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BOARD OF EDITORS

OVERVIEW

The Journal of International Criminal Law (*JICL)* is a scientific, online, peer-reviewed journal, first edited in 2020 by Prof. Dr. Heybatollah Najandimanesh, mainly focusing on international criminal law issues.

Since 2023 JICL has been co-managed by Prof. Dr. Anna Oriolo as General Editor and published semiannually in collaboration with the International and European Criminal Law Observatory (IECLO) staff.

JICL Boards are powered by academics, scholars and higher education experts from a variety of colleges, universities, and institutions from all over the world, active in the fields of criminal law and criminal justice at the international, regional, and national level.

The aims of the JICL, *inter alia*, are as follow:

- to promote international peace and justice through scientific research and pubblication;
- to foster study of international criminal law in a spirit of partnership and cooperation with the researchers from different countries;
- to encourage multi-perspectives of international criminal law; and
- to support young researchers to study and disseminate international criminal law.

Due to the serious interdependence among political sciences, philosophy, criminal law, criminology, ethics and human rights, the scopes of JICL are focused on international criminal law, but not limited to it. In particular, the Journal welcomes high-quality submissions of manuscripts, essays, editorial comments, current developments, and book reviews by scholars and practitioners from around the world addressing both traditional and emerging themes, topics such as

- the substantive and procedural aspects of international criminal law;
- the jurisprudence of international criminal courts/tribunals;
- mutual effects of public international law, international relations, and international criminal law;
- relevant case-law from national criminal jurisdictions;
- criminal law and international human rights;
- European Union or EU criminal law (which includes financial violations and transnational crimes);
- domestic policy that affects international criminal law and international criminal justice;
- new technologies and international criminal justice;
- different country-specific approaches toward international criminal law and international criminal justice;

- historical accounts that address the international, regional, and national levels; and
- holistic research that makes use of political science, sociology, criminology, philosophy of law, ethics, and other disciplines that can inform the knowledge basis for scholarly dialogue.

The dynamic evolution of international criminal law, as an area that intersects various branches and levels of law and other disciplines, requires careful examination and interpretation. The need to scrutinize the origins, nature, and purpose of international criminal law is also evident in the light of its interdisciplinary characteristics. International criminal law norms and practices are shaped by various factors that further challenge any claims about the law's distinctiveness. The crime vocabulary too may reflect interdisciplinary synergies that draw on domains that often have been separated from law, according to legal doctrine. Talk about "ecocide" is just one example of such a trend that necessitates a rigorous analysis of law *per se* as well as open-minded assessment informed by other sources, *e.g.*, political science, philosophy, and ethics. Yet other emerging developments concern international criminal justice, especially through innovative contributions to enforcement strategies and restorative justice.

The tensions that arise from a description of preferences and priorities made it appropriate to create, improve and disseminate the JICL as a platform for research and dialogue across different cultures, in particular, as a consequence of the United Nations push for universal imperatives, *e.g.*, the fight against impunity for crimes of global concern (core international crimes, transboundary crimes, and transnational organized crimes).

ARTICLES

Prosecuting International Law: Diagnosing the International Legal Asthenia Concerning the Gaza Crisis

*by Yassin Abdalla Abdelkarim**

ABSTRACT: This article simulates a court trial of international law because of the grieve failure it proved regarding the deterioration of the humanitarian situation in Gaza, which is a direct impact of the revengeful Israeli military operations against Hamas and the brutal war crimes committed by the Israeli Defense Forces (IDF) against civilians. The research will take the form of a judicial trial before a virtual court named "The Supreme Court of Humanity", an *ad hoc* court with a cosmopolitan jurisdiction to maintain the chief human values. The proceedings are conducted by the values of justice and trustworthiness of international law, which are the *Plaintiff*, versus international law, the *Defendant*. This trial is fictitious since it is based on an entirely virtual judicial process. The research aims to clarify the state of severe weariness of international law application that the war in Gaza revealed in addition to diagnosing the causes of this asthenia thus jurisprudence can overcome its negative impacts on justice. Furthermore, it introduces a universal solution to this dilemma to maintain the integrity of the international legal system by solidifying the efficient and impartial application of International Law.

KEYWORDS: Complicity in Genocide; International Justice; International Law; Legal Asthenia; The Right to Self-Defence.

I. Introduction

With the continuity of the IDF's military operations in the Gaza Strip, jurisprudence found an unprecedented state-of-the-art of international law. The inaction and weariness of international legal mechanisms, besides their inability to suppress the atrocities in Gaza, led legal scholars and jurists to trigger the idea of the pointlessness of international law. They witnessed the ongoing massacres against innocent civilians in Gaza without prosecuting them. The enormous figures of the Palestinian victims of the Israeli non-discriminative military operations created a legal shock among jurists and law academics. The major question was about the justification of the international judicial standstill concerning the genocide in Gaza.

Needless to say, when reality fails the anticipations of humanity, fiction occupies a prominent order to fix the status quo. Therefore, this research introduces fictional judicial proceedings before a virtual court of humanity to prosecute the perpetrators of the Gaza atrocities. It adopts a qualitative theoretical methodology that brings together the normative arguments of the litigation parties and refutes them to conclude a consensual set of legal frameworks. The objective of these frameworks is to provide the international legal system with the practical foundation to support international legal interventions against atrocities and criminalise legal silence under political pressures. The fictional litigation ends with a legal conclusion based on logic that manifests the actual outcomes of the research.

DOUBLE BLIND PEER REVIEWED ARTICLE

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II. The Governing Legal Instruments

Regardless of the litigation fictionality, its judicial process should be governed by formal legal instruments that provide the Court with the required legitimacy. After a curious reading of the outstanding real international legal instruments, the research creates a parallel set of legal instruments that govern the litigation from the beginning to giving the judgment. These instruments are:

A. The Parallel Statute of the Supreme Court of Humanity

A legal document establishes the authority, composition, jurisdiction, and procedures of the highest judicial body of the human race. The United Nations General Assembly adopted the statute in 2023 after a series of global conflicts and crises that threatened the survival and dignity of humanity. The statute aims to promote and protect human rights, uphold international law, resolve disputes among states and other entities, and ensure accountability for crimes against humanity and other grave violations. The statute also contains articles on justice, such as the principles of impartiality, independence, fairness, and transparency that guide the court's work and the rights and obligations of the parties, witnesses, victims, and other participants in the proceedings. It is a parallel document of the International Court of Justice Statute.

B. The Charter of the United Nations

It includes the universal objectives and requirements to maintain cosmopolitan peaceful cohabitation.

C. The Universal Declaration of Human Rights

The Universal Declaration of Human Rights is a document that was adopted by the United Nations General Assembly in 1948. It outlines the basic rights and freedoms that all human beings are entitled to, regardless of race, religion, gender, nationality, or any other status. The declaration consists of 30 articles that cover civil, political, economic, social, and cultural rights. Some of the rights include the right to life, liberty, and security; the right to equality before the law; the right to education; and the right to participate in the cultural life of one's community. The declaration is not legally binding, but it serves as a common standard of achievement and a source of inspiration for human rights movements around the world.

III. The Judgment

A. Factual Backgrounds

On the 7th of October 2023, the Palestinian resistance organization Hamas, among other resistance armed groups, unleashed surprise attacks against Israeli targets.[1] These attacks aimed at melting the political icebergs regarding the ongoing Israeli occupation of the Palestinian West Bank and breaking the solid siege of the Gaza Strip. The strategic starting point of these attacks was the Gaza Strip, a narrow 40 km long beach on the Middeterianean. The Gaza Strip has been de facto controlled by Hamas since 2007;[2] this organisation held the actual control of the Strip, which is populated with over 2.2 million civilians.[3] Hamas military attacks within Israel constituted a severe national shock due to the high casualties they inflicted and the variety of targets they hit during the operations.[4] As a response, the IDF launched a mass striking campaign against targets in Gaza, enraged by the severe casualties and the intelligence failure to anticipate any suspicious military activity in the Strip.[5] Correspondingly, wide-scaled non-discriminative bombarding missions attacked the Strip since 7 October, leading to civilian casualties of more than 14,500 deaths toll, 20,000 injuries and approximately 1.5 million displaced.[6] The Brutality of the Israeli bombings created a tragic humanitarian situation in Gaza that transferred the whole Strip to another Stalingrad.[7]

Not only the humanitarian crisis that deteriorated the human situation in Gaza but also the gross war crimes and genocide that occurred during the Israeli operations. The United Nations explicitly urged the international community to intervene to prevent the possible genocide of the Palestinians by the IDF.[8] The UN Experts noted that the IDF destroyed about 40 thousand dwellings and necessary life facilities.[9] At that unprecedented pace, civilians in the Strip are facing an actual genocide that requires effective preventive measures by the International community. Describing its severity, the UN Regional Information Center for Western Europe warned that Palestinians are ahead of a second Nakba,[10] similar to what they encountered in 1948 upon the establishment of the State of Israel.

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[1] Tom Perry,Angus McDowall, *Timeline of Conflict Between Israel and Palestinians in Gaza*, REUTERS (Oct. 7, 2023), https://www.reuters.com/world/middle-east/conflict-between-israel-palestinians-gaza-2023-10-07/.

[2] Allison Meakem, *The Geopolitics of Palestine, Explained*, FOREIGN POLICY MAGAZINE (Oct. 10, 2023), https://foreignpolicy.com/2023/10/10/israel-palestine-conflict-gaza-hamas-war-geography-history/.

[3] *Gaza Strip in Maps: Life in Gaza under Siege*, BBC (Nov. 23, 2023), https://www.bbc.com/news/world-middle-east-20415675.

[4] Israel admitted that Hamas attacks led to 1,200 Israelis killed and other 240 were taken hostage by Hamas, see Cassandra Vinograd, Isabel Kershner, *Israel's Attackers Took About 240 Hostages. Here's What to Know About Them*, THE NEW YORK TIMES (Nov. 20, 2023).

[5] Julian E. Barnes, David E. Sanger, Eric Schmitt, *Hamas Attack Raises Questions Over an Israeli Intelligence Failure*, THE NEW YORK TIMES (Oct. 8, 2023), https://web.archive.org/web/20231008234117/https://www.nytimes.com/2023/10/08/us/politics/israel-hamas-intelligence.html.

[6] *Deaths in Gaza surpass 14,000, According to Its Authorities*, ECONOMIST (Nov. 23, 2023), https://www.economist.com/graphic-detail/2023/11/23/deaths-in-gaza-surpass-14000-according-to-its-authorities.

[7] John Reed, Srivastava Mehul, *Residents Flee Gaza City as Israel Tells 1.1mn to Leave*, FT (Oct. 13, 2023), https://www.ft.com/content/8ea2374e-c21c-4232-bc69-615e36b26caa?shareType=nongift#.

[8] *Gaza: UN Experts Call on the International Community to Prevent Genocide Against the Palestinian People*, UNITED NATIONS MEDIA CENTER (Nov. 16, 2023), https://www.ohchr.org/en/press-releases/2023/11/gaza-un-experts-call-international-community-prevent-genocide-against, they justified their conclusion by stating that "Israel remains the occupying power in the occupied Palestinian territory, which also includes the Gaza Strip, and therefore cannot wage a war against the population under its belligerent occupation".

[9] *Id.*

[10] *Palestine: Preventing a Genocide in Gaza and a New "Nakba"*, UNRIC (Nov. 21, 2023), https://unric.org/en/palestine-preventing-a-genocide-in-gaza-and-a-new-nakba/.

The mass atrocities committed in Gaza by the IDF triggered a global urge to implement the universal legal rules of international law, conventional and customary, to prosecute the perpetrators and establish their accountability for the war crimes that the whole humanity witnessed in Gaza.[11] International criminal law should be utilised firmly and equally against all atrocity perpetrators in this conflict. From his part, the International Criminal Court (ICC) Prosecutor Karim Khan declared that the prevention of humanitarian aid delivery to civilians in armed conflict zones qualifies as a war crime.[12] However, the Prosecutor did not initiate official investigations or any other judicial proceedings against the IDF's atrocities against the civil population within the Gaza Strip. As a response to this judicial sluggishness, singular states submitted individual referral requests to the ICC against Israel, seeking to bring the Israeli perpetrators to trial.[13] Therefore, Khan noted, in an official statement, that the prosecution office has started to investigate alleged war crimes and crimes against humanity in the Palestinian territories since 2021.[14]

As a result, no judicial reaction was taken to suppress the ongoing atrocities against the civil population in Gaza. The IDF continues the non-discriminative military operations to eliminate Hamas, disregarding the terrible civilian casualties. This judicial standstill deteriorates the true concept of international justice and turns it into a dead letter. With this consequence, international justice loses its trustworthiness and will be no longer considered the humanitarian umbrella that secures global peaceful cohabitation.

Consequently, while finding no shelter in the real legal system of international justice to defend this noble concept besides the ongoing mistrust in international law, both International Justice and Trustworthiness chose to initiate virtual judicial proceedings before the Supreme Court of Humanity, hoping to cure the deficiencies of the real judicial systems.

In their Statement of Claims (hereinafter referred to as the Statement) International Justice and Trustworthiness accuse International Law of passiveness and subordination to political bias and double standards. This contradicts the required impartiality and neutrality of International Law rules. Through this litigation, they urge the Court to introduce a legal mechanism to enhance the effectiveness and credibility of International Law and prevent its hypocritical utilization under politically motivated double standards.

B. Statement of Jurisdiction

[11] James A. Goldston, *Don't Let Gaza Be Another Example of International Criminal Court Double Standards*, POLITICO (Oct. 26, 2023), https://www.politico.eu/article/dont-let-gaza-conflict-be-another-example-international-criminal-court-icc-double-standards-ukraine/.

[12] *Impeding Relief Aid to Gaza May Be a Crime under ICC Jurisdiction, Prosecutor Says*, REUTERS (Oct. 29, 2023), https://www.reuters.com/world/middle-east/icc-prosecutor-rafah-border-crossing-says-hopes-visit-gaza-israel-2023-10-29/.

[13] Mogomosti Magomi, *South Africa Refers Israel to ICC over Gaza Attacks as Pressure Mounts to Cut Diplomatic Ties*, ASSOCIATED PRESS NEWS (Nov. 16, 2023), https://apnews.com/article/south-africa-israel-palestinians-icc-referral-6f1dd2b3af534d4d42d56a156968eae4; Michael Rios, *Five Countries Ask International Criminal Court to Investigate the Situation in Palestinian Territories*, CNN (Nov. 17, 2023) https://edition.cnn.com/2023/11/17/middleeast/israel-gaza-war-crimes-icc-referral/index.html. Those states are Bangladesh, Bolivia, Comoros, Djibouti and South Africa.

[14] *Statement of ICC Prosecutor Karim A. A. Khan KC from Cairo on the Situation in the State of Palestine and Israel*, ICC (Oct. 30, 2023), https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-khan-kc-cairo-situation-state-palestine-and-israel.

The Supreme Court of Humanity establishes its jurisdiction over the present litigation under The Parallel Statute of the Court. Art. 3 of this Statute grants it the ultimate authority to settle the submitted litigation concerning maintaining global peaceful cohabitation among human beings. Since the litigation subject includes a direct threat to this cohabitation because it sheds light on the vulnerability of International Law, which is the supreme code organizing relations between nations, the Supreme Court of Humanity proves competent to settle this litigation under the Charter of the United Nations and the Universal Declaration of Human Rights.

C. The Applicable Legislation

In this litigation, the Court applies the articles of the Parallel Statute to the formal aspects of the litigation. The Court applies the articles of the United Nations Charter and the Universal Declaration of Human Rights to the subject of the litigation.

D. Appointment of the Judges

According to Art. 4 of the Parallel Statute, the cosmopolitan nature of the litigation in addition to its relevance to the fundamental values of humanity implies choosing competent adequate judges. For this reason, the Bench includes the following judges:

(i) Conscience, which is a reflection of the human's true self that grants him a good piece of advice to prevent evil.[15] It is the supreme ruler of human conduct that judges each act to determine which side it belongs to good or evil.[16] According to Merriam-Webster Conscience is "the sense or consciousness of the moral goodness or blameworthiness of one's conduct, intentions, or character together with a feeling of obligation to do right or be good."[17] The judging theme of this concept qualifies it to preside over the Bench.

(ii) Mercy, the rigid nature of conscience implies the existence of another humanitarian value as a relief. Thus, Mercy is appointed as a member of the judicial Bench that hears the litigation. Despite the academic criticism of adopting mercy in the judicial context, its contribution to the appropriate judgment is undeniable[18] because mercy enhances the judicial endeavours to achieve justice in each litigation *per se.* Mercy permits the judges to express their empathy while keeping the convicted accountable for his deeds through the careful comprehensive analysis of the litigation aspects.[19]

(iii) Wisdom, this value is inherent within the whole judicial process; it is found in the procedural and objective aspects of the litigation.[20] It is the result of interpersonal

[15] Naresh Kumar, *Human Conscience – Some Perspectives*, 9(3) THE INTERNATIONAL JOURNAL OF INDIAN PSYCHOLOGY 2153 (2021), at 2153.
[16] *Id*., at 2154.
[17] *Conscience*, Merriam-Webster Dictionary.
[18] Doron Menashel, *Should We Be Merciful to the Merciless—Mercy in Sentencing*, 35(4) EMORY INTERNATIONAL LAW REVIEW 549 (2021), at 552.
[19] *Id*., at 556.
[20] Heidi M. Levitt, Bridget R. Dunnavant, *Judicial Wisdom: The Process of Constructing Wise Decisions*, 28(3) JOURNAL OF CONSTRUCTIVIST PSYCHOLOGY 243 (2015), at 244.

processes, influenced by professional training.[21] Practical judicial experience, besides intelligence and adequate legal knowledge, drives the judge to make the best utilisation of wisdom in his judgments.[22] Therefore, Wisdom is a crucial contributor to deciding the judgment in this sensible litigation.

E. The Proceedings of the Litigation

On 25 November, International Justice and Trustworthiness (*Plaintiff*) initiated the litigation by submitting a statement of claims at the Court Registrar against International Law (*Defendant*). The latter responded three days later by submitting a statement of claims to the Registrar. Both statements fulfilled the formality requirements and hence the Registrar referred them to the Bench. The hearings started on 2 December and continued to 7 in the same month. They were all in public at the Court headquarters, the Virtual Humanity Palace. The *Plaintiffs* were represented by Support the Peaceful Cohabitation Movement while the *Defendant* was represented by Protect the Atrocity Survivors Institution. The Judges ensured that both parties expressed their requests and arguments liberally and maintained the *Defendant*'s ultimate right to defence.

F. Summary of the Plaintiffs' Claims

In their statement of claims, International Justice and Trustworthiness, represented by Support the Peaceful Cohabitation Movement, reviewed International Law failure concerning the mass atrocities committed by the IDF in Gaza. They noted that international judicial bodies stood in languish while the IDF intensified the bloodshed of innocent civilians therein. Under the due diligence theory, this inaction elevates to constitute complicity in genocide, disregarding its causes. Moreover, the *Defendant*'s situation disclosed its clear subordination to political bias and double standards, the state of the art that endangers humans' peaceful cohabitation. Thus, the Court is requested to deprive the *Defendant* of its authority and impose binding judicial measures against the *Defendant* that compel it to accomplish its original humanitarian contribution to peace and security.

G. Summary of the Defendant's Claims

In its statement, International Law, represented by Protect the Atrocity Survivors Institution, the *Defendant* pleaded with the Court to dismiss the *Plaintiffs*' allegations. The attorney indicated that the conflict parties in Gaza did not adopt the official path to activate International Law; the latter had no concern with the political causes that jeopardize this path. Furthermore, the IDF military operations were a pure application of the right to self-defence that was used in a cautious discriminative manner that decreased the civilian losses as far as possible.

[21] *Id*., at 245.
[22] *Id*., at 251.

H. Arguments of the Plaintiffs

The *Plaintiffs* initiated their arguments by mentioning the original role of the *Defendant*. They argued that International Law's chief responsibility is to maintain world peace and security under the UN Charter.[23] Since Justice is a part and parcel of peace, International Law should utilize all its mechanisms to achieve Justice on a universal basis. Justice is the moral requirement to legitimate International Law toolkits.[24] Therefore, International Law should intervene wherever Justice is threatened. That was the basis of the establishment of the ICJ.[25] According to the UN General Assembly, the effective role of International Law enhances the universal rule of law.[26] Therefore, the inaction of International Law against the genocide being committed in Gaza violated the UN Charter because it frustrates the global endeavours to maintain world peace and security.

Furthermore, the *Plaintiffs* reasoned this inaction by the subordination of International Law application to politics. While certain states expressed their sympathy and immediate support for Israel upon the 7th of October attacks, they deliberately turned a blind eye and deaf ear to the atrocities committed in Gaza as a response.[27] This standing reflected Western double standards concerning the conflict in Palestine, which is a chief sort of political bias. The purpose of the latter is to maintain political domination within a region, regardless of the human rights situation therein.[28] Indeed, the subordination of International Law to politics erases the democratic theme of Western states and reveals their authoritarian attitudes.[29] The judicial inaction concerning this conflict strengthens the impunity of the perpetrators of core crimes and weakens International Justice. Furthermore, International Law has expressed an explicit judicial bias, as explained by the ICC,[30] that disqualifies it from being the legal shield of humanity because it contradicts the presumed impartiality of legal rules.

Most importantly, the *Plaintiffs* argued that the *Defendant* violated its natural obligation to preserve universal peaceful cohabitation under the theory of due diligence.[31] Since it is the chief maestro of international judicial reactions, International Law should have exerted an adequate effort to eliminate the risks that humanity faces in Palestine. A due diligence obligation endorses the International Law contribution to defend the fundamental human rights of marginalised persons within the occupied territories, who face oppression by a much stronger

[23] UN Charter, art. 1.
[24] Terry Nardin, *Justice and Authority in the Global Order*, 37(5) REVIEW OF INTERNATIONAL STUDIES 2059 (2011), at 2061.
[25] Statute of the International Court of Justice, art. 1.
[26] UNGA A/RES/72/120.
[27] Muhannad Ayyas, *The West's Double Standards Are Once Again on Display in Israel and Palestine*, THECONVERSATION (Oct. 19, 2023), https://theconversation.com/the-wests-double-standards-are-once-again-on-display-in-israel-and-palestine-215759.
[28] Ramesh Thakur, *Ethics, International Affairs and Western Double Standards*, 3(3) ASIA & THE PACIFIC POLICY STUDIES 370 (2016), at 377.
[29] Miro Cerar, *The Relationship Between Law and Politics*, 15(1) ANNUAL SURVEY OF INTERNATIONAL AND COMPARATIVE LAW 19 (2009), at 23.
[30] ICC, Germain Katanga, ICC-01/04-01/07, Annex to: Notification of the decision on the application of the legal representative for victims for the disqualification of a Judge (July 22, 2014), paras 38-40.
[31] It refers to "a qualifier of behaviour, which is triggered by a due diligence obligation that is particularly relevant when a risk has to be controlled or contained, in order to prevent harm and damage done to another actor or a public interest". For more, see HEIKE KRIEGER, ANNE PETERS, LEONHARD KREUZER, DUE DILIGENCE IN THE INTERNATIONAL LEGAL ORDER (2020), at 2.

occupying authority.[32] Hence, obliging the *Defendant* to implement its due diligence duties enhances justice and trustworthiness since this theory seeks to prevent gross violations of human rights.[33] It is a strong mechanism to ensure International Justice.[34]

Consequently, the *Defendant* was complicit in committing genocide by standing still concerning the atrocities committed in Gaza against civilians by the IDF. This accusation is based on the judicial interpretation of complicity in committing genocide as aiding or betting the perpetrator while realising his criminal intent towards the victims.[35] Accordingly, the *Defendant*'s inaction against the mentioned atrocities while knowing the IDF's intentions regarding the victims in Gaza qualifies this behaviour as complicity in committing genocide.

I. Arguments of the Defendant

International Law defended itself against the *Plaintiffs*' arguments by arguing that it is not the true perpetrator of the atrocities. They were committed by human beings against other human beings so International Law, as a value, has no concern with them.

The official referral to the ICC pathway was not adopted by either state because there was no consensus at the UN Security Council on this question.[36] Therefore, International Law should never be blamed for delaying judicial proceedings regarding the Gaza crisis. In particular, the political bias was clear in the utilization of Veto power by certain states at the Security Council against early ceasefire suggestions.[37] This political contradiction is the main cause of the ongoing atrocities in Gaza since it prevents International Law from achieving its role of enforcing peace and security.

Furthermore, as argued by the *Defendant*'s attorney, the IDF military operations in Gaza are a pure application of the right to self-defence against terrorism.[38] On 7 October 2023, Hamas attacked Israel and it is natural to respond under the right to self-defence. The IDF's conduct meets the classical requirements of a just war against evil and aggression.[39]

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[32] Medes Malaihollo, *On Due Diligence and the Rights of Indigenous Peoples in International Law: What a Māori World View Can Offer*, 70 NETHERLANDS INTERNATIONAL LAW REVIEW 65 (2023), at 70.
[33] *Id*., at 77.
[34] ICC, Bemba Gombo *et al*., ICC-01/05-01/13-2206, para 16.
[35] ICTR, Lauren Semanza, ICTR-97-20-A, Appeal Chamber, Judgment (May 20, 2005), para 369.
[36] Article 16 of the Rome Statute of the ICC implies the UNSC referral to the Court or the Prosecutor to initiate investigations.
[37] *Israel-Gaza crisis: US vetoes Security Council Resolution*, UN NEWS (Oct. 18, 2023), https://news.un.org/en/story/2023/10/1142507; Michelle Nichols, Kanishka Singh. Russia, *China Veto US Push for UN action on Israel, Gaza*, REUTERS (Oct. 25, 2023), https://www.reuters.com/world/russia-china-veto-us-push-un-action-israel-gaza-2023-10-25/.
[38] *The White House Joint Statement on Israel* (Oct. 9, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/10/09/joint-statement-on-israel/. It stated "We make clear that the terrorist actions of Hamas have no justification, no legitimacy, and must be universally condemned. There is never any justification for terrorism. In recent days, the world has watched in horror as Hamas terrorists massacred families in their homes, slaughtered over 200 young people enjoying a music festival, and kidnapped elderly women, children, and entire families, who are now being held as hostages. Our countries will support Israel in its efforts to defend itself and its people against such atrocities. We further emphasize that this is not a moment for any party hostile to Israel to exploit these attacks to seek advantage".
[39] Onder Bakircioglu, *The Right to Self-defence in National and International Law: The Role of the Imminence Requirement*, 19(1) INDIANA INTERNATIONAL AND COMPARATIVE LAW REVIEW 1 (2009), at 6.

J. The Court's Discussion

Concerning the *Plaintiffs'* argument that the *Defendant* violated its formal role, as designated by the UN Charter, the Court should first recall that the idea of establishing a global judicial organisation was motivated by the universal need to prevent atrocities by settling potential legal disputes between the UN Member States.[40] Therefore, the UN Charter indicates that the concept of global justice is a prerequisite to maintaining world peace and security. Because of its moral relevance to the discrimination between good and evil,[41] International Justice considerations must be the governing scheme of international relations among the peoples of the UN. There is a cosmopolitan commitment of the latter to ensure the ultimate achievement of International Justice. Moreover, the ICC decided the obligation to prosecute offenders who manage to obstruct justice deliberately to protect International Justice.[42] International judicial measures should comply with the interests of International Justice.[43]

It should be noted that practice revealed the challenging uncoupling of International Justice and Politics to prevent arbitrary selective utilization of International Justice.[44] When politics hold the upper hand, International Justice turns into an exploited diplomatic weapon by superpowers. This consequence contradicts the pure humanitarian objective of International Justice because it makes the latter an illusory concept in the international legal system.[45] The political dimension of the international judicial proceedings limited their effective contribution to distributive justice.[46] Furthermore, the selectivity of these proceedings has negatively impacted the Trustworthiness of International Law because it deteriorated its credibility among nations;[47] these proceedings introduce a deceptive victory of justice and, *de facto,* enhance international impunity.

Although the judicial selectivity of the international criminal justice system might be a consequence of offsetting the interests of justice, which grants the judicial authority the power to decide the continuation of proceedings or not,[48] International Justice and Trustworthiness require the depoliticization of this evaluation. This stipulation is a requirement for maintaining the independence and impartiality of international judicial organs.

Because of the cruciality of International Justice impartiality, the ICC managed to elaborate on its decisions on certain cases against allegations of politicization. Regarding the ICC's territorial jurisdiction over Palestine, the court decided that the heinous nature of the core crimes committed in Palestine is a core part of its jurisdictional activity.[49] The debate on the political *status quo* of Palestine,[50] a state or a territorial authority, should never prohibit the

[40] The Court (The International Court of Justice website), https://www.icj-cij.org/court.
[41] Andrew Linklater, *The Evolving Spheres of International Justice*, 75(3) INTERNATIONAL AFFAIRS 473 (1999), 477.
[42] ICC, Prosecutor v. Ruto and Sang, ICC-01/09-01/11-1938-Anx-Corr-Red2, Trial Chamber, Decision (Aug. 19, 2015), paras 42-43.
[43] ICC, Situation in Côte d'Ivoire, Legal Finding ICC-02/11-14-Corr (Nov. 15, 2011).
[44] Stefanie Bock, Nicolai Bülte, *The Politics of International Justic*, in INTERNATIONAL CONFLICT AND SECURITY LAW: A RESEARCH HANDBOOK (Sergey Sayapin, Rustam Atadjanov *et al*. eds., 2022), at 966.
[45] *Id.*
[46] *Id.*, at 968.
[47] *Id.*, at 969.
[48] *Id.*, at 972.
[49] ICC, ICC-01/18-143 1, Legal Finding (Feb. 5, 2021), para 56.
[50] *Id.*, paras. 53-55, the ICC stated "Some participants, including certain amici curiae, State Parties, and representatives of victims, have raised the argument that the Prosecutor's Request is of a political nature rather than a legal one. On this basis, some have argued that a ruling on the Court's jurisdiction over the territory of

judicial endeavours to suppress atrocities. Accordingly, the potential political consequences of the ICC's decision do not restrict its jurisdiction over gross core crimes committed in Palestine.[51] This international judicial conclusion enhances the authority of international judicial organs, *i.e.,* The Supreme Court of Humanity, over the serious crimes perpetrated in Palestine.

The Court noted that the *Plaintiff* established their petition upon the theory of due diligence. They claimed that International Law violated its due diligence obligation to intervene against the atrocities committed in Gaza. This theory represents a well-established international system of accountability requiring states, and sub-state actors, to comply their conduct with their obligations to maintain the humanitarian status of all individuals.[52] In international doctrine, due diligence is categorized under two regimes: the law on international liability and the law of state responsibility.[53] The main objective of due diligence is to prevent acts that endanger the peaceful cohabitation of human beings[54] by obliging the members of the international community to act in good faith and follow the good neighbourliness principles.[55] Despite the dispute around its legal classification, due diligence is not an independent law principle but an ancillary to other obligations.[56] Nevertheless, it is a prominent theory in international law because it bridges the gap between law and normativity.[57] The International Court of Justice (ICJ) affirmed the Serbian obligation to utilize the possible and appropriate means to prevent genocide in Bosnia under due diligence standards.[58] By virtue of that, states, and other interacting entities on the globe, should maintain conduct that prevents injuries of other international community members.[59] They should exert their best efforts to achieve this consequence.

In the context of the existing litigation, International Law is legally obliged to take the necessary procedures to prevent atrocities in Gaza. At least, the *Defendant* should have utilized its universal judicial toolkits to prosecute the perpetrators of core crimes in the area of conflict.

Palestine, with the political consequences it would entail, would constitute a political decision and potentially affect the Court's legitimacy. Others have stated that the territorial scope of the Court's jurisdiction is a legal question and falls within the Court's competence to determine, notwithstanding any political ramifications. It is necessary to address those arguments since they not only encompass the case and its developments but also the Court's work and its very mandate.

- The issues raised by the Prosecutor […] clearly raise legal questions regarding the Court's jurisdiction. Arguments to the effect that the aim or consequence of the Prosecutor's Request would be the creation of a 'new State' reflect a misunderstanding of the actual subject-matter of the Request. Indeed, the creation of a new state pursuant to international law […] is a political process of high complexity far detached from this Court's mission.
- Further, some participants have stated that because of the highly political aspect of the Situation in Palestine, it should not be examined by this Court. It should however be noted that, by the very nature of the core crimes under the Rome Statute, the facts and situations that are brought before the Court arise from controversial contexts where political issues are sensitive and latent. Accordingly, the judiciary cannot retreat when it is confronted with facts which might have arisen from political situations and/or disputes, but which also trigger legal and juridical issues".

[51] *Id.*, para. 57.

[52] Joanna Kulesza, *Human Rights Due Diligence*, 30(2) WILLIAM AND BARY HUMAN RIGHTS BILL JOURNAL 265 (2021), at 265.

[53] *Id.*

[54] *Id.*, at 268.

[55] *Id.*, at 271.

[56] Anne Peters, Heike Krieger, Leonhard Kreuzer, *Due Diligence: The Risky Risk Management Tool in International Law*, 9(2) CAMBRIDGE INTERNATIONAL LAW JOURNAL 121 (2020), at 122.

[57] *Id.*, at 123.

[58] ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Feb. 26, 2007), paras. 428-438.

[59] RICCARDO PISILLO MAZZESCHI. INTERNATIONAL HUMAN RIGHTS LAW: THEORY AND PRACTICE (2021), at 147.

Since *Defendant* did not follow these required procedures, its conduct inflicted harm to the *Plaintiffs*, as indicated in their statement of claims. Its negligence, despite the international urges to intervene, delayed the suitable legal response to the crisis, allowing the IDF to increase the genocide pace. Consequently, the common trust in International Justice deteriorated to an unprecedented level, arousing scepticism about the functionality and effectiveness of the entire international criminal justice system.

The final argument of the *Plaintiffs* comes around the *Defendant's* complicity in the atrocities committed in Gaza. Complicity is a form of criminal liability that does not include the perpetrator's physical intervention in the crime commission.[60] The International Criminal Tribunal for the Former Yugoslavia (ICTY) Statute indicated that complicity in a war crime refers to committing these acts: aiding, abetting, planning, instigating, and ordering.[61] Prominently, complicity in war crimes, or other international core crimes, does not require the direct conduct of the *Defendant* as the ICTY decided that the specific direction is not a threshold of complicity by aiding and abetting.[62] According to criminal law jurists, complicity in crimes includes all sorts of criminal acts except the direct commission of the crime.[63] Furthermore, the ICC requires active complicity in international core crimes to consider the *Defendant* accountable for this mode of liability.[64] Therefore, the *Defendant*'s accountability is dismissed once he provides the court with any proof of the procedures he took, regardless of their nature or scope, to prevent the crime. In addition, ICC Judge Eboe-Osuji, in his separate opinion, argued that the mere presence of the *Defendant* at the crime scene does not qualify his conduct to be complicit in that crime.[65] Nonetheless, he admitted that the officials' negligence in taking preventive measures, which are relevant to their duties, despite the ability to do so, is qualified to be complicity in international core crimes.[66] These limitations of the concept of criminal complicity aimed to provide international jurisprudence with a disciplined interpretation of the modes of liability introduced by the Rome Statute.[67]

Under these legal rules, the Court analyse the *Defendant's* conduct regarding the core crimes committed in the Gaza Strip since the 7th of October 2023. Despite the global urgues, International Law did not initiate investigations, or other judicial proceedings, against the IDF to suppress those mass atrocities. The *Plaintiffs* did not submit proof of the *Defendant's* positive complicity in the perpetrated atrocities; their claims accused International Law of languishness and inaction. They are the chief pillars of the *Defendant's* conduct regarding the Gaza crisis, which reflects passive conduct. It should be noted that jurisprudence profiles activities that facilitate the perpetrators' actions during war times, even without knowing their actual conduct, criminal complicity because of their gross impacts on civilians.[68] The casual contribution to civilian unjust harm triggers the ultimate combatant's liability, even when the conduct is merely

[60] Marina Aksenova, *Returning to Complicity for Core International Crimes*, 17 FICHL Policy Brief Series 1 (2014), at 1.
[61] ICTY Statute (May 25, 1993), S/RES/ 827, art. 7, para. 1.
[62] ICTY, Šainović *et al*., IT-05-87-A, Appeal Chamber, Judgement (Jan. 23, 2014), para. 1649.
[63] William Schabas, The U.N. International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone (2006), at 305.
[64] ICC, Bemba Gombo, ICC-01/05-01/08-3636-Anx3_24, para 291.
[65] ICC, Bemba Gombo, ICC-01/05-01/08-3636-Anx3, Concurring Separate Opinion of Judge Eboe-Osuji, para 167.
[66] *Id*., para 186.
[67] The Rome Statute of the ICC (1998), art. 25, para. 3.
[68] Adam Cebula, *Collective Complicity in War Crimes. Some Remarks on the Principle of Moral Equality of Soldiers*, 48 Philosophia 1313 (2020), at 1322.

passive.[69] Aiding a morally corrupted mentality to inflict severe damage on innocents is an original contribution to the atrocity beyond the perpetrator's direct conduct.[70] Therefore, the Court concludes that jurisprudence, when classifying passive indirect conduct, prioritizes focusing on civilian damage, which qualifies that conduct to establish legal criminal responsibility. The IDF's deliberate systematic targeting of civilians in Gaza inflicted gross harm to their fundamental human rights while the responsible legal organ, *the Defendant*, neglected its duties and stood still. These facts drive the Court to conclude the *Defendant's* clear complicity in the IDF's atrocities in Gaza.

