and moved to Iraq in 2002.³⁷² In August 2003, the group carried out some attacks against the UN headquarters, the Jordanian Embassy, the

³⁶⁸ The UN Security Council Monitoring Team, "Letter dated 27 October 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", Report No. 16, S/2014/770, (29 October 2014), p. 13. *UN Security Council Subsidiary Organs*. Available at: <<https://www.un.org/sc/suborg/en/sanctions/1267/monitoring-team/reports>> (Accessed: 21 January 2016).

³⁶⁹ "Monthly Civilian Deaths from Violence 2003 Onwards", *Iraqi Body Count*. Available at: <<https://www.iraqbodycount.org/database/>> (Accessed: 12 February 2016).

³⁷⁰ See Rebaz R. Khdir, "The International State Responsibility for the Acts of Terrorist Groups: The Case of Turkey and Islamic State in Iraq And Syria", *Russian Journal of Legal Studies*, Vol. 4, Issue.1, pp. 32-43; Aaron Y. Zelin, *The War between ISIS and al-Qaeda for Supremacy of the Global Jihadist Movement*, Research Notes No. 20, The Washington Institute for Near East Policy, June 2014, pp.1-2. Available at: <https://www.academia.edu/7481446/The_War_Between_ISIS_and_alQaeda_for_Supremacy_of_the_Global_Jihadist_Movement> (Accessed: 21 January 2016).

³⁷¹ *Sharī'ah* law is a set of rules and principles that govern all the aspects of the life of Muslims. The primary sources of the law are the Quran and *Hadith* (traditions of the Prophet Muhammad). The law also relies on the secondary sources in case of a lack or ambiguity in the primary references. The secondary sources are '*ijmā'*' (scholarly consensus), '*qiyās*' (analogical reason) and some other sources. The law is essentially based on the Islamic legal thought which is known as '*lm al-fiqh*' (science of knowledge). The science of knowledge is divided into '*lm al-usul*' (science of the roots) and '*lm al-fru*' (science of the branches). The science of the roots deals with the philosophy and methodology of the rules and the science of the branches deals with the illustration of the rules. The science of the branches is divided into two parts which are '*ibādat*' (worship) and '*mu'āmalāt*' (transaction). The worship part consists of the rules that deal with the worship of Muslims such as praying, fasting, etc. The transaction part encompasses the rules that deal with commercial and other transactions such as marriage, trade, etc. *Sharī'ah* law is applied and enforced differently from a school to another school, from a country to another country and from an armed group to another one.

³⁷² Ahmed S. Hashim, *supra* note 365, pp. 2-4.

headquarters of the Italian paramilitary police, Iraqi police stations and recruitment centres, foreign contractors, humanitarian workers and *Shiite* civilians³⁷³ and institutions that consequently killed hundreds of people.³⁷⁴

A year after the US-led Coalition invaded Iraq,³⁷⁵ in October 2004, Abu Mushab al-Zarqawi gave ‘*bay‘a*’ (religious allegiance)³⁷⁶ to the leader of al-Qaeda³⁷⁷, Osama bin Laden³⁷⁸ and changed the group’s name to ‘*Tanzīm Qā'idat al-Jihād fī Bilād al-Rāfidayn*’ (the Organisation of *Jihād*’s Base in Mesopotamia), known as al-Qaeda in Iraq (AQI).³⁷⁹ The AQI also targeted the *Shiite* civilians, the Iraqi military and security forces and the US-led Coalition troops.³⁸⁰ The goals of the AQI were expelling the Coalition forces, establishing an Islamic state in Iraq, spreading

³⁷³ *Shiites* are the second major denomination of Islam today. They form a minority and are believed to be between 10 to 15% of the world Muslims. The *Shiites* adhere to the traditions of the Prophet and the guidance of ‘*Ahal-al- Bait*’ (the family of the Prophet) through the lineage of the Prophet’s daughter, Fatimat al-Zahra’ and his cousin and son in law, Ali ibn Abi Talib. The *Shiites* are, in other words, Muslims who follow Ali ibn Abi Talib and his decedents as the only true successors of the Prophet and sources of religious guidance after the Quran and the Prophetic traditions. The *Shiites* though share the Islamic fundamental principles and practices with the *Sunnis*; they differ in the interpretation, jurisprudence, law, rituals and governance. The Islamic countries in which the *Shiites* are a majority today, are Iran, Iraq, Bahrain, etc. The *Shiites* came to power in Iraq after the fall of the Saddam’s Regime in 2003.

³⁷⁴ Gary Gambill, “Abu Musab al-Zarqawi: A Biographical Sketch”, *Terrorism Monitor*, Vol. II, Issue. 24, 2004. Available at: <<https://jamestown.org/program/abu-musab-al-zarqawi-a-biographical-sketch-2/>> (Accessed: 21 January 2016).

³⁷⁵ The US-led Coalition invaded Iraq on 1 May 2003. The Coalition consisted of around 40 countries and was led by the US. The main reason of the invasion was disarming Iraq from the mass destruction weapons. The invasion ended the 35-year rule of Saddam Hussein and established a power sharing government between the country’s ethnic and religious groups. However, the *Shiites* constituted the majority in the new government and began persecuting the *Sunni* minority in revenge of the oppression of the *Sunni* Saddam’s Regime against them.

³⁷⁶ *Bay‘ah* is the traditional declaration of allegiance from Muslims to Islamic rulers. Muslims practiced *bay‘a* first through the recognition of the prophethood of Muhammad and his religion. The practice after the death of the Prophet, formed the election process of rulers. *Bay‘a* included two implications for Muslims. The implications were the recognition of the legitimacy of rulers and the expression of the will to adhere to their orders.

³⁷⁷ Al-Qaeda is a radical international Islamic organisation which was established by Osama bin Laden and several other *Jihādis* in Afghanistan in 1988. The organisation practices the ideology of *Jihādi-Salafism*. The main goal of the organisation now is the overthrowing of secular governments in and expel foreign forces from Muslim countries to establish a united Islamic state. Al-Qaeda has offshoots in many Muslim countries today to realise the goal of the organisation. Al-Qaeda in Iraq was one of the early offshoots of the organisation.

³⁷⁸ Osama bin Laden was a *Jihādi-Salafi* militant who was born in Riyadh, Saudi Arabia on 10 March 1957. In 1979, he joined the Pakistani *Jihādis* to fight against the Soviet forces in Afghanistan. Bin Laden recruited and trained thousands of *Jihādis* during the 1980s and established al-Qaeda in Afghanistan in 1988. He was the founder of the modern *Jihādi* warfare and the most popular *Jihādi* leader. He was killed by the US Special Forces in Abbottabad, Pakistan on 2 May 2011.

³⁷⁹ Ahmed S. Hashim, *supra* note 365, p. 5.

³⁸⁰ “Fast Facts: Abu Musab al-Zarqawi”, *Fox News*, (8 June 2006). Available at: <<http://www.foxnews.com/story/2006/06/08/fast-facts-abu-musab-al-zarqawi.html>> (Accessed: 22 January 2016).

jihād to the Iraqi secular neighbouring countries and fighting Israel.³⁸¹ In general, the AQI presented “a more cohesive ideological vision” compared with the JTJ.³⁸²

On 15 January 2006, the AQI established a council with five other *Sunni jihādi* groups. The council was known as ‘*Majlis Shūrā al-Mujāhidīn*’ (the Council of the Consultation of *Jihādists*) (MSM).³⁸³ The formation of the council was an attempt to unify all the other insurgent groups and make the AQI the resistant leader in Iraq.³⁸⁴ On 7 June 2006, a US military raid killed Abu Mushab al-Zarqawi and the Egyptian *jihādi*, Abu Ayub al-Masri (Abu Hamza al-Muhajir) succeeded him.³⁸⁵ Following the death of al-Zarqawi, the MSM launched strategic steps to force the Coalition forces to retreat from Iraq and establish an Islamic State.

The MSM formed ‘*Hilf al-Mutayibīn*’ (the Coalition of the Scented Ones) (HM) by joining with four other *Sunni* extremist groups and six *Sunni* leaders of their loyal tribes on 12 October 2006.³⁸⁶ The coalition was founded by an announcement which stated:

“We call on all the *mujahideen* (holy fighters), scholars, tribal elders and dignitaries to join hands with their brothers in the coalition to implement God’s *sharia*, expel the occupiers and bring victory to God’s oppressed people... We swear by God to do our utmost to free our prisoners and to rid Sunnis from the oppression of the rejectionists (*Shiite* Muslims) and the crusader occupiers...”³⁸⁷

Three days later, the coalition declared the establishment of the Islamic State of Iraq (ISI) which comprised seven *Sunni* governorates and some parts of the two others.³⁸⁸ The coalition

³⁸¹ Brian Whitaker, “Revealed: Al-Qaida Plan to seize Control of Iraq”, *The Guardian*, (13 October 2005). Available at: <<http://www.theguardian.com/world/2005/oct/13/alqaida.iraq>> (Accessed: 22 January 2016).

³⁸² Ahmed S. Hashim, *supra* note 365, p. 5.

³⁸³ Cole Bunzel, *From Paper State to Caliphate: The Ideology of the Islamic State*, Analysis Paper No. 19, Centre for Middle East Policy at BROOKINGS, March 2015, p. 16. Available at: <<https://www.brookings.edu/wp-content/uploads/2016/06/The-ideology-of-the-Islamic-State.pdf>> (Accessed: 23 January 2016).

³⁸⁴ Ahmed S. Hashim, *supra* note 365, p. 6.

³⁸⁵ *Ibid.*

³⁸⁶ “*Jihad* Groups in Iraq take an Oath of Allegiance”, *The Middle East Media Research Institute*, (17 October 2006). Available at: <<http://www.memri.org/report/en/0/0/0/0/0/1910.htm>> (Accessed: 23 January 2016).

³⁸⁷ Bill Roggio, “Al Qaeda’s Grand Coalition in Anbar”, *FDD’s Long War Journal*, (12 October 2006). Available at: <http://www.longwarjournal.org/archives/2006/10/alqaedas_grand_coali.php> (Accessed: 23 January 2016).

³⁸⁸ Cole Bunzel, *supra* note 383, p. 17.

identified Abu Omar al-Baghdadi as its ‘Amīr’ (Amir)³⁸⁹ and Abu Hamza al-Muhajir as the Minister of war.³⁹⁰

After the formation of the ISI, Abu Hamza al-Muhajir stated that the holy fighters have “reached the end of a stage of jihad (*Jihād*) and the start of a new one, in which we lay the first cornerstone of the Islamic Caliphate project and revive the glory of religion”.³⁹¹ But the ISI did not have enough resources or personnel to run the state, the death of al-Zarqawi did not lessen their brutality and many *Sunni* tribes and insurgent groups were recruited by the Iraqi and US military forces to attack the group.³⁹² As a result, the ISI lost its military bases in the western city of Anbar between July and October 2007³⁹³ and fell into a huge crisis by 2008.³⁹⁴ In 2009, the ISI lost many foreign fighters and only some Iraqi *Sunni* fighters remained to combat for the group.³⁹⁵ In April 2010, the high-level ISI leaders, Abu Hamza al-Muhajir and Abu Omar al-Baghdadi were eventually killed in a joint Iraqi and US raid.³⁹⁶

After the killing of Abu Omar al-Baghdadi, the *Shari‘ah* Council of the ISI appointed Ibrahim ibn Awwad ibn Ibrahim ibn Ali ibn Muhammad al-Badri (Abu Bakr al-Baghdadi) as the new leader of the group in May 2010.³⁹⁷ According to the media, Abu Bakr al-Baghdadi was born

³⁸⁹ Amīr (Amir) is a traditional Islamic title which means leader or commander of Muslims. Based on some narrations, the title was firstly given to Ali ibn Abi Talib by the Prophet Muhammad for his brave role in battles. Some others have reported that the second Caliph, Umar ibn al-Khattab also used Amir along with his official title of Caliph. Although this title signified more of a military leadership or authority during the reign of the Prophet and *al-Rāshidūn* Caliphs, it was also given to members of the ruling families and other people who had been entrusted with administrative and financial posts in later periods. The modern Islamic groups use the title, in the traditional sense, to the military authority of their leaders.

³⁹⁰ “Islamic State of Iraq announces Establishment of the Cabinet of its First Islamic Administration in Video issued through al-Furqan Foundation”, *SITE Institute*, (19 April 2007). Available at: <<https://web.archive.org/web/20070928061225/http://www.siteinstitute.org/bin/articles.cgi?ID=publications274907&Category=publications&Subcategory=0>> (Accessed: 23 January 2016).

³⁹¹ Ahmed S. Hashim, *supra* note 365, p. 6.

³⁹² *Ibid.*

³⁹³ Thomas E. Ricks and Karen DeYoung, “Al-Qaeda in Iraq reported Crippled”, *The Washington Post*. (15 October 2007). Available at: <<http://www.washingtonpost.com/wp-dyn/content/article/2007/10/14/AR2007101401245.html>> (Accessed: 24 January 2016).

³⁹⁴ Andrew Phillips, “How al Qaeda lost Iraq”, *Australian Journal of International Affairs*, Vol. 63, No. 1, 2009, p. 65.

³⁹⁵ “Al Qaeda in Iraq becoming Less Foreign-U.S.General”, *Reuters*, (18 November 2009). Available at: <<http://www.reuters.com/article/idUSLI176502>> (Accessed: 24 January 2016).

³⁹⁶ Ahmed S. Hashim, *supra* note 365, p. 7.

³⁹⁷ Cole Bunzel, *supra* note 383, p. 23.

in the central Iraqi city of Samarra in 1971.³⁹⁸ He holds a doctorate in Islamic jurisprudence from the Islamic University in Baghdad.³⁹⁹ Abu Bakr al-Baghdadi belongs to the tribe of al-Bu Badri⁴⁰⁰ and is believed to be a descendant of the Prophet Muhammad.⁴⁰¹ He founded a *jihādi* group in 2003 and later united with the other insurgent groups which together established the ISI in 2006.⁴⁰² Following the establishment of the ISI, Abu Bakr al-Baghdadi became the supervisor of the group's *Sharī'ah* Council and a member of the group's Consultative Council.⁴⁰³ In 2003, the US military forces arrested him but he was released after a year as he was not a JTJ member and a famous *jihādi* at that time.⁴⁰⁴

In 2011, the ISI was still attacking civilians and military forces in Iraq, although the group was no more a potential threat to the state.⁴⁰⁵ In July 2012, Abu Bakr al-Baghdadi released an online statement and claimed that the group would start a new phase with a plan named 'breaking the walls'. He further claimed that the group would return to its strongholds and the priority in their struggle would be given to free Muslim prisoners. He asked the local *Sunni* people and the world Muslims to join them. He also referred to the Syrian uprising against Bashar al-Assad's

³⁹⁸ "Profile: Abu Bakr al-Baghdadi", *BBC News*, (15 May 2015). Available at: <<http://www.bbc.com/news/world-middle-east-27801676>> (Accessed: 24 January 2016).

³⁹⁹ Cole Bunzel, *supra* note 383, p. 23.

⁴⁰⁰ The tribe of al-Bu Badri is a famous tribe in Iraq that mainly reside in Samarra, Diyala and Baghdad. The name of the tribe derived from the name of its founder, Badri ibn Armoush who was born in Medina, Saudi Arabia but moved to Samarra, Iraq in the beginning of the 18th century. The members of the tribe are estimated to be 25,000 and most of them are *Sunni* Muslims. The tribe is believed to have descended from the Prophet Muhammad.

⁴⁰¹ Muhammad al-Adnani, *supra* note 366.

⁴⁰² Cole Bunzel, *supra* note 383, p. 23.

⁴⁰³ Aaron Y. Zelin, "Abu Bakr al-Baghdadi: Islamic State's driving Force", *BBC World News*, (31 July 2014). Available at: <<http://www.bbc.com/news/world-middle-east-28560449>> (Accessed: 25 January 2016).

⁴⁰⁴ *Ibid.*

⁴⁰⁵ Jessica D. Lewis, *Al Qaeda in Iraq Resurgent*, (Washington: Institute for the Study of War, 2013), p. 9.

Regime⁴⁰⁶ and asked the *Sunni jihādists* to remove the injustice by force and not to accept any rule except *Sharī‘ah* law.⁴⁰⁷

In June 2012, the violence started to escalate again and many attacks were carried out against the *Shiite* civilians in the religious holy places as well as against the Iraqi security forces.⁴⁰⁸ In July 2013, the monthly fatalities in Iraq, for the first time since 2008, exceeded 1,000 while it was only 300-400 from September 2010 to December 2011.⁴⁰⁹ The factors that contributed to the resurgence and re-emergence of the ISI were the restructuring of the organisation, the development of military capacity, the rise of conflict between the Iraqi Government and *Sunni* population and the growing of the Syrian conflict.⁴¹⁰

After the Syrian civil war began in January 2011, the ISI, under the leadership of Abu Bakr al-Baghdadi, started to send Iraqi and Syrian group militants to Syria to establish an affiliated group there.⁴¹¹ The militants founded the group in January 2012 and named Jabhat al-Nusra (al-Nusra). Al-Nusra appointed the Syrian *jihādi*, Abu Muhammad al-Julani as its leader. The group became a very crucial fighting force in Syria in a short while.⁴¹² It could recruit many young *jihādists* from all around the world and receive popular support from many Syrians who were against the Bashar al-Assad’s Regime soon after its establishment.⁴¹³

On 8 April 2013, Abu Bakr al-Baghdadi officially announced the merger of the ISI and al-Nusra and adopted the name of ISIS. In his announcement, al-Baghdadi stated that al-Nusra was established and financed by the ISI and its leader is an ISI member. Hence, the names of the ISI

⁴⁰⁶ Bashar al-Assad’s Regime is a reference to the Syrian regime that is presided by Bashar al-Assad. Bashar al-Assad came to power of the state presidency in 2000 after his father, Hafz al-Assad died in office. In January 2011, mass protests took place against his rule that demanded democratic reforms but the authorities responded to the protests with military violence. The government violence consequently led to a civil uprising. Following the uprising, clashes and confrontations escalated between the civilians and government forces that caused the death and injury of thousands of people. The clashes eventually turned to a civil war between the majority *Shiite*-government forces and *Sunni* groups that were established to topple the al-Assad’s Regime.

⁴⁰⁷ Maamoun Youssef, “Al-Qaida: We’re returning to Old Iraqi Strongholds”, *U.S. News and World Report*, (22 July 2012). Available at: <<https://www.usnews.com/news/world/articles/2012/07/22/al-qaida-were-returning-to-old-iraq-strongholds>> (Accessed: 25 January 2016).

⁴⁰⁸ Jessica D. Lewis, *supra* note 405, p. 10.

⁴⁰⁹ *Ibid*, pp. 7- 9.

⁴¹⁰ Ahmed S. Hashim, *supra* note 365, p. 7.

⁴¹¹ Cole Bunzel, *supra* note 383, p. 24.

⁴¹² Ahmed S. Hashim, *supra* note 365, p. 11.

⁴¹³ Cole Bunzel, *supra* note 383, p. 24.

and al-Nusra were no more to be used.⁴¹⁴ In response to Abu Bakr al-Baghdadi, Abu Muhammad al-Julani issued a statement on the next day and rejected the merger of the two groups. He stated that al-Nusra would change neither its flag nor its behaviour. He finally reaffirmed the allegiance to the leader of al-Qaeda, Ayman al-Zawahiri.⁴¹⁵

In June 2013, Ayman al-Zawahiri ruled against the merger of the two groups in a letter and asked the groups' leaders to operate as separate groups and struggle in separate territories.⁴¹⁶ Soon after receiving the letter, Abu Bakr al-Baghdadi rejected the Ayman al-Zawahiri's rule in an audio message. He stated: "I chose the order of God over the orders that contravenes Allah..." and claimed that "the Islamic State of Iraq and the Levant will remain, as long as we have a vein pumping or an eye blinking. It remains and we will not compromise nor give it up".⁴¹⁷ In October 2013, Ayman al-Zawahiri ordered the abolishment of ISIS and charged al-Nusra with the responsibility of *jihād* solely in Syria⁴¹⁸ but Abu Bakr al-Baghdadi rejected the order again based on his jurisprudential, practical and logical grounds.⁴¹⁹ In February 2014, al-Qaeda eventually announced that ISIS is not its branch anymore, cut all the organisational relations with it and disavowed the group's actions.⁴²⁰

⁴¹⁴ "ISI Confirms that Jabhat al-Nusra is Its Extension in Syria, declares 'Islamic State of Iraq And Al-Sham' As New Name of Merged Group", *The Middle East Media Research Institute*, (8 April 2013). Available at: <<http://www.memri.org/report/en/0/0/0/0/0/7119.htm>> (Accessed: 26 January 2016); Cole Bunzel, *supra* note 383, p. 25; Ahmed S. Hashim, *supra* note 365, p. 11.

⁴¹⁵ "Al-Nusra Commits to al-Qaida, deny Iraq Branch 'Merger'", *Naharnet*, (10 April 2013). Available at: <<http://www.naharnet.com/stories/en/78961-al-nusra-commits-to-al-qaida-deny-iraq-branch-merger/>> (Accessed: 26 January 2016). Ayman al-Zawahiri is one of the most famous *Jihādīs* today. He was born in Cairo, Egypt on 19 June 1951. He went to Afghanistan during the Soviet invasion and worked with the *Jihādīs* as a doctor. Al-Zawahiri led a radical group which was known as 'Egyptian Islamic *Jihād*' during the 1990s. He joined al-Qaeda in 1998 and formed a global Islamic front for *jihād*. Al-Zawahiri was the right-hand man of the previous leader of al-Qaeda, Usama bin Laden. After the killing of Bin Laden in 2011, al-Zawahiri succeeded him and has been leading the organisation since 16 June 2011.

⁴¹⁶ Basma Atassi, "Qaeda Chief annuls Syrian-Iraqi *Jihad* Merger", *Al Jazeera*, (9 June 2013). Available at: <<http://www.aljazeera.com/news/middleeast/2013/06/2013699425657882.html>> (Accessed: 26 January 2016).

⁴¹⁷ Basma Atassi, "Iraqi al-Qaeda Chief rejects Zawahiri Orders", *Al Jazeera*, (15 June 2013). Available at: <<http://www.aljazeera.com/news/middleeast/2013/06/2013615172217827810.html>> (Accessed: 27 January 2016).

⁴¹⁸ "Zawahiri disbands Main Qaeda Faction in Syria", *The Daily Star*, (8 November 2013). Available at: <<http://daily.star.com.lb/News/Middle-East/2013/Nov-08/237219-zawahiri-disbands-main-qaeda-faction-in-syria-jazeera.ashx>> (Accessed: 27 January 2016).

⁴¹⁹ Ahmed S. Hashim, *supra* note 365, p. 12.

⁴²⁰ Liz Sly "Al-Qaeda disavows any Ties with Radical Islamist ISIS Group in Syria, Iraq", *The Washington Post*, (3 February 2014). Available at: <https://www.washingtonpost.com/world/middle_east/al-qaeda-disavows-any-ties-with-radical-islamist-isis-group-in-syria-iraq/2014/02/03/2c9afc3a-8cef-11e3-98ab-fe5228217bd1_story.html> (Accessed: 27 January 2016).

Despite the fact that the ISI and al-Nusra shared some similarities such as in ideology, origins and aims, there were also some pragmatic and strategical differences between them. Al-Nusra was in cooperation with the other *jihādi* groups in Syria to overthrow the Bashar al-Assad's Regime and establish an Islamic state⁴²¹ but the ISI attacked both the regime military forces and opponent groups to capture their territories and establish its own state.⁴²² Al-Nusra had many foreign fighters in its ranks but it was still considered a Syrian group. In contrast, the ISI had recruited many Syrian fighters but it was still described as a foreign invader.⁴²³

Besides the rejection of the merger by the al-Nusra's leader, ISIS reached Syria in mid-2014. In June 2014, an al-Nusra branch, in the Syrian south-eastern town of al-Bukamal near the western Iraqi borders, pledged loyalty to ISIS and the town fell to ISIS.⁴²⁴ The group seized the entire northern city of Mosul in the Ninewa governorate and many strategic cities in the western Anbar governorate in Iraq by the end of the same month. Moreover, the group was advancing to the central and northern parts of Iraq.⁴²⁵ These military successes eventually led the ISIS leadership to declare its Caliphate.

On 29 June 2014, the ISIS spokesman, Abu Muhammad al-Adnani announced the Islamic Caliphate and referred to Abu Bakr al-Baghdadi as the '*Khalīfah*' (Caliph)⁴²⁶. The spokesman proclaimed that the Islamic State was, hereinafter, the reference of the group and Abu Bakr al-Baghdadi was the Caliph for all Muslims. He asked the local and world Muslims to give their religious allegiance to and support the Caliph.⁴²⁷

The Caliphate announcement was a significant step for modern *jihādism*. It had local and global impact upon Muslims. Many Iraqi *Sunni* tribal leaders pledged loyalty to Abu Bakr al-

⁴²¹ Ahmed S. Hashim, *supra* note 365, p. 11.

⁴²² Sarah Birke, "How al-Qaeda changed the Syrian War", *The New York Review of Books*, (27 December 2013). Available at: <<http://www.nybooks.com/daily/2013/12/27/how-al-qaeda-changed-syrian-war/>> (Accessed: 27 January 2016).

⁴²³ Ahmed S. Hashim, *supra* note 365, pp. 11- 12.

⁴²⁴ "Syrian Branch of al-Qaeda vows Loyalty to Iraq's ISIS", *France 24*, (25 June 2014). Available at: <<http://www.france24.com/en/20140625-syrian-branch-qaeda-vows-loyalty-iraq-isis-kamal/>> (Accessed: 27 January 2016).

⁴²⁵ Ahmed S. Hashim, *supra* note 365, p. 13.

⁴²⁶ *Khalīfah* (Caliph) is the traditional Islamic title to the head of the state who rules over all Muslims according to *Sharī'ah* law. The word of Caliph means successor. Thus, Caliph is someone who succeeds the Prophet Muhammad to govern the Islamic state. The title of Caliph was firstly given to the first four successors of the Prophet Muhammad who were known as the *al-Rāshidūn* Caliphs. The Caliphs were Abu Bakr al-Siddiq, Umar ibn al-Khattab, Uthman ibn al-Affan and Ali ibn Abi Talib. The title has been attached to the head of the Islamic Caliphates throughout the history of Islam.

⁴²⁷ Muhammad al-Adnani, *supra* note 366.

Baghdadi. They surrendered their towns and villages to the group and their militias became the ISIS fighters.⁴²⁸ More than 6,300 Syrian fighters, who some had previously fought for the Free Syrian Army (FSA),⁴²⁹ joined the group.⁴³⁰ Many *jihādi* groups from all around the world, also pledged their allegiance to Abu Bakr al-Baghdadi and began operating as ISIS offshoots in their countries. The groups were Jundallah (Soldiers of God) and Tehrik-i-Taliban Pakistan (Taliban Movement of Pakistan) in Pakistan, Anṣar Bayt al-Maqdis (Supporters of the Holy House (Jerusalem)) in Egypt, Jund al-Khilafah fi Ard al-Jazair (Soldiers of the Caliphate on the Land of Algeria) in Algeria, Majlis Shura Shabaab al-Islam (Islamic Youth Consultative Council) in Libya, Jama'at Abu Sayyaf (the Group of Abu Sayyaf) in the Philippines, Ansar Beit al-Maqdis in Palestine, Liwa' Ahrar al-Sunna Ba'albek (Free *Sunnis* of Ba'albek Brigade) in Lebanon, Jama'at Anshorut Tauhid (Partisans of the Oneness of God) in Indonesia, Abna' al-Da'wah al-Tawhid wa al-Jihād fi al-Ardan (Sons of the Call for Tawhid and *Jihād* in Jordan).⁴³¹

The ISIS Caliphate was, on the other hand, heavily criticized by many local and world Muslims. Some scholars defined ISIS as a criminal organisation.⁴³² Some described the group's members as deviators and prohibited supporting the group.⁴³³ Some believed that the group's Caliphate was 'null and void' as it had been established on threat and aggression.⁴³⁴ Some argued that the group's Caliph was not legitimate because the title of Caliph must be given by the majority

⁴²⁸ Ahmed S. Hashim, *supra* note 365, p. 14.

⁴²⁹ The Free Syrian Army (FSA) is an umbrella organisation of various *Sunni* armed groups that fight the Regime of Bashar al-Assad. The organisation was established by some *Sunnis* who defected from the Syrian regime army after the army committed some massacres against the *Sunnis* in 2011. The organisation was the only representative of the *Sunni* Syrians in the beginning of the Syrian civil war and supported by the international community in its fighting to overthrow the al-Assad's Regime but the appearance of the radical Islamic groups discouraged the international community from supporting *Sunni* Syrians and consequently the strength of the FSA declined.

⁴³⁰ "The Syrian Opposition: Who is Who? And Who is with/against Whom?", *Chronicle*, (1 December 2014). Available at: <<https://chronicle.fanack.com/syria/history-past-to-present/the-syrian-opposition-who-is-who-and-who-is-with-against-whom/>> (Accessed: 28 January 2016).

⁴³¹ Katie Zavadski, "ISIS now has a Network of Military Affiliates in 11 Countries around the World", *New York*, (23 November, 2014). Available at: <<http://nymag.com/daily/intelligencer/2014/11/isis-now-has-military-allies-in-11-countries.html>> (Accessed: 28 January 2016).

⁴³² Abdullāh Ladadwi, "Conclusive Scholarly Opinion on ISIS", *Islam 21C.com*, (10 July 2014). Available at: <<https://www.islam21c.com/politics/conclusive-scholarly-opinions-on-isis/>> (Accessed: 26 January 2016).

⁴³³ Muhamad Al-Yaqoubi, *Refuting ISIS*, (Sacred Knowledge, 2015), p. xi.

⁴³⁴ "Prominent Scholars declare ISIS Caliphate 'Null and Void'", *Middle East Monitor*, (5 July 2014). Available at: <<https://www.middleeastmonitor.com/20140705-prominent-scholars-declare-isis-caliphate-null-and-void/>> (Accessed: 28 January 2016).

of Muslims and not a group.⁴³⁵ Some asked people to defend themselves and their places and fight the group.⁴³⁶

In response to the ISIS Caliphate declaration and the operation of the other *jihādi* groups, the UN Security Council adopted the resolution No. (2178) on 24 September 2014. The resolution disassociated the acts of such groups from religion and considered them terrorist acts. It called upon states to combat the groups in all forms and by all means to restore peace and security to the region and world.

1.2. The geography of the ISIS Caliphate

After the declaration of the ISI by the HM, the Coalition claimed that the ISI was comprised of seven Iraqi governorates which were central Baghdad, western Anbar, eastern Diyala, northern Kirkuk, central Salahaddin, north-western Ninewa and parts of Babil and Wasit in the south-east of the country.⁴³⁷ However, the governorates were still administratively governed by the Iraqi Government. The ISI, in other words, was just a secret state inside Iraq until April 2014. Following the adoption of the name of ISIS and the expansion of the group into Syria, the group extended its authority over nine Syrian governorates which were north-eastern al-Hasakah, south-eastern Der al-Zawr, northern al-Raqqah, western Homs, northern Aleppo, north-eastern Idlib, western Hama, south-western Damascus and north-western Ladhikiyah.⁴³⁸ It is worth mentioning that some governorates were not entirely under the control of ISIS. The Iraqi and Syrian armed forces or the other insurgent groups also existed in some parts of these governorates. When ISIS established its Caliphate in June 2014, it started to govern from Aleppo in Syria to

⁴³⁵ Patrick Goodenough, “Self-Appointed ‘Caliph’ makes First Public Appearance”, *CNS News.com*, (6 July 2014). Available at: <<http://cnsnews.com/news/article/patrick-goodenough/self-appointed-caliph-makes-first-public-appearance>> (Accessed: 28 January 2016).

⁴³⁶ Martin Chulov, “Iraqi’s Highest Shia Cleric adds to pressure on Maliki over the ISIS Insurgency”, *The Guardian*, (20 June 2014). Available at: <<https://www.theguardian.com/world/2014/jun/20/iraq-highest-shia-cleric-maliki-isis-insurgency-ayatollah-sistani>> (Accessed: 28 January 2016).

⁴³⁷ Cole Bunzel, *supra* note 383, p. 17.

⁴³⁸ Bill Roggio, “ISIS’ ‘Southern Division’ praises Foreign Suicide Bombers”, *FDD’s Long War Journal*, (9 April 2014). Available at: <<http://www.longwarjournal.org/archives/2014/04/isis-southern-division.php#>> (Accessed: 1 February 2016).

Diyala in Iraq.⁴³⁹ The size of the ISIS territory was estimated to be between 12,000 and 35,000 square miles in August 2014.⁴⁴⁰

ISIS established its own administrative system which corresponded to neither the Iraqi nor the Syrian administrative divisions. It was rather based on the group's interpretation to the traditional Islamic administration. The ISIS Caliphate administration was comprised of nine *wilāyats*⁴⁴¹ in Iraq and nine others in Syria. The *wilāyats* were “‘Anbar; Baghdad; Diyala; Fallujah; al Janoub (the South); Kirkuk; Nineveh, and Salahuddin in Iraq; and Aleppo; al Badiyah (Homs); al Baraka (Hasaka); Damascus; Hama; Idlib; al Khair (Deir ez Zour); al Raqqa, and al Sahel (Latakia) in Syria, with an additional province, al Furat (the Euphrates)...’”.⁴⁴² The *wilāyats* of al-Frat consisted of the Iraqi western city of al-Qaim with its surrounding villages and the Syrian south-eastern city of al-Bukamal.⁴⁴³ The purpose of such administrative constitution was breaking the border lines that had been drawn by the agreement of Sykes-Picot⁴⁴⁴ in 1916.

In 2014, the ISIS leader declared a strategic territorial claim. Accordingly, the territory of the Caliphate would expand to Algeria, Libya, Egypt, Yemen and Saudi Arabia.⁴⁴⁵ In 2015, ISIS declared some other territories that would also be covered by the ISIS Caliphate including

⁴³⁹ Marcy Kreiter, “ISIS declares Caliphate from Diyala Province, Iraq, to Aleppo, Syria; changes Name to Islamic State”, *International Business Times*, (29 June 2014). Available at: <<http://www.ibtimes.com/isis-declares-caliphate-diyala-province-iraq-aleppo-syria-changes-name-islamic-state-1614854>> (Accessed: 1 February 2016).

⁴⁴⁰ Kathy Gilsinan, “The Many Ways to Map the Islamic ‘State’”, *The Atlantic*, (27 August 2014). Available at: <<http://www.theatlantic.com/international/archive/2014/08/the-many-ways-to-map-the-islamic-state/379196/>> (Accessed: 1 February 2016).

⁴⁴¹ ‘*Wilāyat*’ is the traditional Islamic system for administrative governance. The Islamic Caliphates used the word of *wilāyat* for their administrative divisions. The word of *wilāyat* signifies modern words of province, governorate or states within the US.

⁴⁴² Richard Barrett, *The Islamic State*, The Soufan Group, 2014, p. 33.

⁴⁴³ *ISIS: Portrait of a Jihadi Terrorist Organization*, The Meir Amit Intelligence and Terrorism Information Centre, November 2014, p. 120. Available at: <<http://www.terrorism-info.org.il/Data/articles/Art20733/E10114163836165.pdf>> (Accessed: 2 February 2016).

⁴⁴⁴ The Sykes Picot Agreement was a secret agreement concluded between Great Britain and France on 16 May 1916. The agreement included a territorial division of the lands of the Ottoman Empire in the Middle East between the two countries. Accordingly, Great Britain would acquire control over the coastal strip between the Jourdan River and Mediterranean Sea, south and centre of Iraq and the ports of Akko and Haifa in the north of Israel. France would take control of the south-eastern parts of Turkey, Syria, north of Iraq and Lebanon. The agreement eventually divided the Middle East between the two countries and drew new border lines for the region.

⁴⁴⁵ “Islamic State Leader urges Attacks in Saudi Arabia”, *Reuters*, (13 November 2014). Available at: <<http://www.reuters.com/article/us-mideast-crisis-baghdadi-idUSKCN0IX1Y120141113>> (Accessed: 2 February 2016).

Afghanistan-Pakistan border, Northern Nigeria, North Caucasus and Tunisia.⁴⁴⁶The announcements implied the global ambitions and plans of ISIS to occupy other countries and further expand the territory of its Caliphate. The Map below shows the territory of the ISIS Caliphate in May 2015.⁴⁴⁷

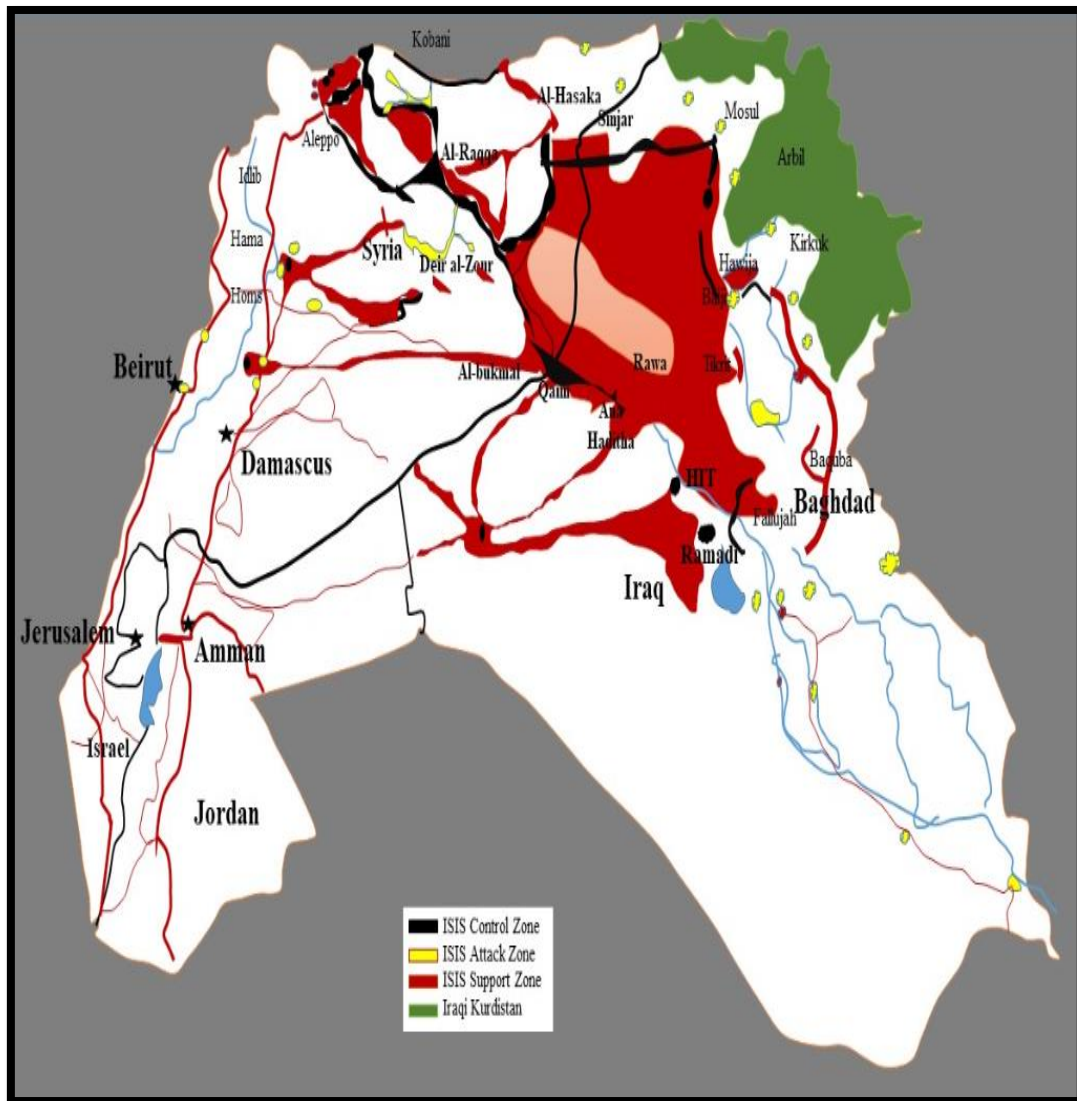


Figure 1: The map of the ISIS Caliphate

⁴⁴⁶ “Islamic State moves in on al-Qaeda Turf”, *BBC News*, (25 June 2015), Available at: <<http://www.bbc.com/news/world-31064300>> (Accessed: 2 February 2016).

⁴⁴⁷ The map was drawn based on “ISIS Sanctuary: May 20, 2015” published by ‘Institute for the Study of War’. The original map is available at: <<http://www.understandingwar.org/backgrounder/isis-sanctuary-map-may-20-2015>> (Accessed: 13 February 2016).

