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Prosecuting ISIS before the International Criminal Court

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Abbreviations

AANES	Autonomous Administration of North and East Syria
AQI	Al-Qaeda in Iraq
ECCC	Extraordinary Chambers in the Courts of Cambodia
FSA	Free Syrian Army
HRC	Human Rights Council
IAC	International Armed Conflict
ICC	International Criminal Court
ICL	International Criminal Law
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
IHRL	International Human Rights Law
IHT	Iraqi High Tribunal
IICIS	International Independent Commission of Inquiry on the Syrian Arab Republic
IIM	The International, Impartial and Independent Mechanism
IMT	International Military Tribunal in Nuremberg
ISI	Islamic State of Iraq
ISIL	Islamic State in Iraq and the Levant
ISIS	Islamic State in Iraq and al-Sham/Syria
NIAC	Non-International Armed Conflict
OAG	Organized Armed Group

RAND	Research and Development Corporation
R2P	Responsibility to Protect
SCSL	Special Court for Sierra Leone
SDF	Syrian Democratic Forces
SGBV	Sexual and Gender-Based Violence
STL	Special Tribunal for Lebanon
UN	United Nations
UNESCO	United Nations Educational, Scientific, and Cultural Organization
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNAMI	United Nations Assistance Mission for Iraq
UNITAD	The Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL
US	United States of America
USCENTON	US Central Command

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Introduction

“*Justice without force is powerless, force without justice is tyrannical,*” an observation made by Blaise Pascal, one of the most influential authors of the French Classical Period. Thus, autocracy seems to be vested in the lack of accountability and in the excessive use of violence, where justice is put on its deathbed. To achieve justice has been the conundrum of all the world’s societies, especially in the Middle East, an area where peace has been a rare occurrence.

Revolution in the “cradle of civilization” known as the Fertile Crescent has always been a dream to many governments and organizations, often with relatively pure intentions, based on patriotism and yearn to unite close-natured countries. It is the region where the first settled agricultural communities of the Middle East and Mediterranean basin are thought to have originated by the early ninth millennium BCE. The Fertile Crescent includes a crescent-shaped area of relatively fertile land, especially in Mesopotamia and the Nile valley. Located between the Arabian Desert to the south and the mountains of the Armenian Highland to the north, it extends from Babylonia and adjacent Elam (the southwestern province of Persia, also called Susiana) up the Tigris and Euphrates rivers to Assyria. From the Zagros Mountains east of Assyria, it stretches westward over Syria to the Mediterranean and extends southward to southern Palestine. The Nile valley is often included as a further extension, especially since the short interruption in Sinai is no more significant than similar desert breaks that disturb its continuity in Mesopotamia and Syria.

The ancient countries of the Fertile Crescent, such as Sumer, Babylonia, Assyria, Egypt, and Phoenicia, are regarded as some of the world’s earliest complex societies.¹ The Fertile Crescent is the archaeologically significant region of the Middle East that contains parts of present-day Egypt, Jordan, Lebanon, Palestine, Occupied Palestine, Syria, Turkey, Iran, Iraq, and Cyprus. The borders of these countries are the direct result of the First World War, where the Allies sliced and partitioned the lands under Ottoman occupation in a way that led to a complete political and economic disconnection between the countries over the years. In addition, most communities in this region watered the seed of religious zeal to identify themselves as a group since the sense of belonging did not correlate with failed states. As a result, the hope of uniting the Middle East has taken a severe turn to the isle of hate and absurdity for some organizations.

¹ *Fertile Crescent*, Encyclopedia Britannica, <https://www.britannica.com/place/Fertile-Crescent>.

One of the most prominent groups in recent history is the Islamic State of Iraq and Al-Sham (ISIS), an entity that aims at assembling the countries of the Fertile Crescent to establish a caliphate. ISIS has sought to completely erase numerous other “enemy” groups in the attempt of their state-building path; a journey that was marched over the dead bodies of innocent civilians, where they were enslaved, tortured, sexually assaulted, and systematically killed whoever stood in their way. Throughout the years, ISIS treated people as a commodity, aside from looting public and private goods, as part of their methodical mode of operation. This criminal organization’s degrading means surpassed reason by encouraging rape and sexual slavery as a form of reward to their fighters and a recruitment magnet. The group also proved to be an adaptive entity that shifts from guerilla warfare to conventional military operations to state-like bodies given the opportunities presented. ISIS operated oil refineries, provided medical support, and offered education, apart from conducting military operations. Furthermore, they portrayed an incredible ability to manipulate social media in painting their picture to the world, which attracted dedicated zealous foreign fighters from all over the world and spread fear among enemy lines.

In this horror excursion, ISIS assembled flagrant military capabilities with over more than 30,000 fighters who were put to use in fighting and employed with running parallel criminal activities. Extensive non-governmental organization reports were presented to the international community, where ISIS’ variant flabbergasting actions have been portrayed in detail. These crimes vary from obnoxious sexual slavery against girls as young as nine, to wielding the prosperous gas industry in occupied regions. Moreover, the organization succeeded in capturing State-run territories using sustained and extreme violence, with the help of thousands of foreign fighters flocking from all around the world.

Despite these testimonials, the rise of ISIS represents an unprecedented challenge to International Criminal Law. ISIS was designated by the United Nations Security Council (UNSC) as a threat to international peace and security as a result of constant advocacy for the commission of attacks worldwide through insurgent groups and dormant individuals who carried out terrorist acts in the name of ISIS in Europe, South East Asia, Africa, and North America. Domestic courts initiated many attempts in prosecuting ISIS criminals. However, these prosecutions involved breaches of domestic anti-terror statutes that do not entirely cover crimes committed by the group in its held territory.

Numerous sources, including the International Criminal Court (ICC) prosecutor, have referred to clear evidence of ISIS committing various offenses that would constitute a Crime Against Humanity (CAH), War Crimes, and Genocide, yet silent on the issue of terrorism; a crime with a distinct intent of a particular desire to commit crimes to instill terror amongst a civilian population for ideological purposes. This is not compatible with the aim of International Criminal Law (ICL), which is to apportion responsibility that accurately reflects the criminality of an individual's conduct. ISIS has shown the international community that modern technology and the accompanying pervasive globalization of radical ideas, coupled with the phenomena of a very large number of foreign fighters flocking to captured State territory in support of an ideology, represents a significant new form of terrorism.

However, labeling the group as a "terrorist organization" obscures a portion of the entity's true nature. ISIS' activities demonstrate that it is a hybrid movement with the characteristics of financial enterprises, militias, and criminal organizations, which uses the fear caused by terrorism as a tactic to instill its power over the region. Therefore, the need to explore the nature of ISIS is fundamentally essential to hold the group properly accountable.

The current loopholes in international laws are the international community's main obstacles in the long road of ISIS prosecution. For example, the ICC, a court established to prosecute the world's worst war criminals, has a restrictive basis for it to act in these situations. The Court cannot act unless the State, in which the alleged conduct occurred, is a party or has accepted the jurisdiction of the ICC, the perpetrator's nationality is party or has accepted the Court's jurisdiction, or the UNSC has referred the situation to the Prosecution regardless of whether a State Party is involved. Therefore, the primary difficulty lies in securing the Court's involvement since ISIS' actions are predominantly in Syria, Iraq, and Libya, none of which is a party to the Rome Statute.

In addition, if ISIS was to be prosecuted before the ICC, Terrorism does not fall within the Court's jurisdiction, for it only tries criminals that allegedly committed four crimes: CAH, War Crimes, Genocide, and Aggression. The Rome Statute excluded terrorism as a distinct crime even though the definition of the crime has emerged as part of international customary law since the Special Tribunal for Lebanon has set it out to be so in 2007. Unlike the ICC, numerous ad hoc tribunals such as the International Criminal Tribunal for the former Yugoslavia (ICTY) and

International Criminal Tribunal for Rwanda (ICTR) have included the act of terrorism within their statutes, which accomplishes precedents in the international justice system.

Notwithstanding the discourse within ICL and terrorism, the International Humanitarian Law (IHL) has set out rules of armed conflicts. IHL differentiates between acts committed in the times of wars and in the times of peace on the one hand, and between international and non-international armed conflicts on the other hand. ISIS can be held accountable under IHL in an effort to hold the entity responsible for acts committed in times of war and peace, apart from the four core crimes designated in the Rome Statute. However, a specific threshold needs to be upheld to differentiate certain situations in armed conflicts that need to be explored.

Given the magnitude of ISIS crimes, one reasonably thinks that this inhumane organization will undoubtedly be held accountable before the international community since it was designated a threat to international peace and security. However, the current politicized international justice system does not point in that direction. Despite numerous recourse options, such as the ICC, ad hocs, and hybrid tribunals, the international community has failed to prosecute ISIS' heinous crimes. Politics has always been the reason behind the idleness of the UNSC, where the VETO power of refusing the enactment of a matter into law has been a constant impediment between feuded states. Even with such robust obstacles, these permanent states can put aside self-centered interests and work around them to prosecute ISIS and achieve justice.

Moreover, when the international community decides to do so, more matters must be tackled to achieve comprehensive accountability. One of which is the non-existing accountability of entities in ICL, therefore the judicial body prosecuting ISIS cannot charge the organization as a whole; it will only be able to prosecute the individual for the crime he/she committed as a person, based on the principle of individual criminal responsibility in international criminal law. This concept has limited the responsibility to natural persons leaving out legal entities such as ISIS, even though it has its own goals and plans represented by its members. However, there exist numerous precedents in international criminal courts that developed accustomed concepts, such as the doctrine of *joint criminal enterprise* that prohibits the membership to a particular group, in an attempt to refrain such entities from eluding justice.

Given what was previously presented, it is evident that ISIS accountability is achievable from various angles; some angle is more suitable than the other. Therefore, to attain justice, one needs to answer to the existing obstacles to overcome them. Why lies the need to understand ISIS

as a serious ongoing threat to international peace and security? Will the International Criminal Court achieve inclusive accountability of this entity in the presence of legal loopholes in International Criminal Law?

Hence, it is imperative to tackle the true nature of ISIS by diving into its roots with fellow organizations, observing the international response to this phenomenon, and correctly classifying this enterprise within the framework of better understanding it (Part One). Additionally, there lies vital importance in the study of the jurisdiction of the ICC if it happens to prosecute ISIS individuals for their crimes, as well as there exists a need to explore alternative means to hold the organization accountable for its crimes if the ICC fails to do so (Part Two).

Part One: Identifying ISIS

In the Middle East, a land full of conflicts, we often hear of organizations that seek power in violent means, under the umbrella of ideology and religion. These entities often fail to reach their pragmatic goals. However, they succeed in infringing fundamental human rights and in committing atrocity crimes. Over the years, many organizations, often categorized as “terrorist organizations,” contributed to many of the region’s conflicts. Technology and exploitation led to the evolvement of the most prominent entity of them all: The *Islamic State in Iraq and al-Sham* (ISIS). This organization stemmed from many predecessors, learning from their brutal and violent means and growing them to new and improved tactics. In order to understand ISIS, it is imperative to dive deeper into the group’s origins, the prominent extremist *Al-Qaeda*, which once shook the world in the early 2000s. However, ISIS did not just copy the strategies of *Al-Qaeda*; they submerged state-like structures within the group, claiming authority on the lands it conquered. Unfortunately, based on extreme *Wahhabism*, the group did not act like a citizen-loving state; instead, mass killings, rape, torture, and many more crimes happened on the order of ISIS affiliates. These happenings lead to many reactions from the international community, even though they might not be as effective as one might hope to stop what ISIS was doing (Chapter One). Nevertheless, these inquiries led to a profound understanding of the group and the conclusion of having gaps in the definition of the Crime of Terrorism itself on the international level (Chapter Two).

Chapter One: A Brief History of ISIS and the International Response

The *Islamic State in Iraq and al-Sham* (ISIS), an *Al-Qaeda*-linked group and extremist movement, are protagonists in today's deadliest crises in the Middle East, complicating efforts to end them. They have exploited state collapse, wars, and geopolitical upheaval in the Middle East and pose an evolving threat elsewhere. Reversing their earnings requires avoiding the mistakes that enabled their rise. This means that in order to halt this advanced type of organization, it is imperative to go back to its roots and depict its identity (Paragraph One), and portray the efforts taken by the international community as a response to the ongoing threat of ISIS (Paragraph Two).

Paragraph One: The Background of ISIS

Not since Arab-Muslim armies spread out to conquer the world in the seventh century have we witnessed such a powerful force that has combined clever military and political strategy along with abject cruelty and oppression of those who are under its thrall. Nevertheless, unlike those early armies, ISIS conquests have been carried out with horrendous massacres, executions, and the killing of tens of thousands of civilians, forced conversions, and literal modern-day enslavement of minorities and women – if they are not immediately killed.

1. The Identity of ISIS

The Greatest possible threat to the stability of the Middle East and the broader world in the modern era has been the unrelenting conquests and destruction of cities by the *Islamic State in Iraq and al-Sham* (ISIS). As an inspirational force, it has been equally successful in mobilizing young Muslims worldwide.

ISIS is determined to raise a unitary state, or caliphate, that eliminates all borders in the Middle East and to enlarge those borders even further - as far as India and Central Asia. Unlike suicide bombers from other groups who wish to attain martyrdom and paradise in heaven, ISIS

wants to build a paradise on earth as well. In the theory and practice of state-building, it has gone many steps further than other groups.²

In June 2014, the organization revealed itself a worldwide caliphate and began referring to itself as the *Islamic State*, punctuating its prowess with highly publicized beheadings, systematized sexual slavery, mass killings of religious minorities, and other cruelties.³ As a caliphate, it claimed religious, military, and political authority over all Muslims worldwide.

When the Islamic State laid hold of Mosul in June 2014, perhaps 30,000 well-armed Iraqi forces ran away from the city in the face of maybe 1,000 ISIS fighters, abandoning behind enormous amounts of equipment, including Abrams tanks and small arms and ammunition.⁴ When asked about the cause of the poor performance of the Iraqi military, one retired general responded: “Corruption! Corruption! Corruption!”⁵

In Syria, ground attacks were performed by ISIS groups on both government forces and opposition factions. By December 2015, it controlled an area extending from western Iraq to eastern Syria, holding an estimated eight to twelve million people, where it implemented its interpretation of Shari’a law. In 2015, ISIS was estimated to have an annual budget of more than US\$1 billion and an army of more than 30,000 fighters. Aymen Jawad al-Tamimi estimates that the expenses of ISIS were around US\$5.6 million per month or around US\$70 million annually in the eastern Syrian province of Deir az-Zor alone. Unsurprisingly, the most significant budgetary item was the salaries given to the fighters, which is equals to 43.6 percent of the budget or about US\$30 million a year. In addition, ISIS intelligence apparatus, the *Emni*, were part of the significant share of the budget, which was used for propaganda and paying intelligence agents and informants.⁶ The rest of their budget covered campground maintenance, which amounted to 19.8

² Charles R. Lister, *The Islamic State: A Brief Introduction*, Brookings Institution Press, 2015, Foreword page vii.

³ Daniel Byman, *Understanding the Islamic State-A Review Essay*, International Security, Volume 40, Issue 4, Spring 2016, page 127, <https://direct.mit.edu/isec/article/40/4/127/12132/Understanding-the-Islamic-State-A-Review-Essay>.

⁴ Peter Van Buren, *Dude, Where’s My Humvee? Iraq Losing Equipment to the Islamic State at Staggering Rate*, Reuters, June 2, 2015, <http://blogs.reuters.com/great-debate/2015/06/02/dude-wheres-my-humvee-iraqi-equipment-losses-to-islamic-state-are-out-of-control/>.

⁵ Patrick Cockburn, *The Rise of the Islamic State: ISIS and the New Sunni Revolution*, Verso, 2015, page 64.

⁶ Anne Speckhard, Ahmet S. Yayla, *The ISIS Emni: The Inner Workings and Origins of ISIS Intelligence Apparatus*, The International Center for the Study of Violent Extremism (ICSVE), December 2016, <http://www.icsve.org/2016/12/>.

percent of total expenditures; media, 2.8 percent; Islamic Police, 10.4 percent; the Services Department, 17.7 percent; and aid to families, 5.7 percent.⁷

After all the expenses shared in the previous paragraph, the total amount of expenses of ISIS in their area of control is by far around US\$80 million.⁸ Therefore, the question that requires to be asked is how does ISIS fund itself and remain solvent?

According to the US Department of Treasury, the group earns a substantial amount of income from criminal activities: extortion via taxation, kidnapping, robbery, counterfeiting drugs and currency, racketeering, charging for protection from violence inflicted on their victims, as well as smuggling oil, weapons, people and antiquities.⁹ They generate the second largest amount of revenue after their black market oil operations. It was estimated that US\$1.2 billion was spent on ISIS' oil infrastructure in 2015, according to a testimony made by Keith Crane from the RAND Corporation.¹⁰ The oil infrastructure is owned directly by ISIS, and any investment in it is required to be allegiant to it. The requirement for allegiance does not apply to those who purchase oil from ISIS and refine or sell it within or outside of ISIS' territory. A variety of oil refineries are operated by ISIS, and refined petroleum products are sold to earn revenue.¹¹

The group also offers essential state-like services like providing medical assistance, enforcing price controls, creating courts and police forces, providing local municipal employees to return to work, providing traffic officers and creating a bureau for consumer protection.¹² Despite the deficiency in the quality of the services and in the group's ability to be in charge of these activities, these small services remain valuable in war zones. In order to prevent any activity

⁷ Aymenn Jawad al-Tamimi, *Unseen Islamic State Financial Accounts for Deir az-Zor Province*, Jihadology.net, October 5, 2015, <http://jihadology.net/2015/10/05/the-archivist-unseenislamic-statefinancial-accounts-for-deir-az-zor-province/>.

⁸ *Islamic State Monthly Revenue Totals \$80 million*, IHS Newsroom, December 7, 2015, <http://press.ihs.com/press-release/aerospace-defensesecurity/islamic-state-monthly-revenuetotals-80-millionihs-says>.

⁹ Celina Realuyo, *Leveraging the Financial Instrument of National Power to Counter Illicit Networks*, Congressional Hearing entitled —*A Dangerous Nexus: Terrorism, Crime, and Corruption*, before the Task Force to Investigate Terrorist Financing, Committee on Financial Services, US House of Representatives, May 21, 2015, page 3, <http://financialservices.house.gov/uploadedfiles/hhrg114-ba00-wstate-crealuyo-20150521.pdf>.

¹⁰ Keith Crane, *The Role of Oil in ISIL Finances*, Testimony presented before the Senate Energy and Natural Resources Committee, RAND Office of External Affairs, December 10, 2015, page 3.

¹¹ Aymenn Al-Tamimi, *A Caliphate Under Strain: The Documentary Evidence*, Counter-Terrorism Center at West Point, Volume 9, Issue 4, 2016, pages 1-8, <https://ctc.usma.edu/a-caliphate-under-strain-the-documentary-evidence/>.

¹² Jessica Stern and J.M. Berger, *ISIS: The State of Terror*, Ecco, 2015, page 114.

that might threaten the monopolistic service provision, the Islamic State refused any assistance from other service providers such as international non-governmental organizations.¹³ In addition, the Islamic State worked on generating millions of dollars per day by holding taxes and hostages for ransom on the population it controls.¹⁴ These resources enable ISIS to hire fighters from rival groups merely because it offers higher salaries. In addition, as impoverished Syrians and Iraqis join its ranks simply to put food on the table, the area's economic problems strengthen the group's recruiting ability.

ISIS has a main goal to gain recruits and reward their followers. That's why it allows and encourages rape and sexual slavery.¹⁵ To do so, prisoners, especially females are forced to become the wives of foreign fighters and that's how they become sexual slaves.¹⁶ Furthermore, the solidification of control and the attraction of recruits is also done by the conversion of the Islamic State. In areas it ruled, training camps were established for boys to enhance the number of soldiers for its armies.¹⁷ Islamic State schools worked to indoctrinate students on the group's religious vision.

In July 2017, the largest city controlled by ISIS, Mosul, was lost to the Iraqi army, followed by the loss of its *de facto* political capital of Raqqa to the Syrian Democratic Forces. ISIS continued to lose territory to the diverse military forces allied against it. By December 2017, ISIS lost 98% of its total territory. In December 2017, Iraqi forces had driven the last remnants of the group underground, three years after they captured about a third of Iraq's territory. By March 2019, ISIS lost one of its last significant territories in the Middle East in the Deir Ez-Zor campaign.¹⁸

¹³ Lina Khatib, *The Islamic State's Strategy: Lasting and Expanding*, Carnegie Endowment for International Peace, June 2015, page 7, http://carnegieendowment.org/files/islamic_state_strategy.pdf.

¹⁴ David S. Cohen, *Attacking ISIS's Financial Foundation*, Carnegie Endowment for International Peace, October 23, 2014, <http://www.treasury.gov/presscenter/press-releases/Pages/j112672.aspx>.

¹⁵ Rukmini Callimachi, *ISIS Enshrines a Theology of Rape*, New York Times, August 13, 2015, <http://www.nytimes.com/2015/08/14/world/middleeast/isis-enshrines-a-theology-of-rape.html?r=0>.

¹⁶ Kevin Sullivan, *Till Martyrdom Do Us Part*, Washington Post, October 1, 2015.

¹⁷ Kevin Sullivan, *For Boys, God and Guns; For Girls, God and Cooking*, Washington Post, October 1, 2015.

¹⁸ Hassan Hassan, *A Hollow Victory over the Islamic State in Syria? The High Risk of Jihadi Revival in Deir Ez-Zor's Euphrates River Valley*, Combating Terrorism Center at West Point, Volume 12, Issue 2, February 2019, <https://www.ctc.usma.edu/hollow-victory-islamic-state-syria-high-risk-jihadi-revival-deir-ez-zors-euphrates-river-valley/>.

On 31 October 2019, four days after the death of *Abu Bakr al-Baghdadi* by a suicide vest in the Syrian rebel-held Idlib province of Syria, ISIS media announced that *Abu Ibrahim al-Hashimi al-Qurashi* was their new leader.¹⁹

Several factors have enhanced ISIS' success and flexibility, which enabled it to survive crushing defeats and expand quickly where there were opportunities to do so. With the capture of American heavy artillery, missiles, and tanks from the Iraqi army, it has understood the art of conventional war, laying siege to cities, attacking targets simultaneously in Syria or Iraq. With enhanced mobility from machine gun-mounted pickups and motorbikes, its forces can also fight a sustained guerrilla war to harass its enemies over long stretches of desert, and with the use of suicide bombings and mass executions, it has taken such acts to a new level. ISIS has proven able to operate along the spectrum of activity identified by Chinese leader Mao Tse-tung as the key to rebel success: building institutions, organizing its supporters, and creating base areas in preparation for conflict; dilating through terror and limited guerrilla attacks and then directing conventional military operations.²⁰

Zarqawi's organization, as a small terrorist group, started using high-profile attacks against Shiites and international targets to weaken the Iraqi government and make a name for itself. Later it would utilize insurgency, destabilizing and finally replacing local governments. Next, after trying to rule in Iraq, it failed. That's when it went back to insurgency and then went through using terrorism when it was almost abolished in Iraq by 2010. As local conditions afflicted, it exploited them by returning to guerrilla war and eventually conventional military operations. To function along this spectrum, former Baathist military and security officers were incorporated into the group of ISIS, bringing much-needed organizational skills to the movement.²¹ This association began right after the US invasion of Iraq when the jihadists and Baathist officers worked together to construct bombs and conduct attacks, and *Baghdadi* renewed it after he came to power.

Although some of these tactics have been adopted from the *Taliban*, *Al-Qaeda*, and other groups, ISIS was the first extremist force that used such a wide array of military tactics within

¹⁹ Hana Masood, *ISIS is Decapitated – but is it Defeated?*, State Craft, Global Affairs Daily, November 11, 2019, <https://www.statecraft.co.in/article/isis-is-decapitated-but-is-it-defeated>.

²⁰ Mao Tse-tung, *Mao Tse-tung on Guerilla Warfare*, US Marine Corps, 1961, page 41-93, <https://play.google.com/store/books/details?id=29837P1TiOIC&rdid=book-29837P1TiOIC&rdot=1>.

²¹ *Ibid.* footnote 12, page 38.

what appears to be an overarching strategic plan. This has been made possible by recruiting 1,000 or more regular officers from the same Iraqi army that the Americans disbanded during the Iraq invasion in 2003. By then, former Iraqi officers, now disenfranchised and alienated from the state, had become the ISIS top commanders. Moreover, foreign fighters have proven a vital resource. When ISIS and *Jabhat al-Nusra* split, perhaps 60 percent of the foreign fighters went with ISIS. This percentage would grow significantly in response to the Islamic State's declaration of a caliphate.²² By the end of 2015, the group had besotted about 30,000 foreign Muslim fighters. Most were from the Middle East and its neighbors. However, about 5,000 came from the West motivated by zeal and a desire for martyrdom, but many by a sense of adventure.²³ Foreign fighters have often proved the most zealous of the group's fighters—and the most replaceable—rigging out many of its suicide bombers that the Islamic State utilizes on an industrial scale.²⁴

ISIS wasn't able to spread its messages worldwide via social media, while limiting the world media to access their agencies and to know its visions. It allows only media coverage that it broadcast itself. It has ensured that no independent journalist will have access to the state that ISIS is attempting to build, by executing many journalists. ISIS media depicts graphic images of violence, but also Ferris wheels and the delivery of sweets to the elderly.²⁵ Operations are often filmed and distributed to potential recruits, leading to massive enlistments: even if the group might lose hundreds in a battle, the publicity from that battle might attract thousands more.²⁶ Most of the publicities were done by uploading images on Twitter in order to spread fear among enemy soldiers.

Dabiq—the ISIS' English-language propaganda organ—expresses support for attacks on the West but fundamentally calls on Muslims to travel to Syria or other territories controlled by ISIS and its provinces to fight on behalf of them. *Baghdadi* himself rarely mentions the West in his

²² Alessandria Masi, *Jabhat Al-Nusra Leader Interview: 'No Solution' to ISIS, Al Qaeda Tension in Syria, Americans Joined Nusra Front*, International Business Times, June 3, 2015, <http://www.ibtimes.com/jabhat-al-nusra-leader-interview-no-solution-isis-al-qaeda-tension-syriaamericans-1951584>.

²³ *Foreign Fighters*, Soufan Group, December 2015, page 6, http://soufangroup.com/wp-content/uploads/2015/12/TSG_ForeignFightersUpdate1.pdf.

²⁴ Mohammed M. Hafez, *Suicide Bombers in Iraq: The Strategy and Ideology of Martyrdom*, United States Institute of Peace Press, 2007, pages 251–254.

²⁵ Kevin Sullivan, *Spoils for the Rulers, Terror for the Ruled*, Washington Post, October 1, 2015.

²⁶ Virginia Page Fortna, *Do Terrorists Win? Rebels' Use of Terrorism and Civil War Outcomes*, International Organization, Volume 69, Number 3, Summer 2015, pages 1–38.

speeches.²⁷ At the end of 2009, when the group was weak, Iraqi jihadists spread a document entitled “Strategic Plan for Reinforcing the Political Position of the Islamic State of Iraq.”²⁸ The plan presciently noted “The situation will be strong politically and militarily” after the Americans’ imminent departure. With some degree of accuracy, the Iraqi jihadists argued that the United States is a more temporary enemy than the Shiites and disloyal Sunnis.

Ultimately, ISIS’ growth has not depended on its skills or ruthlessness, but on the distinct political and military vacuum in Syria, a result of the ruinous years-long civil war, and in Iraq, resulting from the alienation of the Sunni population by the government. Underlying these conditions has been the failure of the Western occupation force in Iraq to carry out effective nation-building after the US invasion. These actions, or the lack of them, have helped create the rush of young Muslims worldwide wanting to enlist in ISIS, which the group has benefited from enormously.

2. ISIS’ Legal Framework

Media coverage of ISIS frequently refers to the group’s violent and seemingly archaic justice system. Such narratives tend to fixate on the distorted form that the violence takes—including decapitations, stoning, and immolations—without considering the institutional structures that enable it or the broader function it serves in ISIS’ ambitious state-building project. In this part of the study, a comprehensive overview of the legal institutions that ISIS uses to justify its brutality and to legitimize its claim to sovereignty over millions of people and tens of thousands of square meters of territory shall be presented. Outside observers of armed groups that engage in terrorism often presume that such groups are entirely lawless. For instance, the U.S. Department of Defense defines terrorism as “the unlawful use of violence or threat of violence ... to instill fear and coerce governments or societies in pursuit of goals that are usually political.”²⁹ Nevertheless, even though the actions of groups such as ISIS are plainly unlawful from the perspective of many states, these

²⁷ Thomas Hegghammer and Petter Nesser, *Assessing the Islamic State’s Commitment to Attacking the West*, Perspectives on Terrorism, Volume 9, Number 4, August 2015, pages 14–30.

²⁸ Al-Shishani, *The Islamic State’s Strategic and Tactical Plan for Iraq*, Terrorism Monitor, Volume 12, Issue 16, August 2014, <https://www.refworld.org/docid/53e8a0174.html>.