Regarding the *Defedant's* arguments, under the Parallel Statute of the Court, non-physical items are valid for prosecution and trial since Article 1 addresses the virtual theme of this Court, permitting it to operate over values and norms. This formality applies to the *Defendant*.

The Court accords with the *Defendant* in attributing the judicial delay to the abuse of the Veto by superpowers at the UN Security Council. Despite the diplomatic consensus on the UNSC resolutions that referred certain atrocity allegations to the ICC,[71] this mechanism failed to refer the situation in Gaza to the ICC due to political causes. The political bias at the UNSC deprives it of accomplishing its main objective of maintaining world peace and security. While Article 103 of the UN Charter permits the UNSC to Intervene In each event of conflict to prevent unwanted negative impacts, the Veto abuse wastes the UNSC's true authority. Furthermore, the abusive use of the Veto to frustrate justice deteriorates the moral feature and credibility of International Justice because it deprives all International judicial organs of their power to achieve justice.[72] It is a direct damage to the *Plaintiffs.* The referral mechanism and the political control of the Veto usage subordinate the ICC *de facto* to the UNSC,[73] i.e., the Permanent Members who hold the Veto, despite the official initiations to avoid using the Veto against mass atrocities.[74] As a consequence, International Justice loses its impartiality and independence, generating a bleak scene of human justice. Political manipulation is the chief threat to the impartiality and credibility of the international criminal justice system.[75] Even the claim of the UNSC's subordination to the UN Charter principles and purposes[76] does not relieve the burden of the political bias effects on justice; the legal practice regarding Gaza revealed that politics can transfer the whole international legal system in vain. The UNSC mechanisms were created originally to serve the Council in defending the global peaceful cohabitation. Thus, Member States should not permit abusing them to protect severe violations of fundamental human rights.

Regarding the *Defendant's* attorney's allegation that Israel was just defending itself against terrorism. The state's right to self-defence is an inherent right deriving its authority from

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[69] *Id*., at 1324.
[70] Neta Crawford, *Individual and Collective Moral Responsibility for Systematic Military Atrocity*, 15(2) THE JOURNAL OF POLITICAL PHILOSOPHY 189 (2007), at 191; Cebula, *supra* note 68, at 1326.
[71] UNSC S/RES/1593 (2005) for Sudan and UNSC S/RES/1970 (2011) for Libya.
[72] Alexandre Skander Galand, *UN Security Council Referrals to the International Criminal Court*, in LEIDEN STUDIES ON THE FRONTIERS OF INTERNATIONAL LAW (Carsten Stahn, Larissa van den Herik, Nico Schrijver eds., 2019), at 220.
[73] *Id.*
[74] Jennifer Trahan, *Why the Veto Power Is Not Unlimited: A Response to Critiques of and Questions About, Existing Legal Limits to the Veto Power in the Face of Atrocity Crimes*, 54(1) CASE WESTERN RESERVE INTERNATIONAL LAW JOURNAL 110 (2022), at 116.
[75] Galand, *supra* note 72, at 222.
[76] Trahan, *supra* note 74, at 122.

state sovereignty and customary international law.[77] International judgements supported this origin of the right to self-defence.[78] Nevertheless, jurisprudence affirms this right with no need to explore its origin because it is rooted in international relations before the beginning of International Law.[79] Disregarding this debate, the critical point concerning the exercise of self-defence is identifying the actual International Law right included in a state's practice of self-defence.[80] The Court, therefore, should investigate the *Defendant's* conduct to determine its compliance with humanitarian requirements and rules.

Article 51 of the UN Charter admits the state's inherent right to self-defence "if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security". The explicit legal text of this article permits states to launch military operations against their attackers. According to positivists, the occurrence of an armed attack is a prerequisite to using the right to self-defence.[81] Furthermore, the UNSC affirmed the lawfulness of the state's self-defence operations against terrorists and sub-state actors.[82] This broad interpretation of the term "armed attacks" of Article 51 grants states a wide umbrella to justify their military operations abroad. Therefore, the Court admits the legitimacy of military operations responding to armed attacks.

Nevertheless, the right to self-defence is not absolute. Armies and their military commanders are obliged to follow the humanitarian restrictions included in International Humanitarian Law (IHL) to maintain the integrity of innocent lives. Moreover, the European Court of Human Rights (ECHR) decided that self-defence operations should use the appropriate and necessary lethal force to prevent the attacker's threats;[83] the exaggerated military reaction is unlawful and can elevate to a war crime, or other core crimes.

Furthermore, military self-defence operations are subordinated to the notion of control. The latter reflects the direct administration of acts and responsibility for their consequences under the obligation to prevent harm in International Law.[84] State officials should exercise adequate control over their subordinates to limit unnecessary casualties.[85] It is a moral obligation that defends the morality of the right to self-defence by preventing its exploitation for blind revengeful operations. Thus, states are responsible for surveilling the military actions of national forces to prevent humanitarian losses. International judgements affirm this concept of state responsibility under International Law.[86] In addition, the occupying state, which has the ultimate control over a region, is responsible for preventing human rights violations within the

[77] Murray Colin Aldar. *The Inherent Right of Self-Defence in International Law*, in IUS GENTIUM COMPARATIVE PERSPECTIVES ON LAW AND JUSTICE (Mortimer N.S. Sellers, James Maxeiner eds., 2013), at 93.
[78] ICJ, Asylum (Columbia v Peru) (1950) ICJ Rep 266, 276–277; ICJ, United States Nationals in Morocco (France v United States of America) (1952) ICJ Rep 176; Continental Shelf (Federal Republic of Germany v Denmark) (Federal Republic of Germany v The Netherlands) (1969) ICJ Rep 3, at 77-78; Aldar, *supra* note 77, at 93 fn 9.
[79] *Id*., at 94.
[80] *Id.*
[81] *Id.*, at 96.
[82] UNSC S/RES/1377 (2001).
[83] ECtHR, Armani De Silva v the United Kingdom, Application no. 5878/08, Grand Chamber, Judgment (Mar. 30, 2016), paras. 245-248.
[84] Gentian Zyberi, *The Shaping of the notion of 'Control' in the Law on International Responsibility by Certain International and Regional Courts,* in MILITARY OPERATIONS AND THE NOTION OF CONTROL UNDER INTERNATIONAL LAW (Ogier Bartels, Jeroen C. van den Boogaard *et al*. eds., 2021), at 285.
[85] *Id.*
[86] ICJ, Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) (2005), para. 214.

occupied territory.[87] Under this norm, the ECHR established the Turkish responsibility for the military actions of its soldiers in Northern Cyprus.[88]

Consequently, the analysis of the aforementioned legal findings drives the Court to decide the IDF's direct responsibility for protecting civilians in Gaza. Since the IDF hold the upper hand within the Palestinian territories as a whole, Israel is obliged to ensure the protection of civilians and prevent the mass atrocities committed in areas of conflict. International Law imposes this obligation on Israel since it is the occupying authority. Indeed, the Gaza Strip is an occupied Palestinian territory since the IDF holds the ultimate military domination over Gaza airspace and sea; Hamas cannot enforce military presence within this sphere. Israel controls all Gaza entry points and the flow of food, water, medical supplies, and power under a tough siege since 2007. Therefore, according to the Hauge Regulations, Gaza is considered an occupied territory by the IDF.[89]

Furthermore, exercising the pure right to self-defence does not justify wrongful acts against the civil population. According to the ICJ, Israel must not rely on its right to self-defence to justify wrongful acts.[90] Apartheid is still apartheid regardless of its causes and motivation. Also, international core crimes are still international core crimes regardless of their political and legal justifications. Above all, security concerns shall not permit breaching the fundamental pillars of peaceful cohabitation entitled in the UN Charter. Thus, Israel should comply its policies in Palestine with obligatory International Law rules.[91] It is concluded that the IDF's military operations under the right to self-defence do not permit Israel to derogate from its obligations towards civilians according to IHL.[92] It goes without saying that non-discriminative bombing missions that inflict damage on innocent civilians in Gaza violate the basic rules of IHL and, therefore, trigger Israeli accountability for mass atrocities caused by these operations. Regardless of the Israeli justifications, humanity implies that atrocities do not justify other atrocities.[93]

K. The Court Conclusions

Under the analysis of the litigation parties' claims and arguments, with full consideration of the oral hearings at which they expressed their pleadings, the Court concludes this state-of-the-art of the international criminal justice system.

The Court conclusions begin with affirming the prohibition of targeting civilians in International Law. Civilians should never be a target of military operations and the conflict

[87] Zyberi, *supra* note 84, at 289.
[88] ECtHR, Manitaras and Others v. Turkey, Application No. 54591/00, Fourth Section, Judgment (June 3, 2008), para. 27.
[89] Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague (29 July 1899), art. 42.
[90] ICJ, Advisory Opinion on the Legal Consequences of the Construction of A Wall in the Occupied Palestinian Territory (July 9, 2004), para. 142.
[91] *Id.*, para. 143.
[92] Terry Gill, *The ICJ Wall Advisory Opinion and Israel's Right of Self-Defence in Relation to the Current Armed Conflict in Gaza*, ARMED GROUPS AND INTERNATIONAL LAW: SYMPOSIA (Nov. 13, 2023), https://www.armedgroups-internationallaw.org/2023/11/13/the-icj-wall-advisory-opinion-and-israels-right-of-self-defence-in-relation-to-the-current-armed-conflict-in-gaza/.
[93] Omer Bartov, *Massacre Doesn't Justify Massacre: Israel, Gaza and War Crimes*, HAARTEZ (Dec. 6, 2023), https://www.haaretz.com/opinion/2023-12-06/ty-article-opinion/.premium/massacre-doesnt-justify-massacre-israel-gaza-and-war-crimes/0000018c-3585-d55e-adbf-7fd7c8900000.

parties must provide them with the appropriate protection which prevents losses. The Court does not find any eligible justification for shooting, kidnapping, and murdering civilians. Furthermore, there is no justification for destroying essential civilian facilities to deprive the population of life essentials. If a civilian facility was used for warfare, military group should adopt the utmost required precautions to prevent civilian losses. The Court directs these words to the conflict parties in Palestine.

The Court expresses its dire grieve for the current status of International Law; because of biased politics and double standards, the *Defendant* lost its humanitarian core and turned into a sharp sword in the hands of neo-colonialism and imperialism. The greedy political objectives of superpowers emptied this cosmopolitan norm of its true core due to subordinating its application to the interests of superpowers. No evidence of that other than the employment of the Veto at the UNSC to prevent ceasefire resolutions, which reflects the politics' crucial impact on legal proceedings. Therefore, International Law became an illusionary component in international legal relations; it appears only against weak nations while it turns a blind eye to atrocities packed by superpowers. The Gaza crisis reveals an ultimate collapse of the entire *Defendant's* establishment and the actual value of law versus politics.

The ongoing atrocities in Gaza by the IDF along with the jeopardization of International Law mechanisms deteriorated critically the reputation of the *Defendant*. It lost a chief deal of trustworthiness because of the apparent inaction to spare innocent lives in Palestine. Therefore, oppressed victims would seek justice by other methods rather than legal proceedings. Their methods could be revengeful and lethal. Thus, this consequence constitutes a threat to world peace and security. Needless to say, armed reactions to oppression lead to the ultimate absence of the legal framework of International Justice; the law of the jungle prevails.

The Court should note that complicity in international core crimes does not require a direct physical commitment to their *acts reus;* weak little tricky silence is qualified to complicity as it leaves the door open to the perpetrators to continue their atrocities. Inaction against atrocities is an ultimate atrocity; intervention to spare innocent lives is a humanitarian requirement of global peaceful cohabitation.

The Court calls states and individuals to respect the purely humanitarian nature of the right to self-defence. Self-defence was developed in practice to protect the integrity of state sovereignty and the well-being of its nationals. It should be used under this restriction as the excessive use transfers it into a revengeful killing machine. Furthermore, operative militants under this right are still accountable for crimes and atrocities they commit during their missions. Self-defence does not exempt war criminals from their legal responsibility. Indeed, international jurisprudence should develop an observatory system of armed conduct related to self-defence to ensure legal accountability for atrocities. It should be an obligation of the *Defendant.*

Furthermore, it is necessary for humanity to develop a flexible referral mechanism to the international judicial organs, e.g., the ICC. The core of this mechanism should be purely legal. Then, politics would not influence the referral proceedings. Consequently, an impartial mechanism enhances the effectiveness of International Law and strengthens the universal trustworthiness of the entire criminal justice system. In addition, legal mechanisms cut off international impunity and support the victims' access to justice. The *Defendant* should exert reasonable efforts to release the international judicial process from political pressures; under the domination of politics, International Justice is lost. It is a due diligence obligation of the *defendant* to cure the practical asthenia that deprives it of achieving the humanitarian objectives.

Therefore, the Court concludes that International Law has become ink on paper; the uselessness of the *Defendant* in the context of the Israeli massacres against innocent civilians in Palestine contradicts the chief feature of legal rules, which is equitable applicability. In this

case, a judicial deprivation of authority might be imposed to protect the pure essence of the leading rules that organize the entire humanitarian relations.

The deprivation is time-limited. The Court would impose judicial rehabilitating measures on the *Defendant* as a mandatory program until it restores its impartiality and equitable applicability. These measures imply isolating the *Defendant* from the direct influence of politics through the enhancement of International Law pure legal concept. The Court addresses the executive office to monitor the *Defendant's* commitment to these measures.

Therefore, under Article 9 of the Parallel Statute, the Court decides:

(i) The admission of the *Plaintiffs'* pleadings and the dismission of the *Defendant's* claims.

(ii) The Deprivation of the authority of International Law until accomplishing the rehabilitation program.

(iii) The imposition of an obligatory framework on the Defendant to enhance the impartial applicability of its rules as a remedy for the Plaintiffs.

IV. Conclusion

The virtual trial designed by the article intended to clarify the current status of chief legal principles in international legal practice to diagnose the prevailed asthenia in legal practice. The trial achieved its objective by reviewing the arguments of virtual litigation parties simulating the parties of the ongoing conflict in Gaza. This fictitious trial sought to reintroduce international law norms within a designated legal context to preserve their efficiency and credibility.

The fictionality of the trial objects and procedures contributes to overcoming global disappointment caused by international law bodies inaction concerning the atrocities committed in Gaza. Fiction proves efficient in surpassing reality's ordeals and relieving humanity's desperate conscience. Therefore, the trial reviewed the pleas of each party and the legal norms they utilized in the arguments to clarify the accurate interpretation of legal principles that maintains their integrity. To do so, the trial recalled relevant literature and international judicial precedents that anchored the abstraction and impartiality of international law rules.

In its decision, the virtual court linked the absence of the neutral application of international law to the deprivation of its authority in legal practice. Selectivity of application bares legal rules of the abstraction and generality required for authority, which destabilizes the civilized international legal system and transforms international law into a political weapon that serves solely superpowers. An impartial and neutral application of international law is critical for humanity since international peace cannot be achieved unless justice prevails.

V. Appendices. The Parallel Statute of the Supreme Court of Humanity

Because of the deficiencies of the international judicial system, the United Nations established this virtual Court to stand as a shelter for defending the fundamental universal values of humanity. It shall be constituted and functioned under the following provisions.

Art 1. The Supreme Court of Humanity is the virtual judicial organ of the United Nations that governs virtual litigations between virtual parties and values.

Art 2. The aim of the Court is to maintain world peace and security under the Charter of the United Nations by providing a global virtual judicial platform to defend the integrity of humanity's values.

Art 3. The jurisdiction of the Court is universal. It is competent to settle litigations that include violations of fundamental humanitarian values that threaten peaceful cohabitation.

Art 4. The Court bench consists of three judges. The virtual nature of the Court does not imply the human nature of the judges; values, slogans, and theories are admitted as judges. The appointment of the judges should be suitable to the subject of each litigation and the nature of the parties.

Art 5. The Court has a Registrar's office. Litigation parties should submit their statements to the Registrar, who is entitled to refer them to the Bench to be heard during the fixed period. These statements of claims include each party's pleading, arguments, and requests for remedy. They should be written in formal legal language and comply with the discipline requirements of judicial documents.

Art 6. The Court conducts the hearings in public. Litigation parties should express their pleadings before the Bench and each other. Each party is obliged to submit an official copy of its statement and documents to the other party.

Art 7. Litigation parties might appoint an attorney to stand for them before the Court. It is not an obligation because the Court should admit the statement and conduct the hearings regardless of this appointment upon the presence of the litigation parties.

Art 8. After the hearings, the Bench should give their judgment on the litigation. It should include the judges' names, dates, factual backgrounds, the statements that express the parties' admittance of the court jurisdiction, the applicable legislation, the reasons for the judges' appointment, the judicial proceedings, each party's arguments, the judicial discussion of these arguments, and the conclusion.

Art 9. The judges should submit their judgment reasoning within a period of thirty (30) days after giving the judgment. Their judgment should be in compliance with the legislation that governs the litigation.

Art 10. The Court judgments are absolute. Litigation parties are not permitted to appeal them before other judicial bodies.

International Crime and Armed Conflict Reconstruction Adjudication Practices: A Human Rights-Based Analysis of Sierra Leone and Western Darfur Experiences

by Harry Amankwaah[*]

ABSTRACT: The study explores International Crime and armed conflict reconstruction adjudication practices within the African context. It answers the extent to which both the Special Court for Sierra Leone and the Western Darfur case referral to the International Criminal Court's practices is consistent with Human Right-Based Approach principles, and the deterrent effect of these adjudication measures towards sustainable peace development. It employs a qualitative content analysis approach and a case study design respectively. It reveals the consistency of the Special Court for Sierra Leone practices with human rights principles, whereas the Western Darfur case referral practices appear the opposite. Largely, the Special Court for Sierra Leone's two-pronged approach (the primacy principle) to International Crime adjudication ensures the realization of human rights principles, whereas the International Criminal Court's complementarity principle as applied in Western Darfur obstructs justice. Therefore, the two-pronged approach should be the premium in international criminal justice administration to ensure sustainable peace development.

KEYWORDS: Complementarity Principle; Deterrence; Implementation Practices; Incarceration; International Crime; Primacy Principle.

I. Introduction

The failure of the League of Nations to secure collective security appears to have resulted in the World War II.[1] It is belief that over 50 million people were killed as a result of the war.[2] This outrageous killing is attributed to advanced weaponry usage.[3] Consequently, the idea that all human beings have rights which need to be respected dominated international political discourse after the war.[4] In protecting humanity, the international bills of rights were instituted: The Universal Human Rights Declaration (1948); the International Covenant on Civil and Political Rights (1966), and the International Covenant on Economic, Social and Cultural Rights (1966).[5] The mass killing of people, including those who were not or who were no more participants in the hostilities, appears to have led the institution of these International Human Rights Laws (IHRL).[6]

DOUBLE BLIND PEER REVIEWED ARTICLE

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[1] DONNA I. CROSMAN, THE RISE AND FALL OF THE LEAGUE OF NATIONS (2016), https://www.cfc.force.gc.ca/259/290/301/305/crosman.pdf.

[2] Anca Oltean, *The creation of the League of Nations*, in The European Space: Borders and Issues (M. Brie, A. Stoica, F. Chirodea eds., 2016), at 477-488.

[3] *Id.*

[4] JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE (2013).

[5] MICHAEL HAAS, INTERNATIONAL HUMAN RIGHTS: A COMPREHENSIVE INTRODUCTION (2014), at 179-276.

[6] *Id.*

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Again, the devastating outcome of the World War II seems to have prompted the revisitation of the International Humanitarian Laws (IHL).[7] The mandate of the IHL is mainly to manage the means and methods of warfare and other armed hostilities to reduce killings, human suffering, and to protect public properties.[8] In page 13 of the International Committee of the Red Cross-national implementation database, most treaties and conventions which supports the IHL operations are listed.[9] Essential among them is the 1998 Statute of the International Criminal Court (ICC). The ICC establishes the rule of law measures in armed conflict reconstruction, as well as the means to ensure sustainable peace development.[10] Its mandate is to investigate and prosecute violations of international crime, namely, crime of aggression, war crime, crime against humanity, and the crime of genocide.[11] However, preceding the ICC establishment was the Versailles Treaty and the Nuremberg & Tokyo International Military Tribunals which tried international crime breaches after the First and the Second World War respectively.[12] Yet, literature that comparatively examines the ICC operations and the activities of its preceding tribunals to assert the extent to which they ensure the realization of human rights principles in practice appears underrepresented.

Armed conflict reconstruction entails the mechanism to rebuild war-devastated country or a community to prevent relapse.[13] This involves the use of either retributive, reconciliation or both as the rule of law measure in practice to ensure sustainable peace development.[14] Yet, the ICC and its preceding Tribunals seem to mainly offer a kind of retribution to ensure accountability, justice and security during armed conflict reconstruction.[15] However, how these International Criminal Justice mechanism practices ensure the realization of human rights principles appear not to have been given the due consideration. As such, this study explores the Special Court for Sierra Leone (SCSL) and the Western-Darfur case referral to ICC practices to assert its consistency with HRBA principles as part of international criminal jurisprudence.

II. Statement of the Problem, Objectives of the Study and Methodology

The use of International Criminal Justice mechanism in armed conflict reconstruction adjudication appears not a new creation.[16] The ad hoc International Criminal Tribunal for Yugoslavia (ICTY), the special chamber for East Timor, and the hybrid tribunals for Cambodia and Kosovo is an affirmation. In Africa, a lot appears to have been written with respect to the Ad hoc International Criminal Tribunal for Rwanda (ICTR), the SCSL, and ICC adjudications

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[7] NANCIE PRUD'HOMME, INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW: FROM SEPARATION TO COMPLEMENTARY APPLICATION (2012).
[8] *Id*.
[9] ICRC, *The Domestic Implementation of International Humanitarian Law* (2013), at 13, http://www.icrc.org/ihl-nat.
[10] SRIRAM L. CHANDRA., OLGA MARTIN-ORTEGA, JOHANNA HERMAN, WAR, CONFLICT AND HUMAN RIGHTS THEORY AND PRACTICE (2010), at 161-232.
[11] ICC, *Understanding the International Criminal Court,* Public Information and Documentation Section of the Registry.
[12] CHANDRA, MARTIN-ORTEGA, JOHANNA HERMAN, *supra* note 10, at 214.
[13] Harry Amankwaah, *The Rule of Law and Armed Conflict Reconstruction Implementation Practices: A Human Right-Based Analysis of the Rwandan Experience,* 9(1) COGENT SOCIAL SCIENCES 1 (2023).
[14] *Id*.
[15] NEIL BOITER, ROBERT CRYER, DOCUMENTS ON THE TOKYO INTERNATIONAL MILITARY TRIBUNAL: CHARTER, INDICTMENT AND JUDGEMENT (2008).
[16] *Id*.

in the Democratic Republic of Congo, Sudan, Uganda, and Central African Republic after the surge in armed conflict both before and after the Cold War.[17] However, what appears not to have been thoroughly examined is how the previous tribunal system's practices, and the current ICC operations in Africa could ensure the realization of human rights principles. In this regard, this study comparatively explores the extent to which the SCSL and the Western-Darfur case referral to ICC practices is consistent with HRBA principles to fill this gap in literature. The motive is to add to the existing literature on International Criminal Justice jurisprudence within the African context.

The objective is to explore the consistency of the SCSL and the Western-Darfur case referral to ICC practices with HRBA principles, and to analyze the deterrent effect of these criminal justice adjudication mechanisms on sustainable peace development. It seeks to answer questions on how the SCSL and the Western-Darfur case referral to ICC practices is consistent with HRBA principles, and what deterrent effects do these rule of law and armed conflict reconstruction mechanisms have on sustainable peace development**.** It employs a qualitative content analysis approach, and an explorative case study design respectively.[18] Philosophically, the constructivist paradigm which evaluates the content of what is said to assert reality was adapted.[19] The well-documented secondary material on these subjects both in print and the social media justifies the use of this methodology. On Data Collection, the instrument used was mainly secondary sourced materials (*i.e*., related books and articles), including social media material (precisely the YouTube interviews on this subject).[20] The YouTube interview materials adapted for this study include, 'Dialogues on international Criminal Justice: Brenda J. Hollis – Special Court for Sierra Leone, Wayomo Foundation (2017); Mohamad Fofanah | Human Rights, Transitional Justice, & the Special Court for Sierra Leone, Duke University School of Law (2020); David Crane, Chief Prosecutor of the Special Court for Sierra Leone, UNH Franklin Pierce School of Law (2012); Stephen Rapp, Prosecutor of the Special Court for Sierra | pt. 1, United Nations Association of the …. (2009); War crimes: Alleged militia leader at ICC's first | DW News (2022); ICC Prosecutor Karim A. A. Khan KC briefs the UNSC on the Situation in Darfur, Sudan, IntlCriminalCourt (2023); Outreach report 2008, Darfur, Sudan, IntlCriminalCourt (2009); Exclusive: Sudan's Bashir on ISIL, Darfur and accusations of genocide and war crimes, Global Conversation (2015). Data Analysis: The thematic analysis approach, through the direct comparative content analysis.[21] There were no personal interviews and questionnaires used to solicit responses. This is because of existing wide range of available materials on these armed conflicts, as provided by experts of this field both in print and on the social media.

III. Literature Review

[17] Babafemi Akinrinade, *International Humanitarian Law and the Conflict in Sierra Leone*, 15(2) NOTRE DAME JOURNAL OF LAW, ETHICS & PUBLIC POLICY 391 (2012).

[18] Reza Azarian, *Potentials and Limitations of Comparative Method in Social Sciences*, 1(4) INTERNATIONAL JOURNAL OF HUMANITIES AND SOCIAL SCIENCE 113 (2011).

[19] Jan Schilling, *On the Pragmatic of Qualitative Assessment: Designing the Process for Content Analysis*, 22(1) EUROPEAN JOURNAL OF PSYCHOLOGICAL ASSESSMENT 28 (2006).

[20] *Id*.

[21] KIMBERLY A. NEUENDORF, THE CONTENT ANALYSIS GUIDEBOOK (2002).

International Law appears a regulatory mechanism which binds all States or State parties to a stated interest under international supervision.[22] Available research highlights some special international legislations to regulate armed conflicts and other armed hostilities: the International Human Rights Law, which stresses States positive and negative obligation in respect of safeguarding the freedoms, rights, dignity and the uniqueness of all its subjects at all times; the Humanitarian Law, which is about the rules and regulations that governs the means and methods of wars and other armed conflicts; and the International Criminal Law (ICL), which deals with the rules and regulations that guides international crime breaches adjudication. Literature on the International Criminal Justice (ICJ) presents this system as the vehicle that makes the provisions of ICL operational.[23] It is argued that, the ICTY, the ICTR, the SCSL, the Special Chambers for Serbia and Bosnia-Herzegovina, and other rule of law measures in pre-ICC operations appear the vehicle that were used to try perpetrators of international crimes. The gap therefore, is on how these ICJ measures both in pre and post ICC ensures the realization of human rights principles. In this respect and within the African context, this study uses the Sierra Leonean and the Western-Darfur experiences" to fill this existing gap.

Historically, the Sierra Leonean armed conflict appears to have claimed thousands of innocent lives and displaced tens of thousands of its citizens.[24] However, unlike many other armed conflicts in Africa which are often attributed to ethnicity, the cause of the Sierra Leonean armed conflict seems to differ.[25] The author gives greed, grievances, radicalization of the youth, unemployment and political corruption as the catalyst that appears to have heightened the atrocities perpetrated during the armed conflict. Again, foreign involvement as its causation cannot be discounted.[26] The alliance formed by Charles Taylor and Corporal Foday Sankoh made the conflict to beseem an act of war.[27] They used maiming, sexual violence, random amputation, and systematic killings which was code named 'Operation No Living Thing' as a tool to perpetuate the atrocities.[28] This resulted to the random amputations, rape, killings, displacement of the citizenry and other criminalities with international crime ramifications.[29] Therefore, the SCSL's establishment as ICJ measure to investigate and prosecute perpetrators of international crime appears consistent with international standards.[30] Although, Sierra Leone at the time of the commission of what appeared an international crime violation have been a party to a number of international treaties, covenants and conventions.[31] Notably, the country signed the Convention against Torture and other Cruel inhuman or Degrading Treatment or Punishment in 1965; acceded to the Additional Protocols I & II of the Geneva Convention in 1986; signed and ratified the Rome Statute in 1998 and a host of others. Yet, context specific literature that interrogates the consistency of the SCSL's practices with HRBA principles appear underrepresented.

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[22] *ABC of International Law, Swiss Federal Department of Foreign Affairs* (FDFA) (2009), https://www.eda.admin.ch.
[23] *Id*.
[24] *Id*.
[25] *Id*.
[26] ALEX DE WALL, THE CONFLICT IN DARFUR SUDAN: BACKGROUND AND OVERVIEW (2022), at 120-160.
[27] *Id*.
[28] *Id*., at 87-90.
[29] *Id*.
[30] *Id*.
[31] MOHAMED SUMA, SIERRA LEONE JUSTICE SECTOR AND THE RULE OF LAW (2014).

The Western Darfur armed conflict on the other hand appears a counter-insurgency operation.[32] The use of invisible forces which appears to be made up of the regular Sudanese soldiers and its auxiliary militia were alleged to have used chemical weapon, rape and other inhuman treatment against the citizenry resulting in mass killings.[33] The perceived grave crimes committed against the citizenry seems to have prompted United Nation Security Council's referral of the situation to the ICC under Resolution 1593 to investigate and prosecute perpetrators.[34] In line with ICC's complementarity principle, the Sudanese government instituted a Special Court for Darfur (SCD) to undertake an internal investigation and prosecution of perpetrators of international crime.[35] However, the SCD was accused to be mainly interested in sheep stealing cases, and reluctant to its core mandate.[36] Yet, whether the SCD's establishment is ostensibly a tool to prevent an international trial, or a way to evade justice appears not to have been thoroughly examined. Sudan amidst these legal inconsistencies appear not a party to most of the international laws, treaties and conventions.[37] Although, it lately signed the Rome Statute of the International Criminal Court in 2000, but yet to ratify most of the Geneva Conventions.[38] This notwithstanding, the ICL appears to bind all state parties regardless of affiliations.[39] Also, the common art. 3 of the Geneva Conventions appears to prohibit internal armed violence and other armed hostilities of all sorts against life and properties.[40] Despite, literature that subjects the Darfur adjudication practices by the ICC to a human right-based scrutiny seems underrepresented – hence, this study.

In both armed conflicts, literature evidence the use of peace accord or peace agreement as an integral component of its reconstruction. This appears the official negotiation between international actors and conflicting parties to bring hostilities to an end to promote sustainable peace development.[41] In this regard, the Lomé peace accord and the Abuja peace agreement I & II were initiated to bring lasting peace in Sierra Leone.[42] However, literature on this subject see the Lomé peace agreement which gave some level of constitutional concessions to the RUF rebels to be inconsistent with international practice. Its further lament on aspects of the accord which granted all combatants absolute Amnesty to be contrary with human right laws. Equally, existing literature shows that the Western Darfur armed conflict reconstruction brought in the Darfur Peace Agreement (DPA).[43] Regardless, the DPA seem dead on arrival because of its refusal to address the land tenure problem prominent to the conflict.[44] Again, the DPA appears to have been strategically used as a peace measure by the Sudanese government to evade justice.[45] However, how these accord as armed conflict reconstruction measure is consistent with HRBA principles appears not to have been thoroughly examined - hence this study.

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[32] Pablo Castillo, *Rethinking Deterrence: The International Criminal Court in Sudan,* 13 UNISCI DISCUSSION PAPERS (2007), https://ciaotest.cc.columbia.edu/olj/unisci/unisj004/unisci004/pdf.
[33] JOHAN BROSCHE, DARFUR-DIMENSIONS AND DILEMMAS OF A COMPLEX SITUATION (2008).
[34] *Id*.
[35] *Id*., at 132.
[36] *Id*.
[37] *Id*.
[38] Human Rights Library, *Ratification of International Human Rights Treaties – Sudan*, https://www.hrlibrary.umn.edu/research/ratification-sudan.html.
[39] *Id*.
[40] *Id*.
[41] Hideaki Shinoda, PEACEBUILDING BY THE RULE OF LAW: AN EXAMINATION OF INTERVENTION IN THE FORM OF INTERNATIONAL TRIBUNAL (2001).
[42] *Id*.
[43] *Id*.
[44] *Id*.
[45] *Id*.

The HRBA requires all international and national conventions, treaties, policies, laws and practices to further the realization of International Human Rights principles.[46] Research shows that the HRBA is anchored on five cardinal principles as its parameter for measurement: 1) respect for the rule of law; 2) accountability; 3) participation; 4) non-discrimination and; 5) empowerment.[47] These principles of integration in social policy practice implementation appear to provide the requisite of knowledge, values, and skills needed to promote a sustainable development.[48] However, existing literature on how these HRBA principles could be integrated in ICJ jurisprudence during armed conflict reconstruction to impact sustainable peace development appears underrepresented, creating a significant gap. The rule of law principle of the HRBA appears a practice which seeks to create an enabling environment that allows the supremacy of acceptable and promulgated laws to function as standards in both international and national crime adjudications.[49] It strict adherence of the equality before the law, certainty and respect for fundamental human rights principles appear fundamental to sustainable peace development. Again, the ICCPR arts. 14 and 16 stresses the due process of law, and the rights to fair hearing by a competent, independent and impartial court respectively.[50] Largely, this principle appears a remarkable feature in international crime adjudication and armed conflict reconstruction practices.[51] Yet, literature that explores its adherence in practice towards sustainable peace development within the African context appears underrepresented. This study therefore seeks to interrogates the extent to which both the SCSL and ICC in Western Darfur satisfy this philosophy – a significant gap this study fills.

The Accountability principle of the HRBA on the other hand, emphasizes transparency and clarity of rules and procedure as well as the proactiveness to protect victims of crime infringements.[52] It further stresses the deserved punishment regime for crime violators to ensure justice towards sustainable peace development.[53] This involves prompt information distribution from justice policy formulators through to victims.[54] This principle in practice seeks to promote peace, safety, and security.[55] As a measure of accountability, the SCSL appears to have tried a number of landmark cases, inclusive is *the Prosecutor v Taylor* with case SCSL-03-0I-A.[56] Overall, it appears the international division of the SCSL indicted 13 people and arrested and tried 12 of them.[57] Although, statistics showing the trials of the domestic courts appears unaccounted. On the contrary, the ICC in Western Darfur in almost over a decade of its inception tried only Ali Kushayb.[58] In the mix of these legal accountability inconsistencies,

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[46] UNRISD, *The Human Rights-Based Approach to Social Protection* (2016), www.unrisd.org.

[47] GIFT MUAMI SOTONYE-FRANK, A CRITICAL EXAMINATION OF THE SUITABILITY OF A HUMAN RIGHTS-BASED APPROACH FOR IMPLEMENTING GIRLS' RIGHT TO EDUCATION IN NIGERIA (2015).

[48] FANNY DUFVENMARK, RIGHTS-BASED APPROACH TO PROGRAMMING (2015).

[49] *Id*.

[50] *Id*., at 116-117.

[51] *Id*.

[52] *Id*.

[53] *Id*.

[54] *Id*.

[55] *Id*.

[56] International Criminal Law, *Accessory Library – Special Court for Sierra Leone Rejects "Special Direction" Requirement for Aiding and Abetting violations of International Law,* Prosecutor v Taylor, Case No. SCL-30-01-A, Judgment (Spec. ct. for Sierra Leone Sept. 26, 2013).

[57] Thierry Cruvellier, *The Special Court for Sierra Leone: The First Eighteen Months* (2002) https://www.ictj.org/sites/default/files/ICTJ-sierraleone-special-court-2004-English.pdf.

[58] *Id*.

literature which specifically analyses its human rights implications on armed conflict reconstruction in Africa appears scant.[59]

The Participation principle of the HRBA principally stresses stakeholder involvement in decision making process during policy implementation practices.[60] This inclusion principle in justice delivery is to help protect the vulnerable and the marginalize in society against structural injustices.[61] This principle appears armed conflict reconstruction and sustainable peace development imperative.[62] Yet, the extent to which stakeholder inclusiveness in ICJ practices impact sustainable peace development in Africa appears not to have received the needed attention in international criminal justice jurisprudence. Although, existing literature on the SCSL practices show the extent to which it involved stakeholders in its activities by instituting international court division to try high-profile cases, the domestic court for low-level trials and a reconciliation commission to settle non legal issues.[63] However, how the ICC which operated from the Hague in trying perpetrators of international crime in Western Darfur ensured participation is yet to be studied. This study therefore examines the impact stakeholder participation and inclusion in ICJ practices have on the realization of human rights and armed conflict reconstruction towards sustainable peace development.