The below map shows the global ambition of the group for further expansion of their Caliphate territory.⁴⁴⁸



Figure 2: The global map of ISIS

⁴⁴⁸ The map was drawn based on the original map of ISIS. The author received the ISIS map from the following source: John Hall, "The ISIS Map of the World: Militants outline Chilling Five-Year Plan for Global Domination as they declare Formation of Caliphate-and change their Name to the Islamic State", *Mail Online*, (30 June 2014). Available at: <<http://www.dailymail.co.uk/news/article-2674736/ISIS-militants-declare-formation-caliphate-Syria-Iraq-demand-Muslims-world-swear-allegiance.html>> (Accessed: 13 February 2016).

1.3. The Ideology of ISIS

The ideology of ISIS is based on a specific Islamic doctrine which is known as ‘*Jihādi-Salafism*’.

The word of ‘*Salaf*’ linguistically means predecessor. It is Islamically used as a reference to the companions of the Prophet Muhammad. Thus, ‘*Salafi*’ is someone who follows the pure teachings and practices of the Prophet.⁴⁴⁹ ‘*Salafism*’ is a theological doctrine that claims to purify the faith and practice of Muslims from ‘*bid‘a*’ (innovation) and ‘*kufri*’ (denial of truth). The doctrine calls for ‘*tawhīd*’ (the oneness of God), elimination of idolatry, strict adherence to the Quran and *Hadith* (traditions of the prophet) and the unity of all Muslims.⁴⁵⁰ *Salafism* is based on a saying of the prophet Muhammad which states “[t]he best of you (people) are my century (generation), then those who will come after them, and then those who will come after the second century (generation)...”.⁴⁵¹

Salafism basically rejects democracy, all human ideologies, reasons, logic and desire on the basis of the absolute truth of God’s commandment but it, like the other religious doctrines, entails moderate and radical divisions. They all may hold the same approach with regard to the Islamic creed but they are different in the interpretation and application of the rules. Some *Salafis* never interfere with politics while some others attempt to establish Islamic states. Some of the Islamic state seekers believe in civil means while some others resort to war to achieve their goal.

The Arabic word of ‘*jihād*’ linguistically means struggling or striving. The linguistic meaning of the word reflects in its theological understanding. Muslim scholars refer to the concept of *jihād* as the exertion of a Muslim in the cause of God.⁴⁵² Hence, a Muslim who struggles in God’s cause is a ‘*Mujahid*’ (*Jihādi*). The concept of *jihād* is too comprehensive and therefore it

⁴⁴⁹ Zulkarnain Haron and Nurdin Hussin, “A Study of the Salafi Jihadist Doctrine and the Interpretation of *Jihad* by *Al Jama'ah Al Islamiyah*”, *Kemanusiaan: Asian Journal of Humanities*, Vol. 20, No. 2, 2013, p. 19.

⁴⁵⁰ Ahmad Moussalli, *Wahhabism, Salafism and Islamism: Who is the Enemy?*, (Beirut et al: Conflict Forum, 2009), pp. 12-23.

⁴⁵¹ *Sahih al-Bukhari*, Translated by: Muhammad Muhsin Khan, Vol. 8, (Riyadh: Darussalam, 1997), *Hadith* No. 6695, p. 364.

⁴⁵² Majid Khadduri, *War and Peace in the Law of Islam*, (London: The Johns Hopkins Press, 1955), p. 55; Joel Hayward, “Warfare in the Qur’an”, In HRH Prince Ghazi bin Muhammad and Ibrahim Kalin et al, (eds.), *War and Peace in Islam; the Uses and Abuses of Jihad*, 1st ed., (Jordan: The Royal Islamic Strategic Studies Centre, 2013) pp. 51-52; Rebaz Khdir, “Jihad between Islamic Jurisprudence and Practice of the Islamic State in Iraq and Syria”, *European Scientific Journal*, Vol.14, No. 5, 2018, p. 44.

has been the subject of scholarly controversies since the beginning of Islam. Scholars generally divide *jihād* into two main categories. The categories are spiritual and combative *jihād*. Accordingly, spiritual *jihād* is inner struggle against evil desires, commanding and encouraging good, prohibiting and discouraging wrong and material development in the society while Combative *jihād* is fighting physically for merely God's sake.⁴⁵³

The nature of *jihād*ic combat is contentious from time to time and from a scholar to a scholar. Classical Islamic scholars believed that combative *jihād* encompassed defensive and offensive battles. They defined defensive *jihād* as battling for defending Muslims and their land from aggression while referred to offensive *jihād* as a battle to spread Islam and expand the Caliphate territory.⁴⁵⁴ Classical Islamic scholars have been of the opinion that offensive *jihād* is waged to establish a just social and political system based on the divine will and not for personal interests or national hegemony.⁴⁵⁵ Hence, offensive *jihād* is neither aggression nor compulsion to enter Islam but rather the only way to convey the universal divine message of Islam to the world.

Modern Islamic scholars, however, do not reject the classical categorisation of *jihād*; they interpret the concept according to the political and cosmopolitan realities of modern life. They believe that the offensive category of combative *jihād* is not necessary today as there are many alternative peaceful mechanisms available to realise the purpose of this *jihād*ic category. In other words, the consensus modern scholarly interpretation to combative *jihād* is only the use of force in self-defence. Scholars refer to the meetings, debates and letters, to neighbouring and world kings, of the prophet Muhammad to justify their opinion.⁴⁵⁶ Based on this, they require Muslims

⁴⁵³ Ibn Qaiyyim Al-Jawazyyah, *Provisions for the Hereafter (Mukhtasar Zad Al- Ma'ad)*, (Riyadh: Darussalam, 2003), pp. 249-250; Ibn Rushd, *Al-Muqaddimat Al Mumahhidat*, Vol. 1, (Cairo: A.H, 1325), p. 259; Rebaz Khdir, *supra* note 452, p. 45.

⁴⁵⁴ Ahmad Moussalli, *supra* note 450, pp. 17-18; Mawardi, *Al-Ahkam al-Sultaniyya*, (Bonn: Enger, 1853), p. 89; Majid Khadduri, *supra* note 452, pp. 56-61; Rebaz Khdir, *supra* note 452, p. 45; Rudolph Peters, *Jihad in Classical and Modern Islam*, (Princeton: Markus Wiener Publishers, 1996), pp. 3-17.

⁴⁵⁵ Rebaz Khdir, *supra* note 452, p. 45; Michael G. Knapp, "The Concept and Practice of Jihad in Islam", *Parameters*, Vol. 33, Issue 1, 2003, pp. 83- 84.

⁴⁵⁶ Three years after the Prophet Muhammad received his first revelations in Mecca in 613, he started announcing his religion and inviting his pagan Quraysh tribe to Islam through meetings and debates. He never resorted to violence to impose his religion on the tribe members. Rather, it was the leaders of the tribe who boycotted, attacked and abused him for insisting on his beliefs and preaching. After the Prophet's uncle, Abu Talib died in 619, the prophet was without protection and the heads of Quraysh convened and plotted to assassinate him. The prophet fled to Medina in 622 and returned ten years later. In 628, the Prophet wrote letters to the kings and governors of the neighbouring and world countries to inform them about his message. These practices show that the Prophet did not intent to conquer

to resort to democratic and civil means in the conveyance of their message and refrain from violence.⁴⁵⁷ In contrast, some *Salafī* scholars are of the opinion of offensive *jihād*.⁴⁵⁸ The scholars are unpopular among Muslims and think differently regarding the way of the waging, target and goal of offensive *jihād*.

The *Jihādi-Salafī* doctrine, in other words, calls on Muslims to revive the teachings and practices of the prophet Muhammad and establish Islamic states through *jihād*. Although ISIS ideologically belongs to the doctrine of *Jihād-Salafism*, its practice is much more violent than the other *Jihādi-Salafī* groups. Hence, the group is described as a ‘*Wahhabi* group’ by some scholars and experts.⁴⁵⁹ ‘*Wahhabism*’ is a sub-doctrine of *Salafism*. The name has been derived from the name of Muhammad ibn Abd al-Wahhab who adopted the doctrine in the 18th century.⁴⁶⁰ The *Wahhabis* are essentially *Salafis* but they are much more intolerant. They believe to be the only true Muslims. Thus, *Wahhabism* contributes to give birth to ‘*Takfirism*’ which shortly means declaring people, even Muslims who do not follow the group, unbelievers.⁴⁶¹ ISIS can also be defined as a ‘*takfiri* group’. *Wahhabism* is only practiced in Saudi Arabia. The doctrine is not only a religious view these days but also a political tool to guarantee *Sunni* domination in the region and world. Therefore, it is promoted by the state among Muslims through various means.

1.4. The structure of the ISIS Caliphate

ISIS was not only a group or an organisation structurally after June 2014 but also a state with all the necessary elements of governance. However, the international community rejected the legitimacy of the group’s state. ISIS governed its Caliphate by a very complicated structure which

land but rather the mind and heart of people with his religion, even though war was often the only means to realise his aim.

⁴⁵⁷ Muhammad Said R. al-Buti, *Jihad fil Islam*, (Beirut: Dar al-Fikr, 1995), pp. 44- 92; Shaykh Muhammad Hisham Kabbani, “What is Jihad? A Scholar’s Prospective”, *History of Islam*. Available at: <<https://historyofislam.com/contents/the-modern-age/what-is-jihad-a-scholars-perspectiv/>> (Accessed: 6 February 2016).

⁴⁵⁸ Sayyid Qutb, *Milestones*, (Indianapolis: American Trust Publication, 1990), pp. 43, 50, 103, 104; Abdullah Azzam, *The Defense of the Muslim Lands*, Translated by: Brothers in Ribbat. Available at: <<https://islamfuture.files.wordpress.com/2009/11/defence-of-the-muslim-lands.pdf>> (Accessed: 7 February 2016).

⁴⁵⁹ Alastair Crooke, “You can’t understand ISIS If you don’t know the History of Wahhabism in Saudi Arabia”, *The World Post*, (27 October 2014). Available at: <http://www.huffingtonpost.com/alastair-crooke/isis-wahhabism-saudi-arabia_b_5717157.html> (Accessed: 7 February 2016).

⁴⁶⁰ Daniel Ungureanu, “Wahhabism, Salafism and the Expansion of Islamic Fundamentalist Ideology”, *Journal of the Seminar of Discursive Logic, Argumentation Theory and Rhetoric*, Vol. 9, Issue 2, 2011, p. 140.

⁴⁶¹ Ahmad Moussalli, *supra* note 450, p. 6.

was probably designed based on the group's understanding of the traditional Islamic state governance.⁴⁶² The ISIS Caliphate was headed by the self-proclaimed Caliph, Abu Bakr al-Baghdadi. The Caliph had two deputies who were both believed to be Iraqi ethnic Turkmen⁴⁶³ and former members of the *Ba'th* Party⁴⁶⁴. The deputies were Fadel Ahmed Abdullah al-Hiyali (Abu Muslim al-Turkmani)⁴⁶⁵ and Abdulrahman Mustafa al-Qaduli (Abu Ali al-Anbari)⁴⁶⁶. Abu Muslim was the second man in the ISIS state and responsible for the Caliphate supervision in Iraq. Abu Ali was in charge of the coordination of the Caliphate affairs in Syria.⁴⁶⁷

The Caliphate administration consisted of some councils. Each of the councils was responsible for overseeing a specific area of the group's Caliphate. The Consultative Council was apparently the highest body of the Caliphate. It was headed by the Iraqi national, Abu Arkan al-Amiri and consisted of nine to eleven members. The council supervised the Caliphate affairs in general.⁴⁶⁸ The *Sharī'ah* Council was directly supervised by the Caliph and consisted of six members. ISIS designed this council to ensure that the whole Caliphate administration process was based on the ISIS interpretation of *Sharī'ah* law.⁴⁶⁹ The Military Council was another Caliphate council that was headed by the ex-member of the *Ba'th* party, Waleed Jassem al-Alwani (Abu Ahmad al-Alawani) and consisted of three members. The main duty of the council was defending

⁴⁶² This argument is a very significant element of the study but the relevant available information is not very accurate and reliable. Therefore, the author will briefly discuss the ISIS Caliphate structure and councils and only mention the most notable and responsible members of the group.

⁴⁶³ Turkmen is the third largest ethnic group in Iraq that primarily reside in the central and northern governorates of the country (See *infra* 2.1.6.3. of this chapter).

⁴⁶⁴ The Iraqi *Ba'th* Party was an Arab-nationalistic, socialistic and anti-imperialistic political party that was established by the Iraqi politician, Fuad al-Rikabi in 1952 as a branch of the Arab Socialist *Ba'th* Party which had been founded by the Syrian politicians, Michel Aflaq, Salah al-Din al-Bitar and Zaki al-Arsuzi in Syria in 1947. The Iraqi *Ba'th* Party seized power in 1968 through a military coup led by the Party's leader, Ahmed Hassan al-Bakr. Following the coup, al-Bakr became the president of the country and established a *Ba'thist* regime. In 1979, al-Bakr was forced to leave state presidency by the leading member of his party, Saddam Hussein. Hussein became president and remained in office until the US-led Coalition overthrew him in 2003. The Party was later banned by the newly established government.

⁴⁶⁵ Abu Muslim al-Turkmani was officially announced dead in October 2015 by the ISIS spokesman, Abu Muhammad al-Adnani. He was then succeeded by Ni'ma Abd Nayef al-Jabouri (Abu Fatima al-Jaheishi). The nationality and further responsibility of Jaheishi remains unknown.

⁴⁶⁶ The killing of Abu Ali al-Anbari has been reported several times but the claim remains unverified.

⁴⁶⁷ Richard Barrett, *supra* note 442, p. 28.

⁴⁶⁸ Jacques Neriah, "The Structure of the Islamic State (ISIS)", *Jerusalem Centre for Public Affairs*, (8 September 2014). Available at: <<http://jcpa.org/structure-of-the-islamic-state/>> (Accessed: 8 February 2016).

⁴⁶⁹ Richard Barrett, *supra* note 442, p. 30.

the territory of the Caliphate and expanding it.⁴⁷⁰ Judicial Authority was also a body in the ISIS Caliphate that was responsible for solving judicial issues, preaching and recruitment. Abu Mohammad al-Ani was the head of this council.⁴⁷¹ There is no reliable information as to the nationality of al-Ani and his further authority. Security and Intelligent Council was one of the most significant Caliphate councils that was headed by Abu Ali al-Anbari. The council was in charge of the security and safety of the Caliph and collection of intelligence.⁴⁷² The Provincial Council dealt with the civilian administration in all Caliphate *wilāyats*. The head of the council was Abu Muslim al-Turkmani.⁴⁷³ Muafaq Mustafa Muhammad al-Khamoush headed the Financial Council and was responsible for financing the Caliphate.⁴⁷⁴ The nationality of al-Khamoush and his further responsibility is unknown. The last Caliphate council was Medea Council. The council was headed by the Syrian-born and national of Saudi Arabia, Abu al-Athir Amr al-Absi⁴⁷⁵. The council was in charge of making effective and extensive propaganda for ISIS.⁴⁷⁶

ISIS appointed some other people and entrusted specific responsibilities to them. Abu Yahya al-Iraqi was a special bodyguard. Abdulla Ahmad al-Mashhadani was the coordinator of the guest houses and suicide bombers. Abu Muhammad al-Adnani was the Caliphate spokesman.⁴⁷⁷ Khairy Abd Mahmoud al-Taey coordinated feast deployment. Bashar Isma'il al-Hamadani was the prisoner's supervisor. Abdul Rahman al-Afari (Abu Saja') was the coordinator of the affairs of women and orphans. Fares Reif al-Naima (Abu Shema) was the supervisor of the logistics and supplies.⁴⁷⁸ Shawkat Hazem al-Farhat (Abu Bakr Kadr) was the general manager. Abd al-Wahid Khutmayer Ahmad was the security general. Mohammad Hamid al-Duleimi (Abu

⁴⁷⁰ Jacques Neria, *supra* note 468.

⁴⁷¹ *Ibid.*

⁴⁷² Richard Barrett, *supra* note 442, p. 31.

⁴⁷³ *Ibid.*, p. 33.

⁴⁷⁴ *Ibid.*, p. 23; Nick Thompson and Atika Shubert, "The Anatomy of ISIS: How the 'Islamic State' is run, From Oil to Beheadings", *CNN*, (14 January 2015). Available at: <<http://edition.cnn.com/2014/09/18/world/meast/isis-syria-iraq-hierarchy/index.html>> (Accessed: 9 February 2016).

⁴⁷⁵ In March 2016, media reported the death of Abu Athir Amr al-Absi in Aleppo. However, his death has not been confirmed and the name of his successor is not known.

⁴⁷⁶ Richard Barrett, *supra* note 442, p. 23.

⁴⁷⁷ ISIS announced the killing of Abu Muhammad al-Adnani in Aleppo, Syria on 30 August 2016. The group later appointed Abu Hasan al-Muhajir as the al-Adnani's successor. Abu Hassan is believed to be a foreign fighter but his nationality is not known.

⁴⁷⁸ Richard Barrett, *supra* note 442, p. 23.

Hajar al-Assafi) was the general coordinator between the *wilāyats*.⁴⁷⁹ The above-mentioned people were all believed to be Iraqis and Syrians.

ISIS also charged some other people with governing the *wilāyats* of its Caliphate. The governors were all important people within the ISIS Caliphate administration. Some of the governors were known and were: Wissam ‘Abd Zeid al-Zubeidi (Abu Nabil), the governor of Salahaddin; Nemr ‘Abd al-Latif Jubouri (Abu Fatma), the governor of Kirkuk; Ahmad Mohsen Khalal al-Jihaishi (Aka Abu Fatma) the governor of South and Middle Euphrates; ‘Adnan Latif Hamid al-Suweidawi (Abu ‘Abd al-Salem aka Abu Mohammad al-Sweidawi), the governor of al-Anbar; and Ahmad ‘Abd al-Kader al-Jazza (Abu Maysara), the governor of Baghdad.⁴⁸⁰ The governors were all believed to be Iraqis and Syrians as well.

1.5. The military forces of ISIS

The size of the ISIS military varied from time to time and from estimation to estimation. The Syrian Observatory for Human Rights (SOHR)⁴⁸¹ estimated that ISIS had more than 50,000 fighters in Syria and according to an ISIS source, the group had 30,000 fighters in Iraq in August 2014.⁴⁸² According to the American Central Intelligence Agency’s⁴⁸³ estimation, which seemed to be the most precise, ISIS had an army of 20,000–31,500 fighters in Iraq and Syria in September 2014.⁴⁸⁴ It was reported that 90% of the ISIS fighters in Iraq were Iraqis and 70% of the ISIS fighters in Syria were Syrians.⁴⁸⁵

⁴⁷⁹ Jacques Neriah, *supra* note 468.

⁴⁸⁰ *Ibid.* It should be mentioned that some of these people might also have been killed in Iraq or Syria by now and succeeded by other members of the group but their deaths have not yet been confirmed and their successors are unknown.

⁴⁸¹ The Syrian Observatory for Human Rights is a non-governmental organisation that was established by the Syrian-British national, Rami Abdulrahman in the UK in 2006. The organisation documents violations of human rights law in Syria. The focus of the organisation has been on the Syrian civil war since 2011. The organisation is defined as a credible and accurate source by the UN, Amnesty International and international media.

⁴⁸² “Islamic State ‘has 50,000 Fighters in Syria’”, *Al Jazeera*, (19 August 2014). Available at: <<http://www.aljazeera.com/news/middleeast/2014/08/islamic-state-50000-fighters-syria-2014819184258421392.html>> (Accessed: 10 February 2016).

⁴⁸³ The American Central Intelligence Agency is the US foreign intelligence service that was founded in 1947. The agency is designed to gather information related to the US national security, from all around the world.

⁴⁸⁴ Jim Sciutto and Jamie Crawford *et al*, “ISIS can ‘muster’ between 20,000 and 31,500 Fighters”, *CNN*, (12 September 2014). Available at: <<http://edition.cnn.com/2014/09/11/world/meast/isis-syria-iraq/index.html>> (Accessed: 10 February 2016).

⁴⁸⁵ Samia Nakhoul, “Saddam’s Former Army is Secret of Baghdadi’s Success”, *Reuters*, (16 June 2015). Available at: <<http://www.reuters.com/article/us-mideast-crisis-baghdadi-insight-idUSKBN0OW1VN20150616>> (Accessed: 10 February 2016).

Although there were many foreign fighters in the ranks of ISIS, the group's leadership was dominated by the former Iraqi officers.⁴⁸⁶ Generally, Iraqis and Syrians gained priority to take responsibility from the leadership. The reason was probably that ISIS wanted to attain the loyalty of the *Sunni* population under its control that was approximately eight million people in both Iraq and Syria.⁴⁸⁷

Again, there were various estimations with regards to ISIS foreign fighters but the most reliable one was the estimation of the UN. Accordingly, around 15,000 foreign fighters from 80 countries, had joined ISIS and other rebel groups in Iraq and Syria by October 2014.⁴⁸⁸ The Soufan Group⁴⁸⁹ estimated that 5,000 fighters from Western Europe, 4,700 fighters from the Former Soviet Countries, 280 fighters from North America, 875 fighters from the Balkans, 8,000 fighters from Maghreb, 8240 fighters from the Middle East, 900 fighters from the south-east Asia, 6,000 fighters from Tunisia, 2,500 fighters from Saudi Arabia, 2400 fighters from Russia, 2100 fighters from Turkey and 2,000 fighters from Jourdan had travelled to Iraq and Syria by December 2015.⁴⁹⁰

In brief, the ISIS military forces consisted of Iraqis, Syrians and foreign fighters. The majority of the group's leaders as well as fighters were Iraqi and Syrian nationals. However, many foreign fighters travelled to Iraq and Syria and joined the group before and after its formation. The fighters came from the other Middle Eastern countries, the Far East, Africa, Europe, America, Australia and the Former Soviet Countries.

1.6. The criminal records of the group before adopting the name of ISIS

As we previously discussed, ISIS has long criminal roots in Iraq that specifically started with the US-led Coalition's invasion of the country. The move of Abu Mushab al-Zarqawi from Jordan to Iraq in 2002 was the beginning of the first criminal phase of the group. The JTJ fought

⁴⁸⁶ Ben Hubbard and Eric Schmitt, "Military Skill and Terrorist Technique fuel Success of ISIS", *The New York Times*, (27 August 2014). Available at: <http://www.nytimes.com/2014/08/28/world/middleeast/army-know-how-seen-as-factor-in-isis-successes.html?_r=0> (Accessed: 10 February 2016).

⁴⁸⁷ "Life under the ISIS Caliphate", *The Week*, (22 August 2015). Available at: <<http://theweek.com/articles/572910/life-under-isis-caliphate>> (Accessed: 11 February 2016).

⁴⁸⁸ The UN Security Council Monitoring Team, *supra* note 368, p. 13.

⁴⁸⁹ The Soufan Group is an international consultancy firm that provides governments and international organisations with security training and intelligence services. The chief executive officer of the firm is the former FBI agent, Ali Soufan. The firm is headquartered in New York and have regional offices in Europe, Middle East, Asia and Africa.

⁴⁹⁰ The Soufan Group, *foreign Fighters: An Updated Assessment of the Flow of Foreign Fighters into Syria and Iraq*, December 2015, p. 5.

to establish a *Sunni* Islamic state in Iraq. The goal of the group made Iraq go through a long bloody war. In its war, the JTJ relied on two tactics which were guerrilla and suicide bombing warfare.⁴⁹¹

The group targeted, as the first precedence, international actors including the UN headquarters, foreign embassies and Coalition military forces. The second target of the group was the Iraqi security forces, police headquarters and recruitment centres. The third group of victims was foreign civilians, contractors and humanitarian workers. The fourth attacked people were political and religious figures and *Shiite* Muslim civilians as the group wanted to spread sectarian violence rapidly to recruit the other *Sunnis* who had not yet joined the group.⁴⁹²

Again, the JTJ was established independently but it later became an offshoot of al-Qaeda after Abu Mushab al-Zarqawi pledged allegiance to the al-Qaeda's leader, Osama bin Laden. However, there were still ideological and practical differences between the two groups' leaders. Abu Mushab al-Zarqawi insisted on his violent *takfiri* belief and targeted all who were not with the group including *Shiites*, non-Muslims and even the *Sunnis* who had rejected the idea of joining the group while al-Qaeda refrained from deliberately targeting Muslim civilians.⁴⁹³ Al-Qaeda in Iraq operated for only two years and became the ISI in 2006. From the date of its announcement until the formation of ISIS, the ISI fought for the same JTJ goals and implemented the same violent policy which caused the death of tens of thousands of people.

It should be mentioned again that until the declaration of the ISI, there were some other independent rebel groups which fought along with the JTJ and al-Qaeda in Iraq against the same forces and people but most of the attacks were still carried out by the two groups. Although there is not a clear statistic regarding all the victims and perpetrators, civilians were the most among the victims. According to the Iraqi Body Count⁴⁹⁴, more than 125,765 civilians were killed between 1 January 2003 and 1 April 2013 as the consequence of the armed and suicide bombing violence.⁴⁹⁵

⁴⁹¹ Ahmed S. Hashim, *supra* note 365, p. 4.

⁴⁹² Gary Gambill, *supra* note 374.

⁴⁹³ Ahmed S. Hashim, *supra* note 365, p. 5.

⁴⁹⁴ Iraqi Body Count is a database that records deaths that occur in Iraq as a result of the violence starting from the US-led intervention in 2003. The database records all civilian deaths caused by the Iraqi armed forces, Coalition forces, *Shiite* militia groups and *Sunni* rebel groups. It receives data from media reports, hospital morgues, non-governmental organisations and official authorities. The database was founded in January 2003 by some volunteers from the US and UK.

⁴⁹⁵ "Monthly Civilian Deaths from Violence 2003 Onwards", *supra* note 369.

2. The crimes of ISIS in Iraq

As we mentioned before, ISIS is a practical product of the most radical Islamic prospective and the consequence of a long violent political rebellion which started with the US-led invasion in Iraq. Although ISIS struggled to establish a *Sunni* Islamic state and not to guarantee the rights and freedoms of the *Sunni* minority within the political process of Iraq, the persecution of the *Sunnis* by the *Shi'a*-majority Iraqi Government led the *Sunnis* to back ISIS in its military operations and join the ranks of the group.⁴⁹⁶

From the end of 2012, the *Sunni* people constantly demonstrated against the government in the governorates of Ninewa, Anbar, Salahaddin, Kirkuk for their exclusion from political process, being targeted by the security forces under the Anti-Terrorism Law No. 13 of 2005⁴⁹⁷, mistreatment of the detainees, particularly women, unfair trials and lack of basic services in their areas but the government always ended the demonstrations militarily instead of fulfilling the demands of the people. Concurrently, ISIS conducted military operations in Ninewa, Salahaddin, Kirkuk, Diyala, Baghdad and most intensively in Anbar due to the geographical significance of the governorate for the future expansion of the group into Syria.⁴⁹⁸

ISIS started attacking some Iraqi cities including Fallujah and Rumadi in Anbar in December 2013. The group seized the cities by early January 2014.⁴⁹⁹ On the first days of June 2014, the group attacked the second largest city of Mosul in Ninewa and the city fell to its fighters on 10 June 2014.⁵⁰⁰ After capturing Mosul, ISIS attacked Salahaddin and Kirkuk and took control of the towns of Zab, Hawijah, Riyadh, Abbasi, Rashad and Yankaja in Kirkuk and the towns of

⁴⁹⁶ UNAMI and OHCHR, "Report on the Protection of Civilians in the Non International Armed Conflict in Iraq: 5 June–5 July 2014", p. 2.

⁴⁹⁷ The Anti-Terrorism law was adopted on 7 November 2005 by the Council of Ministers based on the National Assembly's approval. The issues of the law are that the terrorism definition is very broad and can be widely interpreted, some of the acts (terrorist acts under the law) lack the threshold of seriousness and the prescribed punishments are very severe (see *infra* 3.1 of chapter 3).

⁴⁹⁸ UNAMI and OHCHR, (5 June–5 July 2014), *supra* note 496, p. 2.

⁴⁹⁹ "Iraq's Fallujah falls to 'Qaeda-linked' Militants", *The Daily Star*, (4 January 2014). Available at: <<http://www.dailystar.com.lb/News/Middle-East/2014/Jan-04/243100-fallujah-outside-iraq-government-control-security-official.ashx>> (Accessed: 13 March 2016).

⁵⁰⁰ Martin Chulov, "ISIS Insurgents seize Control of Iraqi City of Mosul", *The Guardian*, (10 June 2014). Available at: <<http://www.theguardian.com/world/2014/jun/10/iraq-sunni-insurgents-islamic-militants-seize-control-mosul>> (Accessed: 13 March 2016).

Baiji and Tikrit in Salahaddin on 11 June 2014.⁵⁰¹ The Iraqi military forces retreated from the centre and surrounding neighbourhoods of Kirkuk and the city was controlled by the Kurdish *peshmerga* forces⁵⁰² on 12 June 2014.⁵⁰³ On 13 June 2014, the ISIS fighters seized the towns of Jalawla and Sa'diyah and several villages in Diyala.⁵⁰⁴ The group captured three other towns in Anbar which were al-Qa'im, Rawa and Anah on 21 and 22 June 2014.⁵⁰⁵ Between 3 and 7 August 2014, ISIS attacked the north towns of Ninewa including Zumar,⁵⁰⁶ Sinjar,⁵⁰⁷ Tal Keif and Qaraqosh⁵⁰⁸ and sized all of them without any resistance.

ISIS used the most brutal military tactics and means against the Iraqi armed forces and Kurdish *peshmergas* during its war. The group violated all the humanitarian law rules applicable during armed conflict and consequently committed most of the criminal acts known as war crimes.⁵⁰⁹ After entering the country, ISIS began regulating the life of people based on its radical ideology. The group forbade the enforcement of Iraqi laws and adopted its own law based on a strict interpretation of *Sharī'ah*. It further established its own police forces to implement the law rules.⁵¹⁰ The group prohibited people from exercising the most basic political, social and cultural

⁵⁰¹ UNAMI and OHCHR, (5 June–5 July 2014), *supra* note 496, p. 3.

⁵⁰² The Kurdish *peshmerga* forces are the official military forces of the northern Iraqi federal region of Kurdistan. Although the Kurdistan region is still considered as the north of Iraq, the *peshmerga* forces are independent from the Iraqi military forces. They are organised under the authority of the Kurdistan ministry of *peshmerga* and execute only the orders of their minister and region's president. The *peshmerga* forces fought ISIS actively and defended their region bravely from the aggression of the group, although a large number of them were killed, wounded, captured and executed by ISIS.

⁵⁰³ UNAMI and OHCHR, (5 June–5 July 2014), *supra* note 496, p. 4.

⁵⁰⁴ Raheem Salman, "Insurgents seize Two more Iraqi Towns, Obama threatens Air Strikes", *Reuters*, (13 June 2014). Available at: <<https://web.archive.org/web/20140613114752/http://uk.reuters.com/article/2014/06/13/uk-iraq-security-jalawla-idUKKBN0EO0LF20140613>> (Accessed: 13 March 2016).

⁵⁰⁵ UNAMI and OHCHR, (5 June–5 July 2014), *supra* note 496, p. 4.

⁵⁰⁶ "Islamic State takes Iraqi Oilfield and Towns", *Al Jazeera*, (3 August 2014). Available at: <<http://www.aljazeera.com/news/middleeast/2014/08/fighters-capture-oilfield-northern-iraq-2014838218162585.html>> (Accessed: 13 March 2016).

⁵⁰⁷ Tim Arango, "Sunni Extremists in Iraq seize 3 Towns from Kurds and threaten Major Dam", *The New York Times*, (3 August 2014). Available at: <<http://www.nytimes.com/2014/08/04/world/middleeast/iraq.html?module=ArrowsNav&contentCollection=Middle%20East&action=keypress®ion=FixedLeft&pgtype=article>> (Accessed: 14 March 2016).

⁵⁰⁸ Martin Chulov, "Iraq's largest Christian Town abandoned as ISIS Advance Continues", *The Guardian*, (7 August 2014). Available at: <<http://www.theguardian.com/world/2014/aug/07/isis-offensive-iraq-christian-exodus>> (Accessed: 14 March 2016).

⁵⁰⁹ UNAMI and OHCHR, (5 June–5 July 2014), *supra* note 496, pp. 9-13; UNAMI and OHCHR, "Report on the Protection of Civilians in the Armed Conflict in Iraq: 6 July–10 September 2014", pp.5-18.

⁵¹⁰ UNAMI and OHCHR, (5 June–5 July 2014), *supra* note 496, pp. 13-14.

rights.⁵¹¹ It killed many people for irrational reasons including having previously worked with the Iraqi Government, in relation to their profession and having allegedly cooperated with the Iraqi military forces and Kurdish *peshmergas* against its fighters.⁵¹² The group adopted the severest punishment for committing adultery, homosexuality and theft. ISIS banned alcohol, cigarettes and using mobile phones and imposed the punishments of whipping and amputation on people who did not obey its rules.⁵¹³ The group restricted the movement of people to outside of its territory and killed many civilians who attempted to flee from its areas.⁵¹⁴ The most heinous atrocities of ISIS have perhaps been against members of ethnic and religious minorities whom the group had defined as polytheists and apostates. Among the minorities, ISIS committed its gravest crimes against the Yazidi religious minority.⁵¹⁵ This section will report many of the group's criminal acts and categorise them into widespread and systematic attacks against the civilian population, the intentional destruction of the Yazidi minority based on religious faith and practice and war atrocities.

⁵¹¹ *Ibid*; UNAMI and OHCHR, (6 July–10 September 2014), *supra* note 509, p. 11.

⁵¹² UNAMI and OHCHR, (5 June–5 July 2014), *supra* note 496, p. 9; UNAMI and OHCHR, (6 July–10 September 2014), *supra* note 509, p. 10; UNAMI and OHCHR, “Report on the Protection of Civilians in the Armed Conflict in Iraq: 11 December 2014–30 April 2015”, pp. 9, 11.

⁵¹³ UNAMI and OHCHR, (11 December 2014–30 April 2015), *supra* note 512, pp. 13,14, 21, 24; “The Charter of the City”, The Islamic State in Iraq and Syria, No. 34, (14 *Sha’ban* 1435 (12 June 2014)), In “Inside Mosul: Why Iraqis are celebrating Islamic Extremists’ Takeover of their City”, *Muftah*, (16 June 2014). Available at: <<https://muftah.org/why-iraqis-are-celebrating-isis-takeover-of-their-city/#.WTwINQvYvIV>> (Accessed: 28 March 2016).

⁵¹⁴ UNAMI and OHCHR, “Report on the Protection of Civilians in the Armed Conflict in Iraq: 1 May–31 October 2015”, p. 9.

⁵¹⁵ UNAMI and OHCHR, (6 July–10 September 2014), *supra* note 509, pp. 11-17; UNAMI and OHCHR, (11 December 2014–30 April 2015), *supra* note 512, pp. 19-21.

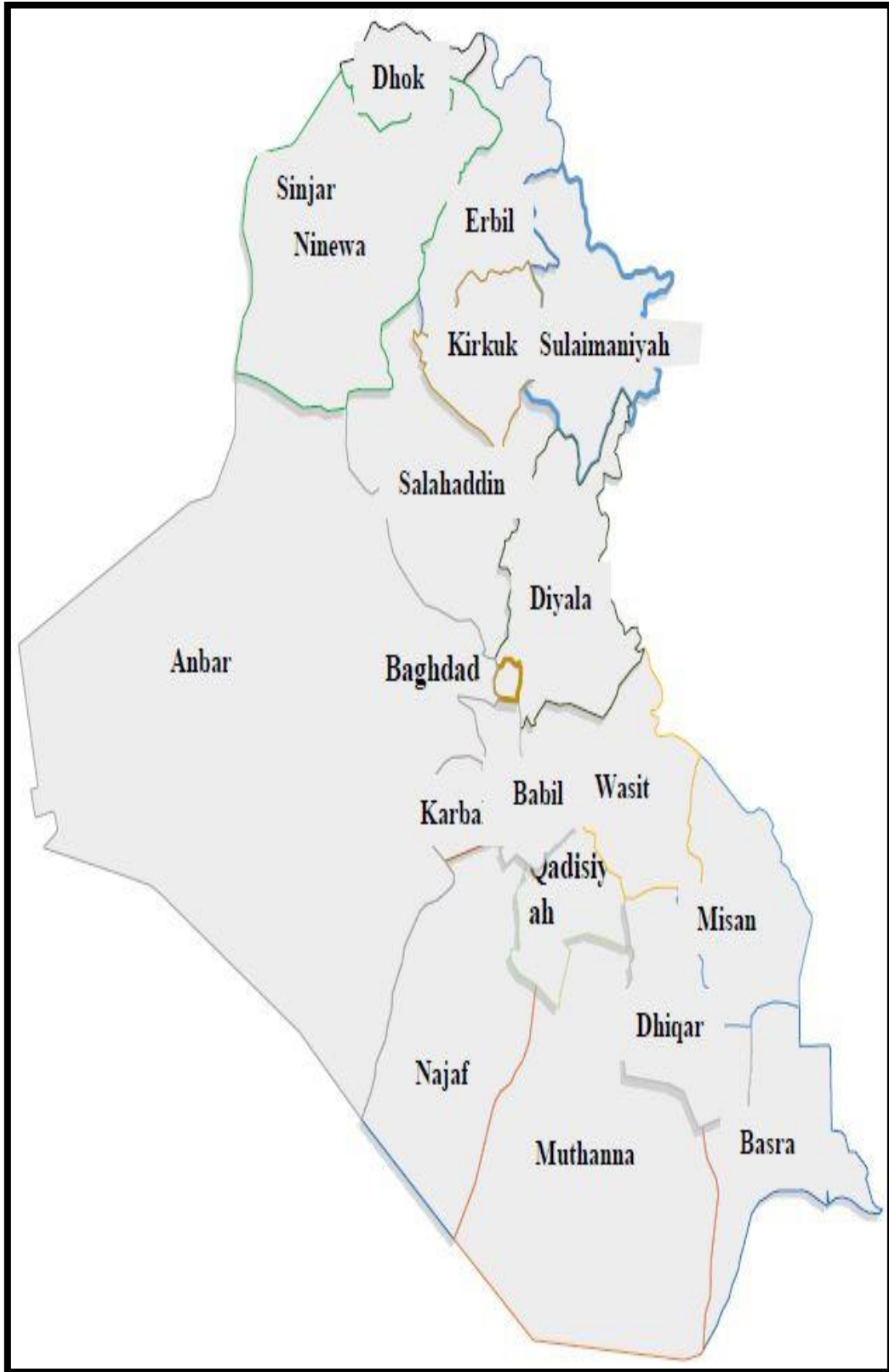


Figure 3: The map of Iraq

2.1. The crimes against the civilian population

Human rights bodies gathered a lot of evidence between 2014 and 2017 according to which ISIS has carried out many systematic and widespread attacks against the Iraqi civilian population. Based on the evidence, the group has committed murder, extermination, enslavement, enforced disappearance of persons, persecution of minorities on the grounds of religion and ethnicity and women on the grounds of gender and other inhuman acts of a similar character.

2.1.1. Murder

ISIS murdered many civilians during its three-year rule in Iraq for violating the group's criminal code, in connection to their work and for posing a threat to the group. The methods ISIS used to murder people varied based on the alleged guilt of the victims. The group shot civilians in the head, stoned them to death and threw some off the top of buildings.

The group is responsible for the following murders: stoning a man to death for adultery on 21 August 2014;⁵¹⁶ stoning a woman to death for the same reason in Ghabat, Mosul on 16 January 2015; executing a man publicly for practicing sorcery in Bab al-Toub, Mosul on 13 February 2015; stoning a man to death for not adhering its rules in Dawasa, Mosul on 31 March 2015;⁵¹⁷ killing a journalist, after being abducted for using his mobile phone, in Bab al-Toub, Mosul on 26 April 2015;⁵¹⁸ executing a man by throwing him off the top of a building for homosexuality in Mosul on 23 August 2015;⁵¹⁹ killing a teacher for refusing to propagate its ideology in school, in Mosul on 4 January 2016;⁵²⁰ and stoning a woman, accusing her of being a prostitute, in Anbar on 1 February 2016.⁵²¹

The group killed the following people in relation to their previous and present works: a female candidate of the general elections in Qayarah, Mosul on 22 July 2014; a female candidate of the Ninewa Provincial Council in Sderat, Mosul on 23 July 2014;⁵²² a former member of the

⁵¹⁶ UNAMI and OHCHR, (6 July–10 September 2014), *supra* note 509, p. 6.

⁵¹⁷ UNAMI and OHCHR, (11 December 2014–30 April 2015), *supra* note 512, p. 13.

⁵¹⁸ *Ibid*, p. 11.

⁵¹⁹ UNAMI and OHCHR, (1 May–31 October 2015), *supra* note 514, p. 17.