²⁹ U.S. Department of Defense, *Department of Defense Dictionary of Military and Associated Terms*, Joint Publication 1-02, November 8, 2010 (as amended through February 15, 2016), http://www.dtic.mil/doctrine/new_pubs/jpl_02.pdf.

groups often claim to be following the rules of their own legal systems. In the Middle East, Islamist insurgent groups, which include *Al-Qaeda*, the *Taliban*, and most recently ISIS, have developed complex systems of governance and service provision that question the sovereignty of the states they are seeking to replace.

Scholars have long illustrated that legitimizing violence,³⁰ protecting economic transactions and property rights,³¹ and justifying taxation³² and military conscription were identified by legal institutions that played a critical role in the emergence of modern states.³³ These functions are fundamental in the social contract between a government and its people. In addition, more recent work in the field of rebel governance suggests that legal institutions are equally crucial for non-state actors that have state-like aspirations to govern people and territory.

Observers of insurgencies in Afghanistan, Yemen, and Mali have affirmed that one of the first things that armed groups do when they acquire new territory is to establish courts and other legal institutions that seem to ease their control over people and land. ISIS is the most recent in a long line of insurgent groups that have attempted to establish a legal basis for their actions. As a result of its dedication to enforcing Islamic law known as Shari'a (الشريعة)³⁴, the group's system of governance is largely shaped and constrained by that commitment. However, in fact, its use of law to legitimize power and violence is consistent with the patterns of state formation around the world. According to ISIS, violence is only accepted when justified by law. For example, following its decision to immolate a captured Jordanian pilot in a cage, ISIS defended the judgment in a detailed *fatwa* (فتوى)³⁵ that rationalized death by fire as a form of punishment that is equal in weight to the harms laid out on civilians by airstrikes.³⁶ Such statements demonstrate ISIS' concern for justifying the legality of its actions.

³⁰ Max Weber, *Politics as Vocation*, in *From Max Weber: Essays in Sociology*, eds. H.H. Gerth and C. Wright Mills, 1958.

³¹ Douglass North, Barry Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in seventeenth-century England*, *The Journal of Economic History*, Volume 49, Number 4, 1989, 803–832.

³² Deborah Bräutigam, *Introduction: Taxation and State-building in Developing Countries*, in *Taxation and State Building in Developing Countries: Capacity and Consent*, eds. Deborah Bräutigam, Odd-Helge Fjeldstad, and Mick Moore, Cambridge University Press, 2008.

³³ Charles Tilly, *The Formation of National States in Western Europe*, Princeton University Press, 1975.

³⁴ Shari'a refers to the body of divine law that is expressed primarily in the texts of the Quran and Sunnah (the opinions and example of the Prophet Muhammad).

³⁵ An Islamic legal opinion given by a jurist or scholar in response to a question.

³⁶ Islamic State Committee of Research and Fatwas, *Question: What is the ruling on burning an infidel with fire until he dies?*, February 2014, <https://web.archive.org/web/20160623170507/https://dotmsrstaging.s3-eu-west-1.amazonaws.com/uploads/uploads/b88geagijiaef4so.jpg>.

Notably, one of the first moves that ISIS made after expanding into Syria was to set up tribunals that demanded exclusive jurisdiction—the authority to decide all legal disputes—in areas where rival armed groups were also operating judiciaries.³⁷ One of the reflections of ISIS in the creation of a significance of courts in its state-building strategy was to establish a monopoly on the interpretation and enforcement of the law. In a region long plagued by corruption, ISIS has attempted to ingratiate itself with civilians by claiming its legal system is proximately more legitimate and effective than the available alternatives. In fact, Syria and Iraq were both near the bottom of the Corruption Perceptions Index in 2015.³⁸ In this context, it has been quite easy for ISIS to make the case that its institutions are less corrupt than those of the Iraqi and Syrian governments or rival armed groups such as the Free Syrian Army (FSA), which has also been accused of graft and mismanagement.³⁹

ISIS' legal system purports to strictly apply the divinely revealed body of Islamic law known as Shari'a. Like *Al-Qaeda* and other jihadist organizations, ISIS dismissed the validity of positive law. The standard jihadist assessment of positive law has been explained in great detail by the *Al-Qaeda*-affiliated scholar Muhammad al-Maqdisi, who has asserted that man-made laws are related to polytheistic idols and therefore violate *tawhid* (توحيد - the Islamic requirement of a monotheistic belief in God). According to al-Maqdisi, the “plurality of sources of legislation” found in modern constitutional democracies implies “the plurality of lords and gods served beside God” and therefore constitutes polytheism.⁴⁰ Although ISIS disagrees with *Al-Qaeda* on several ideological points—most notably ISIS' decision to declare itself a caliphate, which *Al-Qaeda* criticized as premature and disrespectful of the requirement for consultation with other jihadist groups⁴¹—the two groups still agree on the fundamental invalidity of positive law.

ISIS regards Shari'a as the only legitimate basis for governance. Official publications state that subjects of ISIS had an obligation to adjudicate their disputes “only according to the law of

³⁷ Islamic State Committee of Research and Fatwas, *Question: What is the ruling on burning an infidel with fire until he dies?*, February 2014, <https://web.archive.org/web/20160623170507/https://dotmsrstaging.s3-eu-west-1.amazonaws.com/uploads/uploads/b88geagiiief4so.jpg>.

³⁸ Syria was ranked 154th, and Iraq was ranked 161st out of 168 countries in the Corruption Perceptions Index (CPI). Transparency International (2015), <http://www.transparency.org/research/cpi/overview>.

³⁹ *Syrian Rebel Command Sacked Over Graft Claims*, Al Arabiya, June 27, 2014, <http://english.alarabiya.net/en/News/2014/06/27/Syrian-rebel-command-sacked-over-graft-allegations-.html>.

⁴⁰ Abu Muhammad al-Maqdisi, *Kashf Shubhāt al-Mujādilīn ‘an‘Asākīr al-Shirk wa-Ansār al-Qawānīn*, 1999, 28, <https://archive.org/details/S6d2w>.

⁴¹ Thomas Joscelyn, *AQIM rejects Islamic State's caliphate, reaffirms allegiance to Zawahiri*, The Long War Journal, July 14, 2014, http://www.longwarjournal.org/archives/2014/07/aqim_rejects_islamic.php.

God by resorting to Islamic courts in the Islamic State.”⁴² When the group captured Raqqa⁴³ and Mosul,⁴⁴ it issued documents calling for “the release of the people from the rotten shackles of positive law,” among other prescriptions. ISIS has decapitated numerous judges and lawyers on charges of apostasy.⁴⁵ In keeping with its dismissal of positive law, the organization refused to codify all of its laws and it codified only the most widely known Islamic legal rules.⁴⁶ Although ISIS has published written instructions for the punishment of *hudūd* (حدود) crimes—those crimes for which the Quran specifically defines a punishment— the organization generally takes the position that it is not necessary to write down the rules of the Shari’a because they have already been expressed in the primary texts of revelation. Therefore, the Caliph is understood as a mere custodian of divine law rather than a lawmaker himself.

Despite the constraints of its ideology, ISIS’ leaders recognize that the 21st-century caliphate is faced with governance unpredictable challenges that weren’t seen at the time of the Prophet. In order to address modern-day problems such as traffic safety and automobile emissions, ISIS set out an Islamic legal basis for regulations and policies that cannot be traced back to the Quran or other accredited sources of divine law. To this end, ISIS has embraced the doctrine of *siyāsa shar’iyya* (السياسة الشرعية), which translates loosely as “religiously legitimate governance.”⁴⁷ The doctrine, which is often linked with the medieval Islamic scholar Ibn Taymiyyah,⁴⁸ implies a dualistic model of governance and law. First, it requires that Shari’a judges and courts apply Islamic legal rules in situations where controversy or the case in question can be unquestionably resolved by the text of the Quran or other accepted sources. Second, the doctrine admits that these texts do not address rules for every conceivable case, and therefore it allows for religiously legitimate authorities appointed by the state—including police officers, military commanders,

⁴² See for example, al-Battār Media Foundation, Raqqa Province, *Arrest of a Cell of Extremists*, 2015, 5, <https://web.archive.org/web/20160323201354/https://s04.justpaste.it/pdf/Btaar-tf-gholah-justpaste-it-953848.pdf>.

⁴³ The Islamic State, *Wathiqat al-Madinah*, September 13, 2014, issued in Raqqa, Syria, <https://web.archive.org/web/20160530071604/http://1.bp.blogspot.com/-Tv8Nm1G1VxM/VBXdeYnHvpI/AAAAAAAAAJi0/Tlt0hnxgVXE/s1600/proxy.jpg>.

⁴⁴ The Islamic State, *Wathiqat al-Madinah*, June 12, 2014, issued in Mosul, <https://web.archive.org/web/20160530071520/https://justpaste.it/Nenwa>.

⁴⁵ See, for example, this Islamic State propaganda report on the execution of a Syrian lawyer who had worked in one of the state security courts of the Assad regime in Homs. Islamic State Media Office, *Photographic Report: Implementation of the Hadd Punishment on Three spies, One lawyer, and One Apostate Ismaili*, January 8, 2015, <https://web.archive.org/web/20160323192633/https://pbs.twimg.com/media/B62sDz2CAAAPpEC.jpg>.

⁴⁶ Andrew March, Mara Revkin, *Caliphate of Law*, Foreign Affairs, April 15, 2015, <https://www.foreignaffairs.com/articles/syria/2015-04-15/caliphate-law>.

⁴⁷ *Ibid.*

⁴⁸ Ibn Taymiyyah, *al-Siyāsa al-Shar’iyya*, Cairo, 1951.

market inspectors, and the Caliph himself—to issue law-like decisions that meet the following two necessary conditions:

(1) those decisions must be issued with the welfare (*maslaha* - مصلحة) of the Muslim community and

(2) they must not be incompatible with the divine rules of Shari'a. The ensue of human interpretations of Shari'a is known as *fiqh* (الفقه).

Relying on the *siyāsa shar'iyya* doctrine described above and to be able to govern civilians, discipline its own officials and combatants, and control territory, the Islamic State has elaborated several regulations and rules. Suchlike regulations deal with matters that were not directly addressed by the Quran and other sources of Shari'a. ISIS has published many documents specifying the duties and rights of its subjects, whom it normally refers to as an-Nās (the people - الناس) and less regularly as *rai'aya* (literally, the flock - الرعيّة).⁴⁹ The group narrates the act of *bay'ah* (pledging allegiance to the caliph - بايع) as a contract (*'aqd* - عقد) based on mutual duties between the people and their leader.⁵⁰ The terms of this contract are laid out in so-called “documents of the city” (*watha'iq al-madinah* – وثيقة المدينة), which appear to be inspired⁵¹ by a constitution-like text supposedly drafted by the Prophet himself to govern the city of Medina in the year 622.⁵² Documents with this title have been issued by ISIS in the Syrian city of Raqqa,⁵³ the Iraqi cities of Mosul,⁵⁴ Tikrit,⁵⁵ and Hit,⁵⁶ and the Libyan city of Sirte.⁵⁷ Ranging in length from 13 to 16 articles, these writings enumerate the obligations of the Islamic State to its subjects and vice versa.

⁴⁹ *Ibid.* footnote 46.

⁵⁰ The official Islamic State textbook, *al-Siyāsa al-Shar'iyya*, 2015, 27, <https://azelin.files.wordpress.com/2015/10/the-islamic-state-sharc4abah-politics.pdf>.

⁵¹ Historians have reconstructed the “document of Medina,” sometimes translated as “constitution of Medina,” from secondary accounts, one of which has disaggregated the text into 47 articles. ISIS’ version bears little resemblance to the original, despite sharing the same title. Anver Emon, “Reflections on the Constitution of Medina,” *UCLA Journal, of Islamic and Near Eastern Law*, Vol. 1 (2001–02), 103–133.

⁵² Anver Emon, *Reflections on the Constitution of Medina*, *UCLA Journal, of Islamic and Near Eastern Law* 1, 2001-2002, 103–133.

⁵³ *Ibid.* footnote 43.

⁵⁴ *Ibid.* footnote 44.

⁵⁵ The Islamic State, *Wathiqat al-Madinah*, July 27, 2014, issued in Salah ad-Din governorate.

⁵⁶ The Islamic State, *Wathiqat al-Madinah*, October 17, 2014, issued in Hit, Iraq, <https://web.archive.org/web/20160322234824/https://twitter.com/HamidHadeed/status/523020667566825472>.

⁵⁷ The Islamic State, *Wathiqat al-Madinah*, December 2, 2015, issued in Sirte, Libya, <https://web.archive.org/web/20160322234933/https://twitter.com/kalsghyr/status/672090395560529920>.

The right to justice is mentioned frequently in official statements and propaganda produced by ISIS. As one document from Raqqa states, “The Islamic State is just and there is no distinction between a soldier and a Muslim [civilian]. In the Shari’a courts, all are held accountable and no one has immunity, just as the Prophet said he would cut off Fatima’s hand [the Prophet’s daughter] if she stole.”⁵⁸ Even though the rights of women are severely restricted in the caliphate—for example, women cannot go outside of their homes unless chaperoned by a male guardian known as a *mahram* (محرم)—they still have the right to appear before a Shari’a court. According to a report issued by the ISIS’ female police force, “A woman can go to the court and present her grievance with complete freedom, and she will find that [the judge] listens to her and guarantees her right without bargaining or bribes.”⁵⁹

It must be taken into consideration that the rights listed above apply only to Muslims. Non-Muslim “People of the Book” are granted a more limited set of rights conditional on their acceptance of a *jizyah* contract (عقد الجزية), which is the security guarantee that Islamic states have historically provided to religious minorities in exchange for their payment of a special tax. Christians are authorized to the protection of ISIS and limited freedom of worship in exchange for their settlement of this tax and their compliance with various other rules stipulated by the *jizyah* contract. These rules include bans on the repair or construction of houses of worship, trading or publicly consuming pork and wine, possession of weapons, and engaging in religious rituals outside of their churches.⁶⁰

Although ISIS claims to tolerate Christians as minority subjects of the caliphate, adherents of non-Abrahamic faiths enjoy no such privileges. The organization has developed legal justifications for the extermination of certain classes of non-Muslim minorities regarded as too deviant to be allowed to live in the absence of conversion. Before the capture of Mount Sinjar in Iraq, ISIS claimed that its scholars carried out research on the Yazidis to settle whether they should legally be regarded as an unbelieving group “by origin” (*asli* - أصليّ) or one that was initially Muslim and only later apostatized. Eventually, the Islamic State determined that the Yazidis were

⁵⁸ ISIS, *What a Visitor to the City of Raqqa Sees*, February 1, 2015, <https://web.archive.org/web/20151127043218/http://justpaste.it/f7pt>.

⁵⁹ Al-Khansa Brigade of the Islamic State, *Women in the Islamic State*, January 2015, 21, <https://azelin.files.wordpress.com/2015/01/al-khansc481-media-battalion-22women-in-the-islamic-state22.pdf>.

⁶⁰ Richard Spencer, *Militant Islamist Group in Syria Orders Christians to pay Protection Tax*, The Telegraph, February 24, 2014, <http://www.telegraph.co.uk/news/worldnews/middleeast/syria/10666257/Militant-Islamist-group-in-Syria-orders-Christians-to-pay-protection-tax.html>.

apostates by origin and therefore concluded, “Unlike the Jews and Christians, there was no room for jizyah payment ... and [the Yazidis] can only be given an ultimatum to repent or face the sword.”⁶¹

As these examples illustrate, ISIS uses its legal system to articulate the duties and rights of the population that it seeks to govern. Although these rights are minimal (and nonexistent for certain classes of people, such as the Yazidis), the organization nonetheless sees itself as creating a kind of social contract⁶² based on mutual responsibilities between Muslims and the government of the caliphate.

In addition to rules modulating the behavior of its subjects, ISIS also issues rules designed to expand the population and socialize children with Islamic values. These regulations include the obligation of students for Islamic education⁶³ through the ninth grade (boys and girls are educated in different schools) and disallowing the use of birth control.⁶⁴ These rules are generally oriented toward increasing the population of the caliphate and producing obedient subjects which can be easily governed, taxed, and conscripted as fighters. The group’s legal system serves not only to control the behavior of its current citizens but also to ensure the health and ideological conformity of its next generation.

In light of the imminent danger of this group, the international community took action, as portrayed in the following paragraph.

Paragraph Two: The Creation of UN Bodies to Inquire on ISIS Atrocities

Local governments and the international community alike refused to stay still after witnessing how far ISIS has gone and where it still might go. As a result, numerous United Nations (UN) Resolutions, some stemming from the UN General Assembly and others from the UN

⁶¹ ISIS, *The Failed Crusade*, Dabiq, Volume 4, October 2014, 14, <http://media.clarionproject.org/files/islamic-state/islamicstate-isis-magazine-Issue-4-the-failed-crusade.pdf>.

⁶² Mara Revkin, *ISIS’ Social Contract*, Foreign Affairs, January 10, 2016, <https://www.foreignaffairs.com/articles/syria/2016-01-10/isis-social-contract>.

⁶³ ISIS, Deir Ezzor Province, *Announcement About the Opening of Schools*, September 2, 2015, <https://web.archive.org/web/20160323143147/https://justpaste.it/dezeducation1>.

⁶⁴ Jawad Hattab, *ISIS Bans Birth Control in Mosul*, Al Arabiya, December 1, 2014, <http://english.alarabiya.net/en/variety/2014/12/01/Baby-boom-ISIS-bans-contraceptive-pills-in-Mosul-.html>.

Security Council, have denounced ISIS acts. However, two resolutions have a more profound impact on the severe and active response against ISIS, an organization – temporarily- defeated militarily and is far from destroyed.

1. IIIM and UNITAD

The International, Impartial and Independent Mechanism (IIIM) was brought out to light in 2016, when the General Assembly adopted Resolution 71/248 to investigate and prosecute persons responsible for the most serious crimes under International Law committed in the Syrian Arab Republic since March 2011. Neither a prosecutor's office nor a court, the IIIM collects and analyses information and evidence of international crimes committed in Syria: it seeks to support accountability processes aimed at bringing about justice for the victims of grave international crimes committed in Syria since March 2011.

One of the tasks of this mechanism was to collect, consolidate, preserve and analyze evidence of violations. And the second task was to prepare files to facilitate and expedite fair and independent criminal proceedings in national, regional, or international courts, per international law. Furthermore, the IIIM has its own sources to collect evidence and relevant information. Such as the International Independent Commission of Inquiry on the Syrian Arab Republic,⁶⁵ the Joint Investigative Mechanism, states, international or regional organizations, entities of the United Nations system, non-governmental organizations, foundations, and individuals. Despite these sources, the Mechanism also works to collect additional evidence and information by interviews, testimonies, documentations and forensic material.⁶⁶

Later on, on 9 August 2017, Iraq's Minister of Foreign Affairs, Dr. Ibrahim al-Jaafari, freighted a letter to UN Secretary-General António Guterres for circulation the Security Council

⁶⁵ There is a relationship between the IIIM and the International Independent Commission of Inquiry in the Syrian Arab Republic set out in the Terms of Reference of the IIIM; the mandates of these two bodies are distinct but complementary. The Commission of Inquiry on Syria is expected to continue collecting information directly, reporting on broad patterns of violations, and making recommendations, notably to Member States of the UN. Its work will remain visible and publicly reported. In contrast, the Mechanism is not expected to publicly report on its substantive work. Instead, its role will be to consolidate and analyze evidence, preserve it, and establish case files to assist courts.

⁶⁶ *Terms of Reference*, §30, The IIIM website, <https://iiim.un.org/terms-of-reference-of-iiim/>.

requesting international assistance in the criminal investigation of ISIS.⁶⁷ The Iraqi government, however, indicated a distinct preference for the pursuit of domestic criminal proceedings under Iraqi law, noting in the letter addressed to the Security Council following the liberation of Mosul in August 2017:

*“It is ... important to bring justice, following Iraqi law, members of the terrorist groups of ISIL, who have committed such crimes ... Iraq must maintain its national sovereignty and retain jurisdiction, and its laws must be respected, both when negotiating and implementing the resolution.”*⁶⁸

With Iraq’s consent in hand, unlike in Syria, the Security Council reached a consensus around the need to promote criminal accountability and elaborated a resolution. In Resolution 2379, the Council asked the Secretary-General to establish an Investigative Team to Promote Accountability for Crimes Committed by Da’esh/ISIL (UNITAD), headed by a Special advisor, to:

*“support domestic efforts to hold ISIL (Da’esh) accountable by collecting, preserving, and storing evidence in Iraq of acts that may amount to war crimes, crimes against humanity and genocide committed by the terrorist group ISIL (Da’esh) in Iraq, to the highest possible standards... to ensure the broadest possible use before national courts, and complementing investigations being carried out by the Iraqi authorities, or investigations carried out by authorities in third countries at their request ...”*⁶⁹

The Resolution recognizes that the ideology and strategic objectives set by ISIS to hold their members accountable, particularly those who bear a tremendous responsibility, was under the label of crimes by using kidnapping, enslavement, human trafficking, rape, sexual slavery, and the recruitment of child soldiers.

⁶⁷ UN President of the SC, Letter from H.E. Dr. Ibrahim al-Jaafari, Minister of Foreign Affairs of the Republic of Iraq, to H.E. Mr. António Guterres, Secretary-General of the United Nations, UN Doc. S/2017/710, August 9, 2017, <https://en.calameo.com/read/005253664097abb2342ef>.

⁶⁸ Letter dated 14 August 2017 from the Chargé d’affaires of the Permanent Mission of Iraq to the UN addressed to the President of the Security Council, UN Doc. S/710/2017, 16 August 2017, <http://undocs.org/S/2017/710>.

⁶⁹ Security Council Resolution 2379, 21 September 2017, §2, [https://undocs.org/S/RES/2379\(2017\)](https://undocs.org/S/RES/2379(2017)).

In a report shared with the Human Rights Council (HRC) in 2016, the International Independent Commission of Inquiry on the Syrian Arab Republic found that ISIS has committed genocide against the Yazidi people, an ethno-religious minority in Iraq and Syria, and other atrocities against Shi'as, Christians, Sunnis, and other groups. The genocide was enacted through the killing, sexual enslavement, and forcible transfer of the Yazidis.⁷⁰ With the lack of trials against ISIS members for such atrocities and the vulnerability of evidence under their occupation, such reports made the Security Council's Resolution a crucial action.

There have been some concerns raised by many elements of the international community, including those who would ordinarily advocate for such an effort, about this new accountability mechanism. It is one of the first of its kind.⁷¹ Resolution 2379 and 71/258 mark a growing trend in the United Nation's establishment of investigative mechanisms to support domestic prosecution of international crimes, instead of referrals to the ICC or the creation of international ad hoc or hybrid tribunals.

Although UNITAD is primarily mandated to aid Iraqi authorities, Resolution 2379 and its Terms of Reference expect that evidence collected by UNITAD may also be used in criminal proceedings conducted by competent domestic courts in Iraq and third States. Thus, third states exercising active or passive personality jurisdiction or even universal jurisdiction may benefit themselves from the irrefutable resources of UNITAD. The investigations undertaken by UNITAD were a source of benefice for many ISIS cases that has gone forward in courts worldwide.

Such cases include foreign fighters who have returned from the battlefield and individuals from the region who have slipped into asylum states.⁷² Sarah O., a 21-year-old German national, is on trial before the Higher Regional Court of Düsseldorf on charges of terrorism, war crimes, human trafficking, and deprivation of liberty. The Court has stated that the crimes allegedly committed by the defendant could also qualify as crimes against humanity.

⁷⁰ *They Came to Destroy: ISIS Crimes Against the Yazidis*, Report of the Independent International Commission of Inquiry on the Syria Arab Republic, pages 1-2, June 15, 2016, UN Doc. A/HRC/32/CRP.2, https://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A_HRC_32_CRP.2_en.pdf.

⁷¹ Beth Van Schaack, *The Iraq Investigative Team and Prospects for Justice for the Yazidi Genocide*, Journal of International Criminal Justice, Oxford University Press, Volume 16, Issue 1, March 2018, page 116.

⁷² *Dutch Find 30 Suspected War Criminals Among Last Year's Refugee Wave*, The Guardian, February 29, 2016, <https://www.theguardian.com/world/2016/feb/29/refugees-europe-dutch-war-criminals-migration>.

As stated in the indictment, the defendant traveled to Syria to join ISIS at the age of 15 in October 2013. Together with her husband, “Ismail S.,” who is still at large, she was a member of ISIS’ police force. For over two years, from 2015 until 2017, they enslaved a Yazidi woman and two Yazidi girls in their house. The defendant was arrested in Turkey in February 2018 and was deported to Germany in September 2018, where she was arrested upon entry. She has been detained since that time.⁷³ These cases in foreign courts have the benefit of preventing host states from serving as safe havens for potential war criminals.

The scope of UNITAD seems restrained when compared to the IIIM’s in some aspects. Firstly, the territorial scope is limited to crimes committed within the Republic of Iraq for UNITAD and within the Syrian Arab Republic for IIIM. The other UN Member States, in whose territory ISIS has committed criminal acts, must first seek the consent of the Security Council before requesting assistance from UNITAD,⁷⁴ unlike the IIIM who may share information either at the request of national, regional, or international courts or tribunals or on its initiative.⁷⁵ Resolution 2379 mentions that Iraq will be allowed to order “any other uses” of the evidence generated “on a case by case basis.”⁷⁶ UNITAD’s ability to operate in Iraq will be dependent on Baghdad’s consent; however, this will be at the expense of unbiased investigations that concentrate on what the evidence says rather than targeting a single armed group, no matter how criminal.⁷⁷ On the other hand, the non-cooperative Syrian government has raised serious doubts regarding the IIIM’s work, where it refused the IIIM’s focus on the serious crimes of ISIS and claimed to focus on the government itself.

⁷³ *Yazidi survivor joins proceedings against German ISIS member on trial for international crimes*, Doughty Street Chambers, December 11, 2019, <https://www.doughtystreet.co.uk/news/yazidi-survivor-joins-proceedings-against-german-isis-member-trial-international-crimes>.

⁷⁴ SC Res. 2379, §10.

⁷⁵ Report of the Secretary-General, *Implementation of the Resolution establishing the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic*, UN doc. A/71/755, note 20, page 5, January 19, 2017, <http://undocs.org/A/71/755>.

⁷⁶ SC Res. 2379, §5.

⁷⁷ *Ibid.* footnote 55, page 119.

Secondly, in both bodies, subject matter jurisdiction is limited to war crimes, crimes against humanity, or genocide. As a result, IIIM and UNITAD lack jurisdiction to investigate terrorism, human trafficking, or hostage-taking offenses that do not constitute one of these international core crimes. In addition, the Iraqi federal law is insufficient on several fronts. The Iraqi Penal Code contains some common domestic crimes, such as murder and assault, but it is silent for international core crimes. Prosecutors give much importance to the ordinary criminal law and keep aside the crimes against humanity, war crimes and genocide.⁷⁸ The Iraqi Penal Code also contains some glaring flaws regarding sexual and gender-based violence (SGBV). For example, the rape definition is not compatible with international law standards; article 398 of the code states:

"If the offender mentioned in this section then lawfully marries the victim, any action becomes void, and any investigation or other procedure is discontinued and, if a sentence has already been passed in respect of such action, then the sentence will be quashed."

Thirdly, *in personam* jurisdiction in UNITAD is exclusive to ISIS and its members; criminal acts committed by other state or non-state parties to the conflict are beyond the reach of the Investigative Team.⁷⁹ In opposition to the IIIM's jurisdiction in this matter, the Resolution that established the Mechanism did not limit the alleged suspects to members of a particular group, leaving the door open to investigations regarding the government itself.

Moreover, Iraq's weak judicial system and the central government's insistence on employing the death penalty in any ISIS trial have prevented many abolitionist states from fully backing UNITAD. Capital punishment and executions in the world had the highest rate in Iraq.⁸⁰ Indeed, a death penalty sentence was recently handed down in the first case involving a foreign fighter in Iraq, a Russian national who was in charge to "carrying out terrorist operations" against Iraqi security forces.⁸¹ Additional mass executions followed; in December 2017, Iraq implemented 38

⁷⁸ R. Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, Stanford Journal of International Law, 2007, page 71, <http://www.bu.edu/lawlibrary/facultypublications/PDFs/Sloane/SJIL-Expressive%20Capacity.pdf>.

⁷⁹ *Iraq: Missed Opportunity for Comprehensive Justice*, Human Rights Watch, September 21, 2017, <https://www.hrw.org/news/2017/09/21/iraq-missed-opportunity-comprehensive-justice>.

⁸⁰ *Report on the Death Penalty in Iraq*, Office of the High Commissioner for Human Rights and United Nations Assistance Mission for Iraq, October 2014, https://www.ohchr.org/Documents/Countries/IQ/UNAMI_HRO_DP_1Oct2014.pdf.

⁸¹ J. Ensor, *Iraq Sentences Russian ISIL Fighter to Death by Hanging in First Ruling of its Kind on Foreign Jihadist*, The Telegraph, September 13, 2017, <https://www.telegraph.co.uk/news/2017/09/13/iraq-sentences-russian-isil-fighter-death-hanging-first-ruling/>.

men for crimes of terrorism.⁸² Similarly, The UN made explicit at IIIM's inception that the Mechanism will only share case files and data with courts or tribunals that respect international human rights law and standards, including the right to a fair trial and where the death penalty would not apply to the offenses under consideration.⁸³ This situation is not available in Syria, where capital punishment still exists.