The Non-discrimination and equality principle emphasizes equal treatment for all, regardless of any prevailing circumstances.[64] Therefore, the extent to which the ICJ system to adjudicate international crime satisfies this principle to ensure justice is paramount to this study. Particularly, ICC's jurisprudence in respect of its complementarity principle emphasizes the trial of mainly high-level perpetrators of international crime.[65] In this regard, ICC's mandate in the Western Darfur was to primarily tried high-level perpetrators as in the case of Ali Kushayb, by this principle a huge number of other perceived low-level perpetrators appears to have escaped justice.[66] Therefore, the extent to which this principle in practice is consistent with the non-discrimination as a non-derogatory right in respect of ICJ's jurisprudence in Africa needs further scrutiny. Although, available studies show the extent to which the SCSL practices seems consistent with the Non-discrimination and equality philosophy of the HRBA.[67] Yet, a comparable literature which seeks to do a comparative right-based analysis of how the SCSL and ICC in Darfur trials satisfy the non-discrimination principle appears underrepresented - this creates a significant gap in literature to be filled.

The HRBA Empowerment principle emphasizes the need to enlighten the citizenry as right-holders on why, how and when to claim or assert their human rights in case of infringement.[68] The authors further stress the need for governments as duty-bearers to be exposed to human rights principles, freedoms, obligations, as well as its responsibility to protect same. This appears a necessity for both the government and the individual to fully participate in social policy implementation practices.[69] It seeks to embolden victims as right-holders to be

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[59] *Id*.
[60] *Id*.
[61] Sulaiman O. Rabin, *The Philosophy of Punishment as Attainable under English and Islamic Laws,* 4(4) INTERNATIONAL JOURNAL OF BUSINESS & LAW RESEARCH 67 (2016).
[62] *Id*.
[63] *Id*.
[64] *Id*.
[65] Linda E. Carter, *The Principle of Complementarity and the International Criminal Court: The Role of Ne Bis in Idem*, 8(1) Santa Clara Journal of International Law 165 (2010).
[66] *Id*.
[67] *Id*.
[68] *Id*.
[69] *Id*.

able to access justice.[70] However, a context specific literature on the extent to which ICJ practices in Africa empowers victims as right-holders to assert their rights in times of armed conflict reconstruction to ensure sustainable peace development appears not to have been thoroughly examined – hence this study.

IV. The Theoretical Underpinnings of the Study: The Deterrence Theory; The Denunciation Theory and the Theory of Incapacitation

These three public safety theories support punishment regime as a means of crime prevention and justice delivery. As such, these theories have been adapted to underpin this study on International Criminal Justice adjudication jurisprudence. Justifiably, existing research affirms their usage as a valid lens to view national criminal justice policy legislations.[71] Yet, a comparable idea that these theories when sequentially integrated could be adapted to study International Crime adjudication and armed conflict reconstruction practices within the African context appears not to have been thoroughly examined.

On the Deterrence theory, it stresses threat of sanctions to crime violators as a means to prevent the criminal from committing crime, and to discourage other intentions.[72] There are both micro-and-macro-level linkage of this theory to crime and punishment.[73] The micro-level crime liability deals with the assumption that criminals caught and punished will be deterred from future criminal activities, whiles the macro-level predicts the deterrent impact of this theory on the general population.[74] This seems consistent with the basic justification for instituting International Criminal Justice system whose intent is to deter perpetration of international crimes.[75] Punishment which is sufficiently certain and severe appears to make rational beings understand that crime does not pay and the cost of criminal violence outweighs its benefits.[76]

This theory appears to be built principally around three cardinal principles: certainty, celerity and Severity.[77] This is often called the three-pronged approach to criminal justice delivery.[78] Briefly, the certainty principle seems to echoes the assurance that criminal perpetrators will be apprehended through the institution of appropriate enforcement policy mechanisms; the celerity principle on the other hand, emphasizes the immediate or swift imposition of punishment as a consequence of one's criminal action; whiles the severity principle stresses crime commitment and its proportional corresponding punishment.[79] Its

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[70] *Id*.
[71] Ben Johnson, *Do Criminal Laws Deter Crime? Deterrence Theory in Criminal Justice: A Primer,* MN HOUSE RESEARCH (2019).
[72] *Id*., at 63-73.
[73] Kelli D. Tomlison, *An Explanation of Deterrence Theory: Where Do We Stand? Federal Probation,* 80(3) UNITED STATES COURTS 33 (2016).
[74] *Id*.
[75] Yvonne M. Dutton, *Crime and punishment: Assessing Deterrence Theory in the Context of Somalia Piracy,* 46(1) THE GEO. WASH. INT'L. REV 607 (2014).
[76] Sheila R. Maxwell, Kevin M. Gary, *Deterrence: Testing the Effects of Perceived Sanction Certainty on Probation Violations*, 70(2) SOCIOLOGICAL INQUIRY 117 (2000).
[77] Daniel S. Nagain, *Integrating Celerity, Impulsivity and Extra-Legal Sanction Threats into a Model of General Deterrence: Theory and Evidence,* 39(4) CRIMINOLOGY 865 (2001).
[78] *Id*.
[79] *Id*.

relevance appears to be more of crime prevention.[80] Yet, how its integration in international criminal justice system could impact sustainable peace development appears underrepresented. Particularly, the celerity principle's which emphasizes speedy imposition of punishment appears inconsistent with the due process of law.[81] Again, how the deterrence theory principles impact International Criminal Tribunal or Court systems in respect of international crimes infringement trials and its consequence on sustainable peace development within the African context appears not to have been thoroughly examined.

The Denunciation Theory (DT) emphasizes the need to openly punish criminals to suffer their wrong doings.[82] It stresses the need to punish the criminal offender publicly to deter others from committing similar offence due to societal stigmatization.[83] This theory trumpets societal support for punishment infliction to criminals as a means to register its detestation.[84] Research shows that criminals who suffer from the consequences of their wrong doing compensates the larger society.[85] However, the DT has been criticised for its perpetual interest in punishment against crime prevention and corrections.[86] This makes the denunciation theory which is premiss on societal revulsion to appear a challenge.[87] This appears not enough to consider deterrence and denunciation theories in absolute terms in crime prevention, but incapacitating the criminal is also remarkable.[88]

The Incapacitation Theory stresses punishment that removes the criminal from his or her crime zone.[89] This theory according to Bolton, is to disable the perpetrator's influence, power, freedom and capability of continual crime commission. This incarceration principle appears a means of punishment to instil fear that deters the criminal from future intentions of committing crime.[90] However, this theory appears to have been abandoned in international criminal jurisprudence.[91] Instead, the deterrence theory appears to dominate the political discourse on punishment within the international circles since the inception of the International Criminal Court.[92] Regardless of its dominance, its celerity principle seems to have been plagued with jurisprudential challenge in respect of its impediment to the due process of law.[93] Again, the denunciation theory which emphasizes punishment infliction as a means to register societal detestation appears to have been partially applied in Rwanda with respect to the ICTR and the Gacaca Tribunal system.[94] However, how the convergence and integrative synthesis of these theories in international criminal justice delivery impact sustainable peace in Africa appears not to have been clearly articulated, hence, this application.

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[80] Anthony Ellis, *A Deterrence Theory of punishment,* 53(212) THE PHILOSOPHICAL QUARTERLY 338 (2003).
[81] *Id*.
[82] Frederick M. Lawrence, *Punish hates: Bias Crimes under American Law* (1994). Harvard University Press.
[83] *Id*.
[84] *Id*., 67-75.
[85] *Id*.
[86] Gordon Bazemore & Mark Umbreit, *A comparison of four restorative conferencing models.* Office of juvenile justice and delinquency prevention, (2001), https://www.ojp.gov/pdffiles1/ojjdp/184738.pdf
[87] *Id*.
[88] *Id*.
[89] Tessa Bolton, *Potential and Peril: Incapacitation in the new age of International Criminal Law* (2015), A thesis submitted on partial fulfilment of the requirement for the Degree of Mater of Law. The University of Britain Columbia.
[90] Prashna Samadar, *Theories of Punishment*, 6(4). JETIR (2019), at 328-330.
[91] *Id*.
[92] *Id*.
[93] *Id*.
[94] *Id*.

V. Conceptual Framework

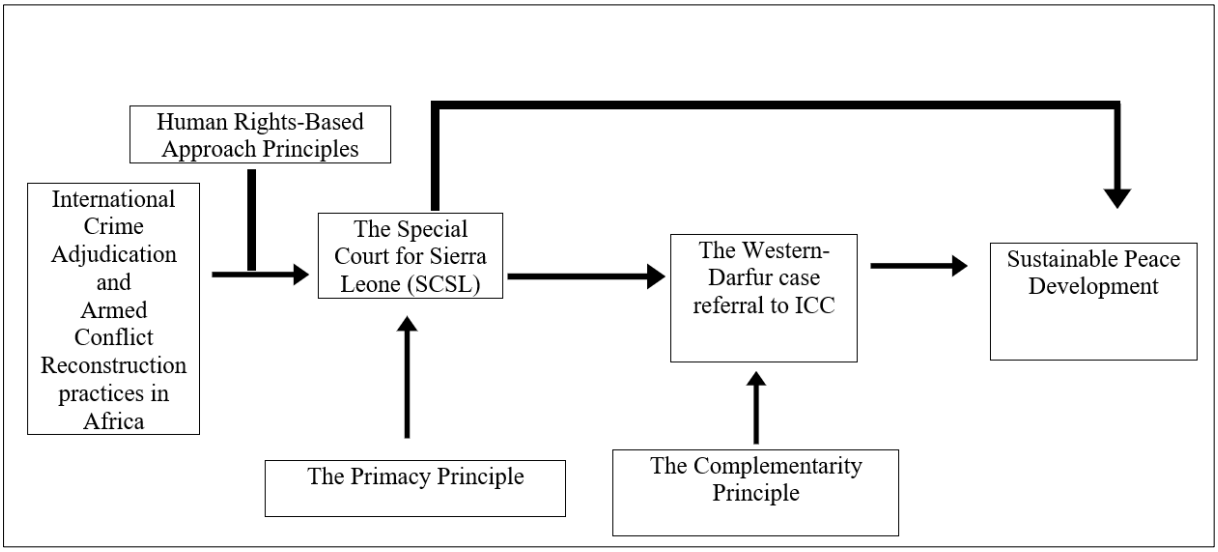

Figure 1.1 (Source: Researcher's construct, 2023)

The Figure 1.1 above conceptually summarizes the phenomenon being studied. It explains the variables in the study as follows: International Crime Adjudication and Armed Conflict Reconstruction Practices as the Independent Variable; the HRBA Principles as the Moderating Variable; the SCSL and The Western-Darfur case referral to ICC as Multiple Mediator Variables; both the Primacy and the Complementarity Principles as Control Variables and Sustainable Peace Development as the Dependent Variable.

VI. Findings

This section presents the findings on the extent to which the SCSL and the Western Darfur case referral to ICC practices is consistent with HRBA principles; and the deterrent effect of these adjudication practices on sustainable peace development.

A. On SCSL and Western Darfur Case Referral to ICC practices

The findings reveal that the SCSL was instituted to adjudicate international crime breaches in the aftermath of the about 10 years old armed conflict in Sierra Leone. According to analyst,

the court's establishment was a partnership between the Sierra Leonean government and the UN Security Council. It was a request by the government to the international community to aid the trial of perpetrators suspected to have violated the ICL during the armed conflict. The findings further reveal that the court was hybrid in nature with a limited mandate and mainly situated in Sierra Leone. It used both international and national laws in its prosecutorial mandate. As recorded, the court was composed of an International Division which had a superior mandate to try the high-level perpetrators of international crime, whereas the National court focused on the trial of low-level perpetrators. Its staff were appointed from both within and outside Sierra Leone. In all, the International Division indicted 13 high-level perpetrators but was able to try 12 of them with 1 on the loose. It convicted Charles Taylor whose trial happened in the Hague. Analyst calls this legal system 'the Dural track' approach. They see this approach as legal empowerment to the SCSL to be able to prosecute both high-level and low-level perpetrators in accordance with their level of perpetration. Besides, the findings report of a detachment to the court which is the Truth and Reconciliation Commission that arbitrated non-legal issues. It settled cases such as children who took part in the hostilities and committed atrocities but who by virtue of the ages at the time of the war could not be tried by the SCSL. This legal empowerment according to analyst helped brought the war to a closure and justice to victims.

On Western Darfur case referral to ICC practices, the findings reveal a countless allegation of human rights infringement, rape charges and other war crime related cases believed to have been largely perpetrated by the government and its affiliates. Analyst of the armed conflict belief the result is the mass killings and loss of properties within the region. Therefore, the passage of Resolution 1593 by UN Security Council to refer the situation to the ICC. The court as the findings shows was situated and operated from the Hague. The ICC through their investigations indicted about 4 out of the 51 inductees referred to it by the United Nation Security Council. Notable among them was Ali Kushayb the leader of the Janjaweed militia. Analyst pointed out that the complexities and the dynamics of the armed conflict hindered the effective operation of the court.

B. The Deterrent Effects of the SCSL and the Western Darfur Case Referral to the ICC

The findings on the deterrent nature of the SCSL was basically premise on the assertion of justice the people want versus justice the International Community seeks contradiction. Analyst belief this could best explain the deterrent effect of the SCSL. Reports on this armed conflict presents the justice the people want to be the immediate incarceration of the guilt to satisfy the quest of the larger society. The justice the International Community seeks on the other hand, emphasizes the assurance that crime perpetrators will be arrested and accorded the due sanction through the due process of law. This notwithstanding, the findings revealed that the SCSL mode of indictment towards conviction of perpetrators of international crime married the two. Yet, its approach appeared to be a somewhat problematic and grossly defective. Particularly, the use of the joint criminal enterprise as a tool for criminal indictment under SCSL. Specifically, its three mode of crime liability towards conviction: the sharing of basic intent; of which being a member of an organisation that condones crime or where crime commission is systemic to that particular institution; and the foreseeability test, appeared the grounds where perpetrators were convicted. 80% of the SCSL international crime convictions according to research came as a result of the JCE.

On Western Darfur the desire to see the perpetrators of international crime jailed appears the ultimate. It is clear from the findings that the victims wanted the perpetrators prosecuted and immediate incarceration by the ICC. Therefore, analyst of the armed conflict sees the almost 15 years delay before the start of prosecution of perpetrators by the ICC as legal obstruction. They belief the trial of Ali Kushayb the leader of the Janjaweed militia, President Bashir and Ahmed Haroun to be camouflage. According to analyst, the complementarity principle of ICC has not been able to bring the armed conflict to a closure. Analyst belief that this ICJ system has not brought the ultimate justice to victims.

VII. Discussions

How consistent is the SCSL and the Western-Darfur case referral to ICC in practice is with HRBA principles: The SCSL establishment as a partnership between the Sierra Leonean government and the international community promotes stakeholder inclusiveness consistent with the participation principle of the HRBA.[95] Again, the SCSL's reliance on both domestic and international criminal laws for the adjudication of international crime and other crimes is in conformity with the rule of law principle.[96] Also, the SCSL's indictment of about 12 high-level perpetrators, and the onward conviction of 8 of them satisfies the accountability principle.[97] Particularly, its landmark case which led to the conviction of Charles Taylor in the Hague is consistent with the non-discrimination and equality principle.[98] The SCSL's Dural track approach which offered a unique opportunity for victims of both international crime and other form of criminal violations to seek justice appeared consistent with the empowerment philosophy of the HRBA.[99] In sum, the SCSL adherence to the above HRBA principles furthers the realization of human rights principles.[100]

Regarding the Western Darfur case referral to ICC, both the court's location and its operation opposes the participation principle of the HRBA.[101] Specifically, the court situated in the Hague obstructs stakeholder participation.[102] Again, the composition of judicial staff to adjudicate the cases in practice seems to contradict the HRBA's transparency principle.[103] Also, the disregard for ICC indictment procedure by the Sudanese government citing political witch-hunting by the West as its basis is inconsistent with HRBA principle of the rule of law.[104] The inability of the ICC to deliver on its prosecutorial mandate in almost over a decade from its inception contravenes the accountability principle of the HRBA.[105] Regardless, the landmark case in respect of Ali Kushayb the leader of the Janjaweed militia and the indictment of President Bashir satisfies the non-discrimination and equality principle of the HRBA.[106] However, the complexities associate with the Western-Darfur armed conflict in respect of

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[95] *Id*.
[96] *Id*.
[97] SCSL, International Criminal Law – *Accessory library – Special Court for Sierra Leone Rejects* (2013).
[98] SCSL, The Prosecutor v Taylor, Case No. SCL-30-01-A, Judgment (Sept. 26, 2013).
[99] *Id*.
[100] *Id*.
[101] *Id*., para. 247.
[102] *Id*.
[103] *Id*.
[104] Gus Waschefort, *Africa and International Humanitarian Law: The More Things Change, the More They Stay the Same; War and Security at Sea,* 98(2) INTERNATIONAL REVIEW OF THE RED CROSS 593 (2016).
[105] *Id*.
[106] *Id*.

human rights excesses, and how best to claim it is inconsistent with the empowerment philosophy of the HRBA.[107] This frowns on the HRBA requirement which mandates all international laws and practices to further the realization of International Human Rights principles.[108]

On the deterrent effects of these international crime adjudication variables towards sustainable peace development: The imprisonment regime for perpetrators of international crimes like Charles Taylor appears to be consistent with the philosophies underpinning both the denunciation and the incapacitation theories.[109] These theories stress the need to punish the criminal publicly to deter others from committing similar offence due to societal stigmatization.[110] This is consistent with the celerity principle of the deterrence theory which emphasizes swift imposition of punishment.[111] Yet, the Western Darfur case referral to ICC dealings with Ali Kushayb's prosecution, which processes and procedure delayed the case for over 10 years contradicts the celerity principle and other philosophies underpinning the adapted theories.[112] Largely, arts. 6, paras. 1 and 3 of the Rome Statute presents the required mode of indictment for international crimes.[113] Particularly, art. 6, para. 1 stresses the indictment for perpetrators of direct participation in planning and execution, whiles art. 6, para. 3 emphasizes threat of punishment for refusal of superiors to control their subordinates during hostilities.[114] However, the use of the complementarity principle by the Sudanese government in the Darfur region appears to mainly satisfy art. 6, para. 3, which stresses threat of sanctions to deter other crime violators; yet, this application in practice beseems a cover-up.[115] The SCSL'S primacy philosophy on the other hand appears consistent with both arts. 6, paras 1 and 3.[116] Again, the SCSL practices appear to conform with International Covenant on Civil and Political Rights (ICCPR) arts. 14 and 16, which stresses adherence to the due process of law to denounce and incapacitate criminal perpetrators, whiles the Western Darfur case referral to ICC practices in this face is opposite.[117]

VIII. Conclusion

Largely, the SCSL primacy principle as the rule of law measure in armed conflict reconstruction in Serria Leone ensured sustainable peace development, whereas the ICC complementarity principle as applied in Western Darfur appears a tool to either evade or obstruct justice. Therefore, the SCSL's dual approach to investigate and prosecute perpetrators of international crime ensures accountability for all. Particularly, its participatory roles accorded both the international and domestic courts to function. This dual mandate application satisfies the cardinal principles underpinning the HRBA, whiles the complementarity principle impedes the realisation of human rights principles. On the deterrent effects these international crime

[107] *Id*.
[108] *Id*.
[109] *Id*..
[110] *Id*.
[111] *Id*.
[112] *Id*.
[113] Arts. 6, paras. 1 and 3 of the Rome Statute.
[114] *Id*.
[115] *Id*.
[116] *Id*.
[117] MICHAEL HAAS, INTERNATIONAL HUMAN RIGHTS: A COMPREHENSIVE INTRODUCTION (2014), at. 116; see also arts. 14 and 16 ICCPR.

adjudication measures have on sustainable peace development, the sequential integration of the denunciation and incarceration theories which supports the use of punishment regime of imprisonment to satisfy the quest of the citizens appears the needful. The motive is to either discourage or prevent the criminal and others who may be nurturing similar intentions from perpetrating same. However, the deterrence theory which stresses threat of sanctions to discourage criminality is largely the foundation of ICC operations. Therefore, the amalgamation of both threat of sanctions and the actual execution of punishment appears the way forward towards sustainable peace development. This will accord the necessary sanctions to both low-level and high-level perpetrators involve in all levels of perpetration of criminalities to deter and satisfy societal interest. This appears to be mainly consistent with the primacy philosophy in practice.

IX. Recommendation

This study recommends a two-pronged approach to International Criminal Justice adjudication. It mainly supports the primacy principles adherence to International Crime investigations and prosecutions. This approach seems to be more of a top-down-bottom-up synthesis approach. It simultaneously vests international crime investigations and prosecutorial powers to both a constituted International Court system and a legally backed domestic courts. This promotes the realization of human rights principles. By this approach, both high-level and low-level perpetrators of international crime can be prosecuted in accordance with their level of perpetration. This appears to satisfy the non-discrimination principle as a non-derogatory right in international criminal justice delivery. Whereas the complementarity principle principally appears a top-down approach and discriminatory. The two-pronged approach therefore appears to have a kind of a due diligence mechanism to provide a standard of care to all citizens in armed conflict reconstruction. Therefore, a further study on "ICC's complementarity principle: A tool for justice evasion or sustainable peace development?" will help put this study in proper perspective.

X. Disclosure statement

There is no potential conflict of interest associated to this study.

XI. Data Availability Statement

The data supporting the findings of this study are available within the article.

XII. Notes

1. "International crime adjudication and armed conflict reconstruction practices" as used in this study defines the rule of law measures use to settle international crime breaches during armed conflict resolution to ensure sustainable peace development.
2. The complimentarily principle emphasizes sequential application of international crime justice delivery mechanism, where the affected State is given the greater leeway to lead the

investigation and prosecution of high-level perpetrators, however, the failure or the unwillingness on the part of the affected State to do so brings in the ICC.
3. The primacy principle is about a dual usage of International Criminal Justice system where the international division of an established court is given the supreme mandate to lead the investigations and prosecutions of mainly high-lever perpetration of international crimes and at the same time a somewhat participatory role is given to the domestic courts, tribunals and reconciliatory bodies to investigate and prosecute low-level perpetrators of other forms of criminalities.

The Responsibility of ISIS for Crimes against the Êzîdîs

by Hoshman Ismail[*]

ABSTRACT: This article delves into the accountability of ISIS for the atrocities inflicted upon the Êzîdîs following the initiation of a military offensive in the Şingal region on August 3rd, 2014. It draws upon desk research pertaining to these crimes and scrutinizes the accusations leveled against ISIS within the framework of the Genocide Convention. Therefore, the aim of this article is not to re-evaluate the legal principles constituting the essential elements of genocide, but rather to employ them as a lens for analysis. The conclusion drawn from this examination is that the actions perpetrated constitute genocide.

KEYWORDS: Accountability; Genocide; ISIS; Responsibility; Sinjar; Yezidis.

1. Introduction

This article examines the responsibility of ISIS for the crimes committed against the Êzîdîs after the launch of a military campaign on the Şingal region on the 3rd August 2014. It relies on desk research related to such crimes. The accusations directed at ISIS are examined within the law of the Genocide Convention.[1] Thus, the purpose of this article is not to re-assess the legal concepts constituting the legal ingredients of genocide but to use them as a tool in the examination. The article concludes that the crimes have amounted to genocide.

The article begins by providing a brief history of ISIS. It then briefly explains the nature of the ISIS attack against the Êzîdîs and the response from the international community. These data and sources are based on reports, witness statements taken by other researchers, secondary data from media outlets, and the empirical study as presented below. This is followed by an analysis of the law concerning genocide. The analysis is supported by the *travaux préparatoires* of the Genocide Convention,[2] genocide cases adjudicated by the international tribunals, in particular the International Criminal Tribunal for Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) (hereinafter the ad hoc tribunals) such as *Akayesu*,[3] and other relevant statutes and academic studies.[4] Attention is paid to the essential ingredients constituting the crime of genocide, especially *dolus specialis,* which characterises this type of crime. Then, the article examines the data, obtained mainly from desk research, in light of each provision enumerated in Article II of the Genocide Convention.[5] In the penultimate

DOUBLE BLIND PEER REVIEWED ARTICLE

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[1] Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS (adopted Dec. 9, 1948, entered into force Jan. 12, 1951) (hereinafter Genocide Convention).

[2] HIRAD ABTAHI, PHILIPPA WEBB, THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES (2009)

[3] The first time genocide was analysed was in the case of ICTR, Prosecutor v Akayesu, ICTR-96-4-T, Trial Chamber, Judgment (Sept. 2, 1998).

[4] See the Rome Statute of the International Criminal Court, 2187 UNTS 90 (adopted July 17, 1998, entered into force July 1, 2002) (hereinafter Rome Statute); Statute of the International Criminal Tribunal for the Former Yugoslavia, UN Doc S/RES/827 (adopted on May 25, 1993) (hereinafter ICTY Statute); Statute of the International Criminal Tribunal for Rwanda, UN Doc S/RES/955 (adopted on Nov. 8, 1994) (hereinafter ICTR Statute).

[5] See Art. II of the Genocide Convention (no. 1).

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section, the chapter separately analyses ISIS's specific intention; this is an additional intent pertinent to genocide only. Finally, based on the examination under Article II of the Convention, the article concludes that these crimes amount to genocide.

It should be noted that it is beyond the scope of this thesis to examine the role of each ISIS member separately. Instead, the examination is applied to the crimes committed on and after 3rd August 2014. Importantly, the crime of genocide can be established without bringing the principal perpetrators to trial.[6]

A. General Background

1. ISIS: Roots, Ideology and Formation

The origin of ISIS is complicated and deep-rooted in history. It is believed that ISIS first tried to enter Iraq in 2000.[7] However, this article is concerned with the formation of the organisation when its members first defected from Jabhat al-Nusrah, a branch of al-Qaeda, at the beginning 2013 in Syria.[8] In the middle of 2013, tensions between al-Qaeda groups emerged as Abubaker al-Baghdadi, the then leader of ISIS, requested the al-Nusrah Front, with its sphere of influence in Syria, to operate under his authority.[9] Rejecting the decision by the head of al-Nusrah, Baghdadi seceded from al-Nusrah and formed the Islamic State in Iraq and the Levant (ISIL) in the early of 2013.[10] The ISIL, designated as a terrorist organisation,[11] launched violent attacks and opened multiple frontlines against different groups with a focus on the Kurds, Christians, Shiite sec of Islam and Ezidis in Syria; and, similarly, later in Iraq.[12] On 11th June 2014, under suspicious circumstances, they captured the city of Mosul, the third-largest city in Iraq, and thereby controlled most of the areas of Ninawah and Salahaddin provinces.[13] On 29th June 2014, following significant territorial gains in Iraq and Syria, the group once again changed its name. This time to the "Islamic State" (IS) and declared Abu Bakr al-Baghdadi the Caliph (*Khalifah*).[14] Baghdadi called upon all Muslims to declare allegiance to the new Caliphate (*Khilafah*).[15] He also considered himself as the *Marjah* (literally meaning "source to imitate/follow" or "religious reference")[16] who can issue a *fatwa* (advisory opinions).[17] ISIS used disallowed

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[6] See ICTY, Prosecutor v Perišić, ICTY IT-04-81-T, Trial Chamber, Judgment (Sept. 6, 2011), para. 127.
[7] See Jonathan Schanzer, *Ansar al-Islam: Back in Iraq*, MID EAST QUART. 41 (2004); Human Rights Watch, Ansar al-Islam in Iraqi Kurdistan, www.hrw.org/legacy/backgrounder/mena/ansarbk020503.htm.
[8] Mona Mahmood, Ian Black, *Free Syrian Army Rebels Defect to Islamist Group Jabhat al-Nusra*, THE GUARDIAN (May 8, 2013), www.theguardian.com/world/2013/may/08/free-syrian-army-rebels-defect-islamist-group.
[9] Hamza al-Mustapha, *The al-Nusra Front: From Formation to Dissension*, ARAB CENTER FOR RES & POL'Y STUD (2014). *See* also Charles Lister, *Profiling Jabhat al-Nusra*, 24 BROOKINGS PROJECT ON US RELATIONS WITH THE ISLAMIC WORLD (2016) www.brookings.edu/wp-content/uploads/2016/07/iwr_20160728_profiling_nusra.pdf.
[10] *Id*.
[11] US Department of State, *Foreign Terrorist Organizations*, www.state.gov/foreign-terrorist-organizations/.
[12] Cameron Glenn, Mattisan Rowan *et al.*, *Timeline: the Rise, Spread, and Fall of the Islamic State*, WILSON CENTER (Oct. 28, 2019), www.wilsoncenter.org/article/timeline-the-rise-spread-and-fall-the-islamic-state.
[13] *Id*.
[14] *ISIS Rebels Declare "Islamic State" in Iraq and Syria*, BBC (June 30, 2014), www.bbc.co.uk/news/world-middle-east-28082962.
[15] See ABDEL BARI ATWAN, ISLAMIC STATE: THE DIGITAL CALIPHATE (2019).
[16] *Who was Abu Bakr al-Baghdadi*, BBC (Oct. 28, 2019), www.bbc.co.uk/news/world-middle-east-50200392. See also Imam Mahdi Association of Marjaeya, *What is Marjaeya?*, imam-us.org/what-is-marjaeya.
[17] It is stipulated in the Qur'an that a *fatwa* is a non-binding legal response of a scholar to a very specific question. See Egypt's Dar Al-Ifta, *What is Fatwa?*, https://www.dar-alifta.org/en/fatwa/what-is-fatwa.

practices of *fatwa* not merely to classify people or excommunicate them from a particular society, but also to justify their killing, as is explained below. The ISIS *Marjah* was so strict that it even persecuted Sunnis who did not swear allegiance to it.

Soon after, ISIS, under the leadership of Baghdadi's deputy leader Abu Muslim al Turkmani (a former Ba'athist army officer), launched its attack on Şingal on 3rd August 2014 and took control of the whole region within several hours.[18] The attack was directed from Mosul and the Syrian border.[19] By that time, ISIS had managed to control around 250,000 square kilometres across Iraq and Syria, an area with a population of around 10 million and had selected Raqqa in Syria as its capital.[20] The number of ISIS military forces increased from thousands of people to nearly tens of thousands within several months.[21]

It is important to highlight that, in addition to Iraq and Syria, ISIS comprised of individuals from different parts of the world, who came via Turkey to Syria.[22] Nevertheless, it is widely believed that the backbone of the organisation was from the Iraq Sunni, mainly from Mosul and Anbar governorates of Iraq who felt isolated after the removal of Ba'athists from Iraq in 2003.[23] Following the fall of their party, high ranking and skilled Iraqi military officers from the Sunni community were humiliated.[24] Although the Ba'athist members were mainly nationalists and believed in socialism,[25] they used ISIS as a tool to regain power as they had been struggling to gain support against Iraq's Shiite led authority.[26] Therefore, they joined the defected members of al-Qaeda around 2013 and later, towards the end of 2013, joined ISIS under the leadership Izzat Ibrahim al-Douri who was Saddam Hussein's deputy leader.[27]

The data indicate that the members of ISIS were an assortment of highly skilled individuals and included: doctors, military commanders, engineers, convicted felons, criminals,

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[18] Michaela Martin, Hussein Solomon, *Islamic State: Understanding the Nature of the Beast and Its Funding*, 4(1) CONTEMPORARY REVIEW OF THE MIDDLE EAST 18 (2017); see also Map 20 (Appendix V)

[19] See Valeria Cetorelli, Sereta Ashraph, *A Demographic Documentation of ISIS's Attack on the Yezîdî Village of Kocho*, LSE MIDDLE EAST CENTRE REPORTS (2019), www.un.org/sexualviolenceinconflict/wp-content/uploads/2019/08/report/a-demographic-documentation-of-isiss-attack-on-the-yazidi-village-of-kocho/Cetorelli_Demographic_documentation_ISIS_attack.pdf.

[20] *Islamic State and the Crisis in Iraq and Syria in Maps*, BBC (Mar. 28, 2018), www.bbc.co.uk/news/world-middle-east-27838034; interview with MK (no. 7).

[21] CHARLES R LISTER, THE ISLAMIC STATE: A BRIEF INTRODUCTION (2015).

[22] See also Aaron Stein, *Islamic State Networks in Turkey: Recruitment for the Caliphate*, ATLANTIC COUNCIL (2016), www.atlanticcouncil.org/images/publications/Islamic_State_Networks_in_Turkey_web_1003.pdf.

[23] Mark Fineman, Warren Vieth, Robin Wright, *Dissolving Iraqi Army Seen by Many as a Costly Move*, LOS ANGELES TIMES (Aug. 24, 2003), www.latimes.com/archives/la-xpm-2003-aug-24-fg-iraqarmy24-story.html; Suzanne Goldenberg, *Bremer Refutes Bush's Accusations over Iraqi Army*, THE GUARDIAN (Sept. 4, 2007), www.theguardian.com/world/2007/sep/04/iraq.usa1; see also Isabel Coles, Ned Parker, *How Saddam's Men Help Islamic State Rule*, REUTERS (Dec. 11, 2015), www.reuters.com/investigates/special-report/mideast-crisis-iraq-islamicstate/.

[24] Cherish M. Zinn, *Consequences of Iraqi De-Baathification*, 9(21) CORNELL INT'L AFFAIRS REV (2016).

[25] See Vicken Cheterian, *The Destruction of the Yezidis*, LE MONDE DIPLOMATIQUE (2017), mondediplo.com/2017/01/08yezidis.

[26] See Coles, Parker, *supra* note 23; Malcolm Nance, *ISIS Forces that Now Control Ramadi Are Ex-Baathist Saddam Loyalists*, THE INTERCEPT (June 3, 2015), theintercept.com/2015/06/03/isis-forces-exbaathist-saddam-loyalists.

[27] See *KRG Denies Former Baath Party Figure Al-Douri Died in Erbil*, NRT NEWS (Oct. 30, 2020) www.nrttv.com/En/News.aspx?id=24806&MapID=1; see Zinn, *supra* note 24; Shane Harris, *The Re-Baathification of Iraq*, FOREIGN POLICY (Aug. 21, 2014), foreignpolicy.com/2014/08/21/the-re-baathification-of-iraq.

and the unemployed.[28] They were recruited and trained in different camps in Syria and Iraq, and allegedly in Turkey too.[29] They used a sophisticated media campaign, via the internet, offering: an employment package, a house, sex, drugs, a salary and many more incentives to new comers.[30] At times, they were even provided with the drug Captagon, which made ISIS fighters alert and is known for its combat-boosting effects.[31] The organisation also recruited young women from different parts of the world, including Western countries, to join ISIS as a "jihadist bride" or a "sexual jihad".[32]

Furthermore, the organisation practised their approach to Sunni Islam in all aspects of life; within its authority through issuing *fatwa*.[33] The ISIS approach towards other communities who did not pledge allegiance (*Bay'a*)[34] to them was ruthless. This is evidenced in the case of the Êzîdîs.[35] ISIS categorised its system of punishment according to its interpretation of *Sharī'ah*. Punishments applied to non-Muslims and also some Muslim groups. Punishments of non-Islamic groups, such as Christians and Jews, who are called *Ahlil al-Kitab* (people of the book),[36] differed from that inflicted on the Êzîdîs,[37] who were considered to be *infidels* and devil worshippers, as is outlined below.[38] In an interview, Omer al-Shishani, the Minister of War of ISIS, called them "the filthiest of creatures on earth… We will fight them, we will take their women, their children. They have to come to Islam or they get wiped out".[39] ISIS militants even persecuted Sunnis who did not swear allegiance to the organisation.[40] For example, in

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[28] See Robin Wright, *The Dangerous Dregs of ISIS*, THE NEW YORKER (Apr. 16, 2019), www.newyorker.com/news/dispatch/the-dangerous-dregs-of-isis; Vera Mironova, *Who Are the ISIS People?*, 13(1) PERSPECTIVES ON TERRORISM 33 (2019).

[29] See David Phillips, *ISIS-Turkey Links*, DOCS HOUSE (2017), docs.house.gov/meetings/FA/FA14/20170405/105842/HHRG-115-FA14-Wstate-PhillipsD-20170405-SD001.pdf; Patrick Cockburn, *Turkey Accused of Colluding with ISIS to Oppose Syrian Kurds and Assad following Surprise Release of 49 Hostages*, INDEPENDENT (Sept. 22, 2014), www.independent.co.uk/news/world/middle-east/turkey-accused-of-colluding-with-isis-to-oppose-syrian-kurds-and-assad-following-surprise-release-of-9747394.html.

[30] Anne Speckhard, Molly D Ellenberg, *ISIS in Their Own Words: Recruitment History, Motivations for Joining, Travel, Experiences in ISIS, and Disillusionment over Time – Analysis of 220 In-depth Interviews of ISIS Returnees, Defectors and Prisoners*", 13(1) J. STRATEGIC SECURITY 82 (2020).