⁵²⁰ UNAMI and OHCHR, “Report on the Protection of Civilians in the Armed Conflict in Iraq: 1 November 2015–30 September 2016”, p. 10.

⁵²¹ *Ibid*, p. 12.

⁵²² UNAMI and OHCHR, (6 July–10 September 2014), *supra* note 509, p. 10.

City Council in Mosul on 20 April 2015;⁵²³ two former candidates of the elections of the Ninewa Provincial Council in Mosul on 11 and 12 July 2015; and a former parliamentary candidate in Mosul on 14 September 2015.⁵²⁴ From 14 December 2014 to 25 September 2015, the ISIS fighters killed the following people for the same reason: a lawyer in Hawija, Kirkuk; nine doctors in Mosul; eight men including employees in Dour, Salahaddin; three female lawyers in Mosul; a female employee from the City Council in Mosul; and two female lawyers in Qayarra, Mosul.⁵²⁵

ISIS systematically murdered people who posed a threat to the group through encouraging people to join the pro-government groups or fight the group or allegedly providing information to the Iraqi security forces from the inside of the group's controlled areas. The group executed the leader of the tribe of al-Jburi⁵²⁶, after detaining him for five months, in Mosul on 5 January 2015. The group accused the victim of encouraging people to join an opponent group known as 'Mosul liberation Movement'⁵²⁷. The group publicly shot two other men in the head in the same city on 21 February 2015. It charged the victims with encouraging people to stand against its fighters.⁵²⁸ The fighters of the group abducted and shot former director of the Mosul Rasheed Radio in the head, purportedly for providing information to the Iraqi security forces, in Mosul on 12 September 2015.⁵²⁹

⁵²³ UNAMI and OHCHR, (11 December 2014–30 April 2015), *supra* note 512, p. 13.

⁵²⁴ UNAMI and OHCHR, (1 May–31 October 2015), *supra* note 514, p. 8.

⁵²⁵ *Ibid*, p. 10; UNAMI and OHCHR, (11 December 2014–30 April 2015), *supra* note 512, p. 11.

⁵²⁶ The al-Jburi tribe is one of the largest tribes in Iraq. The tribe is originally *Sunni* Muslim but many of its members have converted to *Shi'a* Islam. It resides in the northern and central governorates of the country, mostly in the towns and cities of Ninewa and Kirkuk. Besides its *Sunni* identity, the tribe is loyal to the government and not to the radical *Sunni* groups operating in the country. Hence, the *Sunni* groups, particularly ISIS have often targeted the group members.

⁵²⁷ The Mosul Liberation Movement was just a rumour spread in Mosul. Such a movement never existed. Even if it existed, it never carried out any military attack against ISIS. Therefore, the crime against the al-Jburi's leader had no connection with armed conflict. It was rather committed based on the plan and policy of the group to eliminate people who were considered a threat to its authority over the controlled areas. The crime was part of the widespread attacks of the group against the civilian population.

⁵²⁸ UNAMI and OHCHR, (11 December 2014–30 April 2015), *supra* note 512, pp. 10-11. The crime against the two men was similarly perpetrated because the victims would supposedly endanger the group's authority in the city and not in connection with an ongoing armed conflict. The murder was a systematic criminal act within the group's larger attacks against the civilian population.

⁵²⁹ UNAMI and OHCHR, (1 May–31 October 2015), *supra* note 514, pp. 11.

2.1.2. Extermination

The ISIS military attack to Mosul was accompanied with mass executions and summary killings of civilians for various reasons including religious beliefs, fleeing from the ISIS territory, homosexuality and previous work.

The group attacked the Badush prison outside of Mosul on 10 June 2014 and captured it on that day. After taking control of the prison, it started to separate the *Sunni* inmates from the *Shiites*, Kurds⁵³⁰ and Yazidis and later executed 600 inmates. Although the majority of victims were *Shiites*, based on the statements of some survivors, there were also some Kurds and Yazidis among them.⁵³¹ ISIS reportedly carried out the execution process in a valley near the prison.⁵³²

The group abducted 17 *Shiite* civilians, including 15 men, one woman and one girl, in Pirwajli village, Salahaddin and their bodies were later found by the Iraqi security forces.⁵³³

ISIS exterminated the following people for unknown reasons⁵³⁴: seven *Sunni* men in an unknown location on 28 August 2014; 14 men in an unknown location on 4 September 2014; 40 people in Mosul on 7 September 2014;⁵³⁵ 11 people in Tikrit Stadium, Salahaddin on 15 December 2014; eight abductees in Dhulu'iya, Salahaddin on 23 December 2014; 20 abductees in the same town on 27 December 2014; 20 men in Hamam al-Alil, Mosul on 6 January 2015; and 13 people in Door, Salahaddin on 31 January 2015.⁵³⁶

The group killed four men in Mosul for smuggling people from its territory to the areas under the control of the government on 24 July 2015.⁵³⁷ It also shot many civilians for attempting

⁵³⁰ Kurds are an ethnic minority that live in the north of Iraq. The region of the Kurds is defined as the federal region of Kurdistan by the Iraqi constitution. The group possesses its language which is known as Kurdish. The Kurds practice various religions including Islam, Christianity, Yezidism and Zoroastrianism but most of them are *Sunni* Muslims. The size of the Kurdish population in Iraq is around five million (15-20% of the country's population) and inhabited the governorates of Arbil, Sulaymaniyah and Duhok. The Kurds were also the subject of the ISIS attacks due to various reasons including the group's territorial ambition, alliance with the International Coalition against the group and religious diversity.

⁵³¹ Human Rights Watch, "Iraq: ISIS executed Hundreds of Prison Inmates", (30 October 2014). Available at: <<https://www.hrw.org/news/2014/10/30/iraq-isis-executed-hundreds-prison-inmates>> (Accessed: 19 March 2014).

⁵³² UNAMI and OHCHR, (5 June–5 July 2014), *supra* note 496, p. 10.

⁵³³ *Ibid*, p. 11.

⁵³⁴ The ISIS fighters exterminated these people after the group's irregular courts sentenced the victims to death. Although no information is available as to the reasons why ISIS executed these people, the victims were all civilians and the killings took place as part of the widespread and systematic attacks of the group in the governorates of Mosul and Salahaddin.

⁵³⁵ UNAMI and OHCHR, (6 July–10 September 2014), *supra* note 509, p. 6.

⁵³⁶ UNAMI and OHCHR, (11 December 2014–30 April 2015), *supra* note 512, p. 10.

⁵³⁷ UNAMI and OHCHR, (1 May–31 October 2015), *supra* note 514, p. 9.

to flee from its territory including three women and a man, who belonged to the same family, in Hawija, Kirkuk on 30 September 2015; two civilians and a 15-year-old child in Sharqat, Salahaddin on 5 October 2015;⁵³⁸ 12 civilians in Jwaiba, Rumadi, Anbar on 6 February 2016;⁵³⁹ a father and his son in Haj Ali, al-Qayarra, Mosul on 29 February 2016;⁵⁴⁰ three men in Hawija, Kirkuk on 6 March 2016;⁵⁴¹ four civilians including three women in al-Qayarra, Mosul on 22 April 2016;⁵⁴² four civilians from the same family in Hawija, Kirkuk on 24 April 2016; 11 civilians, including a 16-year-old boy, in al-Qayarra, Mosul on 31 May 2016; and two children in Hawija, Kirkuk on 2 September 2016.⁵⁴³

ISIS executed many people by throwing them from the top of buildings for homosexuality including three men in Dawasa, Mosul on 4 June 2015; four men in Fallujah, Anbar on 27 July 2015; nine men in Mosul on 23 August; two men in the same city on 8 October 2015;⁵⁴⁴ and two men in Fallujah, Anbar on 22 November 2015.⁵⁴⁵

The group executed many former employees of the Independent High Electoral Commission⁵⁴⁶ in Mosul including 28 employees among them 11 women, on 25 July 2015; 300 civil servants employed by the commission and including 50 women, on 8 August 2015; 12 employees including four women and a senior official of the commission, on 21 August 2015;⁵⁴⁷ and three employees on 18 February 2016.⁵⁴⁸

⁵³⁸ *Ibid.*

⁵³⁹ UNAMI and OHCHR, (1 November 2015–30 September 2016), *supra* note 520, p. 14.

⁵⁴⁰ *Ibid.*, p. 12.

⁵⁴¹ *Ibid.*, p. 13.

⁵⁴² *Ibid.*, p. 12.

⁵⁴³ *Ibid.*, p. 13.

⁵⁴⁴ UNAMI and OHCHR, (1 May–31 October 2015), *supra* note 514, p. 17.

⁵⁴⁵ UNAMI and OHCHR, (1 November 2015–30 September 2016), *supra* note 520, p. 10.

⁵⁴⁶ The Independent High Electoral Commission is a specific commission established by the Provisional Authority of the US-led Coalition in May 2004 to organise elections in the country. Although the name of the commission was initially the Independent Election Commission of Iraq, it was renamed in 2007 based on the Law of the Council of Representatives of Iraq (No. 11, 2007). The commission has offices in all Iraqi governorates.

⁵⁴⁷ UNAMI and OHCHR, (1 May–31 October 2015), *supra* note 514, pp.8-9.

⁵⁴⁸ UNAMI and OHCHR, (1 November 2015–30 September 2016), *supra* note 520, p. 11.

2.1.3. Enslavement

After taking control of the northern Iraqi predominantly Yazidi district of Sinjar on 3 August 2014, ISIS abducted more than 3500 Yazidi women and girls and enslaved them.⁵⁴⁹ The group acknowledged the enslavement of the victims in an article which was entitled ‘The Revival of Slavery before the Hour’.⁵⁵⁰

ISIS practiced the enslavement based on the religious faith of the victims:

“[T]he Islamic State dealt with this group as the majority of [*fuqahā*] (scholars) have indicated how [*mushrikīn*] (polytheists) should be dealt with. Unlike the Jews and Christians, there was no room for [*jizyah*]⁵⁵¹ (tax) payment. Also, their women could be enslaved unlike female apostates⁵⁵² who the majority of the [*fuqahā*] say cannot be enslaved and can only be given an ultimatum to repent or face the sword”.⁵⁵³

The group described the enslavement as a sign of the Hour when “the slave girl gives birth to her master”.⁵⁵⁴ It furthermore justified the act and warned Muslims to avoid criticising its authority and fighters for such an act:

⁵⁴⁹ UNAMI and OHCHR, “A Call for Accountability and Protection: Yazidi Survivors of Atrocities committed by ISIL”, August 2016, p. 7.

⁵⁵⁰ “The Revival of Slavery before the Hour”, *Dabiq*, Issue. 4, 1435 (2014), pp. 14-17. Available at: <<https://clarionproject.org/docs/islamic-state-isis-magazine-Issue-4-the-failed-crusade.pdf>> (Accessed: 19 March 2016).

⁵⁵¹ ‘*Jizyah*’ means a yearly tax that has historically been taken from non-Muslims residing permanently in the Muslim land. *Jizyah* has been taken from a financially capable adult man. It has not, in other words, been taken from children, women, the insane, sick, elders, monks, slaves, poor and travellers. The amount of *jizyah* has been determined by rulers based on the financial capability of payers. Muslim rulers have levied *jizyah* on non-Muslims for their protection from aggression, freely practice of their faith and exemption from military service in the ranks of Muslim army. Islamic scholars have divided non-Muslims into the People of Books like Christians and Jews and polytheists. They have unanimously allowed the People of Books to live in their land and accepted *jizyah* from them but they have differed regarding the polytheists. Some of the scholars have allowed a similar treatment to the People of Books and polytheists concerning *jizyah* but some have refused such an equal treatment and only given the choices of conversion and death to the polytheists. However, Muslims have lived with Zoroastrians and received *jizyah* from them, although they were not the People of Books. ISIS dealt with the Yazidis as polytheists and refused to give them the choice of *jizyah*, even though they were faithful to God and His monotheistic nature. It is worth mentioning that *jizyah* is not taken by Muslim countries today.

⁵⁵² ISIS used the word of ‘apostate’ for the Muslims, particularly *Shiites* who had ideological differences and disputes with the group. The group required the so-called apostates to repent or face death. The repentance before the group was to confess that the previous beliefs and practices were all wrong and promise to follow the group’s ideology and religious performance.

⁵⁵³ “The Revival of Slavery before the Hour”, *supra* note 550, p. 15.

⁵⁵⁴ *Ibid.*

“[O]ne should remember that enslaving the families of the [*kuffār*] (disbelievers) and taking their women as concubines is a firmly established aspect of the [*Sharī’ah*] that if one were to deny or mock, he would be denying or mocking the verses of the [*Qur’ān*] (Quran) and the narrations of the Prophet ([*sallallāhu ‘alayhiwasallam*]), and thereby apostatizing from Islam”.⁵⁵⁵

ISIS took the victims to Mosul and Syria.⁵⁵⁶ The group divided the enslaved women between the fighters and its authority:

“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*] (spoils of war)”.⁵⁵⁷

Based on some testimonies, the group asked the women to convert to Islam. It later forced the converts to marry its fighters and held the ones who refused in sexual slavery.⁵⁵⁸

The group published a pamphlet entitled ‘Questions and Answers on Taking Captives and Slaves’ in October 2014. Accordingly, “[i]t is permissible to buy, sell, or give as a gift female captives and slaves, for they are merely property, which can be disposed of as long as that doesn’t cause [the Muslim ummah (nation)] any harm or damage”.⁵⁵⁹

ISIS released a price list for the enslaved women in November 2014 and it later surfaced online. The list included prices based on the age of the enslaved. The group established the prices as follows: 50,000 Iraqi Dinar (IQD) (US\$43) for women from 40 to 50-year-old; 75,000 IQD (US\$67) for women from 30 to 40-year-old; 100,000 IQD (US\$86) for women from 20 to 30-year-old; 150,000 IQD (US\$134) for girls from 10 to 20-year-old; and 200,000 IQD (US\$172) for children from one to nine-year-old. The document at the bottom, prohibited anyone from buying more than three women except the fighters from Turkey, Syria and Gulf countries.⁵⁶⁰ The

⁵⁵⁵ *Ibid*, p.17.

⁵⁵⁶ UNAMI and OHCHR, (6 July–10 September 2014), *supra* note 509, pp. 13-14; UNAMI and OHCHR, (11 December 2014–30 April 2015), *supra* note 512, p. 22.

⁵⁵⁷ “The Revival of Slavery before the Hour”, *supra* note 550, p. 15.

⁵⁵⁸ UNAMI and OHCHR, (11 December 2014–30 April 2015), *supra* note 512, pp. 21-22.

⁵⁵⁹ Kenneth Roth, “Slavery: The ISIS Rules”, Human Rights Watch, (5 September 2015). Available at: <<https://www.hrw.org/news/2015/09/05/slavery-isis-rules>> (Accessed: 26 March 2016).

⁵⁶⁰ “The Prices for the Sale of the Spoils of Wars”, The Islamic State of Iraq, No. 127, (21 *Dhul Hijjah* 1435 (15 October 2014)). In Sara A. Carter, “ISIS keeps a Store-Like Price List for Sex Slaves, selling them as Young as Age

authenticity of the document was verified after the issuance by The Defend International Team⁵⁶¹ on 4 November 2014⁵⁶² and by the UN Special Representative of the Secretary-General for Sexual Violence in Conflict, Zainab Bangura in August 2015. According to Zainab Bangura, ISIS sometimes sold back the girls to their own families for thousands of dollars.⁵⁶³

Based on the reports, a special office was opened for the sale of the enslaved women in al-Quds, Mosul. The seller used to show the women with price tags to buyers and the buyers could choose and negotiate the prices.⁵⁶⁴

2.1.4. Enforced disappearance

According to the reports of the human rights bodies, ISIS has abducted many people and made disappear most of them.

The ISIS fighters abducted two *Sunni* men from al-Masaref, Mosul on 25 July 2014 and the fate of the victims remains unclear.⁵⁶⁵

The group abducted 20 ‘*ṣūfī*’⁵⁶⁶ students with a *ṣūfī* leader on 27 July 2014. No information is available regarding the fate and whereabouts of the victims.⁵⁶⁷

1”, *Circa*, (17 August 2016). Available at: <<https://www.circa.com/story/2016/08/17/world/isis-keeps-a-store-like-price-list-for-sex-slaves-selling-them-as-young-as-age-1>> (Accessed: 26 March 2016).

⁵⁶¹ Defend International is an international non-governmental organ which was established by some lawyers and human rights activists in Norway in 2007. The main objective of the organ is promoting and protecting human rights and fundamental freedoms in the Middle East, North Africa and the rest of the world. The mission of the organ is responding to the violations of human rights and humanitarian law rules, ending the impunity of the perpetrators of grave crimes, conducting medical research in order to ensure health standards and promoting peace and democracy.

⁵⁶² “UN Official verified IS “Price List” for Yazidi and Christian Females”, *Defend International*, (4 August 2015). Available at: <<http://defendinternational.org/is-price-list-for-yazidi-and-christian-females-verified-by-un-official/>> (Accessed: 26 March 2016).

⁵⁶³ “ISIS ‘Price List’ for Child Slaves confirmed as Genuine by UN Official Zainab Banguara”, *Independent*, (4 August 2015). Available at: <<http://www.independent.co.uk/news/world/middle-east/isis-price-list-for-child-slaves-confirmed-as-genuine-by-un-official-zainab-bangura-10437348.html>> (Accessed: 26 March 2016).

⁵⁶⁴ UNAMI and OHCHR, (6 July–10 September 2014), *supra* note 509, p. 15.

⁵⁶⁵ *Ibid*, p. 8.

⁵⁶⁶ ‘*Ṣūfī*’ is the follower of the school of *Sūfīsm*. *Sūfīsm* encompasses mystical beliefs and practices. The school essentially focuses on inner purification to obtain the ultimate truth of God. According to the school, the ultimate truth of God is love and knowledge towards God. God’s love and knowledge can only be attained through inner enlightenment. The school consists of various ‘*tariqats*’ (orders) to spread its spiritual teachings and practices. The instances of the *Sūfī* orders are Naqshbandi and Qadri in Iraq. *Sūfīsm* is believed to have emerged in the 8th century. The majority of *Sūfīs* are *Sunnīs* but the school is also followed by some *Shiites*. Besides the fact that *Sūfīsm* shares many similarities with *Salafim*, the *Salafīs*, particularly *Jihādi-Salfīs* are too hostile to *Sūfīs*. The reason is that the *Sūfīs* have some beliefs and practices that violate the core creed element of God’s oneness to *Salafīs*.

⁵⁶⁷ UNAMI and OHCHR, (6 July–10 September 2014), *supra* note 509, p. 8.

The ISIS fighters abducted two brothers from Tuz Khurmatu, Salahaddin on 2 August 2014. The fate and whereabouts of one are unknown.⁵⁶⁸

The fighters from ISIS abducted two policemen and two other members of the security forces from Hawija, Kirkuk on 25 August 2014. The group executed one of the policemen and the fate of the others has remained unknown.⁵⁶⁹

The group abducted 40 civilians from a village in Dhulu'iyā, Salahaddin on 20 December 2014. Its fighters executed 27 and there is no information regarding the others fate.⁵⁷⁰

ISIS is also responsible for abducting and making disappear the following people: nine members of the *Sunni* tribe al-Jburi in Sahil al-Malih village, Ninewa on 10 June 2015; Six *Sunni* clerics in Mosul on 22 June 2015; 54 civilians in Shirqat, Salahaddin on 1 and 2 July 2015; 50 civilians from Hawija and surrounding neighbourhood, Kirkuk between 2 and 9 September 2015; ten moderate *Salafī*⁵⁷¹ *Imāms*⁵⁷² and 15 youths in Hawija, Kirkuk on 19 September 2015; 70 people in Hai Soumar, Mosul on 10 October 2015;⁵⁷³ three owners of internet cafes in Mosul on 1 February 2016;⁵⁷⁴ and three *Imāms* in Zanjilly, Bab al-Toob and Dawasa areas, Mosul on 22 April 2016.⁵⁷⁵

2.1.5. Other inhuman acts of a similar character

ISIS started to enforce the most radical interpretation of *Sharī'ah* law soon after capturing Mosul on 10 June 2014. On 13 June 2014, the group adopted a document which was entitled 'Watheqat al-Madina' (the Charter of the City). The document included a set of rules that covered all the aspects of life.⁵⁷⁶

⁵⁶⁸ *Ibid*, p. 7.

⁵⁶⁹ *Ibid*.

⁵⁷⁰ UNAMI and OHCHR, (11 December 2014–30 April 2015), *supra* note 512, p. 10.

⁵⁷¹ 'Moderate *Salafīs*' also belong to the school of *Salafism* but they do not interfere with politics and do not believe in offensive *jihādi*. Moderate *Salafism* rather concentrates on the reform of the beliefs and practices of Muslims by encouraging them to return to the teachings and practices of the early Muslims and Prophet Muhammad. ISIS also targeted the moderate *Salafīs* for their ideological differences as to the Islamic Caliphate.

⁵⁷² '*Imām*' is an Islamic title which is given to people who lead Muslims in performing religious obligations in mosques and provide Muslims with religious guidance.

⁵⁷³ UNAMI and OHCHR, (1 May–31 October 2015), *supra* note 514, pp. 13-14.

⁵⁷⁴ UNAMI and OHCHR, (1 November 2015–30 September 2016), *supra* note 520, p. 11.

⁵⁷⁵ *Ibid*, p.14.

⁵⁷⁶ "The Charter of the City", *supra* note 513.

According to the document, whoever stole or looted, would face amputation. Muslims had to perform their prayers in congregation in mosques. Drugs, alcohol, and cigarettes were banned. The existence of political and armed groups was prohibited. Graves and shrines were to be destroyed and visiting them was forbidden. Women should stay at home unless it was necessary to go out.⁵⁷⁷

The group obliged men to grow beards and women to cover their bodies fully.⁵⁷⁸ Based on the statement of a cleric in Mosul to the media, ISIS ordered *Imāms* to warn people, while they were gathering in mosques, to cover the face of both male and female mannequins in shops.⁵⁷⁹ The ISIS female brigade asked women to teach their children to ISIS ideology as part of *jihād*.⁵⁸⁰ The group prevented all western activities and lifestyles within the areas under its control.⁵⁸¹

The ISIS fighters controlled civilian movement in to and out of the city. They banned people from going out of their places even to receive medical treatment unless they had guarantors to return them to their places of residence.⁵⁸²

The group abducted people for ideologically opposing or criticizing its policy. The ISIS fighters abducted four teachers from a high school for refusing to teach ISIS curriculum in Mosul in January 2015.⁵⁸³

ISIS lashed people and amputated their fingers for using mobile phones. For instance, the fighters from ISIS lashed five civilians in Mosul on 11 February 2015 and amputated the hands of six people in the same city in March 2015 for contacting their relatives outside of Mosul through mobile phones.⁵⁸⁴

The group cut off hands and fingers of people for theft. The fighters cut off three fingers from the right hands of two men in Mosul on 10 February 2015; the hands of six youths in Mosul

⁵⁷⁷ *Ibid.*

⁵⁷⁸ UNAMI and OHCHR, (11 December 2014–30 April 2015), *supra* note 512, p. 23.

⁵⁷⁹ Damien McElroy, “Islamic State tells Mosul Shopkeepers to cover up Naked Mannequins”, *The Telegraph*, (23 July 2014). Available at: <<http://www.telegraph.co.uk/news/worldnews/middleeast/iraq/10985288/Islamic-State-tells-Mosul-shopkeepers-to-cover-up-naked-mannequins.html>> (Accessed: 28 March 2016).

⁵⁸⁰ UNAMI and OHCHR, (11 December 2014–30 April 2015), *supra* note 512, p. 23.

⁵⁸¹ Amnesty International, “The State of the World’s Human Rights: Report 2014/2015”, 2015, p. 193.

⁵⁸² UNAMI and OHCHR, (11 December 2014–30 April 2015), *supra* note 512, p. 23.

⁵⁸³ *Ibid.*, p. 24.

⁵⁸⁴ *Ibid.*

on 3 March 2015; a man's right hand in Mosul on 7 March 2015;⁵⁸⁵ and a hand of a 13-year-old boy in Mosul on 2 September 2015.⁵⁸⁶

The ISIS fighters stopped a wedding celebration in Ghabat, Mosul on 5 January 2015 for decorating cars and playing loud music in the place. After some argument, the fighters shot people and killed the bride and groom and wounded some others.⁵⁸⁷

The group abducted 56 Kurdish civilians for celebrating the national feast of 'Nowruz' ⁵⁸⁸ on 21 March 2015. The fighters later informed the families of the abductees that they would release the victims only after they paid 100,000 IQD and memorised five verses of the Quran.⁵⁸⁹

2.1.6. Persecution of Shabak, Christian and Turkmen minorities and women

After taking control of Mosul, ISIS started to attack the Iraqi religious and ethnic minorities. The group targeted Shabaks, Christians and Turkmens and committed various atrocities against them including mass murder, abduction, enforced disappearance, forced conversion, torture, destruction of properties, religious and cultural places and displacement. ISIS also persecuted women based on the gender identity. The group ordered women to stay indoors, imposed strict rules of dressing on them outside the home, whipped and stoned them for violations of its rules and practiced forced marriage and sexual slavery against them.

2.1.6.1. Persecution of Shabaks

The Shabaks are an ethno-religious group. There are, however, various hypotheses regarding their ethnic origins; the Shabaks are known as Kurds and their language is the southern Kurdish language dialect of 'Gorani'.⁵⁹⁰ The Shabak religious belief basically originated from the

⁵⁸⁵ *Ibid*, pp. 13-14.

⁵⁸⁶ UNAMI and OHCHR, (1 May–31 October 2015), *supra* note 514, p. 12.

⁵⁸⁷ UNAMI and OHCHR, (11 December 2014–30 April 2015), *supra* note 512, p. 16.

⁵⁸⁸ Nowruz is the Iranian and Kurdish New Year. The Kurds celebrate it on 21 March. The date marks the first day of spring and the first day of the new year in their calendar. Nowruz is also a national feast for the Kurds. They usually hold festivals, wear national clothes, light fires and dance from the evening of 21 March for several days.

⁵⁸⁹ UNAMI and OHCHR, (11 December 2014–30 April 2015), *supra* note 512, pp. 24-25.

⁵⁹⁰ Michiel Leezenberg, *The Shabak and the Kakais: Dynamics of Ethnicity in Iraqi Kurdistan*, (Amsterdam: Institute for Logic, Language and computation (University of Amsterdam), 1994, pp. 4-9. Kurdish language belongs to the group of the Indo-European languages. It consists of four main dialects which are 'Kurmanji', 'Sorani', 'Gorani' and 'Zaza'. Gorani is spoken by the Kurds residing in the north-eastern of Iraq and south-western of Iran.

Shī'ah Islam, although there also *Sunnis* among the Shabaks.⁵⁹¹ The number of Shabaks is estimated to be around 100,000 and they live in 60 villages, primarily around the city of Mosul in Ninewa.⁵⁹²

Human rights bodies have documented many ISIS atrocities against the Shabak community in the course of the group's attacks in the region. The Shabaks seem to have been persecuted for their ethnicity as well as religious belief which is considered apostasy by ISIS.⁵⁹³

ISIS killed five Shabak civilians and wounded 42 others on 6 June 2014 after the group attacked their village in eastern Mosul.⁵⁹⁴

The group arrested two Shabaks in Mosul on 13 June 2014 and killed them later.⁵⁹⁵

ISIS abducted three male Shabaks in the Jazeer area, Mosul on 19 June 2014. One day later, the bodies of two men were found and the body of the third man was found on 21 June. The group's fighters reportedly tortured the victims before killing them.⁵⁹⁶

The ISIS fighters kidnapped two Shabak brothers from Bazwaya village, Mosul on 21 June 2014 and four other Shabaks two days later.⁵⁹⁷ The fate and whereabouts of the victims have remained unknown.⁵⁹⁸

The group's fighters, on 27 June 2014, attacked the village of Tubruk Zeyara in Mosul and abducted three Shabak men.⁵⁹⁹ The bodies of the victims were found on the main road on the following day.⁶⁰⁰

The group attacked the village of Omar Khan in the Nimrod area, Mosul on 2 July 2014 and kidnapped 40 Shabaks allegedly for previously working with the Iraqi armed forces.⁶⁰¹

⁵⁹¹ Sa'ad Salloum, *Minorities in Iraq: Memory, Identity and Challenges*, Translation into English by: The Syrian European Documentation Centre, 1st ed., (Baghdad: *Masarat* for Cultural and Media Development, 2013), p. 161.

⁵⁹² Michiel Leezenberg, *supra* note 590, p. 4.

⁵⁹³ "The [*Rafidah*]: From Ibn Saba' to the Dajjal", *Dabiq*, Issue. 13, 1437 (2016), pp. 32-45. Available at: <<https://clari.onproject.org/factsheets-files/Issue-13-the-rafidah.pdf>> (Accessed: 29 March 2016).

⁵⁹⁴ UNAMI and OHCHR, (5 June–5 July 2014), *supra* note 496, p. 18.

⁵⁹⁵ OHCHR, "Mandates of the Special Rapporteur on Minority Issues, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions; and the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while countering Terrorism", IRQ 5/2014, 18 August 2014, p. 2.

⁵⁹⁶ UNAMI and OHCHR, (5 June–5 July 2014), *supra* note 496, p. 19.

⁵⁹⁷ OHCHR, (18 August 2014), *supra* note 595, p. 2.

⁵⁹⁸ UNAMI and OHCHR, (5 June–5 July 2014), *supra* note 496, p. 19.

⁵⁹⁹ OHCHR, (18 August 2014), *supra* note 595, p. 2.

⁶⁰⁰ UNAMI and OHCHR, (5 June–5 July 2014), *supra* note 496, p. 19.

⁶⁰¹ OHCHR, (18 August 2014), *supra* note 595, p. 2.

ISIS is responsible for the abduction of many Shabaks, including six Shabaks from the village of Bazwaya, Mosul on 12 July 2014; 10 other Shabaks from the villages of Jiliocan and Gojali around Mosul on the same day; a Shabak from Garage, Hay al-Jazaer neighbourhood, Mosul on 21 July 2014; 43 Shabak families including women and children from the villages around Mosul on 29 and 30 July 2014; a Shabak from Qarqasha, Mosul on 6 August 2014; and 26 Shabaks from Hamdanya, Mosul on 20-21 August 2014.⁶⁰²

It has been reported that 20 to 25 Shabak families fled from their villages around the town of Bahshiqa in Mosul due to the ISIS attacks against the villages on 14-18 February 2015. The families fought the ISIS fighters on the way and consequently two Shabaks were killed and 17 others injured.⁶⁰³

The fighters from ISIS shot a 17-year Shabak boy in the head allegedly for spying for *peshmerga* forces in Bairbog village, Mosul on 31 January 2016.⁶⁰⁴

The group killed nine other Shabaks for cooperating with the Iraqi forces in the same villages on 13 March 2016.⁶⁰⁵

ISIS exploded the house of a Shabak parliamentary member in Bertilla, Mosul on 12 August 2014, although the house's residents had fled three days before.⁶⁰⁶

The ISIS fighters damaged the *Shiite* mosque of Ahmed Idrees and burnt the *Shiite* shrine of *Imām* Abbas in the Shabak village of Omar Khan in Mosul on 2 July 2014. The next day, the group's fighters returned to the village and blew up the remains of the shrine.⁶⁰⁷

2.1.6.2. Persecution of Christians

Most of the Iraqi Christians are members of the Assyrian, Chaldean, Syriac and Assyro-Chaldean or Chaldo-Assyrian and Aramean groups. There are, however, some historical hypotheses regarding the distinct origins of the groups; most of the historians trace the groups' origins to the ancient Assyrians⁶⁰⁸. According to them, the name of the groups has rather originated

⁶⁰² UNAMI and OHCHR, (6 July–10 September 2014), *supra* note 509, pp. 16-17.

⁶⁰³ UNAMI and OHCHR, (11 December 2014–30 April 2015), *supra* note 512, p. 21.

⁶⁰⁴ UNAMI and OHCHR, (1 November 2015–30 September 2016), *supra* note 520, p. 15.

⁶⁰⁵ *Ibid.*

⁶⁰⁶ UNAMI and OHCHR, (6 July–10 September 2014), *supra* note 509, p. 17.

⁶⁰⁷ UNAMI and OHCHR, (5 June–5 July 2014), *supra* note 496, p. 19.

⁶⁰⁸ The ancient Assyrians lived in the northern parts of Mesopotamia from approximately 5000 BC. They established an empire in the 25th century BC after the fall of the Akkadian Empire in the region. The territory of the Assyrian

from their belongingness to different Christian denominations.⁶⁰⁹ The Assyrians are an indigenous people in Iraq and have been living there since 5000 BC. They adopted Christianity in the 1st century AD and belong to three denominations which are the Catholic Assyrian Church of the East⁶¹⁰, the Syriac Orthodox Church⁶¹¹ and the Chaldean Catholic Church⁶¹². The current language of the group is known as neo-Syriac. In 2003, the Assyrians were estimated to be 1.5 million but around half of them have left the country due to political upheaval and violence.⁶¹³ The Assyrians primarily live in Mosul, Duhok and Baghdad.

The Assyrians also became the subject of persecution by ISIS after the capture of Mosul. The group persecuted Assyrians for their Christian faith through abduction, displacement, tax payment, looting properties and destruction of their houses and religious places.

ISIS burnt down a Christian church in al-Wahda, Mosul on 10 June and reportedly looted a number of other churches in the city.⁶¹⁴

The group captured the Chaldean Catholic Church and the Syriac Orthodox Church in al-Shurta, Mosul on 30 June 2014. The fighters of the group reportedly used the Chaldean Catholic Church as a base and planted its flag on the top of the church.⁶¹⁵

empire extended from the south of today's Iraq to the coast of the Mediterranean Sea. The capital of the empire was the city of Ashur that was located on the western bank of the Tigris River in today's Iraqi district of Shriqat in the Salahaddin governorate. The Assyrian empire was destroyed by the Babylonian and Median empires in the end of the 7th century BC.

⁶⁰⁹ Vahram Petrosian, "Assyrians in Iraq", *Iran and the Caucasus*, Vol. 10, No. 1, 2006, p. 113.

⁶¹⁰ The Assyrian Church of the East is officially known as the Holy Apostolic Catholic Assyrian Church of the East. The church belongs to the historical Church of the East and follows traditional Christianity. The main language of the church is neo-Syriac and the majority of the church's followers identify themselves as Assyrians.

⁶¹¹ The Syriac Orthodox Church is part of the Oriental Orthodox Church which only recognises the ecumenical Councils of Nicea, Constantinople and Ephesus. The church is believed to have been founded by Saint Peter. The identification of the church's adherents is controversial. Some refer to themselves as Assyrians while others identify themselves as a sub-Assyrian group of Arameans. Yet, the church employs Syriac language in its liturgy.

⁶¹² Peter BetBasoo, *Incipient Genocide: The Ethnic Cleansing of the Assyrians of Iraq*, (Assyrian International News Agency: 2007), p. 5. The Chaldean Catholic Church historically belongs to the Catholic Church of the East but the former was formed from the latter in 1552. However, it is still affiliated with it and with the Roman Catholic Church. The Chaldean Catholic Church practices its own customs and rites that are different from the Roman Catholic traditions. The majority of the church's members are identified as Chaldean Christians. The church similarly uses Syriac language in its liturgy.

⁶¹³ Peter BetBasoo, *supra* note 612, p. 5; Paul Isaac, "The Assault on Assyrian Christians", *The New York Times*, (8 May 2007). Available at: <http://www.nytimes.com/2007/05/08/opinion/08iht-edisaac.1.5618504.html?_r=0> (Accessed: 5 April 2016).

⁶¹⁴ UNAMI and OHCHR, (5 June–5 July 2014), *supra* note 496, pp. 19-20.

⁶¹⁵ *Ibid*, p. 20.

The ISIS fighters abducted a Christian family from a church in al-Bakr, Mosul and took them to an unknown location on 8 July 2014.⁶¹⁶

On 9 July 2014, the fighters from the group entered a house of a Christian family in Ea'alam, Mosul and occupied it, although the family had previously fled the city.⁶¹⁷

Based on the statements of two local Christian authorities, ISIS marked the Christian houses with the letter “N” which implied the word of ‘*Nasrāni*’ (Christian) or, in other cases, the ‘Properties of the Islamic State’ in Mosul on 14 July 2014.⁶¹⁸

ISIS asked the Christians to attend a meeting to determine their statutes on 16 July 2014 but the Christians refused to go to the meeting. The following day, the group issued a decree which was later read out in the city mosques. According to the decree, the Christians had to either “convert to Islam, pay “tribute” money, or leave Mosul by July 19”.⁶¹⁹ Following the ISIS order, the church mass was not held in Mosul for the first time in 1,600 years.⁶²⁰

The fighters from ISIS abducted two Christian nuns aged about 40 and 60 and three Christian orphans who were a 12-year-old boy and two 20-year-old women in Mosul on 29 June 2014. However, the fighters released the victims on 14 July 2014.⁶²¹

According to Human Rights Watch, two ISIS fighters, on 14 July 2014, entered a cell phone store and ordered the Christian owner to pay US\$200 to \$250 a month to be able to work under the group’s rule. The owner later took everything out of the store and left the place.⁶²²

ISIS confiscated gold, jewellery and valuable things from some Christian families at their checkpoints while they were leaving Mosul on 17 and 18 July 2014.⁶²³ Based on the claim of some Christians in Mosul, the group looted the homes of some displaced Christians.⁶²⁴

⁶¹⁶ UNAMI and OHCHR, (6 July–10 September 2014), *supra* note 509, p. 11.

⁶¹⁷ *Ibid.*

⁶¹⁸ Human Rights Watch, “Iraq: ISIS abducting, killing, expelling Minorities”, (19 July 2014). Available at: <<https://www.hrw.org/news/2014/07/19/iraq-isis-abducting-killing-expelling-minorities>> (Accessed: 12 April 2016).

⁶¹⁹ *Ibid.*

⁶²⁰ “No Mass said in Mosul for First Time in 1,600 Years, says Archbishop”, *World*, (28 June 2014). Available at: <<http://www.christiantoday.com/article/no.mass.said.in.mosul.for.first.time.in.1600.years.says.archbishop/38493.htm>> (Accessed: 12 April 2016).

⁶²¹ Human Rights Watch, *supra* note 618.

⁶²² *Ibid.*

⁶²³ *Ibid.*

⁶²⁴ UNAMI and OHCHR, (5 June–5 July 2014), *supra* note 496, p. 20.

By 20 July 2014, about 400 Christian families had left Mosul to the cities of Duhok and Erbil in the Kurdistan region and many other families went to other Christian towns under the control of *peshmerga* forces around Mosul.⁶²⁵

Based on the statement of officials in Mosul, all the Christians left Mosul following the group's decree except some poor families or people who could not leave the city. Moreover, ISIS cut the supplies of electricity and water to the villages and towns where the Christians fled to.⁶²⁶

After seizing the predominantly Christian towns of Qaraqosh, Tal Keppe, Bartella and Karamlish in Mosul on 7 August 2014, the group again prompted the residents to flee.⁶²⁷ Consequently, more than 100,000 Christians fled their homes and left everything behind.⁶²⁸

ISIS captured seven Christians who were fleeing from Hamdanya, Mosul on 22 August 2014 and took them back to Mosul without any statement about their fate.⁶²⁹

In November 2014, the group issued a price list for the abducted Yazidi and Christian females. The list included detailed information regarding the prices of the enslaved and the authenticity of the document was verified soon after its issuance by ISIS.

The group blew up six houses of Christian families in Mosul on 1 March 2015.⁶³⁰

The ISIS fighters released some photos, on 19 March 2015, that showed the destruction of the monastery of Mar Behnam⁶³¹ in the village of Khdir Ilyas, Mosul.⁶³²

The group announced an auction for the properties of the fled Christians in Mosul on 16 January 2016. The properties were reportedly 400 houses, 19 buildings, 167 shops and furniture.⁶³³

⁶²⁵ UNAMI and OHCHR, (6 July–10 September 2014), *supra* note 509, p. 12.

⁶²⁶ *Ibid.*

⁶²⁷ Alroy Menezes, "ISIS captures Largest Christian Town in Iraq and Several Others, Thousands of Minorities flee", *International Business Times*, (7 August 2014). Available: <<http://www.ibtimes.com/isis-captures-largest-christian-town-iraq-several-others-thousands-minorities-flee-1651618>> (Accessed: 15 April 2016).

⁶²⁸ "UN Security Council condemns Attacks by Iraqi Jihadists", *BBC NEWS Middle East*, (7 August 2014). Available at: <<https://web.archive.org/web/20140808001143/http://www.bbc.com/news/world-middle-east-28699832>> (Accessed: 15 April 2016).

⁶²⁹ UNAMI and OHCHR, (6 July–10 September 2014), *supra* note 509, p. 12.