2. The Recognition of an Ongoing Threat in the Middle East: ISIS

At its peak, the self-declared ISIS controlled around 88,000 square kilometers of an area stretching from western Syria to eastern Iraq, this area who joined between eight to twelve million people. ISIS have maintained its slogan of *baqiyah wa tatamaddad* (remaining and expanding) as it obtained control and influence over areas outside Iraq and Syria in the form of numerous provinces that once amounted to 35.⁸⁴ Since then, the terror group has suffered numerous setbacks resulting in shrinking territorial control and arrest of its supporters. However, since ISIS' organization disintegrated, its triumph, state-building, and governance narratives have shifted to ones that emphasize endurance, fortitude, and resilience. Even though the physical force of ISIS was reduced, it kept working on spreading their narratives over the media in order to keep influencing and reaching people.⁸⁵

In mid-2014, an international coalition interfered against ISIS in Syria and Iraq with an airstrike campaign and supplied advisors, weapons, training, and supplies to ISIS' enemies in the Iraqi Security Forces and Syrian Democratic Forces. This campaign was a source of reinforcement to the latter two forces and dealt a blow to the nascent Islamist proto-state, killing tens of thousands of its troops and damaging its financial and military infrastructure. This was followed by a smaller-scale Russian intervention exclusively in Syria, in which ISIS lost thousands of more fighters to airstrikes, cruise missile attacks, and other Russian military activities and had its financial base

⁸² *UN Right Wings 'Appalled' at Mass Execution in Iraq*, UN News Center, December 15, 2017, <https://news.un.org/en/story/2017/12/639662-un-rights-wing-appalled-mass-execution-iraq>.

⁸³ *Responding to Misconceptions Regarding the IIIM*, Syria Justice and Accountability Centre, August 12, 2017, <https://syriaaccountability.org/updates/2017/08/02/responding-to-misconceptions-regarding-the-iiim/>.

⁸⁴ *The Structure of the Khilafah*, Al-Furqan Media Foundation, July 7, 2016

⁸⁵ Nur Aziemah Azman, *Islamic State's Narratives of Resilience and Endurance*, International Centre for Political Violence and Terrorism Research, Counter Terrorist Trends and Analyses, Volume 12, Number 1, January 2020, pages 82-86.

even further degraded. After losing its control in its largest city in July 2017, Mosul, ISIS lost its *de facto* political capital of Raqqa to the Syrian Democratic forces. It continued to lose territory to the diverse military forces allied against it. By December 2017, the Islamic State-controlled just 2% of its maximum territory (in May 2015). In December 2017, Iraqi forces had driven the last remnants of the Islamic State underground, three years after the group captured about a third of Iraq's territory. By March 2019, ISIS off-tracked one of its last significant territories in the Middle East in the Deir Ez-Zor campaign. The loss of the last Syrian stronghold, that was governed by ISIS, Baghouz, was on March 23 and this event marked the end of the so-called caliphate.⁸⁶ By June 2019, it was reported that 10,000 ISIS fighters, from different nationalities, to note 2000 foreign fighters from more than 50 countries and 8000 Iraqis and Syrians, had been held in detention centers in northeastern Syria.⁸⁷

However, despite the State's vanish, the group continued to claim attacks it conducted in Iraq, Syria, and other places. In addition, it has adopted a decentralized command structure, enabling it to continue accomplishing violent crimes.⁸⁸ Despite losing its territory and fighters, ISIS doesn't lose its ideology but it continued to be well-funded and maintained its operations worldwide, even after declaring the fact of the end of the caliphate.

Throughout 2020 and 2021, the three regions in which ISIS militants were the most active, Africa, Middle East and Central Asia, have witnessed a decreasing number of severe attacks. The reemergence of the terrorist group in the Middle East shows how the claimed containment of ISIS has been all too uncertain. Even after breaking down the caliphate in Syria and Iraq, it was scarcely defeated. In Iraq and Syria alone, attacks by ISIS militants have been averaging between 100 and 200 a month. Between mid-July and mid-August 2020, over 130 separate attacks were done by ISIS and have killed more than 500 people.⁸⁹

⁸⁶ Ben Wedeman and Lauren Said-Moorhouse, *ISIS Has Lost Its Final Stronghold in Syria, the Syrian Democratic Forces Says*, CNN, March 23, 2019, <https://edition.cnn.com/2019/03/23/middleeast/iscaliphate-end-intl/index.html>.

⁸⁷ Michael Birnbaum, *Months After the Fall of ISIS, Europe Has Done Little to Take Back Its Fighters*, The Washington Post, June 20, 2019, https://www.washingtonpost.com/world/europe/after-caliphate-collapsed-europe-has-done-little-to-take-back-those-who-joined-isis/2019/06/20/4bab9cc2-8bc4-11e9-b6f4-033356502dce_story.html.

⁸⁸ *Ibid.* footnote 70, page 83.

⁸⁹ Joseph Hincks, *With the World Busy Fighting COVID-19, Could ISIS Mount a Resurgence?*, Time News, April 29, 2020, <https://time.com/5828630/isis-coronavirus/>.

It is relatively dangerous to dodge the failure to truly conquer ISIS by talking about defeating its “physical” caliphate. To bind a movement’s capabilities simply by the territory it can directly control is ludicrous. Taking back Iraqi and Syrian cities and towns from ISIS was a significant achievement, it helped to destroy the physical structure of this organization but did not end up by paralyzing it. It instead involved the destruction of the businesses of ordinary people and that created a cause of instability among the Iraqi’s government which was a potential benediction for ISIS to recover – as does the creation of new refugee and displaced populations in Syria.⁹⁰

The US Central Command (US CENTCOM) has regularly reported on the fact that ISIS continues to be a threat.⁹¹ There are, however, a number of unclassified official reports that cover ISIS’ entire pattern of activity in Syria and Iraq, including those provided to Congress by the Departments of Defense, State, and U.S. Agency for International Development’s Lead Inspector Generals.

ISIS temporarily increased the pace of its attacks in Iraq and Syria, which US CENTCOM attributed to the group’s typical escalation in Syria during the holy month of Ramadan (April 24 through May 23, 2020). In Iraq, the government’s preoccupation with measure to contain the Covid-19 pandemic was a gold opportunity for ISIS to increase its activities of attacks over this area.⁹²

During the quarter, many experts and researchers have presented their assessment concerning ISIS’ resurgence and one of the most mentioned points was that the increase in ISIS’ attacks was a sign of its strength and growth.⁹³ The spike in ISIS attacks in the first half of the quarter had raised new fears about the group’s revival and appeared to be early signs of an ISIS recovery. The increase in attacks correlated with a weakening of sustained military coercion against the group in both countries. In Syria, ISIS gained from the “chaos” that followed Turkey’s

⁹⁰ Anthony H. Cordesman, *The Real World Capabilities of ISIS: The Threat Continues*, Center for Strategic & International Studies, September 9, 2020, <https://www.csis.org/analysis/real-world-capabilities-isis-threat-continues>.

⁹¹ Jim Garamone, *ISIS Caliphates Is Gone, But Threat Remains, Dunford Says*, CENTCOM News, July 27, 2019, <https://www.centcom.mil/MEDIA/NEWS-ARTICLES/News-Article-View/Article/1919309/isis-caliphate-is-gone-but-threat-remains-dunford-says/>.

⁹² Lead Inspector General, *Quarterly Report to Congress on Operation Inherent Resolve, April 1, 2020-June 30, 2020*, page 18, [lead_inspector_general_for_operation_inherent_resolve_april_1_2020_-_june_30_2020.pdf](#).

⁹³ Hassan Hassan, *ISIS in Iraq and Syria: Rightsizing the Right 'Comeback,'* Center for Global Policy, December 5, 2020.

October 2019 assault into Syria and the US troop redeployment. In Iraq, ISIS profited from sustained mass protests and the ensuing political paralysis. In addition, without renewed counter-ISIS operations, the group could benefit from a firm foothold that would allow it to carry out recurrent, large-scale attacks in both countries.

Moreover, researchers claimed that ISIS was taking advantage of the COVID-19 pandemic in both Iraq and Syria. One research institute analyst estimated that the reduction of military forces activity was a benefit for ISIS to reinforce.⁹⁴ A counterterrorism researcher affirmed to the press that ISIS was taking advantage from the pandemic to unleash a “wave of attacks” that coincided with Ramadan.⁹⁵

Observing that ISIS units in Iraq and Syria are isolated and self-contained, a research institute analyst labeled the group as “the ultimate doomsday preppers...” that were well adapted for operating during the Covid-19 pandemic and it is well conscious to operate in non-permissive territories such as the desert and mountainous locals so that the fighters have a little risk of exposure to the virus.⁹⁶ Others have noted that the group will continue to regenerate and proliferate as long as there is unprotected service, governance delivery, lack of economic opportunity, and sectarian division. In a joint report compiled by the Wilson Center, one research analyst stated that ISIS is a “growing threat” to the Iraqi government and security forces.⁹⁷

Throughout ISIS’ history as a terrorist organization, they have utilized various methods to sustain themselves financially. For example, outside of their control in Iraq and Syria, focusing primarily on how they have funded their terror cells, travel, living expenses, operations, propaganda costs, ability to acquire weapons, etc., ISIS has participated in credit card fraud, kidnapping for ransom, human trafficking, agriculture, and controlling oil and gas reservoirs.⁹⁸ ISIS has an extensive role in narcotics trafficking. To expand on how much the illegal drug trade

⁹⁴ Lead Inspector General, *Quarterly Report to Congress on Operation Inherent Resolve*, April 1, 2020-June 30, 2020, page 21, [lead_inspector_general_for_operation_inherent_resolve_april_1_2020_-_june_30_2020.pdf](#)

⁹⁵ Hollie McKay, *How ISIS is Exploiting the Coronavirus Pandemic*, Fox News, May, 2020, <https://www.foxnews.com/world/how-isis-is-exploiting-the-coronavirus-pandemic>.

⁹⁶ Michael Knights, *How the Islamic State Feeds on Coronavirus*, Politico, August 4, 2020, <https://www.politico.com/news/magazine/2020/04/08/how-the-islamic-state-feeds-on-coronavirus-175192>.

⁹⁷ *ISIS: Resilient on Sixth Anniversary*, Wilson Center, June 18, 2020, <https://www.wilsoncenter.org/article/isis-resilient-sixth-anniversary>.

⁹⁸ Financial Action Task Force (FATF), *Annual Report 2015-2016*, pages 12-18, 2017, <http://www.fatf-gafi.org/media/fatf/documents/reports/FATF-annual-report-2015-2016.pdf>.

has benefitted ISIS can be observed in the \$1.4 million worth of Fenethylline (Captagon), an amphetamine narcotic that was seized during a raid on one of their compounds in Syria in 2018.⁹⁹ This type of drug is highly popular addictive among militants, commonly trafficked by terrorist organizations, and is a source of massive revenue. However, ISIS has also created legitimate and illegitimate businesses and conducted trading and investing, especially during their time as a caliphate in Iraq and Syria. For example, *Aman Jain* explained within Business Insider, “During the hearing, it was revealed that the terror group’s finance chiefs use the cash looted from Mosul – estimated to be \$429 million – to invest in international stock markets”. It is important to note that ISIS commonly used an unregulated money transfer system, which provides them with anonymity and the ability to bypass international financial regulations, to conduct their financing.¹⁰⁰

Furthermore, the propaganda content of ISIS showed their strategy of embracing the war of attrition. Developments on the ground in Iraq, Syria, and other parts of the Middle East point to ISIS’ resurgence; its insurgency will grow given that areas previously occupied and controlled by ISIS are neither stable nor secure. While the long war narrative is affirmed through propaganda, ISIS used media jihad and online jihad tactics by emerging a tier of supporters dedicated to disseminating propaganda on online platforms. These platforms helped the supporters to increase in number and to project their violent jihad aspirations. In turn, they attempt to bring to life the ISIS assertion that it is indeed *baqiyah wa tatamaddad* (remains and expanding). Essentially, the two main fronts of war for ISIS were the physical war in the Middle East area and other parts of the world, and the war of information spread online. Governments, intelligence, and law enforcement agencies must take steps to identify and disrupt terror elements on online/digital media. It should also be strengthened further, given the fast-changing and adaptive nature of these platforms.¹⁰¹

⁹⁹ \$1.4M ISIS cache of “jihadist’s drug” seized, the U.S. says, CBS News, June 18, 2018, <https://www.cbsnews.com/news/jihadists-drug-captagon-seized-isis-syria-us-military-amphetamine-haul/>.

¹⁰⁰ Aman Jain, *ISIS is good at trading*, Business Insider, March 4, 2016, <https://www.businessinsider.com/isis-is-really-good-at-trading-2016-3>.

¹⁰¹ *Ibid.* footnote 70, page 86.

Displaying the structure of ISIS lays out a vital query; what is ISIS from the legal perspective? In the following chapter, we shall analyze and categorize the organization and discuss the Crime of Terrorism under ICL and IHL.

Chapter Two: Categorization of ISIS: A Criminal Enterprise?

When in 2014 June ISIS proclaimed itself a Worldwide Caliphate, no one had anticipated that an insurgent group could become the most violent and wealthiest terrorist-criminal organization in the 21st century. ISIS as an international non-state actor has become a de-territorialized phenomenon that has undermined the classic concepts like State, territory, sovereignty, and even threat. Hybrid features and widespread threats of this group are accelerating the socio-political reconstruction conflicts in some regions. In this regard, this chapter examines all the sides of the ISIS “enterprise” (Paragraph One), as well as the specific controversies of applicable international laws when it comes to Terrorism as part of ISIS’ tactics (Paragraph Two).

Paragraph One: Classifying ISIS Actions

The Syrian conflict brings warfare to a new level where jihadists have evolved from small terrorist cells into large armed groups. The Islamic State of Iraq and al-Sham (ISIS) seems to be the most outstanding and eye-catching of all, as it seems to be the strongest and most brutal among them. The group has allegedly committed numerous breaches of International Criminal Law. Moreover, ISIS seems to overachieve its precedents by using organized mafia-like methods, in addition to the atrocities committed on their victims, in order to sustain and finance the organization.

1. Alleged Atrocities Committed by ISIS

ISIS was define as a threat to international peace and security by the UN Security Council (UNSC).¹⁰² The group captured, controlled, and operated with impunity over a large territory in

¹⁰² UNSC, *Resolution 2253*, 2015, [https://www.undocs.org/S/RES/2253%20\(2015\)](https://www.undocs.org/S/RES/2253%20(2015)); and *First report of the Secretary General on the threat posed by ISIL (Da’esh) to international peace and security and the range of U.N.*

Iraq and Syria. In addition, ISIS committed a huge amount of acts corresponding and defined internationally as crimes such war crimes, crimes against humanity and genocide that are penalized by the International Human Rights Law (IHRL), International Criminal Law (ICL), and International Humanitarian Law (IHL).¹⁰³ and ¹⁰⁴ It conducted various kinds of crimes, including sexual and gender-based violence, abduction, extrajudicial killings, torture, prohibited weapons, recruitment and use of children, indiscriminate attacks, attacks against religious and ethnic groups, displacing civilian people. Furthermore, it committed widespread and systematic attacks, known as crimes against humanity towards any civilian population because of their ethnic or political background, religion, or belief.¹⁰⁵

Survivors from ISIS' atrocities explain the severity of what was inflicted on them under ISIS control, Mr. Kachi, as a Yazidi victim of ISIS, on November 26, 2019, addressed at a UNSC meeting:

*“On August 3, 2014, the terrorist gangs of ISIS took control over Sinjar and its villages, causing tens of thousands of the Yazidi population to flee to Sinjar Mountain, approximately 7,000 Yazidi women, children, and men were killed and captured at that day.”*¹⁰⁶

Since ISIS attacked Sinjar in early August 2014, evidence indicates that ISIS fighters have attacked the Yazidi using a campaign of killing and targeting minority groups.¹⁰⁷ ISIS fighters

efforts in support of Member States in countering the threat (S/2016/92), January 29, 2016, § 13, https://www.un.org/sc/ctc/wp-content/uploads/2016/02/N1602353_EN.pdf.

¹⁰³ *First report of the Special Adviser and Head of the UNITAD* (S/2018/1031), November 16, 2018, § 8, https://www.un.org/sc/ctc/wp-content/uploads/2018/11/N1837464_EN.pdf; and *Report of the Office of the United Nations High Commissioner for Human Rights on the human rights situation in Iraq in the light of abuses committed by ISIS and associated groups* (A/HRC/28/18), March 27, 2015, § 16, <https://digitallibrary.un.org/record/791021?ln=en>.

¹⁰⁴ Gerald Waltman, *Prosecuting ISIS*, Mississippi Law Journal, Volume 85, Number 3, 2016, page 830, <https://poseidon01.ssrn.com/delivery.php?ID=186110029069011095071077105122021081054087021052029007119070075009004020071021067065016043025056016121004084011123125015080089027086028018020064005014080120112015109021049007068097124116109102098119122115019125098077090122089107068002097094116072114102&EXT=pdf&INDEX=TRUE>.

¹⁰⁵ *UNAMI Report on the Protection of Civilians in Armed Conflict in Iraq, September 11 to December 10, 2014*, page 5, https://www.ohchr.org/Documents/Countries/IQ/UNAMI_OHCHR_Sep_Dec_2014.pdf; United Nations Security Council Resolution 2170, 2014, [https://www.undocs.org/S/RES/2170%20\(2014\)](https://www.undocs.org/S/RES/2170%20(2014)).

¹⁰⁶ *The 8675th meeting of the UNSC*, (S/PV.8675), November 26, 2019, http://uniraq.com/index.php?option=com_k2&view=item&id=11554:briefing-to-un-security-council-by-karim-asad-ahmad-khan,-special-adviser-and-head-of-unitad&Itemid=542&lang=en.

¹⁰⁷ Dakhil V. Borda and Murray R. J., *Calling ISIL Atrocities against the Yezidis by Their Rightful Name: Do They Constitute the Crime of Genocide?*, Human Rights Law Review, 2017, Volume 17, Number 2, page 269, <https://arro.anglia.ac.uk/id/eprint/700897/>.

executed at least 2,000 Yazidis and captured another 6,417 prisoners imprisoned and subjected to systematic forms of torture and ill-treatment.¹⁰⁸ Those Yazidi who happened to survive from the initial onslaught reported that as soon as the ISIS fighters intercepted them, they were in front of two options, or conversion to Islam or they will be killed; those who refused were killed immediately.¹⁰⁹

Within the beginning days of the attack, the United Nations Assistance Mission for Iraq (UNAMI) gathered evidence that proves ISIS deliberately attacked the Yazidi community and killed them, the reports,¹¹⁰ which were published by the organization demonstrate that the systematic approach of the ISIS attacks from different bases, encircling the mountain and emptying the villages within 72 hours.¹¹¹ For instance, on 3 August 2014, ISIS chased ten Yazidi families fleeing the al-Qahtaniya area, killing the male members and abducting the women and children. The very next day, 60 Yazidi men from Hardan village in Sinjar city were killed and their wives and daughters were taken and abducted in addition to 200 Yazidi killed in Sinjar city and 60 to 70 more killed in the Ramadi area.¹¹² During this same day, 4 August 2014, approximately 400 males were killed in a mass killing of members of the Yazidi community in Kocho village, and 67 male members of the Yazidi community were killed in a village of Qani. ISIS gathered villagers in a school and executed gunfire on the males that were taken in batches to a nearby farm.¹¹³ Similarly, on 15 August, ISIS gathered all males older than ten years of age at a local school, took them outside a village by pick-up trucks, and shot them. There were as many as 400 males that were killed on that day, dozens of women and children were abducted, possibly as many as 1000 were taken away to unknown destinations in Tal Afar, some people were shot by ISIS while trying to

¹⁰⁸ Human Rights Watch, *Flawed Justice and Accountability for ISIS Crimes in Iraq*, 2017, <https://www.hrw.org/report/2017/12/05/flawed-justice/accountability-isis-crimes-iraq>.

¹⁰⁹ UNAMI Report, *A Call for Accountability: Yazidi Survivors of Atrocities Committed by ISIL*, August 2016, https://reliefweb.int/sites/reliefweb.int/files/resources/UNAMI%20OHCHR_Report%20Yezidi%20Survivors%20A%20Call%20for%20Justice%2012Aug2016.pdf.

¹¹⁰ UNAMI published four reports on the protection of civilians in armed conflict in Iraq covering the periods from June 5 to July 5, 2014 (released August 18, 2014), July 6, 2014, to October 31, 2015 (released on September 26, 2014), September 11 to December 10, 2014 (released on December 15, 2014), and May 1 to October 31, 2015 (released on January 5, 2016).

¹¹¹ *Ibid.* footnote 53, § 29.

¹¹² UNAMI, *Report on the Protection of Civilians in Armed Conflict in Iraq: July 6 – September 10, 2014*, https://reliefweb.int/sites/reliefweb.int/files/resources/UNAMI_OHCHR_POC_Report_FINAL_6July_10September_2014.pdf.

¹¹³ *Ibid.* footnote 89.

escape, and executed 14 elderly Yazidi men in Sheikh-Mand Shrine, people with disabilities were among the victims.¹¹⁴

For further explanation, ISIS fighters worked on the division of Yazidis people into groups: the first group included boys and men, males who refused to convert to Islam, after three times repetition of the same question, were killed and those who accepted were taken to temporary locals and afterwards into designated centers far into ISIS-controlled areas.¹¹⁵ The second group included women and children, also divided into sub-groups of married women with children, married women without children and unmarried women and girls.¹¹⁶ This group also included elderly women who were executed right away.¹¹⁷

Some of the Yazidi women and girls who have escaped ISIS captivity and some of those who remained captive have narrated harrowing accounts to Amnesty International of the torture and abuses they have suffered.¹¹⁸ Yazidi women and children suffered severe mental harm due to being separated from their male relatives and being forced to witness their murders or watch them being taken away to an unknown fate. Furthermore, captured Yazidi women and girls who resist rape or attempt to escape ISIS fighters are brutally beaten, as are those who refuse to carry jobs for fighters as well as their families. These actions towards women were followed by many severe actions such as the fact of taking the daughters to sell into sexual slavery and the sons being indoctrinated and recruited in ISIS forces.¹¹⁹

ISIS fighters systematically raped Yazidi women and girls as young as nine; this has been used as a strong evidence and proved by the survivors who had physical and psychological wounds.¹²⁰ The available evidence indicates that ISIS targeted Yazidi women not because they are

¹¹⁴ *Ibid.* footnote 96.

¹¹⁵ Amy L. Beam, *The Last Yazidi Genocide*, Adinolfi books, 2019.

¹¹⁶ *Report of the Office of the United Nations High Commissioner for Human Rights on the human rights situation in Iraq in the light of abuses committed by ISIS*, (A/HRC/28/18)- March 27, 2015, § 36, <https://digitallibrary.un.org/record/791021?ln=en>.

¹¹⁷ *Ibid.* footnote 95, § 48.

¹¹⁸ Amnesty International, *Escape from hell: Torture and sexual slavery in Islamic State Captivity in Iraq*, 2014, <https://www.amnesty.org/en/documents/MDE14/021/2014/en/>.

¹¹⁹ *Ibid.* footnote 95, § 129-130.

¹²⁰ *Ibid.* footnote 95, § 114.

just women but both Yazidi and women.¹²¹ ISIS' sexual enslavement of Yazidi women and girls was extreme because it mimicked the slave trade of previous centuries. In addition, it was deeply institutionalized, which was done openly and treated victims as objects, and, most importantly, because it was done arrogantly and explicitly.¹²²

The terrifying aspect of ISIS' treatment of Yazidis is its systematic sexual and domestic enslavement of thousands of Yazidi women. There is much written evidence that ISIS not only tolerated but also actively encouraged the rape, torture, and enslavement of Yazidi women captives. Indeed, regarding the treatment of women slaves, ISIS bureaucracy has issued multiple religious verdicts or fatwas. For example, a manual on women captives issued at the end of 2014 answered several questions about relations between ISIS members and women slaves. Although it stated that: "... *sex with a woman slave, but if the slave is not a virgin, be ensure that she is not pregnant, is permitted*", the manual also regulated various rules, among other things, the appropriate forms of beating "disciplinary beatings" are acceptable.¹²³

According to ISIS fighters, women have been raped under a plan of self-perpetuation, in order to pass on their ideology to an upcoming generation. To change the demography of the region, women are used as "biological weapons".¹²⁴ Girls and unmarried women who escaped from ISIS captivity narrated that the process by which they were raped and sexually enslaved. ISIS members numbered them or recorded their names on lists and inspected them to evaluate their beauty, while some were presented as "gifts"; others were sold to local or foreign ISIS fighters. Few victims were privy to price negotiations between "vendors" and "buyers," girls would then be prepared for rape.¹²⁵

¹²¹ Emily Chertoff, *Prosecuting Gender-Based Persecution: The Islamic State at the ICC*, Yale Law Journal, 2017, Volume 126, Number 4, page 1067, <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5791&context=yjl>.

¹²² Samar El-Masri, *Prosecuting ISIS for the sexual slavery of the Yazidi women and girls*, The International Journal of Human Rights, 2018, Volume 22, Number 8, page 1052.

¹²³ *Ibid.* footnote 107, pages 1061-1062.

¹²⁴ *Report of the Secretary-General on conflict-related sexual violence (S/2016/361)*, April 20, 2016, § 14, <https://www.un.org/sexualviolenceinconflict/wp-content/uploads/report/s-2016-361/SG-Annual-Report-spread-2015.pdf>.

¹²⁵ *Report of the Office of the United Nations High Commissioner for Human Rights on the human rights situation in Iraq in the light of abuses committed by ISIS and associated groups (A/HRC/28/18)*, March 27, 2015, § 37, <https://digitallibrary.un.org/record/791021?ln=en>.

The UN secretary-general have mentioned many sexual violations which the ISIS fighters have committed and that was in the annual reports to the UNSC about conflict-related sexual violence for years of 2015 to 2019.¹²⁶ The reports expressed that following the seizure of Mosul and surrounding areas in June 2014, ISIS instituted a pattern of sexual violence, slavery, abduction, and human trafficking. “Three cases of forced abortions perpetrated because of the ethnicity of the victim were documented.”¹²⁷ It was stated that ISIS conducted sexual exploitation, trafficking, and trading to force the payment of ransoms; they gained around one million American dollars for releasing 200 abducted Yezidis women, ransom payments to ISIS from the Yezidi community amounted to between \$35 million and 45\$ million. In the reports, ISIS’ conquest of new territory was accompanied by the capture and enslavement of “infidel” women and children, and sexual slavery was codified and regulated.¹²⁸

The UNSC, on 23 April 2019, held a meeting to adopt a Resolution,¹²⁹ which was promoted by Germany for recognizing the use of sexual violence as a tactic and weapon of war and Terrorism.¹³⁰ Sexual violence has played a “push” role in forcing the displacement of civilians, and offers of wives and sex slaves have served as a “pull” factor in recruiting men and boys, both foreign fighters and local youths.¹³¹

These findings are particularly significant in order to address the allegation of ISIS committing the crime of Genocide. This crime, according to ICL, is composed of two mental elements: the *dolus specialis* or the specific intent and the *actus reus*. The first requires that any

¹²⁶ The reports respectively are (S/2015/203), (S/2016/361), (S/2017/249), (S/2018/250), and (S/2019/280).

¹²⁷ *Report of the Secretary-General on conflict-related sexual violence*, (S/2015/203), March 23, 2015, § 28-29, https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2015_203.pdf.

¹²⁸ *Report of the Secretary-General on conflict-related sexual violence*, (S/2016/361), April 20, 2016, § 20-21, <https://www.un.org/sexualviolenceinconflict/wp-content/uploads/report/s-2016-361/SG-Annual-Report-spread-2015.pdf>.

¹²⁹ *United Nations Security Council Resolution 2467*, April 23, 2019, https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_2467.pdf.

¹³⁰ *The 8514th meeting of the United Nations Security Council*, (S/PV.8514), April 23, 2019, https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_pv_8514.pdf.

¹³¹ *Report of the Secretary General on the ISIS to international peace and security and the range of U.N. efforts in support of Member States in countering the threat*, (S/2016/501), May 31, 2016, § 44, https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2016_501.pdf.

act should be done in an intent to destroy one of the protected groups in the Genocide Convention. The second element requires the result of such actions, whether it was positive action or by omission, are serious mental or bodily harm on the victims.

Nevertheless, ISIS fighters executed approximately 1,700 members of the Iraqi armed forces from Camp Speicher, in Salah ad-Din governorate on the 12 June 2014.¹³² ISIS carried out, inspired, or claimed responsibility for terrorist attacks worldwide, particularly in Bangladesh, Lebanon, Pakistan, the Russian Federation, Belgium, Egypt, France, Germany, Indonesia, Turkey, and the United States of America. Over 500 individuals were killed due to the attacks in addition to hundreds of injuries with an exclusion of the attacks and fights that were done in conflict zones inside Afghanistan, Iraq, Libya, Yemen, and Syria.¹³³

ISIS carried out massacres by executing war captives “without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.”¹⁹⁰ Civilians have suffered from beating, flogging, pulling out nails, electrocution and crucifixion and ISIS had the illegibility to commit, torture, humiliating, cruel and degrading treatment, and severe deprivation of liberty.¹³⁴ Moreover, there was outrages upon personal dignity, and passing of sentences and the implementing executions without prior judgment pronounced by a regularly constituted court,¹³⁵ and amputating hands as a punishment for theft. Unfortunately, these amputations, improperly performed, have caused immense suffering to the victims and distress to the crowd who had been urged to watch.¹³⁶ ISIS emphasized on the religious law so it can justify its violation and execution. Furthermore, ISIS has committed the war

¹³² *Report of the Office of the United Nations High Commissioner for Human Rights on the human rights situation in Iraq in the light of abuses committed by ISIS and associated groups*, (A/HRC/28/18), March 27, 2015, § 32, <https://digitallibrary.un.org/record/791021?ln=en>.