[31] *Captagon: Italy Seizes €1bn of Amphetamines "Made to Fund IS*", BBC (July 1, 2020), www.bbc.co.uk/news/world-europe-53254879.

[32] See Arial Ahram, *Sexual Violence and the Making of ISIS*, 57(3) GLOBAL POL & STRATEGY (2015). See also Bo Wang, Bing Fan, *Reflections on the Issue of ISIS*, 9(3) J. M. EAST & ISLAM STUDIES 49 (2015), 57.

[33] See *supra* note 17.

[34] For an explanation of *Bay'a* in Islamic tradition, see Joas Wagemakers, *The Concept of Bay'a in the Islamic State's Ideology*, 9(4) PERSPECTIVES ON TERRORISM 98 (2015); Jim Muir, *Iraq Militant Groups Ordered to Swear ISIS Allegiance*, BBC, (July 2, 2014), www.bbc.co.uk/news/world-middle-east-28123258.

[35] See Cole Bunzel, *From Paper State to Caliphate: The Ideology of the Islamic State*, 19 BROOKINGS CENTER FOR MIDDLE EAST POLICY (2015), www.brookings.edu/wp-content/uploads/2016/06/The-ideology-of-the-Islamic-State.pdf.

[36] For an explanation of "*People of the Book*" see Ismail Albayrak, *The People of the Book in Qur'an*, 47(3) ISLAMIC STUD 301 (2008).

[37] Sarah Myers Raben, *The ISIS Eradication of Christians and Yazidis: Human Trafficking, Genocide, and the Missing International Efforts to Stop It*, REVISTA DE DIREITO INTERNACIONAL (2018), www.publicacoesacademicas.uniceub.br/rdi/article/view/5191/pdf.

[38] See *Islamic State, The Failed Crusade*, 4 DABIQ 1435 (2014), clarionproject.org/docs/islamic-state-isis-magazine-Issue-4-the-failed-crusade.pdf.

[39] See Video 58 (Appendix VI) minute 3:12-3:40

[40] See also Liz Sly, *ISIS: A Catastrophe for Sunnis*, WASHINGTON POST (Nov. 23, 2016), www.washingtonpost.com/sf/world/2016/11/23/isis-a-catastrophe-for-sunnis; Muir, *supra* note 34; Boghani, *supra* note 34.

October 2014, the Sunni Albu Numir tribe suffered a massacre inflicted by ISIS.[41] Similarly, Shiite Muslims were labelled as *Rafzeen* (rejectors) and were also killed for their faith.[42] Only the Sunni communities who had prior arrangements with ISIS commanders were not subject to persecution.[43] Even after the physical demise of ISIS, the conflict continued as some of the Sunni tribes called for revenge against the other Sunni tribes who had joined ISIS.[44] However, according to an ISIS leader, it is impossible for the "devil worshipers and Kurds" to be accommodated under their rule.

Some Islamic scholars disagree with ISIS's interpretation of *Sharī'ah*. They argue that if *Sharī'ah* is relied upon in its pure form, then it is nothing less than the Universal Declaration of Human Rights.[45] In their perspective, ISIS has purposefully misinterpreted *Sharī'ah* to justify their horrific acts against humanity.[46]

2. Êzîdîs: Location, the Crimes and the Aftermath

The Şingal region is located in the north-western Iraq and extends westwards towards the Syrian border, an area mainly populated by the Êzîdîs.[47] On the 2nd August 2014, the ISIS militants intensified bombing on Tel Banat and Tel Qasab from the eastern side, or the Mosul direction, Gir Zerik, Ba'aj the western border of Şingal near the Syrian border, and on Rabia and Zummar from the northern side, or KRG direction.[48] The Êzîdîs raised extra concerns with the Kurdistan Democratic Party (KDP), the authority in the region, however, the KDP claimed that ISIS activities in the area were routine and not specifically directed against the Êzîdîs. At approximately 02:00 AM on 3rd August 2014, ISIS militants raided the surrounding areas of Şingal.[49] By 10 AM, subsequent to the KDP's sudden withdrawal from the area, nearly all the regions fell under ISIS control without resistance.[50] These raids were, allegedly, facilitated by certain local Sunni tribes (CLST), who lived within and around the Êzîdîs and associated with ISIS. By then, the Êzîdîs were surrounded by ISIS on nearly all sides and attacked by CLST

[41] Orla Guerin, *Iraq: Sunni tribe "left for slaughter" by Islamic State*, BBC (Nov. 10, 2014), www.bbc.co.uk/news/world-middle-east-29984668.
[42] Emily Hawley, *ISIS Crimes Against the Shia: The Islamic State's Genocide Against Shia Muslims*, 11(2) GENOCIDE STUD INT'L 160 (2017).
[43] Interview with SMJ (no. 13); interview with KS (no. 13); interview with MK (no. 7). This is further elaborated in Section 3.
[44] Patrick Cockburn, *Mosul's Sunni Residents Face Mass Persecution as ISIS "Collaborators"*, INDEPENDENT (July 13, 2017), www.independent.co.uk/news/world/middle-east/mosul-sunni-residents-isis-collaboration-persecution-city-liberation-iraq-fighters-killed-massacres-a7839716.html; Fazel Hawramy, *Family Survived under ISIS for Two Years by Pretending to be Sunni*, THE GUARDIAN (Dec. 27, 2016) www.theguardian.com/world/2016/dec/27/family-survived-isis-pretending-to-be-sunni-mosul.
[45] See Javaid Rehman, "*Islam and Human Rights: Is Compatibility Achievable between the Sharī"ah and Human Rights Law?*" (2014), dx.doi.org/10.2139/ssrn.2373930.
[46] Mohamed Badar *et al*, *The Radical Application of the Islamist Concept of Takfir*, 31 ARAB LAW QUARTERLY 132 (2017). See also IBN KATHIR, *TAFSIR IBN KATHIR* (2003). According to Ibn Kathir, in verse 6:108 of the *Qur'an*, Allah has forbidden the Prophet Mohammed and his followers from even insulting other religions, as such insults could lead to retaliation.
[47] See Maps 1, 21, 22, 27, 30 and 31 (Appendix V)
[48] Cetorelli, Ashraph, *supra* note 19. See also Maps 30 and 35 (Appendix V)
[49] Cetorelli, Ashraph, *supra* note 19. See also Maps 27, 30, 31 and 32 (Appendix V)
[50] See also UNAMI, *Report on the Protection of Civilians in the Armed Conflict in Iraq: 1 May – 31 October 2015* (Jan. 11, 2016), www.refworld.org/docid/56a09a304.html; Vicken Cheterian, *ISIS Genocide against the Yazidis and Mass Violence in the Middle East,* 48(4) BR J MIDDLE EAST STUD 1 (2019).

from within;[51] ultimately, laying siege to all the Êzîdî villages in the area.[52] Although the Êzîdîs were aware that ISIS had planned the attack, especially after the fall of the city of Mosul and other towns within the Mosul Governorate on and after 10-11th June 2014,[53] they did not know that the attack would take place on 3rd August 2014. The attack resulted in the displacement of the entire Êzîdî community from the region and the commission of multiple crimes against those who could not reach safety in time. It is the purpose of this article to examine the commencement of these crimes firstly in Iraq and then spread throughout Syria and Turkey 60 by reviewing the literature and sources and thus identifying evidence of such crimes.

There has been global condemnation of ISIS's treatment of the Êzîdîs with contention that it amounts to genocide. The United Nation's High Commissioner for Human Rights (UNHCR) found that ISIS's conduct "may amount to genocide".[54] The UN Human Rights Council,[55] the EU Parliament[56] and the US House of Representatives.[57] Also, the British Parliament,[58] the Scottish Parliament,[59] the Canadian House of Commons,[60] the French Senate and National Assembly,[61] the Iraqi government[62] and the Armenian government[63] have all recognised the ISIS crimes against the Êzîdîs as genocide.

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[51] It is necessary to highlight that, before and during the ISIS attack, a state of armed conflict existed in Iraq. The Êzîdî community as a group, at all relevant times, were not part. of the conflict except some individuals who were members of other political parties or armed groups in Iraq. Interview with SMJ refers to the fact that the Êzîdîs were not armed and only certain people were affiliated to KDP. See Toni Pfanner, *Editorial: Conflict in Iraq*, 868 ICRC (2017), www.icrc.org/en/international-review/article/editorial-conflict-iraq-I; James D. Fearon, *Iraq's Civil War*, 86(2) FOREIGN AFFAIRS 2 (2007); World Health Organisation, *Conflict and Humanitarian Crisis in Iraq* (Oct. 24, 2014), www.who.int/hac/crises/irq/iraq_phra_24october2014.pdf.

[52] See *infra*.

[53] Tallha Abdulrazaq, Gareth Stansfield, *The Enemy Within: ISIS and the Conquest of Mosul*, 70(4) MIDDLE EAST J 525 (2016)

[54] See UNAMI, *Report on the Protection of Civilians in the Armed Conflict in Iraq: 1 May – 31 October 2015* (no. 56); UNHRC, *Report of the Office of the United Nations High Commissioner for Human Rights on the Human Rights Situation in Iraq in the Light of Abuses Committed by the so-called Islamic State in Iraq and the Levant and Associated Groups,* UN Doc A/HRC/28/18 (Mar. 27, 2015) (hereinafter Report of HRC on Iraq).

[55] The Independent International Commission of Inquiry on Syria chaired by Paulo Sérgio Pinheiro, on 15th June 2016, concluded that genocide has been committed and it is ongoing, see UNHRC Report: They came to destroy (no. 27); UNAMI, Report no. 56.

[56] European Parliament Resolution, *Systematic mass murder of religious minorities by ISIS*, 2016/2529(RSP), (Feb. 4, 2016), para. M(1).

[57] US Department of State, *Remarks on Daesh and Genocide*, (May 17, 2016), www.youtube.com/watch?v=hrbeMwlBYLY&list=ULBfnkLrnDvvs&index=2693.

[58] Patrick Wintour, *MPs Unanimously Declare Yazidis and Christians Victims of ISIS Genocide*, THE GUARDIAN (Apr. 20, 2016), www.theguardian.com/politics/2016/apr/20/mps-unanimously-declare-yazidis-victims-of-isis-genocide.

[59] Scottish Parliament Motion, *Justice for Yazidi People*, S5M-04130, (Feb. 21, 2017), www.parliament.scot/parliamentarybusiness/28877.aspx?SearchType=Advance&ReferenceNumbers=S5M-04130.

[60] House of Commons of Canada, 42nd Parliament, 1st Sess., Debates, at 4632 (2016) 148(074) (where then Canadian Minister of Foreign Affairs Stéphane Dion announced that "[g]iven this evidence, our government believes that genocide against the Yazidis is currently ongoing"), www.ourcommons.ca/Content/House/421/Debates/074/HAN074-E.PDF#page=38.

[61] Members of the National Assembly (which, together with the Senate, constitutes the French Parliament) voted unanimously to pass a resolution recognizing the IS massacre against the Êzîdîs as genocide, see Yazda, *Genocide Recognition*, www.yazda.org/genocide-recognition.

[62] *Id*.

[63] *Armenian Parliament recognizes Yazidi genocide*, ARMEN PRESS (Jan. 16, 2018) armenpress.am/eng/news/919052/armenian-parliament-recognizes-yazidi-genocide.html.

As a result, on 21st September 2017, the UN Security Council, according to Security Council Resolution 2379, requested the Secretary-General to establish an Investigation Team to Promote Accountability For Crimes Committed by ISIL (*Da'esh*) (UNITAD) for its actions in Iraq.[64] This was to assist the domestic efforts to hold ISIS accountable through the collection, preservation, and storage of evidence in Iraq, which may constitute war crimes, crimes against humanity, and genocide.[65] The terms of reference for the operation of the investigative team were approved on 8th February 2018.[66] On 31st March 2018, the secretary-general appointed Karim A Khan QC as the Special Advisor and Head of the investigative team.[67] The team's *in personam* jurisdiction is very specific with a limited mandate to only investigate the crimes committed by ISIS members in Iraq, and not investigate criminal acts committed by other states or NSAs.[68] Where ISIS has committed criminal acts in other UN member states" territory, the State must first request approval of the Security Council before receiving assistance from the investigative team.[69] By 10th May 2021 and after criticism for the investigative team's slow progress,[70] Khan formally informed the Security Council that, based on the evidence collected, ISIS crimes against the Êzîdîs amounted to genocide.[71]

Nevertheless, despite admitting killing, kidnapping, and raping Êzîdîs, with no remorse shown,[72] so far, no ISIS militant has been tried under international law in Iraq. One ISIS member, during his trial at a court in Mosul/Iraq, admitted participating in the killing, kidnapping, and raping of Êzîdîs, but he was sentenced to death under the law of terrorism.[73] Nethertheless, a few ISIS members accused of genocide and indicted by a court in Germany were found guilty of crimes against humanity.[74] As time passed, the main ISIS culprits have, either been killed,[75] sentenced to death under the law of terrorism,[76] reorganised under other

[64] See UNSC Res 2379, UN Doc S/RES/2379 (Sept. 21, 2017); *Iraq: UN probe into ISIL atrocities making "real progress", Security Council hears*, UN NEWS (June 15, 2020), news.un.org/en/story/2020/06/1066352; UNSC, *Security Council Requests Creation of Independent Team to Help in Holding ISIL (Da'esh) Accountable for its Actions in Iraq* (Setp. 27, 2017); UN Doc SC/12998, www.un.org/press/en/2017/sc12998.doc.htm 7

[65] *Id*.

[66] Terms of Reference of the Investigative Team to Support Domestic Efforts to Hold ISIL (Da'esh) Accountable of Acts that May Amount to War Crimes, Crimes Against Humanity and Genocide Committed in Iraq, established pursuant to Security Council Resolution 2379 (2017), www.justsecurity.org/wp-content/uploads/2018/02/2018-02-09-TORs-UN-iraq-investigative-mechanism.pdf.

[67] *Secretary-General Appoints Karim Asad Ahmad Khan of United Kingdom to Head Team Investigating Islamic State Actions in Iraq*, UN Doc SG/A/1806-BIO/5091 (May 31, 2018).

[68] Human Rights Watch, *Iraq: Missed Opportunity for Comprehensive Justice* (Sept. 21, 2017) www.hrw.org/news/2017/09/21/iraq-missed-opportunity-comprehensive-justice; Beth Van Schaack, *The Iraq Investigative Team and Prospects for Justice for the Yazidi Genocide*, J INT'L CRIM J 113 (2018).

[69] UNSC Res 2379 (no. 72), para. 11.

[70] See Sabrine Wennberg, Albin Falck, *Returnees and Accountability: an Inquiry Into the UN Evidence Collection in Iraq*, FOI (May 22, 2020), www.foi.se/rest-api/report/FOI%20Memo%207145.

[71] See *supra* note 54.

[72] Video 68 (Appendix VI).

[73] See Simona Foltyn, *Inside the Iraqi Courts Sentencing Foreign ISIS Fighters to Death*, THE GUARDIAN (June 2, 2019), www.theguardian.com/world/2019/jun/02/inside-the-iraqi-courts-sentencing-foreign-isis-fighters-to-death.

[74] *Genocide trial: IS suspect in court in Germany*, BBC (Apr. 24, 2020), www.bbc.co.uk/news/world-europe-52409406.

[75] Rukmini Callimachi, Falih Hassan, *Abu Bakr al-Baghdadi, ISIS Leader Known for His Brutality, Is Dead at 48*, NEW YORK TIMES, (Oct. 27, 2019), www.nytimes.com/2019/10/27/world/middleeast/al-baghdadi-dead.html.

[76] Foltyn, *supra* note 73.

umbrella organisations,[77] or, placed in camps for years without trial.[78] For example, even though tens of thousands of ISIS members have been arrested or placed in camps in the north of Syria, so far, there has been a lack of political will to try them for the crimes committed in the region.[79] To date, attempts to establish a court in Iraq have begun, nevertheless, this lacks political will due to various reasons, such as corruption and weak governance.[80] In the rest of this chapter, upon a determination that the *prima facie* case exists, the crimes committed by ISIS against the Êzîdîs are examined.

II. The Genocide Convention

On 9th December 1948, the Convention on the Prevention and Punishment of the Crime of Genocide was the first ever human rights treaty adopted by the General Assembly of the United Nations.[81] Before this, genocide was only mentioned as an element of other international crimes, especially during the Nuremberg trials.[82] The Convention establishes a State Parties" obligation to take measures to prevent genocide and to punish those accused of its commission.[83] It is considered to be a crime under customary international law to be prohibited by states and it is a violation of a *jus cogens*[84] prohibited for states *erga omnes*.[85] However, while there is an obligation on states to prevent and punish genocide, there is a lack of an effective mechanism for implementation of the obligation to prevent genocide.[86] After fifty years, for the first time, the Convention was applied in the case of *Akayesu* in the ICTR proceedings.[87]

The etymology of the word genocide identifies it as a crime that is specifically designed to target a group.[88] Raphael Lemkin, who created the word, combined the word from the Greek

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[77] Many others have joined other groups in Syria under the authority of Turkey in Afrin. See Patrick Cockburn, *Turkey Accused of Colluding with ISIS to Oppose Syrian Kurds and Assad Following Surprise Release of 49 Hostages*, THE INDEPENDENT (Sept. 22, 2014).

[78] Tanya Mehra, *New Kid on the Block: Prosecution of ISIS Fighters by the Autonomous Administration of North and East Syria*, INTERNATIONAL CENTRE FOR COUNTER (Mar. 16, 2021), icct.nl/publication/prosecution-of-isis-fighters-by-autonomous-administration-of-north-east-syria.

[79] The courts in Germany have found multiple ISIS members guilty of genocide and crimes aginst humanity. See *Yazidi Genocide: IS Member Found Guilty in German Landmark Trial*, BBC (Dec. 1, 2021) www.bbc.co.uk/news/world-europe-59474616?fbclid=IwAR2yaVu6_mFBAU_5rYO7lEPzt_3MT2V6AkfWm3nvn1CzqafX2RAKRsOtev4.

[80] Martin Chulov, *Iraqi Kurds Plan Special Court to Try Suspected Islamic State Fighters*, THE GUARDIAN (Apr. 30, 2021), www.theguardian.com/world/2021/apr/30/iraqi-kurds-plan-special-court-try-suspected-islamic-state-fighters.

[81] Genocide Convention, *supra* note 1.

[82] William A. Schabas, *Origins of the Genocide Convention: From Nuremberg to Paris*, 40(1) CAS W RES J INT'L 35 (2007), at 41-42; Henry T. King, *Origins of the Genocide Convention*, 40(1) Cas W Res J INT'L L 13 (2008).

[83] ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosnia-Herzegovina v Serbia-Montenegro), Judgment (Feb. 26, 2007), para. 162 (hereinafter the *Bosnian Genocide* case).

[84] *Jus cogens* first appeared in the Vienna Convention on the Law of Treaties, 1155 UNTS 331 (adopted May 23, 1969, entered into force Jan. 27, 1980).

[85] Oxford Reference, "*erga omnes obligations"*, www.oxfordreference.com/view/10.1093/oi/authority.20110803095756413.

[86] The United Nations Office on Genocide Prevention and the Responsibility to Protect has special advisors to the General Secretary of the UN "to make assessments as to whether there is risk of any of those crimes (genocide for example) occurring in a particular situation, with the objective of preventing or halting those crimes in case they are suspected to be already occurring".

[87] For the first time genocide was analysed in the case of *Akayesu* (Trial Judgement) (n 3), para. 473.

[88] See ICTY, Prosecutor v Stakić, ICTY IT-97-24-A, Appeal Chamber, Judgement (Mar. 22, 2006), para. 21.

word *genos*, meaning race, tribe, nation, and the termination *cide*, from the Latin suffix *caeder*, meaning to kill.[89] Further, genocide neither requires State or organisational policy,[90] nor a connection to an armed conflict, and the State parties involved are required to undertake prevention and punishment in times of peace or war.[91] As of July 2020, 152 States have ratified the Convention including Iraq and Turkey.[92]

The objective of the Convention is clearly defined in its Articles I and IV and IX, which imposes on all signatory parties the obligation to prevent genocide and punish the perpetrators under Articles IV, V and VI, recognising genocide as a crime under international law.[93] Also, Article VII provides for extradition. Under Article VIII, states can call upon the UN's competent organs to implement the Convention through appropriate mechanisms to prevent and punish the perpetrators for the crime of genocide.[94]

Article I[95] does not *expressis verbis* ask states not to commit genocide. However, the ICJ judgement in the *Bosnian genocide* case explicitly stated that Article I prohibits states and their subjects from committing genocide.[96] Under Article III(a), genocide means the following acts enumerated under Article II that are:

> [C]ommitted 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 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 groups; [and]
> e) Forcibly transferring children of the group to another group.[97]

Both articles, especially after the end of the Cold War, have been widely adopted by both national and international courts, including the ICC. However, unlike Article III of the Convention, Article II has always been copied *verbatim* to the international courts and tribunal statutes without dispute. For example, while there is no dispute about inscribing Article III(a) as Article 6 of the Rome Statute, Article III(e) is mainly inscribed in Article 25(3)(c), and complicity is replaced with the terms "aids, abets or otherwise assists".[98]

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[89] RAPHAEL LEMKIN, AXIS RULE IN OCCUPIED EUROPE (2008).
[90] See ICTY, Prosecutor v Kunarac *et al*., ICTY IT-05-88-A, Appeal Chamber, Judgement (June 12, 2002), para. 98; ICTY, Prosecutor v Popović *et al.*, ICTY IT-96-23/1-A, Appeal Chamber, Judgement (Jan. 30, 2015), *paras.* 43-43. See also William A. Schabas, *State Policy as an Element of International Crimes (2007-2008)*, 98(3) J CRIM L & CRIMINOLOGY 953 (2008).
[91] Genocide Convention (no. 1), art. I. Genocide could be different from a conflict occurred concomitantly. See *Akayesu* (Trial Judgement) (no. 3), para. 128
[92] *Legal Framework: Genocide Convention*, UNITED NATIONS, www.un.org/en/genocideprevention/genocide-convention.shtml.
[93] Genocide Convention (no. 1).
[94] *Id*.
[95] *Id*. art. I provides that "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law, which they undertake to prevent and to punish".
[96] *Bosnian Genocide* case, *supra* note 83, para. 166
[97] Genocide Convention, *supra* note 1.
[98] See Rome Statute (no. 4), art. VI where it has *verbatim* copied art. II of the Genocide Convention but avoided to adopt art. III *verbatim*; comparatively, in ARSIWA, complicity in genocide has been replaced with "aids or assistance" under art. 16 of ARSIWA (no. 4).

A. Elements of the Crime of Genocide

The Convention specifies that subjective and objective elements must be present to establish liability in genocide.[99] The article grounds its examination on the established elements and does not argue the aspects of the disputed elements. Instead, it uses them as tools to examine the crimes committed by ISIS against the Êzîdîs.[100] Accordingly, the elements of genocide are explained in the next section.

1. Distinctive Groups

An important element that separates genocide from other crimes is the commission of a crime against members of a distinctive group, also known as protected groups, specifically a national, ethnical, racial, or religious group. Based on the *travaux preparatoires* of the Genocide Convention,[101] only stable groups can meet the criteria under the Convention, and the group's identity needs to be acknowledged as a protected group, based exclusively on nationality, ethnicity, race, or religion.[102] The drafters of the Convention paid attention to the identification of groups, meeting the requirement of well-established characteristics as having positive immutable characteristics that could be destroyed.[103] Mobile groups, such as newly established political groups where one can easily become a member or, just as easily, withdraw one's membership, are not considered to be eligible as a distinctive group under the Convention.[104] This was reconfirmed in the case of *Akayesu*, "the crime of genocide exists to protect certain groups from extermination or attempted exterminationAlthough the latter [105]." states that nationality be confined to *nationals of a state*.[106] Based on the former Yugoslavian Constitution 1963, in *Krstić*, the Trial Chamber, recognised Bosnian Muslims as a national group.[107] Therefore, the definition of protected groups remained controversial to the extent that the Darfur Commission stated:

> collective identities, and in particular ethnicity, are by their very nature social constructs, imagined identities entirely dependent on variable and contingent perceptions, and not social facts, which are verifiable in the same manner as natural phenomena or physical facts.[108]

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[99] Elements of Crimes, adopted by the Assembly of States Parties on, UN Doc ICC-ASP/1/3, 1st Sess (09 September 2002) 240 (hereinafter ICC Elements of Crimes). See also WAYNE R. LAFAVE, AUSTIN W SCOTT, SUBSTANTIVE CRIMINAL LAW (1986), at 576.

[100] For example, there is an argument whether the state policy should form part. of the ingredients constituting the elements characterising the crime of genocide. See *Popović et al.* (Appeals Judgement) (no. 98), para. 429-440. See also JEROME DE HEMPTINNE, ROBERT ROTH, ELIES VAN SLIEDREGT (eds.), MODES OF LIABILITY IN INTERNATIONAL CRIMINAL LAW (2019), at 25, 116 and 343.

[101] Abtahi, Webb, *supra* note 2.

[102] Genocide Convention (no. 1), art. II; ICTR, Prosecutor v Nahimana *et al.*, ICTR-99-52-A, Appeals Chamber, Judgement (Nov. 28, 2007), para. 496.

[103] *Stakić*, (no. 96), paras. 20-28

[104] *Id.*; *Akayesu* (no. 3), para. 510; UNGA, Sixth Committee (74th Session), *Summary record of the 8th meeting*, UN Doc A/C.6/SR.128 (Oct. 29, 2019), at 659-661.

[105] *Akayesu*, paras. 469 and 70

[106] *Id.*, para. 702

[107] ICTY, Prosecutor v Krstić, ICTY IT-98-33-T, Trial Chamber, Judgement (Aug. 2, 2001), para. 559.

[108] Report of the Darfur Commission (Jan 25, 2005), para. 499.

Similarly, racial and religious identities remain controversial. The former, according to *Akayesu,* is based on "the hereditary physical traits often identified with a geographical region, irrespective of: linguistic, cultural, national, or religious factors";[109] the latter is "one whose members share the same religion, denomination or mode of worship".[110] Although members may be able to leave the group voluntarily, certainly racial and religious identities are more fixed than political groups.[111]

The importance of establishing a group identity is necessary to determine *dolus specialis* in genocide. Such intention only applies when the affected members are part of the targeted group,[112] as confusion can arise when different groups are involved in a conflict. For example, in Rwanda, acts committed by the Hutus against their non-Tutsi political opponents were not perceived as genocide, even though the Hutu targeted them for their condemnation of the genocidal policy.[113] In the case of *Nahimana*, "Hutu political opponents were acknowledged as such and were not "perceived" as Tutsi".[114] Although the perception of the defendant will be considered in determining the membership of the individuals to that targeted group, it is not always necessary. Every case is to be considered on its own merits. Thus, being a targeted group member is a legal ingredient of the crime.[115]

Moreover, the Stakić Appeal Judgement contended that a targeted group cannot be defined negatively.[116] For example, identifying "non-Serbs" is broad and does not satisfy the requirement of group definition under the Genocide Convention. The sole subjective criterion of 'stigmatisation" of the perpetrators against their opponent group is insufficient; rather, identifying a protective group is a combination of subjective and objective criteria that characterise that group as distinctive.[117]

2. Êzîdîs as a Distinctive Group

The Êzîdî people are one of the originating ethnic and religious communities in the Middle East.[118] The positive definition[119] is that they are a specific religious group out of all the other groups uniquely targeted by ISIS militants. The Êzîdî, before the ISIS attack, was the largest non-Muslim religious group in north-western Iraq, mainly living around Şingal town adjacent to the Syrian border.[120] Members of the group share the same religion and denomination of

[109] *Akayesu*, para. 514.
[110] *Id*., para. 515.
[111] Frances Stewart, *Religion versus Ethnicity as a Source of Mobilisation: Are There Differences?*, 70 CRISE WORKING PAPER (2019).
[112] ICTY, Prosecutor v Kupreškić *et al.*, ICTY IT-95-16-T, Trial Chamber, Judgement, (Jan. 14, 2000), para. 636.
[113] *Nahimana et al.*, para. 496.
[114] *Id*., paras. 496-497.
[115] *Id*., para. 496.
[116] *Stakić*, para. 25.
[117] *Id*. Also, the parties in the *Bosnian Genocide* case disagreed about the definition of "group". The Applicant in its final submission refers to "the non-Serb national, ethnical or religious group within, but not limited to, the territory of Bosnia and Herzegovina, including in particular the Muslim population". The Court found this as a negative approach to the definition of a group in relation to genocide, see *Bosnian Genocide*, paras. 191-201.
[118] Christine Allison, *The Yazidis*, OXFORD RES ENCY (2017), ore.exeter.ac.uk/repository/bitstream/handle/10871/36072/ALLISONThe%20YazidisOxfordResearchEncyclopaediaofReli-gion%C2%A0.pdf?sequence=2&isAllowed=y.
[119] See Akayesu, paras. 511, 516, 701-702
[120] See *Sinjar Urban Profile*, UN HABITAT (2019), unhabitat.org/sites/default/files/2021/03/sinjar_urban_profile_-_english_3.pdf. See also Maps 1, 2, 3 and 35 (Appendix V).

worship.[121] The people follow a mixture of mystical principles and theological traditions dating back to the ancient religions of the Middle East.[122] They claim that their religion is 4,000 years old and is a synthesis of pre-Islamic, Zoroastrian, Manichaean, Jewish, Nestorian Christian, and Muslim elements.[123] Notwithstanding believing in God the Creator and *Malak Ta'us* (Peacock Angel), an executive organ of a divine will; the Êzîdîs are considered to be monotheistic.[124] Their belief in *Malak Ta'us* is a cause for their alienation from other religious majorities, and ISIS and its supporters regard them as devil worshippers.[125]

It is worth shedding light on the persecution of Êzîdîs over centuries in the belief this attack is the continuation of a discriminative policy practised by the powerful authorities in the region; especially during the time of the Ottoman Empire.[126] This time the opportunity was created to target the Êzîdîs on a larger scale and so to eliminate them. One of the interviewees stated that:

> Since the Battle of Chaldiran war in 1514 to the World War One in 1914, over one million Êzîdîs have been killed and they were all innocent and I say that because they have not carried out any crimes apart from the fact that they were Êzîdîs and the Êzîdî were forced to convert to Islam.[127]

Other interviewees counted this campaign against the Êzîdîs as the 74th *Ferman*, order to eliminate the Êzîdîs.[128] Each *Ferman* had, to a various extent, affected the Êzîdî community. The *Ferman*s have restricted the Êzîdîs from preserving their religion through artefacts. For example, due to the *Ferman*s, they have been obliged to rely on *Aqwals* (sayings) – orally transmitted hymns and the real core of the Êzîdî religion – to preserve the rules and principles of their religion. The Êzîdîs rely on oral memorisation of the statements to pass on the *Aqwals* from one generation to another because their attackers have always tried to burn and destroy their religious books and places of worship or forge their *Aqwals*.[129]

3. Objective Elements (*Actus Reus*)

The commission of any prohibited acts against any specified group, including the commission of genocide, is not limited to physical participation but is also "as much an integral part of the

[121] UNHRC, Report: They Came to Destroy, para. 103.
[122] Interview with HBS. See also Allison.
[123] Allison, *supra* note 118; Eszter Spät, *Religious Oral Tradition and Literacy among the Yazidis of Iraq*, 103(2) ANTHROPOS: INT'L CONFLICT & SECUR 393 (2008), at 393, 399.
[124] "Malak Taus is considered God's alter ego, inseparable from Him, and to that extent Yazidism is monotheistic". See "*Who, What, Why: Who are the Yazidis?*", MAGAZINE MONITOR, (Aug. 7, 2014) www.bbc.co.uk/news/blogs-magazine-monitor-28686607.
[125] Khenchelaoui Zaim, *The Yezidis, People of the Spoken Word in the Midst of the People of the Book*, 47(187) DIOGENES 20 (1999).
[126] See Martin van Bruinessen, *Genocide of Kurds*, in ISRAEL W CHARNEY, THE WIDENING CIRCLE OF GENOCIDE: GENOCIDE – A CRITICAL BIBLIOGRAPHICAL REVIEW (2018)
[127] Interview with KS *supra* note 13.
[128] See Cheterian, *supra* note 25.
[129] Some accused that Êzîdîs lack a holy book. Others say the Êzîdî holy books are claimed to be the *Kitêba Cilwe* (Book of Revelation) and the *Mishefa Reş* (Black Book). The Êzîdîs have places of worship at different in various areas populated by Êzîdîs. The main holiest place is called Lalish in Shenkhan in the north of Iraq.

genocide as were the killings which [they] enabled".[130] The *actus reus* of the crime refers to the means of achieving the crime of genocide through the prohibited acts listed in sub-paragraphs (a) to (e) of Article II of the Genocide Convention.[131] The Convention requires that the acts be committed against the physical or psychological integrity of members of a group, including acts other than killing.[132] Thus, where any of the above acts are committed with the specific intention to destroy a group, in whole or a substantial part of it,[133] the perpetrator becomes liable for the crime of genocide.[134]

Nonetheless, before clarifying the subjective elements, some other essential elements of genocide, such as "destroy", "in part", and "contextual", should be explained. The prosecutor is required to prove the acts enumerated in Article II of the Convention took place beyond a reasonable doubt.[135] This must be shown accompanied by the specific intention to destroy, in whole or in part, in a circumstance that can amount to genocide.[136]

According to the law of genocide, the destruction need not be a complete annihilation of the group in all corners of the world where group members exist,[137] but the deliberate[138] actions to destroy part of the group in a particular place, and this does amount to the crime of genocide.[139] Thus a destruction seeking the "physical and biological destruction of all or part of the group".[140] It must be noted that the term "in part" needs to meet the substantiality requirement.[141] The Trial Chamber in *Krstić* based its decision on the facts that the intention behind the genocide of Bosnian Muslims in Srebrenica was to "[n]ever re-establish itself on that territory".[142] Certainly, the Chamber considered the "continued survival of the Bosnian Muslim people"[143] in its broader context. This is related to both physical and biological

[130] ICTR, Prosecutor v Gacumbitsi, ICTR -01-64-A, Appeals Chamber, Judgement (July 7, 2006), para. 60; ICTR, Prosecutor v Seromba, ICTR-01-66-A, Appeals Chamber, Judgement (Mar. 12, 2008), para. 161; WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW (2000), at 172-240.
[131] See the Genocide Convention *supra* note 1. See also Roger Clark, *The Mental Element in International Criminal Law: the Rome Statute of the International Criminal Court and the Elements of Offences*, 12(3) CRIM L FORUM 291(2001).
[132] *Gacumbitsi*, para. 60. Not necessarily that every act can amount to genocide, but it may amount to ethnic cleansing, see *Bosnian Genocide*, para. 190; ROBERT CRYER *ET AL*., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE (2019), at 216-217.
[133] See *Krstić*, para. 10; ICTY, Prosecutor v Jelisić, ICTY IT-95-10-T, Trial Chamber, Judgement (Dec. 14, 1999), para. 82. See also SCHABAS, *supra* note 130, at 238.
[134] See art. II of the Genocide Convention (no. 1); *Seromba,* paras. 161-172.
[135] ICTR, Prosecutor v Ngirabatware, ICTR MICT-12-29-A, Appeals Chamber, Judgement (Dec. 18, 2014), para. 19. See also Andrea Gattini, *Evidentiary Issues in the ICJ's Genocide Judgment*, 5(4) J INT'L CRIM JUS 889 (2007).
[136] See also *Akayesu,* paras. 485, 497 and 540; *Bosnian Genocide,* paras. 186-190.
[137] *Draft Code of Crimes against the Peace and Security of Mankind*, with commentaries, text adopted at its 48th Session (1996) II(2) YILC 30, para. 8 of the commentary on art. 17. For an in-depth analysis of the Genocide convention see SCHABAS, *supra* note 130.
[138] In the words of ILC, deliberate means conscious intention and volitional engagement in a conduct. See (Commentary on art. 17 of the 1996 Draft Code of Crimes against the Peace and Security of Mankind, ILC Report 1996, YILC, 1996, Vol. II, Part. Two, at 44, para. 5)
[139] See *Akayesu*, para. 521
[140] See *Krstić* (Trial Judgement), para. 582; *Krstić* (Appeals Judgement), para. 10; *Jelisić* (Trial Judgement), para. 82. See also SCHABAS, *supra* note 130, at 238.
[141] *Bosnian Genocide* case, para. 198; *Krstić* (Appeals Judgement), paras. 8-11. See also ICTR, Prosecutor v Kayishema, Ruzindana, ICTR-95-1-A, Appeals Chamber, Judgement (June 1, 2001); ICTR, Prosecutor v Bagilishema, ICTR-95-1A-A, Appeals Chamber, Judgement (July 3, 2002); ICTR, Prosecutor v Semanza, ICTR-97-20-A, Appeals Chamber, Judgement (May 20, 2005).
[142] *Krstić* (Trial Judgement), para. 597.
[143] *Id*., para. 590.

destruction of the group whereby, in addition to killing the men, deportation of the women, can result in the imposition of measures intended to prevent birth within the group.[144]

Further, the ICJ, in the *Bosnian Genocide* case, considered the word "part" to be extremely important for Article II of the Convention.[145] Destroying part of the group means the genocide "must be significant enough to have an impact on the group as a whole,"[146] even if it only occurs within a limited area and not necessarily among every member and component of the group around the world.[147] Hence, the number of individuals targeted should be weighed against the overall size of the entire group. Of course, the position and the prominence of the people killed should be taken into consideration.[148] The interpretation is more qualitative in nature, and the overall physical and biological destruction of the group is considered, especially for the continued existence of the "whole" group in future.[149]

Furthermore, whether the "contextual element" is a requisite objective element is contentious. Unlike the Rome Statute,[150] there is no explicit provision for its legal requirement in the Genocide Convention.[151] This element requires that the genocide has taken place in a "manifest pattern of similar conduct" against the members of the group to destroy them physically or/and biologically and, as such, is important to determine *dolus specialis*.[152] This element is significant in distinguishing the crime of genocide from other similar crimes, such as crimes against humanity committed by the accused. The word "manifest" refers to the specific timeframe within which the crimes are committed and if they amount to genocide.[153] Theoretically, an exception to this is where the accused can commit the crime of genocide with one conduct, for example, using a nuclear bomb to destroy the whole area of the group in question.[154] In the *Krstić*, the Appeal Chamber criticised the Trial Chamber as being "inapposite" for relying on the ICC's Elements of Crime in respect of a crime of genocide. According to the Chamber, the word "contextual element" is not explicitly a requisite element under the Genocide Convention, and it does not reflect the customary international law.[155] Also, some of the Articles of the Rome Statute do not reflect customary international law.[156]

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[144] See *Krstić* (Appeals Judgement), para. 28. See also *Bosnian Genocide* case, paras. 355-361.
[145] *Bosnian Genocide* case, paras. 198-201.
[146] *Krstić* (Appeals Judgement), paras. 8-11.
[147] See ICTY, Prosecutor v Stakić, ICTY IT 97-24-T, Trial Chamber, Judgement (July 31, 2003), para. 523; *Bosnian Genocide* case, paras. 198-201.
[148] *Krstić* (Appeals Judgement), paras. 12-13.
[149] ICTR, Prosecutor v Gacumbitsi, ICTR-2001-64-T, Trial Chamber, Judgement (June 17, 2004), para. 253.
[150] See art. 6 of the ICC Elements of Crime.
[151] See CRYER *ET AL*, *supra* note 132; NASOUR KOURSAMI, THE "CONTEXTUAL ELEMENTS" OF THE CRIME OF GENOCIDE (2018).
[152] ICC Elements of Crimes, art. 6; ICC, Prosecutor v Al Bashir, ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (Mar. 4, 2009), para. 123. See also *Akayesu* (Trial Judgement), para. 523; Valerie Oosterveld, Charles Garraway, *The Elements of Genocide*, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE (Roy Lee *et al* eds., 2001), at 41, 44-45.
[153] See CRYER *ET AL*, *supra* note 132, at 218.
[154] In the history of genocide, there is lack of a case that genocide has been committed by one man with one act. Nonetheless, the case of the bombing of the Kurdish Halabja town by Saddam Hussein's regime in 1988 killed 5,000 people in one day by using chemical weapons, see JOOST R. HILTERMANN, A POISONOUS AFFAIR: AMERICA, IRAQ, AND THE GASSING OF HALABJA (2007); DAVID MCDOWALL, A MODERN HISTORY OF THE KURDS (2003). See also Schabas, *supra* note 90.
[155] *Krstić* (Appeals Judgement), para. 224
[156] See also US Court of Appeals for the Second Circuit, Presbyterian Church of Sudan v Talisman Energy Inc., 582 F.3d 244, 259 (2d Cir. 2009) (hereinafter *Talisman* Case 2009).