⁶³⁰ UNAMI and OHCHR, (11 December 2014–30 April 2015), *supra* note 512, p. 21.

⁶³¹ The Mar Behnam Monastery was a Syriac Catholic Monastery. It was located in the Khdir Ilyas village, Beth Khdeda town, Mosul. The monastery had been built by the Assyrian emperor, Senchareb in the 4th century and maintained by the Syriac Catholic monks until ISIS captured it in 2014.

⁶³² "ISIS Militants blow up 4th-Century Christian Mar Behnam Monastery in Iraq", *Independent*, (20 March 2015). Available at: <<http://www.independent.co.uk/news/world/middle-east/isis-militants-blow-up-ancient-4th-century-christian-mar-behnam-monastery-in-iraq-10123238.html>> (Accessed: 16 April 2016).

⁶³³ UNAMI and OHCHR, (1 November 2015–30 September 2016), *supra* note 520, p. 15.

2.1.6.3. Persecution of Turkmen

The Turkmen are an ethnic group in Iraq. The origins of the group date back to the Oghuz Turks, Seljuk Turks and Ottoman Turks who immigrated to Iraq from the 7th century to the 17th century.⁶³⁴ The group is estimated to be 9% of the country's population and about three million.⁶³⁵ They are the third largest group after Arabs and Kurds and speak in Turkish language.⁶³⁶ Although the majority of Turkmen are Muslims, there are also Turkmen Christians. The Muslim Turkmen, like all the world Muslims, are divided into *Sunni* and *Shiite* sects. The *Sunnis* constitute about 60% and the *Shiites* are estimated to be around 40% of the Turkmen community.⁶³⁷ The Turkmen mainly live in the northern and central governorates including Mosul, Erbil, Kirkuk, Diyala, Salahaddin, and Baghdad.⁶³⁸

After ISIS took over the central and northern areas of Iraq, the members of the Turkmen community, particularly *Shiites* were subjected to persecution by the group.

The fighters from ISIS executed more than 100 male *Shiite* Turkmen who had been displaced in Sinjar and Tal afar, Mosul on 7 August 2014.⁶³⁹

The Iraqi armed forces found the body of three Turkmen, who had been abducted by ISIS in August 2014, in al-Habbash village, Salahaddin on 1 January 2015.⁶⁴⁰

ISIS reportedly abducted over 38 *Shiite* Turkmen on 15 June 2014 from the villages of Qubba and Qubbek, Tal Afar, Mosul.⁶⁴¹

Based on the statements of an activist, a journalist, and six relatives of the victims, the group made 35 *Shiite* Turkmen disappear in Tal Afar, Mosul between 16 June and 19 July 2014.⁶⁴²

⁶³⁴ Şevket Koçsoy, *Iraqi Turks*, (İstanbul: Boğaziçi Yayınları, 1991), pp.125-126; Erşat Hürmüzlü, *Turkmen and Iraq*, (İstanbul: Kerkük Vakfı, 2003), pp.12-14.

⁶³⁵ *The Forgotten Nation: Turkmen in Iraq*, The Conference was jointly organised by the Unrepresented Nations and Peoples Organisation, Minority Rights Group International and the Nonviolent Radical Party, Geneva, 6 June 2013, p. 8. Available at: <<http://unpo.org/downloads/676.pdf>> (Accessed: 17 April 2016).

⁶³⁶ Mofak Salman Kerkuklu, *Turkmen of Iraq*, (Dublin: 2007), pp. 8, 24.

⁶³⁷ Raber Tal'at Jawhar, "The Iraqi Turkmen Front", *Open Edition Books*, 2010. Available at: <<http://books.openedition.org/ifpo/1115>> (Accessed: 17 April 2016).

⁶³⁸ Sa'ad Salloum, *supra* note 591, p. 147.

⁶³⁹ UNAMI and OHCHR, (6 July–10 September 2014), *supra* note 509, p. 16.

⁶⁴⁰ UNAMI and OHCHR, (11 December 2014–30 April 2015), *supra* note 512, p. 21.

⁶⁴¹ UNAMI and OHCHR, (6 July–10 September 2014), *supra* note 509, p. 16.

⁶⁴² Human Rights Watch, *supra* note 618.

According to a Turkmen resident of Tal Afar, his brother and four nephews disappeared while fleeing to the west on 20 June 2014.⁶⁴³

The group abducted 25 Turkmens from al-Shamsayad village in Hamdanya district, Mosul on 21 June 2014. The fate and whereabouts of the victims remain unknown.⁶⁴⁴

The fighters from ISIS abducted more than 40 people, demolished four religious places and ransacked civilian houses and farms in the *Shiite* Turkmen villages of Guba and Shrikhan, Mosul on 23 June 2014. They moreover ordered all the residents who were 950 families to leave the villages.⁶⁴⁵ The killing of 25 civilians has been reported during the group's attack to the villages.⁶⁴⁶

It was reported that more than 125, 000 *Shiite* Turkmen residents, at least 90% of the population, fled the Turkmen town of Tal Afar to the other areas after the capture of the town by ISIS on 16 June 2014.⁶⁴⁷

The group seized the areas around the Turkmen *Shiite* town of Amerli, Salahaddin on 12 June 2014 and sieged the town and residents who were 13,000 including 10,000 women and children. ISIS shelled the town every day until the siege was broken by the Iraqi and US air strikes on 31 August 2014. During the siege, the ISIS fighters cut off the electricity and water supplies to the town's residents. The shortage of food, medicine and clean water was also reported that made the residents suffer and some even died.⁶⁴⁸

According to a journalist, an activist, and some residents, the ISIS fighters demolished nine *Shiite* mosques and shrines in Tal Afar, Mosul between 25 June and 2 July 2014.⁶⁴⁹

2.1.6.4. Persecution of women

Women were also among the groups whom ISIS persecuted. The persecution of women was based on the gender identity. The ISIS Mosul Charter included a provision regarding women. Accordingly, women should stay at home unless it was necessary to go out.⁶⁵⁰ When they went

⁶⁴³ *Ibid.*

⁶⁴⁴ UNAMI and OHCHR, (5 June–5 July 2014), *supra* note 496, p. 19.

⁶⁴⁵ Human Rights Watch, *supra* note 618.

⁶⁴⁶ UNAMI and OHCHR, (5 June–5 July 2014), *supra* note 496, p. 19.

⁶⁴⁷ Human Rights Watch, *supra* note 618.

⁶⁴⁸ UNAMI and OHCHR, (6 July–10 September 2014), *supra* note 509, p. 16.

⁶⁴⁹ Human Rights Watch, *supra* note 618.

⁶⁵⁰ "The Charter of the City", *supra* note 513, pro. 14.

out, they had to be accompanied with male relatives. The group obliged women to cover their bodies fully. It prevented them from wearing clothes that hugged their bodies and from using perfume throughout the areas under its control.⁶⁵¹ The group lashed many women for violating its dress rules and stoned many others for adultery in front of crowds. The ISIS fighters lashed women who were not properly dressed in Mosul on 21 August 2014.⁶⁵² The group stoned a woman to death for adultery in Mosul on 6 June 2016.⁶⁵³ The group's fighters killed a woman for being a prostitute in Anbar on 1 February 2016.⁶⁵⁴

ISIS separated female students and employees from the male ones in schools and workplaces.⁶⁵⁵ The group practiced forced marriage against the Iraqi women and used some as sex slaves to provide sexual service to its fighters.⁶⁵⁶ ISIS reportedly killed 19 women in Mosul on 1 and 2 August 2015 after they refused to have sex with its fighters.⁶⁵⁷ The group has further rewarded some of its fighters with the wives of the men whom they had previously executed to encourage them to continue fighting. It has also given women to the winners of religious competitions as rewards.⁶⁵⁸

⁶⁵¹ Human Rights Watch, "Iraq: Women suffer under ISIS", (5 April 2016). Available at: <<https://www.hrw.org/news/2016/04/05/iraq-women-suffer-under-isis>> (Accessed: 25 April 2016); Amnesty International, *supra* note 581, p. 193; "Islamic State says Women in Mosul must wear Full Veil or be punished", *The Irish Times*, (26 July 2014). Available at: <<http://www.irishtimes.com/news/world/middle-east/islamic-state-says-women-in-mosul-must-wear-full-veil-or-be-punished-1.1878642>> (Accessed: 25 April 2016).

⁶⁵² UNAMI and OHCHR, (6 July–10 September 2014), *supra* note 509, p. 11.

⁶⁵³ UNAMI and OHCHR, (1 November 2015–30 September 2016), *supra* note 520, p. 11.

⁶⁵⁴ *Ibid.*, p. 12.

⁶⁵⁵ Amnesty International, *supra* note 581, p. 193.

⁶⁵⁶ Human Rights Watch, *supra* note 651.

⁶⁵⁷ UNAMI and OHCHR, (1 May–31 October 2015), *supra* note 514, p. 18.

⁶⁵⁸ *Ibid.*

2.2. The crimes against the Yazidis

The Yazidis are an ethno-religious group. The group ethnically belongs to the Kurds and speaks in the Kurdish language dialect of ‘Kurmanji’.⁶⁵⁹ The religion of the group is Yazidism. Yazidism is generally a combination of the pre-Islamic and Islamic practices.⁶⁶⁰

The Yazidis believe that God is the source of creation and existence but the world is run by seven angels whose chief is ‘*Melek Tawwus*’ (the peacock angel). According to their belief, after God created Adam; he commanded all the angels to prostrate to his creation in respect. Soon after, all the angels prostrated to Adam except the peacock angel as he thought that it was only the Supreme God who deserved prostration. God threw the peacock angel into hellfire for his disobedience and held him there until his remorse tears quenched the fire. God then forgave and made peacock angel a mediator between him and humanity. The Yazidis, in other words, worship God through the peacock angel.⁶⁶¹

The concept of the peacock angel in the Yazidi faith is slightly similar with Satan in Islamic tradition. Based on the Islamic belief, God ordered the angels to bow down to Adam. Except Satan, all the angels fulfilled the commandment of God. Therefore, the Almighty God cursed him and removed him from the heavens. Satan later asked God to allow him respite until the day of resurrection. God accepted Satan’s request and Satan then swore to lead human beings astray.⁶⁶² Muslims now believe that all temptations, evil thoughts and sinful acts derive from Satan. From this fact, the radical Muslims have given the title of devil worshipers to the Yazidis.⁶⁶³

⁶⁵⁹ Sa’ad Salloum, *supra* note 591, p. 70; Shak Hanish, “The Islamic State Effect on Minorities in Iraq”, *Review of Arts and Humanities*, Vol. 4, No. 1, 2015, p. 8. ‘Kurmanji’ is one of the four main dialectics of the Kurdish language. It is the most popular dialect among the Kurds. The dialect is mostly spoken by the Kurds who live in Turkey and Syria, although it is also spoken by some Kurds in Iran and some Kurds in Iraq. Kurmanji is the language of the Yazidis’ sacred books, prayers and religious ceremonies.

⁶⁶⁰ Sebastian Maisel, *Social Change amidst Terror and Discrimination: Yazidis in the New Iraq*, Policy Brief No. 18, The Middle East Institute, August 2008, p. 2. Available at: <https://www.files.ethz.ch/isn/90905/No_18_Social_Change_Amidst_Terror.pdf> (Accessed: 26 April 2016); Carole A O’Leary, “The Kurds of Iraq: Recent History, Future Prospects”, *Middle East Review of International Affairs*, Vol. 6, No. 4, 2002, p. 17.

⁶⁶¹ The Black Book; The Book of Revelation; Yasmine Hafiz, “Yazidi Religious Beliefs: History, Facts and Traditions of Iraq’s Persecuted Minority”, *Huffpost*, (13 August 2014). Available at: <http://www.huffingtonpost.com/2014/08/13/yazidi-religious-beliefs_n_5671903.html> (Accessed: 27 April 2016); Patrick Comerford, “Who are the Yazidi People, and what are their Beliefs”, *The Irish Times*, (13 August 2014). Available at: <<http://www.irishtimes.com/news/world/middle-east/who-are-the-yazidi-people-and-what-are-their-beliefs-1.1894940?page=2>> (Accessed: 27 April 2016).

⁶⁶² The Quran, *al-Baqarah*, 2: 34; *al-A’raf*, 7: 11-13; *al-Isra*, 17: 61-63.

⁶⁶³ “The Revival of Slavery before the Hour”, *supra* note 550, p. 14.

The Yazidis primarily live in and around the Sinjar district. Sinjar is located, approximately 100 kilometres west of the city of Mosul, in the northern Iraqi governorate of Ninewa. The additional Yazidi communities live in Syria, Turkey, Georgia, Armenia and Europe. The size of the Iraqi Yazidi population is estimated to be 560,000 members.⁶⁶⁴

Prior to attacking Sinjar and the other predominantly Yazidi inhabited areas, ISIS had researched the Yazidi faith to decide on their status: “[*Sharī’ah*] students in the Islamic State were tasked to research the Yazidis to determine if they should be treated as an originally [*mushrik*] group or one that originated as Muslims and then apostatized”.⁶⁶⁵ The group then defined the Yazidis as polytheists and distinguished them from Christians and Jews: “[u]nlike the Jews and Christians, there was no room for [*jizyah*] payment”. ISIS, in other words, only had the choices of conversion and death for the Yazidis.

ISIS captured the Sinjar region without any resistance on 3 August 2014. Over the course of the group’s attack, the ISIS fighters systematically targeted the Yazidi community members. Tens of thousands of Yazidis consequently fled to a mountain, known as Mount Sinjar, in the north of the city, Kurdistan region governorate of Duhok and many others were trapped within their villages and the Sinjar district. The group killed and captured thousands of Yazidi men and abducted thousands of Yazidi women and children. It later systematically separated women and children from men and young girls from older women. The group asked them to convert to Islam or else be killed. It forced the converted women and girls to marry its fighters and forced the ones who refused into sexual slavery. The group’s fighters subjected many Yazidis to forced labour and made many others disappear. They moreover burnt and destroyed many villages and religious shrines and symbols of the Yazidis.

According to a database of a Yazidi group given to Human Rights Watch, 3,133 Yazidis had been killed, abducted or were missing by September 2014. In the end of March 2015, the number had risen to 5,324.⁶⁶⁶ The documented criminal incidents indicate that ISIS has intentionally sought to destroy the Yazidi minority based on their religious belief and practice by killing members of the group, causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical

⁶⁶⁴ Sa’ad Salloum, *supra* note 591, p. 66; Sebastian Maisel, *supra* note 660, p. 1.

⁶⁶⁵ “The Revival of Slavery before the Hour”, *supra* note 550, p. 14.

⁶⁶⁶ Human Rights Watch, “Iraq: ISIS Escapees describe Systematic Rape”, (14 April 2015). Available at: <<https://www.hrw.org/news/2015/04/14/iraq-isis-escapees-describe-systematic-rape>> (Accessed: 28 April 2016).

destruction in whole or in part, imposing measures intended to prevent births within the group and forcibly transferring of the group's children to its areas.

2.2.1. Killing members of the group

Based on the statements of four Yazidi community leaders and activists, ISIS abducted at least 51 Yazidis, more than half were the members of the security forces and the rest were civilians, from Sinjar and other places on 10 June 2014. The fighters summarily killed at least 2 of them.⁶⁶⁷

The group kidnapped two Yazidi members of the Iraqi National Guard from a government building in Mosul on 13 June 2014. Ten days later, the bodies of the victims were found in the Mosul morgue.⁶⁶⁸

According to the statements of the survivors and witnesses, ISIS captured a group of some 300 Yazidis in the village of Qiniyah, Sinjar on 3 August 2014. Most of the victims were from the nearby village of Tal Qasab and from the same extended family and tribe. The group captured the victims while they were fleeing to Mount Sinjar. It separated men and boys from children and women and took a group of 85-90 men including 12-year-old boys and killed all of them.⁶⁶⁹ The group killed another group of 50-60 men in the village of Qahtanyah, Sinjar while they were also fleeing to Mount Sinjar on that day.⁶⁷⁰

ISIS attacked Mount Sinjar and killed 30 Yazidi men on 4 August 2014. The group attacked the Sinjar village of Hardan on the same day and killed 60 Yazidi men. According to the Yazidi community leaders, more than 200 Yazidis were killed by the ISIS fighters in Sinjar and 60-70 others in the nearby area, Ramadi Jabal on 4 August 2014.⁶⁷¹

Between 3 and 6 August, ISIS killed many Yazidis in the Sinjar region including more than 50 Yazidis near the Dhola village; 100 in the Khana Sor village; 250-300 in the Hardan area; more than 200 on the road between Adnaniya and Jazeera area; and dozens including elderly and people with disabilities near the al-Shimal village and on the road from the Matu village to Mount Sinjar.⁶⁷²

⁶⁶⁷ Human Rights Watch, *supra* note 618.

⁶⁶⁸ *Ibid.*

⁶⁶⁹ Amnesty International, "Ethnic Cleansing on a Historic Scale: The Islamic State's Systematic targeting of Minorities in Northern Iraq", London, 2014, pp. 12-13.

⁶⁷⁰ *Ibid.*, p. 15.

⁶⁷¹ UNAMI and OHCHR, (6 July–10 September 2014), *supra* note 509, p. 13.

⁶⁷² *Ibid.*, p. 14.

On 5 August 2014, the ISIS fighters started killing the remaining members of the fled families in the Tal Qasab and Qana villages in Sinjar.⁶⁷³

Based on the statement of the Iraqi Human Rights Minister, Mohammed Shia al-Sudani, ISIS had killed at least 500 members from the Yazidi community and buried some of them alive by 10 August 2014.⁶⁷⁴

After the ISIS fighters attacked the Sinjar region on 3 August 2014, the residents of the Kocho village were trapped within the village and could not flee to Mount Sinjar. On 15 August 2014, the group attacked the village and assembled all the residents at the village secondary school where they separated men and boys from women and younger children. The group's fighters transferred the men, each 15-20 men in a pick-up vehicle, and took them to an unknown location where they shot them dead. The consequence of the incident was the killing of at least 90 Yazidi men.⁶⁷⁵ Based on another human rights body, the number of the victims was 400 men.⁶⁷⁶

According to the statements of some Yazidi abductees who contacted human rights bodies, ISIS executed five elderly and 200 other Yazidi men for refusing to convert to Islam.⁶⁷⁷

The ISIS fighters killed 14 elderly Yazidi men including people with disabilities in the Sheikh Mand Shrine, the Jidala village, Sinjar between 24 and 25 August 2014.⁶⁷⁸

The *peshmerga* forces found a mass grave which contained 14 corpses around the Bardi village, Zummar, on 9 September 2014. The victims were a young woman, 10 men, three children and an elderly person who were presumably Yazidis.⁶⁷⁹

Based on the statement of eyewitnesses, the ISIS fighters tortured and killed eight Yazidi men on 28 April 2015, for attempting to escape from the group's captivity.⁶⁸⁰

After an ISIS court sentenced eight Yazidi women to death for unknown charges in Mosul, the victims were executed by hanging on 20 December 2014.⁶⁸¹

⁶⁷³ *Ibid*, p. 13.

⁶⁷⁴ "Islamic State killed 500 Yazidis, buried Some Victims Alive". *The World Post*, (10 August 2014). Available at: <http://www.huffingtonpost.com/2014/08/10/yazidis-islamic-state-massacre_n_5665655.html> (Accessed: 1 May 2016).

⁶⁷⁵ Amnesty International, *supra* note 669, pp. 8-9.

⁶⁷⁶ UNAMI and OHCHR, (6 July–10 September 2014), *supra* note 509, p. 14.

⁶⁷⁷ *Ibid*.

⁶⁷⁸ *Ibid*, p. 15.

⁶⁷⁹ *Ibid*.

⁶⁸⁰ UNAMI and OHCHR, (11 December 2014–30 April 2015), *supra* note 512, p. 20.

⁶⁸¹ *Ibid*, p. 13.

The group captured two Yazidi men in the Sakiniya village, Sinjar while they were trying to retrieve their tractor that they had left there since August 2014. The fighters executed the two men in the Sinjar nearby town of Ba'aj on 22 January 2016.⁶⁸²

The fighters from ISIS killed six women including four Yazidis in the south of Mosul for attempting to escape from the group's captivity on 8 March 2016.⁶⁸³

In early October 2014, the scholar of the Yazidi history at the University of Chicago, Matthew Barber estimated that ISIS had killed between 3,000–5,000 Yazidi men.⁶⁸⁴

According to the UNOHCHR and UNAMI, ISIS has killed 2,000-5,500 Yazidis since 3 August 2014.⁶⁸⁵

2.2.2. Causing serious bodily or mental harm to members of the group

ISIS captured 51 Yazidis who were mostly security guards on 10 June 2014. The group killed two, released 27 including three for ransom and the fate of the rest remains unknown.⁶⁸⁶

The group captured 28 Yazidi border guards during clashes on the Iraqi-Syrian border, outside of the Ba'aj town, Mosul on 13 June 2014. It released 24 of them for US\$1, 2 million ransom and the rest remain captives.⁶⁸⁷

ISIS demanded ransom from several other Yazidi families to release their abducted members. In some cases, the group demanded US\$50,000.⁶⁸⁸

The group abducted three Yazidi male members from the Baashiqa area, Mosul on 20 June 2014. It released two of them on 29 June and the third man on 2 July after being referred to a group's court.⁶⁸⁹

⁶⁸² UNAMI and OHCHR, (1 November 2015–30 September 2016), *supra* note 520, p. 15.

⁶⁸³ *Ibid.*

⁶⁸⁴ Steve Hopkins, "Full Horror of the Yazidis who didn't escape Mount Sinjar: UN confirms 5,000 Men were executed and 7,000 Women are now kept as Sex Slaves", *Mail Online*, (14 October 2014). Available at: <<http://www.dailymail.co.uk/news/article-2792552/full-horror-yazidis-didn-t-escape-mount-sinjar-confirms-5-000-men-executed-7-000-women-kept-sex-slaves.html>> (Accessed: 10 May 2016).

⁶⁸⁵ UNAMI and OHCHR, (August 2016), *supra* note 549, p. 7.

⁶⁸⁶ Human Rights Watch, *supra* note 618.

⁶⁸⁷ *Ibid.*

⁶⁸⁸ UNAMI and OHCHR, (5 June-5 July 2014), *supra* note 496, p. 19.

⁶⁸⁹ *Ibid.*

It has been documented that the group took some abducted and captured Yazidi members before its courts in July 2014. The courts forced them to either convert or be punished. In some cases, the group's fighters executed people for refusing conversion.⁶⁹⁰

The ISIS fighters used some Yazidis, who had captured them from Sinjar before, as human shields and forced them to dress like them. The fighters later detained the victims at sites in the city centre of Sinjar, the former station of the security forces and the food stores in the al-Shuhada'a neighbourhood, Sinjar.⁶⁹¹

Based on the statement of witnesses, ISIS took the captured and abducted Yazidis to a prison in the Tal Afar district, Mosul. The group forced them all to convert to Islam. Consequently, many Yazidis refused and were killed and many others converted. The fighters of the group later transferred the converted Yazidis to a village in Sinjar and held them there under their surveillance.⁶⁹²

ISIS forced the Yazidi men to grow beards and shave their moustaches, contrary to their tradition, and the Yazidi women to dress according to the group's dressing style. The group ordered the captured and abducted Yazidis to pray in houses until it built a mosque.⁶⁹³

ISIS took about 65 Shabak and Yazid children aged between 5 and 17-year-old to an orphanage in Mosul. The children were reportedly traumatised as they had witnessed the murder of their parents. The orphanage also lacked food, clothes, bottles, infant formula, diapers, etc.⁶⁹⁴

According to the statement of a captive who contacted a human rights body through a mobile phone between July and September 2014, ISIS transferred some converted Yazidi men, women and children to the houses of the fled *Shiite* Turkmens in the villages of Tal Afar. The group's fighters locked the victims in the houses and monitored their activities.⁶⁹⁵

It is worth mentioning that the ISIS fighters confiscated the mobile phones of the victims when they found them.⁶⁹⁶

⁶⁹⁰ UNAMI and OHCHR, (6 July–10 September 2014), *supra* note 509, p. 12.

⁶⁹¹ *Ibid*, p. 13.

⁶⁹² *Ibid*, p. 14.

⁶⁹³ *Ibid*.

⁶⁹⁴ *Ibid*, p. 15.

⁶⁹⁵ *Ibid*.

⁶⁹⁶ *Ibid*, p. 16.

The group reportedly forced some Yazidis to work for them as shepherds and farmers under their surveillance.⁶⁹⁷

ISIS transferred many Yazidi women and girls to Mosul and Syria as slaves. The group divided the slaves between its fighters who participated in the Sinjar battle and its authority.

The ISIS fighters committed rape, sexual slavery and forced marriage against the Yazidi women and girls. Based on an interview of 11 escaped women and nine girls including as young as 12, the fighters of the group raped Yazidi women and girls some multiple times. The victims have stated that “they had been forced into marriage; sold, in some cases a number of times; or given as “gifts””. According to a female doctor, from 105 escaped Yazidi women whom she examined, 70 had been raped in the ISIS captivity.⁶⁹⁸ According to the statement of an adolescent girl, several ISIS fighters raped her several times before she was sold as a slave in a market.⁶⁹⁹

The victims were under emotional distress and worried about the fate of their family members. They either attempted to commit suicide or witnessed the suicide of the other girls for not facing rape, forced marriage and conversion.⁷⁰⁰

According to the statements of some other captives, the group also sexually assaulted male and female teenage children.⁷⁰¹

2.2.3. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part

Following the ISIS attack to Sinjar and surrounding neighbourhoods on 3 August 2014, around 200,000 Yazidi inhabitants fled the city including who 50,000 escaped to Mount Sinjar. People including women, children, elderly and disabled persons walked long distances without water, food, shelter and medicine for fear of being killed by the group.⁷⁰²

Based on the human rights reports, people faced hunger, dehydration and heat to the extent that over 12 children died on 3 August, two more children with some elderly and disabled people died on 4 August and 40 other children died on 5 August. The reports have documented that there

⁶⁹⁷ UNAMI and OHCHR, (11 December 2014–30 April 2015), *supra* note 512, p. 20.

⁶⁹⁸ Human Rights Watch, *supra* note 666.

⁶⁹⁹ UNAMI and OHCHR, (6 July–10 September 2014), *supra* note 509, p. 15.

⁷⁰⁰ Human Rights Watch, *supra* note 666.

⁷⁰¹ UNAMI and OHCHR, (6 July–10 September 2014), *supra* note 509, p. 15.

⁷⁰² *Ibid*, p. 4; UNAMI and OHCHR, (August 2016), *supra* note 549, p. 6.

were 25,000 children in urgent need of humanitarian assistance during the group's campaign in the region. Some other people have reported that they have seen the dead bodies of 200 children, from hunger, thirst and heat, on the road while they were fleeing to Mount Sinjar. It has also been documented that some women threw themselves off the mountain with their children in desperation.⁷⁰³

ISIS sieged the Sinjar nearby village of Kocho on 3 August 2014. It later informed the village residents, who had been trapped within their houses, if they did not convert, they would die.⁷⁰⁴

The ISIS fighters also besieged Sinjar Mount and reportedly shot all who attempted to leave the mountain between 4 and 8 August 2014.⁷⁰⁵

The group blew up the Yazidi Sheikh Mand shrine in the Jidala village, Sinjar between 24 and 25 August 2014;⁷⁰⁶ burnt the Yazidi villages of Kotan, Hareko and Kharag Shafsrsky in Sinjar on 1 September 2014;⁷⁰⁷ and exploded the Sinjar Minaret⁷⁰⁸ in Sinjar on 22 March 2015.⁷⁰⁹

2.2.4. Imposing measures intended to prevent births within the group

ISIS abducted some women in the Yazidi village of Maturat, Sinjar on 2 August 2014. The fighters took the victims to the Badush prison outside of Mosul.⁷¹⁰

The group gathered 450–500 women and girls and took them to the citadel of Tal Afar, Mosul on 3 August 2014. Two days later, it transferred 150 unmarried girls and women, mostly Yazidis and Christians, to Syria to offer them as rewards to their fighters or sell them as sex slaves.⁷¹¹

The ISIS fighters abducted scores of women and children in the Qiniyah village, Sinjar on 3 August 2014, although the exact number of the victims is not known.⁷¹²

⁷⁰³ UNAMI and OHCHR, (6 July–10 September 2014), *supra* note 509, pp. 13-14.

⁷⁰⁴ *Ibid.*, p. 13.

⁷⁰⁵ UNAMI and OHCHR, (August 2016), *supra* note 549, p. 6.

⁷⁰⁶ UNAMI and OHCHR, (6 July–10 September 2014), *supra* note 509, p. 15.

⁷⁰⁷ *Ibid.*

⁷⁰⁸ The Sinjar Minaret was a religious symbol of Yazidism. It was also a historical site and the most archeological monument of Sinjar. The history of the Minaret traced back to 1127 AD and it was 12 metres high.

⁷⁰⁹ UNAMI and OHCHR, (11 December 2014–30 April 2015), *supra* note 512, p. 19.

⁷¹⁰ UNAMI and OHCHR, (6 July–10 September 2014), *supra* note 509, p. 15.

⁷¹¹ *Ibid.*

⁷¹² Amnesty International, *supra* note 669, pp. 12-15.

The group attacked ten Yazidi families in the Qahtaniyah village, Sinjar on 3 August 2014. It killed the men and abducted the women and children. One day later, the group's fighters attacked the Hardan village, Sinjar and similarly killed the men and abducted their wives and daughters. Later, they took the women and children to Tal Afar and, according to some others, to the al-Hol camp in al-Hasakah, Syria.⁷¹³

The ISIS fighters abducted at least 50 women from the Tal Banat village, Sinjar on 4 August 2014. On the same day, the fighters abducted members of three families in the Khana Sour village, Sinjar, a Yazidi woman and her daughter in the Sinjar nearby sub-district of Qairawan and another Yazidi woman with two girls in the Adnaniyah village, Sinjar.⁷¹⁴

ISIS abducted 500 Yazidi women and children from the town of Ba'aj and more than 200 others from the village of Tal Banat between 3 and 6 August 2014.⁷¹⁵

Based on the statements of some survivors, the group transferred more than 1000 women from the Sinjar village of Kocho to unknown locations in Tal Afar on 15 August 2014. Some of the victims were reportedly killed while attempting to escape from the group's fighters.⁷¹⁶

The group abducted more than 2,500 civilians, mostly women and children, from Ninewa plains by the end of August 2014. It held the abductees in the Badush prison, Mosul, Tal Afar, and other locations.⁷¹⁷

Based on the report of the UNOHCHR and UNAMI, ISIS abducted 6,386 (3,537 women and 2,859 men) on and after 3 August 2014.⁷¹⁸

According to the estimation of Matthew Barber in mid-October 2014, more than 4,800 Yazidi women and children were believed to be in the ISIS captivity and the number was expected to rise up to 7,000.⁷¹⁹

Between December 2014 and April 2015, around 3,000-3,500 Yazidis, most of them women and children, still remained captives.⁷²⁰

⁷¹³ UNAMI and OHCHR, (6 July–10 September 2014), *supra* note 509, p. 13.

⁷¹⁴ *Ibid.*

⁷¹⁵ *Ibid.*, p. 14.

⁷¹⁶ *Ibid.*

⁷¹⁷ *Ibid.* p. 15.

⁷¹⁸ UNAMI and OHCHR, (August 2016), *supra* note 549, p. 7.

⁷¹⁹ Steve Hopkins, *supra* note 684.

⁷²⁰ UNAMI and OHCHR, (11 December 2014–30 April 2015), *supra* note 512, p. 20.

According to the testimonies of some survivors, ISIS required the Yazidi women and girls to convert to Islam. The converted women and girls were forced to marry the ISIS fighters while those who refused became sexual slaves in markets in Mosul, Iraq and in al-Raqqah, Syria.⁷²¹ The group intended that the Yazidi women bear children from its fighters or Muslims. As children belong to fathers in Islamic tradition, the process would prevent births and the future Yazidi generations.

2.2.5. Forcibly transferring children of the group to another group

ISIS abducted many children along with women and transferred them to Mosul and Syria. Although there is not an exact database regarding the abducted Yazidi children, it is believed that the number exceeds one thousand.

According to the testimonies of some former captives, the group separated single girls and girls over five years of age and took them to Mosul to teach them ‘the tenets of Islam’.⁷²²

It has been reported that the ISIS fighters made the Yazidi and Shabak children, in the Mosul orphanage, pose with the group’s flag and took their photos for publication.⁷²³

ISIS separated some hundred men and boys, reportedly over 700, from their families in Tal Afar, Mosul on 26 April 2015. Based on some statements, it forced them to take part in an ideological education program and according to some other statements, it killed them. However, the latter allegation remains unverified.⁷²⁴

Based on a video published by ISIS in February 2015, the group trained 15 Yazidi children who were all under 18 and most below 15 years of age. They children were from the Kocho village, Sinjar and recognised by their relatives. The group taught them the Quran, military training and how to deal with prisoners in Tal Abyad, al-Raqqah, Syria.⁷²⁵

According to the head of the Yazidi affairs office in the Kurdistan Regional Government, ISIS has trained over 1,000 Yazidi children. The group has taught them Islam and *jihād*

⁷²¹ *Ibid.*

⁷²² UNAMI and OHCHR, (6 July–10 September 2014), *supra* note 509, p. 14.

⁷²³ *Ibid.*, p. 15.

⁷²⁴ UNAMI and OHCHR, (11 December 2014–30 April 2015), *supra* note 512, p. 20.

⁷²⁵ *Ibid.*, p. 23.

theoretically and practically. The group's fighters have moreover trained them on means of war and conducting suicide attacks.⁷²⁶

In February 2017, ISIS published a video which showed two Yazidi children, aged 11 and 12, expressing their gratefulness for leaving their previous ignorant faith and joining the true belief of Islam. The video further showed the suicide attacks of both children in Mosul and Tal Afar against the Iraqi armed forces.⁷²⁷

The group forced young girls along with adults and women to convert and marry its fighters. The ones who refused conversion were held in sexual slavery.⁷²⁸ In both cases, the group used the girls to bear children from Muslim men.

In short, ISIS abducted many Yazidi children and transferred them to the areas under its control. The group prevented them from their previous identity, faith and culture and indoctrinated them into its *Takfiri* belief.

2.3. The crimes committed during armed conflict

ISIS committed numerous war crimes during its armed conflict against the Iraqi military and Kurdish *peshmerga* forces. The crimes are attacking and murdering civilians, attacking and murdering other protected persons,⁷²⁹ attacking protected places,⁷³⁰ killing people placed *hors de combat*, using prohibited weapons,⁷³¹ passing sentences and carrying out executions without due

⁷²⁶ "KRG asks For Help freeing Yazidi Children Brainwashed by ISIS", *Rudaw*, (15 February 2017). Available at: <http://www.rudaw.net/english/kurdistan/150220174>> (Accessed: 5 March 2017).

⁷²⁷ Mohamed Mostafa, "Islamic State Video depicts Final Hours of Yazidi Child Suicide Bombers", *Iraqi News*, (15 February 2017). Available at: <<http://www.iraqinews.com/iraq-war/video-depicts-last-minutes-life-minor-yazidi-suicide-bombers/>> (Accessed: 5 March 2017); "ISIS Extremists use Yazidi Children as Suicide Bombers", *Ara News*, (16 February 2017). Available at: <<http://aranews.net/2017/02/isis-extremists-use-yezidi-children-as-suicide-bomber-s/>> (Accessed: 5 March 2017).

⁷²⁸ Human Rights Watch, *supra* note 666; UNAMI and OHCHR, (6 July–10 September 2014), *supra* note 509, pp. 14-16; UNAMI and OHCHR, (11 December 2014–30 April 2015), *supra* note 512, p. 20.

⁷²⁹ Attacking and murdering other protected people is the criminal act of directing a military attack against and killing medical personnel, personnel involved in a humanitarian or peacekeeping mission, religious personnel or any other similar people who takes no direct part in armed conflict such as war correspondents and journalists.

⁷³⁰ Attacking protected places is the act of waging military attacks against civilian houses or other places protected under international humanitarian law such as buildings and medical units using emblems of the Geneva Conventions, buildings used for religious, educational, artistic, scientific or charitable purposes, hospitals, historical and cultural sites or any other place of a non-military character.

⁷³¹ Using prohibited weapons during armed conflict is the act of using a weapon or a substance that causes supercilious or unnecessary harm to the armed members of the hostile party. The examples of such weapons are poisoned weapons,

process, displacing civilians, committing rape, sexual slavery and forced pregnancy and recruiting children⁷³².

2.3.1. Attacking and murdering civilians

ISIS targeted civilians through direct attacks, suicide and car bombing attacks⁷³³ and shelling residential areas. Consequently, thousands of civilians were killed and injured.⁷³⁴

The group on 17 June 2014, attacked the Bashir village, Kirkuk and killed two civilians, a woman and a child, and wounded six others.⁷³⁵

On 23 July 2014, ISIS claimed responsibility for a suicide attack in the Kadhimiya district, Baghdad that killed 33 people and injured 50 others.⁷³⁶

In October 2014, ISIS carried out a series of suicide bombing attacks in the *Shiite* neighbourhoods in Baghdad. According to the Iraqi Body Count, the attacks caused the death of 590 people.⁷³⁷

In May 2015, nearly 500 people were killed including civilians during the ISIS battle for the control of Rumadi in Anbar. Even after controlling the city, the group's fighters attacked and killed civilians and members of the security forces and threw the bodies of some in to the Euphrates River.⁷³⁸

asphyxiating, poisonous gases, all dangerous liquids, materials or devices, bullets and any other means of warfare that have a similar effect.

⁷³² Child recruitment is the act of conscripting or enlisting one or more persons who have not attained 15 years of age, into armed forces or groups or using them to actively take part in hostilities whether it is of an internal or international nature. However, ISIS committed this crime in the context of or in connection with internal armed conflict.

⁷³³ The suicide and car bombing attacks were part of the ISIS war to control Iraq. The group used this tactic along with its new warfare method of direct confrontation. The acts are, in other words, not isolated but rather parts of the group's main military operations.

⁷³⁴ The crimes of directing attacks and murder are two different crimes under article eight, paragraph (c) and (e) of the ICC Statute. In the ISIS case, the crimes are related to each other and therefore we mention them together. Yet, the group is responsible for the crimes separately.

⁷³⁵ UNAMI and OHCHR, (5 June-5 July 2014), *supra* note 496, p. 12.

⁷³⁶ Ahmed Malik, "Islamic State says carried out Baghdad Suicide Bombing", *Reuters*, (23 July 2014). Available at: <<http://www.reuters.com/article/us-iraq-security-idUSKBN0FS0QZ20140723>> (Accessed: 1 June 2016).

⁷³⁷ Erin Banco, "Baghdad Residents fear ISIS Suicide Bombers and Car Bombs, don't Trust Government Militias", *International Business Times*, (27 October 2014). Available at: <<http://www.ibtimes.com/baghdad-residents-fear-isis-suicide-bombers-car-bombs-dont-trust-government-militias-1714185>> (Accessed: 1 June 2016).

⁷³⁸ Amnesty International, "Report 2015/2016-Iraq", (24 February 2016). Available at: <<http://www.refworld.org/docid/56d05b4a9.html>> (Accessed: 1 June 2016).

ISIS targeted a public market in Khan Bani Saad, Baquba, Diyala on 17 July 2015. The attack killed 108 and wounded 167 people.⁷³⁹

The group exploded a vehicle in a market place in Hwaidar, Baquba, Diyala on 10 August 2015. The result of the explosion was the killing of 61 people and wounding of 88 others, among them four children.⁷⁴⁰

ISIS targeted a market with explosives in the Sadr city, Baghdad on 13 August 2015 and killed 45 people and wounded 72 others.⁷⁴¹

On 5 October 2015, the group exploded a mini-bus in the main market in the Khalis district, Baquba, Diyala and killed over 40 people and wounded more than 60 others.⁷⁴²

ISIS killed 10 civilians and wounded 25 others followings an explosive attack in the al-Zubair district, Basra on 6 October 2015.⁷⁴³

The group continued carrying out suicide and car bombing attacks against civilians in Iraq throughout 2016. The attacks caused thousands of casualties. The UNOHCHR and UNAMI have reported most of the attacks including: an attack killed 30 civilians and injured 55 others in Diyala on 11 January 2016;⁷⁴⁴ an attack killed 24 civilians and wounded 62 others in Baghdad on 28 February 2016;⁷⁴⁵ an attack killed 25 civilians and injured 59 others in the al-Kariya al-Asriya village, Iskandariya district, Babil on 25 March 2016;⁷⁴⁶ an attack against pilgrims in the south of Baghdad, killed ten and wounded more than 11 civilians on 2 May 2016;⁷⁴⁷ an attack killed 12 and injured 49 civilians in New Baghdad, Baghdad on 9 June 2016; an attack killed 292 civilians and wounded 200 others in Karrada, Baghdad on 3 July 2016; an attack killed nine civilians and injured 26 others in Bayaa, Baghdad on 27 September 2016;⁷⁴⁸ and five suicide attacks against a wedding in the Tamr village, Karbala, killed 17 people and wounded 25 others on 28 August 2016.⁷⁴⁹

⁷³⁹ UNAMI and OHCHR, (1 May–31 October 2015), *supra* note 514, p. 2.