¹³³ *Report of the Secretary General on the ISIS to international peace and security and the range of U.N. efforts in support of Member States in countering the threat*, (S/2016/501), May 31, 2016, § 5, https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2016_501.pdf.

¹³⁴ Fajri Matahati Muhammadin, *Comparing International Humanitarian Law and Islamic Law on War Captives: Observing ISIS*, *Dauliyah Journal of Islamic and International Studies*, 2016, Volume 1, Number 2, page 132, <https://ejournal.unida.gontor.ac.id/index.php/dauliyah/article/view/596/533>.

¹³⁵ *Report of the Office of the United Nations High Commissioner for Human Rights on the human rights situation in Iraq in the light of abuses committed by the ISIS*, (A/HRC/28/18), March 27, 2015, § 76, <https://digitallibrary.un.org/record/791021?ln=en>.

¹³⁶ *Report of the IICIS*, (A/HRC/27/60), August 13, 2014, § 66.

of crime and execution without being based on a true procedure and that it showed by the interdiction of the victims prisoners to contact lawyers.¹³⁷

The group caused massive internal displacement of around 3.2 civilians from all ages, including 1 million children under the age of seventeen and this happened between January 2014 and October 2016.^{138,139} During the battle of Mosul, ISIS fighters executed civilians who refused to follow ISIS' instructions in addition to those who were previously members of the Iraqi security forces; at least 7000 families were abducted, including 232 civilians who were reportedly shot to death on one day.¹⁴⁰ UNAMI documented 202 mass graves sites after liberating the seized area from ISIS; the victims were a mixed group of women, children, elderly and persons with disabilities, members and former members of the Iraqi armed forces, police, and some foreign workers.¹⁴¹

Moreover, critical archeological sites and museums in Iraq and Syria had a part in ISIS' crimes and this constituted major cultural catastrophes. While ISIS leaders claim that they demolish pre-Islamic structures and artifacts because they believe the idols are gods, their motivations and actions are substantially more nuanced than this ultra-radical and propaganda claim. ISIS sought spectacular acts of Terrorism and defiance to attract new recruits and intimidate opponents on the ground. It also sought to project strength in order to limit potential resistance in the areas under its control. Beyond these concerns, the organization must generate funds to meet some of its most important goals for organizational survival, by destroying and selling antiquities despite international efforts to bankrupt it.

¹³⁷ *Ibid.* § 35 and 36.

¹³⁸ International Organization for Migration (IOM), *Displacement Tracking Matrix, DTM Round 56*, October 2016, https://reliefweb.int/sites/reliefweb.int/files/resources/Round56_Report_English_2016_October_13_IOM_DTM%20%281%29.pdf.

¹³⁹ Office for the Coordination of Humanitarian Affairs (OCHA), *Iraq Crisis, Report Number 41*, April 2015, https://reliefweb.int/sites/reliefweb.int/files/resources/iraq_crisis_situation_report_no.41_22_-_28_april_2015.pdf.

¹⁴⁰ U.N. Office of the High Commissioner for Human Rights, *Battle for Mosul: ISIL forces thousands of civilians from their homes and executes hundreds*, 2016, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20783&LangID=E>.

¹⁴¹ UNAMI/OHCR, *Unearthing Atrocities: Mass Graves in territory formerly controlled by ISIL*, November 6, 2018, page 6, https://www.ohchr.org/Documents/Countries/IQ/UNAMI_Report_on_Mass_Graves4Nov2018_EN.pdf.

While ISIS was not the only group looting sites in Syria and Iraq, ISIS actions were significantly more destructive than those of other groups. In early July 2015, the United Nations Educational, Scientific, and Cultural Organization (UNESCO) warned that ISIS looting was taking place on an “industrial scale.”¹⁴² The funds obtained from the illicit sales of these items have correspondingly been estimated to be quite significant, although they are difficult to calculate with exactitude.¹⁴³ ISIS’ ability to spoil cultural heritage sights expanded dramatically in 2014. Early in that year, ISIS became the dominant anti-government opposition group in Syria throughout its north and bringing the city of Raqqa under their complete control by 13 January 2014. Then, in June 2014, ISIS succeeded to capture a new territory in the north of Iraq that included some of Iraq’s most important archeological sites and museums, bringing them under its control. In an early example of future attacks on Iraq’s ancient heritage, militants plunder the Mosul library and burn several books in front of students in January 2015, igniting a firestorm of anger.¹⁴⁴

While ISIS had been involved in opportunistic looting, their policy of destroying ancient sites as a propaganda event had not fully developed until they seized northern Iraq in 2014. After that, in March 2015, ISIS used bulldozers and explosives to move forward with their destructive policies in order to destroy the ancient Assyrian city of Nimrud, southeast of Mosul. One or two days after bulldozing large portions of Nimrud, ISIS then demolished the ancient city of Hatra. ISIS members were seen searching for coins and other small items before the destruction with the bulldozers began. Later, looting was to become much more comprehensive, sophisticated, and well-organized.¹⁴⁵

Another important site that was vandalized in this period was Nineveh, the oldest of the Assyrian cities. Also, in 2015, ISIS vandalized the ancient Assyrian city of Khorsabad, which is north of Mosul, and looted and destroyed large numbers of small and less well-known sites. ISIS did not immediately destroy the ancient city of Palmyra in Syria and initially promised not to do

¹⁴² Henri Neuendorf, *UNESCO Head Warns of ‘Industrial Scale’ Looting in Syria*, Artnet, September 21, 2015, <https://news.artnet.com/art-world/unesco-warning-looting-syria-333814>.

¹⁴³ Matthew Sargent, James V. Marrone, Alexandra Evans, Bilyana Lilly, Erik Nemeth, Stephen Dalzell, *Tracking and Disrupting the Illicit Antiquities Trade with Open-Source Data*, RAND Corporation, 2020, page 10, https://www.rand.org/content/dam/rand/pubs/research_reports/RR2700/RR2706/RAND_RR2706.pdf.

¹⁴⁴ *Islamic State ‘destroys ancient Iraq statues in Mosul*, BBC News, February 26, 2015, <https://www.bbc.com/news/world-middle-east-31647484>.

¹⁴⁵ Andrew Curry, *Here Are the Ancient Sites ISIS Has Damaged and Destroyed*, National Geographic, September 1, 2015, <https://www.nationalgeographic.com/history/article/150901-isis-destruction-looting-ancient-sites-iraq-syria-archaeology>.

so to gain the loyalty of the nearby citizens of Tadmur, who were known to oppose the Assad regime. This restraint did not last long, and as ISIS consolidated its rule, it began to destroy critical structures, including two important temples within the ancient city. However, they were somewhat surprised and disrupted in their capacity for looting since most of the small and transportable objects had been removed from the city before it fell. ISIS fighters in Palmyra were excessively concerned about finding gold in this city but unfortunately they didn't find any, even though they weren't sophisticated.¹⁴⁶

2. *Is it a Criminal or Terrorist Organization?*

ISIS fundamentally represents an insurgent movement that employs Terrorism at a tactical and operational level. Nevertheless, many of ISIS activities mirror those found in armies or militias, criminal organizations, and companies or financial enterprises. Classifying ISIS as *only* a terrorist group risks obscuring the group's nature. A fitting way to observe ISIS is to view it as a hybrid movement that encompasses all of the characteristics mentioned above, including state-building aspects. It can be an example of an "intermediary body" that assembles the exemplars of state and non-state actors.¹⁴⁷

Despite being a terrorist group, ISIS is also a political and military organization that makes a radical interpretation of Islam as a political philosophy and aims to manipulate Muslims and non-Muslims under its ideology. ISIS, after being excluded from *Al-Qaeda* for being excessive, affirms that it is the legitimate ruler of all Sunni Muslims. And that's why, they dominated the area of Raqqa in Syria, which they saw as a state with large areas in Syria and Iraq.¹⁴⁸

The term "terrorist organization" offers small insight and limits the understanding and approach to the group. ISIS is an insurgent group using Terrorism as a tactic. While ISIS indeed employs Terrorism as a tactic, and the label is one that de-legitimizes an opponent, it also obscures the facts. To name it a terrorist organization is to mislabel it. Conventionally, groups were

¹⁴⁶ Allison Cuneo, Susan Penacho, LeeAnn Barnes Gordon, *Special Report: Update on the Situation in Palmyra*, asor Cultural Heritage Initiatives, September 3, 2015, <https://www.asor.org/chi/reports/special-reports/Update-on-the-Situation-in-Palmyra>.

¹⁴⁷ Glen Rangwala, *Islamic State and the International Politics of Statehood in the Middle East*, E-International Relations, 2014, <https://www.e-ir.info/2014/07/26/the-islamic-state-and-the-international-politics-of-statehood-in-the-middle-east/>.

¹⁴⁸ Selami Erdogan and Abdulkaki Bilgin, *ISIS as a Terrorist Organization: Its Effort of Statehood*, page 314.

identified as terrorist groups if their goal was ultimately to effect policy through intimidation. The goals of these groups are not regionally specific but often international in scope. In addition, the tactics have surpassed intimidation to affect policy. Terrorist entities do not typically hold territory. They are generally formed of small numbers, and they cannot prevail in a military confrontation. Thus, they pose an asymmetric threat.

ISIS, however, has an estimated number of 30,000 men army which is impressive as military capabilities. This group conducts itself as a global criminal enterprise plundering its victims, exchanging hostages for millions in ransom, imposing taxes, routinely engaging in extortion, stealing, and selling antiquities, creating and imposing laws. It has portrayed a disregard for national borders and is holding territory in Iraq and Syria. In the first six months of 2014, ISIS took Fallujah, Ramadi, Mosul, Tikrit, and al Qaim, while the world watched in disbelief.

ISIS is widely regarded as a terrorist group by international actors due to its adherence to the threat and use of violent tactics (ranging from kidnappings and enslavement to crucifixion, beheadings, and its use of improvised explosive devices, among other methods) deliberately conducted against civilian non-combatants and government entities on account of its political aims to form its Islamic State. Terrorism is just one tactic that groups like ISIS employ other than their conventional military operations, unconventional warfare techniques, state-building, and even humanitarian aid. ISIS has even issued its own currency.

In many ways, ISIS manifests signs of different types of political actors on its way to state making. Not discounting its use of terrorist tactics, ISIS has pushed over the last several years beyond the “terrorist” label. At its core, the group represents an insurgent militant group operationally and tactically attempting to wrest control of Iraq and Syria from its security forces and political authorities. The Institute for the Study of War, for instance, notes that ISIS’ military used the “Clear, Hold, Build” approach, common in insurgency dogma, as its action plan. First, it engages government security forces and wins over their trust, then uses repellent tactics to penetrate

territories and maintain control over them against attack. In turn, ISIS sets up its own form of governance and coerces civilians into following its rules and ideologies.¹⁴⁹

The group's military configuration and fighters has two main goals: seizing lands and eliminating government security forces, also giving it the form of a powerful militia or army. ISIS has worked on long-implemented policies in order to professionalize its army, highlighting its attention to its long-run objectives. The group thinks like a state actor and professionalizes its military for future operations.¹⁵⁰ The group's strategy is insurgency while using guerilla warfare and Terrorism as the strategy's tactics.

This strategy, like all similar warfare methods, needs funding. ISIS funds itself in criminal organizational methods; some likened it to a mafia gang due to its prowess in fencing, racketeering, smuggling, and money laundering. It also funds itself through extortion, robbery, human trafficking, and the highly lucrative oil industry. Similarly, ISIS has demonstrated professional management as an entity that is partly organized crime syndicate, partly business enterprise. Even before the taking of Mosul in June 2014, the group had allegedly extracted up to (and likely more than) \$8 million from local businesses, like a mafia with racketeering experience would.¹⁵¹

The estimation of ISIS daily income was around \$3 million dollars which made it be the wealthiest terrorist organization in the world.¹⁵² At one point, ISIS raked in an estimated \$3 million daily from oil sales alone,¹⁵³ though military airstrikes and heightened tracking of ISIS' smuggling routes have successfully targeted ISIS' oil infrastructure and business, drops in oil prices have also

¹⁴⁹ Alex Bilger, *Backgrounder: ISIS Annual Reports Reveal A Metrics-Driven Military Command*, Institute for the Study of War, May 22, 2014, http://www.understandingwar.org/sites/default/files/ISWBackgrounder_ISIS_Annual_Reports_0.pdf.

¹⁵⁰ Charles Lister, *Profiling the Islamic State*, The Brookings Institution, 2014, page 19, https://www.brookings.edu/wp-content/uploads/2014/12/en_web_liste.pdf.

¹⁵¹ Eckart Woertz, *How Long Will ISIS Last Economically?*, Barcelona Centre for International Affairs, Notes Internacionals CIDOB, Number 98, 2014, https://www.cidob.org/en/publications/publication_series/notes_internacionals/n1_98/how_long_will_isis_last_economically.

¹⁵² Matthew Levitt, *Terrorist Financing and the Islamic State*, Washington Institute for Near East Policy, 2014, <https://www.washingtoninstitute.org/policy-analysis/terrorist-financing-and-islamic-state>.

¹⁵³ Al Arabiya English, *ISIS makes up to \$3 million daily in oil sales*, August 28, 2014, <https://english.alarabiya.net/perspective/analysis/2014/08/28/Experts-ISIS-makes-up-to-3-million-daily-in-oil-sales>.

affected the group's revenue from oil sales. As a result, as of February 2015, oil is no longer the primary source of funding for the group, according to the Pentagon.¹⁵⁴

ISIS profited from archeological artifacts and sold them in the black market due to its ability to set possible prices which increased demand, and that's where ISIS took a change to facilitate the transportation of these pieces.¹⁵⁵ The antiquities trafficking that ISIS allegedly controlled was said to be worth \$1 billion.¹⁵⁶ ISIS has illegally exported valuable antiquities from Iraq to Turkey, and profited from hundreds of millions of dollars in return.¹⁵⁷ While ISIS' destruction of antiquities has grabbed worldwide attention, the group does not wantonly destroy everything it finds. Buyers of these antiquities were unknown but the authorities believed that the income of ISIS for this illegal selling of antiquities taken from captured territories in northern Iraq, jumped over \$100 million monthly. The United Nations has condemned ISIS' antiquities looting as "a form of violent extremism that seeks to destroy the present, past and future of human civilization."¹⁵⁸

The sale of oil and other fossil fuels compose around 38% of ISIS income for oil selling and 17% for gas selling.¹⁵⁹ UN experts estimated that ISIS assembled between \$846,000 and \$1,645,000 a day from oil revenues.¹⁶⁰ The group employed part-time smugglers as a third-party tankers.^{161,162} ISIS-controlled oil fields in its strongholds of eastern Syria and northern Iraq. Here,

¹⁵⁴ Esther Tanquintic-Misa, *Oil No Longer ISIS' Main Income Stream – Pentagon*, 2015, <https://english.alarabiya.net/News/middle-east/2015/02/05/Pentagon-oil-is-no-longer-ISIS-main-source-of-income->.

¹⁵⁵ K. Caulderwood, *Islamic State Antiquities Trade Stretches to Europe*, *United States*, *International Business Times*, November 17, 2016.

¹⁵⁶ Cem Erciyes, *Islamic State Makes Millions From Stolen Antiquities*, *Al Monitor*, September 2, 2014, <http://www.al-monitor.com/pulse/security/2014/09/turkey-syria-iraq-isisartifacts-smuggling.html#>.

¹⁵⁷ Associated Press, *Islamic State group earning more than \$3 million per day*, *PBS NewsHour*, September 14, 2014, <https://www.pbs.org/newshour/nation/islamic-state-group-earning-3-million-per-day>.

¹⁵⁸ *Violent forms of extremism seek to destroy civilization*, *U.N. News*, May 28, 2015, <https://news.un.org/en/audio/2015/05/600852>.

¹⁵⁹ Alex Whiting, *Islamic State Lacks Funds to Keep Control of Iraqi, Syrian Territory-experts*, *Reuters*, November 28, 2014, <https://www.reuters.com/article/syria-iraq-islamic-state-finance-idUKL6N0TH3YP20141127>.

¹⁶⁰ Somini Sengupta, *Push in U.N. to Intercept Jihadists' Oil*, *New York Times*, November 2014, <http://www.nytimes.com/2014/11/18/world/middleeast/push-in-un-to-intercept-jihadists-oil.html?partner=rss&emc=rss&smid=tw-nytimesworld&r=0>.

¹⁶¹ Colleen Curry, *Islamic State Making Millions, Has Enough Weapons to Keep Fighting for Up to Two Years*, *VICE News*, November 19, 2014, <https://www.vice.com/en/article/9kv73y/islamic-state-making-millions-has-enough-weapons-to-keep-fighting-for-up-to-two-years>.

¹⁶² Louise Shelley, *Blood Money: How ISIS Makes Bank*, *Foreign Affairs*, November 30, 2014, <https://www.foreignaffairs.com/articles/iraq/2014-11-30/blood-money>.

ISIS smuggled crude oil by truck in exchange for cash and refined petroleum.¹⁶³ Customers include those who oppose ISIS, such as Syria and Turkey.¹⁶⁴

Still, other finances come from the sale of many items such as counterfeit cigarettes (despite a law against them in the *dawla*), foreign passports, pharmaceuticals, and cell phones.¹⁶⁵ ISIS has also boasted about trafficking women and children in Dabiq (UNSC). And only 4% of ISIS earnings were from extortion (including levies on local businesses), kidnapping and ransom.¹⁶⁶ Nonetheless, according to the UN, ISIS has collected between \$35 million and \$45 million over the past year in ransom payments.¹⁶⁷ The large majority of those kidnapped were Iraqi and Syrian nationals. The group has also made millions from the sale of women and children as sex slaves. According to an analysis at the Council of Foreign Relations, after seizing Mosul in June 2014, ISIS has raked in more than \$8 million each month from extortion payments such as forced taxes, looting, and ransom from kidnapped hostages.¹⁶⁸ In 2014, ISIS made a minimum of \$25 million in ransom payments, although that figure is believed to be much higher.¹⁶⁹

The attempts of ISIS to consolidate territory and impose authority and control was a factor to enhance ISIS' revenue rapidly.¹⁷⁰ ISIS has several forms of taxation aside from the fees extracted for the provision of utilities. Business owners regularly received official receipts stamped with ISIS' logo, indicating forms of standardization or professionalization seen in regularized tax collection.

Even though it is not precise nor scientific to categorize ISIS as a terrorist organization, it is imperative to look into the ongoing discourse over the Crime of Terrorism. Therefore, in the following paragraph, we shall tap on the Crime and its status in the Rome Statute and demonstrate what this Crime represents in times of war and peace.

¹⁶³ Luay Al-Khatteeb, *How Iraq's black market in oil funds ISIS*, CNN, August 22, 2014, <https://edition.cnn.com/2014/08/18/business/al-khatteeb-isis-oil-iraq/index.html>.

¹⁶⁴ John Deferios, *ISIS' struggle to control its oil riches*, CNN, September 4, 2014, <https://edition.cnn.com/2014/09/03/business/deferios-oil-isis/index.html>.

¹⁶⁵ *Ibid.* footnote 147.

¹⁶⁶ *Ibid.* footnote 146.

¹⁶⁷ *Ibid.* footnote 146.

¹⁶⁸ *Ibid.* footnote 145.

¹⁶⁹ Mike Bird, *3 Big Sources of Revenue Help ISIS Make Millions Each Day*, Business Insider, December 4, 2014, <https://www.businessinsider.com/isis-islam-terrorist-makes-millions-2014-12>.

¹⁷⁰ Joseph Thorndike, *How ISIS Is Using Taxes to Build a Terrorist State*, Forbes, August 18, 2014, <https://www.forbes.com/sites/taxanalysts/2014/08/18/how-isis-is-using-taxes-to-build-a-terrorist-state/?sh=381353d13ac0>.

Paragraph Two: The Definitional Dilemma in International Law

Although Terrorism has become the subject of constant levels of discussion in international law in recent years, these discussions and writings have generally concentrated on whether acts of Terrorism can activate the right to use force and how counter-terrorist operations and the law of human rights interact with one another in situations of perceived terrorist risk. This paragraph, however, focuses on the exclusion of the Crime of Terrorism from ICL and how it has become part of international customary law and the applicable laws in the case where Terrorism is conducted in armed conflicts and in peace times.

1. Terrorism and the Rome Statute

The Rome Statute, which established the ICC, excluded the crime of Terrorism from its jurisdiction. The Court only focuses on three crimes with universal jurisdiction, which are Genocide, Crimes Against Humanity, and War Crimes. Even if the Rome Statute also includes Crimes of Aggression as part of the Court's jurisdiction, a provision with the definition of this crime is still missing.

The term of Terrorism first emerged during the French Revolution. At the time, Terrorism was associated with the notion of state-instigated terror "unleashed on a state's own population as a mechanism of control."¹⁷¹ This concept evolved with years, and currently, Terrorism can be identified within its three categories: (i) state instigated policies of terror applied domestically; (ii) domestic or internal terrorism carried out by private individuals or groups; and (iii) international terrorism, including state-sponsored acts of transnational violence.¹⁷² To carry on the actions of terrorism, terrorists stick to the reason that the actions are "low-cost, relatively low-risk, and yet afford the possibilities of high yield in terms of weakening, penetrating or even gaining control through covert means. Moreover, such methods carry far less cost and less risk of escalation than

¹⁷¹ Tim Stephens, *International Criminal Law and the Response to International Terrorism*, University of New South Wales Law Journal, Volume 27, Number 2, 2004, page 457, <http://www.unswlawjournal.unsw.edu.au/wp-content/uploads/2017/09/27-2-4.pdf>.

¹⁷² *Ibid.*

conventional war.”¹⁷³ As such, terrorist groups can conduct attacks intended to threaten decisions or policies that their enemy (states or international organizations) intends to implement. Despite that Terrorism is considered as a politicized action, the international community has not been able to find a consensus on a comprehensible definition. Up until the end of the Cold War, the main problem was whether to incorporate or not national liberation movements as terrorists or not. Subsequently, the international community’s reaction has drastically changed to condemn any action regardless of its motives as Terrorism. However, being a highly political issue has prevented an agreement on what exactly Terrorism is. Hence, one reason for not wanting to include the crime of Terrorism within the Rome Statute has been this same fear of having a highly politicized court that would threaten its most important objective of being independent and being a court of last resort.

Even if the phenomenon of Terrorism is not new and many treaties subsist to address specific acts of Terrorism, the international community has no agreement on a holistic definition of the term. However, different sources underline the current international views on the meaning of Terrorism.

In the first time that the international community made have an international court in 1937, in the League of Nation’s Terrorism Convention, the crime was defined as “*all criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public.*”¹⁷⁴ While the Statute was never ratified and the Court never entered into existence, this first effort at creating a definition is an important precedent and unmistakable evidence that it was of interest to many states to have an indefinite international tribunal that would claim jurisdiction over the crime of Terrorism. At the beginning of the 1960s, several conventions that condemned many types of Terrorism were created by the international community. There exist no country that has not signed or become a party to at least one of the 16 existing instruments, with at least two thirds of UN member states ratifying at least 10 and acceding to at least 10 out of 16.¹⁷⁵ These conventions can be divided into four

¹⁷³ Lucy Martinez, *Prosecuting Terrorists at the International Criminal Court: Possibilities and Problems*, Rutgers Law Journal, Volume 34, Number 1, 2002, page 3.

¹⁷⁴ Article 1(2) of the Convention for the Prevention and Punishment of Terrorism – 1937, League of Nations, <https://www.wdl.org/en/item/11579/view/1/1/>.

¹⁷⁵ *Counter-Terrorism Commission*, United Nations Security Council, <https://www.un.org/sc/ctc/>.

categories: (i) international civil aviation conventions; (ii) internationally protected persons and hostage-taking conventions; (iii) maritime navigation; and (iv) the “new generation” of counter-terrorism conventions (which include the Terrorist Bombings Convention, Terrorism Finance Convention, and the Nuclear Terrorism Convention).¹⁷⁶

Even if these instruments are applied, which is currently among the most widely ratified international agreements,¹⁷⁷ there is still no single definition of the crime, allowing for gaps weakening the existing framework. One example of the existing loopholes can be seen in the Lockerbie case, in which two Libyan officials were investigated for the bombing of an airplane over Lockerbie, Scotland. The aircraft was registered in the United States, and flying over the United Kingdom, the nationals accused were Libyan. This crime then had three different states that could acquire jurisdiction in the case. Both the United States and the United Kingdom wanted Libya to extradite the two officials, convinced that they would not get an appropriate punishment if tried in a Libyan court. On the other hand, Libya insisted that through article 7 of the Montreal Convention¹⁷⁸ it had an obligation to prosecute or extradite (*aut dedere aut punier*), stating that these two officials would be prosecuted in Libya. The main lesson of this specific case is that even though the existing counter-terrorism conventions network does give more instruments to the international community to address acts of Terrorism, there are still situations in which officials and senior leaders can escape the appropriate punishment. Moreover, without the crime of Terrorism having universal jurisdiction, some specific events can become extremely hard to deal with.

Another source is the United Nations General Assembly (UNGA) Resolutions and Declarations. The *Declaration on Measures to Eliminate International Terrorism* was adopted by UNGA unanimously in December 1994 and again in 1996 and 1999.¹⁷⁹ The General Assembly

¹⁷⁶ *Ibid.* footnote 157, pages 467-470.

¹⁷⁷ Mateo Corrales Hoyos, *Including the Crime of Terrorism Within the Rome Statute: Likelihood and Prospects*, Global Politics Review, Volume 3, Number 1, April 2017, page 31, https://www.globalpoliticsreview.com/publications/2464-9929_v03_i01_p025.pdf.

¹⁷⁸ *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*, Montreal, September 23, 1971, Article 7:

“The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offense was committed in its territory, to submit the case to its competent authorities for prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offense of a serious nature under the law of that State.”

¹⁷⁹ *Ibid.* footnote 159, page 7.

declared that: “*criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.*”¹⁸⁰

In addition, the United Nations Security Council has adopted resolutions both prohibiting terrorist acts as such and resolutions related to specific terrorist incidents. Drawing again on the Lockerbie case explained above, the Security Council adopted Resolution 1192 in August 1998 in which, recalling the three previous resolutions on the case, Resolutions 731, 748, and 883, it demanded the Libyan Government to comply with those resolutions.¹⁸¹ The Council, acting under Chapter VII of the UN Charter, considered this terrorist act as threatening international peace and security. In addition, the Council took more decisive action after the September 11 attacks. Resolution 1373 calls on all the United Nations members under Chapter VII, making the resolution legally binding for states to “prevent and suppress the financing of terrorist acts.”¹⁸² Furthermore, it created the Counter-Terrorism Committee, which had the mission to monitor the domestic implementation of this resolution within the UN Members. A belief has also grown that having legally binding resolutions addressing terrorist acts strengthens these crimes into peremptory standards. Even without a precise definition, these acts have been recognized worldwide and are continuously coming into focus in international criminal law, and the discourse on whether these acts are indeed *jus cogens* is also becoming more relevant.

Terrorist acts can be addressed by using ad hoc tribunals established by the International Criminal Tribunals for Rwanda, Yugoslavia, and Sierra Leone. These three international courts were established to bring those responsible for various crimes during the genocides and wars that ravaged the world to justice. Although the International Criminal Tribunal for the former Yugoslavia (ICTY) did not explicitly state that terrorism was a subject matter of its jurisdiction, the Statute of the International Criminal Tribunal for Rwanda (ICTR) and the Statute of the Special

¹⁸⁰ U.N. General Assembly, Resolution 49/60, *Measures to Eliminate International Terrorism*, December 9, 1994, <http://www.un.org/documents/ga/res/49/a49r060.htm>.

¹⁸¹ UNSC, Resolution 1192, August 27, 1998, <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/ROL%20SRES1192.pdf>.

¹⁸² UNSC, Resolution 1373, September 28, 2001, https://www.unodc.org/pdf/crime/terrorism/res_1373_english.pdf.

Court for Sierra Leone (SCSL) explicitly cover acts of terrorism. Article 3 of the SCSL and article 4 of the ICTR called “Violations of article 3 Common to the Geneva Conventions and of Additional Protocol II”¹⁸³ refer to acts of terrorism as one of the elements of the tribunal’s jurisdiction. This is a significant development as it shows that the international community considers terrorism to be a crime that has universal jurisdiction.