However, in the *Al Bashir Arrest Warrant,* the ICC applied the "contextual element" in order to determine whether the conduct had been undertaken:

> in the context of a manifest pattern of similar conduct directed against the targeted group or must have had such a nature so as to itself effect, the total or partial destruction of the targeted group.[157]

According to the Court, determining a "contextual element" is necessary in order to determine a concrete threat to "the existence of the targeted group, or a part thereof".[158] The nature of "contextual element" is reflected throughout the examination in later sections of the chapter.

4. Subjective Elements (*Mens Rea*)

The physical element of a crime is not sufficient for an act to be criminal. In addition to the above elements, the perpetrator's act must be blameworthy behaviour. In paragraphs (a) and (b) of Article II, the perpetrator's act must be intentional in "killing" or causing serious bodily harm to members of the distinctive group in question.[159] In *Akayesu*, the Chamber believed that the word "killing" in paragraph (a) is too general. The word of "*meurtre*" in French, which means murder in English, is more precise because it implies killing with intention.[160] In paragraphs (c) and (d), the term "deliberate" is a precondition for acts of physical destruction of the group.[161] The term "deliberate" is interpreted as consciously and intentionally engaging in a conduct.[162] Also, "inflicting" or "imposing" are acts with a particular intention required.[163] The term "intended" in paragraph (d) is a precondition to prevent the action of breeding between the members of the group; and in paragraph (e), transferring the children must be "forceful", for example, it is against the will of the children or their parents.[164]

To amount to genocide, the above objective and subjective elements need to be accompanied with another unique requisite *mens rea* element to genocide, *dolus specialis*.[165] The *dolus specialis* to "destroy in whole or in part" the distinctive group "as such", differentiates the crime of genocide from other international crimes.[166] For example, an act of killing under Article II(a) must be proved with two different intentions, a normal requisite

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[157] *Al Bashir* (Decision), para. 123.
[158] *Id*., para. 124.
[159] See *Krstić* (Appeals Judgement), para. 19; ICTR, Prosecutor v Munyakazi, ICTR-97-36A-A, Appeals Chamber, Judgement (Sept. 28, 2011), paras. 14-142.
[160] *Akayesu* (Trial Judgement), para. 501.
[161] See *Stakić* (Trial Judgement), paras. 516-517. Theoretically, the crime of genocide could be committed without any killings taking place. Only art. II, lett. a) of the Convention, which is copied *verbatim* and appears as art. 6, lett. a) of the Rome Statute, requires the act of killing another person for the purpose of *actus reus* of the crime of genocide to be met. Also, in its Commentary in the 1996 Draft Code of Crimes Against the Peace and Security of Mankind, the International Law Commission qualified genocide's specific intent as "the distinguishing characteristic of this particular crime under international law". See GABRIELLE KIRK MCDONALD, SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW: THE EXPERIENCE OF INTERNATIONAL AND NATIONAL COURTS (2000), at 387.
[162] *Akayesu* (Trial Judgement), paras. 505-506. The terms "deliberate" is described as "carefully thought out and formed, or done on purpose; premeditated".
[163] *Akayesu* (Trial Judgement), paras. 505-6
[164] *Id*., para. 509. See also Exhibit 3 (Appendix VII)
[165] See *Krstić* (Appeals Judgement), para. 19; *Munyakazi* (Appeals Judgement), paras. 14-142
[166] See *Krstić* (Trial Judgement), para. 553; ICTR, Prosecutor v Kambanda, ICTR-97-23-S, Trial Chamber, Judgement (Sept. 4, 1998), para. 16.

intention to kill or harm a person combined with a surplus specific intention of genocide (*dolus specilais*) of killing that person because his/her membership of the targeted group.[167] While the stricter *mens rea* of *dolus specialis* is pertinent to genocide only, the other intention is broader with multiple interpretations,[168] ensuing as *dolus directus* (direct intention) or *dolus eventualis* (recklessness).[169] In terms of the genocidal intent of *dolus specialis*, it only covers *dolus directus*. The perpetrator must have committed the crime "knowingly and wilfully"[170] and the conduct must be as a result of a guilty mind. Also, the perpetrator needs to commit the crime with such specific intent; even if that intent is formed just before commission of the genocide.[171] The normal intention is exemplified in the Rome Statute.[172] For the first time in history, the intention has been explicitly defined under Article 30.

It must be noted that the "as such" term has the *effet utile* to sharply distinguish the crime of genocide from other atrocities; such as the targeting a member of a group is motivated by their membership of that distinctive group.[173] The special characteristic of *dolus specialis* is unique because the principal perpetrators must discriminatively commit the prohibited acts under Article II of the Convention with intent to "destroy in whole or in part a national, ethnic, racial or religious group as such".[174] This specific intent is "characterised by a psychological relationship between the physical result and the mental state of the perpetrator".[175] Similarly, concerning State liability,[176] the ICJ concluded that the additional intent is necessary, and without such "intent to destroy", the crime would fall out of the genocide spectrum and be considered as mass murder, a crime against humanity, or ethnic cleansing.[177] Thus, the objective of the acts enumerated under Article II are only fulfilled when the principal perpetrator wilfully and discriminatively commits or attempts to commit the crime against a distinctive group to constitute genocide.

The *Darfur Commission* has raised the question of whether it is sufficient for a principal perpetrator who knows "that his acts would destroy, in whole or in part, the group as such," but denies personal desire to achieve such an outcome.[178] Establishing *dolus specialis* carries probative difficulties. This has been recognised by the jurist community as one of the most

[167] See *Krstić* (Appeals Judgement), para. 19; *Munyakazi* (Appeals Judgement), paras. 14-142.
[168] See *supra* note 146.
[169] WILLIAM A. SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE (2016), at 475; Rodger Clark, Elements of Crimes in Early Decisions of Pre-Trial Chambers of the International Criminal Court, 6(28) NZ YRBK INT'L 208 (2009), at 210.
[170] MICHAEL JEFFERSON, CRIMINAL LAW (2006), at 81. See also *Munyakazi* (Appeals Judgement), para. 142.
[171] See *Prosecutor v Kayishema, Ruzindana* (Trial Judgement) ICTR-95-1-T (21 May 1999), para. 91; *Munyakazi* (Appeals Judgement) (n 167), para. 142
[172] See art. 30 of the Rome Statute.
[173] ICTR, Prosecutor v Niyitegeka, ICTR-96-14-A, Appeals Chamber, Judgement (July 9, 2004), para. 53; *Akayesu* (Trial Judgement), para. 498.
[174] Genocide Convention, art. II; ICTR, Prosecutor v Munyakazi, ICTR-97-36A-T, Trial Chamber, Judgement (July 5, 2010), para. 493.
[175] *Akayesu* (Trial Judgement), para. 518.
[176] The law of state responsibility for complicity in genocide is analysed in Chapter Six. The subject matter in Chapter Six
[177] See *Bosnian Genocide* case, para. 190; the Preamble of General Assembly Resolution 47/121 stating that "ethnic cleansing" is a form of genocide, A/RES/47/a47r121 (Dec. 18, 1992); the Trial Chamber in *Krstić* found similarities between "genocide" and "ethnic cleansing". See *Krstić* (Trial Judgement), para. 562.
[178] Report of the Darfur Commission, *supra* note 108. The personal desire is further reflected in the "purpose" element in art. 25, para. 3, lett. c) of the Rome Statute.

daunting tasks in establishing genocide.[179] The intent must be distinguished from the motive[180] as the former is an essential part of the crime, and the latter is not an element of a crime, rather a probative purpose.[181] This is because hate can also be a motive and lead to crimes of killing, kidnapping, and destroying parts of groups in other international crimes.[182] This was the case in the *Tadić* Appeal Judgement when the Chamber stressed the irrelevance and "inscrutability of motives in criminal law".[183] Nonetheless, the word "as such" is an important component of the definition of the crimes constituting genocide. As an essential element constituting crimes of genocide, the "as such" notion has been used instead of exclusion of motive. Although motive is important in determining the guilty mind of a person who participated in the crime, it is not an essential element of genocide. However, it has *effet utile* of determining and clarifying *mens rea* in genocide.[184] Hence, although motivation is not a contradiction and does not preclude *dolus specialis*,[185] committing a crime without possessing *dolus specialis* may not amount to genocide, but it may amount to, for example, crimes against humanity or ethnic cleansing.[186] This is evidenced by the fact that, out of all the crimes committed in the territory of the former Yugoslavia, the Courts and Tribunals only found genocide in Srebrenica.[187] Clearly, proving intent poses many problems, including the determination of the mental element of the crime of genocide. In many cases, genocidal intent is inferred from the crime itself.

4. Inferring Intention

Unless the defendant confesses, the prosecutor has to deduce the *dolus specialis* from various facts. For example, from the general context and other culpable acts, meticulously and uniformly directed against the group, and the scale of the atrocities against the individuals because they constitute parts of the group.[188] Hence, objective elements are also vital to infer intention. In the case of *Kayishema, Ruzindana,* the Chamber found that:

> the intent can be inferred either from words or deeds and may be demonstrated by a pattern of purposeful action. In particular, the Chamber considers evidence such as the physical targeting of the group or their property; the use of derogatory language toward members of the targeted group; the weapons employed and the extent of bodily injury; the methodical way of planning, the systematic manner of killing. Furthermore, the number of the victims from the group is also important[189]

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[179] See *Bosnian Genocide* case, para. 188. See also Ryan Y. Park, *Proving Genocidal Intent: International Precedent and ECCC Case 002*, 63(1) RUTGERS L REV 129 (2010), at 136-138.
[180] See *Stakić* (Appeals Judgement), paras. 43-45.
[181] See ICTR, Prosecutor v Kanyarukiga, ICTR-02-78-A, Appeals Chamber, Judgement (May 8, 2012), para. 262.
[182] *Stakić* (Appeals Judgement), paras. 43-45. See also See also Elaine E. Chiu, *The Challenge of Motive in the Criminal Law*, 8(2) BUFFALO CRIM L REV 653 (2005).
[183] ICTY, Prosecutor v Tadić, ICTY IT-94-1-A, Appeals Chamber, Judgement (July 15, 1999), para. 269.
[184] See *Niyitegeka* (Appeals Judgement), para. 53. See also *Kanyarukiga* (Appeals Judgement), para. 262; Paul Behrens, *Genocide and the Question of Motive*, 10(3) J INT'L CRIM JUSTICE 501 (2012).
[185] In the law of ICR, "the existence of a personal motive does not preclude the perpetrator from also having the specific intent to commit genocide". See ICTY, Prosecutor v Kvočka *et al*., ICTY IT-98-30/1-A, Appeals Chamber, Judgement (Feb. 28, 2005), para. 106.
[186] *Bosnian Genocide* case, para. 190. See also *Krstić* (Trial Judgement), para. 562.
[187] *Bosnian Genocide* case, paras. 278-297 and 377-415.
[188] See *Akayesu* (Trial Judgement), paras. 522-524; *Bosnian Genocide* case, paras. 202-230. See also for further reading see Melina Sterio, *The Karadžić Genocide Conviction: Inferences, Intent, and the Necessity to Redefine Genocide*, 31(2) EMROY INT'L L REV 271(2017), at 290.
[189] *Kayishema, Ruzindana* (Trial Judgement), para. 93.

The ICTY states that specific intent can be inferred from:

> a number of facts such as the general political doctrine which gave rise to the acts possibly covered by the definition in Article 4, or the repetition of destructive and discriminatory acts. The intent may also be inferred from the perpetration of acts which violate, or which the perpetrators themselves consider to violate the very foundation of the group- acts which are not in themselves covered by the list in Article 4(2) but which are committed as part the same pattern of conduct.[190]

In its finding, the Trial Chamber in the ICTY concluded that:

> this intent derives from the combined effect of speeches or projects laying the groundwork for and justifying the acts, from the massive scale of their destructive effect and from their specific nature, which aims at undermining what is considered to be the foundation of the group.[191]

The tribunals further accept that:

> Factors that may establish the specific intent include but are not limited to: (a) the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others, (b) the scale of atrocities committed, (c) their general nature, (d) their execution in a region or a country, (e) the fact that the victims were deliberately and systematically chosen on account of their membership of a particular group, (f) the exclusion, in this regard, of members of other groups, (g) the political doctrine which gave rise to the acts referred to, (h) the repetition of destructive and discriminatory acts and (i) the perpetration of acts which violate the very foundation of the group or considered as such by their perpetrators.[192]

Furthermore, as part of inferring *mens rea*, it is important to consider motive, as explained above, and State policy.[193] It is argued by the Chambers in the two ad hoc tribunals that State policy does not constitute part of the legal elements required for genocide, yet it is relevant and important to infer intention.[194] For example, in the case of *Milošević*, the prosecution mentioned that he had a political plan whereby he attempted to create a country that incorporated all Serbs, and presented evidence that *Milošević* adopted an ideology of "All Serbs in a Single State".[195] However, *Milošević* died before completion of the trial.[196]

Further, chanting, uttering against the victim group, or being affiliated to the extremist group that is accused of genocide, does not necessarily mean possessing *dolus specialis*.[197] In this case, ISIS, or some of their supporters, publicly declared a *Fatwa*[198] on the Êzîdîs to either

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[190] ICTY, Prosecutor v Karadžić, Mladić, ICTY IT-95-5-R61 and IT-95-18-R61, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence (July 11, 1996), para. 94.
[191] *Karadžić, Mladić* (Review), para. 95.
[192] *Munyakazi* (Trial Judgement), para. 494.
[193] See *Popović et al.* (Appeals Judgement), paras. 431-435. The argument considers the previous leading cases such as the *Bosnian Genocide* case, paras. 379, 386-390, 394-395 and 408-413.
[194] *Id*.
[195] Report of the Darfur Commissio, *supra* note 108, paras. 491-493, 502-503 and 514-522; Schabas, *supra* note 90; NEVENKA TROMP-VRKIC, PROSECUTING SLOBODAN MILOSEVIC: THE UNFINISHED TRIAL (2016), at 2. See also *Popović et al.* (Appeals Judgement), paras. 431-435.
[196] *Id*.
[197] *Kayishema, Ruzindana* (Appeals Judgement), para. 160.
[198] See *supra* note 17.

surrender and convert to the ISIS approach to Islam or be killed.[199] The Êzîdîs were not at any time a party to the conflict, nor did they declare war against ISIS, even if in self-defence. The examination here is based on the crimes committed against the Êzîdîs by individuals identified as ISIS members. This examination tries to establish the crime, rather than focusing on specific ISIS members who may have committed the crime(s). Due to the lack of genocide cases before the ICC, the examination relies on the precedents set mainly from the cases adjudicated by the ad hoc tribunals and the *Bosnian Genocide* case. Nonetheless, the Elements of Crimes use a similar method. Thus, the subjective element "can be inferred from relevant facts and circumstance"[200] as discussed above. For that, the precedents from the ad hoc tribunals serve the foundation for future cases before the ICC.

III. Examination of ISIS Crimes against the Êzîdîs

ISIS members were identified as the principal perpetrators in relation to the crimes committed against the distinctive group of the Êzîdîs on and after 3rd August 2014.[201] In international law, the principal perpetrator means the person who directly commissions[202] all the elements of a crime.[203] Concerning genocide, the person is required to commit one or more of the crimes enumerated under Article II of the Genocide Convention with specific intent. For example, in the case of *Seromba*, it is established that committing covers more acts than simply "direct and physical perpetration".[204] The following sections examine the facts related to the crimes committed in light of Article II of the Genocide Convention.

A. Article II of the Convention

According to the Genocide Convention, genocide means the acts enumerated in its Article II, "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group".[205] The following sections apply, mainly, via desk research, the provisions of Article II of the Genocide Convention to the empirical data collected. A separate section to address the additional *mens rea* of *dolus specialis* follows this.

1. Article II(a) of the Convention: Killing Members of the Group

[199] See Video 70 (Appendix VI). The Video starts by providing a background on Êzîdîs. It shows an ISIS leader sitting with young ISIS fighters around him in Şingal. He is asking the Êzîdîs to come down from Mount Şingal and convert to Islam. The Video further shows, in minutes 05:40-11:19, the way ISIS leader receives the Êzîdîs who convert their religion to Islam.
[200] ICC Elements of Crimes, General Introduction.
[201] As explained in the Section 1, not necessarily all the ISIS members are equally considered to be principal perpetrators but, for the purpose of this thesis, the focus is on the crimes resulted in ISIS attack on Êzîdîs.
[202] Commission is a well-established form of liability in ICL. See Lachezar D. Yanev, *Joint Criminal Enterprise*, in MODES OF LIABILITY IN INTERNATIONAL CRIMINAL LAW (Jerome de Hemptinne, Robert Roth, Elies van Sliedregt eds., 2019), at 128 citing CRYER *ET AL*, *supra* note 132, at 354.
[203] ICC Elements of Crimes.
[204] *Seromba* (Appeals Judgement), para. 161. See also *Gacumbitsi* (Appeals Judgement), para. 60.
[205] See art. II of the Genocide Convention.

The act of killing must be against an individual who is a member of that distinctive group.[206] The act must meet the required constitutive elements of genocide, but it is not necessarily premeditated that the killings were accompanied with *dolus specialis*.[207] As discussed above, the French use the word "*meurtre*", a more precise word, which implies "killing" with intention.[208]

The ISIS members were accused of killing the Êzîdîs immediately after entering Şingal.[209] According to the empirical data such treatment of the Êzîdîs, by ISIS, amounts to killing with intention. Families from Solah told a *Telegraph* journalist that Êzîdî people, including whole families, were lined up and shot dead by ISIS.[210] The ISIS fighters, with the help of CLST, asked the captured Êzîdîs to convert to Islam to avoid execution.[211] In one incident on 4th August 2014, an estimated 60 men were executed in Hardan village in the Şingal district.[212] The remainder of their families were transferred to the town Tel-Afar (several kilometres away from Şingal in the direction of Mosul). On the same day, hundreds of Êzîdîs were killed in Şingal region.[213] On almost every occasion, following the separation of females from males, ISIS fighters immediately executed the men and boys aged 12 years and over.[214] Most were executed by gunshots to the head, while others had their throats cut.[215] The executions were deliberately carried out in front of other captives, including family members, who were forced to witness the killings.[216]

By 10th August 2014, the former Iraqi Human Rights Minister, Mohammed Shia al-Sudani, declared that ISIS had killed at least 500 Êzîdî members in Iraq and, further, buried alive an unknown number.[217] Also, hundreds of Êzîdî women had been forced into slavery.[218] Those who escaped across the river Tigris into Kurdish-controlled areas of Syria gave accounts of how they had seen individuals attempting to flee but who had later died because of the heat, starvation and thirst.[219] The United Nations Assistance Mission for Iraq (UNAMI) and the Office of the OHCHR investigators interviewed witnesses who claimed that ISIS committed

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[206] See *Krstić* (Appeals Judgement), paras. 21, 27 and 225.
[207] See *Stakić* (Trial Judgement), paras. 515 and 520. See also *Akayesu* (Trial Judgement), para. 589 for the material elements of the act of killing.
[208] *Akayesu* (Trial Judgement), para. 501.
[209] See also Cheterian, *supra* note 50.
[210] Jonathan Krohn, *Iraq Crisis: My Night on the Mountain of Hell with Dying Yazidi Refugees*, THE TELEGRAPH (Aug. 11, 2014).
[211] UNAMI and OHCHR, *A Call for Accountability and Protection: Yezidi Survivors of Atrocities Committed by ISIL* (Aug. 2016), at 10, www.ohchr.org/Documents/Countries/IQ/UNAMIReport12Aug2016_en.pdf.
[212] UNAMI, *Report on the Protection of Civilians in the Armed Conflict in Iraq: 06 July–10 September 2014*, (Oct. 2, 2014), reliefweb.int/sites/reliefweb.int/files/resources/UNAMI_OHCHR_POC_Report_FINAL_6July_10September2014.pdf.
[213] UNAMI and OHCHR Report, *supra* note 211.
[214] *Id*.
[215] See UNHRC Report: They Came to Destroy, paras. 2, 33, 37 and 159. See also Video 11, 19, 36 and 57 (Appendix VI).
[216] Exhibit 13, 14 and 16 (Appendix VII).
[217] *Ahmed Rasheed, Exclusive: Iraq Says Islamic State Killed 500 Yazidis, Buried Some Victims Alive, REUTERS (Aug. 10, 2014),* www.reuters.com/article/us-iraq-security-yazidis-killings-idUSKBN0GA0FF20140810.
[218] Peter Nicolaus, Serkan Yuce, *Sex-Slavery: One Aspect of the Yezidi Genocide*, 21(2) IRAN AND THE CAUCASUS 196 (2017).
[219] *Krohn, supra note 210.* Valeria Cetorelli, Isaac Sasson *et al.*, *Mortality and Kidnapping Estimates for the Yazidi Population in the Area of Mount Sinjar, Iraq, in August 2014: A Retrospective Household Survey*, 14(5) PLOS MED 3 (2017); see also Appendix VI.

mass killings near Dhola village, Khana Sour, and the Hardan area.[220] The witnesses also recounted seeing more dead bodies on the road leading to Mount Şingal; around 200 bodies were counted with some of them children.[221] Also, the people who fled from Ba'aje village, on the night of the attack, were captured by ISIS close to Qiniyeh village, near to the water source.[222] The families were separated from each other; the 90 men were taken to a ditch, lined up, and then shot dead.[223]

On 15th August 2014, ISIS captured all the men from Kocho village, located south of Şingal,[224] after the whole population received the ISIS ultimatum to convert or be killed.[225] In the beginning, ISIS killed over 80 men.[226] A witness recounted that the villagers were first converted under duress,[227] but when the village elder refused to convert the entire male population of an estimated 400 were taken away in trucks under the pretext of being led to Şingal; they were then gunned down along the way.[228] Their families, around 1,000 women and children, were abducted.[229] On the same day, up to 200 Êzîdî men were reportedly executed for refusing to convert in a Tel-Afar holding site. In an interview with an ISIS member, the interviewer asks, "do you have an idea how many people you killed" and the interviewee answers "around 900" including the Êzîdî men.[230]

According to an OHCHR/UNAMI report, by the end of August, thousands of Êzîdîs had been murdered, executed, or died from starvation. By early October, it was estimated that ISIS had killed between 3,000-5,000 Êzîdî men.[231] Later, on 1st May 2015, it was revealed that ISIS had killed 300 Êzîdî captives in Tel-Afar.[232] Also, it is estimated that around 200 Êzîdî men were executed in prison for refusing to convert, and those who did convert were forced to become prison labourers or human shields,[233] or they were deployed by ISIS leaders accordingly.[234] The men who converted to Islam at the Tel-Afar holding site were asked to shave their traditional long style moustaches and grow their beards according to *Sharī'ah* in Islam.[235] Although there is no accurate count of the victims, UN documents estimate 5,000 were

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[220] UNAMI and OHCHR Report, *supra* note 211.
[221] *Id*., at 10-11 and 12-13.
[222] *Id*., 12-16; Videos 54 and 55 (Appendix VI); Map 32 (Appendix V).
[223] See UNAMI and OHCHR Report, *supra* note 211, at 14.
[224] Rahim Rashidi, *The 74th Command Kojo, Sinjar Genocide of Yazidis by ISIS* (Dec. 21, 2016), www.youtube.com/watch?v=1PYNtelnmL8; Cetorelli, Ashraph, *supra* note 19.
[225] See UNHRC Report: They Came to Destroy, para. 33.
[226] *Katie Zavadski, ISIS Just Killed 80 More Yazidis in an Iraqi Village*, NEW YORK MAGAZINE *(Aug. 15, 2014)*, nymag.com/intelligencer/2014/08/isis-killed-80-yazidis-in-iraqi-village.html.
[227] *David Blair, Isil's Yazidi "mass conversion" Video Fails to Hide Brutal Duress*, THE TELEGRAPH *(June 6, 2015), www.telegraph.co.uk/news/worldnews/middleeast/iraq/11049393/Isils-Yazidi-mass-conversion-video-fails-to-hide-brutal-duress.html.*
[228] See UNHRC Report: They Came to Destroy**;** UNAMI and OHCHR Report, *supra* note 211, at 13.
[229] *The Last Dance: The Kidnapped Yazidi Girls of Kocho, Iraq*, VOA NEWS (Aug. 25, 2017), www.youtube.com/watch?v=Yy2SaT0rQvA.
[230] Video 68 (Appendix VI)
[231] UNAMI and OHCHR Report, *supra* note 211, at 7.
[232] *Islamic State: Militants kill 300 Yazidi captives*, BBC *(02 May 2015)*, www.bbc.com/news/world-middle-east-32565809.
[233] Rohit Kachroo, *Yazidi Children "Used as Human Shields" under so-called Islamic State Rule Speak to ITV News About Difficult Days Ahead*, ITV NEW (Feb. 26, 2019), www.itv.com/news/2019-02-26/yazidi-children-used-as-human-shields-under-islamic-state-rule-speak-to-itv-news-about-difficult-days-ahead.
[234] Charles Lister, *Islamic State Senior Leadership: Who's Who*, BROOKINGS (Dec. 2014), www.brookings.edu/wp-content/uploads/2014/12/en_whos_who.pdf.
[235] Valeria Cetorelli, Isaac Sasson *et al.*, "*ISIS" Yazidi Genocide: Demographic Evidence of the Killings and Kidnapping*, FOREIGN AFFAIRS (June 8, 2017), www.foreignaffairs.com/articles/syria/2017-06-08/isis-yazidi-genocide.

massacred and 7,000 were kidnapped, forced into sex slavery, and subsequently forced into converting to Islam.[236] To date, at least 100 mass graves have been discovered around the Şingal region.[237]

In March 2019, the Iraqi authority, in co-operation with UNITAD, began their search for the remains of hundreds of victims in Kocho.[238] By 24th October 2020, nearly 17 mass graves had been exhumed and a ceremony was held which began the exhumation of the mass grave in Solagh.[239] This contained the remains of elderly women.[240] The graves are named "Mothers" Graves" as they are of women who ISIS deemed to be too old for sexual slavery, and so their bodies were tossed into a pit.[241]

2. Article II(b): Causing Serious Bodily or Mental Harm to the Members of a Group

The terms 'serious bodily and mental harm" are not clearly defined under the Genocide Convention.[242] The ad hoc tribunals interpreted this provision as "a grave and long-term disadvantage to a person's ability to lead a constructive normal life".[243] This can be caused:

> by the enslavement, starvation, deportation and persecution [...] and by their detention in ghettos, transit camps and concentration camps in conditions which were designed to cause their degradation, deprivation of their rights as human beings, and to suppress them and cause them inhumane suffering and torture.[244]

Serious or bodily harm need not be permanent or irreparable.[245] This also applies to mental harm,[246] for example threats of death or "knowledge of impeding death".[247]

The empirical data indicate that ISIS treatment of the Êzîdîs amounts to serious bodily and mental harm. For example, from the first day that ISIS entered the Êzîdî region on 3rd

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[236] See UNAMI and OHCHR Report, *supra* note 211, at 7; Cetorelli, Sasson *et al.*, *supra* note 235; Lin Taylor, *Nearly 10,000 Yazidis Killed, Kidnapped by Islamic State in 2014, Study Finds*, REUTERS (May 9, 2017), www.reuters.com/article/us-mideast-crisis-iraq-yazidis/nearly-10000-yazidis-killed-kidnapped-by-islamic-state-in-2014-study-finds-idUSKBN18527I.

[237] See Jane Arraf, *Nothing Left in the World Except These Bones: Yazidis Search for Mothers Remains*, NPR (Dec. 2, 2020), www.npr.org/2020/12/02/940208630/nothing-left-in-the-world-except-these-bones-yazidis-search-for-mothers-remains; Map 33 (Appendix V).

[238] *Government of Iraq, UNITAD, United in going exhumation in Sinjar, Iraq*, UNITAD (Mar. 31, 2019), www.unitad.un.org/content/government-iraq-unitad-united-ongoing-exhumations-sinjar-iraq.

[239] *Iraq Resumes Exhuming Shingal Mass Graves of ISIS Victims*, RUDAW (24 October 2020) www.rudaw.net/english/middleeast/iraq/24102020?ID=543385.

[240] Arraf, *supra* note 237.

[241] Sophy Ridge, *Mass Graves of Women "Too Old to Be ISIS Sex Slaves" – This is What We're up against*, THE TELEGRAPH (Nov. 17, 2015), www.telegraph.co.uk/women/womens-politics/12000148/Islamic-State-sex-slaves-Sinjar-mass-graves-show-what-were-fighting.html.

[242] ICTR, Prosecutor v Semanza, ICTR-97-20-T, Trial Chamber, Judgement (May 15, 2003), paras. 321-322.

[243] *Krstić* (Trial Judgement), para. 513.

[244] *Akayesu* (Trial Judgement), paras. 503 and 731 citing District Court of Jerusalem, Attorney General of the Government of Israel v Adolph Eichmann (Dec. 12, 1961); *Seromba* (Appeals Judgement), para. 46; MARK KLAMBERG, COMMENTARY ON THE LAW OF THE CRIMINAL COURT (2017), at 25.

[245] *Akayesu* (Trial Judgement), para. 502. See also ICTY, Prosecutor v Tolimir, ICTY IT-05-88/2-A, Appeals Chamber, Judgement (Apr. 8, 2015), paras. 201-203, 204, 207 and 209.

[246] See *Semanza* (Trial Judgement), para. 321. Also, upon its ratification, the US interpreted the mental harm as "means permanent impairment of mental faculties through drugs, torture or similar techniques", see CRYER *ET AL*, *supra* note 132, at 215.

[247] *Tolimir* (Appeals Judgement), para. 206; cited by KLAMBERG, *supra* note 244, at 26.