⁷⁴⁰ *Ibid.*, p. 15.

⁷⁴¹ *Ibid.*

⁷⁴² *Ibid.*

⁷⁴³ *Ibid.*

⁷⁴⁴ UNAMI and OHCHR, (1 November 2015–30 September 2016), *supra* note 520, p. 7.

⁷⁴⁵ *Ibid.*, p. 5.

⁷⁴⁶ *Ibid.*, p. 6.

⁷⁴⁷ *Ibid.*, p. 5.

⁷⁴⁸ *Ibid.*, p. 6.

⁷⁴⁹ *Ibid.*, p. 8.

ISIS shelled many villages, towns and cities during its armed conflict with the Iraqi armed forces, government associated tribes and Kurdish *peshmerga* forces. The consequences were similarly the killing and wounding of hundreds of civilians.

The group shelled the village of al-Bashir, Kirkuk and wounded nine civilians and displaced many others on 19 and 20 July 2014.⁷⁵⁰

The ISIS fighters shelled a residential area in Tal Kef, Mosul and killed one civilian on 4 August 2014. The next day, they shelled al-Hadba', al-Sukar, al-Baladiyat and al-Sideeq in Mosul and killed two civilians and wounded 17 others and many others fled their houses to the other parts of the city.⁷⁵¹

The group shelled al-Askari in Tuz Khurmatu, Salahaddin and killed five civilians and wounded 25 others on 29 August 2014.⁷⁵²

ISIS carried out five suicide and detonated car bomb attacks along with shelling against the Dhulu'iya town, Salahaddin on 8 September 2014. The consequence was the killing of 20 civilians and the wounding of 120 others.⁷⁵³

The group shelled the village of Mahana, Makhmur, Erbil and wounded six civilians on 26 March 2016. Three wounded reportedly died later including two minors.⁷⁵⁴

The group is also responsible for the following shelling incidents: shelling Heet, Rumadi, Anbar on 6 May 2016 and killing four civilians and wounding three others; and shelling Khalidiya, Rumadi, Anbar on 13 May 2016 and killing five civilians.⁷⁵⁵

2.3.2. Attacking and murdering other protected persons

ISIS is accused of attacking and killing press members in Iraq⁷⁵⁶ along with the abduction and execution of local and foreign journalists in Syria. The group is also responsible for attacking and killing numerous Muslim *Imāms* in the areas under its control.

⁷⁵⁰ UNAMI and OHCHR, (6 July–10 September 2014), *supra* note 509, p. 9.

⁷⁵¹ *Ibid.*

⁷⁵² *Ibid.*

⁷⁵³ *Ibid.*

⁷⁵⁴ UNAMI and OHCHR, (1 November 2015–30 September 2016), *supra* note 520, p. 9.

⁷⁵⁵ *Ibid.* p. 8.

⁷⁵⁶ The press members are entitled to the same protection granted to civilians as long as they have no direct part in armed conflict. The Geneva Convention III, in article four (A) (4) and Additional Protocol I, in article 79 protect war correspondents and journalists during international armed conflict. Although Additional Protocol II includes no article regarding such people, they are protected under customary international humanitarian law. ISIS targeted journalists

Two suicide bombers from ISIS, attacked the headquarters of the Salaheddin TV Station in Salaheddin in December 2013 and killed five journalists for allegedly “distorting the image of Iraq’s *Sunni* community”.⁷⁵⁷

The ISIS fighters seized a news cameraman of the Salaheddin Channel in the village of Samra, Tikrit, Salaheddin on 7 September 2014. On 11 October, the fighters executed him publicly for refusing to work with them.⁷⁵⁸

It was reported that 60 to 70% of the Mosul’s journalists left the city after ISIS entered it and the rest stayed at home. According to the Reporters without Borders⁷⁵⁹, ISIS threatened journalists to stop working or else be killed.⁷⁶⁰

The Journalistic Freedoms Observatory⁷⁶¹ has reported that in October 2014, the ISIS fighters were detaining nine journalists and observing nine others in Mosul and Salahaddin for previously working with some TV channels.⁷⁶²

ISIS abducted an Egyptian journalist and his son from his house in Wadi Hajar, Mosul on 4 July 2014, although the reason of their abduction has not been reported.⁷⁶³

along with the other people during or in association with armed conflict in Iraq. Although the reasons of the attacks and killings have not been reported in many cases, the group attacked and killed all of the victims for their journalistic activities.

⁷⁵⁷ “ISIL ‘Publicly executes Iraqi Journalist’”, *Aljazeera*, (11 October 2014). Available at: <<http://www.aljazeera.com/news/middleeast/2014/10/reports-isil-executes-iraqi-journalist-20141010194149556427.html>> (Accessed: 5 June 2016).

⁷⁵⁸ *Ibid.*

⁷⁵⁹ The Reporters without Borders is an international non-governmental organisation which was founded by the French journalists, Robert Ménard, Rémy Loury, Jacques Molénat and Émilien Jubineau in France in 1985. The objective of the organisation is promoting and defending the freedom of information and press. The organisation monitors the situation of media and journalists in the world. It fights censorship and encourages governments to refrain from adopting laws that restrict the freedom of expression. It protects journalists from being attacked and provides material and moral support to persecuted journalists and war correspondents.

⁷⁶⁰ “Areas controlled by Islamic State are News ‘Black Holes’”, *Reporters without Borders*, (23 October 2014). Available at: <<http://en.rsf.org/iraq-areas-controlled-by-islamic-state-23-10-2014,47147.html>> (Accessed: 5 June 2016).

⁷⁶¹ The Journalistic Freedoms Observatory is an Iraqi independent organisation that was established by some Iraqi Journalists in 2014. The organisation promotes and observes the freedom of press in Iraq. It defends journalists and media workers from risky environments. It advocates legal reforms to prevent censorship and guarantee the freedom of information and press.

⁷⁶² “Areas controlled by Islamic State are News ‘Black Holes’”, *supra* note 760.

⁷⁶³ UNAMI and OHCHR, (5 June-5 July 2014), *supra* note 496, p. 12.

On 18 February 2015, the group executed a journalist who had worked for the Sama Mosul TV Channel in Mosul.⁷⁶⁴

ISIS executed a journalist working for a local channel in Mosul on 8 April 2015.⁷⁶⁵

The group executed three journalists who were all brothers in Hamam Alil, Mosul on 10 August 2015 for transmitting news to the local and international media about the life in Mosul and the group's movement and military bases.⁷⁶⁶

The ISIS fighters executed another journalist of the Sama TV in Mosul on 4 October 2015. The reason of his execution is not known.⁷⁶⁷

The group executed the *Imām* of the Grand Mosque in Mosul, Muhammad al-Mansuri on 12 June 2014, for refusing to join its fighters. Two days later, the group executed 12 other *Imāms* from the al-Isra Mosque, Mosul for refusing to pledge allegiance to its authority.⁷⁶⁸

ISIS executed a *Sunni Imām* in Baquba, Diyala on 22 July 2014, for denouncing its acts.⁷⁶⁹

On 8 September 2014, the group's fighters banned 40 *Imāms* from performing religious work in mosques for refusing to give their religious loyalty to the group.⁷⁷⁰ One day later, the fighters executed another *Imām* in Mosul for the same reason.⁷⁷¹

ISIS reportedly executed three *Imāms* in Hamam Ali, Mosul on 13 September 2015, for not praising the group during their sermons.⁷⁷²

The group abducted two *Imāms* of the Grand Mosque of Mosul and the Mosque of Prophet Yunus (Jonah) from their houses in Mosul on 17 January 2015. It later executed the *Imām* of the Mosul's Grand Mosque on 18 January 2015 and the fate of the other one is unknown.⁷⁷³

The ISIS fighters publicly executed an *Imām* of a Mosul's mosque for criticizing the group in the Musherfia village, Mosul on 20 July 2015.⁷⁷⁴

⁷⁶⁴ UNAMI and OHCHR, (11 December 2014–30 April 2015), *supra* note 512, p. 13.

⁷⁶⁵ *Ibid.*

⁷⁶⁶ UNAMI and OHCHR, (1 May–31 October 2015), *supra* note 514, p. 11.

⁷⁶⁷ *Ibid.*

⁷⁶⁸ UNAMI and OHCHR, (5 June–5 July 2014), *supra* note 496, pp. 10–11.

⁷⁶⁹ UNAMI and OHCHR, (6 July–10 September 2014), *supra* note 509, p. 7.

⁷⁷⁰ *Ibid.*, p. 11.

⁷⁷¹ *Ibid.*, p. 7.

⁷⁷² UNAMI and OHCHR, (1 May–31 October 2015), *supra* note 514, p. 10.

⁷⁷³ UNAMI and OHCHR, (11 December 2014–30 April 2015), *supra* note 512, p. 13.

⁷⁷⁴ UNAMI and OHCHR, (1 May–31 October 2015), *supra* note 514, p. 11.

2.3.3. *Attacking protected places*

After taking control of Mosul, ISIS started to destroy the houses of the fled civilians,⁷⁷⁵ public officials, members of the security and police forces and members of the government associated tribes⁷⁷⁶. The group moreover destroyed government offices and buildings, cultural sites, artifacts, museums, libraries, mosques, churches, graves and shrines.

The group destroyed the houses of the members of the Council of Representatives and the house of the father of the City Governor soon after entering Mosul.⁷⁷⁷

On 12 July 2014, the ISIS fighters destroyed 200 houses of the members of the security and police forces and people who had previously fought the group in the al-Zewija village, Baji, Salahaddin.⁷⁷⁸

The group's fighters blew up 15 other houses of the security and police members in Hamm al-Alil, Mosul on 11 and 12 July 2014.⁷⁷⁹

The group looted and destroyed the house of the leader of the al-Obaidi tribe⁷⁸⁰ in the al-Ramel village on 20 July 2014 for refusing to help the group with men and vehicles in fighting against the Iraqi armed forces.⁷⁸¹

The ISIS fighters are also responsible for destroying the following houses: four houses in Baiji, Salahadin on 8 August 2014; a house in Ainzala, Diyala on 27 August; three houses in Mosul on 29 August 2014; a house in al-Mu'tasam, Samarra on 1 September 2014; six houses in al-Qayarah, Mosul on 4 September 2014; another house in Mosul on the same day; a house in Jalawla, Diyala on 6 September 2014;⁷⁸² a house in Zab, Kirkuk on 19 December 2014; seven houses in Hawija, Riyadh and Zab, Kirkuk on 7 and 8 January 2015; and 21 houses in Hawija, Kirkuk on 7 and 8 February 2015.⁷⁸³ The houses mostly belonged to the members of the police and security forces and government loyal tribes.

⁷⁷⁵ The term of civilian object is not mentioned in article eight, paragraph (c) and (e) regarding an armed conflict not of an international character but the objects are protected under customary international law.

⁷⁷⁶ Destroying the houses of the members of the government armed forces and government loyal tribes constitutes a war crime under article eight, paragraph (e) (xii) of the ICC Statute, as states: “[d]estroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict”.

⁷⁷⁷ UNAMI and OHCHR, (5 June-5 July 2014), *supra* note 496, p. 13.

⁷⁷⁸ UNAMI and OHCHR, (6 July–10 September 2014), *supra* note 509, p. 8.

⁷⁷⁹ *Ibid.*

⁷⁸⁰ The tribe of al-Obaidi is a *Sunni* Arab tribe that resides in the central and northern governorates of Iraq.

⁷⁸¹ UNAMI and OHCHR, (6 July–10 September 2014), *supra* note 509, p. 8.

⁷⁸² *Ibid.*, pp.8-9.

⁷⁸³ UNAMI and OHCHR, (11 December 2014–30 April 2015), *supra* note 512, p. 17.

The group destroyed the government offices, police station and municipality building in Sulaiman Bek, Salahaddin on 19 August 2014;⁷⁸⁴ the bridges, electricity station and Sedoor Dam in Jalawla, Diyala by 3 February 2015; several bridges in Kirkuk on 7 February 2015; the buildings of local police, local council, finance and municipality and some other buildings under construction in Hmdaniya, Mosul on 16 February 2015; and all the police and security headquarters in Mosul on 1 March 2015.⁷⁸⁵

The group carried out a suicide attack in a market place in Khan Bani Saad, Diyala on 17 July 2015. Besides the killing and wounding of many civilians, the attack caused the destruction of over 50 shops and 70 cars.⁷⁸⁶

The group destroyed eight houses of Christian families in Hmadanya, Mosul on 2 June 2015; eight other Christians' houses in Hay al-Arabi, Mosul and 14 other houses belonging to Christians in al-Zahoor, Mosul on 22 June 2015; a house of a Christian family in Hay al-Shifaa, Mosul on 1 July 2015; 15 houses in Makhmur, Erbil on 29 July 2015; three houses in the Dwezat Tahtani village, Qayarah, Mosul on 1 August 2015; 11 houses of the Shabak families in Mosul on 2 September 2015; three houses in Qayyarah, Mosul on 3 September 2015; and 21 houses in an unknown village near Mosul on 21 September 2015.⁷⁸⁷

According to the United Nations Educational, Scientific and Cultural Organisation's (UNESCO) World Heritage Centre⁷⁸⁸, Iraq owned 10,000 cultural sites and 20% of the sites were located in the ISIS territory. The group destroyed 34% of the sites in 2014. In 2015, The destruction rate reached 66%.⁷⁸⁹ ISIS justified the destruction with Islamic monotheism and the elimination of

⁷⁸⁴ UNAMI and OHCHR, (6 July–10 September 2014), *supra* note 509, p. 9.

⁷⁸⁵ UNAMI and OHCHR, (11 December 2014–30 April 2015), *supra* note 512, p. 17.

⁷⁸⁶ UNAMI and OHCHR, (1 May–31 October 2015), *supra* note 514, p. 14.

⁷⁸⁷ *Ibid.*, pp. 15-16.

⁷⁸⁸ The United Nations Educational, Scientific and Cultural Organization (UNESCO) is a UN specialised agency that coordinates educational, scientific and cultural cooperation in the world. The mission of the agency is contributing to provide everyone with quality education, cultural diversity and dialogue, scientific development and the freedom of expression. One of the projects of the UNESCO is protecting cultural and natural heritage of the world. For this purpose, it adopted the Convention concerning the Protection of the World Cultural and Natural Heritage in 1972 and established the World Heritage Centre in 1992. The convention and the centre play a great role these days in securing the world's cultural and natural heritage.

⁷⁸⁹ Hannah Ghorashi, "A look at the Full Scope of ISIS's Destruction of Cultural Heritage Sites", *ARTNEWS*, (11 July 2015). Available at: <<http://www.artnews.com/2015/11/07/isis-destruction-graphic/>> (Accessed: 10 June 2016).

polytheism⁷⁹⁰. According to the group, the presence of such sites was an open invitation for idolatry.⁷⁹¹

Based on the statement of media officials and agencies, the ISIS fighters blew up large parts of the Mosul's ancient wall⁷⁹² with explosives on 27 January 2015.⁷⁹³

On 6 March 2015, the Iraq's Ministry of Tourism and Antiquities stated that ISIS had destroyed the remains of the historical city of Nimrud⁷⁹⁴ that was located 30 kilometres south of Mosul.⁷⁹⁵ The group released a video in April 2015 that showed the demolition of the city with bulldozers and explosives.⁷⁹⁶

⁷⁹⁰ The religion of Islam is based on the idea of monotheism. The concept of Monotheism in Islam, is the confession of humans to the oneness of God and worshiping no beings other than Him. The denial of the God's oneness or the association of partnership to Him is defined as polytheism. Polytheism is regarded as the most major sin in Islam that God never forgives. The Quraysh tribe of the Prophet Muhammad was originally a pagan tribe. The Prophet destroyed all the tribe's idols in 630. ISIS referred to the practice of the Prophet in the destruction of the historical and cultural heritage of Iraq. The group was not aware of the fact that Iraq has been part of the Islamic Caliphate from the beginning of the Islamic history. The cultural sites have never been the object of worship of people and survived throughout the Islamic history.

⁷⁹¹ Mubaraz Ahmed, "Why Does ISIS destroy Historic Sites", *Centre on Religion and Geopolitics*, (1 September 2015). Available at: <<http://tonyblairfaithfoundation.org/religion-geopolitics/commentaries/opinion/why-does-isis-destroy-historic-sites>> (Accessed: 10 June 2016); Susannah Cullinane and Hamdi Alkhshali *et al*, "Tracking a Trial of Historical Obliteration: ISIS trumpets Destruction of Nimrud", *CNN*, (14 April 2015). Available at: <<http://edition.cnn.com/2015/03/09/world/iraq-isis-heritage/>> (Accessed: 12 June 2016).

⁷⁹² The wall of Mosul is an archaeological structure whose history dates back to the Assyrian civilisation. Historically, Ninewa was one of the capitals of the Assyrian empire. The city was developed by the emperor, Sennacherib in around 700 BC and the wall was built during his reign. The wall has several gates and each has been named after an Assyrian god.

⁷⁹³ Abdelhak Mamoun, "ISIS detonates Large Parts of Nineveh Historical Wall", *Iraqi News*, (28 January 2015). Available at: <<http://www.iraqinews.com/iraq-war/isis-detonates-large-parts-nineveh-historical-wall/>> (Accessed: 11 June 2016).

⁷⁹⁴ The history of the Nimrud city also traces back to the Assyrian empire. The city was developed by the emperor, Shalmanesere I between 1365 and 1050 BC. It became the capital of the empire during the rule of Ashurnasirpal II (883-859 BC).

⁷⁹⁵ "ISIS 'bulldozes' Nimrud: UNESCO condemns Destruction of Ancient Assyrian Site as a 'War Crime'", *The Independent*, (6 March 2015). Available at: <<http://www.independent.co.uk/news/world/middle-east/isis-militants-bulldoze-ancient-assyrian-site-of-nimrud-10089745.html>> (Accessed: 11 June 2016).

⁷⁹⁶ "'IS Destruction of Nimrud' on Video", *Reuters*, (12 April 2015). Available at: <<https://www.youtube.com/watch?v=D23tLvZnbxk>> (Accessed: 11 June 2016).

Officials from the same ministry reported that the ISIS fighters demolished the remains of the city of Hatra⁷⁹⁷, situated 110 kilometres south of Mosul, on 7 March 2015.⁷⁹⁸

On 8 March 2015, the group attacked the archeological city of Khorsabad⁷⁹⁹, 19 kilometres north-east of Mosul, and demolished the city.⁸⁰⁰

ISIS released another video that showed the destruction of the statutes and artifacts of the second largest Iraqi museum, Mosul Museum on 26 February 2015.⁸⁰¹

The group destroyed many libraries and burnt many books. Consequently, thousands of manuscripts and instruments used by Arab scientists disappeared in late 2014 and beginning of 2015.

Based on some reports on 15 July 2014, the ISIS fighters destroyed the largest library in Tal Afar, Mosul after using it as a military base for a while.⁸⁰²

The group burnt hundreds of books from the Central Library of the University of Mosul on 14 January 2015.⁸⁰³

ISIS burnt thousands of books and manuscripts from the public library and bookshops in Mosul on 21 February 2015.⁸⁰⁴

On 22 February 2015, the group destroyed the Mosul Public Library with explosives.⁸⁰⁵

ISIS destroyed hundreds of *Sunni*, *Shiite* and *Sūfī* mosques as well as graves and shrines of the religious leaders and scholars. The group also destroyed Christian churches, Yazidi and Kaka'i⁸⁰⁶ religious places.

⁷⁹⁷ Hatra is similarly a very ancient city that is located around the city of Mosul in Ninewa. Some historians believe that the Assyrians built the city in the 2nd and 3rd century BC. Some others say that the history of the city dates back 2000 years ago, to the Seleucid empire. The third view is that the city was the capital of an Arabic kingdom first but later fell to the Sassanid emperor, Shapur in 241 AD.

⁷⁹⁸ Chris Johnston, "ISIS Militants destroy Remains of Hatra in Northern Iraq", *The Guardian*, (7 March 2015). Available at: <<http://www.theguardian.com/world/2015/mar/07/isis-militants-destroy-hatra-iraq>> (Accessed: 12 June 2016).

⁷⁹⁹ Khorsabad has also been one of the capitals of the Assyrian empire. The city is believed to have been constructed between 717 and 706 BC by the Assyrian emperor, Sargon II.

⁸⁰⁰ Susannah Cullinane and Hamdi Alkhshali *et al*, *supra* note 791.

⁸⁰¹ "ISIS Fanatics destroy Mosul's Museum", *Tube News*, (26 February 2015). Available at: <<https://www.youtube.com/watch?v=AJ9wvHq3eQ8>> (Accessed: 12 June 2016).

⁸⁰² UNAMI and OHCHR, (6 July–10 September 2014), *supra* note 509, p. 10.

⁸⁰³ UNAMI and OHCHR, (11 December 2014–30 April 2015), *supra* note 512, p. 18.

⁸⁰⁴ *Ibid.*

⁸⁰⁵ *Ibid.*

⁸⁰⁶ Kaka'i is also an ethno-religious group of the north of Iraq. The group is ethnically Kurdish and speaks in the Kurdish language dialect of Gorani. There are different views on the religion of the group but the majority of scholars

The group blew up the *Shiite* mosques in the Shanaf and Staeh villages in Mosul on 7 July 2014.⁸⁰⁷

On 25 July 2014, the ISIS fighters destroyed the Mosque of the Prophet Jonah in Mosul completely as they thought that the mosque had become a place for apostasy⁸⁰⁸ and not prayers.⁸⁰⁹

The fighters from ISIS demolished the *Sunni* Mosque of Sheikh al-Shat, in Mosul on 3 September 2014.⁸¹⁰

The group demolished the tomb of the Islamic historian Ibn al-Athir in Sinjar, Mosul on 16 June 2014.⁸¹¹

The fighters from ISIS blew up the *Sunni* shrines of *Imām* Yahya Abu al-Qasm, Prophet Daniel, *Imām* Abul Oula, Prophet Jonah and Aoun al-Deen Bin al-Hasan in Mosul as well as the *Sūfī* shrines in the al-Rawtha al-Muhamadiya Mosque in Muthanna, Mosul and the shrine of *Sūfī* Salih in a village in Daquq, Kirkuk in July 2014.⁸¹²

ISIS destroyed the thousand-year-old site and tomb of the *Shiite* leader, Uqaylid Amir Sharaf al-Dawla in Samarra on 23 October 2014.⁸¹³

According to the photos released by the ISIS media on 18 March 2015, the group blew up the Mar Behnam Monastery that was located in the village of Khdir Ilyas, 30 kilometres south-east of Mosul, close to the town of Beth Khdeda.⁸¹⁴

believe that the Kaka'i religious belief is a mixture of *Sūfīsm*, *Shi'a* Islam and Christianity. Kaka'is are, in other words, Kurds but identify themselves with a specific religious faith which is known as Kaka'ism. The group's members predominantly live in Kirkuk but the additional Kaka'i communities live in Diyala, Arbil and Sulaymaniyah as well as in Iran.

⁸⁰⁷ UNAMI and OHCHR, (6 July–10 September 2014), *supra* note 509, p. 9.

⁸⁰⁸ Some people used to visit the mosque of the Prophet Jonah and his shrine to ask for blessings from God through the Prophet. ISIS considered the practice as apostasy and often as polytheism because the group believed that asking anything from God must be done directly without involving intermediaries, particularly when the intermediaries were dead.

⁸⁰⁹ Abdelhak Mamoun, "ISIL destroys Mosque of Biblical Jonah, Prophet Yunus", *Iraqi News*, (25 July 2014). Available at: <<http://www.iraqinews.com/features/urgent-isil-destroys-mosque-biblical-jonah-prophet-yunus/>> (Accessed: 10 June 2016).

⁸¹⁰ UNAMI and OHCHR, (6 July–10 September 2014), *supra* note 509, p. 10.

⁸¹¹ UNAMI and OHCHR, (5 June–5 July 2014), *supra* note 496, p. 13.

⁸¹² UNAMI and OHCHR, (6 July–10 September 2014), *supra* note 509, p. 10.

⁸¹³ "Islamic State destroyed the Shia Shrine of Imam al-Daur", *Conflict Antiquities*, (23 October 2014). Available at: <<https://conflictantiquities.wordpress.com/2014/10/30/iraq-samarra-islamic-state-destruction-shia-shrine-imam-al-daur/>> (Accessed: 12 June 2016).

⁸¹⁴ "ISIS Militants blow up 4th-Century Christian Mar Behnam monastery in Iraq", *supra* note 632.

ISIS exploded the religious symbol of the Yazidis, Sinjar Minaret in Sinjar on 22 March 2015. Besides being a religious symbol for the Yazidis, the Minaret was an ancient site and archaeological monument.⁸¹⁵

In late August 2014, the group demolished many *Kaka'i* shrines in the villages of the Ninewa plains including Sayid Hayas, Bawah Haidar, BawahYadgar and Shawas Quali.⁸¹⁶

2.3.4. Executing persons placed hors de combat

One of the most serious crimes of ISIS has been the execution of *hors de combat* people. The group shot, beheaded, hanged and burnt alive thousands of such protected people during its military campaigns in the country.

ISIS executed seven prison guards in front of civilians in Tikrit, Salahaddin on 10 June 2014.⁸¹⁷

The group published a video on 12 June 2014 that showed hundreds of captured air force recruits in the Spiker Military Base. Two days later, it posted 60 photographs that indicated the recruits had been executed. Although ISIS claimed responsibility for the execution of 1,700 combatants, the claim remains unverified. Human Rights Watch believes that the executions have been carried out in two trenches. The group's fighters have killed between 90 and 110 men in the first trench and between 35 and 40 in the second trench.⁸¹⁸

ISIS publicly killed 30 captured policemen in Tikrit, Salahaddin on 11 June 2014.⁸¹⁹

The group killed ten members of the security forces near Riyadh and Rashad, Kirkuk on 11 June 2014 while they were returning home from their military positions.⁸²⁰

In June 2014, ISIS released some videos that showed the abduction and killing of civilians and policemen. In a video, the group beheaded a policeman in his home and another one by a side of a road.⁸²¹

⁸¹⁵ Cristina Silva, "Islamic State Iraq Battle: ISIS bombs Yazidi Religious Site in Sinjar, destroys Homes", *International Business Times*, (23 March 2015). Available at: <<http://www.ibtimes.com/islamic-state-iraq-battle-isis-bombs-yazidi-religious-site-sinjar-destroys-homes-1855556>> (Accessed: 12 June 2016).

⁸¹⁶ UNAMI and OHCHR, (6 July–10 September 2014), *supra* note 509, p. 10.

⁸¹⁷ OHCHR, (18 August 2014), *supra* note 595, p.1.

⁸¹⁸ Human Rights Watch, "Iraq: ISIS Execution Site Located", (26 June 2014). Available at: <<https://www.hrw.org/news/2014/06/26/iraq-isis-execution-site-located>> (Accessed: 13 June 2016).

⁸¹⁹ UNAMI and OHCHR, (5 June-5 July 2014), *supra* note 496, p. 10.

⁸²⁰ *Ibid*, p. 10.

⁸²¹ *Ibid*, p. 11.

The group killed 42 captured soldiers in Awenat, Tikrit, Salahaddin on 16 July 2014.⁸²²

ISIS executed many captured soldiers and police officers whose corpses were later found by people. The bodies of 12 were found in the Tawakkul village, Baquba, Diyala on 13 July 2014;⁸²³ the corpses of 18 policemen were found in Abbasiyah, Tikrit, Salahaddin on 25 July 2014; 40 bodies were found in the Jumela village, Salahaddin on 27 July 2014;⁸²⁴ 15 bodies were found in a mass grave in Sulaiman Bek, Salahaddin in the end of August 2014; the corpse of a policeman was received by a hospital in Hawija, Kirkuk on 26 August 2014; seven bodies were found in Wahda, Diyala on 29 August 2014; and five corpses were found in Baquba, Diyala on 31 August 2014.⁸²⁵

In late August 2014, ISIS released a shocking video that showed the execution of a Kurdish *peshmerga* along with sending a threatening message to the president of the Kurdistan region, Mass'ud Barzani for joining the US-led Coalition. The fighters threatened Barzani to behead 14 more captured *peshmergas*.⁸²⁶

The group is also responsible for the killing of the following captured people: 15 policemen in al-Wafa, Anbar on 13 December 2014; a policemen in Borsa, al-Alam, Salahaddin on 18 December 2014; eight former members of the security forces in Tikrit, Salahaddin on 6 January 2015; a colonel and a major in Salahaddin on 16 January 2015; eight former members of the security forces in al-Door, Salahaddin on 22 January 2015; ten former members of the security forces in different areas in Salahaddin on 30 January 2015;⁸²⁷ an army officer in Mosul on 1 March 2015; a former army colonel in Mosul on 5 March 2015; and two former pilots in Aski Mosul on 8 March 2015.⁸²⁸

⁸²² UNAMI and OHCHR, (6 July–10 September 2014), *supra* note 509, p. 6.

⁸²³ *Ibid*, p. 7.

⁸²⁴ *Ibid*, p. 6.

⁸²⁵ *Ibid*, p. 7.

⁸²⁶ “ISIS beheads a Kurdish Man...”, *Vevo Kurd*, (30 August 2014). Available at: <<https://www.youtube.com/watch?v=d5RVTzYvh0E>> (Accessed: 14 June 2016); Alessandria Masi, “ISIS says It beheaded Kurdish Peshmerga Fighter in Graphic Video”, *International Business Insider*, (28 August 2014). Available at: <<http://www.ibtimes.com/isis-says-it-beheaded-kurdish-peshmerga-fighter-graphic-video-1673054>> (Accessed: 14 June 2016).

⁸²⁷ UNAMI and OHCHR, (11 December 2014–30 April 2015), *supra* note 512, p. 11.

⁸²⁸ *Ibid*, p. 12.

In March 2015, ISIS published another video that showed the execution of three Kurdish *peshmergas*, who had been captured while fighting the group's fighters around Mosul, in front of a large crowd including some children.⁸²⁹

ISIS hanged a captured soldier from a bridge in Fallujah, Anbar on 20 May 2015.⁸³⁰

On 13 June 2015, the group killed 27 captured members of the security forces in the Badush prison, Mosul.⁸³¹

The fighters from ISIS executed a captured army officer, his son and a soldier in Mosul on 21 June 2015.⁸³²

On 30 September 2015, the group released another video that showed the beheading of ten captured Kurdish *peshmergas*.⁸³³

ISIS targeted civilians and members of some tribes who worked with, supported or provided information to the Iraqi armed forces and *Shiite* militia groups.

The group executed 17 civilians who previously worked for the police in Mosul on 11 June 2014. On the same day, the fighters from the group executed 12 other men for the same reason in Dawasa, Mosul.⁸³⁴

ISIS published a video on 23 June 2015 that showed the killing of 16 men for cooperating with the national armed forces.⁸³⁵

The group executed nine people in Mosul on 10 July 2015 and four others in Shirqat, Salahadin on 4 September 2015 for supporting the national armed forces and helping people to flee from the district.⁸³⁶

⁸²⁹ Tom Wyke, "ISIS beheads three Peshmerga Soldiers as a warning to their Sworn Enemies on Kurdish New Year", *Mail Online*, (20 March 2015). Available at: <<http://www.dailymail.co.uk/news/article-3004040/ISIS-behead-three-Peshmerga-soldiers-warning-sworn-enemies-Kurdish-New-Year.html>> (Accessed: 14 June 2016).

⁸³⁰ UNAMI and OHCHR, (1 May–31 October 2015), *supra* note 514, p. 12.

⁸³¹ *Ibid.*

⁸³² *Ibid.*

⁸³³ Johnlee Varghese, "Mosul: New ISIS Beheading Video shows 10 Kurdish Peshmerga Soldiers reciting from Quran before Execution", *International Business Times*, (1 October 2015). Available at: <<http://www.ibtimes.co.in/mosul-new-isis-beheading-video-shows-10-kurdish-peshmerga-soldiers-reciting-quran-before-execution-648769>> (Accessed: 15 June 2016).

⁸³⁴ UNAMI and OHCHR, (5 June–5 July 2014), *supra* note 496, p. 9.

⁸³⁵ UNAMI and OHCHR, (1 May–31 October 2015), *supra* note 514, p. 9.

⁸³⁶ *Ibid.*

The ISIS fighters killed more than 320 members of the tribe of Albu Nimr⁸³⁷ in Anbar in October 2014 as the tribe was being recruited by the government to fight the group.⁸³⁸

The group executed 13 members of the al-Jburi tribe in Salahaddin on 15 December 2014.⁸³⁹ It abducted 42 men from the same tribe in Qayarra, Mosul on 9 September 2015 and executed 16 of the abductees later for cooperating with the national armed forces and Popular Mobilization Forces.⁸⁴⁰

The fighters from ISIS executed 15 members of the al-Jumaili tribe in al-Shihabi, Garma district, Anbar on 1 January 2015 and 11 members of the tribes of Qaisi, al-Jburi, and al-Duri in al-Mazra'a, Baiji, Salahaddin on 21 April 2015, for the same reason.⁸⁴¹

2.3.5. Using prohibited weapons

ISIS has been accused of the use of prohibited weapons against civilians, Iraqi military and Kurdish *peshmerga* forces throughout the time of the conflict in Iraq.

The fighters from ISIS in December 2014, told the residents of the Dujail and Yathrib areas in Salahaddin that they would use chemical weapons. Following the news, 15,000 civilians fled the area. The group attacked the Baghdadi district, Anbar with shelling on 24 December 2014. The group's fighters reportedly used chlorine gas in the attack.⁸⁴²

ISIS detonated a cylinder, reportedly containing chlorine gas, near a stadium in Samarra, Salahaddin on 9 March 2015. After the explosion, the residents began coughing, choking and breathing with difficulty.⁸⁴³

⁸³⁷ Albu Nimr is a *Sunni* Arab tribe whose members mostly reside in the western Anbar governorate. The tribe is loyal to government in the fight against the *Sunni* rebel groups including ISIS.

⁸³⁸ Amnesty International, *supra* note 581, p. 193.

⁸³⁹ UNAMI and OHCHR, (11 December 2014–30 April 2015), *supra* note 512, p. 12.

⁸⁴⁰ UNAMI and OHCHR, (1 May–31 October 2015), *supra* note 514, p. 9. The Popular Mobilization Forces comprise 30 militia groups. The forces were established based on a religious *fatwa* (Islamic pronouncement) of the Iraqi *Shiite* religious leader, Ayatollah Ali al-Sistani after ISIS captured Mosul and defeated the Iraqi military forces on all fronts in June 2014. The Popular Mobilization Forces mainly consist of *Shiite* members and played a decisive role in the fight against ISIS. After the Iraqi Parliament passed a law regarding them on 25 November 2016 and the Iraqi president approved it on 19 December 2016, the forces became part of the Iraqi security forces. The Badr Organisation and Mahdi Army are two main forces among the militia groups.

⁸⁴¹ UNAMI and OHCHR, (11 December 2014–30 April 2015), *supra* note 512, p. 12. The al-Jumaili, al-Qais and al-Duri tribes are also *Sunni* Arab tribes that have inhabited the western Anbar and central Salahaddin. The tribes are generally affiliated with the *Sunni* rebel groups but some tribe members or sub-tribes are loyal to government.

⁸⁴² UNAMI and OHCHR, (11 December 2014–30 April 2015), *supra* note 512, p. 19.

⁸⁴³ *Ibid.*

In March 2015, the Kurdistan Regional Government claimed that ISIS had used chlorine gas in a car bomb attack against *peshmerga* forces in Zumar, Mosul on 23 January 2015.⁸⁴⁴

The Conflict Armament Research group⁸⁴⁵ has also documented that ISIS attacked *peshmerga* forces with an unknown chemical, had the characteristics and effects of chlorine chemical agent, on 21 or 22 June 2015.⁸⁴⁶

Based on the statement of a *peshmerga* senior official, ISIS attacked *peshmerga* forces with Katyusha rockets filled with chlorine in Makhmur, Erbil on 11 August 2015.⁸⁴⁷ The attack eventually affected around 35 *peshmerga* members.⁸⁴⁸ According to an official from the German Ministry of Defence, there were some indications of the use of chemical weapons by ISIS in that attack.⁸⁴⁹ In February 2016, the Organisation for the Prohibition of Chemical Weapons⁸⁵⁰ released the results of the laboratory tests of the affected *peshmergas* and confirmed that the tests were positive for sulphur mustard.⁸⁵¹

The UNOHCHR and UNAMI have reported many other ISIS attacks that caused vomiting, suffocation, sneezing, eye sores, fever and chest pain to civilians, members of the Iraqi armed forces and Kurdish *peshmergas* but the actual use of the prohibited weapons have not yet been declared officially by the Iraqi Government.⁸⁵²

⁸⁴⁴ *Ibid.*

⁸⁴⁵ The Conflict Armament Research is an international organisation that was established in 2011. The organisation documents illicit weapons and finds their sources. The goal of the organisation is limiting the supply of illicit weapons to unauthorised users including the rebel and terrorist organisations. The organisation works in the conflict zones throughout the world including Iraq, Syria, Somalia and Libya.

⁸⁴⁶ “Kurdish Forces fighting ISIS Report being attacked with Chemical Weapons”, *The Guardian*, (13 August 2015). Available at: <<https://www.theguardian.com/world/2015/aug/13/kurdish-forces-fighting-isis-attacked-chemical-weapons-reports>> (Accessed: 15 June 2016).

⁸⁴⁷ “Iraqi Kurds say Islamic State used Chemical Weapons on them”, *The Times of Israel*, (13 August 2015). Available at: <<http://www.timesofisrael.com/iraqi-kurds-say-islamic-state-used-chemical-weapons-on-them/>> (Accessed: 15 June 2016).

⁸⁴⁸ “Samples ‘confirm IS used Mustard Agent in Iraq Attack’”, *BBC NEWS*, (15 February 2016). Available at: <<http://www.bbc.com/news/world-middle-east-35582861>> (Accessed: 15 June 2016).

⁸⁴⁹ “Iraqi Kurds say Islamic State used Chemical Weapons on them”, *supra* note 847.

⁸⁵⁰ The Organisation for the Prohibition of Chemical Weapons is an inter-governmental organisation that was established in 1997 and is based in Hague, Netherlands. The organisation is monitoring the implementation of the provisions of the ‘Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction’. The aim of the organisation is contributing to maintain international peace and security and disarm the world from chemical weapons.

⁸⁵¹ “Samples ‘confirm IS used Mustard Agent in Iraq Attack’”, *supra* note 848.

⁸⁵² UNAMI and OHCHR, (1 November 2015–30 September 2016), *supra* note 520, pp. 9-10.

2.3.6. *Passing sentences and carrying out executions and other punishments*

ISIS established *Sharī'ah* courts in the areas under its control. The courts were not based on the regular Iraqi judicial system but rather dependent on the understanding of the group of the traditional Islamic judiciary.⁸⁵³ The judges were appointed by the group's leadership and from the members of the group. The applicable law before the courts was *Sharī'ah* law. The courts applied the law as strict as possible. According to the statements of some victims: before the ISIS courts, everyone was guilty unless he or she could prove his or her innocence.⁸⁵⁴ Based on the testimonies of some former prisoners, victims were held for a long time and criminal trials lasted only a few minutes even regarding the most serious cases that ended with executions. The courts did not provide any console or legal assistance for defence. Moreover, the group tortured and compelled prisoners to confess.⁸⁵⁵ Hence, the courts were not regularly constituted, the trials were not fair and the due process rights were not guaranteed.

ISIS committed most of the crimes based on the judgments of the courts.⁸⁵⁶ The courts would announce the guilt and the fighters would punish the victims. The victims were civilians, *hors de combat* fighters and captured combatants. The civilians were detained, lashed, amputated and executed for various acts including not pledging allegiance to the group, smoking, drinking alcohol, trading during prayer hours, not fasting during Ramadan, using mobile phones, cooperating with the Iraqi military and Kurdish *peshmerga* forces, fleeing from the group's territory, insulting the group's leaders,⁸⁵⁷ denouncing the group for its criminal acts and previous work with the Iraqi Government. The courts similarly sentenced the *hors de combat* fighters

⁸⁵³ UNAMI and OHCHR, (6 July–10 September 2014), *supra* note 509, p. 6; UNAMI and OHCHR, (11 December 2014–30 April 2015), *supra* note 512, p. 13; UNAMI and OHCHR, (1 May–31 October 2015), *supra* note 514, p. 11; UNAMI and OHCHR, (1 November 2015–30 September 2016), *supra* note 520, p. 10.