Terrorism has been classified as *hosti humani generis* – an enemy of all mankind and has been considered to be on the same level as slavery, genocide, and piracy. As a result, Domestic legislation criminalizing international Terrorism was adopted by almost all the states around the world.¹⁸⁴ Furthermore, one of the most recent conventions, the International Convention for the Suppression of the Financing of Terrorism of 1999, which 173 parties ratify, has stated a definition of Terrorism. The Convention expresses under article 2 that: “*any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.*”¹⁸⁵

In addition to domestic law and conventions, in 2007, a clear legal foundation for the international crime of Terrorism was developed by Judge Antonio Cassese, as President of the Special Tribunal for Lebanon (STL) under international customary law.¹⁸⁶ In 2005, sitting Prime Minister Hariri of Lebanon was murdered along with 22 others. A tribunal was established in May 2007, after a negotiation between the United Nations and the Lebanese government, under a Security Council Resolution acting under Chapter VII of the UN Charter to prosecute those responsible for the bombing.¹⁸⁷ The Special Tribunal for Lebanon was mandated to judge according to the Lebanese Criminal Law, but it could apply international customary law and treaty law when considered required. Thus, based on its analysis of state practice and indicators of *opinio*

¹⁸³ United Nations, *Statute of the International Criminal Tribunal for Rwanda*, 1994, https://legal.un.org/avl/pdf/ha/icttr_EF.pdf; and United Nations, *Statute of the Special Court for Sierra Leone*, 2002, https://legal.un.org/avl/pdf/ha/scsl/scsl_e.pdf.

¹⁸⁴ Thomas Weatherall, *The Status of the Prohibition of Terrorism in International Law: Recent Development*, Georgetown Journal of International Law, Volume 46, Number 2, 2015, page 590.

¹⁸⁵ United Nations, *International Convention for the Suppression of the Financing of Terrorism*, 1999, <http://www.un.org/en/sc/ctc/docs/conventions/Conv12.pdf>.

¹⁸⁶ *Ibid.* footnote 170, pages 600-601.

¹⁸⁷ UNSC, Resolution 1757, May 30, 2007, <http://www.un.org/press/en/2007/sc9029.doc.htm>.

juris, the Appeals Chamber of the court stated that there actually existed a definition of Terrorism in customary international law, consisting of the following three key elements:

- (i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act;
- (ii) the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it;
- (iii) when the act involves a transnational element.¹⁸⁸

Just a few weeks after the STL issued the definition of Terrorism, the French Court of Cassation released a decision assuming the *jus cogens* status of the prohibition of Terrorism in international law.¹⁸⁹ In a 2013 Appeal Decision in the England Court against *Gul*, the judgment clearly stated a prohibition of Terrorism in international customary law. The *Gul* case is the judgment of a United Kingdom national born in Libya, which divulged terrorist videos on the internet, including websites such as YouTube. The Court highlighted that such a violation is considered an international crime imputing individual responsibility.¹⁹⁰ Having confirmation of the existence of an obligatory norm through international judicial organs provides the most authoritative indication of the emergence of the crime of Terrorism under ICL. The STL already viewed it to be part of customary international law and became the first international tribunal to claim jurisdiction through these ways. Shortly after, both French and English courts established the crime of Terrorism as a peremptory norm.

Even though Terrorism wasn't included in the Rome Statute as a distinct crime, the ICC could exercise its jurisdiction on this crime. This can be done by analyzing acts of Terrorism as crimes that fall under the definition of one of the crimes already within the ICC competence.¹⁹¹ Contextualizing this, there are few possibilities for the Court to interpret acts of Terrorism under

¹⁸⁸ Michael P. Scharf, *Special Tribunal for Lebanon Issues Landmark Ruling on Definition of Terrorism and Modes of Participation*, American Society of International Law, Volume 15, Number 6, 2011, <https://www.asil.org/insights/volume/15/issue/6/special-tribunal-lebanon-issues-landmark-ruling-definition-terrorism-and>.

¹⁸⁹ *Ibid.* footnote 170, pages 600-601.

¹⁹⁰ *Ibid.* footnote 170, pages 605-609.

¹⁹¹ Richardson Galingsing, *Prosecuting Acts of Terrorism as Crimes against Humanity under the ICC Treaty*, Indonesian Journal of International Law, Volume 7, Number 4, 2010, page 746, http://ijil.ui.ac.id/index.php/home/article/view/245/pdf_175.

Genocide, but there is a possibility for these acts to be categorized under War Crimes or, even more feasible, under Crimes Against Humanity. Thus, although it is not impossible to prosecute terrorists under the ICC, the absence of a definition of the term creates gaps that protect terrorists. In order to address this issue, the ICC has two options; it can alter its jurisdiction in the Statute in order to exercise it over the crime of Terrorism, or it can interpret Terrorism as part of War Crimes or Crimes Against Humanity. However, giving the Court jurisdiction over this crime will not bring every terrorist to justice, this alternative would more adequately address the problem and provide the international community with universal jurisdiction, which can result unifying the broad network of counter-terrorism conventions and eliminate the existing loopholes in the prosecution of terrorists.¹⁹²

2. Terrorism in War Time and Peace Time

International humanitarian law (IHL) is a body of rules that apply during armed conflict. These rules seek, for humanitarian reasons, to restrict the effects of armed conflict. IHL shields persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare. Thus, IHL is also known as the law of war or the law of armed conflict.

IHL distinguishes between international and non-international armed conflict. Under IHL, two types of armed conflict are recognized, each governed by its own legal regime. An international armed conflict (IAC) is one between two or more states and is subject to the rules of all applicable treaties to which the belligerent states are party and to customary IHL rules pertaining to such conflicts. The threshold for such a conflict according to the generally held position is low and is often referred to as “the first shot theory.”¹⁹³ Under this approach, the existence of an armed conflict between the States will be triggered by any use of force by one State against another State’s armed forces, or any total or partial occupation of another State’s territory

¹⁹² *Ibid.* footnote 163, page 36.

¹⁹³ International Institute of Humanitarian Law, XXXVIII Round Table on Current Issues of International Humanitarian Law, *The Distinction Between International and Non-international Armed Conflicts: Challenges for IHL?*, Sanremo, September 3–5, 2015, page 3, <https://iihl.org/full-list-congresses-international-conferences-round-tables-since-institutes-foundation/the-distinction-between-international-and-non-international-armed-conflicts-challenges-for-ihl/>.

irrespective of whether it is opposed.¹⁹⁴ According to this view, a border skirmish or isolated incident would not require applying the whole body of IHL.

The second type of armed conflict is a non-international armed conflict (NIAC) in which at least one of the parties is a non-State actor (ordinarily an organized armed group (OAG)). A threshold for this type of armed conflict is somewhat higher, since the parties must be organized and coordinated sufficiently to conduct operations, and the intensity must be higher than unrest and sporadic violence.¹⁹⁵ Such a conflict can be between a government and one or more OAGs, or between two or more OAGs.

In NIACs, the applicable treaty law is much more limited than in IACs. The only universally applicable treaty provision is Common article 3 of the Geneva Conventions.¹⁹⁶ In some cases, Additional Protocol II¹⁹⁷ to the Geneva Conventions may be applicable if the State where the conflict is taking place is a party to it and the requisite conditions for its applicability have been met. In addition, several other conventional instruments may be applicable provided the State where the conflict is occurring is a party to them.¹⁹⁸

In addition, it is essential to differentiate between IHL and human rights law. These two bodies of law have developed separately and are contained in different treaties despite the similarities in their regulations. In particular, human rights law – unlike IHL – applies in peacetime, and many of its provisions may be suspended during an armed conflict.¹⁹⁹ When it comes to ISIS, it gains territory by taking military action against local governments, other armed groups, and the international coalition who was conducting military operations against it, which amounts to an armed conflict that meets the threshold of international humanitarian law.

¹⁹⁴ *Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I)*, article 1, August 12, 1949, https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.30_GC-I-EN.pdf.

¹⁹⁵ *Ibid.* page 7.

¹⁹⁶ *Ibid.* article 3.

¹⁹⁷ *Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts*, June 8, 1977, https://www.icrc.org/en/doc/assets/files/other/icrc_002_0321.pdf.

¹⁹⁸ *Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, March 26, 1999, http://portal.unesco.org/en/ev.php-URL_ID=15207&URL_DO=DO_TOPIC&URL_SECTION=201.html.

¹⁹⁹ International Committee of the Red Cross, Advisory Service on International Humanitarian Law, *What is International Humanitarian Law?*, https://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf.

In order to know whether ISIS is held accountable according to IHL, several related issues need to be considered. First is the issue of the existence of armed conflict, which is determined by two factors – the intensity of the conflict and the organization of the parties to the conflict. The second question is whether the rules of IHL bind the armed group members as members of a non-state terrorist group and how they are accountable.

However, the Geneva Conventions doesn't present a definition of an armed conflict. The most widely used definition of armed conflict was stated in the *Tadic* case decided by the ICTY. The Tribunal stated that: "an armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."²⁰⁰ The analysis of state practice and *opinio juris*, the jurisprudence of international courts, and most authors agree that to be considered as an armed conflicts, warlike acts have to reach a certain level of intensity.²⁰¹ The factors taken into account are the nature, character, frequency of terrorist acts, the number of fighters that both sides of the conflict have, the number and kind of arms used, the duration of the conflict and its territorial prevalence, the nature of the state response to the abovementioned acts and similar factors.²⁰²

From January 2014, ISIS had taken control of parts of territory in Iraq and Syria. The first two cities taken were Fallujah and Raqqa.²⁰³ In the middle of 2014, ISIS took over Mosul.²⁰⁴ In August 2014, US President Barack Obama authorized attacks against ISIS.²⁰⁵ Later the US forces were joined by other states (Australia, Belgium, Canada, Denmark, the Netherlands, Bahrain, and the United Arab Emirates, later Jordan, Egypt, Turkey, Russia), and their airstrikes were extended

²⁰⁰ ICTY, *Prosecutor v Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of October 2, 1995, (IT-94-1-AR72), §70, <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>.

²⁰¹ International Committee of the Red Cross, *How is the Term "Armed Conflict" Defined in International Humanitarian Law?*, Opinion Paper, March 2008, page 3, http://www.icrc.org/eng/assets/files/other/opinion_paper_armed_conflict.pdf.

²⁰² Use of Force Committee, *Final Report on the Meaning of Armed Conflict in International Law*, delivered at the Hague Conference, International Law Association, page 30, <http://www.ilahq.org/en/committees/index.cfm/cid/1022>.

²⁰³ Tara John, *Timeline: The Rise of ISIS*, Time, October 9, 2015, <http://time.com/4030714/isis.timeline.islamic.state/>.

²⁰⁴ *Ibid.*

²⁰⁵ Spencer Ackerman, *Obama Authorises Air Strikes on ISIS to Help Iraqis Besieged on Mountain*, The Guardian, August 8, 2014, <https://www.theguardian.com/world/2014/aug/08/obama-authorises-iraq-air-strikes-against-isis>.

from the territory of Iraq to cover Syria.²⁰⁶ It has been counted that from the start of the air attacks' campaign through November 2015, there were 8,289 airstrikes carried out against ISIS-controlled territories.²⁰⁷

The organizational criterion refers to the existence of “an armed group with a certain level of organization that would essentially enable it to implement international humanitarian law.”²⁰⁸ The important factors include: “existence of a command structure and disciplinary rules and mechanisms within the armed group; the existence of headquarters; the ability to procure, transport, and distribute arms; the group’s ability to plan, coordinate, and carry out military operations, including troop movements and logistics; its ability to negotiate and conclude agreements such as ceasefire or peace accords; and so forth.”²⁰⁹

The ICTY demarcated several groups of factors and indicators, which help to reveal the organization level of the armed group which directly indicate that ISIS fulfills these requirements. ISIS controlled quite large portions of the territory in Iraq and Syria. Regarding command structure, it can be noted that ISIS is not merely a terrorist group, but it purports to be a state. The press publications indicate that ISIS has the Military Council, the Shura (Consultative) Council, the Judicial Authority, The Defense, Security and Intelligence Council, and The Islamic State Institution for Public Information.²¹⁰ Furthermore, the information seized from the former militants “reveal another parallel structure which suggests an executive branch of the State, a sort of “cabinet” dedicated to the daily administration of the State.”²¹¹

Regarding the ability to implement the norms of IHL, it can be noted that ISIS does not act according to the norms of IHL; in fact, it is systematically infringing those rules, and its actions do amount to war crimes and crimes against humanity.²¹² Therefore, according to this feature, there can be doubts whether ISIS may be considered a party to an armed conflict. However, the

²⁰⁶ Ashley Fantz, *Which Nations are Attacking ISIS?*, CNN, December 2, 2015, <https://edition.cnn.com/2015/12/02/world/war-on-isis-whos-doing-what/>.

²⁰⁷ *Ibid.*

²⁰⁸ Jelena Pejic, *The protective scope of Common Article 3: more than meets the eye*, International Review of the Red Cross, March 2011, Volume 93, Number 881, pages 189—225, <https://www.icrc.org/es/doc/assets/files/review/2011/irrc-881-pejic.pdf>.

²⁰⁹ *Ibid.*

²¹⁰ Aymenn al-Tamimi, *The Evolution in Islamic State Administration: The Documentary Evidence*, Perspectives on Terrorism, Volume 9, Number 4, Special Issue on the Islamic State, August 2015, pages 117-129, <https://www.jstor.org/stable/pdf/26297420.pdf?refreqid=excelsior%3Ac5f1a103b90fd2184a604fda72a3d1c6>.

²¹¹ *Ibid.*

²¹² Ralph Ellis, *U.N. Panel Details ISIS Abuses in Syria, Says They Amount to War Crimes*, CNN, November 14, 2014, <https://edition.cnn.com/2014/11/14/world/meast/isis-war-crimes/>.

ICTY has stated in a similar case that “where members of armed groups engage in acts that are prohibited under international humanitarian law, [...] they are liable to prosecution and punishment. However, so long as the armed group possesses the organizational *ability* to comply with the obligations of international humanitarian law, even a pattern of such type of violations would not necessarily suggest that the party did not possess the level of organization required to be a party to an armed conflict.”²¹³ Therefore, despite this fact, ISIS may be considered a party to an armed conflict, which confers them with the rights and duties of a party to armed conflict.²¹⁴

The rights and obligations afforded under international law depend on the proper application of legal definitions. IHL, in particular, needs the accurate classification of “the status of the conflict and those involved.”²¹⁵ It should be highlighted that the distinction between IACs and NIACs remains interlinked with the nature of the actors involved (state or non-state) instead of the territory in which a conflict occurs. In other words, the conflicts in Syria and Iraq should be considered as NIACs, because ISIS is a non-state actor.²¹⁶

In 2006, Antonio Cassese argued that a generally accepted definition of Terrorism as an international crime in a time of peace exists. This definition has developed in the international community at the level of customary law. However, there is still disagreement over whether the definition may also be applied in a time of armed conflict.²¹⁷ Even after the STL interlocutory decision, which defines the crime of Terrorism and admits it as existing in international customary law, the definition of the crime in time of peace is still vague.

In a time of peace, international Terrorism may also reveal the hallmarks of a crime against humanity. This happens when it is part of a widespread or systematic attack against civilians (although terrorist conduct as such may be taken against state officials or even combatants) and in

²¹³ ICTY, *Prosecutor v. Ljube Boskoski, John Tarculovski*, Trial Judgment of July 10, 2008, (I.T. 04 82 T), § 205, http://www.icty.org/x/cases/boskoski_tarculovski/tjug/en/080710.pdf.

²¹⁴ Violeta Vasiliauskienė, *The International Humanitarian Law and the Fight Against ISIS*, Public Security and Public Order Research Journal, 2016, <https://repository.mruni.eu/bitstream/handle/007/15033/Vasiliauskien%C4%97.pdf?sequence=1&isAllowed=y>.

²¹⁵ Michael P. Scharf, *How the War against ISIS Changed International Law*, Case Western Reserve Journal of International Law, Volume 48, page 52, https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=2637&context=faculty_publications.

²¹⁶ Hollie Edwards, *Does International Law Apply to the Islamic State? Towards a More Comprehensive Legal Response to International Terrorism*, Geneva Center for Security Policy, Strategic Security Analysis, Number 1, January 2017, page 5, <https://css.ethz.ch/content/dam/ethz/special-interest/gess/cis/center-for-securities-studies/resources/docs/GCSP-SSAI-2017-UNGERER%20and%20EDWARDS%20-Draft7%20Final.pdf>.

²¹⁷ Antonio Cassese, *The Multifaced Notion of Terrorism in International Law*, *Journal of International Criminal Justice*, Volume 4, Issue 5, November 2006, Pages 933–958, <https://academic.oup.com/jicj/article-abstract/4/5/933/835024>.

addition takes the shape of specific categories of criminal conduct (murder, causing great suffering or serious injury to body or mental or physical health, torture, rape or enforced disappearance).

After profoundly displaying the history and structure of ISIS and the disadvantages of narrowing the group to a terrorist organization only, a need to look into concrete methods to put ISIS before trial emerged. In the coming part, the ICC's capacity shall be examined in this regard, following other courses of action.

Part Two: The Practical Means to Prosecute ISIS before the ICC

ISIS crimes must not go unpunished. In this part, numerous means of recourse shall be demonstrated simply because they can be used on the international level to prosecute the organization, whether it occurs before the ICC or before other entities. Unlike what is being marketed, the ICC has jurisdiction over ISIS crimes. However, unfortunately, the political will always find its way in tumbling justice in light of personal interest. This is displayed in the UN Security Council, where the five permanent members often use the Veto Power to dissent over matters. In the case of ISIS, one might argue that the dissenting and the agreeing parties' actions are "politically" justifiable, though not legally nor humanely. Nevertheless, there exists the problem of prosecuting exclusively individuals and not legal entities such as ISIS. This portrays a gap in the current ICC Statute since the existence of an independent-from-individual entity is more than evident, as it shall be demonstrated in the following part. In light of these obstacles, one should not think that there are no other means of recourse. For so long, the international community has come up with pivotal solutions, such as hybrid or ad hoc tribunals, to attain justice, especially in atrocity crimes as the ones we witnessed ISIS commit. However, prosecuting the organization under the status quo is not enough; there is a need to include the Crime of Terrorism in the Rome Statute and Corporate Criminal Liability to ensure that the ICC Statute englobes its existing gaps, especially in the case of ISIS.

Chapter One: The Power of the ICC in the Context of ISIS

Many reasons back the importance of ICC jurisdiction on ISIS. First, there is an accountability gap in Syria and Iraq: they assert jurisdiction when they apprehend individuals in areas under ISIS control. Secondly, even if suspects were detained, extradition may be raised. In addition, ISIS perpetrates international and transnational crimes where domestic prosecution is unsuitable. It publicizes its violations of international and humanitarian law. Furthermore, there are alleged atrocities against ISIS, such as genocide, rape, mass executions, sexual slavery, and other forms of sexual and gender-based violence, enlistment, torture, mutilation, forced recruitment of children, ethnic and religious cleansing, and destruction of cultural property. By holding ISIS accountable, the Court can demonstrate that it can deal with matters of immediate and pressing international concerns and ensure that perpetrators of the most egregious violations of international law do not go unpunished. However, there lies the most significant difficulty in securing the Court's involvement (Paragraph One). Once the ICC tries ISIS, it would be more precise if certain amendments were made (Paragraph Two).

Paragraph One: The Court and its Challenges

If the ICC seeks to assert jurisdiction over ISIS, rather than leaving prosecutions to domestic forums, particular challenges within the ICC itself should be taken into account. These challenges stem from fundamental principles, which are the backbones of the Court. However, challenges are not only legal; they are also political. Whether we like it or not, the international community is led by states that portray their opinions within the Security Council, which sometimes prevents certain legal aspects from going in an ideal path.

1. An ICC Overview of Principles in the Case of ISIS

On July 17, 1998, 120 states adopted a statute in Rome - also known as the Rome Statute of the International Criminal Court (the Rome Statute) - which established the International Criminal Court. The signatory states decided to accept the jurisdiction of a permanent international criminal court for the prosecution of the perpetrators of the most serious crimes committed in their

territories or by their nationals after the entry into force of the Rome Statute on July 1, 2002. The ICC is a permanent independent court, whereas the ad hoc tribunals for the former Yugoslavia and Rwanda and other similar courts established within the United Nations framework to deal with certain situations only have a limited mandate and jurisdiction. In addition, the ICC, which tries individuals, is also distinct from the International Court of Justice, the primary judicial organ of the UN for the settlement of disputes between States.

When a State becomes a Rome Statute party, it agrees to submit itself to the ICC jurisdiction concerning the crimes stated in the Statute. The Court may exercise its jurisdiction in the situation where the alleged perpetrator is a national of a State Party or where the crime was committed in the territory of a State Party. In addition, a State not a party to the Statute may decide to accept the jurisdiction of the ICC. However, these conditions do not apply when the Security Council, acting based on Chapter VII of the UN Charter, refers a situation to the Office of the Prosecutor. The Court prosecutes individuals, not groups or States. Therefore, any individual alleged to have committed crimes within the ICC jurisdiction may be brought before the ICC.

The Court's directive is to try individuals (rather than States) and hold such persons liable for the most serious crimes of concern to the international community. The crimes are namely the crime of genocide, war crimes, crimes against humanity, and the crime of aggression when the conditions for the exercise of the Court's jurisdiction over the latter are fulfilled.

The Rome Statute makes sure that a number of rights are accorded to victims, the most innovative of which is the right to participate in proceedings independently of the Prosecution or Defense. In addition, all victims have the right to have their personal legal representative or lawyer in the Courtroom portraying their personal interests and concerns to the Court. Individuals who have suffered harm due to the commission of any crime within the ICC jurisdiction are called victims. They may also include organizations or institutions that have assisted harm to any of their property dedicated to education, religion, art, science, or charitable purposes.²¹⁸

The Rome Statute is an attempt to consolidate the criminal justice systems into one legal instrument of more than 150 states that was more or less agreeable to every delegation present in the Rome Conference. Article 21 of the Statute provides for a hierarchy of the applicable law: first, the Statute, the Elements of Crimes, and the Rules of Procedure and Evidence are to be applied.

²¹⁸ ICC, *Understanding the International Criminal Court*, <https://www.icc-cpi.int/iccdocs/pids/publications/uicceng.pdf>.

Secondly, the principles and rules of international law and applicable treaties and, failing that, general principles of national laws in states with jurisdiction over the crime, given that those principles are compatible with international law.²¹⁹ Consequently, the Court can jump from one source to the next until it finds an applicable rule. Nevertheless, practically, it will often have recourse to the general principles of national law for the reason that international criminal law provides no rules in many situations, particularly in the general part.

If a defendant has previously been convicted or acquitted by the ICC for the same conduct that forms the core of crimes within the ICC's jurisdiction, he or she may invoke the *ne bis in idem* principle before any national court or the ICC. However, if a national trial has only protected a person from criminal responsibility or was not conducted independently or impartially, then this person may be exceptionally tried before the ICC.²²⁰ This exception comes from the rule of complementarity stated in article 17 of the Statute. Consequently, a trial before the ICC is only admissible if the State with jurisdiction is unwilling or unable to prosecute the concerned person.

The principle of complementarity governs the exercise of the jurisdiction of the ICC. This principle distinguishes the Court in many significant ways from other known institutions, such as the ICTY and the ICTR. The ICC Statute recognizes that states have the first responsibility and right to prosecute international crimes. Generally, the Court comes into action only when national legal systems fail to act, for example when they assert their jurisdiction but fail to carry out proceedings in a meaningful manner. The principle of complementarity is founded on respect for States' primary jurisdiction and considerations of effectiveness and efficiency since states will have the best access to evidence and the resources and witnesses to carry out proceedings, in general. The complementarity regime is a mechanism that encourages and facilitates the compliance of states with their primary responsibility to investigate and prosecute core crimes. Where states fail to carry out proceedings genuinely, the Prosecutor must be ready to move decisively with ICC proceedings.²²¹

²¹⁹ *Rome Statute of the International Criminal Court*, Article 21: Applicable Law, <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>.

²²⁰ *Ibid.* Article 20: *Ne bis in idem*.

²²¹ *Informal Expert Paper: The Principle of Complementarity in Practice*, page 3, <https://www.icc-cpi.int/nr/rdonlyres/20bb4494-70f9-4698-8e30-907f631453ed/281984/complementarity.pdf>.

Although it is common to emphasize the “unwilling or unable” test in article 17, this article deals with three logically distinct circumstances. First, the most evident scenario is where no State has initiated any investigation (the inaction scenario). In such a case, consequently, there is no need to examine the factors of unwillingness or inability; the case is simply admissible under the explicit terms of article 17. In such circumstances, the case will be inadmissible unless the exceptions in those provisions are established. Finally, this inadmissibility is displaced where it can be portrayed that the proceedings are not authentic because the State is either unwilling or unable to carry out genuine proceedings. Therefore, the issues of “unwilling,” “unable,” and “genuine” only arise where a State claims to be handling the matter, yet there are reasons to believe that a genuine proceeding will not result.²²²

The principle of *nullum crimen (sine lege scripta, praevia, certa and stricta)* is explicitly laid down in its four different forms in articles 22 and 24. A person can only be prosecuted for an act which was codified in the Statute at the time of the commission (*lex scripta*), was committed after it entered into force (*lex praevia*), was defined with clarity (*lex certa*), and was not extended by analogy (*lex stricta*). The latter principles of certainty and the prohibition of analogy entail the consequence that ambiguities are to be resolved in favor of the suspect. Further, the principles of written (Statute) law (*lex scripta*) and of non-retroactivity (*lex praevia*) give the accused the right to rely on the law, which was codified and valid at the time of commission. If in case of a change of the law before the final judgment, the law more favorable to the accused must be applied.²²³ Finally, article 23 provides a very limited *nulla poena* principle, stating that a person convicted may only be punished by penalties laid down in the Statute.

In spite of an individual’s involvement in any of the core crimes, such as genocide, crimes against humanity, and war crimes, they cannot be prosecuted until it is determined that jurisdiction is exercised first. Can the ICC prosecute individuals that are operating under ISIS in Syria and Iraq? Both Syria and Iraq have not signed the Rome Statute, hence the Non-Member States. It is not essential to be a Member State when observing jurisdictional principles. However, it is

²²² *Ibid.* page 7.

²²³ Kai Ambos, *General Principles of Law in the Rome Statute*, Criminal Law Forum, Volume 10, 1999, page 4, <https://poseidon01.ssrn.com/delivery.php?ID=030073122122023064010005115096026097046038052029001020118030082093020114125027093086120032033122033062107072116066072109103022117009025075093065005090086007015064067076056021115007112007118112001071116069125122065105091104012127114005089105088105116&EXT=pdf&INDEX=TRUE>.

necessary to examine the jurisdictional principles to understand whether it is possible to exercise jurisdiction. The general jurisdictional principles consist of territoriality, personality, nationality, protective principle, and universality.²²⁴ For the exercise of jurisdiction, at least one of these principles must be fulfilled.

The territoriality principle gives a state the right to exercise jurisdiction when the conduct has taken place within the State's territory. The personality principle is when a state's national has been subjected to unlawful conduct. Finally, the nationality principle is when the individual committing the conduct is a national of the State, and universality is when any state can exercise jurisdiction on any person that has committed a crime within international law.

An inevitable fact is that the success of the ICC and the prosecutions of these individuals are not only because of the competent judges. Instead, it lays on the cooperation between the states to refer individuals to the ICC or through the Security Council.²²⁵ A state in which the atrocities have been committed can refer by itself to the ICC, like in the cases of the DRC and Uganda. Another way can be through a referral by a resolution adopted by the Security Council like in Darfur in Sudan and Libya.

Article 12 in the Rome Statute states the preconditions to exercise jurisdiction as:

1. "A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court concerning the crimes referred to in article 5.
2. In the case of article 13, paragraph (a) or (c), the ICC may employ its jurisdiction in the case where one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court under paragraph 3:
 - (a) The 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;
 - (b) The State of which the person accused of the crime is national.
3. In the case where the acceptance of a State which is not a Party to this Statute is required following paragraph 2, that State may, by declaration lodged with the Registrar, accept

²²⁴ Cedric Ryngaert, *The Concept of Jurisdiction in International Law*, Utrecht University, page 6, <https://unijuris.sites.uu.nl/wp-content/uploads/sites/9/2014/12/The-Concept-of-Jurisdiction-in-International-Law.pdf>.

²²⁵ Andrew Clapham, Paola Gaeta, *The Oxford Handbook of International Law in Armed Conflict*, Oxford University Press, 2015, page 173.

the exercise of jurisdiction by the Court concerning the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.”

Article 12.1 determines that the ICC can apply jurisdiction within a territory per the Rome Statute if that State is a Member State of the Rome Statute. In contrast, Syria and Iraq have abstained from ratifying the Rome Statute. Therefore, the ICC cannot have territorial jurisdiction in these states. Both states have also proven to be “unwilling or unable” to prosecute individuals that have violated international law. In addition, they cannot prosecute individuals with merely a Syrian nor an Iraqi nationality. Thus, crimes committed within the territory of Iraq and Syria cannot automatically be referred to the ICC. Nonetheless, there are other ways for the ICC to exercise jurisdiction over the Syrian and Iraqi territories even though they are not Member States.

As for the principle of personality, the individuals that have been subjected to the atrocities, in this case, are nationals in Syria and Iraq. Because neither State has signed the Rome Statute, the personality principle is inapplicable.