August 2014, they separated the Êzîdî male and female members into distinct groups according to ISIS's understanding of *Quran* and *Sharī'ah* law.[248] The men and boys aged around 12 and above were separated from women, girls and younger boys.[249] The Êzîdîs were forcibly transferred to temporary holding sites located within the Şingal area and al-Hasakah governorate in Syria.[250] A second transfer then took place, which was more organised. It included the use of large vehicles to transfer the prisoners deeper into ISIS-controlled territories, including to the Tel-Afar and Raqqa holding sites, which became a hub for systematic separation in al-Hol camp in al-Hasakah Governorate in Syria.[251]

The ISIS militants adopted various techniques to threaten, frighten and psychologically harm Êzîdî members[252] and each group suffered distinct and systematic violations.[253] For example, captive females were taken from site to site, as space became available, to be held as captives and distributed through the sex slave markets.[254] Videos show how ISIS militants surrounded Êzîdî members, beating and separating the women from their children at the holding sites.[255] In an interview, an ISIS fighter tells how he had raped Êzîdî woman.[256] The food ISIS provided to the captives often contained insects and they were forced to drink toilet water.[257] There are circumstances where mothers often gave their share of the food to their infants and children or were forced to commit cannibalism.[258] Many women and children became very ill and died due to malnutrition, mistreatment, or the lack of medical care.[259] Those women who managed to escape continue to bear the psychological trauma.[260]

According to their *Dabiq* online magazine, ISIS militants praised the revival of the enslavement of women and children. The Êzîdî women were considered to be of defeated idolaters (or *Mushrik* in Arabic) who should be divided as part of the obligation to forfeit one fifth of acquired wealth, or "*Khums*," which is a traditional tax on the spoils of war, as tribute to the ISIS leadership.[261] The magazine further clarified that ISIS militants treated the Êzîdî

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[248] See Islamic State, *supra* note 38; *ISIS Atrocities Detailed by Yazidi Refugees*, NBC NEWS (Aug. 14, 2014) www.youtube.com/watch?v=HuM62nR5WUU.
[249] See UNAMI and OHCHR Report, *supra* note 211, at 8-10 and 12-16.
[250] See UNHRC Report: They Came to Destroy, para. 30; UN Commission of Inquiry on Syria, ISIS is Committing Genocide against the Yazidis, OHCHR NEWS (June 16, 2016), www.ohchr.org/FR/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=20113&LangID=F.
[251] See UNHRC Report: They Came to Destroy, para. 30.
[252] See also Zeynep Kaya, *Iraq's Yazidis and ISIS; The Causes and Consequences of Sexual Violence in Conflict* LSE MIDDLE EAST CENTRE (2019). See Videos 29, 30, 39, 66, 68 and 94.
[253] UNAMI and OHCHR Report, *supra* note 211.
[254] *Nadia Murad speaking to BBC Hardtalk*, BBC (Oct. 5, 2018), www.youtube.com/watch?v=YRbHxsPLmkg; *Yazidi Girls: Prisoners of ISIS*, THE ATLANTIC (Dec. 7, 2017), www.youtube.com/watch?v=Te6HOtiBcf.
[255] Hawar Moradi, *The Remnants of the Ezidi Genocide (English Subtitle)*, (June 30, 2015) www.youtube.com/watch?v=QcHPyCZmZTk; Video 66 (Appendix VI).
[256] *Yazidi Women Tell of Sex-Slavery Trauma*, BBC NEWS (Dec. 22, 2014), www.bbc.co.uk/news/av/world-middle-east-30576989; Videos 33, 39, 66 and 68 (Appendix VI).
[257] UNHRC Report: They Came to Destroy, para. 51.
[258] Will Worley, *ISIS Torture, Child Rape and Cannibalism Described by Iraqi MP*, THE INDEPENDENT (June 27, 2017), www.independent.co.uk/news/world/middle-east/isis-fed-baby-mother-raped-girl-death-family-iraqi-mp-vian-dakhil-a7811216.html.
[259] Nick Paton Walsh, Salma Abdelaziz, *Beaten, Tortured, Sexually Abused: An American Widow Looks for a Way Home*, CNN WORLD (Apr. 20, 2018), edition.cnn.com/2018/04/19/middleeast/syria-us-isis-bride-intl/index.html; see also Video 19 (Appendix VI).
[260] Lizzie Dearden, *Almost 10,000 Yazidis "Killed or Kidnapped in ISIS genocide but True Scale or Horror May Never Be Known*", THE INDEPENDENT (May 9, 2017), www.independent.co.uk/news/world/middle-east/isis-islamic-state-yazidi-sex-slaves-genocide-sinjar-death-toll-number-kidnapped-study-un-lse-a7726991.html; Video 66 (Appendix VI)
[261] *Id.*

males differently from females. Young males of five to thirteen were sent to camps where they were forced to convert to Islam, indoctrinated with ISIS's extremist views, and given military training.[262] Those who refused, or resisted, were killed, as were those males aged 13 or over.[263] Once the women and girls were captured, ISIS typically separated them into three groups: married, with children up to five years old; married, without children; and unmarried young women and girls.[264] Following separation, elderly women considered too old to be sold as sex slaves or used for physical labour were killed and buried in mass graves.[265]
To justify their actions, the ISIS militants used Quranic verses or *hadith*[266] of Prophet Muhammed such as:

> Rasūlullāh (sallallāhu "alayhi wa sallam) said, "Allah marvels at a people who enter Jannah in chains" [reported by al-Bukhārī on the authority of Abū Hurayrah]. The hadīth commentators mentioned that this refers to people entering Islam as slaves and then entering Jannah.[267]

Or of Abū Hurayrah, the companion of Prophet Muhammed:

> Abū Hurayrah (radiyallāhu "anh) said while commenting on Allah's words, {You are the best nation produced for mankind} [Āli "Imrān: 110], "You are the best people for people. You bring them with chains around their necks, until they enter Islam" [Sahīh al-Bukhāri].[268]

The published ISIS article justifies the enslavement of polytheist women through their interpretation of the practice of the early Islamic community:

> After capture, the Êzîdî women and children were then divided according to the *Sharī'ah* amongst the fighters of the Islamic State who participated in the Sinjar operations, after one fifth of the slaves were transferred to the Islamic State's authority to be divided as khums…The enslaved Êzîdî families are now sold by the Islamic State soldiers as the mushrikīn were sold by the Companions (radiyallāhu "anhum) before them. Many well-known rulings are observed, including the prohibition of separating a mother from her young children.[269]

Moreover, the *Dabiq* further adds:

> Before Shaytān reveals his doubts to the weak-minded and weak hearted, one should remember that enslaving the families of the kuffār and taking their women as concubines is a firmly established aspect of the *Sharī'ah* that if one were to deny or mock, he would be denying or mocking the verses of the Qur"ān and the narrations of the Prophet (sallallāhu "alayhi wa sallam), and thereby apostatizing from Islam.[270]

In addition to the above, the following questions were asked in the same issue of *Dabiq*, and answers were given in a box next to the questions:

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[262] UNHRC Report: They Came to Destroy; Exhibit 3 and 12 (Exhibit VII).
[263] *Id*.
[264] Report of HRC on Iraq, *supra* note 54, at 36. See also Video 29, 30 and 94 (Appendix VI).
[265] Lucy Westcott, *More Yazidi Mass Graves Discovered Near Sinjar by Iraqi Officials*, NEWSWEEK (Nov. 30, 2015), www.newsweek.com/more-yazidi-mass-graves-discovered-near-sinjar-iraqi-officials-399446.
[266] See BAKRI AL-AZZAM, CERTAIN TERMS RELATING TO ISLAMIC OBSERVANCES: THEIR MEANINGS WITH REFERENCE TO THREE TRANSLATIONS OF THE QUR"AN AND A TRANSLATION OF HADITH (2005).
[267] Islamic State, *"The Failed Crusade"*, *supra* note 38.
[268] *Id*.
[269] *Id*.
[270] *Id*.

1. "Is it permissible to beat a female slave?" Answer: "Yes";
2. "Is it permissible to have intercourse with a female slave who has not reached puberty?" Answer: "Yes, however, if she is not fit for intercourse, then it is enough to enjoy her without [that]".
3. "Is it permissible to sell a female captive?" Answer: "It is permissible to buy, sell, or gift female captives and slaves, for they are merely property".[271]

This permitted ISIS militants to treat the Êzîdî women as their property and use them as they wish. To humiliate the women and girls further, ISIS brought in a gynaecologist to check whether the captives were virgins or not,[272] as this enabled ISIS to price them for the sex slave market.[273]

The above analyses reveal that ISIS selected statements from various areas of Islamic law to justify their systematic rape, torture, and the commission of numerous other acts against Êzîdî members.[274] The literature on the use of rape during violent campaigns implies that the outcome of this act is more than humiliation of the family members and their community at large; it causes the dissolution of all family and community ties.[275] Moreover, the young and middle-aged women were also traded as sex slaves in the market, which could amount to 'serious bodily and mental harm on the victims".[276] To date, some Êzîdî girls have been bought back by their families from different parts of Iraq, Syria, and Turkey.[277]

The acts of sexual violence include "the forcible sexual penetration of the vagina, anus or oral cavity by a penis and/or of the vagina or anus by some other objects, and sexual abuse, such as forcible nudity".[278] Whether it was rape or acts of sexual violence, these abuses could be considered as constituting genocide.[279] For example, the ICTR, in the case of *Akayesu*, became the first international tribunal to define rape as an act of genocide:

> Indeed, rape and sexual violence certainly constitute [the] infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of inflicting harm on the victim as he or she suffers both bodily and mental harm.[280]

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[271] Robert Guest, *Two Women, One Cause*, THE ECONOMIST (Aug. 2017), www.economist.com/sites/default/files/celebrating-inspiring-women2018.pdf.
[272] UNHRC Report: They Came to Destroy, para. 44.
[273] Harriet Agerholm, *ISIS Using Whatsapp and Telegram to Sell Sex Slaves*, THE INDEPENDENT (July 7, 2016) www.independent.co.uk/news/world/middle-east/isis-using-whatsapp-telegram-sell-sex-slaves-iraq-facebook-a7125551.html.
[274] This is not to generalise that Islamic law has a uniform approach. As explained, ISIS has a certain approach of interpreting Islamic law. The question is whether ISIS considered the context and the time the texts were created (1,400 years ago).
[275] See Katherine M. Franke, *Putting Sex to Work*, 75 DENV U L REV 1139 (1998). For further understanding about rape in international crimes. See ECCC, Prosecutor v Kaing Guek Eav alias Duch, 001/18-07-2007/ECCC/TC, Trial Chamber, Judgement (July 26, 2010).
[276] *Akayesu* (Trial Judgement), para. 731. See also *Yazidi women tell of sex-slavery trauma*, *supra* note 256; Video 41 (Appendix VI) showing the evidence seized by the Iraqi army. The data reveal how ISIS used the sex slave women according to their plans and time sheets for ISIS members to have sexual contacts with sex slaves. See also Videos 73, 74, 75 and 82 (Appendix VI).
[277] The slave markets of Êzîdî females were not limited to Iraq and Syria but extended to Turkey. See *HDP Deputy to Turkish Government: How Can ISIS Bring Yazidi Slaves to Ankara?*, SCF (Aug. 5, 2020), stockholmcf.org/hdp-deputy-to-turkish-government-how-can-isis-bring-yazidi-slaves-to-ankara.
[278] *Akayesu* (Trial Judgement), para. 10A.
[279] *Id*., para. 734
[280] *Id*., para. 731. For further detail on the definition of rape within legal context see ICTY, Prosecutor v Kunarac *et al.*, ICTY IT-96-23-T, Trial Chamber, Judgement (Feb. 22, 2001), paras. 436-444; Sherrie L. Russell-Brown, *Rape as an Act of Genocide*, 21 BERKELEY J INT'L L 350 (2003), at 351.

The ICTR succeeded in 'surface[ing] gender in the midst of genocide"[281] by acknowledging the 'subjectivity of the victims of the crime of genocidal rape".[282] The ICTR recognised that the act of genocidal rape is intended to destroy a particular group and stated that it is the most effective method to advance the destruction of an entire group by recognition of how sex effectively worked to destroy people.[283]

The later trials of the ad hoc tribunals further developed the concept of sexual violence in international crimes. For example, in the *Stakić* case, the ICTY stated:

> Causing serious bodily and mental harm" in subparagraph (b) [of Article 4 (2) of the Statute of the ICTY] is understood to mean, inter alia, acts of torture, inhumane or degrading treatment, sexual violence including rape, interrogations combined with beatings, threats of death, and harm that damages health or causes disfigurement or injury.[284]

In the case of the Êzîdîs, the women who were forcibly converted to Islam were given to the unmarried ISIS fighters, and those who refused to convert were allotted to the ISIS fighters as war booty, known as "Malak Yamiin".[285] They were sold as sex slaves and distributed throughout Iraq and Syria[286] or sent to ISIS liaison offices in Turkey.[287]

Some Êzîdî women tried to escape and made-up stories to protect themselves or their children from being further raped by their captors. For example, Khatoon, a mother who was transferred to Raqqa in Syria, said, "I am sick. I have AIDS. If you want to catch it, do what you want".[288] The captor then used her as a house slave. Another woman shaved the hair of her teenage daughter, so she would look like a disabled individual, to avoid her being raped.[289] Khatoon further reported that for "any woman found with a mobile phone, the punishment was to be raped by five different men".[290]

Nadia Murad, the freed Êzîdî girl who was later appointed as the UN Goodwill Ambassador for the Dignity of Survivors of Human Trafficking and was the 2018 Noble Peace Prize winner,[291] said in Kocho she was devastated after witnessing the killing of 312 men from her village, including six of her own brothers and stepbrothers, and her mother.[292] She was

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[281] Rhonda Copelon, *Gendered War Crimes: Reconceptualising Rape in Time of War*, in WOMEN'S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES (Julie Peters, Andrea Wolper eds., 1995), at 199.
[282] Russell-Brown, *supra* note 280, at 352. For further reading see ICTY, Prosecutor v Furundžija, ICTY IT-95-17/1-T, Trial Chamber, Judgement, (Dec. 10, 1998), paras. 172-186.
[283] See Emily Chertoff, *Prosecuting Gender-Based Persecution: The Islamic State at the ICC*, 4 YALE LJ 126 (2017).
[284] *Stakić* (Trial Judgement), para. 516.
[285] UNAMI and OCHRC Report, *supra* note 211, at 13.
[286] *Emerging from Slavery, Yazidi Women Struggle to Recover*, UNFPA (Aug. 8, 2016) www.unfpa.org/news/emerging-slavery-yazidi-women-struggle-recover.
[287] Marco Giannangeli, *Daesh Kidnaps Women and Children to Sell as Sex Slaves on Social Media*, EXPRESS (Dec. 27, 2015), www.express.co.uk/news/world/629563/Daesh-kidnaps-women-children-sell-sex-slaves-social-media.
[288] Robert Guest, *Nadia Murad's Fight to Bring Islamic State to Justice*, THE ECONOMIST (Mar. 2017), at 10, www.economist.com/1843/2017/01/19/nadia-murads-fight-to-bring-islamic-state-to-justice.
[289] *Id*.
[290] *Id*.
[291] *Nobel Peace Prize for anti-rape activists Nadia Murad and Denis Mukwege*, BBC NEWS (Oct. 5, 2018) www.bbc.co.uk/news/world-europe-45759221.
[292] Seth Frantzman, *Nadia Murad Returns to Kocho: ISIS Genocide, Trauma and World's Failure*, SETHFRANTZMAN.COM (June 1, 2017), sethfrantzman.com/2017/06/01/nadia-murad-returns-to-kocho-isis-genocide-trauma-and-worlds-failure/.

transferred to Mosul by ISIS militants and imprisoned with many other Êzîdî women and children. She states that one of her captors, who was enormous,

> like a monster, came to take me… I cried out that I was too young and he was huge. He kicked and beat me. A few minutes later, another man came up to me… I saw that he was [a] little smaller. I begged him to take me.[293]

Nadia was later forced to convert to Islam, to enter into marriage with the captor, and to sleep with him. Nadia told the reporter that she managed to run from her captor when one day, he forgot to lock the door.[294] Two other survivors stated that they were the only women in a building among 48 men, who continuously raped them.

In an interview with an ISIS prisoner, the interviewer asks "[How many women, how many children, do you think, you have raped over the years?" The prisoners answers "during the time I was with them, the 15-16 year olds, 50. And the older ones [I raped] over 200".[295]

There were reports of rape committed by ISIS fighters at the holding sites.[296] At any one site there were hundreds of women held captive and surrounded by many young men.[297] The Êzîdî captives were considered to be the property of ISIS and the individuals who were sold were openly termed *sabaya*, or slaves.[298] While in captivity, the women and girls were taken to slave markets or sold as individual purchases to fighters who came to the holding centres to choose their "brides".[299] In some cases, the women and girls were bought in slave markets in groups and then taken to rural areas to be sold separately for higher prices.[300] ISIS also established offices in Gaziantep in Turkey to sell the women for higher prices in areas outside its territorial control.[301] These facts imply that ISIS targeted the Êzîdî girls and women with the specific intention of breaking the ethnic lineage of the Êzîdîs by using rape as a tool to disintegrate the Êzîdî population. One scholar in the field explains that 'shame" is deeply ingrained in Êzîdî society and, unlike in Western society where "what a shame" more often means "what a pity", the Êzîdîs see 'shame" as "disgrace". It is 'so big that it is unforgettable and often unforgivable. In many situations, Daesh [ISIS] effectively relied on this culture of shame to control and capture the Yezidis". Consequently, many Êzîdî women committed suicide or developed post-traumatic stress disorder (PTSD).[302]

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[293] Guest, *supra* note 288, at 8.
[294] *Id*.
[295] Video 68 (Appendix VI) minute 00:50-01:50
[296] See Nick Gutteridge, *ISIS Tells Fighters to Gang Rape Women Saying Sex with Multiple Johadis Makes them Muslim*, EXPRESS.CO.UK (Oct. 9, 2015), www.express.co.uk/news/world/610940/Islamic-State-ISIS-terrorists-gang-rape-women-Yazidi-convert-Islam-al-Baghdadi.
[297] Rukmini Callimachi, *ISIS Enshrines a Theology of Rape*, THE NEW YORK TIMES (Aug. 13, 2015) www.nytimes.com/2015/08/14/world/middleeast/isis-enshrines-a- theology-of-rape.html.
[298] In Islamic writings the *sabaya* needs to be respected and in terms of sexual activity and there is a clear requirement that the women need to be dealt with as any other female in Islam. See Holy Quran, Chapter 4, para. 25, quran.com/4/25.
[299] See Video 33 (Appendix VI)
[300] Emma Graham-Harrison, "*I Was Sold Seven Times": The Yazidi Women Welcomed back into the Faith*, THE GUARDIAN (July 1, 2017), www.theguardian.com/global-development/2017/jul/01/i-was-sold-seven-times-yazidi-women-welcomed-back-into-the-faith.
[301] Anne Speckhard, *ISIS Sex Slave Trade in Gaziantep, Turkey*, HUFFPOST (Apr. 26, 2016), www.huffingtonpost.com/anne-speckhard/isis-sex-slave-trade-in-g_b_9774610.html.
[302] Jan Ilhan Kizilhan, Florian Steger, Michael Noll-Hussong, *Shame, Dissociative Seizures and Their Correlation Among Traumatised Female Yazidi with Experience of Sexual Violence*, 216 BRITISH J PSYCHIATRY 138 (2020).

3. Article II(c): Deliberately Inflicting on a Group Condition of Life to Bring about Its Physical Destruction in Whole or in Part

Under this provision, the perpetrator aims to bring about the destruction of a group through multiple methods of non-immediate killings. This provision has been interpreted by the ICTR as:

> inter alia, subjecting a group of people to a subsistence diet, systematic expulsion from homes and the induction of essential medical services below [the] minimum requirement.[303]

It has been confirmed by the ICC Elements of Crimes that depriving group members of resources essential to stay alive is included.[304] Such deprivation is a calculated measure taken to destroy a group through various means. Viewing this provision in the context of this research, as a result of the ISIS attack on the Şingal region, the Êzîdîs were subjected to living conditions that destroyed their community through mass exodus.[305]

While some interpretations regard systematic expulsion as genocide,[306] others believe that unless the expulsion is accompanied by *dolus specialis* it does not amount to genocide.[307] In the circumstances surrounding this case, systematic expulsion was an effective tool used to disintegrate the Êzîdî group. The sudden attack by ISIS, with the support of CLST, caused approximately 350,000 Êzîdîs, believed to be half of the entire Êzîdî population around the world, to flee within several hours and under harsh summer conditions.[308] The forced migration caused untold humanitarian tragedies.[309] Many Êzîdî members, especially the children, disabled, and elderly, could not survive the hot summer of 50° Celsius and above.[310] In the first few days, hundreds of children and elderly people, who had taken refuge in Mount Şingal, safer areas in KRG, and in the Kurdish held area in Syria, died.[311] The ISIS militants surrounded nearly 150,000 Êzîdîs at the top of Mount Şingal who were without any food or water. The Kurdish fighters from the Kurdish authority in the north of Syria managed to open a corridor for the stranded Êzîdîs after two days of intensive fighting with ISIS.[312]

In addition, some of the group members managed to leave Iraq, mainly relocating to Western countries.[313] This included women who, having been rescued from ISIS, were transferred to Germany, Canada, Australia and other parts of the world to receive treatment. Reports reveal that these women had been living in very unpleasant conditions because of their

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[303] *Akayesu* (Trial Judgement), para. 506.
[304] ICC Elements of Crimes, art. 6, lett. c).
[305] Fazil Moradi, Kjell Anderson, *The Islamic State's Ezıdı Genocide in Iraq: The Sinjar Operations*, (10)2 GENOCIDE STUD INT'L 121 (2016).
[306] *Bosnian Genocide* case, paras. 325 and 431-432.
[307] See ICTY, Prosecutor v Blagojević, ICTY IT-02-60-T, Trial Chamber, Judgement (Jan. 17, 2005), para. 666.
[308] See UNHRC Report: They Came to Destroy.
[309] Cheterian, *supra* note 50; Video 66 (Appendix VI).
[310] UNHRC Report: They Came to Destroy, para. 27; Ivan Watson, Greg Botelho, *"A Catastrophe": Yazidi Survivor Recalls Horror of Evading ISIS and Death*, CNN (Aug. 16, 2014) edition.cnn.com/2014/08/09/world/meast/yazidi-survivor/index.html.
[311] Cetorelli *et al*., *supra* note 219. See also Minority Rights Groups International, *Between the Millstones: The State of Iraq's Minorities Since the Fall of Mosul* (2015), hminorityrights.org/wp-content/uploads/2015/08/Between-the-Millstones-English.pdf.
[312] UNAMI and OHCHR Report, *supra* note 211, at 6-10 and 12-16.
[313] Cathy Otten, *Refugee Crisis: Desperate Iraqi Yazidis Join Exodus to Europe*, THE INDEPENDENT (Sept. 15, 2015), www.independent.co.uk/news/world/middle-east/refugee-crisis-desperate-iraqi-yazidis-join-exodus-europe-10498497.html.

confinement, unable to speak the language, and being far from their community.[314] According to the President of Yazda:

> Our culture is our identity, and as a community, the entire Yazidi population has been displaced to internally Displaced Camps in Northern Iraq for seven years now, missing our traditions, rituals, and missing all our cultural events. We have seven-year children who have never experienced Yazidi traditions and cultural events outside of these tents.[315]

The accumulation of these conditions has further impact on the declining Êzîdî community as they have been forced to disperse around the world.[316] As a result, they are no longer able to raise their children within dramatically changed identities.[317] This means the new Êzîdî generation is growing up with their identity changed.[318] Further, while the majority of the population within Şingal and its surroundings have not been able to return, thousands of Êzîdî members, especially women and children, are still missing.[319] This adds to the threat to Êzîdî identity.

This disintegration also put the identity of Êzîdîs at risk as it led to them losing their property and left them living in conditions of hardship. Those who managed to escape were only able to take small amounts of money with them, alongside whatever they could carry or put in their cars.[320] Those Êzîdîs who managed to flee and seek help from locals in slightly safer areas in the north of Iraq and Syria were then forced to ask for financial help to pay thousands of dollars for the return of their families from ISIS militants via middlemen.[321] Some of the Êzîdîs paid with everything they owned, but still they could not save all their family members from ISIS.[322] For example, a negotiator from Turkey told a reporter that he had transferred around $2.5 million from Êzîdî families to liberate 250 people.[323] To cope with poverty and to pay their debts, the Êzîdîs each had to bear the responsibility of working under difficult

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[314] Jan Ilhan Kizilhan, Florian Steger, Michael Noll-Hussong, *Potential Trauma Events and the Psychological Consequences for Yazidi Women after ISIS Captivity*, 20 BRITISH J PSYCHIATRY 256 (2020).

[315] Antiquities Coalition, *United States Agency for International Development Supports the Preservation of Cultural Heritage of Religious and Ethnic Minority Communities in Iraq through Award to the Antiquities Coalition* (July 1, 2021), theantiquitiescoalition.org/united-states-agency-for-international-development-supports-the-preservation-of-cultural-heritage-of-religious-and-ethnic-minority-communities-in-iraq-through-award-to-the-antiquities-coalition/?fbclid=IwAR34l0YiOjBqTQ0C18nhIZhRjBZ2M1Kymp_9FVsk0ehUKMFJthLmR-MV-EA1.

[316] MINORITY RIGHTS GROUP INTERNATIONAL, "*Yezidis"* (November 2017), minorityrights.org/minorities/yezidis; British Council, "*Preserving Yazidi heritage and identity"*, www.britishcouncil.org/arts/culture-development/cultural-protection-fund/projects/preservingyazidiheritage.

[317] Barbara Kay, *The Yazidis Are in Danger of Extinction and Ottawa's Stopped Helping*, NATIONAL POST (June 19, 2018), nationalpost.com/opinion/barbara-kay-the-yazidis-are-on-the-brink-of-extinction-canada-must-do-more.

[318] Robert Oliphant, *Road To Recovery: Resettlement Issues of Yazidi Women and Children in Canada* (Mar. 2018), www.ourcommons.ca/Content/Committee/421/CIMM/Reports/RP9715738/cimmrp18/cimmrp18-e.pdf.

[319] Richard Hall, *Yazidi Women Rescued from ISIS Captivity Nine Months after Fall of Caliphate*, THE INDEPENDENT (Dec. 4, 2019), www.independent.co.uk/news/world/middle-east/isis-yazidi-women-rescue-slaves-iraq-syria-a9232621.html.

[320] See Video 36 and 47 (Appendix VI). See also Guest, *supra* note 288, at 10. See also UNHRC Report: They Came to Destroy, para. 47.

[321] Nafiseh Kohnavard, *Smugglers Help Enslaved Yazidis Escape Islamic State*, BBC (Aug. 18, 2015) www.bbc.co.uk/news/world-middle-east-33964147.

[322] *Id*. See also Lizzie Porter, *I Paid $90,000 to Free My Family from IS*, BBC (Apr. 8, 2018), www.bbc.co.uk/news/stories-43673840.

[323] Uzay Bulut, *For the Record: ISIS Selling Yazidi Women and Children in Turkey*, LINKEDIN (Dec. 23, 2015), www.linkedin.com/pulse/record-isis-selling-yazidi-women-children-turkey-maha-hamdan.

circumstances in different parts of Iraq, or leave the country. At times, they were subject to interrogation by the authorities and charged with sending money to ISIS.[324] They were also forced to live within communities dominated by Muslims. This, in the long run, prevented the Êzîdîs from practising their religion and limited their children from being nurtured with a strong Êzîdî identity. Ultimately, this led to assimilation and further contributed to the disintegration of the group.

Further contributions to their disintegration include the destruction of holy, cultural, and historical Êzîdî sites. This commenced from the first day ISIS entered the Êzîdî region and, between the 24th and 25th August 2014, at that time the Sheikh Mand Shrine and the Êzîdî Shrine in Jidala village were destroyed by explosions. On 1st September 2014, ISIS militants set fire to the Êzîdî villages of Kotan, Hareko and Kharag Shafrsky and razed them to the ground.[325] The Êzîdî towns and villages occupied by the ISIS militants also suffered destruction as they were becoming a battleground for the fighting between ISIS and the local, national, and international powers.[326] Consequently, due to the accumulation of the above factors, the members are not able to practice their religion, especially as their places of worship are associated with shrines.[327]

To date, notwithstanding ISIS's physical defeat, the Êzîdîs have not been able to return to their villages and towns and are still suffering the consequences. As further outlined in the forthcoming chapters, the three identified actors accused of complicity render it difficult for them to return. The Êzîdîs still have no choice but to live in camps for internally displaced people or are dispersed throughout different towns and cities under the Kurdish held authorities in the KRG and the north of Syria where they live in dire conditions.[328] Some members, mainly the women, have committed suicide.[329] On the 24th June 2021, one of their main camps was set on fire.[330] The fire caused injuries to the officials in the camp, destroying 400 hundred tents. Also, throughout the Covid-19 pandemic, which emerged in late 2019/early 2020, the Êzîdîs suffered deaths due to a lack of medical treatment.[331]

4. Article II(d): Imposing Measures Intended to Prevent Births within the Groups

Interpreting Article II(d),[332] the Trial Chamber in *Akayesu* stated that prevention of births within groups included acts such as:

> sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages. In patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group

[324] Porter, *supra* note 341.
[325] Minority Rights Groups International, *supra* note 311.
[326] Ingvill Thorson Plesner, Sareta Ashraph, Cecilie Hellestveit, *Flight from Iraq: The Impact of Religious and Ethnic Identity*, HL-SENTERET (2020), www.hlsenteret.no/aktuelt/nyheter/2020/hl_report-flight-from-iraq.pdf.
[327] Raya Jalabi, *Who Are the Yazidis and Why is ISIS Hunting Them?*, THE GUARDIAN (Aug. 11, 2014), www.theguardian.com/world/2014/aug/07/who-yazidi-isis-iraq-religion-ethnicity-mountains.
[328] Nisan Ahmado, *For Yezidis, Healing Remains a Long Way, Seven Years after IS Genocide*, WILSON CENTER (Aug. 2, 2021), www.wilsoncenter.org/blog-post/yezidis-healing-remains-long-way-seven-years-after-genocide.
[329] Khalid Al-Taie, *Experts Express Concern for Yazidi Women amid Rise in Suicide Cases*, DIYARUNA (Oct. 14, 2020), diyaruna.com/en_GB/articles/cnmi_di/features/2020/10/14/feature-01.
[330] *Al-Taie of Yezidi IDPs in Kurdistan Region*, NPASYRIA (June 4, 2021), npasyria.com/en/60403.
[331] Nisan Ahmado, *"Unbearable" Memories Push Some Yazidi Survivors of IS to Suicide*, VOA (Oct. 7, 2020), www.voanews.com/extremism-watch/unbearable-memories-push-some-yazidi-survivors-suicide.
[332] See the Genocide Convention, *supra* note 1.

> is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group.[333]

Both physical and psychological acts may result in preventing births and, in the case of Êzîdî women, physical and psychological damage was caused by forced abortion, rape, and sexual violence.[334] Some women were raped hundreds of times during their captive period and subsequently developed *Androphobia* (a persistent fear of men).[335]

ISIS militants practised numerous and various policies to prevent a child from being born as an Êzîdî. Following their separation from the men at the holding sites, the women were forced to convert to Islam, to wear clothes according to Islamic *takfiri* doctrine, and to start praying.[336] They were, then, transferred to various locations in Iraq and Syria to be used as *sabaya* and sex slaves.[337] The pregnant Êzîdî women faced dire conditions. They were forced to abort their children to prevent more children from being born with pure Êzîdî lineage.[338] Furthermore, some were transferred to Syria to be used as *sabaya* and sex slaves[339] and any of these who were pregnant by Êzîdî men were also subject to forced abortion as it was easier to re-sell females without children in the market.[340]

The ISIS militants intentionally tried to impregnate Êzîdî women through rape.[341] They saw the project of enslavement as a means of forcing Êzîdîs to renounce their identity and convert to Islam:

> Many of the mushrik women and children have willingly accepted Islam and now race to practice it with evident sincerity after their exit from the darkness of shirk.[342]

After their freedom, the Êzîdîs as a whole felt stigmatised and humiliated in the eyes of other communities in Iraq. However, the freed women who had been impregnated by ISIS members faced further trauma. In some cases, the women were so ashamed that they did not want to return to live within their community,[343] and others were forced to abandon their children in order to be accepted back by their community.[344] These acts had severe implications

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[333] *Akayesu* (Trial Judgement), paras. 507-508.
[334] Amnesty International, *Legacy of Terror: The Plight of Yezidi Child Survivors of ISIS* (2020), www.amnesty.org.uk/files/2020-07/Legacy%20of%20Terror.pdf?062FJYh4TGhKcuCcbEJRX8VVXTeEXSSR.
[335] Graham-Harrison, *supra* note 300; Cathy Otten, *Life After ISIS Slavery for Yazidi Women and Children*, THE NEW YORKER (Aug. 31, 2017), www.newyorker.com/news/news-desk/life-after-isis-slavery-for-yazidi-women-and-children.
[336] See Videos 29, 82 and 94 (Appendix VI)
[337] *Investigators Build Case for IS Crimes Against Yazidis*", *VOA* (May 21, 2020), www.voanews.com/middle-east/investigators-build-case-crimes-against-yazidis.
[338] See UNHRC Report: They Came to Destroy, paras. 64, 70, 75 and 142; Minority Rights Groups International, *supra* note 311, at 16, 26, 30. 31 and 32; UNAMI and OHCHR Report, *supra* note 211, at 9, 14 and 16.
[339] *Investigators Build Case for IS Crimes Against Yazidis*, *supra* note 337.
[340] Atika Shubert, Bharati Naik, *ISIS Forced Pregnant Yazidi Women to Have Abortions*, CNN (Oct. 6, 2015), edition.cnn.com/2015/10/06/middleeast/pregnant-yazidis-forced-abortions-isis/index.html.
[341] See Callimachi, *supra* note 297.
[342] Islamic State, *"The Failed Crusade"*, *supra* note 38.
[343] See Hawkar Ibrahim, Verena Ertl *et al*., *Trauma and Perceived Social Rejection among Yazidi Women and Girls Who Survived Enslavement and Genocide*", BMC MEDICINE (2018); Dana T. Menmy, "*We Do Not Accept Those Children": Yazidis Forbid ISIS offspring*, ALJAZEERA (Mar. 24, 2021), www.aljazeera.com/features/2021/3/24/wrenching-choice-yazidi-mothers-to-choose-children-or-community.
[344] Maya Oppenheim, *Yazidi Rape Survivors Forced to Abandon Children of Isis to Be Able to Return to Community: "Drowning in an ocean of pain"*, THE INDEPENDENT (Aug. 3, 2019),

on the lives of Êzîdî women to the extent that it is unlikely they will marry within their community and have children of pure Êzîdî lineage. Also, children born to Êzîdî women suffered the degrading condition of statelessness; neither accepted by the community in general nor by the Êzîdî community. They were not eligible to attend school, which made it difficult for them to be reintegrated into the Êzîdî community.[345]

This strategy of gender inequality, sexual violence, and dominance over the lives of women and children aimed to eliminate the Êzîdî identity and to secure the continuity and future of the Caliphate, is a clear state-building strategy.[346]

5. Article II(e): Forcibly Transferring Children of the Group to Another Group

According to the Trial Chamber in *Akayesu*, the focus of this article is:

> not only to sanction a direct act of forcible physical transfer, but also to sanction acts of threats or trauma which would lead to the forcible transfer of children from one group to another.[347]

The data shows that ISIS took several hundred Êzîdî children against their will.[348] Children as young as five were separated from their families and sent to training camps to be taught the ISIS programme and learn ISIS fighting techniques.[349] Some children were sold as slaves and servants to Muslim families within ISIS-controlled areas, or even transferred to Turkey.[350]

According to Article 6(e) of ICC Elements of Crime, someone aged under 18 years is considered to be a child.[351] However, the ISIS policy towards captive children was based on checking a boy's armpits. Those without hair were spared and taken to training camps for indoctrination[352] into Islam and training for frontline fighting or suicide bombing.[353] This was intended to ensure ISIS ideology was established inside the community for future generations. One method that ISIS used to indoctrinate boys aged 13 and under was starvation. They were made to fight over food and told that by blowing themselves up, they could eat to their heart's

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www.independent.co.uk/news/world/middle-east/yÊzîdîs-sinjar-massacre-rape-iraq-isis-fighters-children-a9037126.htmlr.

[345] *Yazidis to Accept ISIS Rape Survivors, But Not Their Children*, ALJAZEERA (Apr. 29, 2019), www.aljazeera.com/news/2019/4/29/yazidis-to-accept-isil-rape-survivors-but-not-their-children.

[346] For further background, see BAYAR MUSTAFA SEVDEEN, THOMAS SCHMIDINGER (EDS.), BEYOND ISIS: HISTORY AND FUTURE OF MINORITIES IN IRAQ (2019)

[347] *Akayesu* (Trial Judgement), para. 509.

[348] UNHRC Report: They Came to Destroy; Cetorelli, Ashrap, *supra* note 19. See also UNAMI and OHCHR Report, supra note 211, at 7; Cetorelli, Sasson *et al.*, *supra* note 235.

[349] Amnesty International, *supra* note 335.

[350] Jane Arraf, *This Man Has Freed Hundreds of Yazidis Captured by ISIS. Thousands Remain Missing*, NPR (Jan. 18, 2018), www.npr.org/sections/parallels/2018/01/18/578313469/this-man-has-freed-hundreds-of-yazidis-captured-by-isis-thousands-remain-missing.

[351] ICC Elements of Crimes, art. 6, lett. e).

[352] See *ISIL: Nationals of ICC states parties committing genocide and other crimes against the Yazidis,* FREE YEZIDI FOUNDATION (Sept. 2015), at 9, www.freeyezidi.org/wp-content/uploads/Corr-RED-ISIL-commiting-genocide-ag-the-Yazidis.pdf.

[353] UNHRC Report: They Came to Destroy, paras. 89-97; Amnesty International, *supra* note 335; Exhibit 3 (Appendix VII).

content in paradise.[354] At times, if children did not show a willingness to cooperate, they would be tortured.[355]

Even after their rescue, the boys were deeply traumatised and lived a very disordered life.[356] They found it very difficult to adjust to their new life again with their real parents as they had forgotten the language and become accustomed to their adopted parents. For example, Ahmed Ameen Koro said "I can"t sleep properly because I see them in my dreams".[357] Another Êzîdî boy who was captured in Şingal Mountains was indoctrinated into ISIS ideology, then used as a servant at his captor's house and as a soldier on the frontlines.[358] When his mother tried to take his hand, he said, "where are you taking me? I do not want to go". He was fighting to break free of his mother's clasp as he thought he would be sold to another captor because he did not recognise his mother.[359]

Another child did not know his name and found it difficult to speak to his family weeks after his liberation from ISIS. Soon after ISIS captured him, he was sent to Turkey and was taught Turkish.[360] He was then transferred to Tel-Afar, mainly occupied by Turkmen, and used as a servant by the wife of an ISIS commander who bought him. He thought his name was "Ghulam" (a servant boy), as this is what his Turkish captor called him.[361]

While many children have suffered psychological trauma from witnessing the execution of their family members, the current domestic situation in Iraq further assists the cycle of discriminative policy against the Êzîdî members and prevents the Êzîdîs from recovering.

B. *Dolus Specialis* of ISIS Towards the Êzîdîs

For the ISIS crimes against the Êzîdîs to amount to genocide, the *actus reus* and the *mens rea* of the prohibited acts enumerated under Article II of the Convention[362] must also be accompanied by *dolus specialis*. The ISIS members did not hide their *dolus specialis* and later in October 2014, in their online magazine *Dabiq – Issue Number 4: The Failed Crusade*, under the title: "The Revival of Slavery", they published the reason for killing the Êzîdî males and kidnapping and enslaving the girls and younger boys because they were regarded as *Pagan* and *Kuffar* (infidels). The Issue stipulates:

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[354] *Become Suicide Bombers, Food Will be Served in Paradise: Islamic State Told Yazidi boys,* THE HINDU (May 10, 2017), www.thehindu.com/news/international/become-suicide-bombers-food-will-be-served-in-paradise-islamic-state-told-yazidi-boys/article18419803.ece.

[355] Amnesty International, *supra* note 335; *Children of ISIS*, FRONTLINE PBS (Nov. 23, 2015) www.youtube.com/watch?v=0VPiJr3qBEc; *Children of ISIS – CBSN on Assignment*, CBS NEWS, (July 24, 2017), www.youtube.com/watch?v=IKkENq0Z9V0.