⁸⁵⁴ UN Human Rights Council (UNHRC), "Report of the Independent International Commission of Inquiry on the Syrian Arab Republic", 14 November 2014, p. 5.

⁸⁵⁵ Amnesty International, "Syria: Harrowing Torture, Summary Killings in Secret ISIS Detention Centres", (19 December 2013). Available at: <<https://www.amnesty.org/en/latest/news/2013/12/syria-harrowing-torture-summary-killings-secret-isis-detention-centres/>> (Accessed: 18 June 2016).

⁸⁵⁶ UNAMI and OHCHR, (6 July–10 September 2014), *supra* note 509, p. 6; UNAMI and OHCHR, (11 December 2014–30 April 2015), *supra* note 512, p. 13; UNAMI and OHCHR, (1 May–31 October 2015), *supra* note 514, p. 11; UNAMI and OHCHR, (1 November 2015–30 September 2016), *supra* note 520, p. 10.

⁸⁵⁷ Abdelhak Mamoun, "ISIS whips Young Man for insulting ISIS Leader al-Baghdadi in Kirkuk", *Iraqi News*, (3 December 2014). Available at: <<http://www.iraqinews.com/iraq-war/isis-whips-young-man-insulting-isis-leader-al-baghdadi-kirkuk/>> (Accessed: 20 June 2016).

including the former members of the Iraqi armed forces and the former police officers as well as the captured combatants and members of the government loyal tribes to repentance and death.

2.3.7. Displacing civilians

The ISIS conflict displaced many people in Iraq. According to the reports of the human rights bodies, more than three million people, mostly from Ninewa, Salahaddin and Anbar left their places for fear of being killed as a consequence of the conflict or the group's *takfiri* practice.

After ISIS captured Mosul and the surrounding areas more than 100,000 Christians left Mosul and Ninewa governorate. The displaced people left everything behind except their clothes and fled to the Kurdistan region.

The group ordered the Kurds to leave Mosul or else be killed on 21 July 2014. Consequently, 100 Kurdish families left the city and also went to the Kurdistan region.⁸⁵⁸

After ISIS attacked Sinjar and the surrounding villages, around 200,000 from 308,315 inhabitants fled the region to Mount Sinjar, Kurdistan region and other areas between 4 and 8 August 2014.⁸⁵⁹

On 10 August 2014, the entire Kurdish inhabitants fled the village of Kanossia around Mosul from indiscriminate shelling and in fear of being killed by the ISIS fighters.⁸⁶⁰

Based on the UNAMI report, 149,280 people from Salahaddin and about 550,000 people from Anbar, mostly from Rumadi and Faluja were displaced by 5 July 2014.⁸⁶¹

The total number of the displaced people in Iraq reached 2 million individuals by December 2014⁸⁶² and 3,2 million people by December 2015.⁸⁶³

Human rights bodies reported that some of the displaced people were living in squatter settlements without the basic services of clean water, electricity and sanitation.⁸⁶⁴ Some people were displaced more than once as they were not welcomed by the other governorates for suspected links with ISIS and other armed groups.⁸⁶⁵

⁸⁵⁸ UNAMI and OHCHR, (6 July–10 September 2014), *supra* note 509, p. 17.

⁸⁵⁹ UNAMI and OHCHR, (August 2016), *supra* note 549, p. 6.

⁸⁶⁰ UNAMI and OHCHR, (6 July–10 September 2014), *supra* note 509, p. 17.

⁸⁶¹ UNAMI and OHCHR, (5 June–5 July 2014), *supra* note 496, p. 8.

⁸⁶² Amnesty International, *supra* note 581, p. 195.

⁸⁶³ Amnesty International, "The State of the World's Human Rights: Report 2015/2016", 2016, pp. 197-198.

⁸⁶⁴ Human Rights Watch, "World Report 2015: Events of 2014", 2015, p. 307.

⁸⁶⁵ Amnesty International, *supra* note 863, p. 198.

2.3.8. Committing rape, sexual slavery and forced pregnancy

ISIS has been accused of sexual violence against women under *Jihād al-Nikah* (sexual *Jihād*) which, in short, means temporary marriage of women with the group's fighters to provide them with sexual service.

The UNAMI has reported 11 acts of rape of the ISIS fighters against women in Mosul on 17 June 2014 and four suicide incidents of women because of their forcible marriage to the group's fighters.⁸⁶⁶

The group reportedly executed 19 women for refusing sexual *jihād* with its fighters in Mosul on 1 and 2 August 2015.⁸⁶⁷

ISIS abducted more than 3,500 Yazidi women and girls after capturing Sinjar and the other predominantly Yazidi inhabited areas around Mosul in August 2014. The group either forced the victims to marry its fighters or held them in sexual slavery. Based on the human rights reports, most of the victims were raped multiple times including girls as young as 12. The ISIS systematic sexual violence of the Yazidi women and girls can be, in other words, defined as forced pregnancy as the group intended the women and girls to bear children from its fighters and prevent the next Yazidi generation.

2.3.9. Recruiting children

ISIS has been accused of recruiting children into its ranks. In July 2015, Human Rights Watch, based on an interview with two Iraqi children who had escaped from the ISIS training camps, reported that ISIS separated children as young as 14, from their parents and sent them to its camps for military training.⁸⁶⁸

The UNAMI has received information about recruiting children as young as 13 by ISIS. Accordingly, children have worn ISIS uniforms and accompanied the group's fighters with weapons that were too big and heavy for them. The group gave children the responsibility to patrol the cities and guard the arrested people. ISIS also trained children and used them as fighters. In

⁸⁶⁶ UNAMI and OHCHR, (5 June-5 July 2014), *supra* note 496, p. 11.

⁸⁶⁷ UNAMI and OHCHR, (1 May–31 October 2015), *supra* note 514, p. 18.

⁸⁶⁸ Christoph Wilcke, "No Child's Play: Kids fighting One Another in Iraq Conflict", *Human Rights Watch*, (30 October 2015). Available at: <<https://www.hrw.org/news/2015/10/30/no-childs-play-kids-fighting-one-another-iraq-conflict>> (Accessed 25 June 2016).

some cases, the ISIS fighters have ordered children to shield them in front lines and donate blood to the wounded fighters.⁸⁶⁹

In February 2015, the group, in Mosul, ordered that a son from every family must join the group unless he was the family's only son.⁸⁷⁰

ISIS enforced compulsory recruitment of children in Salahaddin and Anbar from February 2015.⁸⁷¹

According to a video released by the group on 14 January 2015, ISIS had a camp in Tal Afar, Mosul for recruiting and training children.⁸⁷²

In February 2015, the group published another video showing the training of 15 Yazidi children.

The responsible ISIS fighters visited the high schools in the Hay al-Tamin area, Mosul on 11 May 2015 and asked students to give their religious loyalty to the group and join their ranks.⁸⁷³

It has been reported that the group used the recruited children to execute 15 of its fighters in Mosul on 14 May 2015, for losing a battle in Bashiqa, Mosul.⁸⁷⁴

On 23 May 2015, ISIS ordered all the school and university male students in Ninewa, to join the group after taking the year-end exams.⁸⁷⁵

ISIS transferred about 25 abducted *Shiite* Turkmen children aged between 10 and 17 from an orphanage in Zuhoor, Mosul to a training camp in Tal Afar, Mosul on 13 March 2016.⁸⁷⁶

The group executed two of its minor fighters in Hamam Alil, Mosul on 12 May 2016, for running away from a battle in the al-Mahana village, al-Qayyarah, Mosul.⁸⁷⁷

ISIS gathered some civilians in Hawija, Kirkuk on 4 June 2016. The fighters later took some people, among them children, to a training camp in Riyadh, Kirkuk.⁸⁷⁸

⁸⁶⁹ UNAMI and OHCHR, (6 July–10 September 2014), *supra* note 509, pp. 17-18.

⁸⁷⁰ UNAMI and OHCHR, (11 December 2014–30 April 2015), *supra* note 512, p. 22.

⁸⁷¹ *Ibid.*

⁸⁷² *Ibid.*, p. 23.

⁸⁷³ UNAMI and OHCHR, (1 May–31 October 2015), *supra* note 514, p. 18.

⁸⁷⁴ *Ibid.*

⁸⁷⁵ *Ibid.*

⁸⁷⁶ UNAMI and OHCHR, (1 November 2015–30 September 2016), *supra* note 520, p. 15.

⁸⁷⁷ *Ibid.*

⁸⁷⁸ *Ibid.*, p. 16.

3. The crimes of ISIS in Syria

Before the expansion of ISIS into Syria, its predecessor, the ISI was well-organised. The group had made significant territorial gains, seized sustainable financial sources and captured considerable military equipment in Iraq. The group, after the adoption of the name of ISIS on 8 April 2013, moved to Syria and engaged in war with all the rebel groups and the government forces. In a short while, ISIS consolidated control over large areas including the oil rich governorate of Der al-Zawr in the east, majority of the northern city of al-Raqqah, the countryside of the northern Aleppo, most of the Syrian desert in the south, the Yarmouk refugee camp in the south-western Damascus, parts of the countryside of the western Homs and the Palmyra city in the south. The ISIS territory in Syria, according to the SOHR, was estimated to be more than half of the country's landmass in May 2015.⁸⁷⁹ The rapid military and territorial gains made ISIS become the strongest group among the rebel groups in Syria.

The ISIS warfare was unimaginably indiscriminate and horrific. It was conducted neither based on the Islamic principles and rules applicable during armed conflict nor according to the international humanitarian costumes and treaties. It is believed that there was no secret behind the ISIS rapid successes other than using brutal means in its war. The group has been accused of the commission of gross humanitarian and human rights law violations in Syria as well. After entering the country, the group began enforcing the most radical interpretation of *Shari'ah* law upon Syrians. The administrative and criminal policies that the group adopted to rule its areas and people in Iraq was indeed the extension of its religious policy in Syria. The Director of Amnesty International for the Middle East and North Africa, Philip Luther, in December 2013, said:

“After years in which they were prey to the brutality of the al-Assad regime, the people of al-Raqqah and Aleppo are now suffering under a new form of tyranny imposed on them by ISIS, in which arbitrary detention, torture and executions have become the order of the day”.⁸⁸⁰

This section will discuss the group's atrocities in Syria and categorise them into widespread and systematic acts against the civilian population and war crime acts.

⁸⁷⁹ Kareem Shaheen, “Half of Syria now under Islamic State's Control”, *The Hindu*, (22 May 2015). Available at: <<http://www.thehindu.com/todays-paper/tp-international/half-of-syria-now-under-islamic-states-control/article7233028.ece>> (Accessed: 5 September 2016).

⁸⁸⁰ Amnesty International, *supra* note 855.

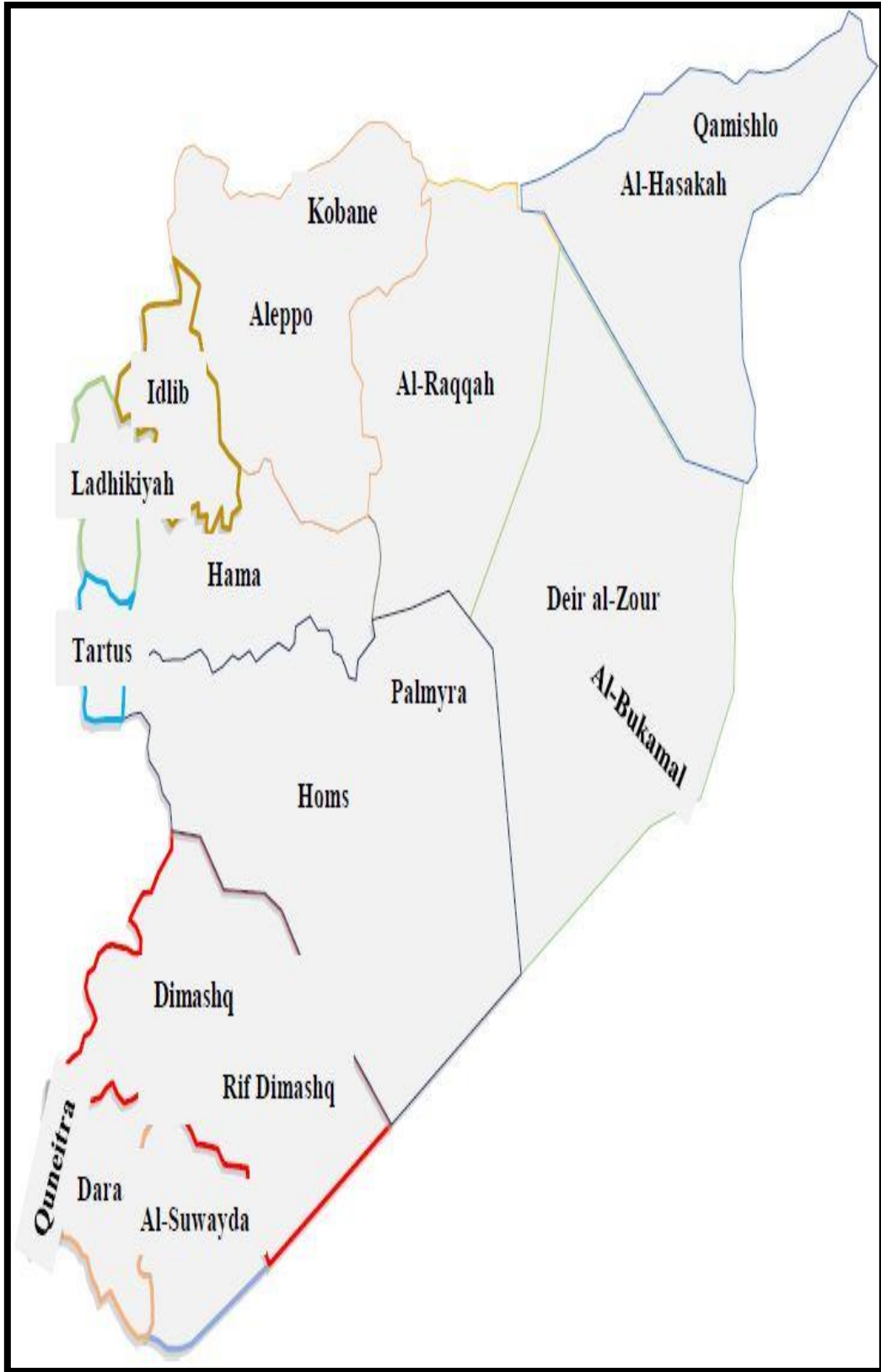


Figure 4: The map of Syria

3.1. The crimes against the civilian population

ISIS, similarly to its attacks in Iraq, carried out many widespread and systematic attacks against Syrian civilian populations. The group committed murder, imprisonment, persecution against Christians⁸⁸¹, Kurds⁸⁸², *Alawites*⁸⁸³ and women on the grounds of faith, ethnicity and gender, enforced disappearance and other inhuman acts of a similar character.

3.1.1. Murder

Public executions were a common order on Fridays throughout the territory of ISIS.⁸⁸⁴ The group had a specific practice to carry out executions. It would initially inform the residents, the passers-by and often children to attend the process. Later, the group's fighters would announce the guilt of the victim and execute him or her. The execution methods were similar to the methods that the group used in Iraq. The group beheaded, shot in the head at close range, stoned to death or threw the victims from the top of buildings. After executing the victim, the ISIS fighters would usually leave the dead body on public display for three days or more in order to be a lesson for the

⁸⁸¹ The Syrian Christians are one of the oldest Christians in the world. Most of them are Assyrians and people who descended from the ancient Aramaean speaking people. Besides the Assyrians and Arameans, there are also Armenian Christians in Syria. Armenians have settled there as a consequence of the historical battles and oppressions on their land. The Christian community constitutes 8 to 10% of the Syrian population. The Syrian Christians follow the Eastern Orthodox Churches, the Eastern Catholic Churches and the Assyrian Church of the East. The Orthodox Churches include the Greek Orthodox Church of Antioch, the Syriac Orthodox Church and the Armenian Apostolic Church. The Eastern Catholic Churches are the Melkite Greek Catholic Church, the Syriac Maronite Church of Antioch, the Armenian Catholic Church, the Syrian Catholic Church and the Chaldean Catholic Church. It should also be mentioned that there also some Protestants among the Syrian Christians. The Christians live in Hama, Aleppo, al-Laziqiyah and al-Hasakah.

⁸⁸² The Kurds are the second largest ethnic group in Syria who comprises 7 to 10% (around two million people) of the country's population. They live in the eastern and northern parts of the country, particularly in the governorates of al-Hasaka, al-Raqah and Aleppo. They are indigenous people and have been living there for millenniums. The traditional name of the land of the Kurds is Kurdistan. Kurdistan was a battlefield of the Ottoman and Safavid empires for a long time. In the 17th century, the two empires divided the land between themselves. After the fall of the Ottoman Empire in 1923, the Ottoman Kurdistan was attached to Turkey, Syria and Iraq based on the Sykes Picot agreement. Therefore, the Kurds live as minorities in Turkey, Iraq, Syria and Iran today.

⁸⁸³ The *Alawites* are a group of the *Shiite* Muslims whose religious faith is known as *Alawism*. The *Alawites* present around 10 to 15% of the Syrian population. They predominantly live in the north-western and central governorates of al-Laziqiyah, Hama and Hums.

⁸⁸⁴ In some cases, the reasons of the executions have not been reported by human rights bodies. However, the reasons were clear for people. The group, similar to its policy in Iraq, executed people for not obeying the group's law, having previously worked with the government or other rebel groups and threatening its authority and power over the captured areas.

others.⁸⁸⁵ Most of the executions took place in Aleppo, al-Raqqah, Idlib, al-Hasakah and Der al-Zawr. The majority of the group's victims were adult men but there were also examples of people as young as 15 years of age and women.⁸⁸⁶

ISIS publicly executed three *Alawite* men in a square in al-Raqqah on 14 May 2013 in revenge for a massacre committed by the regime and pro-regime armed forces on 2 and 3 May 2013.⁸⁸⁷

The group executed a 15-years-old boy for committing blasphemy on 8 June 2013.⁸⁸⁸

The ISIS fighters executed two 15-years-old boys, previously abducted in Nubul, Aleppo on 26 June 2013, in the Mayer city on 11 August 2013 and mutilated their corpses.⁸⁸⁹

The ISIS foreign fighters entered the Yazidi village of al-Talaliyah in al-Hasakah on 29 May 2014 and killed 15 civilians including seven children. The fighters were not Arabic speakers and believed that the victims were Yazidis. An ISIS Iraqi fighter intervened and stopped further executions of the inhabitants who were actually *Sunni* Arabs and not Yazidis. The victims had also been displaced people from the conflict area of Saifira, Aleppo and had taken over the village after the Yazidi original inhabitants had left the village for fear of being attacked by the group.⁸⁹⁰

The group executed an *Alawite* and a Christian resident in the main square, after it had controlled the town of Bukamal in Der al-Zawr in July 2014.⁸⁹¹

ISIS is also responsible for the following murders: shooting a man in Tabqa, al-Raqqah on 22 March 2014; beheading two men in al-Bza'a, Aleppo in April 2014; executing two other men in Tabqa, al-Raqqah in the same month; stoning two women to death in the same city in July 2014;⁸⁹² and executing two civil activists on 5 July 2015 for documenting the group's abuses.⁸⁹³

⁸⁸⁵ UNHRC, "Report of the Independent International Commission of Inquiry on the Syrian Arab Republic", (A/HRC/27/60), (13 August 2014), p. 7.

⁸⁸⁶ *Ibid.*

⁸⁸⁷ UNHRC, "Report of the Independent International Commission of Inquiry on the Syrian Arab Republic", (A/HRC/23/58), (18 July 2013), p. 12.

⁸⁸⁸ UNHRC, "Report of the Independent International Commission of Inquiry on the Syrian Arab Republic", (A/HRC/24/46), (16 August 2013), p. 8.

⁸⁸⁹ UNHRC, "Report of the Independent International Commission of Inquiry on the Syrian Arab Republic", (A/HRC/25/65), (12 February 2014), p. 7.

⁸⁹⁰ UNHRC, *supra* note 885, p. 39.

⁸⁹¹ Human Rights Watch, *supra* note 864, p. 519.

⁸⁹² UNHRC, *supra* note 885, p. 7.

⁸⁹³ Amnesty International, *supra* note 863, p. 352.

The group publicly executed the archaeologist and head of the antiquities in the city of Palmyra, Khalid Assad on 18 August 2015 for refusing to disclose the location of the artifacts of the city that the group destroyed entirely in the following months.⁸⁹⁴

ISIS continually executed men on charges of homosexuality by throwing the victims from the top of buildings. The group threw a gay man from a tower and stoned him to death in Tabqa, al-Raqqah on 3 March 2015.⁸⁹⁵ Based on the gay activist organisation OutRight Action International,⁸⁹⁶ the group has executed 36 men for sodomy in Iraq and Syria.⁸⁹⁷

3.1.2. Imprisonment

ISIS is accused of arbitrary arrest and unlawful detention of people along with the other groups. The ISIS prisoners included smokers, adulterers, people who challenged the group's law, members of the other rebel groups and regime military forces and local and international journalists.⁸⁹⁸

The group had seven prisons in al-Raqqah and Aleppo in December 2013. The prisons were "Mabna al-Mohafaza, Idarat al-Markabat and al-Mer'ab, all in al-Raqqah city; Sadd al Ba'ath and al-'Akershi oil facility, both elsewhere in al-Raqqah governorate; and Mashfa al-Atfal and Maqar Ahmed Qaddour in Aleppo".⁸⁹⁹

ISIS was accused of imprisoning hundreds of people including civil activists and women without legal grounds in al-Raqqah in 2013.⁹⁰⁰

The group arrested Kurdish civilians for their distinct ethnicity in the town of Tal Abyad, al-Raqqah in July 2013.⁹⁰¹

⁸⁹⁴ UNHRC, "Report of the Independent International Commission of Inquiry on the Syrian Arab Republic", (A/HRC/31/68), (11 February 2016), p. 13.

⁸⁹⁵ Amnesty International, *supra* note 863, p. 352.

⁸⁹⁶ The OutRight Action International is an international organisation that was founded in 1990 and is headquartered in New York. The organisation documents abuses and discrimination perpetrated, based on sexual orientation or gender identity, against lesbian, gay, bisexual and transgender people. It actively works throughout the world and has a consultative status with the UN Economic and Social Council.

⁸⁹⁷ Human Rights Watch, "World Report 2016: Events of 2015", 2016, p. 551.

⁸⁹⁸ UNHRC, *supra* note 854, pp. 6-8.

⁸⁹⁹ Amnesty International, *supra* note 855.

⁹⁰⁰ UNHRC, *supra* note 888, p. 10.

⁹⁰¹ UNHRC, *supra* note 889, p. 9.

The ISIS fighters abducted 153 Kurdish students as young as 13 and 14 on 29 May 2014 while they were returning from Aleppo, where they had taken the year-end exams, to Kobani. The fighters imprisoned the students in a school in the city of Minbaj, Aleppo until they eventually released them in September 2014.⁹⁰²

The group is also accused of arbitrary arrest and imprisonment of local activists, government supporters, foreign journalists and aid workers.⁹⁰³

3.1.3. Persecution against Christians, Kurds, Alawites and women

The areas, where ISIS established its Caliphate, were essentially very diverse in terms of religion and ethnicity. As ISIS practiced the most radical interpretation of *Shari'ah* law, there was no place for religious and ethnic diversity within its state. The group persecuted Christians, Kurds, *Alawites* and women based on religious, ethnic and gender grounds.

After ISIS entered Syria in June 2013, most of the Christians fled from al-Raqqah for fear of being attacked and killed by the group. The group destroyed and burned five Christian churches located in its territory. ISIS abducted and made disappear many Christian priests and nothing is known about their fate and whereabouts. The group, in February 2014, publicised the condition of conversion or payment of religious tax for the fled Christians to return to their places in al-Raqqah.⁹⁰⁴ ISIS abducted around 200 Christians in the course of its attacks against the Christian villages in al-Hassakah in February 2015 and later asked for ransom for their release. In addition, the forced conversion of three Christians in May 2015, has been reported.⁹⁰⁵

The Kurds were also persecuted by ISIS for their ethnic identity. The group arbitrarily arrested, abducted, imprisoned, took them hostage, tortured, killed and forcibly displaced them. The international human rights bodies have documented many criminal acts of the group against

⁹⁰² UNHRC, *supra* note 885, p. 8; UNHRC, *supra* note 854, p. 11; UNHRC, "Report of the Independent International Commission of Inquiry on the Syrian Arab Republic", (A/HRC/28/69), (5 February 2015), p. 39.

⁹⁰³ UNHRC, *supra* note 854, pp. 7-8.

⁹⁰⁴ *Ibid*, p. 5; UNHRC, *supra* note 889, p. 18; UNHRC, (5 February 2015), *supra* note 902, p. 59.

⁹⁰⁵ UNHRC, *supra* note 894, p. 16; Carey Lodge, "ISIS demand \$30m Ransom for Assyrian Hostages", *World*, (10 April 2015). Available at: <<http://www.christiantoday.com/article/isis.demand.30m.ransom.for.assyrian.hostages/51831.htm>> (Accessed: 10 September 2016).

the Kurds that all amount to systematic and widespread attacks against the Kurdish population in Syria.⁹⁰⁶ The crimes will be mentioned under specific headings.

ISIS targeted *Alawites* along with the other groups for their distinct Islamic belief and practice. The group carried out many attacks against houses and religious places of the *Alawite* inhabitants in May 2014 in al-Raqqah and consequently some fled from the city and some others converted to survive.⁹⁰⁷ Human Rights Watch reported some suicide attacks of ISIS against the *Alawite* community in Damascus, Homs and Ladhikiah on 21 February and 23 May 2016. The February attack killed 109 and injured 235 *Alawite* civilians in Damascus and Homs and the May attack killed 145 *Alawites* in Ladhikiah.⁹⁰⁸ ISIS executed an *Alawite* along with some Christian residents in the town of Bukamal, Der al-Zawr in July 2014.

ISIS similarly persecuted women in Syria based on the grounds of gender. The group ordered women, above the age of ten, to dress properly, stay at home and be accompanied with male guardians outdoors. It determined who women could socialize with and where they could work.⁹⁰⁹ ISIS monitored the women's life through its female fighters within its police forces, known as al-Hisbah Morality Police, and punished many women for violating its rules.⁹¹⁰ The group detained and beheaded a female dentist for treating male and female sexes in al-Mayadin, Der al-Zawr in August 2014.⁹¹¹ The female fighters of the group publicly flogged women for improperly dressing in al-Raqqah on 26 and 30 April 2014.⁹¹² Many criminal incidents of stoning women for committing adultery have been documented across the areas under the control of the group.⁹¹³ ISIS practiced forced marriage of unmarried women and early marriage of girls as young as 13 years of age.⁹¹⁴ The group held many Yazidi girls, whom its fighters abducted in Iraq and transferred to Syria, as sex slaves to provide sexual service to its fighters returning from battle.⁹¹⁵

⁹⁰⁶ UNHRC, *supra* note 889, pp. 11, 22; UNHRC, *supra* note 854, pp.5,7, 12; UNHRC, (5 February 2015), *supra* note 902, p. 7.

⁹⁰⁷ UNHRC, *supra* note 854, p. 6.

⁹⁰⁸ Human Rights Watch, "World Report 2017: Events of 2016", 2017, p. 575.

⁹⁰⁹ UNHRC, *supra* note 854, p. 8.

⁹¹⁰ UNHRC, (5 February 2015), *supra* note 902, p. 49.

⁹¹¹ UNHRC, *supra* note 854, p. 9.

⁹¹² UNHRC, *supra* note 885, p. 11.

⁹¹³ *Ibid*, p. 7; UNHRC, (5 February 2015), *supra* note 902, pp. 10, 35.

⁹¹⁴ UNHRC, *supra* note 854, p. 9.

⁹¹⁵ UNHRC, (5 February 2015), *supra* note 902, p. 49.

3.1.4. Enforced disappearance

The ISIS fighters abducted the English war photographer, John Cantlie in November 2012. The fate and whereabouts of the victim have remained unknown since February 2015.⁹¹⁶

The group abducted the Syriac Orthodox and Greek Orthodox Archbishops, Yohanna Ibrahim and Paul Yazigi in Aleppo in April 2013 and nothing is known about the fate and whereabouts of the victims.⁹¹⁷

An Italian Jesuit priest, Paolo Dall'Oglio was also abducted by the group in al-Raqqa on 29 July 2013. The fate and whereabouts of the victim remain unclear.⁹¹⁸

In December 2013, the fighters from ISIS abducted two men for not adhering to ISIS rule and the group later denied the detention of the abductees.⁹¹⁹

The group abducted some media workers in October and November 2013 and their fate and whereabouts similarly remain unknown.⁹²⁰

3.1.5. Other inhuman acts of a similar character

The ISIS religious practice restricted the basic human rights and freedoms of people. According to Amnesty International, people were really suffering from the ISIS religious oppression.⁹²¹

The group regulated the people's life from dress to employment based on its interpretation of *Shari'ah* law. It imposed its rules strictly and inflicted severe penalties upon people who transgressed or refused to obey the Caliphate rules through the al-Hisbah Morality Police. The group's police forces conducted complete surveillance over the communities.⁹²²

The group beheaded a 15-year-old boy for committing rape in February 2014 and shot a man for kidnapping a child in Jarabuls, Aleppo in the same month.⁹²³

⁹¹⁶ Jethro Mullen, "ISIS' High-Profile Hostages", *CNN*, (11 February 2015). Available at: <<http://edition.cnn.com/2015/02/11/world/isis-hostages/>> (Accessed: 12 September 2016).

⁹¹⁷ UNHRC, *supra* note 885, p. 19.

⁹¹⁸ UNHRC, *supra* note 854, p. 5.

⁹¹⁹ UNHRC, *supra* note 889, p. 40.

⁹²⁰ UNHRC, *supra* note 854, pp. 7-8.

⁹²¹ Amnesty International, *supra* note 855.

⁹²² UNHRC, (5 February 2015), *supra* note 902, p. 10; UNHRC, *supra* note 854, p. 4.

⁹²³ UNHRC, *supra* note 885, p. 7.

ISIS imposed corporal punishments including lashing and amputation in public places and often during public events for violating the group's rules. The group lashed people for drinking alcohol, trading during prayer hours and not fasting during Ramadan.⁹²⁴ The ISIS fighters took a man to the square of al-Raqqah and amputated one of his hands for committing theft in May 2014.⁹²⁵ The group amputated the fingers of men for smoking cigarettes. The ISIS fighters lashed men for having tattoos on their bodies and accompanying improperly dressed women.⁹²⁶

ISIS forbade children from attending government schools and indoctrinated them into *jihād*ist ideology.⁹²⁷ The group encouraged children to attend the execution processes in public squares. In some cases, children have assisted adult executioners with the distributing of knives. In some other cases, children have themselves carried out the execution process.⁹²⁸ The group detained children in the same inhuman conditions with adults⁹²⁹ and, based on some testimonies, tortured those who were accused of committing crimes. In one occasion, a child, who was believed by witnesses to be fourteen, was flogged for several days for stealing a motor bike.⁹³⁰

The group prohibited social and cultural practices such as weddings, musical and traditional events throughout its territory. ISIS banned civil and human rights activists and journalists from their professional work and threatened them with death.⁹³¹

3.2. The crimes committed during armed conflict

ISIS similarly committed many war crimes in the course of its operations against the Syrian military forces and the rival armed groups throughout Syria. According to the documented and reported criminal incidents, the group attacked and murdered civilians, attacked other protected people, attacked protected places, executed people placed *hors de combat*, committed torture and cruel treatment, took people hostage, used prohibited weapons, sentenced and executed

⁹²⁴ *Ibid*, p. 11; UNHRC, *supra* note 854, p. 7.

⁹²⁵ UNHRC, *supra* note 885, p. 11.

⁹²⁶ UNHRC, *supra* note 854, p.7.

⁹²⁷ *Ibid*, pp.10-11.

⁹²⁸ Noman Benotman and Nikita Malik, *The Children of Islamic State*, Quilliam, 2016, p. 42. Available at: <<https://f.hypotheses.org/wp-content/blogs.dir/2725/files/2016/04/the-children-of-islamic-state.pdf>> (Accessed: 15 September 2016).

⁹²⁹ Amnesty International, *supra* note 855.

⁹³⁰ *Ibid*.

⁹³¹ UNHRC, *supra* note 854, pp. 4-8.

people without due process, displaced people forcibly, perpetrated rape and sexual slavery and recruited children.

3.2.1. Attacking and murdering civilians

ISIS was not like its predecessors in battling against its enemies. The group, after becoming ISIS, completely quit guerrilla warfare and fought to capture territories and attach them to its Caliphate. However, it, along with the new warfare method, continued using suicide and remote-detonated car bombs during its war. ISIS, with the other armed groups, used its limited firepower in an indiscriminate manner that consequently caused huge civilian casualties.

The group directed a suicide attack against the office of Hizbullah⁹³² in al-Thabitiya, Homs on 4 November 2013. The attack caused civilian casualties, although the number of victims has not been reported.⁹³³

After the ISIS fighters controlled the Sha'ar gas field in Homs in mid-July 2014, they killed 350 people in close quarters. Although most of the victims were government soldiers and guards, technicians and workers with their family members and a doctor in his medical clinic were among the victims.⁹³⁴

ISIS massacred many people from the tribe of al-Sheitat in Der al-Zawr in August 2014 for fighting the group to control the oil sources in the region. A video, which was later published by ISIS itself, clearly showed the mass execution of the tribe.⁹³⁵ Although it has not officially been affirmed, the media reported the execution of 700 people including 100 fighters and 600 civilians.⁹³⁶

In the course of its attack to Kobani, al-Raqah in September 2014, the group killed some people who had not fled and took some others to Tal Abyad, al-Raqqah and detained them there.⁹³⁷

⁹³² Hizbullah is a *Shiite* militia group which was established in 1985 in Lebanon. The group generally operates in Lebanon but it has been involved in the Syrian civil war since 2011. It supports the *Shiite* Syrian Government against the *Sunni* opposition groups.

⁹³³ UNHRC, *supra* note 889, p. 16.

⁹³⁴ UNHRC, *supra* note 854, p. 12.

⁹³⁵ *Ibid.*

⁹³⁶ "Islamic State Group 'executes 700' in Syria", *Al Jazeera*, (17 August 2014). Available at: <<http://www.aljazeera.com/news/middleeast/2014/08/islamic-state-group-executes-700-syria-2014816123945662121.html>> (Accessed: 20 September 2016).

⁹³⁷ UNHRC, *supra* note 854, p. 12.

ISIS attacked Kobani again on 25 June 2015 and killed and injured many civilians. The attack started with the explosion of three suicide car bombers on the perimeter of Kobani. Later, the group's fighters, who either spread across the city or from the rooftops as snipers, started shooting civilians. The attack consequently killed 233 and wounded more than 273 people besides taking dozens hostage.⁹³⁸

The group executed three men, in October 2015, of the Christians whom its fighters had taken hostage in February 2015.⁹³⁹

An ISIS self-detonated suicide bomber killed five civilians including three children in Tal Abyad, al Raqqah on 22 November 2015.⁹⁴⁰

The group targeted a clinic with three bombing attacks in Tal Tamar, al-Hasakah on 10 December 2015 and killed more than 50 civilians.⁹⁴¹

The ISIS fighters attacked the *Alawite* community in Damascus and Homs on 21 February 2016 with bombings and consequently killed 109 and wounded 235 civilians including children. Another ISIS bombing and suicide attack has been reported against an *Alawite* gathering in al-Laziqiyah on 23 May 2016 that killed 145 civilians.

The group claimed responsibility for attacking the Kurdish administration⁹⁴² *de facto* capital of Qamishlo, al-Hasaka with a track bomb on 27 July 2016 that killed 48 people and injured 140 others.⁹⁴³

The killing of 221 children by ISIS in Syria has been verified.⁹⁴⁴

⁹³⁸ Human Rights Watch, "Syria: Deliberate Killing of Civilians by ISIS", (3 July 2015). Available at: <<https://www.hrw.org/news/2015/07/03/syria-deliberate-killing-civilians-isis>> (Accessed: 20 September 2016).

⁹³⁹ UNHRC, *supra* note 894, p. 16.

⁹⁴⁰ *Ibid*, p. 10.

⁹⁴¹ *Ibid*.

⁹⁴² The Kurds have been a side of the Syrian civil war since 2011. They have fought against the rebel groups including ISIS and the Syrian regime forces. Eventually, they have controlled most of the areas that are historically known to be part of their land. They have established a *de facto* administration in the controlled areas since 2012 and named it 'the Democratic Federation of Northern Syria'. The administration extends from al-Hasaka in the north-east to the city of Hafirin, Aleppo in the north-west and consists of three regions which are the Jazira, Euphrates and Afrin regions.

⁹⁴³ Human Rights Watch, *supra* note 908, p. 575.

⁹⁴⁴ "Syrian Arab Republic", Office of the Special Representative of the Secretary-General for Children and Armed Conflict, (Report of the Secretary-General on Children and Armed Conflict on 20 April 2016). Available at: <<https://childrenandarmedconflict.un.org/countries/syria/>> (Accessed: 23 September 2016).

3.2.2. *Attacking other protected people*

ISIS abducted scores of journalists and aid workers during 2012, 2013 and 2014 and took them hostage. The group beheaded all of them by the beginning of 2015. In the end of 2014, the group released the beheading videos of two American journalists, James Wright Foley⁹⁴⁵ and Steven Joel Sotloff,⁹⁴⁶ two British aid workers, David Haines⁹⁴⁷ and Alan Henning⁹⁴⁸ and an American aid worker, Peter Kassig.⁹⁴⁹ The group published two other beheading videos of two Japanese journalists, Haruna Yukawa⁹⁵⁰ and Kenji Goto Jogo⁹⁵¹ in the beginning of 2015. It must also be mentioned that the American aid worker, Kayla Mueller was also among the victims of the ISIS hostages, although she was reportedly killed by a Jordanian air strike against the group in al-Raqqah in February 2015.⁹⁵²

The group is further responsible for three Christian Archbishops that are missing, Yohanna Ibrahim, Paul Yazigi and Dall'Oglio in al-Raqqah since 2013 and a British war photographer, John Cantlie since February 2015.

⁹⁴⁵ “James Wright Foley beheaded by ISIS Militants Full Video”, *CNN*, (20 August 2014). Available at: <<https://www.youtube.com/watch?v=rZiSIXtTgeY>> (Accessed: 25 September 2016).

⁹⁴⁶ “American Journalist Steven Joel Sotloff Final Words before Execution”, *Evaonnews*, (3 September 2014). Available at: <<https://www.youtube.com/watch?v=umprJlzSyYU>> (Accessed: 25 September 2016).

⁹⁴⁷ “David Haines, British Aid Worker, beheaded by ISIS”, *NBC News*, (15 September 2014). Available at: <<https://www.youtube.com/watch?v=b2bhsStKC3o>> (Accessed: 25 September 2016).

⁹⁴⁸ “British Aid Worker Alan Henning beheaded by ISIS~ 4th Beheading”, *Fox News*, (3 October 2014). Available at: <<https://www.youtube.com/watch?v=dcfOJhTTGis>> (Accessed: 25 September 2016).

⁹⁴⁹ “ISIS beheads Another American Aid Worker~ Peter Kassig”, *Fox News*, (16 November 2014). Available at: <<https://www.youtube.com/watch?v=WZPGir0RjIE>> (Accessed: 25 September 2016).

⁹⁵⁰ “ISIS appears to execute Japanese Hostage”, *CBS News*, (24 January 2015). Available at: <<https://www.youtube.com/watch?v=-qq5xmh37T4>> (Accessed: 25 September 2016).

⁹⁵¹ “ISIS Video purportedly shows Execution of Japanese Hostage”, *CBS News*, (31 January 2015). Available at: <<https://www.youtube.com/watch?v=Yyb8YmpBeow&t=1s>> (Accessed: 25 September 2016).

⁹⁵² Catherine E. Shoichet and Jason Hanna *et al*, “American ISIS Hostage Kayla Mueller Dead, Family says”, *CNN*, (11 February 2015). Available at: <<http://edition.cnn.com/2015/02/10/world/isis-hostage-mueller/>> (Accessed: 25 September 2016). ISIS attacked and took the victims hostage before the International Coalition intervened and attacked the group on 22 September 2014. However, the executions took place as a reaction of the intervention as most of the victims were nationals of the coalition member states. Hence, the attacking, abduction and hostage taking acts were war crimes committed during internal armed conflict but the executions were war crimes perpetrated in connection with international armed conflict. This thesis is limited to the war crimes committed during or in association with the conflict between ISIS and other national forces in Syria and therefore the executions are not included as murder in the heading (See *infra* 3.2.6 of this chapter).