The ICC does not have territorial nor personal jurisdiction that an individual can be referred to. Nevertheless, it is possible to use the nationality principle if the individual who allegedly committed a crime is a national of a Member State. This is the case with foreign fighters in Iraq and Syria. Therefore, If the fighters are nationals of one of the 122 Member States of the ICC, the ICC can assert extensive jurisdiction over crimes committed in the areas where ISIS operates.²²⁶ That means that the ICC can exercise its jurisdiction over fighters from the member states of the Rome Statute and, in that way, prosecute perpetrators.

The ICC can also exercise jurisdiction following article 13. Article 13 (b) states:

“(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.”

Here the Rome Statute provides the Security Council by a tool to refer individuals to the ICC and regulates it further in the UN Charter. Chapter VII of the UN Charter²²⁷ sets up concretely

²²⁶ Jennifer Trahan, *New Paths to Accountability for Crimes in Syria and Iraq (Including ICC Jurisdiction over Foreign Fighters)*, NYU Center for Global Affairs, 2014, page 1, <https://www.justsecurity.org/17308/paths-accountability-crimes-syria-iraq-including-icc-jurisdiction-foreign-fighters/>.

²²⁷ *Charter of the United Nations and Statute of the International Court of Justice*, adopted October 24, 1945, <https://treaties.un.org/doc/publication/ctc/uncharter.pdf>.

what the Security Council's actions should be concerning international peace. Article 39 of the UN Charter emphasizes that the Security Council has the ability to determine the presence of any threat to peace and the measures that should be taken then. In addition, articles 41 and 42 of the UN Charter numbered the measures that can be taken to reestablish peace without the usage of military and armed force but by focusing on economic sanctions. And if these sanctions were found inadequate, then the focus should be on blockades or other operations such as land forces.

What can be settled is that the Security Council has under article 13 in the Rome Statute the power to refer individuals to the ICC, and thus the ICC can exercise jurisdiction. It may seem unlikely for *all* individuals operating under ISIS to be under ICC's jurisdiction. However, in theory, it is possible. In practice, it hasn't worked since two permanent members of the Security Council have vetoed the latest resolution referring perpetrators to the ICC.²²⁸ Nevertheless, the Security Council have, through a resolution²²⁹ referred to the foreign fighters who joined ISIS and emphasized the importance of bringing the foreign fighters to justice.

2. *The Veto*

The founding fathers of the UN Charter believed that five countries would play an essential role in ensuring international peace and security and that is because of their crucial role in the establishment of the UN. These five countries are China, France, the USSR (the Russian Federation since 1990), the United States, and the United Kingdom. Therefore, together with the Permanent Member status in the Security Council, these countries also had a special right known as the "veto right." Thus, those who prepared the UN Charter agreed that if one of the five permanent members cast a negative vote for a resolution, then the 15-membered Security Council would not approve it.²³⁰ Under the UN Charter, the five permanent members of the Security Council are authorized to use the veto power. Article 27 reads:

1. "Each member of the Security Council shall have one vote.
2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.

²²⁸ Ian Black, *Russia, and China veto U.N. move to refer Syria to the International Criminal Court*, The Guardian, May 22, 2014, <https://www.theguardian.com/world/2014/may/22/russia-china-veto-un-draft-resolution-refer-syria-international-criminal-court>.

²²⁹ UNSC, Resolution 2170, 2014, (UN Doc S/RES/2170), [https://www.undocs.org/S/RES/2170%20\(2014\)](https://www.undocs.org/S/RES/2170%20(2014)).

²³⁰ UNSC, *Voting System and Records*, <https://www.un.org/securitycouncil/content/voting-system>.

3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI (Peaceful Settlement of Disputes), and paragraph 3 of article 52 (encouragement of settlement of local disputes through regional arrangements or regional agencies), a party to a dispute shall abstain from voting.”²³¹

The UN member states allocated the responsibility of guaranteeing peace and security on the Security Council. The permanent members of the Council, usually referred to as the “P5,” had “veto power,” and with this power, any of the five States could override any Council’s decision. It has been observed throughout the Cold War and up to the present day that members of the P5 use the Veto for political ideologies, foreign policy decisions, and economic interests. Given these, doubts have been cast, and suspicion pervades the activities of the Security Council. Due to the indiscriminate use of the Veto, the Council has been unable to make critical decisions on critical issues for world peace and security as a result of stalemate, lock jams, and stalemate.²³²

Although the veto power is not explicitly stated in the UN Charter, there is an authority to permanent member to avoid such decisions by the fact that the critical decisions to be taken by the Security Council require permanent members’ unanimity voting. Therefore, sometimes the veto power is also defined as the “great power of unanimity,” or the authority itself is called the “great power veto.”²³³

However, after the commission of several attacks by ISIS against Muslims, Christians, Yazidis, and other religious and ethnic minorities, facts showed that the United Nations has failed to intervene. Moreover, since ISIS is carrying out some of its activities in Syria and the Syrian issue has been transformed into an international security problem, the interests of the five permanent members do not always coincide.

Addressing the veto issue, the 2001 Report of the International Commission on Intervention and State Sovereignty (ICISS) said, “the Permanent Five members of the Security Council should

²³¹ UN Charter, Article 27.

²³² Oludoun Temitope, *Peace and Security as a Catalyst for the Reform of the U.N. Security Council*, USAK, Issue 39, Central and Eastern European Online Library, 2014, <https://www.ceeol.com/search/article-detail?id=200114>.

²³³ United Nations, *Security Council*, <https://www.norway.no/en/missions/un/norway-and-the-un/un-bodies2/security-council/>.

consider and seek to reach an agreement not to apply their veto power, in matters where their vital state interests are not involved, to obstruct the passage of resolutions authorizing military intervention for human protection purposes for which there is otherwise majority support.”²³⁴ The report highlighted a caution to the Security Council that if the Council were to fail to handle its responsibility, single states or coalitions are allowed to take action, and if these actions were a success, this “may have enduringly serious consequences for the stature and credibility of the UN itself.”²³⁵

When we speak of non-accepted resolutions, Russia and sometimes China escaped resolutions by using their veto power. Since the beginning of the Syrian civil war in 2011, twelve draft resolutions have been vetoed. The first was presented to the Security Council on October 4, 2011, and the draft expressed severe concerns about the situation in Syria. At the same time, it was highlighted that the creation of an inclusive formula that takes into account the demands and needs of people, would be the only possible solution to the crisis in Syria. Nevertheless, China and Russia vetoed this resolution. Vitaly Churkin, the representative of the Russian Federation, opposed warnings against Damascus and sanctions for peaceful conflict resolution. According to Li Baodong, the UN must respect the sovereignty and territorial integrity of Syria while advancing the draft’s objectives.²³⁶

In August 15, 2014, the first UN Security Council resolution referring to ISIS was adopted. This resolution denounced the inclusion of *Al-Nusra*’s foreign fighters in the ranks of ISIS and lists the names of six people linked to these groups.²³⁷ However, there is no article related to any intervention against these terrorist groups. Instead, this resolution enabled the introduction of various obligations to member states, against the threat of foreign terrorist fighters, and that by the expansion of the framework of the fight against terrorism.²³⁸ Here, we cannot speak of a UN

²³⁴ *Ibid.* footnote 222, § 8.29(2).

²³⁵ *Ibid.* footnote 222, § 6.40.

²³⁶ UNSC, *Security Council Fails to Adopt Draft Resolution Condemning Syria’s Crackdown on Anti-Government Protestors, Owing to Veto by Russian Federation, China*, October 4, 2011, <https://www.un.org/press/en/2011/sc10403.doc.htm>.

²³⁷ *Ibid.* footnote 215.

²³⁸ UNSC, Resolution 2178, (S/RES/2178), September 24, 2014, http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_2178.pdf.

intervention against ISIS because this resolution aims to combat terrorism within the member states' territories and increase international cooperation.

Later, there was a resolution concerning ISIS prepared by Russia. Resolution 2199 emphasizes on many fiscal measures such as freezing and preventing all financial resources of terrorism, including eliminating illegal drugs and mining natural resources in the context of the fight against terrorism. Furthermore, the resolution underlines the need to ensure peace and security by combatting terrorism by all possible means under the UN Charter and international law.²³⁹ Indeed, the resolution gives more details about the sanctions imposed by the Security Council against ISIS. These sanctions have already been applied to the *Al-Qaeda* terrorist organizations and their followers for many years. The implementation of this resolution seems complicated because ISIS works with many intermediaries, as previously demonstrated, to provide financial resources.

The UN Security Council adopted Resolution 2249 on November 20, 2015 and that was after the attacks in Paris on November 13, 2015. With this resolution, the Security Council called on member states to take necessary measures following international law to prevent and suppress terrorist attacks, particularly the ones that performed by ISIS.²⁴⁰ After this, even though some resolutions adopted contained a few articles concerned with fighting against ISIS, there are no responses or resolutions to intervene with ISIS in Syria or Iraq.

As understood from these unaccepted resolutions, China and Russia (which openly support the Syrian government) argued that these resolutions posed a threat to Syria's territorial integrity and sovereignty. In this case, they did not hesitate to use their veto powers. An examination of these decisions reveals that the UN Security Council perceives the Syrian government as a more dangerous force than a terrorist organization like ISIS. Russia has often suggested this as the rationale for vetoing.

In the following paragraph, we shall examine the actions of ISIS that fall under ICC jurisdiction and under what liability can ISIS and its fighters be held accountable.

²³⁹ UNSC, Resolution 2199, (S/RES/2199), February 12, 2015, http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_2199.pdf.

²⁴⁰ UNSC, Resolution 2249, (S/RES/2249), November 20, 2015, http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_2249.pdf.

Paragraph Two: ICC Jurisdiction over ISIS

According to UNITAD, ISIS committed grave breaches of International Human Rights Law (IHRL), International Criminal Law (ICL), and International Humanitarian Law (IHL), its actions that may amount to war crimes, crimes against humanity, and genocide.²⁴¹ Moreover, according to many scholars, ISIS' crimes met by far the internationally accepted definitions of war crimes and crimes against humanity.²⁴² Based on evidence collected by UNAMI, It conducted various kinds of crimes, including abduction, sexual and gender-based violence, use of prohibited weapons, extrajudicial killings, torture, indiscriminate attacks, recruitment, and use of children, attacks against religious and ethnic groups, and displacing civilian people.²⁴³ ISIS committed widespread and systematic attacks directed against any civilian population because of their ethnic or political background, belief, or religion, which may constitute crimes against humanity, as it was stated in a UNSC resolution.²⁴⁴

1. The Organization's Actions as International Crimes

As it was argued previously, confining ISIS as a terrorist organization only obscures reality. Thus, it is imperative to look at the group's crimes from a broader scope for the sole reason of justice. Furthermore, the crimes committed by ISIS are crimes that fall under ICL, apart from other acts that may be categorized as terrorist acts, which can also be interpreted as part of the core crimes to fall under the ICC jurisdiction.

- ISIS Committing Genocide

The International Criminal Court has jurisdiction over the crime of genocide, which is defined in article 6 as follows:

²⁴¹ UNITAD, *First report of the Special Adviser and Head of the UNITAD*, (S/2018/1031), November 16, 2018, § 8; *Report of the Office of the United Nations High Commissioner for Human Rights on the human rights situation in Iraq in the light of abuses committed by ISIS and associated groups*, (A/HRC/28/18), March 27, 2015, § 16.

²⁴² *Ibid.* footnote 89, page 830.

²⁴³ *UNAMI Report on the Protection of Civilians in Armed Conflict in Iraq, 11 September to 10 December 2014*, page 5, https://www.ohchr.org/Documents/Countries/IQ/UNAMI_OHCHR_Sep_Dec_2014.pdf; United Nation Security Council Resolution 2170, 2014, [https://www.undocs.org/S/RES/2170%20\(2014\)](https://www.undocs.org/S/RES/2170%20(2014)).

²⁴⁴ *Ibid.* footnote 215.

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

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

The crime of genocide requires that the perpetrator have a unique intent to destroy, in whole or in part, a protected group. Thus, to be considered as a genocidal acts, the act must be committed against a person for their membership in a particular group and as a gradual step in the overall objective of destroying the group.²⁴⁵ This particular intent is also distinct from motive. However, it is not a contradiction that perpetrators who have the unique intent to destroy the protected group may also be triggered by multiple other motives such as capturing territory, economic advantage, sexual gratification, and spreading terror.

Firstly, there is a need to examine whether acts are committed on a particular “protected group.” Article II of the Genocide Convention, replicated in article 6 of the Rome Statute, states that a protected group must be a national, ethnic, racial, or religious group, as such. The term “as such” has been interpreted to mean that the prohibited act must be committed against a person based on that person’s membership in a specific group and specifically because the person belonged to this group, in a way that the real victim is not merely the person but the group itself.²⁴⁶

The Yazidis are often attributed as an ethno-religious group. However, both ethnic and religious groups are protected groups within the explanation of article II of the Genocide Convention, with ethnic groups defined as “groups whose members share a common language or

²⁴⁵ ICTR, *Prosecutor v. Rutaganda*, Trial Judgment, December 6, 1999, § 59, http://www.worldcourts.com/ictt/eng/decisions/1999.12.06_Prosecutor_v_Rutaganda.pdf; ICTY, *Prosecutor v. Jelisić*, Trial Judgment, December 14, 1999, § 66, <https://www.icty.org/x/cases/jelisc/tjug/en/jel-tj991214e.pdf>.

²⁴⁶ ICTR, *Prosecutor v. Muhimana*, Trial Judgment, April 28, 2005, § 500, http://www.worldcourts.com/ictt/eng/decisions/2005.04.28_Prosecutor_v_Muhimana.pdf; ICTR, *Prosecutor v. Kajelijeli*, Trial Judgment, December 1, 2003, § 813, <http://hrlibrary.umn.edu/instree/ICTR/KAJELIJELI ICTR-98-44A/KAJELIJELI ICTR-98-44A-T.pdf>.

culture.”²⁴⁷ and religious groups as groups “whose members share the same religion, denomination or mode of worship.”²⁴⁸

Little debate surrounds the Yazidis’ identity as a distinct religious group. An indigenous religion that has lived for thousands of years, the Yazidi faith has adjoined some aspects of later faiths – including Zoroastrianism, Judaism, Christianity, and Islam – while maintaining its traditions. Without exception, diverse members who believed that the Yazidis constitute a separate religious denomination with distinct modes of worship were interviewed by the Yazidi Community.

Jurisprudence from the ICTR and ICTY indicates that the belief of those perpetrating crimes may also be considered to determine the membership of a protected group.²⁴⁹ ISIS has continually referred to the Yazidis’ religious beliefs as the basis for its attack and subsequent abuse. The group’s fighters commonly refer to the Yazidis as pagans and “dirty *kuffar*.” In addition, ISIS does not regard Yazidism as an unchangeable identity and has forced conversions, suggesting that it views Yazidis as belonging to their religious community.

Therefore, it can be determined that the Yazidis are a protected religious group within the meaning of article II of the Genocide Convention.

Secondly, to assess whether ISIS committed the crime of genocide, the group needs to have committed one of the prohibited acts against the protected groups.

a) *Killing members of the group*

Hundreds of Yazidis were killed by ISIS’ fighters who come from bases inside Syria during the attacks on Sinjar. This includes Yazidis executed on capture and the deaths, which resulted from ISIS’ besieging of Yazidis trapped on the mountain.²⁵⁰ ISIS subsequently executed Yazidis

²⁴⁷ ICTR, *Prosecutor v. Akayesu*, Trial Judgment, September 2, 1998, § 513, http://www.worldcourts.com/ictcr/eng/decisions/1998.09.02_Prosecutor_v_Akayesu.pdf.

²⁴⁸ *Ibid.* § 515.

²⁴⁹ ICTY, *Prosecutor v. Stakić*, Appeals Judgment, July 31, 2003, § 25, <https://www.icty.org/x/cases/stakic/tjug/en/stak-tj030731e.pdf>; ICTR, *Prosecutor v. Gacumbitsi*, Trial Judgment, June 17, 2004, § 255, http://www.worldcourts.com/ictcr/eng/decisions/2004.06.17_Prosecutor_v_Gacumbitsi_2.pdf; ICTR, *Prosecutor v. Musema*, Trial Judgment, January 27, 2000, § 161, <https://unictr.irmct.org/sites/unictr.org/files/case-documents/ictcr-96-13/trial-judgements/en/000127.pdf>.

²⁵⁰ *Ibid.* footnote 250, § 589 for the material elements of the act of killing.

held captive in Iraq and Syria. In August 2014, ISIS fighters summarily executed hundreds of Yazidi men and young boys when the victims refused to convert to Islam or were captured with weapons in their possession. In addition, mass killings occurred in Qani and Kocho villages. ISIS fighters also executed an unknown number of older Yazidi women from Kocho village while held in Solagh Technical Institute in the early hours of August 16, 2014. While most of the killing of Yazidis happened in Iraq, ISIS fighters who had purchased Yazidi women and children in Syria also committed intentional killings.

b) *Causing serious bodily or mental harm to members of the group*

Conduct resulting in serious bodily or mental harm “may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment.”²⁵¹ ICTR and ICTY jurisprudence has continuously emphasized that such harm includes torture and inhuman and degrading treatment.²⁵² The physical or mental harm does not need to be perpetual or irremediable.³⁰ The ICTR case of *Akayesu* at the ICTR first found that rape and sexual violence constitutes serious harm on both a physical and mental level – and as a result, if carried out with unique intent to destroy, in whole or in part, a protected group, adds up to genocide. The discoveries of the Trial Chamber in the *Akayesu* case are considered “the most important decision rendered thus far in the history of women’s jurisprudence.”²⁵³

ISIS fighters systematically raped Yazidi females, especially women and girls as young as nine. Thus, there is overwhelming evidence of such rapes occurring from survivors who display physical and psychological wounds. The severe physical and mental harm that ISIS perpetrates against captured Yazidi women and girls expands beyond rape itself. From the victims’ perspective, perpetrators, and those involved in documenting violations, apprehended Yazidi women and girls are subjected to sexual violence so that they are sexually enslaved by ISIS and by its fighters. ISIS and its fighters forcibly transferred Yazidi women and children among multiple locations to sell them or re-sell them. Such forcible transfers cause Yazidi women and girls serious

²⁵¹ Footnote 3 of Article 6(b) of the Rome Statute.

²⁵² *Ibid.* footnote 250, § 504; ICTY, *Prosecutor v. Krstić*, Trial Judgment, August 2, 2001, § 513, <https://www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf>.

²⁵³ Dinah Shelton, *International Criminal Law: Recent Developments and the Potential Contribution of the ICC in International Crimes*, Peace and Human Rights: the Role of the International Criminal Court, 2000, pages 47-52.

mental harm that constitute a prohibited act under article II of the Genocide Convention and article 6 of the Rome Statute.⁴¹

Based on the conduct described above, it can be determined that ISIS has committed the prohibited act of causing serious bodily or mental harm to the Yazidis, a protected religious group.

c) *Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.*

ISIS controlled Yazidis, who had successfully fled to the upper slopes of Mount Sinjar on August 3, 2014. The group deliberately cut those on the mountain off from food, water, and medical care. Yazidis struggled to survive in temperatures that rose above 50 degrees Celsius. ISIS fighters also attacked planes seeking to aid drop water and food supplies and helicopters that attempted to rescue those in need of medical attention or were otherwise particularly vulnerable.

By these actions, ISIS has committed the prohibited act of deliberately inflicting on captured Yazidis conditions of life calculated to bring about their physical destruction, in whole or in part.

d) *Imposing measures intended to prevent births within the group*

Several actions were taken by ISIS as measures that intended to prevent births within the group include rape, sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes, prohibition of marriages, impregnation of a woman to deprive group identity, and mental trauma resulting in a reluctance to procreate.²⁵⁴ The first act of ISIS on capturing Yazidis in August 2014 was to separate men from women. By the act of separating Yazidi men and women, by killing hundreds of Yazidi men, and by forcing conversions to Islam, ISIS' will was primarily to impose measures in order to prevent births within the group.

Rape can be a measure to prevent births when the person raped subsequently refuses to procreate, in the same way, through threats or trauma. Many abused Yazidi women and girls did not want to marry anymore or contemplate relationships with men now or in the future. This was exacerbated by a feeling that they had lost their honor. In this way, the rapes being perpetrated by

²⁵⁴ *Ibid.* footnote 250, § 507-508.

ISIS fighters on Yazidi women and girls themselves constitute a measure to prevent births within the group.

This indicates that ISIS has committed the prohibited act of imposing measures intended to prevent births within the Yazidi community.

e) Forcibly transferring children of the group to another group.

ISIS forcibly transfers Yazidi children in two methods, depending on their sex. First, on reaching the age of nine, girls are taken from their mothers and sold as sex slaves to the fighters in Syria and Iraq. Second, once they reach the age of seven, Yazidi boys are also taken from their mothers and sent to ISIS training camps in Syria and Iraq, where they are taught how to fight and follow Islam as interpreted by ISIS.

In this mean, ISIS transfers Yazidi children to the custody of fighters, admittedly in radically different ways. These transfers, achieved through physical force when the children are taken from their mothers, remove the children from their community and the practice of their faith. In this method, ISIS intentionally seeks to destroy Yazidi children's concept of themselves as Yazidi, erasing their attachment to the Yazidi religion. Moreover, whereas Yazidi girls are prevented from practicing their religion, Yazidi boys are thoroughly indoctrinated into ISIS ideology, proving that the prohibited act of forcibly transferring Yazidi children to another group had occurred.

Thirdly, for a finding of genocide, it must be shown that ISIS perpetrated one or more of the prohibited acts listed in article II of the Genocide Convention, and replicated in article 6 of the Rome Statute, with the special intent that its acts result in the destruction, in whole or in part, of the Yazidis. Pivotal to this intent is the reason why the Yazidis were targeted. The ICTR *Rutaganda* Trial Judgment deconstructs this unique intent:

“For any of the acts charged to constitute genocide, the said acts must have been committed against one or more persons because such person or persons were members of a specific group, and specifically, because of their membership in this group. Thus, the victim is singled out not by reason of his individual identity, but rather on account of his being a member of a national, ethnical, racial or religious group.”²⁵⁵

²⁵⁵ *Ibid.* footnote 248, § 60.

Historically, the particular intent to destroy has often been concluded from conduct, including statements. ISIS explicitly holds its abuse of the Yazidis to be regulated by its religious interpretation, and its public statements have provided a resource directly demonstrative of its intent. ISIS' plan to attack Sinjar was foretold by research into how its religious interpretation dictated the treatment of the Yazidis they would find there. This explanation determined the behavior of its fighters during the attack on Sinjar and in its subsequent abuse of Yazidi men, women, and children. When ISIS executed Yazidi men and boys for not converting, sexually enslaved and enslaving Yazidi women and girls, and abducted, recruited, and indoctrinated Yazidi boys to use in hostilities, converting them de facto, it adhered to its religious obligations regarding how to treat Yazidi captives as laid out by its "scholars". Various ISIS statements and documents mentioned the goals for the capture and enslavement of Yazidis.²⁵⁶

There are reasonable grounds to believe that ISIS committed prohibited acts, as set out in article II of the Genocide Convention and article 6 of the Rome Statute, against individual Yazidis as a consequence of his or her belonging to the Yazidi group and as an incremental step in the overall objective of destroying the group.²⁵⁷

- ***ISIS' Crimes Against Humanity***

Article 7 of the Rome Statute of the International Criminal Court defines Crimes Against Humanity over which the Court has jurisdiction thus:

1. "For the purpose of this Statute, 'crime against humanity' means 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:
 - (a) Murder;
 - (b) Extermination;
 - (c) Enslavement;
 - (d) Deportation or forcible transfer of population;

²⁵⁶ For example, *Unseen Islamic State Pamphlet on Slavery*, translated by Aymenn Jawad al-Tamimi, <http://www.aymennjawad.org/2015/12/unseen-islamic-state-pamphlet-on-slavery>.

²⁵⁷ ICTY, *Prosecutor v. Jelisić*, Trial Judgment, December 14, 1999, § 66, <https://www.icty.org/x/cases/jelusic/tjug/en/jel-tj991214e.pdf>.

- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3²⁵⁸, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”

The crime, therefore, requires the commission of one or more of the specified acts against a civilian population as part of a widespread or systematic attack of which the perpetrator knew. In addition, there are difficulties with identifying the threshold for a “widespread or systematic attack” from a definitional perspective – At what point does such a campaign become widespread or systematic? Article 7(2) of the Statute provides that an attack against the civilian population is to be understood as “a course of conduct involving the multiple commission of acts referred to in article 7(1) against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.” Unfortunately, this does not offer any further clarity with the “widespread or systematic” requirement.²⁵⁹

Moreover, for the ICC to have jurisdiction, the attack must be “pursuant to or in furtherance of a State or organizational policy.” That requirement is arguably the most significant obstacle. In addition, the disjunctive phrasing – State or organizational policy – already suggests that perpetrators of crimes against humanity might include private organizations. However, the

²⁵⁸ Article 7, § 3 of the Rome Statute:

“For the purpose of this Statute, it is understood that the term “gender” refers to the two sexes, male and female, within the context of society. The term “gender” does not indicate any meaning different from the above.”

²⁵⁹ Fiona de Londras, *Terrorism as an international crime*, in William A Schabas & Nadia Bernaz (eds), *Routledge Handbook on International Criminal Law*, 2010, Chapter 11, page 167.

pertinent question is what level of organizational proficiency those non-state actors should have achieved to come within reach of article 7. In the *Bemba* confirmation decision, the Pre-Trial Chamber addressed the concept of “policy,” indirectly shedding some light on the nature of “organization”: “the requirement of a “State or organizational policy” implicit that the attack follows a regular pattern. This policy may be made by groups or persons who govern a specific territory or by an organization with the capacity to commit a widespread or systematic attack against a civilian population. The policy need not be formalized. As a matter of fact, an attack which is planned, directed or organized – as opposed to spontaneous or isolated acts of violence – will satisfy this criterion.”²⁶⁰

ISIS’ August 2014 attack on Sinjar and its following abuse of captured Yazidis, including the sexual and physical violence directed against Yazidi women and children transferred into Syria, constitutes a direct attack on the Yazidis. Thus, this civilian population was the primary target of the attack.

ISIS attacks were widespread, encompassing hundreds of villages across the Iraqi and Syrian regions, such as the Sinjar region and Mount Sinjar itself, in addition to many other attacks. Their attacks seemed to be systematic, with organized acts of violence committed in a near-identical manner by fighters across Sinjar and later across ISIS-controlled areas of Syria and Iraq. Their attacks on specific groups were committed following an explicit ideological policy of the extremist group, whose radical religious interpretation does not permit the existence of other than their version of Islam within the territory it controls. The fighters’ abuse of these victims closely follows and is supported by ISIS’ stated organizational policy.

- ***ISIS’ War Crimes:***

Article 8(2)(b) of the Rome Statute of the ICC includes the following within its definition of war crimes:

- (i) “Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

²⁶⁰ ICC, *Prosecutor v. Bemba*, (ICC-01/05-01/08), 15 June 2009, § 81, https://www.icc-cpi.int/courtrecords/cr2009_04528.pdf.

- (iii) Intentionally directing attacks against personnel, installations, material, units, or vehicles involved in a humanitarian assistance or peacekeeping mission following the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
- (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment, which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.”

In addition, article 15 of Additional Protocol One and article 13 of Additional Protocol Two to the Geneva Conventions provide that:

- 1- The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.
- 2- The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence, the primary purpose of spreading terror among the civilian population, are prohibited.

As previously stated, the need for distinction between IACs and NIACs matters from the perspective of accountability, the list of war crimes has conventionally been more extensive in the context of IAC. In addition, conflict cannot be prosecuted for their engagement in conflict unless they violate the law. In NIAC, there is no “combatant” or “prisoner of war” status.²⁶¹

ISIS is an organized group that resorted to armed force in Iraq and Syria.²⁶² The group attacks would appear to occur when an armed conflict has been prolonged between the group’s operating state (e.g., Syria and Iraq) and the level of organization of the parties to the conflict.²⁶³ It could

²⁶¹ Carsten Stahn, *A Critical Introduction to International Criminal Law*, Cambridge University Press, 2019.

²⁶² Annalise Lekas, *ISIS: The Largest Threat to World Peace Trending Now*, Emory International Law Review, Volume 30, Number 2, 2015, pages 313-351, <https://scholarlycommons.law.emory.edu/cgi/viewcontent.cgi?article=1162&context=eilr>.

²⁶³ Coman Kenny, *Prosecuting Crimes of International Concern: Islamic State at the ICC?*, Utrecht Journal of International and European Law, Volume 34, Number 84, 2017, pages 120-145, <https://www.utrechtjournal.org/articles/10.5334/ujel.364/>.

also be said that the existence of foreign States' armed forces has caused the conflicts to become internationalized, right after involving the global coalition against ISIS. In any event, whether considered international or internal conflicts, specific ISIS attacks would likely amount to war crimes per article 8 of the Rome Statute.