[356] See Kaamil Ahmed, *Yazidi Children and Rape Victims "Left Abandoned" after ISIS Captivity -Report*, THE GUARDIAN (July 30, 2020), www.theguardian.com/global-development/2020/jul/30/yazidi-children-and-victims-left-abandoned-after-isis-captivity-report.

[357] Yeica Fisch, Maya Alleruzzo, *ISIS Starved Yazidi Children and Told Them They Could Feast in Paradise if They Carried out Suicide Bombings*, THE INDEPENDENT (May 11, 2017), www.independent.co.uk/news/world/middle-east/isis-yazidi-children-syria-iraq-starved-suicide-bombings-eat-in-paradise-a7729581.html.

[358] Nima Elbagir, *ISIS Power Is Waning, But Its Child Slave Trade Is Still Booming*, CNN (Oct. 18, 2017), edition.cnn.com/2017/10/18/middleeast/isis-yazidi-slavery-child-slaves/index.html.

[359] *Id*.

[360] *Id*.

[361] *Id*.

[362] Such as intention to kill or deliberately bringing about conditions threatening the life of the group members, forcibly transferring children etc., see art. II of the Genocide Convention, *supra* note 1.

> Prior to the taking of Sinjar, *Sharī'ah* students in the Islamic State were tasked to research the Êzîdîs to determine if they should be treated as an originally mushrik group or one that originated as Muslims and then apostatized, due to many of the related Islamic rulings that would apply to the group, its individuals, and their families. Because of the Arabic terminologies used by this group either to describe themselves or their beliefs, some contemporary Muslim scholars have classified them as possibly an apostate sect, not an originally mushrik religion, but upon further research, it was determined that this group is one that existed since the pre-Islamic jāhiliyyah [meaning ignorance, author's translation], but became "Islamized" by the surrounding Muslim population, language, and culture, although they never accepted Islam nor claimed to have adopted it. The apparent origin of the religion is found in the Magianism of ancient Persia, but reinterpreted with elements of Sabianism, Judaism, and Christianity, and ultimately expressed in the heretical vocabulary of extreme Sufism.[363]

It continues:

> Accordingly, the Islamic State dealt with this group as the majority of fuqahā" have indicated how mushrikīn should be dealt with. Unlike the Jews and Christians, there was no room for jizyah payment. Also, their women could be enslaved unlike female apostates who the majority of the fuqahā" say cannot be enslaved and can only be given an ultimatum to repent or face the sword.[364]

The following passage from *Dabiq* clearly states that the existence of the Êzîdîs is something for which God will judge Muslims:

> Upon conquering the region of Sinjar in Wilāyat Nīnawā, the Islamic State faced a population of Êzîdîs, a pagan minority existent for ages in regions of Iraq and Shām. Their continual existence to this day is a matter that Muslims should question as they will be asked about it on Judgment Day, considering that Allah had revealed Āyat as-Sayf (the verse of the sword) over 1400 years ago.[365]

As seen above, ISIS members made ideological use of Islamic *Sharī'ah* law to justify their crimes.[366] The above statements are examples of how ISIS scholars had studied the Êzîdîs and differentiated between a) Ahl al-Kitāb (People of the Book)[367] b) religious groups who were originally Muslim but that have apostatized, and c) religious groups that were "originally polytheistic".[368] This shows that the Êzîdîs were separated from Christians, who could convert or stay under the Islamic rule and pay *Jizyah* or leave their property and their belongings for ISIS.[369] They were also separated from the Shiites who were called *Murtad w Rafz* which means

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[363] Islamic State, *"The Failed Crusade"*, *supra* note 38. See also Mohamed Badar, *The Road to Genocide: The Propaganda Machine of the Self-declared Islamic State*, 16(3) INT'L CRIM L REV (2016).
[364] Islamic State, *"The Failed Crusade"*, *supra* note 38.
[365] *Id*.
[366] Tony Blair, *At a Glance How ISIS Justifies Genocide*, FAITH FOUNDATION tonyblairfaithfoundation.org/religion-geopolitics/commentaries/glance/how-isis-justifies-genocide.
[367] *Ahl al-Kitāb* (People of the Book/Scripture (Arabic: أهل الكتاب)) is an Islamic term which refers to Jews, Christians and Sabians. See FRANK PETERS, PEOPLE OF THE BOOK, 2011.
[368] Islamic State, *"The Failed Crusade"*, *supra* note 38; UNHRC, *Rule of Terror: Living under ISIS in Syria*, UN Doc A/HRC/27/CRP.3 (Nov. 14, 2014); UNHRC, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc A/HRC/28/69 (Feb. 5, 2015).
[369] *Jizya* or *jizyah* is a *per capita* annual tax historically levied on non-Muslim subjects, called the *dhimma*, permanently residing in Muslim lands governed by Islamic law, see Oxford Dictionary of Islam, "*Jizyah*" www.oxfordislamicstudies.com/article/opr/t125/e1206.

apostate and hypocrite; those who have refused and manipulated the true method of Islam, upon their capture, the death sentence was justified.[370] Accordingly, ISIS members did not hide their aim to target the Êzîdîs, referring to them as "a pagan minority" or "polytheistic" to justify this persecution. They justified rape, considering it a halal (acceptable) act, but noted that married women were forbidden from inclusion. In order to circumvent this rule, married women's husbands were killed so that the women could be used as sex slaves.[371] Consequently, this systematic classification left the Êzîdîs with the option of either to be killed or to convert to the ISIS approach to Islam.

Such ISIS approach to Islam further allowed ISIS rights to kill women too old to be sold as sex slaves or used for physical labour and bury them in mass graves. These acts by ISIS, detailed in Article II of the Convention, were conducted openly and, in many cases, ISIS fighters boasted of them. For example, in 2014, a video was released showing ISIS fighters bragging about life with enslaved Êzîdî women and girls.[372] "Today is the [female] slave market day. Today is the day where this verse [citing from Qur"an] applies".[373]

Due to their belief the ISIS members specifically targeted the members of Êzîdîs. They committed the above mentioned acts against the Êzîdîs with specific intent to destroy the Êzîdî group as such.

IV. Final Remarks and Conclusion

This chapter examined ISIS crimes against the Êzîdîs in light of the Genocide Convention. Initially, the law of genocide was analysed via its constituting elements in order to be applied to the accusations directed at ISIS. The accusations were obtained from multiple open sources, including interview statements. It was found that the range of crimes committed by ISIS were varied and each was examined under the provisions enumerated under Article II. Due to the scope of the article, only limited details of the crimes committed have been presented. Regardless, it is clear that ISIS members systematically committed crimes according to the Genocide Convention in accordance with their strict approach to Islam.

From the examination, it was found that ISIS managed to force out nearly all the Êzîdî people from their ancestral land in the Şingal region. Those who did not, or could not, escape in time were subjected to ISIS's strict rule; for example, they either converted to ISIS's approach to Islam or were killed. The killing of certain groups of Êzîdîs, mainly males over 13, and older females, was not part of a conflict between the Êzîdîs and ISIS; the Êzîdîs were civilians and did not take part in any fighting between ISIS or other groups in the region.[374]

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[370] The Shiite were called *Murtad* (مرتد, apostate) who hides his apostasy is referred to as a *munāfiq* (منافق, hypocrite), see Oxford Dictionary of Islam, *Murtadd*, meaningin.com/urdu-to-english/murtad-in-english.

[371] See Sophie Shevardnadze, *ISIS Sex Slave Survivor: They Beat Me, Raped Me, Treated Me like an Animal*, RT (Aug. 19, 2016), www.rt.com/shows/sophieco/336398-is-slave-horrors-crime; Video 66 (Appendix VI).

[372] See Video 33 (Appendix VI). The fighters stating that "today is the day of distributing the sex slaves between us". The fighters are laughing and describe the type of women they want to buy.

[373] *Video Shows ISIS Fighters Trading Women*, PIGMINE (Nov. 9, 2014) www.youtube.com/watch?v=ESkFoE0yADs. See also Videos 29, 30 and 94 (Appendix VI)

[374] Interview with FM (Presidential Palace, Baghdad, Iraq 30 May 2017). Also, killing men who take part. in a conflict between one party and another and which results in genocide was elaborated in *Krstić*. See *Krstić* (Trial Judgement), paras. 595-597. However, this can be differentiated from the Darfur Report where killing men was not accompanied by *dolus specialis* because genocide could not be proved. See Report of the Darfur Commission, *supra* note 108.

With regards to Êzîdî children too young to be sold for sex (females) or too young to be killed (males under 13), they were indoctrinated according to the ISIS interpretation of Islam. The killing, forced conversion and brainwashing of children were used by ISIS as a tool to eliminate the Êzîdî population of the community simply because they were Êzîdîs. Although the motive of each ISIS perpetrator who participated in the crimes committed against the Êzîdîs could have been different, the objective was to destroy the community as a whole.

In addition, the Êzîdî community were subjected to harsh conditions due to their mass flight under very hot summer conditions, which many could not endure. The majority of Êzîdîs are now dispersed around the world and cannot practice their religion as a group. ISIS also destroyed the Êzîdî holy places and looted their properties and cultural heritages. Most of their holy places are shrines which cannot be rebuilt in other regions as they are sacred to their ancestral land. The Êzîdîs faced further restriction because they were not allowed to openly worship their religion, and it was difficult to practice their religion in the areas populated by Muslims.

Whether the "destroying" component of the Convention can be achieved through forcibly moving members of the groups from their ancestral land is subject to argument. The Trial and Appeal Chambers in *Krstić* concluded that genocide is limited to the physical and biological destruction of the group in whole or in part.[375] In contrast, the Trial Chamber in *Blagojević* considered changes to the cultural formation of a group through the forcible transfer of its members to another group can amount to genocide.[376] Certainly, whether such expulsion was accompanied by *dolus specialis* is subject to a fact-based inquiry. The examination above demonstrated that the entire Êzîdî population in the Şingal region was forced off their ancestral land and obliged to flee to different areas around the world because ISIS identified them as infidels. This brought about awful conditions for the Êzîdîs, including harsh conditions that led to death, at times by suicide, and being deprived of practising their religion. The dispersal of the Êzîdîs worldwide may lead to new generations being assimilated into the dominant communities due to separation from their groups and lack of adequate places of worship. Those who escaped to Europe live in fear of attack. For example, in Germany, they have been targeted because of their religion.[377] Also, several years after the ISIS attack, only a limited number of Êzîdîs have been able to return to their homeland. This is due to multiple factors related to the existential threat of ISIS supporters in the region, including the three identified actors accused of assisting ISIS when they attacked the Êzîdîs on 3rd August 2014.[378] Such expulsion has been very destructive. It could be suggested that, even if support is given to the Êzîdîs, it is still unlikely they could ever return to their normal daily lives.[379] Despite ISIS's control in the region being limited now, the three identified actors continue to pursue policies of discrimination by other means. This is elaborated on in the next three core chapters. Moreover, the al-Hawl camp, in reality, is a small ISIS state and thus a "ticking time bomb", which contains tens of thousands of captured ISIS members. This is an existential threat to the Êzîdîs. In addition to the captured ISIS members, thousands of their children have been raised without a formal education, and the

[375] *Krstić* (Trial Judgement), para. 580; *Krstić* (Appeals Judgement), para. 25.
[376] *Blagojević, Jokić* (Trial Judgement), para. 666.
[377] Wladimir van Wilgenburg, *Germany's Yezidi Community Shocked by Second Murder in 3 Days*, KURDISTAN24 (Apr. 11, 2020), www.kurdistan24.net/en/story/22213-Germany%E2%80%99s-Yezidi-community-shocked-by-second-murder-in-3-days.
[378] *Turkish Aircraft Target a Hospital in Sinjar,* SHAFAQ NEWS (Aug. 17, 2021), shafaq.com/en/Iraq-News/Turkish-aircraft-target-a-hospital-in-Sinjar; Zeidon Alkinani, *Iraq's Yazidi Existential Crisis Amidst Sinjar's Hyper-militarization*, CENTER FOR IRANIAN STUDIES IN ANKARA (Mar. 24, 2021), iramcenter.org/en/iraqs-yazidi-existential-crisis-amidst-sinjars-hyper-militarization/.
[379] See Cryer *et al*, *supra* note 110, at 222-223.

camp is only sixteen kilometres away from Şingal.[380] This presents a real threat to the life of the Êzîdîs, if ISIS finds an opportunity to rise again.

The article also illustrated that ISIS committed numerous crimes against the Êzîdîs, such as using them as sex slaves and human shields, training and using children for suicide bombings, and forcing cannibalism on them, an indignity rarely used in genocides in the past. Each of these acts, to a various extent, has contributed to destroy parts of the Êzîdî community to the extent of consigning the community to elimination. Nevertheless, it is not appropriate to generalise that every Muslim believes in the approach taken by ISIS in its interpretation of Islamic law.[381] It is the ISIS members who relied on the strict interpretation of *Sharī'ah* to achieve its goals, which was important in inferring the *mens rea* in respect of the crimes committed by ISIS members.

ISIS did not shy away from publicly announcing their intention to eliminate the Êzîdîs. On the contrary, they openly published their methods of imposing their rule on the Êzîdî. In the *Dabiq* magazine, ISIS justified the punishments given to the Êzîdîs as being a result of their religious faith. Using *Kuffar* in their statements allowed the executive bodies of ISIS to impose the strict approach of *Sharī'ah* that led to murder, kidnapping, rape, indoctrination, sex slavery, and more crimes mentioned throughout this chapter.

It must be highlighted that many foreign fighters who joined ISIS may not have known of the Êzîdîs, or may have lacked the level of understanding to be able to make an interpretation of Islamic law which concerned the Êzîdîs. This phenomenon of ISIS attracting foreign fighters from around the world poses a question for *mens rea*. Some of the foreign fighters who acted as foot soldiers were trained to execute ISIS rules and principles. Some of them may have been motivated or obligated to become involved in a crime without possessing the requisite *mens rea* of genocide against the Êzîdîs. For example, being ordered to kill their members or destroy their places of worship without possessing sufficient knowledge about them. This may raise difficulties between conviction or acquittal of genocide. One can argue that some fighters may not have possessed the specific intent, yet they knew ISIS's strict policy and still wished to join the organisation. Certainly, the findings indicate that the aim of ISIS was to eliminate its opponents, including the Sunnis, who did not swear allegiance to its authority. A future court may draw the specific intention from the wider implications of the accused's conduct that led to the success of the commission of the crime as a whole. Otherwise, the crime falls below the level of genocide, and the accused may be found guilty of complicity in genocide,[382] or crimes against humanity.

Certainly, many crimes committed against the Êzîdîs were systematic and committed on a large scale aimed at destroying the community. These crimes were committed in different countries with the aim of physical and biological destruction of the Êzîdî community, in whole or in part, due to their religious beliefs. While the specific intention of ISIS is clearly reflected in *Dabiq*, other circumstantial evidence overwhelmingly points to the intentions of ISIS in their treatment of the Êzîdîs.

The article also considered the "contextual element". This is a contested area in the law concerning genocide because it has not been recognised as an essential element of genocide. Rather, it is part of the ICC standard and has not been accepted as part of customary international law. Yet the ICC standard finds it necessary that a pattern of systematic attack is

[380] Richard Spencer, "*Soon They Will Be Old Enough to Carry a Gun": The Lost Children of ISIS*, THE TIMES (Sept. 28, 2021), www.thetimes.co.uk/article/soon-they-will-be-old-enough-to-carry-a-gun-the-lost-children-of-isis-gw9rk35qw.
[381] See Section 1.
[382] See *Krstić* (Appeals Judgement).

met. The examination in this article has shown that such crimes were committed systematically, and the pattern of committing similar crimes in different parts of Şingal has been realised. Êzîdî members faced the same pattern of persecution in ISIS areas of control because the systematic approach was based on the ISIS approach to Islam.

Finally, the accumulation of the acts performed by ISIS members against the Êzîdîs did not destroy the whole Êzîdî group; nevertheless, it can be said to have had a substantial impact on the group through the destruction of many physical and biological aspects of their community. This article concludes that the examination above is in line with the conclusion reached by different organisations and competent legal teams, that ISIS crimes against the Êzîdîs amount to genocide.[383]

[383] UNHRC Report: They Came to Destroy.

Navigating Justice: Assessing the Crucial Role of Police Administration in the Criminal Justice System

by Panchota Mohan[*] & Jayanti Majhi[**]

ABSTRACT: This Paper assesses the role of police administration in the complex landscape of the criminal justice system. Every civil government has a criminal justice system in place to uphold the moral standards of its community. The criminal justice system enforces the standards of conduct necessary to safeguard people within society. The criminal justice system works by identifying, bringing charges against, finding guilty, and sentencing individuals who break the fundamental societal norms. The study employs a descriptive research methodology to achieve four primary objectives. Firstly, it examines the Role of Police Administration in the Criminal Justice System. Secondly, the effectiveness of police administration in preventing crime, ensuring public safety, and apprehending offenders. Thirdly, investigated the challenges and obstacles faced by police administrators in fulfilling their duties effectively. Fourthly, the impact of police administration on community relations, trust, and cooperation. Utilizing comprehensive analysis techniques involving self-reported data and psychological assessments, the study elucidates the role of police administration in the criminal justice system. Furthermore, the study explores opportunities for improvement, the integration of technology, community engagement strategies, and the imperative for enhancing transparency and accountability within law enforcement agencies. The results of this study offer insightful information for policymakers, law enforcement professionals, and stakeholders seeking to enhance the effectiveness and legitimacy of police administration within the criminal justice framework.

KEYWORDS: Administration; Criminal Justice; India; Law; Police.

I. Introduction

Every civil government has a criminal justice system in place to uphold the moral standards of its community. The criminal justice system enforces the standards of conduct necessary to safeguard people within society. Knowing the police is a prerequisite to knowing the criminal justice system. The criminal justice system works by identifying, bringing charges against, finding guilty, and sentencing individuals who break the fundamental societal norms. The criminal justice system's actions against lawbreakers serve several purposes, including removing dangerous individuals from society who endanger it, discouraging others from engaging in criminal activity, creating an environment that is favorable to social interaction, and providing society with a chance to rehabilitate lawbreakers and anti-social people into law-abiding citizens.

The Police, the Prosecution, the Judiciary, and the Prison and Correctional Services comprise India's criminal justice system. Because of the nature of their roles in society, the police continue to be the primary institution in the criminal justice system. Since police officers

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are the first to arrive at a crime scene, their role is crucial. The boundaries of a crime scene that is the subject of court cases are created by the police officer's application of the law in each instance. As was already noted, gathering information from the police – facts, evidence, witness interviews, and other pertinent materials – has a significant impact on the investigation. The modern police force was founded on the solidification of British rule in India.[1]

A. History of Indian Police

The Latin word *politia*, which refers to a State's status, is where the word *police* originate. The Oxford Dictionary defines the term *police* as the internal government of a State, a system of regulations for maintaining law and order. This phrase refers to the deliberate upholding of the law to promote national and public peace, as well as the protection of property from dangerous activities and the commission of legal acts. In India, the idea of *police* has existed since antiquity. Manu was given an ancient rule that placed a strong emphasis on the necessity of police force to uphold law and order. According to him, only individuals who are committed to defending society against violence and have a good understanding of the local populace should be assigned police duties. The era of Lord Rama and Lord Krishna also saw the existence of the police force. Since India is the second most populous country in the world and a multicultural, multiethnic nation, maintaining law and order is a very challenging challenge. Growing levels of violence, social unrest, and grave risks of terrorist activity have made the role of the police increasingly crucial. Although there are no precise references to criminal justice organizations from the past, significant aspects of the criminal justice system were expressed during the Mauryan period (324-183 BC). The Arthasastra of Kautilya, composed in 310 BC, provided insights into the conditions of society, governance, the administration of justice, and criminal activity.

The colonial era is where the Indian Police's history begins. The Indian Police was founded by the British in 1861 and was based on their own police force. The major responsibilities of the police were to uphold law and order, deter crime, and defend British interests. The Indian Police were reorganized to meet the demands of a democratic and independent India following the country's independence in 1947. These days, each State has its own police force, and the Indian Police are under State authority.[2]

B. Criminal Justic System

The extent to which governments succeed in the criminal justice system affects the rule of law, democracy, development, and human rights. The goals of the criminal justice system include preventing and controlling crime, upholding public peace and order, defending the rights of victims and those in legal trouble, punishing and rehabilitating those found guilty of crimes, and generally defending people's lives and property from criminal activity. According to the Indian constitution, it is seen as the State's main duty. The police, courts, and prisons are the main official criminal justice agencies. According to India's Constitution, prison management and law enforcement are State matters. However, the federal Supreme Court and State High

[1] C.P. Gupta, Rekha Khandelwal, *Role of Police in Criminal Justice System: An Analytical Study on Indian Perspective*, 3(1) GLS LAW JOURNAL 59 (2021).

[2] Devasish Bose, *Introduction to Forensic Science*, UGC MOOCs (n.d.), https://ugcmoocs.inflibnet.ac.in/assets/uploads/1/3/34/et/P10_M12200206060602025454.pdf.

Courts oversee managing the nation's judicial system. The organizational structure, management, and operation of all criminal justice agencies are governed by federal legislation such as the Indian Penal Code, Criminal Procedure Code, Indian Evidence Act, Police Act, and Prison Act, even though police and prisons are State-related entities. This essay provides an explanation of the composition and operations of the different Criminal Justice System agencies.

The Police, Judiciary, and Correctional Institutes, which are the fundamental components of the Criminal Justice System, adhere to Federal laws. The adversarial common law system that India has adopted for the administration of criminal justice was given by the British colonial rulers. Within the Indian Criminal Justice Administration, the Judge serves as both an impartial arbiter and a fact finder in addition to imposing the sentence. The Police are responsible for conducting investigations. The Correctional Institutes are tasked with carrying out the punishment.[3]

C. Evolution of the Criminal Justice System

Since the beginning of time, humanity has developed a variety of strategies and tools to uphold social order, curb criminal activity among its population, and maintain law and order. The methods used by different societies – and occasionally even within the same society – to regulate criminal activity vary. But the system mostly consists of the arrest, prosecution, and sentencing procedures.

Together with the advancement of civilization, the socioeconomic and political circumstances that have prevailed throughout history have had a significant impact on the development and expansion of the arrest, trial, and punishment mechanisms. According to this, there have been three primary stages in the formation of penal law: strict responsibility is the first, and moral depravity or guilt consciousness is the focus of the second stage. The test of consequences foresee was added to the notion of moral evil.

The history of the Criminal Justice System is extensive. In England during the 12th century, the Crown progressively came to govern the administration of justice, and the Crown was to be compensated rather than the sufferer. But no formal methods were developed. Before the 18th century, the criminal justice system was characterized by uncodified law and informal methods. It is a historical fact that the criminal justice system's operational framework may be traced back to some codified legal codes and State-administered processes from antiquity. The oldest known set of laws was created by King Hammurabi of Babylon in the eighteenth-century B.C. and is known as the Code of Hammurabi. This code was intended to govern many different aspects of human affairs.

The law of dharma, as outlined in the Vedas, dominated the criminal justice system in ancient India because it was regarded as the highest law. The king has the authority to punish the transgressor. The distinction between criminal and civil wrong was not made explicitly in early Hindu law, but as society advanced and developed, the King began enacting laws and regulations that considered regional usages and customs. The system underwent very subtle yet slow adjustments.[4]

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[3] R. Thilagaraj, *Criminal Justice System in India*, in HANDBOOK OF ASIAN CRIMINOLOGY (Jianhong Liu, Bill Hebenton, Susyan Jou eds., 2013).

[4] Mehraj Uddin, *Concept of Criminal Justice System and Police System*, EGYANKOSH (2024), *https://egyankosh.gkpad.com/page/38802*.

D. Role of Indian Police in Criminal Justice System

An important part of India's criminal justice system is the Indian Police. They fall into four areas for their role: protecting human rights, maintaining law and order, investigating crimes, and preventing crimes.

Prevention of Crime – It is the duty of the Indian Police to deter crime. They accomplish this by seeing possible offenders and taking action to stop them. To discourage criminal activity, the police also monitor their particular jurisdictions on a regular basis. Along with collaborating closely with the community, the police also identify possible dangers and take preventative action.

Investigation of Crime – Crime investigation falls under the purview of the Indian Police. They accomplish this by gathering information, speaking with witnesses, and identifying potential culprits. In addition, the police employ scientific techniques like fingerprinting and DNA analysis to solve crimes. To get evidence, the police also collaborate closely with forensic specialists.

Maintenance of Law and Order – Upholding law and order is the duty of the Indian Police. They accomplish this by making sure that individuals abide by the law and, where required, by enforcing it. In addition, the police oversee controlling traffic and making sure that the law is obeyed. Public order is also protected by the police during protests and demonstrations.

Protection of Human Rights – The Indian Police oversee defending the citizens' human rights. They achieve this by making sure that individuals are not subjected to discrimination based on their gender, caste, or religion. Additionally, the police make sure that no one is tortured or exposed to other types of physical or psychological abuse. In addition, the police guarantee that people's rights are upheld and that they can access the legal system.

Policing through social media – In various parts of India, police are tinkering with social media. The focus is on how to use social media platforms like Facebook and Twitter to inform the public about police department activities and crime prevention efforts. Public information can also be gathered using the *social media* account. In such instances, it seems that the police strategy ignores a significant aspect of the issue.

Despite their efforts to mitigate the harmful impacts of social media, law enforcement agencies often overlook the impact that *social media* has on their security agents. Social media has already given protestors the ability to communicate with each other in an accurate and dependable manner, so police must know when and how to track them to assess community sentiment, spot any potential criminal activity, and stay informed about any large-scale activities.[5]

E. Challenges faced by Indian Police in Criminal Justice System

The Criminal Justice System presents several difficulties for Indian police. Among the noteworthy obstacles are:

[5] *Role of Police in Criminal Justice System*, THE TAMIL NADU DR. AMBEDKAR LAW UNIVERSITY (2023), https://www.tndalu.ac.in/Role%20of%20police%20in%20criminal%20justice%20system.pdf.

Overburdened and understaffed police force – The Indian Police force lacks sufficient staffing and is overworked. A lack of quality investigation is caused by a manpower shortfall, which further delays the resolution of cases.

Outdated laws – The Criminal Justice System is governed by antiquated rules that do not adapt to the shifting requirements of society. These laws need the police force to operate, which presents several challenges.

Lack of training – India's police force is not well trained to investigate incidents. Their training is frequently insufficient and does not get them ready for the actual world.

Corruption – One of the biggest problems facing the Indian Police is corruption. It is not unusual for law enforcement officials to accept bribes or engage in illegal activity.

Political interference – Another significant issue is political meddling in the way the police operate. This meddling frequently results in the police force being exploited for political purposes, undermining its independence.

Lack of resources – The Indian Police force struggles to conduct efficient investigations because it lacks resources such as trucks, equipment, and contemporary technology.

Low conviction rates – India has a low conviction rate in criminal cases, which contributes to a lack of trust in the legal system. Numerous reasons contribute to the low conviction rate, such as inadequate investigation and ineffective prosecution.[6]

F. Contribution of Police in the Criminal Justice System

Numerous functions are played by police in the criminal justice system. A developed civilization is incapable of understanding how the legal system would operate without a robust police force and its responsibilities.

Lawbreakers and suspected criminals are apprehended by police. They are arrested and brought before the trial court to prevent the corrupt officers' wrongdoings. Through this approach, the police hope to deter illegal activity.

The pursuit of criminal activity is one of the police's most important responsibilities. Sections 154 through 176 of the Code of Criminal Procedure grant police the authority to investigate criminal cases. Following the conclusion of the inquiry, the police must file a final report to be released from custody or an indictment to be prosecuted.

Someone who is knowledgeable of the case's facts and circumstances may be subject to a verbal examination by a police officer. The Code of Criminal Procedure allows for interrogations of the police in Sections 61 and 167.

One of the most important things the police do is stop and seize. The Code of Criminal Procedure's Sections 96 through 105 address the manner and process of search and seizure. When conducting searches and seizures, police should adhere to just and reasonable policies. This is a task that the police can carry out with or without a warrant.

A police officer satisfies his duty to report an event to an individual who has taken their own life, passed away without raising a reasonable suspicion, been murdered by another person, or died in an unusual way. A police officer mentions the physical conditions of the body in the article, regardless of the arm or tool that may have been used to commit the crime.[7]

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[6] Safena Akter Jidni, The Role of Police in Ensuring Justice under the Criminal Justice System in Bangladesh: A Critical Study (2021).

[7] Arun Kumar Singh, Yogendra Singh, *A Study on the Role of Police in Criminal Justice System*, 16(6) Journal of Advances and Scholarly Researches in Allied Education 1980 (2019).

G. Literature Review

Cleghorn[8] studied that in Trinidad and Tobago, as in other Anglophone Caribbean countries, the criminal justice system was a holdover from the colonial past. Judicial users' problems with access to and participation in the legal system were still little studied, despite several reforms aimed at enhancing the caliber and nature of police and judicial services offered. The study examined the intricacies of victims' experiences and the consequences for the caliber and kind of police and judicial services rendered using interview data from direct and circumstantial victims. In addition to sentiments of inequity and silence, many had to overcome obstacles that were structural, interpersonal, and systemic. The result was institutionalized victimization. According to the research, colonialism's lasting effects on island populations may have had an impact on the victims' experiences. Power disparities, institutional actions that foster networks of solidarity, bargaining, unofficial systems, and procedures, among other things. Based on victim narratives, it was apparent that reforms and a new strategy were required to enhance the standard of justice services while also giving victims more agency within the legal system.

Ram [9]analyzed the major goals of criminal justice administration was to protect and uphold the rule of law, which includes social control of the law, keeping the peace, ensuring a prompt trial, punishing offenders, rehabilitating them through the legal system, and providing comfort to victims of crimes. Numerous flaws and gaps exist were the existing criminal justice system. The lengthy legal process was sometimes designed with the accused's mindset in mind, *i.e*., a system that prioritizes the rights and interests of the perpetrator over those of the victims. The criminal justice system that was place today has failed to provide individuals with swift and efficient justice or to ensure that those who commit crimes undoubtedly face consequences. Considering the growing difficulties associated with criminal justice reform, it was imperative to provide a revised perspective on the various facets of the criminal justice system.

Chakraborty[10] viewed that the criminal justice systems rely heavily on the police. The primary goal of the police was to provide immediate assistance to the victim of the crime. The primary duties of the police include providing emergency assistance, apprehending the accused, conducting criminal investigations, and initiating the criminal justice system. It was accurate to State that the police's investigation and narrative serve as the foundation for the entire prosecution. The Criminal Justice System failed if the Police were not impartial and diligent. It works the function and responsibilities of police in India's criminal justice system were be covered in the essay.

Guerette and others[11] evaluated that in today's police, conducting accurate crime analyses has become essential. It was brought about by both enhanced technology capabilities and the key role that analysis plays in contemporary police procedures. However, given the dearth of academic research on the subject, many police departments struggle with the development of

[8] Leah L. Cleghorn, *Victims Navigating Justice in Island Communities: An Exploration of Victims' Experiences of the Criminal Justice System and Quality of Justice Services Provided in Trinidad and Tobago,* 18(1) ISLAND STUDIES JOURNAL 52 (2023).

[9] Mohan A. Ram, Binoy Shivanna, *A Study on The Challenges of Administration of Criminal Justice System in Modern India*, WORLD HEALTH ORGANIZATION GLOBAL INDEX MEDICUS (2023), https://search.bvsalud.org/gim/resource/en/sea-218774.

[10] Abhijay Chakraborty, *Police in Criminal Justice System in India*, 2(2) INDIAN JOURNAL OF LAW AND LEGAL RESEARCH (2021).

[11] Rob T. Guerette, Kimberly Przeszlowski *et al*., *Improving Policing through Better Analysis: An Empirical Assessment of a Crime Analysis Training and Enhancement Project within an Urban Police Department*, 22(4) POLICE PRACTICE AND RESEARCH 1425 (2021).

their own analytical capabilities. The assessment literature that was now available also provides little help in this regard. One of the initial evaluations of the efforts to enhance the crime analytic capabilities of an urban police agency was the study. Pre- and post-training session analyst knowledge tests showed a 25-53% improvement. Additionally, an estimated pre- and post-assessment of police administrator conduct revealed that the typical usage of analytical work products grew dramatically to about 1 to 2 times per week. It represented a discernible advancement in the comprehensive application of data-derived information was the execution of law enforcement activities.

Bhat & Mir[12] examined that the police, the prosecution, the courts, and the administration of corrections make up the criminal justice system. All these system components were meant to function in unison with one another. The criminal justice system's success was only made feasible by these organs working together harmoniously. As the most important branch of the system, the prosecution system needs to function without interference from outside parties. The prosecutor bears the responsibility of maintaining impartiality as the minister of justice. The status, appointments, and function of prosecutors within the criminal justice system be the subject of an analytical focus in the study. It also highlights the criticism of the prosecutor's function and the difficulties they encountered carrying out the responsibilities. The study ends with several insightful recommendations that help the criminal justice system – in general, and the prosecution system in particular – run smoothly.

Islam[13] determined that in criminology, the role of the police was crucial. Because the primary responsibility of law enforcement was to apprehend offenders and hold them until the end of the trial to deter crime. Police were legally permitted to enforce public and social order using force and other forms of coercion. Since law enforcement personnel need a basic understanding of both crime and criminology, nearly every nation in the world has a police criminology division. Additionally, police receive manual training in criminology. It was true that a happy and peaceful society can be guaranteed by an honest, sincere, and proficient police force. While the police cannot eradicate crime entirely from society, they can manage it and keep it at a manageable level. If not, a cunning, dishonest, uneducated, and deceitful police force can provide facilities to criminals and ruin the lives of ordinary citizens. The study makes a statement and offers some suggestions for improving police officers' criminology understanding and for reforming Bangladesh's police force. The police personnel can refer to the study for strategic strategy guidance.

Goel[14] emphasized that the criminal justice system in India was enforced to uphold law and order. The legal system had been placing since British India's era. All Indian courts and police fall under the legal system. The Indian criminal justice system requires the Court and Police to abide by all regulations pertaining to criminal statutes. There were several extremely old statutes that fall within the judicial system. The Indian Penal Code governs these criminal laws. The laws of the Indian criminal justice system include several measures, such as the Dowry Prohibition Act of 1961 and the Protection of Civil Rights Act of 1955. Penalties for breaking the statutes were also imposed via the criminal court system.

[12] Mudasir Bhat, Mehraj Ud Din Mir, *The Role of Prosecution in the Criminal Justice System in India: An Analytical Audit*, 1(2) INDRAPRASTHA LAW REV 1 (2020).
[13] Sundija Islan, *Role of Police in the Criminal Justice System of Bangladesh: Need for Reformation*, 4(1) INTERNATIONAL JOURNAL OF MANAGEMENT, TECHNOLOGY, AND SOCIAL SCIENCES 46 (2019).
[14] Aman Goel, *Working of Indian Criminal Justice System*, 22(3) THINK INDIA JOURNAL 7609 (2019).

Connelie[15] evaluated that State Police was continuing to play a crucial role in the criminal justice system and was a bright future. Some onlookers concluded that there was no longer a need for a State-level law enforcement organization because local police agencies were adequate. But there's a chance that a State police force may play a complementing role rather than a rival one. Many State police agencies, such as State highway patrols, already collaborate closely with other law enforcement agencies under the purview. It was likely that the criminal justice system would be enhanced by streamlining and/or coordinating its components, which would reduce the need for duplicate processes across different governmental levels. Another way that unification could manifest itself is through the centralization of law enforcement. Centralized police agencies were shown to be effective, affordable, and efficient in numerous urban regions.

II. Research Objective

To examine the Role of Police Administration in the Criminal Justice System.

To identify the effectiveness of police administration in preventing crime, ensuring public safety, and apprehending offenders.

To investigate the challenges and obstacles faced by police administrators in fulfilling their duties effectively.

To evaluate the impact of police administration on community relations, trust, and cooperation.

III. Research Questions

What is the Role of Police Administration in the Criminal Justice System?

What is the effectiveness of police administration in preventing crime, ensuring public safety, and apprehending offenders?

What challenges and obstacles faced by police administrators in fulfilling their duties effectively?

What is the impact of police administration on community relations, trust, and cooperation?

IV. Research Methodology

Research methodology refers to the specific procedures or techniques used to locate, select, handle, and assess data on a topic. The data from a case study and the role of police administration in the criminal justice system were both investigated in this study. Primary and secondary sources serve as the foundation for the data compilation process. Relevant books, papers, and journals are the main sources of secondary data on the function of police in the criminal justice system. Establishing research questions and objectives, planning a project, choosing a sample, gathering, and analyzing data, and presenting the results in a report are all necessary steps in the research process. Research questions and objectives must be established,

[15] William Connellie, *Future Role of the State Police in the Criminal Justice System*, in CRIME AND JUSTICE IN AMERICA (John T. O'Brien, Marvin Marcus eds., 1979), at 76-89.

a research project must be organized, a sample must be selected, data must be gathered and evaluated, and the findings must be presented in a research report. A research topic must also be identified, and its background must be grasped through a literature review.