3.2.3. *Attacking protected places*

ISIS took over a former ophthalmology hospital, which was previously under the control of another Islamic group and used it as the place of its *Shari'ah* court, in Qadi Askar, Aleppo in late 2013. After controlling it, ISIS established a detention centre in the basement of the hospital. In January 2014, ISIS retreated from the city and another group entered it. The new group found dozens of bodies who were all men, inside the hospital. The dead bodies were all bound and blindfolded and had probably been killed by ISIS recently.⁹⁵³

The group carried out three bombing attacks against a clinic in Tal Tamer, al-Hasakah on 10 December 2015 and killed more than 50 civilians.

ISIS attacked, with five suicide bombings, Jableh, al-Laziqiyah on 23 March 2016. The first attacks were summarily directed against civilians and caused casualties. While the casualties were being transported to hospitals, another attack targeted the al-As'ad Hospital and the last one was carried out inside the emergency ward of Jableh National Hospital. Consequently, the emergency department was completely destroyed, 15 people were killed, from the medical team to patients including people who had been injured during the earlier attacks, and 50 others wounded.⁹⁵⁴

The group attacked the government-controlled city of al-Jourah in Der al-Zawr with rockets on 22 December 2015. Some of the rockets struck the yard of a school and killed around 20 students.⁹⁵⁵

ISIS is accused of attacking Christian churches in al-Raqqah, Der al-Zawr and Homs. The group's fighters destroyed, occupied and burnt three churches in al-Raqqah between September and October 2013.⁹⁵⁶ They destroyed a church in Der al-Zawr in September 2014.⁹⁵⁷ The group destroyed the Mar Elian Monastery⁹⁵⁸ in al-Qaryatayn, Homs on 21 August 2015.⁹⁵⁹

⁹⁵³ UNHRC, *supra* note 885, p. 39.

⁹⁵⁴ UNHRC, "Report of the Independent International Commission of Inquiry on the Syrian Arab Republic", (A/HRC/33/55), (11 August 2016), p. 11.

⁹⁵⁵ UNHRC, *supra* note 894, p. 11.

⁹⁵⁶ UNHRC, *supra* note 854, p. 5.

⁹⁵⁷ UNHRC, (5 February 2015), *supra* note 902, p. 59.

⁹⁵⁸ The Mar Elian Monastery was a Catholic monastery that traced back to the 5th century. The monastery was located close to the town of al-Qaryatayn in the Homs governorate. It was a pilgrimage site and visited by people who were seeking physical and mental cure.

⁹⁵⁹ Nich Gutteridge, "ISIS dig up and desecrate Saint's Bones after bulldozing 1,600-Year-Old Christian Church", *Express*, (21 August 2015). Available at: <<http://www.express.co.uk/news/world/599816/ISIS-Islamic-State-Mar-Elian-monastery-Homs-Syria-bulldoze-saint>> (Accessed: 28 September 2016).

ISIS destroyed the Wais al-Qarni *Shiite* Mosque and all the *Sunni* mosques which had been built around tombs and shrines of religious figures in al-Raqqah by the end of May 2014.⁹⁶⁰

After the group captured the Syrian historical city and world heritage site of Palmyra in May 2015, it started to destroy it with bulldozers and explosives. ISIS destroyed the ancient Statue of Lion of *al-Lāt*⁹⁶¹ on 27 June 2015.⁹⁶² Some other statues were reportedly seized from a smuggler that had also been removed by the group.⁹⁶³ ISIS blew up the Temple of *Baalshamin*⁹⁶⁴ on 23 August 2015.⁹⁶⁵ On 30 August 2015, the group exploded the Temple of *Bel*⁹⁶⁶ in the city.⁹⁶⁷ According to the ASOR Cultural Heritage Initiative⁹⁶⁸, the ISIS fighters also demolished Seven Tower Tombs⁹⁶⁹ in Palmyra between June and September 2015.⁹⁷⁰ The destruction of the city of Palmyra has been described as a cultural cleansing by the UNESCO Director General, Irina Bokova as it was an attempt to eliminate cultural identity.⁹⁷¹

⁹⁶⁰ UNHRC, *supra* note 854, p. 6.

⁹⁶¹ The Statue of *al-Lāt* was an ancient lion statue in the city. It was discovered by the Polish archeologist, Michał Gawlikowski in 1977. The statute dated back to the 1st century AD. It was three and half metre high and weighed 15 tones.

⁹⁶² “ISIS Militants destroy 2,000-Year-Old Statue of Lion at Palmyra”, *The Guardian*, (2 July 2015). Available at: <<http://www.theguardian.com/world/2015/jul/02/isis-militants-destroy-palmyra-stone-lion-al-lat>> (Accessed: 1 October 2016).

⁹⁶³ “Islamic State Militants destroy Palmyra Statues”, *BBC News*, (2 July 2015). Available at: <<http://www.bbc.com/news/world-middle-east-33369701>> (Accessed: 1 October 2016).

⁹⁶⁴ The Temple of *Baalshamin* was an ancient temple in Palmyra that was believed to have been built in the 2nd century BC. The temple became a church in the 5th century after spreading Christianity in the region.

⁹⁶⁵ “Palmyra’s *Baalshamin* Temple ‘blown up by IS’”, *BBC News*, (24 August 2015). Available at: <<http://www.bbc.com/news/world-middle-east-34036644>> (Accessed: 1 October 2016).

⁹⁶⁶ The Temple of *Bel* was also known as the Temple of *Baal*. It had been built in the first half of the 1st century AD and dedicated to the ancient Mesopotamian god of *Bel*. The temple was converted into a church during the Byzantine rule in the region and became a mosque in 1132 by the Arabs.

⁹⁶⁷ “Palmyra’s Temple of Bel destroyed, says UN”, *BBC News*, (1 September 2015). Available at: <<http://www.bbc.com/news/world-middle-east-34111092>> (Accessed: 1 October 2016).

⁹⁶⁸ The ASOR Cultural Heritage Initiative is a collaboration of international scholars and professionals to respond to the cultural heritage destruction carried out by ISIS in Iraq, Syria and Libya. The mission of the ASOR Cultural Heritage Initiative is documenting the destroyed sites, making the world aware of the destruction and protecting the remaining sites through urgent actions.

⁹⁶⁹ The Seven Tower Tombs were seven sandstone tower tombs that had been built in a valley, near Palmyra, known as the valley of the tombs. The history of the tombs traced back to the 1st and 2nd century AD.

⁹⁷⁰ “In latest Round of Destruction, ISIL reduces Three Ancient Tower Tombs in Palmyra to rubble”, *National Post*, (4 September 2015). Available at: <<http://news.nationalpost.com/news/world/intolerable-crime-against-civilization-isil-destroys-three-ancient-tower-tombs-in-palmyra>> (Accessed: 2 October 2016).

⁹⁷¹ Alexander Sehmer, “ISIS Guilty of ‘Cultural Cleansing’ Across Syria and Iraq, UNESCO Chief Irina Bokova says”, *The Independent*, (5 October 2015). Available at: <<http://www.independent.co.uk/news/world/middle-east/unesco-chief-irina-bokova-accuses-islamist-groups-of-cultural-cleansing-isis-a6679761.html>> (Accessed: 2 October 2016).

3.2.4. Executing people placed hors de combat

The majority of victims of the ISIS executions have been members or people affiliated with the other armed groups or the Bashar al-Assad's Regime.

In February 2014, ISIS beheaded three captured fighters of another armed group in Jarabulus. One of the victims was 17 years of age.⁹⁷²

The group arrested a man in Jarabulus in March 2014, for being affiliated with another armed group and killed him three days later.⁹⁷³

In April 2014, ISIS executed seven people in al-Raqqah, for being members of the other insurgent groups. Among the victims, five were under the age of 18.⁹⁷⁴

Before ISIS seized the Tabqa Air Base in al-Raqqah completely in August 2014, its fighters captured four government soldiers outside of the base and later executed them in public squares. The group executed two in Slouk and the other two in Tabqa, al-Raqqah.⁹⁷⁵ After controlling the whole air base, ISIS captured two hundred soldiers and forced them to walk into the desert. Later, a video was published by the group that showed hundreds of dead bodies laid on the sand and all had been shot in the head.⁹⁷⁶ According to an ISIS fighter who talked to the Reuters media via internet from al-Raqqah, all 200 soldiers were executed on that day.⁹⁷⁷

The ISIS fighters killed 350 people in July 2014, after they seized Sha'ar gas field in Homs.⁹⁷⁸ According to an ISIS official, 200 of the victims were government troops and guards.⁹⁷⁹

⁹⁷² UNHRC, *supra* note 885, p. 7.

⁹⁷³ *Ibid.*

⁹⁷⁴ *Ibid.*

⁹⁷⁵ UNHRC, *supra* note 854, pp. 11-12.

⁹⁷⁶ UNHRC, (5 February 2015), *supra* note 902, p. 29.

⁹⁷⁷ Sylvia Westall and Mariam Karouny, "Video shows Islamic State executes Scores of Syrian Soldiers" *Reuters*, (28 August 2014). Available at: <<http://www.reuters.com/article/us-syria-crisis-idUSKBN0GS10Q20140828>> (Accessed: 5 October 2016).

⁹⁷⁸ UNHRC, *supra* note 854, p. 12.

⁹⁷⁹ Mousab Alhamadee, "Syria fights to free Gas Field from Islamic State", *The Sacramento Bee*, (19 July 2014). Available at: <<http://www.sacbee.com/news/nation-world/article2604328.html>> (Accessed: 5 October 2016).

The group captured a female Kurdish fighter, member of the Syrian Kurdish Forces known as *Yekîneyên Parastina Gel* (People's Protection Units) (YPG)⁹⁸⁰, and cut her throat in Tal Abyad in mid-September 2014.⁹⁸¹

ISIS arrested a fighter from the Syrian Democratic Forces (SDF)⁹⁸², a man and his son who were accused by the group of being SDF informants in February 2016. The group's fighters later executed all of them.⁹⁸³

In March 2016, ISIS burnt alive some YPG fighters who were not fewer than four.⁹⁸⁴

The group abducted, tortured and executed seven fighters of another armed group in March 2016 in the town of Tafas, Dara'a.⁹⁸⁵

It has been reported that ISIS has captured the cameraman of the Islam Brigade⁹⁸⁶, Bassam al-Rayes with five other fighters in a village near Damascus and slaughtered him.⁹⁸⁷

3.2.5. Torture and cruel treatment

ISIS practiced the worse form of torture against captured members of the rival armed groups and the regime armed forces, journalists and people who worked with international media.

⁹⁸⁰ The *Yekîneyên Parastina Gel* (People's Protection Units) (YPG) are the official forces of the Democratic Federation of Northern Syria. The YPG was established as the military wing of the Kurdish political party, Democratic Union Party in 2004. After the Syrian civil war started in 2011, the YPG engaged in it and took control of most of the Kurdish areas by the end of 2015.

⁹⁸¹ UNHRC, *supra* note 854, p. 12.

⁹⁸² The Syrian Democratic Forces (SDF) are the armed forces of the ethnic and religious minorities that live in the east and north of Syria. The SDF was established in October 2015 and became a member of the International Coalition against ISIS. The YPG is the dominant faction within the SDF and constitutes 40% of the forces. The rest of the SDF fighters are from Arab, Christian and other ethnic and religious groups. The SDF mainly fights ISIS in the areas located outside of the Kurdish administration. The SDF is also the official force of the Democratic Federation of Northern Syria along with the YPG since 2016.

⁹⁸³ UNHRC, *supra* note 954, pp. 12-13.

⁹⁸⁴ *Ibid*, p. 13.

⁹⁸⁵ *Ibid*.

⁹⁸⁶ The Islam Brigade was a radical *Sunni* Islamic group that fought the Bashar al-Assad's Regime alongside the other rebel groups in Syria. The group was established by the Syrian *Sunni* Islamist, Zahran Alloush in 2011. In September 2013, the Islam Brigade united with some other radical units and formed the Army of Islam under the leadership of Zahran Alloush.

⁹⁸⁷ Zaid Al Fares, "The Forgotten ISIS Beheadings: The World mourns Steven Sotloff, but Who remembers Bassam al-Rayes?", *International Business Times*, (5 September 2014). Available at: <<http://www.ibtimes.co.uk/forgotten-isis-beheadings-world-mourns-steven-sotloff-who-remembers-bassam-al-raies-1464138>> (Accessed: 8 October 2016).

The group imprisoned people in the captured government prisons, military bases, schools, hospitals and private houses. The places, based on the statements of some former detainees and prisoners, were usually overcrowded and filthy without lights, beds, adequate food and medical treatment. Moreover, the group did not allow the detainees and prisoners to communicate with their family members.⁹⁸⁸

The group held prisoners for a long time. In one occasion, the fighters of the group have held a man in solitary confinement for 40 days. The fighters further beat the detainees and prisoners during interrogations until they were bloody.⁹⁸⁹

Former prisoners talked to Amnesty International and described how ISIS tortured people in prisons. Accordingly, “they or others were flogged with rubber generator belts or cables, tortured with electric shocks or forced to adopt a painful stress position known as *aqrab* (scorpion), in which a detainee’s wrists are secured together over one shoulder”.⁹⁹⁰ Other detainees also affirmed to human rights bodies that the group has beaten, electrocuted and hanged people by their arms from walls or ceilings. According to the statements of witnesses, the victims often showed signs of torture when they were presented in public squares for executions.⁹⁹¹

It has been reported that ISIS abducted and tortured dozens of Syrian journalists and human rights activists in June 2013.⁹⁹²

The group beat and electrocuted Kurdish civilians in Tal Abyad in July 2013.⁹⁹³

Based on the statements of some former detainees, the ISIS fighters have left a man, accused of being a member of the FSA, beaten and handcuffed in a cell with an open fracture on his leg.⁹⁹⁴

A former prisoner reported a story to the SOHR in July 2016. Accordingly, he was imprisoned with 13 other prisoners in a less than eight square metre sized cell. One night, he woke up with the scream of a prisoner, whose name was Abdulla and had been accused of being an FSA

⁹⁸⁸ UNHRC, *supra* note 854, p. 7; UNHRC, *supra* note 885, p. 11.

⁹⁸⁹ Amnesty International, *supra* note 855.

⁹⁹⁰ *Ibid.*

⁹⁹¹ UNHRC, *supra* note 854, p. 7.

⁹⁹² *Ibid.*

⁹⁹³ UNHRC, *supra* note 889, p. 11.

⁹⁹⁴ UNHRC, *supra* note 854, p. 7.

fighter, and witnessed that he had gone crazy. The reason was that the ISIS fighters had entered the cell and put a severed head next to him while he was sleeping and woke him up.⁹⁹⁵

ISIS forced the abducted Kobani children to study *Sharī'ah* and *Jihādīst* Ideology and beat the children who were misbehaving.⁹⁹⁶ Based on the statements of four students, the group even tortured the children “with a hose and electric cable” and forced them to watch the ISIS beheading and fighting videos.⁹⁹⁷

The traumatising of the abducted Christian children has been reported, as they were forced to watch the execution videos by ISIS during their hostageship between February 2015 and February 2016.⁹⁹⁸

3.2.6. Taking of hostages

ISIS abducted many civilians, national and international journalists and aid workers. The group held some of the abductees as hostages and asked their governments or families to pay a huge amount of ransom or exchange its captured fighters for the hostages.

ISIS seized hundreds of Kurdish men in the town of Tal Abyad, al-Raqqah on 21 July 2013, to exchange them for one of its commanders who had been captured before by the YPG.⁹⁹⁹

The group released 15 of 153 abducted Kobani children, in exchange for three of its fighters with the YPG on 28 June 2014.¹⁰⁰⁰

After controlling the Assyrian Christian villages in the east of Syria in February 2015, the ISIS fighters captured many Christians and later took them hostage. The number of the hostages was 220-230 including, reportedly, 84 women and 51 children.¹⁰⁰¹ The group took the victims from eleven villages in the Tal Tamer area, al-Hasakah to Mount Abdelaziz in the south-west of

⁹⁹⁵ John Shammass, “ISIS Monsters use Torture Technique ‘the flying Carpet’ to force Prisoners to confess”, *Mirror*, (22 July 2016). Available at: <<http://www.mirror.co.uk/news/world-news/isis-monsters-using-spine-snapping-8471128>> (Accessed: 15 October 2016).

⁹⁹⁶ Human Rights Watch, “Syria: ISIS holds 130 Kurdish Children”, (30 June 2014). Available at: <<https://www.hrw.org/news/2014/06/30/syria-isis-holds-130-kurdish-children>> (Accessed: 16 October 2016).

⁹⁹⁷ Human Rights Watch, “Syria: ISIS tortured Kobani Child Hostages”, (4 November 2014). Available at: <<https://www.hrw.org/news/2014/11/04/syria-isis-tortured-kobani-child-hostages>> (Accessed: 16 October 2016).

⁹⁹⁸ UNHRC, *supra* note 954, p. 14.

⁹⁹⁹ UNHRC, *supra* note 889, p. 10.

¹⁰⁰⁰ UNHRC, *supra* note 885, p. 8.

¹⁰⁰¹ “ISIS demands \$23 Million for release of Assyrian Christians”, *Catholic Herald*, (30 April 2015). Available at: <<http://www.catholicherald.co.uk/news/2015/04/30/isis-demands-23-million-for-release-of-assyrian-christians/>> (Accessed: 20 October 2016).

Tal Tamer.¹⁰⁰² Later, ISIS demanded a ransom of US\$100,000 for each and a total of US\$23 million for all the hostages.¹⁰⁰³ The group reportedly released 23 of them who were believed to be over 50 except a six-year-old girl in November 2015¹⁰⁰⁴, 16 more in January 2016¹⁰⁰⁵ and the rest in February 2016.¹⁰⁰⁶

When ISIS attacked Kobani, al-Raqqah for the second time on 25 June 2015, its fighters took many people hostage and held them in three places. The fighters held more than 55 people in some houses in Maqtala in the south-east of Kobani, 30-40 people in a school building close to Mount Mishta Nur and 80 people in a store in the city centre.¹⁰⁰⁷ Although most of the ISIS fighters were eventually killed by the YPG, the fate of the victims has not been reported even by the media.

According to some videos that ISIS published in 2014 and 2015, the group took dozens of international media and humanitarian actors hostage.

The first international hostage was an American journalist, James Foley. The group abducted him in the north of Syria in November 2012 and later demanded an amount of US\$113 million. The ransom was not paid and ISIS posted his beheading video on 19 August 2014.¹⁰⁰⁸

The other international hostages were American Journalist, Steven Joel Sotloff, British aid workers, David Haines and Alan Henning and American aid worker, Peter Kassig. The group beheaded all in September and November 2014.

The ISIS fighters abducted the Japanese journalist, Haruna Yukawa and arrested another one whose name was Kenji Goto in 2014. The group asked the Japanese Government to pay US\$200 million ransom for the release of the hostages. Eventually, no deal was reached and ISIS beheaded both in January 2015.¹⁰⁰⁹

¹⁰⁰² Laura Smith-Spark, “Activist: ISIS Now holds 262 Christians Hostages in Syria”, *CNN*, (26 February 2015). Available at: <<http://edition.cnn.com/2015/02/26/middleeast/isis-syria-iraq/>> (Accessed: 20 October 2016).

¹⁰⁰³ “ISIS demands \$23 Million for Assyrian Hostages, Vigil held in Australia”, *Assyrian International News Agency*, (01/05/2015). Available at: <<http://www.aina.org/news/20150501165829.htm>> (Accessed: 20 October 2016).

¹⁰⁰⁴ Carey Lodge, “ISIS 'demand \$30m Ransom for Assyrian Hostages”, *supra* note 905.

¹⁰⁰⁵ UNHRC, *supra* note 894, p. 16.

¹⁰⁰⁶ UNHRC, *supra* note 954, p. 14.

¹⁰⁰⁷ Human Rights Watch, *supra* note 938.

¹⁰⁰⁸ Jethro Mullen, “ISIS' High-Profile Hostages”, *CNN*, *supra* note 916.

¹⁰⁰⁹ *Ibid.*

The group abducted an American aid worker, Kayla Mueller in August 2013 and demanded an amount of US\$ seven million from her family. The ransom was not paid and she was reportedly killed by a Jordanian air strike in jail in al-Raqqah in February 2015.¹⁰¹⁰

ISIS shot two other hostages, a Chinese national, Fan Jinghui and a Norwegian national, Ole Johan Grimsgaard-Ofstad on 19 November 2015. The group later published their pictures without much detail.¹⁰¹¹

3.2.7. Using prohibited weapons

The Kurdish activists in the Syrian Kurdish town of Kobani al-Raqqah, have reported that ISIS used chemical agent on 12 Jun 2014 in the village of Avdiko, Kobani where three Kurdish fighters were killed without any sign of damage by bullets. According to the health minister of the Kurdish authority in Kobani, Nisan Ahmed, there were “burns and white spots on the bodies of the dead indicated the use of chemicals, which led to death without any visible wounds or external bleeding”.¹⁰¹²

The group used a prohibited weapon again in battling against the YPG in the same city in October 2014. Following the attack, the residents reportedly started losing their consciousness, faced with the difficulty of breathing and seeing. According to local doctors’ diagnosis, the patients were affected by chlorine gas or phosphorous attack.¹⁰¹³

Human Rights Watch has, based on the statements of some Kurdish officials and photographs, noted that ISIS used cluster munitions on 12 July and 14 August 2014 during battling against the YPG in Kobani.¹⁰¹⁴

The Conflict Armament Research group have also reported two chemical attacks by ISIS against the YPG in al-Hasakah on 28 June 2015.¹⁰¹⁵

¹⁰¹⁰ “Kayla Mueller killed”, *NEWS*, (2/11/2015). Available at: <<http://teddy4h.weebly.com/blog/kayla-mueller-killed>> (Accessed: 25 October 2016).

¹⁰¹¹ “Islamic State claims It has killed two more Hostages”, *BBC News*, (19 November 2015). Available at: <<http://www.bbc.com/news/world-europe-34860261>> (Accessed: 25 October 2016).

¹⁰¹² Jonathan Spyer, “Did ISIS use Chemical Weapons Against the Kurds in Kobani?”, *Middle East Forum*, (12 October 2014). Available at: <<http://www.meforum.org/4852/did-isis-use-chemical-weapons-against-the-kurds>> (Accessed: 26 October 2016).

¹⁰¹³ *ISIS: Portrait of a Jihadi Terrorist Organization*, *supra* note 443, p. 131.

¹⁰¹⁴ Human Rights Watch, *supra* note 864, pp. 517-519.

¹⁰¹⁵ “Kurdish Forces fighting ISIS Report being attacked with Chemical Weapons”, *supra* note 846.

Amnesty International has documented that ISIS used chlorine and mustard agents in its attacks against the town of Marea in Aleppo on 21 August 2015. Consequently, many civilians were affected and one baby died.¹⁰¹⁶

3.2.8. Passing sentences and carrying out executions and other punishments

ISIS established *Shari'ah* courts in Syria along with its courts in Iraq. The courts were similarly based on the group's interpretation of Islamic judiciary and not the Syrian judicial system. The structure of the courts, applicable law, procedural rules, interrogation process, conducting of criminal proceedings and lack of due process rights were similar with the law and practice of the group's courts in Iraq. The group similarly committed most of its crimes in Syria based on the judgments of its courts. The courts were rendering judgments on the fate of victims and the fighters would execute them.

3.2.9. Displacing people forcibly

ISIS forcibly displaced thousands of Kurds from al-Raqqah and al-Hasakah between 2013 and 2014. The group in July 2013, demanded the Kurdish inhabitants of Tal Abyad, al-Raqqah to leave the town or else be killed. Following the demand, thousands of Kurds left the town. After displacing them, ISIS systematically looted and destroyed their properties and resettled some displaced *Sunni* Arabs from the regime-controlled areas, in their houses.¹⁰¹⁷ The Kurds of the Tal Arab and Tal Hassel villages in al-Hasakah faced the same displacement policy by ISIS in July 2013.¹⁰¹⁸ The group on 18 March 2014, ordered the Kurdish inhabitants of the Tal Akhder village in al-Raqqah to leave within two days otherwise they would kill them. The Kurds eventually left the village with few possessions in fear.¹⁰¹⁹ It is worth mentioning that some people who were displaced from the village, were the same victims who had been displaced from the town of Tal Abyad in July 2013.¹⁰²⁰

¹⁰¹⁶ Amnesty International, *supra* note 863, p. 352.

¹⁰¹⁷ UNHRC, *supra* note 854, p. 5.

¹⁰¹⁸ *Ibid.*

¹⁰¹⁹ UNHRC, *supra* note 885, p. 21.

¹⁰²⁰ *Ibid.*

3.2.10. Committing rape and sexual slavery

After ISIS enslaved the Yazidi women and girls in Sinjar, Iraq, it divided the victims among the fighters that participated in the Sinjar battle and transferred one-fifth of the victims to its authority as the spoils of war. The group took most of the victims to its controlled areas in Syria. Some of the victims were held in houses and raped by the fighters returning from battles while some others were sold to individual men in markets across the group's territory as sex slaves.¹⁰²¹

3.2.11. Recruiting children

ISIS established camps throughout its Caliphate to recruit children from the age of ten. The fighters of the group encouraged children to join their ranks. The group educated children to *Jihād*ist ideology. The ISIS education consisted of radical Islamic theory and military training. The group trained children with adults.¹⁰²²

The group had a military training camp for children in a school in al-Bab, Aleppo and gave them US\$100 to \$150 monthly.¹⁰²³ The *Sharī'ah* Youth Camp of the group, in Tabqa, al-Raqqah, was training 350 children aged between 5 and 16 in November 2014.¹⁰²⁴ The UN Office of the Special Representative of the Secretary General for Children and Armed Conflict has verified 274 child recruitment cases in Syria by ISIS.¹⁰²⁵

ISIS used children for guarding its bases and prisons, actual combats, executions and suicide bombing missions. According to testimonies, children were present among adult fighters in the group's checkpoints and guarding the group's bases in al-Hasaka in 2014. A child, who was believed to be about 10 years old, was a prison guard in Tibneh, Der al-Zawr in 2014. Children have participated in the military attacks of the group against Kobani, al-Raqqah and Tibneh and al-Shuhaili, Der al-Zawr in 2014.¹⁰²⁶ Only between January 2015 and January 2016, at least 31% of 89 children recruited by ISIS, were Syrians and 36% of the children (of 89) lost their lives in Syria in the group's military operations and suicide bombing attacks.¹⁰²⁷

¹⁰²¹ UNHRC, (5 February 2015), *supra* note 902, p. 49; UNHRC, *supra* note 854, p. 9.

¹⁰²² UNHRC, *supra* note 885, p. 15.

¹⁰²³ UNHRC, *supra* note 954, p. 18.

¹⁰²⁴ UNHRC, *supra* note 854, p. 11.

¹⁰²⁵ "Syrian Arab Republic", *supra* note 944.

¹⁰²⁶ UNHRC, (5 February 2015), *supra* note 902, p. 53.

¹⁰²⁷ Mia Bloom and John Horgan *et al*, "Depictions of Children and Youth in the Islamic State's Martyrdom Propaganda, 2015-2016", *Combating Terrorism Center*, Vol. 9, Issue 2, 2016, pp. 29-32.

CHAPTER 3

THE INTERNATIONAL CRIMINAL COURT AND THE ISLAMIC STATE IN IRAQ AND SYRIA

3. The ICC and ISIS

As we mentioned in the first chapter, the ICC function is limited by the principle of complementarity. National courts must be either unwilling or unable to conduct investigations and prosecutions genuinely regarding the concerned situation or the case so that the ICC can take the considerations of jurisdiction, referral mechanisms and admissibility conditions. The Iraqi and Syrian national courts might be willing to deal with the ISIS criminal cases but they are unable to do so. Thus, the principle of complementarity allows the ICC to consider the cases for investigations and prosecutions. Additionally, the group's crimes all fall within the subject matter jurisdiction of the Court as they satisfy the definitions and material and mental elements of the crimes mentioned in article five of the Court's Statute. Yet, the cases lack normal personal and territorial bases to establish the jurisdiction of the Court and need a referral mechanism to bring them before the Court. Nevertheless, the ISIS criminal cases can possibly fulfil the admissibility conditions, if they are referred to the Court through a referral mechanism. This chapter will examine the ISIS criminal cases considering the willingness and ability of the Iraqi and Syrian national courts, the principle of complementarity, the ICC jurisdiction, referral mechanisms and admissibility criteria.

3.1. National prosecutions and the ISIS criminal cases

As a basic rule in international criminal law, states have primary legal responsibility to try international crimes.¹⁰²⁸ ISIS has committed its crimes on the territories of Iraq and Syria and most of its high-responsible members are nationals of these two states. Hence, the primary criminal mechanisms for investigation and prosecution of the crimes are the Iraqi and Syrian national courts. The investigation and prosecution of the international crime of genocide, crimes against humanity and war crimes require a sophisticated judicial system that guarantees justice and

¹⁰²⁸ The ICC Statute, *supra* note 89, Preamble, para 6.

credibility. The main elements of justice and credibility are willingness, ability and genuineness in criminal proceedings. The lack of one makes the judicial system ineffective and inefficient. Both Iraq and Syria are willing to try the ISIS responsible fighters but the issue lies in the ability and genuineness in the process of investigation and prosecution of the crimes.

The inability of the Iraqi and Syrian courts arises from the fact that the two states lack legislation regarding the international crimes, judiciary staff, expertise, modern procedural rules and infrastructure.¹⁰²⁹ The issue of genuine criminal proceedings originates from the unfair trials and not sufficiently guaranteeing due process rights.

The applicable law, regarding such crimes that ISIS has committed, before the Iraqi national courts is Anti-Terrorism Law¹⁰³⁰ and before the Syrian national courts is Counterterrorism Law¹⁰³¹. The Judiciary staff in both Iraq and Syria, is dependent and partial. The majority of judges

¹⁰²⁹ Human Rights Watch, "Syria: Criminal Justice for Serious Crimes under International Law", (17 December 2013). Available at: <<https://www.hrw.org/news/2013/12/17/syria-criminal-justice-serious-crimes-under-international-law>> (Accessed: 1 January 2017); Gerald Waltman III, "Prosecuting ISIS", *Mississippi Law Journal*, Vol. 85, No. 3, 2016, p.835; Michael Scharf, "Is the Saddam Hussein Trial One of the Most Important Court Cases of all Time?", *Grotian Moment*, Issue 10, (5 October 2005). Available at: <<http://law.case.edu/Academics/Academic-Centers/Cox-International-Law-Center/Grotian-Moment/ArtMID/804/ArticleID/490>> (Accessed: 2 January 2017); Michael Scharf, "Did the Dujail Trial meet International Standards of Due Process?", *Grotian Moment*, Issue 41, (28 June 2006). Available at: <<http://law.case.edu/Academics/Academic-Centers/Cox-International-Law-Center/Grotian-Moment/ArtMID/804/ArticleID/396>> (Accessed: 2 January 2017).

¹⁰³⁰ The Anti-Terrorism Law defines terrorism in article one as:

"Every criminal act committed by an individual or an organized group that targeted an individual or a group of individuals or groups or official or unofficial institutions and caused damage to public or private properties, with the aim to disturb the peace, stability, and national unity or to bring about horror and fear among people and to create chaos to achieve terrorist goals".

The law in article two, considers the following acts as the acts of terrorism: any violence or threat that aims to spread fear or endanger the life, rights, freedoms or security of civilians; work with violence or threat against public or private properties; organising, supporting or participating in such acts; any violence or threat that leads to sectarian or civil war; any military attack against the state armed forces; any military attack against any public or private institutions; blowing, planting or spreading any explosive or incendiary device that can cause the killing of people; and kidnaping, detaining or preventing people from their physical liberty. The law in article three, adds some other acts to the list that are the following: any act that is carried out for a terrorist motive; any military or violent act whose objective is to overthrow the government; any act of leading military forces without the authorisation of government; any attempt to lead a rebellion against government; any act which impedes the orders of government. The law provides a very severe punishment for the acts which is either death penalty or life imprisonment. Accordingly, anyone who perpetrates, participates, plans, incites, finances or assists such acts shall be sentenced to death and anyone who covers the acts or harbours terrorists shall be sentenced to life imprisonment.

¹⁰³¹ Counterterrorism Law No. 19 was adopted by the Syrian President, Bashar al-Assad on 28 June 2012 after his decree on 21 April 2012, to end the state of emergency that had been in place in Syria since 1962. The law, similarly to the Iraqi Anti-Terrorism Law, includes a broad definition regarding terrorist acts and severe penalties for the perpetration and promotion of the acts as such death penalty and imprisonment with hard labour. On 26 July 2012,

and prosecutors are from the *Shiites*. The courts do not guarantee fair trial and due process regarding the *Sunnis* even in ordinary cases, let alone in the cases of ISIS.¹⁰³²

After the invasion of Iraq by the US-led Coalition in 2003, the Coalition Provisional Authority¹⁰³³ delegated power to the Iraqi Governing Council¹⁰³⁴ to establish a tribunal, later known as the Iraqi High Criminal Tribunal, to try the high-responsible officials of the *Ba'ath* Regime for genocide, crimes against humanity, war crimes and crimes related to abuse of power.¹⁰³⁵ The Tribunal faced many basic issues, *inter alia*, dependence, partiality and disqualification of the judges, insufficient due process rights and capital punishment.¹⁰³⁶ Syrian courts have never carried out criminal investigations and prosecutions regarding the international crimes and therefore the experience would never be better than what we witnessed in Iraq.

Human Rights Watch documented that Iraq has held 20,000 people as ISIS suspects in overcrowded places and inhuman conditions without segregating children from the adult ones. There are people who have spent months in detention centres because they were wrongfully identified as ISIS members after they escaped from the group's controlled areas. The Iraqi courts try every suspect, under Anti-Terrorism Law, without prioritizing the ones who are responsible the

President Assad, issued law No. 22 by which the Counterterrorism Court was established to implement the Counterterrorism law.

¹⁰³² Human Rights Now, "Iraq: Submission of Human Rights Now to the Committee on the Elimination of Racial Discrimination in Advance of its Consideration of Iraq's Report", 2014. Available at: <https://www.ecoi.net/en/file/local/1278615/1930_1417700605_int-cerd-ngo-irq-17926-e.pdf> (Accessed: 3 January 2017); Human Rights Watch, "Syria: Counterterrorism Court Used to Stifle Dissent", (25 June 2013). Available at: <<https://www.hrw.org/news/2013/06/25/syria-counterterrorism-court-used-stifle-dissent>> (Accessed: 3 January 2017); Amnesty International, *supra* note 863, pp. 197, 354; Human Rights Watch, *supra* note 897, pp. 323, 325, 549, 550.

¹⁰³³ The Coalition Provisional Authority was an administrative body that was established by the US-led Coalition after the official occupation of Iraq on 1 May 2003. The Authority was established to rule Iraq with the Iraqi Governing Council. The Coalition eventually transferred its authority to the Iraqi Interim Government in July 2004 and announced the end of the occupation.

¹⁰³⁴ The Iraqi Governing Council was an Iraqi provisional government that was established by the US-led Coalition in May 2003, after the fall of the Saddam Hussein's Regime, to rule the country along with the Coalition Provisional Authority. The Council consisted of the country's political and tribal leaders that led the country until an interim government was established in June 2004.

¹⁰³⁵ The Statute of the Iraqi Special Tribunal (adopted 10 December 2003, as amended 18 October 2005), Arts. 11, 12, 13, 14; Rebaz Khdir, "The Nature of the High Iraqi Criminal Court: An International, Nation or Hybrid Court?", *Scientia Iuridica*, Vol. LXVI, No. 345, 2017, pp. 367-368.

¹⁰³⁶ Human Rights Watch, "The Former Iraqi Government on Trial", (16 October 2005). Available at: <<https://www.hrw.org/legacy/backgrounders/mena/iraq1005/4.htm>> (Accessed: 3 January 2017); Michael Scharf, "Is the Saddam Hussein Trial One of the Most Important Court Cases of all Time?", *supra* note 1029; Michael Scharf, "Did the Dujail Trial meet International Standards of Due Process?", *supra* note 1029; Rebaz Khdir, *supra* note 1035, p. 379.

most. The courts fail to provide the detainees with due process rights that the Iraqi law guarantees such as presenting them before courts within 24 hours, granting them access to lawyers during interrogation process, notifying their families regarding their detention, allowing their family members to communicate with them in the detention facilities and not torturing them to confess to be ISIS members.¹⁰³⁷ The UNHRC reported that the Syrian authorities have arbitrarily arrested and detained thousands of people, under Counterterrorism Law, who are suspected of participating in hostilities with ISIS and other armed groups against the government. The authorities have similarly held the detainees in filthy and crowded places. Thousands of the detainees have consequently died from torture, inhuman conditions of the cells, diseases and infections, lack of food, water and medical treatment. The government does not even provide information on the deaths to the victims' family members.¹⁰³⁸ Hence, the Iraqi and Syrian national courts are unable to address such complex cases like the ISIS criminal cases and national prosecutions in the group's cases are a form of political revenge and not real criminal proceedings that meet international fair trial standards.

Although most of the ISIS fighters and the high-responsible members of the group are Iraqis and Syrians, national prosecutions are not confined to the Iraqi and Syrian judicial systems. ISIS has many foreign fighters in its ranks from all around the world and therefore states, whose nationals have committed crimes in Iraq and Syria, may also try their nationals based on personal jurisdiction. Moreover, universal jurisdiction empowers all states' national courts to prosecute the ISIS members for their crimes in Iraq and Syria even if they are not their nationals. However, the foreign national courts also lack the ability to capture the perpetrators until they return home and even if they arrest them, the courts would have no direct access to potential evidence and witnesses.

Some European countries have arrested several ISIS fighters and prosecuted them for their crimes in Iraq and Syria. Germany is among the countries that are eager to exercise personal and universal jurisdiction over the ISIS members. The country has so far persecuted two returned fighters for the war crimes of inhuman act and torture in Syria and is currently investigating 15

¹⁰³⁷ Human Rights Watch, "Iraq: Flawed Prosecution of ISIS Suspects", (5 December 2017). Available at: <<https://www.hrw.org/news/2017/12/05/iraq-flawed-prosecution-isis-suspects>> (Accessed: 5 January 2018).

¹⁰³⁸ HRC, "Out of Sight, Out of Mind: Deaths in Detention in the Syrian Arab Republic", (A/HRC/31/CRP.1), (3 February 2016), pp. 2-12.

other cases.¹⁰³⁹ The Göteborg District Court in Sweden has also tried two men for the war crime of killing in Syria and sentenced them to life imprisonment.¹⁰⁴⁰ France is another country that has charged returned fighters with war crimes in Syria.¹⁰⁴¹ In the US, some individuals have been prosecuted for supporting ISIS materially rather than committing crimes within the group.¹⁰⁴² These courts might have benefited from the reports of the intelligence services and the evidence that ISIS itself has published and not from direct access to the territory where the crimes were committed or the people who actually witnessed the crimes.

Here it is clear that even though national courts are willing to carry out investigations and prosecutions in the ISIS criminal cases, the inability of the courts and incredibility of the process block the road towards justice. Therefore, the ISIS cases require a much more sophisticated criminal mechanism that guarantees delivering justice for the victims, on the one hand, and ensuring fair trials for the perpetrators, on the other hand.

3.2. The principle of complementarity and the ISIS criminal cases

The principle of complementarity generally determines the role of national courts and the ICC in the investigation and prosecution of the international crimes. The principle prioritizes national prosecutions as long as national courts are willing and able to carry out investigations and prosecutions genuinely. The principle only enables the ICC to function when national courts lack willingness or ability to try international crimes in credible criminal proceedings.

Iraq, Syria, the states whose nationals are accused of grave crimes in these two countries and the states with effective exercise of universal jurisdiction have shown willingness to investigate and prosecute the ISIS crimes but their national courts are not able to try the perpetrators. Additionally, the Iraqi and Syrian judicial systems do not guarantee fairness and due process rights in criminal trials as standard as required. Thus, the principle of complementarity allows the ICC to play its complementary role in the ISIS criminal cases. The ICC complementary

¹⁰³⁹ C.M.J. Ryngaert and D.W. Hora Siccama, *Justice for Sexual Crimes Committed by IS: Exploring Accountability and Compliance Mechanisms*, Report for the European Parliament (Committee on Legal Affairs), 25 November 2016, p. 10. Available at: <<https://dspace.library.uu.nl/bitstream/handle/1874/348268/Justice.pdf?sequence=1>> (Accessed: 4 January 2017).

¹⁰⁴⁰ “2 Men given Life Sentences in Sweden for Terror Crimes”, *The World Post*, (14 December 2015). Available at: <<http://www.huffingtonpost.com/huff-wires/20151214/eu-sweden-terror-crimes/>> (Accessed: 4 January 2017).

¹⁰⁴¹ C.M.J. Ryngaert and D.W. Hora Siccama, *supra* note 1039. p.10.