Two provisions in the Rome Statute relate to war crimes committed in NIAC, article 8(2)(c) and 8(2)(e). The first subparagraph relates to serious violations of article 3 common to the four Geneva Conventions:

“In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of August 12, 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

- (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- (iii) Taking of hostages;
- (iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.”²⁶⁴

The second subparagraph 8(2)(e) relates to some criminalized violations to NIAC. Its provisions are taken from article 8(2)(b) related to IAC, but some of them were not taken since some of the provisions are by their very nature not applicable to internal war, or proposed provisions concerning internal armed conflicts were opposed by a certain number of states during the Rome Statute drafting.²⁶⁵

By deliberately killing and summarily executing people who refused to convert, often within the presence of their relatives, ISIS committed the war crime of killing civilians. ISIS also killed men, women, and children during their captivity in Iraq and Syria; these killings are part of the

²⁶⁴ Article 3 common to the four Geneva conventions, August 12, 1949.

²⁶⁵ Otto Triffterer, Kai Ambos, *Rome Statute of the International Criminal Court*, C.H. Beck, 2017, page 530.

war crime of murder.²⁶⁶ According to the UNAMI monitoring, a minimum of 4,410 civilians were killed and 7,517 others wounded throughout Iraq (excluding Mosul governorate) due to armed conflict between January 1 to June 30, 2014.²⁶⁷ For example, ISIS killed two former candidates for the Mosul Provincial Council in a military base; the victims were shot to death after abducting from their homes separately. Moreover, 53 employees of the Independent High Electoral Commission were abducted; 28 of those, including 11 women, were executed in a military base.¹⁸⁵ On August 8, 2014, around 300 civil servants employed by Independent High Electoral Commission were executed by ISIS.²⁶⁸ The group took hostages; where hostage-taking means “the seizure and detainment of one or more protected persons and a threat to kill, injure or continue to detain such person or persons.”²⁶⁹ Hostage-taking was done by capturing 3,200 Yazidi women and girls, deprived of their liberty, and repeatedly sold them to be sexually abused.²⁷⁰

ISIS carried out massacres by beheading war captives “without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.”¹⁹⁰ Article 8(2)(c)(iv) of the Rome Statute guarantees certain minimal due process rights before a sentence is passed or an execution against a protected person happens, the protect interests in this matter are person or persons were either “hors de combat,” or were medical personnel, civilians, or religious personnel who take no active part in the hostilities.²⁷¹

2. Individual Criminal Responsibility vs. Legal Entity

Article 25(1) of the Rome Statute states that:

“Individual criminal responsibility

1. The Court shall have jurisdiction over natural persons according to this Statute.”

Pursuant to this article, the Court’s jurisdiction is limited to “natural persons”; in other words, individuals. Accordingly, the Statute does not provide for the criminal prosecution of public or private legal persons.

²⁶⁶ *Ibid.* footnote 54, § 169 & 170.

²⁶⁷ UNAMI, *Report on the Protection of Civilians in Armed Conflict in Iraq: June 5 – July 5, 2014*, page 7, https://www.ohchr.org/Documents/Countries/IQ/UNAMI_OHCHR_POC%20Report_FINAL_18July2014A.pdf.

²⁶⁸ *Ibid.* page 9.

²⁶⁹ Mark Klamburg, *Commentary on the Law of the International Criminal Court*, Torkel Opsahl Academic EPublisher, 2017, page 114, <https://www.legal-tools.org/doc/aa0e2b/pdf/>.

²⁷⁰ *Ibid.* footnote 54, § 171.

²⁷¹ The Elements of Crimes, element (2) of Article 8(2)(c)(iv).

The legal status of the individual in international law is closely bound with the evolution of the international human rights law and the international criminal law after the Second World War. From the field of international criminal law, a fundamental breaking point is the creation of the International Military Tribunal in Nuremberg (IMT) and from the field of international human rights law. It is the chain of international documents from the Universal Declaration of Human Rights (1948) or the International Covenant on Civil and Political Rights (1966) to the regional treaties such as the Convention for the Protection of Human Rights and Fundamental Freedoms (1950, also called the European Convention on Human Rights). Some of these treaties, including the London Agreement (1945) to which the Charter of IMT was attached, also contain the procedural norms (of the judicial or extrajudicial form) that serve to help to enforce substantial norms, which also apply directly to the individuals. Therefore, concerning the development in these distinct fields of international law, it could be concluded that the individual is already a subject of the international law and not only in the substantial field but also in the procedural law.

On the other hand, it should also be noted that its international subjectivity is limited to criminal law and the field of human rights. The international human rights law is based on human dignity; hence it is typically connected with natural persons. However, this statement is not exhaustive. There are regimes of human rights protection in international law that also cover legal entities (legal persons).²⁷²

That does not indicate that the issue of legal persons did not exceed the field of international criminal law at all. Even the Charter of IMT is mentioned in its article 6²⁷³ the power of the IMT to try and punish persons who committed crimes under international law (as defined in the IMT Charter), whether as individuals or as members of organizations that were declared as a criminal organization under article 9 of the IMT Charter. If the IMT declared distinct organization as criminal, then competent national authorities were able (according to article 10 of the IMT Charter) to accuse an individual (natural person), and the national authorities were bound by the legal

²⁷² PHPHMC Van Kempen, *Human Rights and Criminal Justice Applied to Legal Persons. Protection and Liability of Private and Public Juristic Entities under the ICCPR, ECHR, ACHR and AfChHPR*, Electronic Journal of Comparative Law, Volume 14.3, 2010, <https://www.ejcl.org//143/art143-20.pdf>.

²⁷³ Article 6 of the International Military Tribunal Charter in Nuremberg: "... power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes...", https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.2_Charter%20of%20IMT%201945.pdf.

opinion of the IMT about the “criminal nature” of such organization.²⁷⁴ However, the IMT declared some organizations as criminal that does not mean that it held them criminally liable. It did not impose any sentence on a criminal organization. Concerning the effects of its judgment, it could be concluded that it was a case of collective criminal liability applied against their distinct members (if other conditions were also fulfilled), not a case of criminal liability of a legal person.

ICTY developed (especially in the *Tadić* case) the doctrine of the *joint criminal enterprise* (JCE). ICTY was in its argumentation referring to the IMT’s judgment, which was used as evidence for an international customary rule prohibiting membership in the JCE.²⁷⁵ Every member of such an enterprise is criminally considered as co-perpetrator and not as aider (abettor).²⁷⁶ In comparison to the criminal organization, the difference of the JCE is in that it has an informal (not legally formalized) character. ICTY in the *Tadic* case defined three conditions of the *actus reus* of the JCE.²⁷⁷ The difference could also be seen in that the JCE can be created spontaneously, and in the case of the criminal organizations, these had legal subjectivity or were parts of such legal entities, but in both cases, they were legally formalized entities.

Based on the previously stated, it can be concluded that no body of international criminal justice declared any legal person criminally liable. On the contrary, the opposite is true – they were aware only of the criminal liability of natural persons, either in its individual or in its collective form.²⁷⁸ This situation was not changed by the ICTY case law because even in the JCE, neither was this declared a criminal liable; what is more, it even does not have to be a legally formalized organization of property or persons.

In addition, another question is the possibility of declaring criminally liable heads of legal persons for crimes committed by their subordinates. In such cases, the institute of *superior responsibility* (also known as *command responsibility*) could be applied. Such a possibility is considered a characteristic trait of international criminal law. However, it can be applied, again,

²⁷⁴ Article 6 of the Charter of the International Military Tribunal in Nuremberg: “In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case, the criminal nature of the group or organization is considered proved and shall not be questioned.”

²⁷⁵ *Ibid.* footnote 186, § 194.

²⁷⁶ *Ibid.* footnote 186, § 191-193.

²⁷⁷ *Ibid.* footnote 186, § 227.

²⁷⁸ Lukáš Mareček, *Criminal Liability of Legal Persons under International Law – Retrospection and Current Status*, The Lawyer Quarterly, 2020, page 416, <https://tlq.ilaw.cas.cz/index.php/tlq/article/view/427/431>.

only against natural persons in charge of a legal person (company, corporation), not against a legal person as such.

There is an explicit restriction of jurisdiction *ratione personae* in the statutes of the ICC (article 25 of the Rome Statute), ICTR (article 5 of the ICTR Statute), or ICTY (article 6 of the ICTY Statute), which should be considered as of procedural, not of substantive nature. The conclusion about exclusion or inclusion of legal persons hence should not be derived from it. However, the fact that the criminal liability of legal persons was a part of the discussion during the formation of the ICC Rome Statute, and its result was not to include legal persons, reflects the absence of universal consensus about such rule instead. The reason why states decided to restrict ICC's jurisdiction to natural persons explicitly could be found that many contracting states of the Rome Statute did not have the concept of criminal liability of legal persons in their national legal systems. Consequently, it would be questionable how they would deal with legal persons if they had an obligation to try and penalize them in their criminal system.

In general, the states are not very enthusiastic about changes in their legal systems; many of them hold doctrinal traditions for which criminal liability of legal persons is unthinkable. In addition, it should not be forgotten that based on the complementarity principle, the criminal proceedings should take place primarily on the national level. Only when national authorities are inactive, unwilling, or unable to try perpetrators, the ICC jurisdiction should apply. Hence, it is likely that their reasoning had not normative (about what the international law is) but a rather pragmatic character due to their concerns about the effectiveness of enforcement of ICC's Rome Statute provisions or their unwillingness to alter their distinct national laws. However, concerning the development on the national level that took place after the Rome Statute (1998) in the legal systems of many states, the pragmatic or practical reasons, which lead to explicit narrowing of its jurisdiction *ratione personae*, are weakened.²⁷⁹

In fact, one could argue that it would be difficult to imagine that an isolated person, acting independently of any organizational framework and without links to any ideological or political group, could plan and commit crimes falling under the ICC jurisdiction. This question of "criminal organizations" is particularly relevant today as national laws and international conventions have been trying for many years to establish the principle of responsibility of legal persons for criminal acts.

²⁷⁹ Ibid. page 317.

In its current outskirts, the ICC cannot prosecute ISIS as a legal entity; it can only do so by trying individuals who committed atrocity crimes falling under its jurisdiction as natural persons. Thus, even though they occupied high ranks within ISIS, an entity that had systematically planned and executed many punishable acts may go unpunished given that no evidence, other than their belonging to the group, is available to the Court.

In a situation where the ICC does not prosecute ISIS, hope is not eliminated. Justice can be achieved through other means of recourse, and alternative solutions shall be stated in the following chapter.

Chapter Two: Alternatives to fight ISIS' Impunity

The ICC is a last resort court. Therefore, if ISIS crimes never get to be heard before the Court, alternatives must be considered. Over the years, we have witnessed numerous courts and tribunals varying from specific courts to mixed-breaded ones (Paragraph One). However, the ideal solution is to include the Crime of Terrorism in the Court's jurisdiction and inducing the concept of legal persons and natural persons (Paragraph Two) to englobe ISIS crimes and prevent future ones.

Paragraph One: Other Means of Recourse

The idea of prosecuting ISIS before the ICC, whether adjustments of the Rome Statute occurred or not, seems to be the most suitable. However, given that this did not happen as quickly as anyone hoped for, domestic tribunals exercised their rights and tried ISIS fighters. Unfortunately, this resulted in unjust outcomes, whether towards the victims or the fighters themselves. For this reason, many scholars may consider establishing hybrid or ad hoc tribunals, each for their own reasons.

1. Domestic Tribunals

The domestic courts of Iraq and Syria could feasibly try ISIS defendants because the atrocities are being committed in Iraqi and Syrian territories occupied by ISIS forces. International law considers all states as sovereign entities, by which they have full authority to act on internal and international level as well.²⁸⁰ The notion of sovereignty assumes the idea that the government of a State has the exclusive power to exercise authority within that State. In this context, "a government" should be understood in the broadest sense – comprising the judicial, executive, and legislative aspects.²⁸¹ In their national legislation and within their jurisdiction, states have a right

²⁸⁰ James Crawford, *Sovereignty as Legal Value*, in Crawford, James, and Koskenniemi, Martti, *The Cambridge Companion to International Law*, Cambridge University Press, 2012, page 118.

²⁸¹ *Ibid.* page 121.

to adjudicate crimes committed on their territory and a duty to prosecute them..²⁸² Thus, the prosecution might be done in national courts only if an individual has committed a violation constituting a crime under national law. By then, the establishment of a jurisdiction in a State is based on territoriality, nationality, universality, and protective principle that the State chooses. There is no binding legal instrument in public international law that would state which principle a State should apply.²⁸³

International law violations can also be prosecuted in addition to crimes committed domestically, on a national level.²⁸⁴ The principle of legality adheres to the fact that the punitive element of a violation can be derived from a generally recognized source of law, that means legally binding instruments such as international conventions, national legislation, and customary law.²⁸⁵ In order to enable prosecution, State parties of a convention concerning international crimes must incorporate the provisions in their national legislation and criminalize the conduct in question.

It has been noted by scholars and jurisprudence alike that in cases of widespread and large-scale atrocities, it is the national courts that are considered as *forum conveniens*, the best suited for adjudicating crimes that have occurred on their territory. That is the case because it is easier and cheaper for them to discover witnesses and evidence related to the crimes committed than for their international counterparts in the ordinary course of events. They can depend on the State's investigative and enforcement authorities in locating it.²⁸⁶ Further, the society better approves and receives the verdicts on the national courts because they are likely to affect public opinion, as long as the proceedings are genuine.²⁸⁷

The violations of *jus cogens* crimes, that includes core crimes of international law, genocide, crimes against humanity, and war crimes, require punishment due to their peremptory nature. Their principles apply to all individuals, and the transgressors of these norms must therefore be held criminally liable.²⁸⁸ According to Bassiouni, both national and international justice mechanisms

²⁸² M. Cherif Bassiouni, *Introduction to International Criminal Law: Second Revised Edition*, Martinus Nijhoff Publishers, 2013, page 488.

²⁸³ Jan Klabbers, *International Law, 2nd Edition*, Cambridge University Press, 2017, page 99.

²⁸⁴ *Ibid.* footnote 264, page 15.

²⁸⁵ *Ibid.* footnote 286, pages 9-10.

²⁸⁶ Antonio Cassese, *Cassese's International Criminal Law*, Oxford University Press, 2013, page 275.

²⁸⁷ Marco Sassòli, *International Humanitarian Law: Rules, Controversies and Solutions to Problems Arising in Warfare*, Edward Elgar Publishing, 2019, page 115.

²⁸⁸ *Ibid.* footnote 286, pages 933-934.

have an obligation to prosecute those violating *jus cogens* norms and that's because these crimes threaten international peace and security or seriously violate the values of importance to the international community.²⁸⁹ The forum choice in such a case is, for Bassiouni, is essentially based on the primacy of competence and on the ability of national tribunals to genuinely and adequately conduct fair trials.²⁹⁰

The question of whether prosecuting international crimes is allowed when they have not been criminalized in domestic legislation is vexing since it might violate the principle *nullum crimen sine lege, nulla poena sine lege*. Individuals committing an offense should know that it is prohibited by law and to know beforehand the punishment they are to receive if they commit such an offense. The Extraordinary Chambers in the Courts of Cambodia (ECCC), when confronted with whether international crimes can be prosecuted even though they have not been codified in Cambodian law. The ECCC found that “the international principle of legality does not require that international crimes and modes of liability be implemented by domestic statutes in order for violators to be found guilty.” It further noted that the Cambodian government ratified that it was under an obligation to prosecute international crimes, which took place within its jurisdiction.²⁹¹

As noted in the first part, during its heyday, ISIS kept large areas of Iraqi and Syrian territory under its control. According to the principle of territoriality, states have the full power to exercise jurisdiction over crimes that have happened within their territory.²⁹² In the context of foreign fighters, this includes Iraq and Syria essentially, and it thus follows that it is warranted to investigate further the possibilities and challenges of prosecuting ISIS members in the national courts of both States. It should be noted that neither of the states has disciplined provisions concerning genocide, crimes against humanity, or war crimes in their national legislations.²⁹³

The Human Rights Watch has reported that ISIS-related trials in Iraq are conducted under counterterrorism law.²⁹⁴ The Iraqi Anti-Terrorism Law²⁹⁵ defines terrorism in article 1 as:

²⁸⁹ Ben Saul, *Defining Terrorism in International Law*, Oxford University Press, 2006, page 12.

²⁹⁰ *Ibid.* footnote 286, page 937.

²⁹¹ ECCC, *Public Decision on Ieng Sary's Appeal Against the Closing Order*, (002/19-09-2007-ECCC/OCIJ (PTC 75), April 11, 2011, § 213, https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E95_EN.PDF.

²⁹² *Ibid.* footnote 264, page 184.

²⁹³ Amr Jomaa, *Addressing Jurisdictional Challenges in Prosecuting ISIL Fighters*, *Berkeley Journal of Middle Eastern and Islamic Law*, Volume 11, 2020, page 26, <https://lawcat.berkeley.edu/record/1172187?ln=en>.

²⁹⁴ *Ibid.* footnote 92.

²⁹⁵ *Iraqi Anti-Terrorism Law*, Law Number 13 for the Year 2005, <https://www.refworld.org/docid/5bd093414.html>.

“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, 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 Counterterrorism Act distinguishes acts that are considered acts of terrorism in article 2 and acts that are crimes against State security in article 3. Article 4 assigns the death penalty for both acts to their perpetrators and participants and persons who incite, plan, finance, or assist terrorists. In addition, persons intentionally covering up any terrorist act or harboring a terrorist with the purpose of concealment are treated to life imprisonment.

UNAMI has reported that the extensive counterterrorism trials – over 20,000 between January 2018 and October 2019 – in which special terrorism courts impose convictions upon ISIS combat veterans and homemakers alike are deeply flawed. The accused have had very little or no means to defend themselves, and the judiciary has relied on unchallenged statements from anonymous witnesses and official reports and evidence and confessions obtained by torture and ill-treatment as a basis of convictions. Moreover, most of the accused were convicted, often to a death penalty, for membership or association with ISIS without proper assessment of their actual relationship with the group or the basis of their criminal responsibility. According to the report, even individuals who had provided medical care to wounded ISIS members were sentenced to years of imprisonment.²⁹⁶

In the case of Syria, President Assad enacted the Syrian counterterrorism law during the civil uprising on July 2, 2012. Special counterterrorism courts were established in the same year in order to govern criminal proceedings based on this counterterrorism law.²⁹⁷ The law defines terrorism as “every act that aims at creating a state of panic among the people, destabilizing public security and damaging the basic infrastructure of the country by using weapons, ammunition, explosives, flammable materials, toxic products, epidemiological or bacteriological factors or any method fulfilling the same purpose.”²⁹⁸ The formulation “any method” will allow the authorities to

²⁹⁶ UNAMI, *Human Rights in the Administration of Justice in Iraq: Trials under the antiterrorism laws and implications for justice, accountability and social cohesion in the aftermath of ISIL*, January 2020, https://reliefweb.int/sites/reliefweb.int/files/resources/Iraq_-_ISIL_trials_under_the_anti-terrorism_laws_and_the_implications_for_justice_28012020.pdf.

²⁹⁷ Human Rights Watch, *Syria: Counterterrorism Court Used to Stifle Dissent*, June 25, 2013, <https://www.hrw.org/news/2013/06/25/syria-counterterrorism-court-used-stifle-dissent>.

²⁹⁸ *Ibid.*

arbitrarily interpret any undesirable acts as those of terrorism, thus risking prejudiced and politically motivated trials. Certain terrorist acts can, and in some instances must be met with capital punishment.

Concerning Syria, another actor than the Syrian authorities has also conducted the prosecution of ISIS affiliates. The Syrian Kurds have, since 2012, established the Autonomous Administration of North and East Syria (AANES) to the area close to the Turkish border. Neither Syria nor the international community has recognized the Kurdish autonomous administration. Although AANES has reportedly established judicial institutions, the proceedings have been criticized for lack of the rule of law, corruption, and lack of expertise among the judges.²⁹⁹

In early 2020, it was reported that the Kurdish-led Syrian Democratic Forces (SDF) would start to hold trials for both local and foreign ISIS members.³⁰⁰ As of June 12, 2020, according to a HRC report, 1,881 Syrian nationals had been convicted for affiliations with ISIS, and around 8,650 detainees had been brought to justice. However, the report also noted several due process flaws, especially concerning the representation and judicial assistance of minors accused with ISIS affiliations. It was also reported that the minors were held in detention together with adults.³⁰¹ In its findings, the HRC determined that detention of individuals, both in military intelligence facilities and also in camps, constitutes a war crime committed against those who have been deprived of their freedom.³⁰² In addition to reported procedural flaws and violations, AANES is not an internationally recognized authority, and its legitimacy in holding trials is questionable since the exercise of judicial functions is reserved for state authorities.

Jurisdiction may also be dependent on the actors' nationality irrespective of where the prosecutable act was committed.³⁰³ Following this, all states whose citizens are currently being detained in Syria could invoke jurisdiction over the acts committed by the detainees, provided that their national legislation allows for prosecution of acts that have taken place outside of their

²⁹⁹ Mikael Ekman, *International Legal Assistance Consortium Rule of Law Assessment Report: Syria 2017*, pages 113-117, <http://www.ilacnet.org/wp-content/uploads/2017/04/Syria2017.pdf>.

³⁰⁰ Tessa Fox, *Syrian Kurds to begin trials for foreign ISIS fighters next month*, The National News, February 12, 2020, <https://www.thenationalnews.com/world/mena/syrian-kurds-to-begin-trials-for-foreignisis-fighters-next-month-1.978070>.

³⁰¹ IICIS, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, (A/HRC/45/31), § 77-78.

³⁰² *Ibid.* § 80.

³⁰³ *Ibid.* footnote 264, page 184.

territories. Several European states have already initiated and conducted proceedings against ISIS' foreign fighters who have deliberately returned to the states from which they departed to join ISIS.

According to Stahn, these proceedings have primarily focused on prosecuting them for terrorism-related acts, such as membership in a terrorist organization. In prosecutions, terrorism is more likely to be relied upon than actual violations committed in the theatre because it is easier to prove that a person went to Syria or Iraq to join the ranks of ISIS than the actual violations committed there.³⁰⁴

One of the main problems being brought forth discussing the prosecution of these foreign fighters in their states of origin or nationality is the lack of available evidence relating to their actions in Iraq and Syria. Therefore, to further the investigations and prosecutions for the crimes committed in Syria, the UN General Assembly established in December 2016 the IIIM to assist in the investigation and prosecution committed in the Syrian Arab Republic since March 2011. After that, it established the UNITAD for the same purpose, focusing on ISIS in Iraq. In addition, UNITAD participated for the first time in national proceedings in the Turku Court of Appeal case against Iraqi twins suspected of war crimes.³⁰⁵ The Court ended up in February 2020 to acquittal.³⁰⁶

2. Hybrid and ad hoc Tribunals

According to Cassese, the creation of mixed or internationalized courts requires three components, to note: Firstly, that national judicial authorities have been rendered unable, unwilling, or incapable of administering justice; secondly, there must be political will in both the national and international sphere to establish a tribunal and, thirdly, there must be political will to finance such a tribunal.³⁰⁷

³⁰⁴ *Ibid.* page 190

³⁰⁵ UNSC, *Tenth report of the Secretary-General on the threat posed by ISIL (Da'esh) to international peace and security and the range of United Nations efforts in support of Member States in countering the threat*, (S/2020/95), February 4, 2020, § 70, https://reliefweb.int/sites/reliefweb.int/files/resources/S_2020_95_E.pdf.

³⁰⁶ Kaisa Hautala, *There and back again? Prosecuting the foreign terrorist fighters of ISIS*, University of Helsinki, 2020, pages 24-30, https://helda.helsinki.fi/bitstream/handle/10138/324581/Hautala_Kaisa_Tutkielma_2020.pdf?sequence=2&isAllowed=y.

³⁰⁷ Antonio Cassese, *Role of Internationalized Courts in the Fight Against Criminality*, in Romano, Cesare P. R., Nolkaemper, Andre, Kleffner, Jann K., *Internationalized Criminal Courts, and Tribunals*, pages 3-14, Oxford University Press, 2004, page 5.

A suggestion for establishing a new tribunal for adjudicating the crimes committed by ISIS was put forth in 2015 by the former chief prosecutor of the ICTY, Carla del Ponte. The former chief prosecutor of the ICTY, Del Ponte, emphasized that an ad hoc tribunal would be the best solution.³⁰⁸ She believed that an ad hoc tribunal would be more efficient and work faster than the ICC. When comparing the number of cases, the ICC has heard against the number of cases the ICTY has heard and the number of cases the ICTR has heard in roughly the same amount of time, it is clear that the ad hoc tribunals are more efficient. In addition, the creation of an ad hoc tribunal would allow for regional placement of the Court, which could facilitate access to witnesses and documentation, which would be more difficult with the ICC.

The creation of an ad hoc court would be limited in the jurisdiction, scope, and time, which would be more appealing to Syria (and likely Iraq), Russia, and China.³⁰⁹ This option is also attractive because, ideally, a single ad hoc court could deal with ISIS defendants from both Iraq and Syria, similar to how the ICTY can hear cases of defendants from Kosovo and Bosnia and Herzegovina (the Former Yugoslavia). Although most nations would be supportive, at the end of the day, the question remains whether Russia and China, as permanent Security Council members, would approve of the creation of an ad hoc court to address ISIS crimes.

Another drawback of the ad hoc courts is that they are usually created after the conflicts have ended. As a result, these courts are reactionary and cannot effectively serve to deter future or ongoing crimes. Furthermore, it is challenging to seize and jail war criminals while the conflicts are ongoing. However, if the end goal is to bring war criminals to justice, the goal can be achieved after the conflicts have ended.³¹⁰

Historically speaking, there have been various ways to achieve this. In the aftermaths of both World Wars, the victorious side found judicial avenues for punishing the losing side by creating one-sidedly first the Leipzig Trials in the 1920s,³¹¹ and the IMTs a tad over 20 years later. This was to uphold notions of democracy, keep a record of the atrocities committed by Nazis, and

³⁰⁸ Julian Borger, *Call For Special Tribunal To Investigate War Crimes and Mass Atrocities in Syria*, The Guardian, March 17, 2015, <http://www.theguardian.com/world/2015/mar/17/callfor-special-tribunal-to-investigate-war-crimes-and-mass-atrocities-in-syria>.

³⁰⁹ Patricia M. Wald, *The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-to-Day Dilemmas of an International Court*, Washington University Journal of Law & Policy, page 87, https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1553&context=law_journal_law_policy.

³¹⁰ Andrew Solis, *Only [___] Can Judge: Analyzing Which Courts Have Jurisdiction Over ISIS*, Southern Illinois University Law Journal, Fall 2015, page 85, <https://law.siu.edu/common/documents/law-journal/articles-2015/fall2015/9%20-%20Solis%20Comment%20Proof%203%20FINAL%20-%20sm.pdf>.

³¹¹ *Ibid.* page 73.

effectively prosecute crimes, which, by their collective and systemic nature, would not have been possible to be dealt with in the perpetrator's national courts air trial. As a result, the IMT has been both praised and criticized. On the one hand, their creation showed the effectiveness of international legal order when given the political will and adequate resources for it, but it was perceived as victor's justice (or victor's vengeance).³¹²

Both ad hoc tribunals created in the 1990's – the ICTY³¹³ and the ICTR³¹⁴ – were established by UN Security Council through resolutions whereby it acted under Chapter VII of the UN Charter. It was done without a voluntary concession of sovereignty by the states in question.³¹⁵ These tribunals were given primacy over national courts due to the suspicions raised by other states that domestic proceedings would not manage to uphold impartial trials.³¹⁶ Article 29 of the UN Charter empowers the Security Council to “establish such subsidiary organs as it deems necessary for the performance of its functions.”

Generally, in the case of ad hoc courts, the Security Council has been able to “override” state sovereignty in establishing a new tribunal. However, Solis has argued that such a method is preferable in case the national authorities have themselves committed violations or when they refuse to cooperate.³¹⁷ For him, an ad hoc court would be the most desirable solution in bringing perpetrators to justice in the case of ISIS. He nevertheless admitted that such a creation is dependent on the political will of members of the Security Council, especially that of Russia and China.³¹⁸

The often-quoted “tribunal fatigue” ignited by the financial burden of ad hoc tribunals should also be taken into consideration. As a matter of tradition, ad hoc tribunals have been extraordinarily

³¹² Antonio Cassese, *From Nuremberg to Rome: International Military Tribunals to the International Criminal Court*, in Antonio Cassese, Paola Gaeta, R.W.D. John Jones, *The Rome Statute of the International Criminal Court: a commentary*, Volume I, pages 3-19, Oxford University Press, 2002, page 8.

³¹³ UNSC, *International Criminal Tribunal for Former Yugoslavia*, (S/RES/827), 1993, <https://www.refworld.org/docid/3b00f21b1c.html>.

³¹⁴ UNSC, *Establishment of International Criminal Tribunal for Rwanda*, (S/RES/955), 1994, <https://www.refworld.org/docid/3b00f2742c.html>.

³¹⁵ *Ibid.* footnote 286, page 536.

³¹⁶ Jane E. Stromseth, *The International Criminal Court and Justice on the Ground*, Arizona State Law Journal, Volume 43, Number 2, 2011, page 430.

³¹⁷ *Ibid.* footnote 313, page 85.

³¹⁸ *Ibid.* page 89.

expensive and have typically outlived their expected duration.³¹⁹ The Security Council has since been reluctant to establish new ad hoc tribunals after the model of the ICTY and the ICTR due to their financial burden on the UN and the lengthy administrative process in establishing and maintaining them. Instead, the focus has been on creating hybrid and internationalized tribunals that includes international elements within their national judicial system..³²⁰

In comparison to the ad hoc tribunals, the creation of hybrid and internationalized tribunals are more diverse. In most cases, the inability and unsuitability of administering justice on the national level due to a complete or partial post-conflict collapse of national administration were a cause for the establishment of a hybrid tribunal. After this, the international community became increasingly concerned with the creation of means for administering justice for atrocities committed during civil wars (which sometimes had outside interference) and systematic campaigns against civilians as part of the post-conflict justice system.³²¹ None of the hybrid tribunals was created without the consent of the state in question.³²² Some of these tribunals were established through resolutions of the Security Council acting under Chapter VII of the UN Charter. The STL was eventually formed through a Security Council Resolution³²³ after the UN, following the request from the Lebanese government.

One of the significant benefits of hybrid courts in comparison to ad hocs is that hybrids operate with a considerably smaller budget, making them more financially tempting. In addition, States present a desirable option in international adjudication by the fact that the hybrid courts allow these States to maintain a certain degree of sovereignty and participate in the judicial process.³²⁴ In the present COVID-19 world, such financial considerations cannot be overlooked.

³¹⁹ Sandra L. Hodgkinson, *Are Ad Hoc Tribunals an Effective Tool for Prosecuting International Terrorism Cases*, Emory International Law Review, Volume 24, Number 2, 2011, page 521, <https://www.law.upenn.edu/live/files/5913-session424emoryintlrev515pdf>.

³²⁰ Daphna Schraga, *The Second Generation UN-Based Tribunals: A Diversity of Mixed Jurisdictions*, in Cesare P.R. Romano, Andre Nollkaemper, Jann K. Kleffner, *Internationalized Criminal Courts and Tribunals*, Oxford University Press, 2004, page 15.

³²¹ Aaron Fichtelberg, *Hybrid Tribunals: A Comparative Examination*, Springer New York, 2015, pages 1-27.

³²² Kirsten Ainley, Mark Kersten, *Dakar Guidelines on the Establishment of Hybrid Courts*, LSE Institute of Global Affairs, 2019, page vi, http://eprints.lse.ac.uk/101134/1/Dakar_Guidelines_print_version_corr_1_.pdf.

³²³ UNSC, *The Special Tribunal for Lebanon*, (S/RES/1595), 2005, <https://digitallibrary.un.org/record/545254?ln=en>.

³²⁴ *Ibid.* footnote 313, page 87-88.

However, a smaller budget will inevitably reflect a tribunal's practical functioning, although they have been able to investigate a substantially more significant number of cases than the ICC.³²⁵

Since the Security Council has not created ad hoc tribunals since the ICTR, it is likely, that if a new tribunal were to be established, it would follow the model of a hybrid court. Political realities also support this. As Russia and China vetoed the attempt to refer the situation of Syria to the ICC, it would be highly improbable that they accepted the creation of an ad hoc tribunal. Despite these issues, the hybrid courts are still attractive because they allow domestic sovereignty and involvement while still providing international objectiveness.³²⁶

In the status quo, prosecuting ISIS may be far from perfect. However, if certain concepts change, this might pave the way for a more just international criminal law. These alterations are discussed in the following paragraph.

Paragraph Two: Aspirations

Prosecuting core crimes perpetrators must not be deficient. It is unfortunate that even though the ICC encompasses the four core crimes under its jurisdiction, it still lacks a definitional tool that fights impunity from all its sides. In order to fill these gaps, the ICC must first include the Crime of Terrorism and Corporate Criminal Liability in its Statute.

1. Including the Crime of Terrorism in the Rome Statute

Many states have tried to postulate a response to the terrorist threat by devising a patchwork of (sectoral and regional) treaties, a so-called piecemeal approach. Therefore, the global normative framework surrounding terrorism is somewhat fragmented and suffers from a lack of coherence. Instead of defining terrorism, several United Nations conventions have been adopted in reaction to specific acts of terrorism. These conventions are helpful in the pursuit of defining terrorism because it emphasizes the acts we know the international criminal community seeks to prosecute. These conventions forbid the following acts associated with terrorism: Hijacking³²⁷, Unlawful acts

³²⁵ *Ibid.*

³²⁶ Laura A. Dickinson, *The Promise of Hybrid Courts*, Cambridge University Press, 2017, page 306.

³²⁷ *Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft*, September 14, 1963; *Hague Convention for the Suppression of Unlawful Seizure of Aircraft*, December 16, 1970.

against the safety of civil aviation³²⁸, crimes against internationally protected persons³²⁹, hostage-taking³³⁰, unlawful acts against maritime navigation³³¹, and unlawful acts against fixed platforms at sea³³². Other United Nations conventions have been made regarding the use of explosives and nuclear materials.³³³

On the other hand, likely, certain acts of terrorism can already be prosecuted under the Rome statutes' article 7 CAH provision or article 8 War Crimes provision.³³⁴ However, only prosecuting international terrorism acts that qualify for these two provisions will leave loopholes of acts of terror that cannot be reached under the ICC. Numerous acts of terrorism do not fit within the jurisdiction of the War Crimes or CAH Provisions of the Rome Statute and are therefore impenetrable by the ICC. This leaves a loophole in prosecution where a terrorist can elope prosecution in situations where the act of terror does not fit the existing Rome Statute. For this reason, the ICC must revise the Rome Statute to add Terrorism as a core crime.³³⁵ These challenges justify the indispensability of rethinking the ICC by adding new facets and deepening facets foreseen in the Statute. More specifically, rethinking the competence of this body to expand its jurisdiction to the crime of international terrorism.

The idea of including terrorism as one of the most severe crimes of concern to the international community dates back to the Draft Statute for an International Criminal Court of the International Law Commission of 1994. The Commission's proposal contained article 20, which contemplated, along with the crimes of genocide, aggression, severe violations of the laws and customs applicable to armed conflict, and CAH, a specific subparagraph. Subparagraph e), regarding the "treaty crimes" which included terrorism: "Crimes, established under or pursuant to

³²⁸ *Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, September 23, 1971; *Montreal Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation*, February 24, 1988.

³²⁹ *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*, December 14, 1973.

³³⁰ *International Convention Against the Taking of Hostages*, December 17, 1979.

³³¹ *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, March 10, 1988.

³³² *Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf*, March 10, 1988.

³³³ *Convention on the Marking of Plastic Explosives for the Purpose of Detection*, March 1, 1991.

³³⁴ *Ibid.* footnote 159, page 2.

³³⁵ Travis Clark, *Amending the ICC to Include Terrorism as a Core Crime*, Seton Hall University, 2021, https://scholarship.shu.edu/cgi/viewcontent.cgi?article=2119&context=student_scholarship.

the treaty provisions listed in the Annex, which, having regard to the conduct alleged, constitute exceptionally serious crimes of international concern.”³³⁶

Similarly, the Preparatory Committee on the Establishment of an International Criminal Court created by the UN General Assembly in 1996 suggested the inclusion of the crimes of terrorism among others (article 5, subparagraph e))³³⁷ as an offense covered by the conventions mentioned in the Commission’s draft statute (paragraph 2). However, it went further by specifying these crimes as follows:

“Undertaking, organizing, sponsoring, ordering, facilitating, financing, encouraging or tolerating acts of violence against another State directed at persons or property and of such a nature as to create terror, fear or insecurity in the minds of public figures, groups of persons, the general public or populations, for whatever considerations and purposes of a political, philosophical, ideological, racial, ethnic, religious or such other nature that may be invoked to justify them.” (paragraph 1)

“An offense involving use of firearms, weapons, explosives and dangerous substances when used as a means to perpetrate indiscriminate violence involving death or serious bodily injury to persons or groups of persons or populations or serious damage to property.” (paragraph 3)

The dissent among states at the Rome Conference prevented the incorporation of the crime of terrorism in the Statute, but states in resolution E of Annex I to the Conference Final Act recognized that “terrorist acts, by whomever and wherever perpetrated and whatever their forms, methods or motives, are serious crimes of concern to the international community. Additionally, the States, deeply concerned about the persistence of this serious threat to international peace and security, urged a Review Conference to be convened in accordance with article 123 of the Statute³³⁷ in order to develop a consensus definition of terrorism and include it on the list of the most serious crimes.³³⁸ However, this topic was not discussed at the Kampala Review Conference of 2010. Undoubtedly, the main difficulty lies in the absence of a universal legal and political

³³⁶ *Draft Statute for an International Criminal Court, Report of International Law Commission on the work of its forty-sixth session*, (U.N. Doc. A/49/10), May 2- July 22, 1994, Official Records of the General Assembly, Forty-ninth Session, Yearbook of the International Law Commission, 1994, Volume II (2), page 38.

³³⁷ *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Official Records, Rome 15 June-17 July 1998, (U.N. Doc. A/CONF.183/13 (Vol. III)), 2002, pages 5 & 21, https://legal.un.org/ilc/documentation/english/reports/a_49_10.pdf.

³³⁸ *Ibid.* footnote 340, page 77.

definition enshrined in a comprehensive convention on international terrorism, prescribing that large-scale terrorist acts constitute an international crime.

In order to include terrorism in the Rome Statute, the UN must first adopt a definition for terrorism. Unfortunately, the international community has not yet adopted a clear and universal definition for terrorism because there is no internationally agreed-upon definition. Worldwide, states vary on what acts they consider to be terrorism. For example, states disagree on whether activities of national armed forces could be considered acts of terrorism and whether specific acts should be allowed because of a state's right to self-determination.³³⁹ The aphorism "one man's terrorist is another man's freedom fighter" can be applied here. A particular state may consider an act of terrorism with political motives to be a legitimate act of aggression, while the other state does not.

Secondly, the ICC needs to establish a Special Working Group on the Crime of Terrorism. This working group could then use the STL's definition of terrorism to developing a definition that could be included in the Rome Statute, among other internationally available instruments. As the development of the definition for crimes of aggression, a Special Working Group should set out the definition, elements, and jurisdictional conditions for the crime of terrorism. The Netherlands has proposed the usage of the same technique to include the crime of aggression in the Rome Statute should include terrorism in the Working Group's Report on the Review Conference.³⁴⁰ The proposal displays that terrorism should be included under article 5, with the condition that there should be a deferral of the exercise of jurisdiction until a clear definition for the crime can be developed. It also proposes that a working group should be created similar to the Special Working Group on the Crime of Aggression. Finally, the proposal states that the absence of a universal definition of terrorism should not be a cause to exclude it from the Rome Statute.³⁴¹

The ICC should be permitted to prosecute terrorists because the state with jurisdiction over the criminal is often unable or unwilling to do so. Thus, the ICC is a court of last resort. The Court has jurisdiction only when a state is unwilling or unable to investigate or prosecute the crime. For this reason, the ICC can ensure that serious crimes, such as terrorism, do not go unpunished. One

³³⁹ Thalif Deen, *Politics: U.N. Member States Struggle to Define Terrorism*, Inter Press Service, July 25, 2005, <http://ipsnews.net/news.asp?idnews=29633>.

³⁴⁰ ICC, *Report of the Working Group on the Review Conference*, (ICC Res 8/20, app. III), November 2009, article 42, https://asp.icc-cpi.int/iccdocs/asp_docs/RC2010/WGRC-ENG.pdf.

³⁴¹ *Ibid.*

occasion where the ICC would be a better forum for the prosecution of terrorists is when a state would favor the surrender of a suspect to the ICC rather than to another state, which has a legal system it has concerns over. In addition, the ICC does not have to rely on complicated extradition and cooperation treaties to obtain evidence and suspects.³⁴²

2. Introducing Legal Entity Criminal Responsibility

One reason corporate criminal liability has not been accepted as a mode of liability in ICL is the objections regarding difficulties of this law's assessment and well-established principles. Mainly through argumentation, the principle of *societas delinquent non potest* has to be upheld as corporations have nobody to kick and no soul to damn.³⁴³ We should argue that the legal entity should be punished as a whole. Because, if not the whole legal person is punished, the corporation may continue with its commence, which is entirely unacceptable, especially if the crimes committed constitute core crimes. Inertia, corruption, poverty, and generally disempowerment explain why victims face difficulties in obtaining justice for abuses they have suffered at the hands of legal entities, even when the state itself or other dominant groups are not seen as perpetrators but rather as passive enablers.³⁴⁴ The fact that justice often can be obtained neither in the country where core crimes have occurred nor in a developed country, and certainly not at the international level, leads to a well-documented impunity gap.³⁴⁵

None of the contemporary international criminal tribunals explicitly has jurisdiction over legal persons such as organizations. Instead, they are based on the principle of individual criminal liability, making human beings the only possible defendants when it comes to the core crimes these institutions have been established to prosecute. The final consensus of the Rome Statute was that it made more sense to focus on the less contentious principle of individual liability than to include corporate liability and take the risk to see some key states, which struggled with the very notion

³⁴² Richard J. Goldstone, *Evaluating the Role of the International Criminal Court as a Legal Response to Terrorism*, Harvard Human Rights Journal, Volume 16, 2003, pages 13-26.

³⁴³ John C. Coffee Jr, "No Soul to Damn, No Body to Kick": *An Unscandalized Inquiry into the Problem of Corporate Punishment*, Volume 79, Issue 3, Michigan Law Review, 1981, page 386, <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=3809&context=mlr>.

³⁴⁴ Nadia Bernaz, *Corporate Criminal Liability Under International Law*, Journal of International Criminal Justice, Volume 13, 2015, page 319.

³⁴⁵ Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, Yale Law Journal, Volume 11, 2001-2002, pages 461 & 473, <https://core.ac.uk/download/pdf/157778424.pdf>.

of corporate liability, not signing the treaty. In other words, and although this is how some domestic courts have interpreted the Rome Statute, the fact that corporate liability is not included in the Statute does not necessarily mean that the concept does not exist under international law. In truth, organizations should not be immune from liability under international criminal law for any conceptual reason, and that idea has never been rejected.³⁴⁶ Although the first international criminal tribunal, the pioneering IMT, only prosecuted individuals, they did label some groups - namely the Nazi leadership corps, the S.S., and the Gestapo - as “criminal.” Hence, the Tribunal recognized that legal persons could be part of a criminal conduct.³⁴⁷ Although the cases were against individual people in business, in practice, corporate and individual liability could not be strictly separated at all times. The reality, therefore, is more complex than an outright rejection of the notion of corporate criminal liability under international criminal law, despite what a mere glance at the current tribunals’ statutes would otherwise suggest.

Over the last few years, international criminal tribunals have developed a solid body of jurisprudence in this notion, relating to offenses against the administration of justice and taking them seriously.³⁴⁸ The *New TV SAL* and *Akhbar Beirut SAL* cases at the STL provide cases in point. In January 2014, the Contempt Judge at the STL, Judge David Baragwanath, issued orders instead of an indictment against four persons, two natural persons, and two corporate persons. The orders relate first to the broadcast of T.V. programs on *Al Jadeed TV*, operated by the private company *New TV SAL*, and on the subsequent online publication of the programs on the video-sharing website *YouTube*. Secondly, they relate to information published in *Al Akhbar*, a newspaper operated by another private company, *Akhbar Beirut SAL*. This information was also published on the paper’s website.³⁴⁹ Both the TV program and the newspaper mentioned: “names asserted to be those of alleged confidential witnesses in the Tribunal’s proceedings.”³⁵⁰ The

³⁴⁶ *Ibid.* footnote 348, page 320.

³⁴⁷ IMT, *Judgement of October 1, 1946*, https://crimeofaggression.info/documents/6/1946_Nuremberg_Judgement.pdf.

³⁴⁸ Göran Sluiter, Håkan Friman, Suzannah Linton, Sergey Vasiliev, and Salvatore Zappalà, Yvonne McDermott, *Criminal Procedure, Principles and Rules*, Oxford University Press, 2013, page 743.

³⁴⁹ STL Appeals Chamber, *Decision on Motion Challenging Jurisdiction and on Request for Leave to Amend Order In Lieu of an Indictment*, (STL-14-05/1/CJ/), January 31, 2014, § 3, https://www.stl-tsl.org/crs/assets/Uploads/20140724_F0054_PUBLIC_CJ_Dec_on_Mot_Challen_Jurisd_and_Req_Leav_Amen_Ord_in_Lieu_Ind_EN_Joomla.pdf.

³⁵⁰ *Ibid.* § 4.

indictment led to two separate cases. One is against a legal person, *New T.V. SAL*, and a natural person, *New TV SAL*'s Deputy Head of News and Political Programs Manager, Karma Khayat. The other is against another legal person, *Akhbar Beirut SAL* and another natural person, *Akhbar Beirut SAL*'s Editor-in-Chief, Ibrahim Al-Amin.³⁵¹

In the indictment, Judge Baragwanath concluded that there were “sufficient grounds to proceed for contempt” against these four persons as there was enough *prima facie* evidence that the publication of witnesses’ names constituted “willful interference with the administration of justice in breach of Rule 60bis (A).”³⁵² He then referred the case to an *amicus curiae* prosecutor and disqualified himself from hearing the charges. As a result, Judge Nicola Lettieri was designated as Contempt Judge in both cases.³⁵³ In June 2014, the defense for *New TV SAL* and Karma Khayat presented a preliminary motion, challenging the Tribunal jurisdiction against *New TV SAL* and asking that all charges be dropped against the company. The crux of their argument was that “the Tribunal lacks jurisdiction to charge and try *New TV SAL* as there is no legal basis in the Statute of the Tribunal... and Rules or under international criminal law in general to institute criminal proceedings against a legal person.”³⁵⁴ In July 2014, Judge Lettieri favored the defense on this point and dismissed all charges against *New TV SAL* because Rule 60bis applies to natural persons only and not to corporate entities.³⁵⁵ Later that month, the prosecution appealed this decision.³⁵⁶ In October 2014, an Appeals Panel (composed of three judges designated pursuant to

³⁵¹ *Ibid.* The cases are STL-14-05 and STL-14-06, respectively.

³⁵² *Ibid.*

³⁵³ STL, *Order Designating Contempt Judge, New TV SAL and Khayat*, (STL-14-05/I/CJ), January 31, 2014, https://www.stl-tsl.org/crs/assets/Uploads/20140131_F0002_PUBLIC_PRES_Order_Designating_Contempt_Judge_EN_Joomla.pdf?; STL, *Order Designating Contempt Judge, Akhbar Beirut SAL and Ibrahim Mohamed Al-Amin*, (STL-14-06/I/PRES), January 31, 2014, https://www.stl-tsl.org/crs/assets/Uploads/20140131_F0002_PUBLIC_PRES_Order_Designating_Contempt_Judge_EN_Joomla_1.pdf?

³⁵⁴ STL, *Defence Preliminary Motion challenging jurisdiction, New TV SAL and Khayat*, (STL-14-05/PT/CJ), June 16, 2014, § 3, https://www.stl-tsl.org/crs/assets/Uploads/20140616_F0037_PUBLIC_Defence_Preliminary_Motion_Challenging_Jurisdiction_EN_Joomla.pdf?

³⁵⁵ STL, *Decision on Motion challenging jurisdiction and on request for leave to amend the order in lieu of an indictment, New TV SAL and Khayat*, (STL-14-05/PT/CJ), July 24, 2014, https://www.stl-tsl.org/crs/assets/Uploads/20140724_F0054_PUBLIC_CJ_Dec_on_Mot_Challen_Jurisd_and_Req_Leav_Amen_Ord_in_Lieu_Ind_EN_Joomla.pdf.

³⁵⁶ STL, *Interlocutory Appeal against the Decision on Motion challenging jurisdiction, New TV SAL and AI Khayat*, (STL-14-05/PT/AP/AR126.1), October 2, 2014, https://www.stl-tsl.org/crs/assets/Uploads/20141002_F0012_PUBLIC_AP_Dec_on_InteLoc_Appl_Jurisdic_Cont_Proceed_EN_AR_FR_Joomla.pdf?

a roster) upheld the appeal and effectively reversed Judge Lettieri's decision. According to the Appeals Panel, "it is in the interests of justice to interpret the Tribunal's personal jurisdiction under Rule 60*bis* as encompassing legal persons."³⁵⁷ One member of the Appeals Panel dissented.³⁵⁸ As it is the first time an international tribunal envisages the criminal liability of corporations, the *New TV SAL* Appeal Decision arguably makes a decisive contribution to the development of corporate accountability under international law.

The Appeals Panel dedicated no less than thirteen paragraphs to discussing corporate criminal liability in domestic systems. It convincingly concluded that although there is some variation from system to system, in a majority of them, corporations "are not immune from accountability merely because they are a legal - and not a natural - person."³⁵⁹ Moreover, "while international law has not evolved to the stage where the subjection of a corporate person to criminal liability has become imperative on States," the Appeals Panel retain a strong power over contempt and therefore "need not be constrained by this fact."³⁶⁰

The *New TV SAL* case may now undoubtedly be relied upon in ICC litigation as proof that organizations, such as ISIS, may commit crimes, which can be prosecuted at the international level. In other words, the Appeals Panel's decision proves that corporate criminal liability under ICL is not conceptually impossible. In order to address this gap, the ICC needs to include corporate criminal liability in its Statute. This can be achieved by adopting compromised solutions, such as the one proposed by France in the context of negotiations of the Rome Statute. Corporate criminal responsibility was made dependent on individual criminal responsibility. The scope of responsibility was limited and conditional. It required a conviction of an organization agent for acts carried out "on behalf of and with the explicit consent" of the entity concerned.³⁶¹

³⁵⁷ *Ibid.* § 91.

³⁵⁸ STL Appeals Chamber, *Dissenting opinion of Judge Walid Akoum, Decision on Interlocutory Appeal concerning personal jurisdiction in contempt proceedings, New TV SAL and AI Khayat*, (STL-14-05/PT/AP/AR126.1), page 106, https://www.stl-tsl.org/crs/assets/Uploads/20160308_F0028_PUBLIC_PRV_AP_Judgment_on_Appeal_EN_Joomla.pdf.

³⁵⁹ *Ibid.* § 58,

³⁶⁰ *Ibid.* § 59.

³⁶¹ *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, (U.N. Doc. A/Conf.183/C.1/WGGP/L.5/Rev.2), July 3, 1998, page vii, https://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v1_e.pdf.

Conclusion

In closing, after portraying the connection between *Al-Qaeda*, *Jabhat al-Nusra*, and ISIS as evidence that these organizations are inherently reproducing such ideologies, exploiting the sensitive chord of religion in a sphere full of educated yet uncultured citizens. This group has systematically used the vacuum of state efficiency, making the region fertile for their plot to gain power with reprehensible violence. Regardless of their military defeat, this does not implicate that the organization has disbanded, nor does it warrant an accountability-free ticket to its perpetrators. Additionally, many studies and events proved that ISIS continues to be a threat regardless of held territory and strives to reach its final destination.

ISIS aims to build a worldwide caliphate in the Middle East, a region that has always experienced unease. This entity has committed countless atrocities to minorities in the most heinous ways and exploited the oppositions' weakness to feed their financial needs. Their criminal activities raised revenues mainly from controlling petroleum infrastructure, kidnapping, racketeering, extorting, and smuggling weapons or people. The group has assumed a state-like structure with its attempt to become so.

On the other hand, even though ISIS appears to be an innovative, self-sufficient criminal enterprise, its religiously zealous side seems to be most astonishing to the international community. The entity so blatantly promotes rape, sexual slavery, minority abolishment, child soldiers, among other actions, through social media that attracted foreign fighters who came to satisfy their dire desires. Masking these horrendous actions under the name of religion is more than sickening, and any attempt to diminish its magnitude is another crime towards the victims.

Therefore, efforts to hold ISIS accountable for its crimes that established international entities such as UNITAD and IIIM, the two mechanisms that facilitate the investigation process and trials of local tribunals in Iraq and Syria, respectively, are not enough to reach justice. These bodies have multiple obstacles in their mandates and are considered secondary accessorial instruments that do not level up to a comprehensive response from the international community. The territoriality jurisdiction of UNITAD must be broadened to encompass the crimes of other

existing armed entities, not just ISIS, given that very similar groups perpetrated numerous crimes. In addition, both UNITAD and IIIM need to delve into other preposterous crimes and not just be limited to war crimes, crimes against humanity, or genocide. The mandates of these bodies need to be revised to expand their subject matter jurisdiction because the local investigations may be insufficient or lacking resources with other alleged crimes.

Moreover, with the surplus of evidence proving that ISIS has committed heinous crimes, such as the systematic mass killing of Yazidi men, the abduction of women that were put on a sex market, and the entrapment of infants in military camps, it is entitled to the international community to reply with a proportionate response. This entity has perpetrated uncountable crimes listed in all sorts of international laws, like ICL, IHL, and IHRL. ISIS unlawfully massacred and tortured war captives, severely deprived civilians from their liberty and executed them simply because they refused to comply with its instructions, and destroyed or sold archeological gems on an industrial scale. All of the above clearly demonstrates how ISIS only uses its terrorism mask to diminish its actual complex multi-faced enterprise. It is imperative to understand that the group is a hybrid movement encompassing political, military, and mafia-like structures that cannot be limited to a simple terrorist cell label. Recognizing the scale of the ISIS identity will allow an encircled loop of liability.

However, holding the organization accountable for all of its crimes should be done in the light of innovative legislation and not with the current texts. Whether it was before the ICC or any other court that aims to prosecute ISIS, the need to treat terrorism as a crime of international scale is a must. Even though the STL has set out a legal foundation for this international crime, it has yet to be incorporated in the statute of international criminal tribunals such as the ICC. Whichever international criminal tribunal prosecuting ISIS must include the crime of terrorism alongside the four core crimes in its material jurisdiction since this crime has been a critical tactic alongside other alleged crimes. Terrorism should not just be considered part of these crimes since there is a clear differentiation between terrorism, genocide, crimes against humanity, war crimes, and the crime of aggression.

As for the ICC, it is possible to prosecute ISIS within its current framework under the umbrella of holding persons liable for the most horrible crimes to the international community. Even though Lebanon, Iraq, and Syria are not parties to the Rome Statute, which limits the

jurisdiction of the ICC, it is still possible to prosecute ISIS individuals through a UNSC referral under Chapter VII of the UN Charter or the acceptance of one of these states of the ICC jurisdiction. Based on previous condemning statements by the UNSC, ISIS has been categorized as a threat to international peace and security; therefore, there have got to be more definitive measures towards the group members under Chapter VII. Moreover, the misuse of the veto power needs to be re-guided into more suitable resolutions before the Security Council, where the five permanent members have to find common grounds and not let their supremacy over other council members overthrow the path in attaining justice. A UNSC resolution specifically referring ISIS members to the ICC should be adopted. In addition, the nationality principle can be used if it proves that the alleged perpetrator is a national of a Member State since there have been numerous foreign fighters involved with the entity.

Respectively, when ISIS is tried on an international forum, many aspects of international laws and procedures need to be reconsidered. In light of various developments on the national scale about the concept of legal entity responsibility, where states have already embraced this concept more than ever, the international forums need to level up as well. ISIS is a self-governing engine that must be shut down in parallel with prosecuting its members. Therefore, it is imperative to integrate this concept and not limit the court with individual criminal responsibility only. Allowing the court to hold the entity accountable by imposing various sanctions on the financial and social backbones of the enterprise will initiate its demise.

On the other hand, it is not preferable to try ISIS before national courts, even though history has proved that local tribunals are best suited for adjudicating crimes because they are cheaper and more manageable. However, in this case, Syria and Iraq cannot exercise the principle of territoriality since ISIS controlled large areas of Iraqi and Syrian territories, denying them the exercise of their jurisdiction. In addition, none of the laws of these states have included provisions mentioning war crimes, crimes against humanity, or genocide, and the legislation on terrorism in both Syria and Iraq has been proved to be flawed.

To be more effective, establishing an ad hoc tribunal is one of the better solutions for ISIS. These tribunals have been an efficient means of prosecuting such crimes, as the ICTY and ICTR. An ad hoc tribunal for ISIS would have jurisdiction overcoming the principle of complementarity and prevail over national courts and politics, giving leverage to the ad hoc over the ICC. Should

the UNSC agree to establish such a tribunal, the national states will likely be more cooperative, similar to Rwanda and Yugoslavia. However, with the financial burden on the UN caused by these tribunals, given the current worldwide financial crises in light of the COVID-19 pandemic and other political situations like the war in Ukraine, establishing a hybrid or an internationalized tribunal may be more suitable. The political will could be more responsive with a hybrid tribunal because this type of court maintains a certain degree of sovereignty in the judicial process, which may appease China and Russia in the UNSC.

Wherever ISIS ends up being prosecuted, it is vital to correct all the wrongs of previous courts and change faulty concepts. Impediment of justice happens when there is a lack of coherence with legal notions and no political will to act upon it. Therefore, the UN must adopt a unified definition of terrorism to include it in international legal bodies after establishing a working group that would explore possible definitions. Moreover, it is not enough to label an enterprise like ISIS as “criminal” without establishing a legal person or corporate liability, building clear thresholds for categorizing and punishing such entities. However, reaching justice in the current counterproductive ambiance of the international community is far away. On the other hand, all states must work towards eradicating policies that drove their citizens to seek the extremism path in the first place by ensuring fair trials, inducing rehabilitative measures, and working on sustaining the development of their governments. It is essential to recognize that ISIS has not seized to be a threat to the national and international communities, and one cannot imagine lasting peace without justice.

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