¹⁰⁴² *Ibid.*

role ensures that the ISIS perpetrators would not go unpunished and the criminal proceedings would be held according to international standards.

3.3. The ICC and ISIS

The ICC was basically set up to try persons responsible for the perpetration of the most serious international crimes. The Court does not prosecute entities but rather individuals who lead and are responsible within the entities. The Genocide Convention refers to some people who can possibly commit the crime of genocide. Accordingly, “[p]ersons committing genocide ... shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals”.¹⁰⁴³ International law scholars also establish a link between the perpetration of international crimes and political and military power. The reason is that each international crime normally impacts a large number of people. Such crimes can hardly be committed by ordinary people or people without political and military potential.

State authorities and their agents possess sufficient power to commit international crimes and most of the historical atrocities have been perpetrated by them. The ICC has tried many state political and military leaders since 2002.¹⁰⁴⁴ Hence, the referral of the international crimes, committed by state leaders, to the ICC does not raise any legal question. Besides state officials, the perpetration of international crimes by private groups is also possible. Private groups consist of some individuals that common goals bring them together. The groups often operate in geographical territories. They exercise governing power over certain peoples and may even impact other peoples outside of their territories. The groups, in other words, have the potential to commit international crimes and their cases may be brought before the ICC as well.

The Lord’s Resistance Army group committed various serious crimes in the northern parts of Uganda during the country’s civil war. The Ugandan Government accepted the jurisdiction of the ICC under article 12, paragraph three as of the entry into force of the Court’s Statute and referred the situation to the Court’s Prosecutor in December 2003. After the Prosecutor informed the Court’s Presidency regarding the referral, the Presidency assigned the situation to the Pre-Trial

¹⁰⁴³ The Genocide Convention, *supra* note 65, Art. 4.

¹⁰⁴⁴ *Prosecutor v. Laurent Gbago*, (Case No. ICC-02/11-01/11), ICC (Pre-Trial Chamber I), Decision, 12 June 2014; *Prosecutor v. Jean-Pierre Bemba Gombo*, (Case No. ICC-01/05-01/08), ICC (Trial Chamber III), Decision, 21 June 2016.

Chamber on 5 July 2004.¹⁰⁴⁵ The Government of the Democratic Republic of Congo similarly referred a situation to the ICC Prosecutor in April 2004 relating to the atrocities that had been perpetrated during the Second Congo war. The ICC opened investigations into the atrocities committed after 1 July 2002, on 5 July 2004.¹⁰⁴⁶ Among the perpetrators, the Court tried the head of the Union of Congolese Patriots, Lubanga Dyilo and the leader of the Patriotic Resistance Force in Ituri, Germain Katanga and charged them with war crimes and crimes against humanity.¹⁰⁴⁷ Another relevant situation that the ICC has accepted to deal with, is the situation of the Central African Republic in 2004.¹⁰⁴⁸ The Court investigated the crimes that had also been perpetrated during the civil war in the country. In 2014, the Central African Republic referred another situation regarding the same extended conflict in which various crimes had again been committed by the Muslim Séléka and Christian Anti-Balaka groups from 2012.¹⁰⁴⁹

ISIS operated in a large area which was almost the size of Jourdan. The group ruled over millions of people within its territory. It was, however, not a state or not a recognised state; the group possessed political, economic and military potential of governance. The fighters of the group, based on the order of some certain individuals, namely Abubakr al-Baghdadi, perpetrated most of the crimes within the jurisdiction of the ICC. Therefore, the ISIS criminal cases can be brought before the Court. The ICC deals with the aspects of seriousness and territoriality or nationality of crimes and not the status of entities through which the perpetrators commit the crimes within its mandate.

3.4. The ICC jurisdiction and the ISIS crimes

As we discussed in the first chapter, the ICC jurisdiction refers to subject matter jurisdiction, temporal jurisdiction, territorial jurisdiction and personal jurisdiction. Hence, we must examine the ISIS crimes in light of all these jurisdictional parameters in order to reach a clear conclusion regarding the competence of the ICC to try the ISIS atrocities in Iraq and Syria.

¹⁰⁴⁵ *Situation in Uganda*, *supra* note 320.

¹⁰⁴⁶ *Situation in the Democratic Republic of Congo*, *supra* note 322.

¹⁰⁴⁷ *Prosecutor v. Thomas Lubanga Dyilo*, (Case No. ICC-01/04-01/06), ICC (Trial Chamber), Judgment, 14 March 2012; *Prosecutor v. Germain Katanga*, (Case No. ICC-01/04-01/07), ICC (Trial Chamber), Judgment, 7 March 2014.

¹⁰⁴⁸ *Situation in the Central African Republic*, *supra* note 324.

¹⁰⁴⁹ *Situation in the Central African Republic II*, (Case No. ICC-01/14), ICC (The Presidency), Decision assigning the Situation in the Central African Republic II to Pre-Trial Chamber II, 18 June 2014.

3.4.1. The ICC subject matter jurisdiction and the ISIS crimes

The subject matter jurisdiction of the ICC is restricted to the most serious international crimes. The crimes are genocide, crimes against humanity, war crimes and the crime of aggression. The ISIS atrocities constitute all of these grave crimes except the crime of aggression. Thus, the group's crimes fall within the subject matter jurisdiction of the Court. As the nature of some ISIS crimes is different from Iraq to Syria, we shall separate the crimes committed in Iraq from the crimes perpetrated in Syria.

3.4.1.1. The ISIS crimes in Iraq

ISIS started in Iraq and expanded from there to Syria but it could not consolidate control over a large part of Iraq until it moved back from Syria. The return of ISIS was accompanied with much more horrific atrocities that the group committed in Syria. The reason was that ISIS faced stronger military challenges in Iraq¹⁰⁵⁰ and needed much more brutal efforts to create a state of fear and make its military power stronger than its enemies.¹⁰⁵¹ The crimes ranged from systematic and widespread attacks against the civilian population, destroying a group on the ground of religion, to war crime acts.

3.4.1.1.1. Crimes against humanity

The main ISIS victims in Iraq have, however, been the Yazidis due to their geographical locations that were very close to the city of Mosul¹⁰⁵² and religious belief and practice; the group targeted all the other communities, as parts of the Iraqi civilian population, through widespread and systematic attacks. The group tried all forms of violence and perpetrated all acts of cruelty including murder, extermination, enslavement, persecution of the members of the Shabak, Christian and Turkmen communities and women on the grounds of religion, ethnicity and gender,

¹⁰⁵⁰ Zack Beauchamp, "Iraqi Forces are Much Stronger than ISIS, but the Iraqi Army is Kind of a Mess", In 18 Things about ISIS You need to know, *Vox*, (17 November 2015). Available at: <<http://www.vox.com/cards/things-about-isis-you-need-to-know/iraqi-army-sectarian-lines>> (Accessed: 6 January 2017).

¹⁰⁵¹ Hamish de Bretton-Gordon, "Is ISIL winning the Psychological Battle?", *AlJazeera*, (3 July 2015). Available at: <<http://www.aljazeera.com/indepth/opinion/2015/06/isil-winning-psychological-battle-150629104951958.html>> (Accessed: 6 January 2017).

¹⁰⁵² Avi Asher-Schapiro, "Who are the Yazidis, the Ancient, Persecuted Religious Minority struggling to survive in Iraq?", *National Geographic*, (11 August 2014). Available at: <<http://news.nationalgeographic.com/news/2014/08/140809-iraq-yazidis-minority-isil-religion-history/>> (Accessed: 5 January 2017).

enforced disappearance and other inhuman acts of a similar character. These criminal acts constitute crimes against humanity under article seven of the ICC Statute.

3.4.1.1.2. Genocide

Following the capture of Mosul, ISIS began to attack all the non- *Sunni* communities in Iraq. The group systematically targeted all national, ethnic and religious minorities including Christians, Yazidis, Kurds and *Shiite* Muslims: Shabaks and Turkmens. However, it never attempted to systematically eliminate any minority group except the Yazidis. ISIS defined the Yazidis as polytheists and gave them the choice of either conversion or death. Hence, the elimination of the group was concretely justified by their radical interpretation of Islam. The atrocities that ISIS committed against the Yazidis were killing between 3,000-5,000 members of the group; kidnapping, arresting, hostage taking and practicing torture and cruel treatment against members of the group; causing the displacement of 200,000 Yazidi members; abducting more than 6,000 Yazidis including 3,537 women; systematic rape, sexual slavery and forced marriage of women and girls; and abducting and transferring thousands of Yazidi children to the areas under the control of the group, besides the death of hundreds of Yazidis from starvation, dehydration and heat while fleeing from their areas and the suicide of many Yazidi women from the shame of being raped by the ISIS fighters. These offences are all genocidal acts based on article six of the ICC Statute.

3.4.1.1.3. War crimes

The return of ISIS from Syria to Iraq was not only accompanied with crimes against humanity and genocide but also war atrocities. The capture of Mosul was soon followed by a terrifying execution of a large number of inmates and captured combatants. The main reason for the military successes and territorial gains of the group was perhaps not efficient weaponry or ideological beliefs that made the fighters die for the cause but rather barbarity as psychological warfare to defeat their enemies. ISIS is responsible for intentionally attacking civilians and murdering thousands of them; attacking journalists and religious clerics and leaders; destroying thousands of civilian houses, government buildings, cultural sites, artifacts, museums, libraries, religious places, graves and shrines; killing members of the Iraqi armed forces who were *hors de combat* through beheading, shooting in the head and hanging; using prohibited weapons including

sulphur mustard; passing sentences and carrying out executions and other punishments on victims; displacing and causing the displacement of millions of people including Christians, Yazidis and Kurds; rape, sexual slavery and forced pregnancy of the *Sunni* and Yazidi women; and recruiting children below the age of 15 . The group perpetrated all of these serious offences against protected persons and places, in violation of the customary humanitarian rules, during its armed conflict against the Iraqi armed forces and Kurdish *peshmergas*. These atrocities all amount to be war crimes according to article eight of the ICC Statute.

3.4.1.2. The ISIS crimes in Syria

After the ISIS militants seized the Syrian town of al-Bukamal, Der al-Zawr in June 2014, they started to carry out widespread and systematic attacks against civilian populations, all the rebel groups who rejected the idea of giving allegiance to the group's Caliph and the Syrian regime forces. Consequently, they caused a humanitarian catastrophe in the country. The group committed the crimes on a large scale with a high degree of severity and systematicity that impacted the entire country and shocked the conscience of mankind.

3.4.1.2.1. Crimes against humanity

The ISIS crimes in Syria, include murder, imprisonment, persecution against Christians, Kurds, *Alawits* and women on the grounds of religion, ethnicity and gender, enforced disappearance of persons; and other inhuman acts of a similar character. ISIS committed these crimes through widespread attacks against civilian populations based on its previous plans and policy to take control of the entire territory of Syria. One can certainly argue that the ISIS crimes against civilian populations in Syria completely fall within article seven of the ICC Statute.

3.4.1.2.2. War crimes

As the goal of ISIS from the very beginning was establishing a *Sunni* Islamic state in Iraq and Syria, it practiced a new warfare method along with suicide and car bombing attacks. The group captured most of the *Sunni* territory in Syria from the Syrian regime forces and the rival *Sunni* groups and began to govern it. It, similarly to its war in Iraq, violated all the customs of war during armed conflict. Consequently, it committed various serious war crimes against protected persons and places. The group's fighters intentionally attacked and murdered civilians; attacked

other protected persons including humanitarian actors, journalists and religious leaders; demolished objects of non-military character including civilian houses, government buildings and offices, temples, graves, shrines and cultural sites; killed captured members of the Syrian regime forces and other *Sunni* rebel groups, committed torture and cruel treatment against civilians and other protected persons; took people hostage including civilians and national and international journalists; used prohibited weapons including chlorine and mustard agents; passed sentences and carried out executions and other punishments on people; displaced Kurds forcibly; perpetrated rape and sexual slavery against the abducted Iraqi Yazidi women; and recruited children under the age of 15. These atrocities all meet the definition and material elements of war crimes listed in article eight of the ICC Statute.

3.4.1.3. The mental element and the ISIS crimes

Islam encourages Muslims towards peace and tolerance¹⁰⁵³ and allows them to wage war in specific times and circumstances.¹⁰⁵⁴ Muslims must direct war within the obligation of *jihād*. Combative *jihād* is consensually defined as war to protect Muslims and defend Islamic countries from aggression these days. Moreover, *jihād* must be performed under the authority of a legitimate ruler and within the confines of the Quranic verses, traditions of the prophet Muhammad and teachings and practices of the first successors.¹⁰⁵⁵ The amount of force that Muslims use in *Jihād*, must be necessary and proportionate.¹⁰⁵⁶ The target of *jihād* must be only combatants whereas civilians must be protected.¹⁰⁵⁷ Muslims must protect prisoners during *jihād* and treat them well

¹⁰⁵³ The Quran, *al-Baqarah*, 2:256; *al-Maidah*, 5:32; *al-Isra*, 17:33; *al-Nur*, 24:22; *al-Zumar*, 39:10; *al-Nahl*, 16:90; *al-Mai'dah*, 5:8; *al-Anfal*, 8:61.

¹⁰⁵⁴ *Ibid*, *al-Haj*, 22:39; *al-Baqarah*, 2:190; *al-Baqarah*, 2:191; *al-Tawbah*, 9:123; *al-Tawbah*, 9:36.

¹⁰⁵⁵ Shaykh Muhammad Hisham Kabbani, *supra* note 457; Abdurashid Lawan Haruna and Laminu Bukar, *et al*, "War and Islamic Humanitarian Law: Appraising Warfare and Distinction as a Principle in Hostilities", *International Journal of Humanities and Social Science*, Vol. 4, No. 5, 2014. pp. 232-235.

¹⁰⁵⁶ Niaz A. Shah, "The Use of Force under Islamic Law", *The European Journal of International Law*, Vol. 24, No. 1, 2013, pp. 359-361.

¹⁰⁵⁷ Karima Bennoune, "Humanitarian Law in Islamic Jurisprudence", *Michigan Journal of International Law*, Vol. 15, No.2, 1994, pp. 614-615; Rebaz Khdir, "The Fate of Prisoners of War between the Quran, Traditions of the Prophet Muhammad and Practice of the Islamic State in Iraq and Syria", *European Scientific Journal*, Vol 13, No. 34, 2017, p. 32; Abu Amina Elias, "Protection of Civilian Non-Combatants in Islam", *Faith in Allah*, (3 April 2016). Available at: <<http://abuaminaelias.com/protection-of-civilian-non-combatants-in-islam/>> (Accessed: 9 January 2017).

during their captivity.¹⁰⁵⁸ They are required to refrain from attacking objects of a non-military character and environment unless it is justified by military necessity and proportionality.¹⁰⁵⁹

ISIS is part of the regional and international conflicts in the Middle East. The group attacked the *Shiite*-Muslim majority country of Iraq and the *Shiite* Government of Syria to separate the *Sunni* regions from the countries.¹⁰⁶⁰ The establishment of the Caliphate was to legitimise its *Sunni* state and not to revive the traditional Islamic Caliphate. The group asked Muslims to join its ranks and give their religious allegiance to its Caliph but the response of the Muslim communities was not even close enough to legitimise Abu Bakr al-Baghdadi as the Caliph of Muslims.¹⁰⁶¹ The group never adhered to the humanitarian rules that the Quran and traditions of the prophet Muhammad enshrined and committed the most serious crimes of concern to mankind, mainly against Muslims.¹⁰⁶² Hence, the ISIS war does not fulfil the Islamic requirements of reason, purpose, permission of a legitimate ruler and adherence to Islamic humanitarian rules to be *Jihād*. The group's war is a political war directed for a political purpose that is weakening the *Shi'a* hegemony and retrieving the *Sunni* domination in the Middle East.¹⁰⁶³ However, the group is strongly connected with Islam and its ideology and practice are based on the *wahhabi* interpretation of the Islamic sources.¹⁰⁶⁴

After Muslims rejected the legitimacy of the ISIS Caliphate and refused to give their religious loyalty to the group's Caliph, ISIS declared them heretics or apostates and allowed the killing of all except those who submitted to the ISIS doctrine.¹⁰⁶⁵

The group determined the statues of the Yazidis as polytheists: "the Islamic State dealt with this group as the majority of [*fuqahā'*] have indicated how [*mushrikīn*] should be dealt with".

¹⁰⁵⁸ Etim E. Okon, "Islam, War and International Humanitarian Law", *European Scientific Journal*, Vol.10, No.14, 2014. p.107; Rebaz Khdir, *supra* note 1057, pp. 32-37.

¹⁰⁵⁹ Karima Bennoune, *supra* note 1057, pp. 611, 613, 617; Rebaz Khdir, *supra* note 1057, p. 32; Heba Ali, "Islamic Law and the Rules of War", *IRIN*, (24 April 2014). Available at: <<http://www.irinnews.org/analysis/2014/04/24/islamic-law-and-rules-war>> (Accessed: 10 January 2017).

¹⁰⁶⁰ Rebaz Khdir, *supra* note 452, p. 47.

¹⁰⁶¹ *Ibid*, p. 48.

¹⁰⁶² *Ibid*, pp. 48-49.

¹⁰⁶³ *Ibid*, p. 49.

¹⁰⁶⁴ See *infra* 1.3. of chapter 2.

¹⁰⁶⁵ "The [*Murtadd*] Brotherhood", *Dabiq*, Issue. 14, 1437 (2016), pp. 28-43. Available at: <<https://clarionproject.org/docs/Dabiq-Issue-14.pdf>> (Accessed: 16 January 2017); "Kill the Imams of Kufr in the West", *Dabiq*, Issue. 14, 1437 (2016), pp. 8-17; "The [*Raffidah*]: From Ibn Saba' to the Dajjal", *supra* note 593, pp. 32-45.

The Yazidi men had to choose between conversion and death and the women and children were to be enslaved and divided:

“Unlike the Jews and Christians, there was no room for [*jizyah*] payment...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*]”.¹⁰⁶⁶

Therefore, the destruction of the Yazidis was based on the group's intent and knowledge.

ISIS viewed the People of Books who were Jews and Christians as infidels. The so-called infidels could live under the ISIS Caliphate if they converted to Islam or paid *jizyah*. In case of the refusal of the two choices, they had two other options which was either to leave the territory of the group's Caliphate or to die.¹⁰⁶⁷

The group dealt with the captured combatants and hostages based on their religious statuses. The *Sharī'ah* courts took decisions on their fate. The decision of the courts could be giving amnesty, killing, ransom or enslavement.¹⁰⁶⁸ Although ISIS executed most of its captured combatants and hostages, it gave ransom and amnesty to some captured civilians. ISIS similarly derived from the *wahhabi* interpretation of the Quranic verses and Islamic jurisprudence and practices all the punishments of stoning, lashing, amputation, imprisonment and torture.¹⁰⁶⁹

The group referred to the practice of the prophet Muhammad, when he destroyed all the idols in Ka'ba after the conquest of Mecca in 630, regarding the destruction, demolition and burning of the mosques, churches, other temples, shrines, graves, artifacts, historical monuments and cultural sites. ISIS believed that the presence of any of these might lead Muslims to polytheism which is completely rejected in Islam.¹⁰⁷⁰

¹⁰⁶⁶ “The Revival of Slavery before the Hour”, *supra* note 550, p.15.

¹⁰⁶⁷ “The Response to the Call of the Prophet”, *Dabiq*, Issue 15, 1437 (2016), p. 19. Available at: <<http://clarionproject.org/wp-content/uploads/islamic-state-magazine-dabiq-fifteen-breaking-the-cross.pdf>> (Accessed: 16 January 2017); Human Rights Watch, *supra* note 618.

¹⁰⁶⁸ Johnlee Varghese, “ISIS lists out 5 Islamic Reasons to justify Beheading Alan Henning and Other Captives”, *International Business Times*, (6 October 2014). Available at: <<http://www.ibtimes.co.in/isis-lists-out-5-islamic-reasons-justify-beheading-alan-henning-other-captives-610585>> (Accessed: 16 January 2017).

¹⁰⁶⁹ Heather Saul, “ISIS Publishes Penal Code listing Amputation, Crucifixion, and Stoning as Punishments—and vows to vigilantly enforce it”, *Independent*, (22 January 2015). Available at: <<http://www.independent.co.uk/news/world/middle-east/isis-publishes-penal-code-listing-amputation-crucifixion-and-stoning-as-punishments-and-vows-to-9994878.html>> (Accessed: 17 January 2017).

¹⁰⁷⁰ Mubaraz Ahmed, *supra* note 791.

Here it is quite clear that the ISIS crimes in Iraq and Syria were never the random consequences of war. The group had previous plans, policies and religious justifications for all of its attacks and acts. The ISIS fighters intentionally engaged in the group's operations with complete awareness and knowledge and for purposeful consequences. Therefore, the mental element is, as mentioned in article 30 of the ICC Statute, completely present in all of the group's crimes.

3.4.2. The ICC territorial jurisdiction and the ISIS crimes

Territorial jurisdiction is one of the main basic preconditions for the ICC to consider a case for investigation and prosecution. The Court may only investigate and prosecute the crimes that are committed on the territories of the states parties to its Statute. As neither Iraq nor Syria are member states of the Statute,¹⁰⁷¹ the Court lacks territorial jurisdiction, as provided for in article 12 (2) (a), in the ISIS case.

The non-membership of the two states seems to be the main problematic aspect in the ISIS criminal cases to the ICC but the two states still can empower the Court to try the crimes committed on their territories by the group. To do so, the states must, based on article 12 (3), accept the Court's jurisdiction, in respect of the entire situations in their countries, through a declaration. Yet, neither Iraq nor Syria have lodged such a declaration nor have they shown any intention to do so. Therefore, the ICC is now unable to take any step towards opening investigations in the ISIS criminal case based on territorial jurisdiction.

3.4.3. The ICC personal jurisdiction and the ISIS crimes

According to article 12 (2) (b) of the ICC Statute, personal jurisdiction is another precondition for the Court to investigate and prosecute the international crimes. This type of jurisdiction enables the Court to try nationals of the states parties even if territorial jurisdiction is absent.

As we mentioned before, the majority of ISIS fighters are Iraqis and Syrians but thousands of foreign fighters have joined the group's ranks as well. Again, the ISIS Iraqi and Syrian fighters cannot be tried by the ICC now but the foreign fighters who are the nationals of the states parties

¹⁰⁷¹ "States Parties-Chronological List", International Criminal Court. Available at: <https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/states%20parties%20%20chronological%20list.aspx> (Accessed: 18 January 2017).

can be prosecuted before the Court. The only issue regarding personal jurisdiction is that the Court exercises it on the high-responsible criminals.¹⁰⁷² As ISIS is led by the Iraqis and Syrians, the possibility to open investigations on the basis of personal jurisdiction, is also limited before the Court.

3.5. The ICC trigger mechanisms and the ISIS criminal cases

As we previously mentioned, Iraq and Syria where ISIS has committed the crimes, are not member states to the ICC under article 12 (1) of the Court's Statute. The two states have also not lodged any declaration, based on article 12 (3), to accept the Court's jurisdiction regarding their current situations. Hence, article 13 (a) is not applicable through which states parties refer situations to the Court and even the Court's Prosecutor cannot initiate any investigations *proprio motu* in accordance with article 13 (c).

The ICC Chief Prosecutor, Fatou Bensouda issued a statement on 8 April 2015 in response to the communications that her office had received regarding the ISIS crimes. The Prosecutor reaffirmed that ISIS has committed "crimes of unspeakable cruelty" in both Iraq and Syria. Yet, her office is unable to open a preliminary examination regarding the crimes as neither Iraq nor Syria are member states to the ICC Statute nor have they accepted the jurisdiction of the Court on their situations. The Prosecutor further stated that the ICC can, however, exercise personal jurisdiction over the ISIS foreign fighters who are states parties nationals; the high-responsible perpetrators of the group are nationals of Iraq and Syria and therefore "the jurisdictional basis for opening a preliminary examination is too narrow at this stage".¹⁰⁷³

The ICC may also exercise direct jurisdiction over the ISIS crimes in Iraq and Syria, if the UN Security Council refers the situations to the Court under article 13 (b). On 22 May 2014, the Security Council acted under Chapter VII of the UN Charter and voted on a resolution to refer the

¹⁰⁷² The ICC Statute, *supra* note 89, Art. 28.

¹⁰⁷³ "Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the Alleged Crimes committed by ISIS", *The International Criminal Court*, (8 April 2015). Available at: <<https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-08-04-2015-1>> (Accessed: 21 January 2017).

Syrian situation to the ICC but Russia and China vetoed the referral.¹⁰⁷⁴ Russia believed that the referral of the Syrian situation to the ICC would be “ill-timed and counterproductive”.¹⁰⁷⁵

ISIS is the most hated group in the world and the whole international community seeks justice against them but the issue stems from the fact that the ISIS war is just a mere part of the general situations that Iraq and Syria have been faced with. The situations, in other words, are much more complicated and horrendous than just the ISIS crimes. Besides ISIS, there are many other groups and states that have been involved in these situations and all have similarly been accused of gross human rights and humanitarian law violations. Thus, the ISIS criminal cases can hardly be referred to the ICC separately and the referral of the entire situations enables the Court to exercise jurisdiction over all the sides of the conflicts and prosecute all the crimes regardless of who has committed them.

The Syrian armed forces, Syrian backed *Shiite* militias, Iraqi armed forces and its *Shiite* militia allies have all committed serious war atrocities.¹⁰⁷⁶ If the two states become ICC members or accept the Court’s jurisdiction with regards to their situations, they will empower the Court to investigate and prosecute their own alleged crimes along with the other crimes. Therefore, the two states do not seem to want to become the Court’s members neither do they accept the jurisdiction of the Court as to their situations.

Many countries have called upon the UN Security Council to play a decisive role in referring the Iraqi and Syrian situations to the ICC but neither America nor Russia nor China have supported the idea. America and Russia are both permanent members of the Security Council and active sides of the conflicts in Iraq and Syria. Both have likely been accused of committing

¹⁰⁷⁴ “Russia, China block Security Council Referral of Syria to International Criminal Court”, *UN News Centre*, (22 May 2014). Available at: <<http://www.un.org/apps/news/story.asp?NewsID=47860#.WIFQ59IrLIV>> (Accessed: 22 January 2017).

¹⁰⁷⁵ “Russia opposes Syria Crisis War Crimes Court Referral”, *Reuters*, (15 January 2013). Available at: <<http://www.reuters.com/article/syria-crisis-russia-idUSL6N0AKCNB20130115>> (Accessed: 22 January 2017).

¹⁰⁷⁶ Amnesty International, “The State of the World’s Human Rights: Report 2017-2018”, 2018, pp. 203, 351; Human Rights Watch, “Iraq: US-Trained Forces Linked to Mosul War Crimes”, (27 July 2017). Available at: <<https://www.hrw.org/news/2017/07/27/iraq-us-trained-forces-linked-mosul-war-crimes>> (Accessed: 5 December 2017); Amnesty International, “Absolut Impunity: Militia Rule in Iraq”, London, 2014; Human Rights Watch, “Iraq: Possible War Crimes by Shia Militia”, (31 January 2016). Available at: <<https://www.hrw.org/news/2016/01/31/iraq-possible-war-crimes-shia-militia>> (Accessed: 5 December 2017); Amnesty International, “At any Cost: The Civilian Catastrophe in West Mosul, Iraq”, 2017, pp. 24-38; Human Rights Watch, *supra* note 908, pp. 342, 343, 572, 573, 574.

violations of the laws and customs of war¹⁰⁷⁷ and therefore they are concerned about their own individuals that may be tried if they refer the situations to the Court. Thus, America, Russia and possibly China veto any Resolution of the Security Council on the referral unless there is a jurisdictional clause¹⁰⁷⁸ that bans the Court from investigating and prosecuting American and Russian nationals and Bashar al-Assad.

The conclusion is that the possibility to refer the ISIS criminal cases to the ICC is left to the time when Iraq and Syria become ICC member states or accept the ICC jurisdiction in respect of their situations or the UN Security Council acts under Chapter VII of the UN Charter.

3.6. The ICC admissibility criteria and the ISIS criminal cases

As a rule in the ICC Statute, the admissibility of the case must be decided before the Court initiates prosecutions. The ICC raises the admissibility question *proprio motu* even if the defendants do not ask the Court to do so.¹⁰⁷⁹ If the ISIS criminal cases are brought before the ICC, they can possibly be admissible based on the criteria mentioned in article 17 of the Court's Statute.

¹⁰⁷⁷ Human Rights Watch, "Russia/Syria: War Crimes in Month of Bombing Aleppo", (1 December 2016). Available at: <<https://www.hrw.org/news/2016/12/01/russia/syria-war-crimes-month-bombing-aleppo>> (Accessed: 22 January 2017); Amnesty International, *supra* note 863, p. 353; Human Rights Watch, *supra* note 897, pp. 326,327, 555, 556; Lizzie Dearden, "War Against ISIS: US-led Coalition accused of Killing Civilians using 'Scorched Earth Policy' in Syria", *Independent*, (5 August 2016). Available at: <<http://www.independent.co.uk/news/world/middle-east/war-aga-inst-isis-us-led-coalition-accused-of-killing-civilians-using-scorched-earth-policy-in-syria-a7174736.html>> (Accessed: 25 January 2017); "US Strikes may have killed 119 Civilians in Iraq, Syria: Pentagon", *Daily News*, (10 November 2016). Available at: <<http://www.hurriyetdailynews.com/us-strikes-may-have-killed-119-civilians-in-iraq-syria-pentagon.aspx?pageID=238&nID=105986&NewsCatID=352>> (Accessed: 22 January 2017).

¹⁰⁷⁸ The UN Security Council is not only able to refer situations to the ICC or defer the investigation and prosecution of the Court but also can limit the Court's jurisdiction to certain people. The council adopted the resolution No. (1593) on 31 March 2005 to refer the situation of Darfur to the ICC and decided:

"[N]ationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State".

The council included a similar provision in the resolution No. (1970) of 26 February 2011 through which it referred the situation of Libya to the Court. The council decided:

"[N]ationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations in the Libyan Arab Jamahiriya established or authorized by the Council, unless such exclusive jurisdiction has been expressly waived by the State".

¹⁰⁷⁹ The ICC Statute, *supra* note 89, Art. 19 (1).

The reasons are that the Iraqi and Syrian courts are unable to genuinely try the group's responsible members and most of the ISIS responsible foreign fighters, whose states are the ICC members, have not been tried by their national courts neither by other states, on the basis of universal jurisdiction, for their criminal acts in Iraq and Syria. Another reason is that the ISIS crimes meet the sufficient gravity threshold as they are serious, systematic, caused a large number of victims and had a great impact upon the entire states.

However, the group's accused members, the states to which the accused members are nationals and Iraq and Syria may challenge the admissibility of the cases before the ICC under article 19 of the Court's Statute. The ICC may not accept the challenges of the accused unless they are among the fighters who have already been tried by Iraq, Syria and states which have exercised national or universal jurisdiction as to their criminal acts. The Court may similarly not consider the challenges of Iraq and Syria due to the inability of their national courts in conducting criminal proceedings and not guaranteeing fair trials and due process rights. The only possibility that makes the cases inadmissible before the ICC is that after the Court's Prosecutor, as a preliminary ruling regarding the admissibility of the cases, notifies states parties or other states, normally exercise jurisdiction over the accused, as to the referral of the group's cases and states inform the Prosecutor within one month that investigate and prosecute the group's accused members as they are their nationals.¹⁰⁸⁰ If the ICC Pre-Trial Chamber authorised investigations in the cases anyway at the request of the Prosecutor, the states may challenge the decision of the Pre-Trial Chamber before the Appeals Chamber.¹⁰⁸¹ Even if the Appeals Chamber upheld the ruling of the Pre-Trial Chamber, the states may challenge the admissibility of the cases under article 19 of the Court's Statute.

¹⁰⁸⁰ *Ibid*, Art. 18 (1), (2).

¹⁰⁸¹ *Ibid*, Art. 18 (2), (4).

CONCLUSION

The ICC is an international criminal body that was established, after the Rome treaty entered into force, on 1 July 2002. The Court is a permanent criminal institution and has international legal personality. The ICC is based on the principle of complementarity and functions when the states' national courts are unwilling or unable to carry out criminal proceedings genuinely. The Court's mandate is investigating and prosecuting the international crime of genocide, crimes against humanity, war crimes and the crime of aggression. The ICC jurisdiction is limited to, the crimes committed after the entry into force of its Statute, the territories of the states parties and their nationals, the territories and nationals of the states accept the jurisdiction of the Court regarding specific situations and the territories and nationals of states whose criminal situations are referred to it by the UN Security Council. The referral mechanisms of the ICC are states, UN Security Council and its Prosecutor. The Court is not able to deal with all cases but only those which fulfil the admissibility criteria. An admissible case before the ICC, is a case that is not being or has not been investigated or prosecuted by the states' national courts, its perpetrators are not being or have not been tried for the concerned conducts and its crimes satisfy the gravity threshold.

ISIS is a radical Islamic group whose origins date back to the beginning of this century but the group adopted the name of ISIS on 8 April 2013. It follows the ideology of *Wahhabism* which is a sub-school of *Jihādi-Salafism*. The group captured large swaths of territory from Iraq and Syria between 2013 and 2014 and established a so-called Islamic Caliphate on 29 June 2014 under the leadership of the Iraqi extremist Islamist militant, Abu Bakr al-Baghdadi. Most of the group's fighters are, however, Iraqis and Syrians; thousands of foreign *Jihādis* have also joined the group from the Middle East, Africa, Europe, Middle Asia, the Far East and Russia. During its military operations and three-year rule in Iraq and Syria, ISIS perpetrated gross humanitarian and human rights violations that amounted to serious international crimes.

The group carried out many systematic and widespread attacks with intent and knowledge against the Iraqi civilian population and committed various crimes including murder, extermination, enslavement, enforced disappearance, persecution against Christian, Shabak and Turkmen minorities on the grounds of religion and ethnicity and women on the grounds of gender and other inhuman acts of a similar character. ISIS targeted the Yazidi religious minority in the

northern Iraqi city of Sinjar and surrounding areas in the Ninewa governorate with intent to destroy the group in whole and killed many members of the group, caused serious bodily and mental harm to many others, inflicted on the group conditions of life to bring about its physical destruction, imposed measures intended to prevent births within the group and forcibly transferred children to its territories. The group further committed large-scale atrocities during its military campaigns against the Iraqi and Kurdish military forces including attacking and murdering civilians and other protected persons, attacking protected places, killing *hors de combat* fighters, using prohibited weapons, passing sentences and carrying out executions and other punishments, displacing civilians, committing rape, sexual slavery and forced pregnancy and recruiting children.

ISIS similarly carried out systematic and widespread attacks against the Syrian civilian population with intent and knowledge and perpetrated the crimes of murder, imprisonment, persecution against Christians, Kurds, *Alawites* and women on the grounds of faith, ethnicity and gender, enforced disappearance and other inhuman acts of a similar character. The group further committed large-scale offences in the course of its military operations against the Syrian military forces and the rival *Sunni* armed groups including attacking and murdering civilians, attacking other protected people, attacking protected places, killing fighters placed *hors de combat*, perpetrating torture and cruel treatment, taking of hostages, using prohibited weapons, sentencing and executing through irregular courts and without fair trial and due process rights, displacing civilians forcibly, committing rape and sexual slavery and recruiting children under the age of 15.

The author argues that the ISIS crimes in Iraq are crimes against humanity, genocide and war crimes and the group's crimes in Syria are crimes against humanity and war crimes. The Iraqi and Syrian national courts are willing to investigate and prosecute the ISIS crimes but they are unable to carry out criminal proceedings genuinely. The principle of complementarity may not prevent the ICC from opening investigations in respect of the ISIS criminal cases but neither Iraq nor Syria are member states to the Court nor have they lodged any declaration to accept the Court's jurisdiction regarding their current situations. In addition, the UN Security Council has taken no effective step towards the referral of the two states' situations as both America and Russia are active sides of the two countries' conflicts. The Court may initiate proceedings regarding the group's responsible foreign fighters whose countries are its member states but the high-responsible members of the group are Iraqi and Syrian nationals. Therefore, the ICC is now unable to deal with the ISIS criminal cases. The possibilities, to bring the ISIS cases before the ICC, are limited to

when Iraq and Syria become ICC member states or accept the Court's jurisdiction temporarily regarding their situations, in accordance with article 12 (3) of the Court's Statute or the act of the UN Security Council Under Chapter VII of the UN Charter and in accordance with article 13 (2) of the ICC Statute. If the ISIS criminal cases are eventually brought before the ICC through one of the above-mentioned possibilities, they can possibly fulfil the admissibility conditions before the Court.

ISSUES AND RECOMMENDATIONS

Despite its achievements, the ICC is facing a number of issues and needs to be developed more. The main issues of the Court are related to its jurisdiction and referral mechanisms. The ICC jurisdiction does not extend to the territories and nationals of non-states parties and states that the UN Security Council fails to activate its jurisdiction to. The Court further lacks a trigger mechanism to refer situations or cases of such states to it. The number of the states that have ratified the Court's Statute so far is 123. There are still many states left to become the Court's member states. The issues of jurisdiction and referral mechanisms do not only undermine the judicial reputation of the ICC but also prevent it from the realisation of its goal which is the prosecution of the international crimes and the ending of the impunity of the perpetrators of such crimes. The ISIS criminal cases are a clear instance in which the ICC is unable to take any steps without the initiation of Iraq and Syria or the act of the Security Council, besides the fact that most of the crimes within the jurisdiction of the Court have been perpetrated and most of the perpetrators have so far gone unpunished. Therefore, the relevant articles of the ICC Statute must be amended. The author recommends that the principle of universal jurisdiction be placed in the Court's Statute so that the Court can try the crimes within its mandate, when the states' national courts are unwilling or unable to deal with them genuinely, regardless of the non-membership of states on whose territories or by whose nationals the crimes are committed. The author further recommends that the Court's prosecutor be empowered to refer cases in which one or more crimes within the jurisdiction of the Court are committed based on the principle of universal jurisdiction.

Iraq and Syria are two states that have been established on the basis of compulsory togetherness of some ethnic and religious minorities and not citizenship intimacy. The two states have constantly experienced revolts and military coups or at least attempts to change governments since their establishment. The Iraqi and Syrian regimes have eventually resorted to the policy and practice of blood-revenge instead of tolerance and reconciliation. The policy and practice of the states have led to ethnic and sectarian conflicts. The sectarian violence has destroyed economic infrastructure and ruined political and judicial systems in the two countries. Consequently, the two countries have become dangerous places for their peoples and many of their nationals have left their homes forever and sought refuge in the other countries. The current situations in Iraq and Syria are far more complicated than the criminal cases of ISIS. The crimes of ISIS are one third of

the total atrocities that have been perpetrated in the two countries. The issue lies not in the operation of the groups but the failure of governments in ruling these states. The appearance of the groups is the reaction of the oppressive policy and practice of the Iraqi and Syrian Governments. ISIS may disappear in the two countries but many more radical groups may appear in the future. If the Iraqi and Syrian authorities want to preserve the national sovereignty and territorial integrity of their states, they should completely refrain from ethnic and sectarian revenge. They should immediately initiate political tolerance and social reconciliation. The two states should adopt a standard democratic constitution and enforce it in favour of all and not only a certain group. They should recognise the status of their ethnic and religious minorities and guarantee their political, civil, social, and cultural rights. The states should comply their laws with modern international law rules. They should reform their judicial systems to enable their courts to carry out criminal investigations and prosecutions genuinely. The reform of the judicial system can be done through the legislation of modern criminal and procedural rules, employment of expert and judicial staff based on qualifications and not ethnic and religious identity and the courts should be provided with sufficient infrastructure. One of the most necessary steps that the states should take as soon as possible is to become members of the ICC in order to put an end to criminal impunity and prevent the perpetration of grave crimes.

As an alternative mechanism to the national and ICC prosecutions, the author recommends a hybrid court or an *ad hoc* international criminal tribunal for the investigation and prosecution of the ISIS responsible fighters. Although the establishment of such courts is a temporary solution for the criminal environment of Iraq and Syria, they also can restore rights for the victims of the ISIS crimes. Hence, Iraq and Syria should at least enter into agreements with the UN and establish a joint or sperate hybrid courts. The UN Security Council, in a number of resolutions, has condemned ISIS along with the other radical Islamic groups and defined it as a threat to the peace and security of the world. Moreover, it has called upon its member states to take necessary measures to combat the group. Therefore, in case Iraq and Syria do not take any step towards the prosecution of the group's crimes in a just and credible process, the Security Council should, as a measure to restore peace and security to the world and the region of the Middle East, act to establish an *ad hoc* international criminal tribunal or separate *ad hoc* international criminal tribunals for the crimes of the group in Iraq and Syria. politically, such a mechanism is very

realistic as the members of the council can compromise on the establishment of the tribunal, particularly the issue of jurisdiction.

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