V. Result and Discussion

According to the study *Role of Police Administration in the Criminal Justice System*, police administration has a significant influence on the legitimacy and efficacy of the criminal justice system. The findings show a correlation between reduced crime rates, enhanced public safety, better community ties and efficient police administration. But problems like ineffective procedures and problems with prejudice and misbehavior demand focused changes. Furthermore, it becomes clear that integrating technology is essential to improving police operations' responsiveness and transparency. The conversation emphasizes how substantial reforms are required to solve these issues and how police administration is linked to wider criminal justice results. According to the study's findings, funding for the enhancement of police administration is essential to promoting an impartial, effective, and reliable criminal justice system.

A. To examine the Role of Police Administration in the Criminal Justice System

In the criminal justice system, police play a crucial role. As the first responders to crimes, the police are essential in stopping, identifying, and looking into illegal activity. They oversee upholding law and order, safeguarding people's lives, and property, and making sure everyone is safe[16]. In addition, the police oversee supporting crime victims and prosecuting those who have committed crimes. The criminal justice system works by finding, accusing, convicting, and punishing members of the public who break the fundamental social norms. [17]The criminal justice system's actions against lawbreakers serve a number of purposes, including removing dangerous individuals from society who endanger it, discouraging others from engaging in criminal activity, creating an environment that is favorable to social interaction, and providing society with a chance to turn lawbreakers and anti-social people into law-abiding citizens. [18]

The criminal justice system's use of police administration highlights the multidimensional importance of this institution in upholding justice and social order. As the first line of defense between the community and the law, police administration oversees stopping and looking into illegal activity. In addition to conventional law enforcement, it contributes to public trust-building, community safety, and the preservation of justice. The fair and impartial implementation of the law is contingent upon effective police administration, which in turn enhances the credibility of the criminal justice system. An in-depth analysis of this position clarifies the complex relationships within the criminal justice system and highlights how vitally important an efficient and responsible police administration is to be maintaining the effectiveness of the system and the trust of the public.

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[16] GARY W. CORDNER, POLICE ADMINISTRATION (2023).
[17] James W. Williams, *Interrogating Justice: A Critical Analysis of the Police Interrogation and Its Role in the Criminal Justice Process*, 42(2) CANADIAN JOURNAL OF CRIMINOLOGY 209 (2000).
[18] ANTHONY V. BOUZA, THE POLICE MYSTIQUE: AN INSIDER'S LOOK AT COPS, CRIME, AND THE CRIMINAL JUSTICE SYSTEM (2013).

B. To Identify the Effectiveness of Police Administration in Preventing Crime, Ensuring Public Safety, and Apprehending Offenders

The public looks to the police to do a variety of tasks, and one of the most significant things they are frequently expected to do is reduce violent crime. However, in any given neighborhood, public disorder – which is defined by drug sales, prostitution, vagrancy, and public alcohol consumption – may be more prevalent than serious violence. Controlling crime is the police's primary goal[19]. In fact, professional crime fighting is widely supported by the public as a fundamental policing tactic since it reflects a strong dedication to this goal[20]. On the other hand, it seems that other suggested tactics like community policing or problem-solving will obscure this goal. These would be terrible choices if they increased the community's susceptibility to criminal victimization. When evaluating the effectiveness of various police tactics in reducing crime).[21]

One of the most important aspects of law enforcement's function in the criminal justice system is its ability to effectively prevent crime, maintain public safety, and capture offenders. Using proactive tactics to dissuade potential offenders and keep a visible presence in communities, police administration serves as the first line of defense against criminal activity. Public safety settings are what police administrators strive to build through community policing, smart resource allocation, and crime prevention activities. The prompt and effective capture of criminals is thus a crucial indicator of police administration success. In this context, intelligence gathering, effective coordination, and investigative skills are critical elements. To improve the overall efficacy of police administration in carrying out its mandate of public safety, crime prevention, and the arrest of lawbreakers, it is essential to regularly review and modify policing techniques.

C. To Investigate the Challenges and Obstacles Faced by Police Administrators in Fulfilling Their Duties Effectively

One area of criminal justice that encounters many difficulties is law enforcement. In the US, law enforcement duties fall under the purview of the police service[22]. Due to various circumstances, the police force of today has changed from that of the past. Consequently, the management of police has grown more difficult as the quantity and complexity of circumstances have increased. [23] The public expects the police to offer the highest level of security. When an insecurity situation is made public, there are sometimes a lot of concerns from the public. Police administrators are therefore under intense pressure to make sure they complete their work carefully. This essay explores the difficulties in carrying out the functional duty of police administration as it exists now. [24]

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[19] Cody W. Telep, David L. Weisburd, *What Is Known about the Effectiveness of Police Practices in Reducing Crime and Disorder?*, 15(4) POLICE QUARTERLY 331 (2012).
[20] Lawrence W. Sherman *et al.*, *Preventing Crime: What Works, What Doesn't, What's Promising*, in NATIONAL INSTITUTE OF JUSTICE RESEARCH IN BRIEF (Jeremy Travis dir., 1998), https://www.ojp.gov/pdffiles/171676.pdf.
[21] ANTHONY A. BRAGA, PROBLEM-ORIENTED POLICING AND CRIME PREVENTION (2008).
[22] WESLEY SKOGAN, KATHLEEN FRYDL (eds.), FAIRNESS AND EFFECTIVENESS IN POLICING: THE EVIDENCE (2004).
[23] Jonathan Koppell, *Pathologies of Accountability: ICANN and the Challenge of "Multiple Accountabilities Disorder",* 65(1) PUBLIC ADMINISTRATION REVIEW 94 (2005).
[24] George L. Kelling, Robert Wasserman, Hubert Williams, *Police Accountability and Community Policing*, (7) PERSPECTIVES ON POLICING 1 (1989).

The obstacles that police administrators encounter in carrying out their responsibilities successfully point to a complicated environment shaped by a number of internal and external variables. Internal resource issues, such as budgetary restrictions and a lack of personnel, frequently plague police agencies, making it more difficult for them to effectively combat crime and maintain public safety. Law enforcement agencies' relationship with the communities they serve is further strained by issues about legitimacy and trust in the community, which are made worse by misbehavior or the excessive use of force. Proactive leadership, strategic planning, and stakeholder participation are necessary to address these issues and put reforms that improve police administration's responsiveness, accountability, and transparency into place.

D. To Evaluate the Impact of Police Administration on Community Relations, Trust, and Cooperation

Division of Police agencies and the communities they serve must have solid, mutually trusting relationships to maintain public safety and effective policing. To handle issues related to disorder and crime, police officials rely on community members' cooperation to obtain information about crimes in local neighborhoods and work with law enforcement. [25] In a similar vein, whether the public feels that police acts uphold the legitimacy and procedural justice principles as well as community values determines how willing the public is to trust the police. [26] Police should never minimize the negative experiences that people have had with the police, nor should they ignore the history of racial minorities and those who have suffered injustice at the hands of the police. Due to their past marginalization and abuse at the hands of the police, African Americans have a distrustful and resentful culture. [27]

By placing a high priority on resident engagement, communication, and cooperation, effective police administration promotes good community relations. The public's trust in law enforcement authorities is bolstered when officers are seen as impartial, courteous, and attentive to community concerns. This trust fosters community members' cooperation and information sharing, which is essential for efficient crime prevention and investigation. On the other hand, unfavorable interactions, wrongdoing, or accusations of bias can undermine confidence and harm ties between the police and the community, making it more difficult for them to work together and impede law enforcement efforts. Therefore, analyzing the degree of collaboration, trust, and quality of contacts between law enforcement agencies and the varied populations they serve is necessary to determine how police administration affects community relations. Strategies to strengthen trust, foster cooperation, and improve police-community relations are informed by this kind of evaluation.

VI. Conclusion

[25] Medareshaw Melkamu, Woldeab Teshome, *Public Trust in the Police: Investigating the Influence of Police Performance, Procedural Fairness, and Police-Community Relations in Addis Ababa, Ethiopia*, 9(1) COGENT SOCIAL SCIENCES 1 (2023).
[26] TOM R. TYLER, YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS (2002).
[27] Justin N. Crowl, *The Effect of Community Policing on Fear and Crime Reduction, Police Legitimacy and Job Satisfaction: An Empirical Review of the Evidence*, 18(5) POLICE PRACTICE AND RESEARCH 449 (2017).

The study *Assessing the Crucial Role of Police Administration in the Criminal Justice System*, which examines the vital role that police administration plays within the complex framework of the criminal justice system, highlights the law enforcement agencies' multifarious significance in upholding justice principles, ensuring public safety, and maintaining societal order. A thorough examination makes clear how important good police administration is for preventing crime, apprehending offenders, cultivating positive community relations, establishing trust, and encouraging collaboration between law enforcement and the people they serve. According to the report, despite police administration's best efforts, it faces a number of obstacles, including organizational complexity, resource limitations, and sociocultural issues that affect community dynamics and perceptions.

However, despite these obstacles, there are chances for change and advancement, especially with the help of technological integration, community-focused policing tactics, and programs meant to boost accountability and openness in law enforcement organizations. Police administration may play a crucial role in navigating the intricacies of the criminal justice system and helping to create communities that are safer, more just, and resilient by tackling these issues and seizing possibilities for progress. Therefore, in order to maximize the efficacy and legitimacy of police administration in advancing a just and equitable criminal justice system for everyone, the study highlights the vital significance of ongoing evaluation, adaptation, and reform initiatives.

Furthermore, the report also looks at ways to make improvements, how to incorporate technology, how to engage the community, and how important it is to increase accountability and openness in law enforcement. Effective police administration is positioned as a keystone in the goal of a just, fair, and resilient society. The study emphasizes the necessity for ongoing examination and deliberate improvements in navigating the complexities of the criminal justice system. In the end, the results offer insightful information to stakeholders, law enforcement personnel, and legislators who aim to maximize the contribution of police administration to the development of a strong and fair criminal justice system.

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What Happens to Torture Reports Made in Bail Hearings in Brazil? An Analysis of the City of Cuiabá Between May and July 2021

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ABSTRACT: Considered a "civilizational advancement", bail hearings were included in the Brazilian Criminal Procedure in 2019. This article describes how torture reports made by people caught committing crimes and thus arrested in the city of Cuiabá, Mato Grosso State's capital, were answered by the Judiciary and the State's investigative offices. For this research, we examined 641 bail hearings that took place from May to July 2021, as well as the reports' legal outcomes.

KEYWORDS: Bail Hearings; Brazil; Cuiabá; Mato Grosso; Torture.

"Bail hearings are today a reality. I believe they were a civilizational advancement"
Ricardo Lewandowski

I. Introduction

In his last speech as a member of the Court in April 2023, the Brazilian Federal Supreme Court's Minister Ricardo Lewandowski stated that bail hearings[1] are a "civilizational advancement".

At 1:30 PM, May 28, 2011, Marinho[2], a 22-year-old, white, father of underage children, was brought before the judge on duty. Stopped by the police near Cuiabá's harbor, Marinho was caught carrying 1.70 kg of marijuana and arrested for drug trafficking. The bail hearing's presiding judge attentively and carefully listened to the reports of the authorities up to that moment. The representative from the Public Prosecutor's Office was present, as was the public defender appointed for the occasion. Marinho, when asked by the judge if he had been tortured, reported that he had been subjected to electric shocks and other ill-treatment by the Military Police officers until he told them where the drugs were. The torture reports were included in the hearing's transcripts. However, this document was not sent by the Judiciary to the legal authorities responsible for investigating such occurrences.[3] There was no statement from the State of Mato Grosso Public Prosecutor's Office nor from the State public defender. Marinho

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[1] In the original text, the term used is "*audiências de custódia*" (or "custody hearings"). In Brazil, these hearings are the instances when judges decide if the arrests were legitimate, if pre-trial detention was necessary, and if other precautionary measures such as bail are applicable. Therefore, in terms of function, they are similar to bail hearings in the US. "Custody hearings", on the other hand, is a term usually applied only to child custody hearings in the US. Because of this, we decided to use the term, "bail hearings", to translate the original "*audiências de custódia*". However, we must also point out that some translated documents from Brazil's judicial oversight institution, the National Council of Justice, translate the term as "detention control hearings" and "pre-trial detention hearings".
[2] Fictional name.
[3] Nona vara criminal especializada delitos de tóxicos do Tribunal de justiça do Mato Grosso, Case file no. 1007689-37.2021.8.11.0042.

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was charged with drug trafficking. The policemen accused of torturing him, on the other hand, were not even heard.

Established in the Brazilian Criminal Procedure Code by Law no. 13.964/2019, bail hearings have since been thought of as measures to combat torture in the Brazilian criminal system. The present study aims to understand what happened to the torture reports made by people who were arrested and subsequently brought to bail hearings in the City of Cuiabá, between May and July 2021.

We examined 641 bail hearings conducted at the 11th Criminal Court of Cuiabá, all of which took place during the aforementioned period. Among them, we found 143 torture reports made by the detainees to the judges. In these cases, this is what happened: when asked if they had been tortured, 143 people confirmed it. We did not intend to investigate whether they were indeed tortured, or if their treatment constituted some other form of cruel, inhuman or degrading conduct, or even some other crime. Instead, our goal was to investigate what the authorities did after receiving these 143 positive answers.

In other words, our objective was to understand the outcome of the torture reports submitted during the bail hearings. We examined whether there had been an investigation, a criminal charge, a trial, or a ruling following them. In this sense, it is worth mentioning here that there were representatives from the State of Mato Grosso Public Prosecutor's Office, and a lawyer, hired or appointed by the State, present in all these hearings. Indeed, even when the person could not afford a lawyer, a State of Mato Grosso public defender was appointed to the case.

The first section of this article explains how bail hearings were introduced to the Brazilian legal system and since then, how they have been perceived as a torture prevention measure. In the following section, as an illustration of our analysis, we describe the torture allegations reported in a series of bail hearings held in Cuiabá on May 28, 2021. The goal of this section is to expose a microcosm of the research reality, based on various hearings held on the same day. We chose May 28, 2021, because several hearings that demonstrate the general results of this research, took place on that day. These results, in turn, are then presented in the article's following section. Thus, by the end of this paper, we present all the data collected during our research and the several legal outcomes of the torture reports submitted by detainees.

II. Bail Hearings in the Brazilian Legal System and How They Relate to Torture Prevention

Torture is a harmful practice that profoundly affects the humanity and dignity of its victims. According to the Inter-American Convention to Prevent and Punish Torture, approved by the Organization of American States, the practice is defined as follows:

> Article 2. For the purposes of this Convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.[4]

[4] Organization of American States. Inter-American Convention to Prevent and Punish Torture (Sept. 12, 1985).

In Brazil, Law No. 9455/97 establishes the elements necessary to constitute the crime of torture, based on international conventions. In this context, it is worth mentioning that the Federal Supreme Court understands that torture "is characterized by the infliction of torments and distress that exasperate, in the physical, moral or psychic dimension in which its effects are projected, the suffering of the victim for acts of unnecessary, abusive and unacceptable cruelty".[5]

One of the torture prevention instruments, bail hearings – also called "pre-trial detention hearings" – are provided for in Art. 7.5 of the American Convention on Human Rights: "Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power (…)".[6] In the same manner, Art. 9.3 of the International Covenant on Civil and Political Rights ensures that: "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power[7] (…)".[8]

According to Carver and Handley, bail hearings can be one of the main torture prevention measures, as shown in their research commissioned by the Association for the Prevention of Torture (APT). The research indicates that the immediate presentation of the person deprived of liberty before a judge, through the bail hearing method, has an undeniable impact on preventing torture. Judicial oversight, along with informing the family, and providing access to a lawyer and medical exams are essential means to reduce the risk of torture.[9]

Year 2014 marks an important milestone for bail hearings in Brazil, when the National Council of Justice, under Minister Ricardo Lewandowski's presidency, debated the use of these hearings as a means to combat the Brazilian prison system's massive torture-perpetrating situation.

On the ADPF 347 ruling (from September 9, 2015), Brazil's Federal Supreme Court determined that all judges and courts must observe the Covenant on Civil and Political Rights and the Inter-American Convention on Human Rights. Therefore, within a term of 90 days, Brazilian courts were to institute bail hearings, enabling the detained person to be presented before the judicial authority within a maximum 24 hours of their arrest.[10] Ultimately, bail hearings were incorporated into the Brazilian Criminal Procedure Code on articles 287 and 310, which were added to the Code by Law No. 13.964/2019.

On the other hand, research such as the ones conducted by the Institute for the Defense of the Right to Defense[11] and Conectas Human Rights[12] points out that, despite bail hearings being an important measure for preventing torture, many problems remain, such as

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[5] Supremo Tribunal Federal. Tânia L. T. N vs. Herbert F. C, Habeas Corpus no. 70.389-5. Tribunal Pleno, Judgment (June 19, 1994).

[6] Organization of American States. American Convention on Human Rights (Nov. 22, 1969).

[7] United Nations, General Assembly Resolution 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966).

[8] In addition to provisions in the global and Inter-American Human Rights Systems, bail hearings are also provided for in the European Convention on Human Rights, in art. 5, para. 3, which states that "Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial".

[9] RICHARD CARVER, LISA HANDLEY, DOES TORTURE PREVENTION WORK? (2016), at 1.

[10] Supremo Tribunal Federal. Partido Socialismo e Liberdade, Medida Cautelar na Arguição de Descumprimento de Preceito Fundamental nº 347 – Distrito Federal. Plenário, Judgment (Sept. 9, 2015).

[11] Institute for the Defense of the Right to Defense, *O Fim da Liberdade: a urgência de recuperar o sentido e a efetividade das audiências de custódia* (2019), at 80.

[12] Conectas Human Rights, *Tortura Blindada: Como as instituições do sistema de Justiça perpetuam a violência nas audiências de custódia* (2017), at 78.

underreporting and the normalization of violence. Furthermore, in many cases, torture reports are not properly submitted to the investigative authorities, and those responsible for the torture face no punishment.

In this context, our challenge here was to understand how this torture prevention mechanism worked in the city of Cuiabá during the period of our study.

III. Research Results and the Duty to Investigate Torture Reports

Cuiabá is the capital and largest city of the State of Mato Grosso in Brazil. With a population of around 620,000 people and a metropolitan area with more than one million people, the city's gross domestic product (GDP) per capita is R$ 42,918.31[13], higher than the national average. It has an average income of 3.9 minimum wage per person, placing it at 32 on the country's income ranking. On the other hand, the schooling enrollment rate (6 to 14 years old) only reaches 95%, placing it at 4,692 on the national ranking. Infant mortality rates and basic sanitation data are also low compared to other Brazilian State capitals.[14]

In the city of Cuiabá, all bail hearings are held by the 11th Criminal Court, which also holds jurisdiction over the Military Justice proceedings. For this research, we examined accounts of torture crimes reported by arrested people in hearings held between May and July 2021, as well as the legal outcomes of these reports. In doing so, we sought to understand what had happened to the 143 torture reports submitted for the 641 observed hearings. We checked investigation outcomes up until a year-and-a-half after the torture reports were submitted at the bail hearings under study. In other words, we tried to identify whether the alleged torture crimes were investigated, and if any criminal, legal, or other administrative procedures were conducted because of them.

In this context, it is worth noting that the torture allegations were presented before the judges during hearings recorded on audiovisual media. All these hearings were attended by representatives of the Public Prosecutor's Office and defense lawyers, and addressed violent acts that took place between the time of the arrest and the bail hearing.

The 143 reports of torture among a total of 641 audiences had initially surprised us. It constituted almost one torture report for every four hearings. This high rate of allegations demonstrated that torture was still a common practice in the Brazilian criminal system. Even though torture is prohibited in all situations in the national and international[15] systems, we need to question the functionality of the Brazilian system. Here, we will examine how the Brazilian system relates to this prevention system.

After identifying them, we tracked down the cases with torture reports, from the moment the persons verbalized that they had been assaulted to the last legal outcome of these submissions. We examined the reports' referrals to investigative offices, to Police Stations, to the Military Police's Internal Affairs, and to the State of Mato Grosso Public Prosecutor's Office. We also checked whether torture reports were being investigated during the period of our study, if any complaints had been filed, and if there had been any criminal proceedings, or any convictions or acquittals. We looked for outcomes in the entire criminal justice system of Cuiabá.

Additionally, we watched all the bail hearings in person or via recordings. In most cases, the accused persons reported being arrested by Military Police officers and transferred to a Civil

[13] U$ 8,536.
[14] Data available at https://cidades.ibge.gov.br/brasil/mt/cuiaba/panorama.
[15] KAI AMBOS, TORTURA Y DERECHO PENAL, RESPUESTAS EN SITUACIONES DE EMERGÊNCIA (2009), at 180.

Police Station. There, they were searched by the police and had their private assets seized and inventoried, before being interrogated, brought to court, presented to a Judge, and in the end, were either granted freedom or sent to prison, according to the magistrate's ruling.

The most reported occurrences were the excessive use of force during the arrest; unofficial interrogations at the crime scene, as a way to press the accused for confessions, as well as information on the whereabouts of other suspects or objects used in the crime; and lack of communication about the arrest to the accused's lawyer or family members.

The reports, in general, also included the use of handcuffs behind the accused's backs, or of the locks being too tight and used for long periods; punching, slapping, kicking and general beatings; choke holds (known as "necktie" or rear-naked choke); plastic bag asphyxiations; drowning asphyxiations; shocks; burns; humiliations; threats; as well as being held in unofficial places or vehicles for long periods.

In other words, all torture methods reported to have taken place during the Brazilian Military Dictatorship were also described in the year 2021, in Cuiabá. Even though the existence of torture can erode the rule of law, as Roxin writes[16], the practice still appears to be constant in Brazil.

IV. May 28, 2021

On the same day that Marinho was detained, as described in the introduction, other people were also brought before the judge in Cuiabá for bail hearings. In this section, we describe the various torture reports submitted during that day. The date, May 28, 2021, chosen here as an example, is just one among the many days that demonstrated the torture reporting routine at bail hearings in the city of Cuiabá.

Rita[17], black, illiterate, and homeless, was arrested for carrying 7.50g of marijuana. Despite claiming to be addicted to the drug, she was arrested for drug trafficking; and when asked if she had been tortured in the bail hearing, she replied, "Yes". She reported having been beaten by the military police officers until she told them about "the drug dealers". The torture allegations, despite their gravity and their inclusion in the hearing's transcripts, did not undergo due investigation procedures. The disregard for Rita's reporting was shared by representatives of both the Public Defender's Office and the Public Prosecutor's Office, who refrained from making any statements about the allegations despite being present at the session. Rita was then criminally prosecuted, and no administrative procedures were conducted about her torture allegations. This outcome, as we will see going forward, was the same for all the hundreds of procedures[18] that we studied.

Roberto[19], white, was arrested for drug trafficking when he was found carrying 1.15kg of marijuana, and brought before the judge on the same day. When asked if he had been subjected to torture, he replied, "Yes". He then reported being subjected to aggression, kicking, "stomping" and threats of beatings. The police officers wanted Roberto to show them where he had found the drugs. According to the report, the beatings only ceased when he took the police officers to his residence so that they could seize more drugs. Roberto's initial arrest was

[16] CLAUS ROXIN, ¿PODRÍA LLEGAR A JUSTIFICARSE LA TORTURA? (2020), at 141.
[17] Fictional name.
[18] Nona vara criminal especializada delitos de tóxicos do Tribunal de justiça do Mato Grosso, Case file no. 1007679-90.2021.8.11.0042.
[19] Fictional name.

converted into a preventive arrest and the violence allegations, despite being on record and in the transcripts, were not submitted for further investigation.[20]

Cases like these are commonplace in the city of Cuiabá, where torture reports are typically ignored. Violence is reported by the accused and recorded, and the transcripts of the hearings are signed without the judge referring them for any further investigation. or initiating an inquiry. Usually, Public Prosecutors and the defense also remain silent.

In cases where the judges made referrals for investigative proceedings, the rulings were seldom complied with. Bail hearings of torture practices against detainees are just legal formalities in Cuiabá. One of its essential functions – combating torture – is, therefore, underused.

Júnior[21], black, homeless, was arrested in the Alvorada neighborhood of the city of Cuiabá and brought to the 11th Criminal Court. The presiding judge of the bail hearing listened attentively to him, just as she did to the other detainees that day. Junior, who showed signs of having Covid-19, when asked if he had been tortured, replied, "Yes". He then reported that he had been subjected to beatings by police officers, who had identified themselves as Mr. Silva and Mr. Smith – generic names, probably false ones. After the bail hearing, the judge freed Junior. He had been arrested by mistake because someone with the same name – who, on the other hand, was white and from another city – had an arrest warrant against him in Maceió/Alagoas.[22]

The violence to which Júnior had been subjected and was reporting was included in the hearing's transcripts and highlighted by his lawyer – an exceptional occurrence on that day. The document was sent by the Judiciary to the Civil Police for investigation. We went to the Police Station and looked for the investigation proceedings: even after months of the reporting, Júnior still hadn't been heard in the investigation. Considering that this is one of the first steps in an investigation, one can presume that it was not advancing. The police officers accused of beating Júnior continue to walk free on the streets of Cuiabá.

This case shows that in the many torture reports where a judge orders an investigation – which in itself is a rarity in this Bail Court – it doesn't undergo due process at the police station.

Also, on May 28, 2021, five other people were brought before the judge for bail hearings. Except for Júnior's case, where he was released because he had been mistakenly detained, torture report cases share similarities: usually, the person is arrested for drug trafficking, and then the arrest is converted to a preventive detention. Therefore, arrests for drug trafficking and conversion of the initial arrest into preventive detention seem to be the pattern for torture allegations at bail hearings. In such cases, no investigations are conducted about the reported tortures.

Júnior's case, as shown above, deviates from this pattern. He was not charged with a crime, his prison was considered illegal, and the judge ordered an investigation. Even so, the legal outcome in this case too was unexpected – the investigative inquiry into the complaint registered by Júnior had not yet been concluded and he had not even been heard at the time of this article's writing.

Throughout our study, we repeatedly questioned whether torture should not be the central element investigated in these cases. Our perception is that the criminal justice system has neglected the narratives concerning the crime of torture. On several occasions, we questioned

[20] Nona vara criminal especializada delitos de tóxicos do Tribunal de justiça do Mato Grosso, Case file no. 1007677-23.2021.8.11.0042.

[21] Fictional name.

[22] Nona vara criminal especializada delitos de tóxicos do Tribunal de justiça do Mato Grosso, Case file no. 1007705-88.2021.8.11.0042.

the purpose of a system that commits a crime – torture – to investigate other crimes. Sometimes, the system seems to violate more rights than the accused persons themselves.

And, although it is the State's obligation to promptly and safely guide the individual when deprived of liberty[23], the Brazilian system seems to respond to suspicion of committing a crime with more violence.

V. The Results

Considering all the examined cases, one of the most relevant conclusions that transpired from the research was the commonplace status of the situations mentioned above, and: the fact that usually the prisoners are either poor black men or the socially vulnerable (homeless people and drug users, for example).

In this context, it is worth reaffirming that we are not able to prove whether those people were tortured or not. We cannot claim materiality or even authorship of these facts. The only evidence examined in this research is the bail hearings and what happened during them. That being said, what we can say for sure is that the torture allegations and the violence those people claim to have suffered don't engender any legal outcomes. If bail hearings were drawn up as a means to prevent or avoid the torture of detainees, the hearings that took place in Cuiabá make this goal questionable.

Additionally, in this study, considering the incomes declared in the case files, we found that all individuals who had reported having suffered violence during detention did not belong to the upper class. In other words, at least regarding the researched pool, only members of the most vulnerable strata of the community were subjected to torture.

In the same sense, the National Council of Justice has detected that systematic institutional violence disproportionately impacts some social segments, in particular, poor black people, and residents of the outskirts of urban centers – a profile identical to the one identified in this research:

> The issue of torture and ill-treatment in the country permeates several dimensions that result in a scenario of systematic institutional violence, incipient accountability of the agents involved, a fearful social perception of the police, and significant underreporting of torture and ill-treatment. These elements disproportionately impact some social segments, in particular young, black, and poor people, and residents of the urban centers' outskirts – a profile similar to that of those most present at bail hearings.[24]

For the research period ranging from May to July 2021, we followed 92 days of bail hearings held in Cuiabá. However, only 72 days of audiovisual recordings were located. The audiovisual recordings of 20 days (21.73% of the total) worth of hearings were lost, making researching them impossible. It is believed that the losses happened due to the Covid-19 pandemic, as the standard of arrests in Cuiabá was then changed for health purposes, thus causing the loss of the recordings.

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[23] Flávia Piovesan, Melina Fachin, Valério Mazzuoli, Comentários à Convenção Americana sobre Direitos Humanos (2019), at 94.

[24] Luís Geraldo Sant'Ana Lanfredi et al. eds., Conselho Nacional de Justiça (eds.), Programa das Nações Unidas para o Desenvolvimento, Escritório das Nações Unidas sobre Drogas e Crime (2020), at 18.

Table showing relation between the total sample of days from the 11th Criminal Court of Cuiabá – Bail Hearings and Military Justice proceedings and the researched ones, from May to July 2021.

Total days	Researched days	Lost days
92 (100%)	72 (78,27%)	20 (21,73%)

Six hundred and forty-one bail hearings were conducted on the 72 researched days. In 143 of the cases, the detainees gave positive answers when asked by the judge if they had been in any way tortured during the period between being arrested and brought to court – a number equivalent to 22.30% of the hearings. Of the 143 torture reports made at the bail hearings, the Judiciary only submitted five cases for investigation:

1) Case file no. 1007360-25.2021.8.11.0042 – 05/18/2021 hearing (communication sent to the Civil Police's Internal Affairs);

2) Case file no. 1007940-55.2021.8.11.0042 – 05/28/2021 hearing (communication sent to the Civil Police's Internal Affairs);

3) Case file no. 1010168-03.2021.8.11.0042 – 07/16/2021 hearing (communication sent to the Military Police's Internal Affairs);

4) Case file no. 1010814-13.2021.8.11.0042 – 07/29/2021 hearing (communication sent to the Military Police's Internal Affairs);

5) Case file no. 1008265-30.2021.8.11.0042 – 06/06/2021 hearing (communication sent to the Military Police's Internal Affairs).

In this context, we must highlight that, despite the five official communications submitted by the Judiciary to the responsible authorities, only two police inquiries were opened to investigate the torture cases mentioned in the bail hearings. However, no legal criminal proceedings were initiated, and the alleged torturers were not brought to trial. The other three communications from the Judiciary to the Police did not lead to the opening of a police inquiry.

The investigation of the two torture cases mentioned remained untouched in the police unit up until the writing of this article. No criminal charges were filed by the Public Prosecutor's Office, and the investigations have still not produced major outcomes after almost two years.

The ruling that decides on the start of an investigation is often short and timid, since the judge, in most cases, has no probative elements other than the claims made by the tortured person. In many cases, the forensics institute has not concluded its report in time for the bail hearings. Here is an example of a ruling:

> Finally, I ORDER that, with the addition of the forensic report to the case file, if any bodily injury is found, the Police's Internal Affairs Department shall be notified so that it can take adequate measures regarding the allegations of assault [that would have been done] by police officers Silva and Smith.[25]

In the two cases that resulted in official inquiries, case file nos. 1007360-25.2021.8.11.0042 and 1007940-55.2021.8.11.0042, the victims were not even officially heard to identify the alleged torturers. In the other cases, Internal Affairs determined the opening of preliminary investigations, and no progress followed.

[25] Case file no. 1007705-88.2021.8.11.0042, *supra* note 20.

In conclusion, an official investigation was started into the torture reports presented at a bail hearing in only 1.40% of the cases. However, no criminal charges were filed, nor were the police inquiries concluded in any of them.

Table showing relation between torture reports, inquiries, and the punishment of perpetrators of the 11th Criminal Court of Cuiabá – Bail Hearings and Military Justice cases, from May to July 2021.

Torture reports	Cases forwarded to investigative offices	Official inquiries	Criminal charges/ proceedings
143 (100%)	05 (3,50%)	02 (1,40%)	Zero (0%)

More than half of the prisoners who reported to have been tortured were arrested for drug trafficking (53.52%), and the rest for a variety of other types of crimes, indicating a higher torture and ill-treatment incidence in cases of repression to the illicit narcotics trade.

Table showing relation between the types of crimes and the presence of torture reports in the 11th Criminal Court of Cuiabá – Bail Hearings and Military Justice cases from May to July 2021.

Drug-related crimes	76	53.5%
Property crimes	40	28.17%
Maria da Penha Law (domestic violence crimes)	11	7.74%
Gun control crimes	3	2.11%
Traffic offenses	5	3.52%
Others	7	4.93%

The complete report of the studied cases is filed at the 11th Criminal Court of Cuiabá[26].

[26] Consulted case files. Nona vara criminal especializada delitos de tóxicos do Tribunal de justiça do Mato Grosso, Case file nos. 1006600-76.2021.8.11.0042, 1006601-61.2021.8.11.0042, 1006627-59.2021.8.11.0042, 1006660-49.2021.8.11.0042, 1006734-06.2021.8.11.0042, 1006740-13.2021.8.11.0042, 1006731-51.2021.8.11.0042, 1006833-73.2021.8.11.0042, 1006836-28.2021.8.11.0042, 1006837-13.2021.8.11.0042, 1006838-95.2021.8.11.0042, 1006839-80.2021.8.11.0042, 1006845-87.2021.8.11.0042, 1006948-94.2021.8.11.0042, 1006947-12.2021.8.11.0042, 1006943-72.2021.8.11.0042, 1006980-02.2021.8.11.0042, 1006979-17.2021.8.11.0042, 1007079-69.2021.8.11.0042, 1007079-69.2021.8.11.0042, 1007117-81.2021.8.11.0042, 1007111-74.2021.8.11.0042, 1007128-13.2021.8.11.0042, 1007128-13.2021.8.11.0042, 1007128-

Considering the analysis presented above, it is relevant to mention Lucian Maia's research, which criticized the Judiciary's performance, stating that judges are unable to effectively combat torture in their decisions. Here, Maia reported that, at all stages of the justice system's intervention in society, there are serious flaws that need to be overcome. There is underreporting of torture occurrences, allegations that are not investigated, and, even when investigations are conducted, the police's or Public Prosecutor's Office's conclusions downgrade the reports of torture by labeling them with some other crime classification (assaults, abuse of authority). According to the author, almost no one accused of torture is convicted[27].

The results found in the analysis of these 92 days of bail hearings in Cuiabá were the same. Of the 143 allegations of torture, only five resulted in a judicial submission for investigation. Even of these five cases, only two police inquiries were opened. A year-and-a-half after the hearings, neither inquiry had been concluded. There were no criminal charges, nor any criminal legal proceedings.

Finally, we must also highlight one last fact about the alleged torture perpetrators: of the 143 reports of torture, 139 people claimed that they were tortured by the Military Police and four by the Civil Police.

VI. Conclusion

Our intention here was not to question the importance of bail hearings in Brazil. In a country with massive numbers of violence, torture, and other crimes, they are essential for exercising judicial control over police activity. This work sought to understand how torture and violence reports were received by the criminal justice system, through the analysis of bail hearings held in the city of Cuiabá, the Mato Grosso State capital, between May and July 2021.

As repeatedly alleged in the hearings at the 11th Criminal Court of Cuiabá, beatings, strangulation, shocks, suffocation, burns, and humiliation are a common occurrence in the city's preventive arrests. Additionally, despite the large number of torture reports made during bail hearings, in most cases, no investigations are conducted by the responsible authorities.

The research results indicate that, in the city of Cuiabá, only in 1.40% of the cases where torture was reported, the allegations were submitted for official investigation by the responsible authorities. Even among those few cases, no official inquiries were completed, nor were any criminal charges filed. It is also worth emphasizing that the judges, prosecutors, and defense lawyers of these cases were all present when the arrested persons reported being tortured.

The essence of bail hearings is that every arrested person must have direct and personal contact with a judge so that the magistrate can examine the conditions in which the person was arrested and provide fairer and more humane rulings. Therefore, it is undeniable that the bail hearings' existence contributes to some level of humanization of the detainees, representing an improvement in the criminal justice system. Therefore, the use of bail hearings must be

13.2021.8.11.004, 1007117-81.2021.8.11.0042, 1007128-13.2021.8.11.0042, 1007175-84.2021.8.11.0042, 1007178-39.2021.8.11.2021, 1007177-54.2021.8.11.0042, 1007220-88.2021.8.11.0042, 1007218-21.2021.8.11.0042, 1007229-50.2021.8.11.0042, 1007340-34.2021.8.11.0042, 1007348-11.2021.8.11.0042, 1007348-11.2021.8.11.0042, 1007343-86.2021.8.11.0042, 1007343-86.2021.8.11.0042, 1007349-93.2021.8.11.0042, 1007352-48.2021.8.11.0042, 1007360-25.2021.8.11.0042, 1007347-26.2021.8.11.0042, 1007405-29.2021.8.11.0042, 1007409-66.2021.8.11.0042 e 1007458-10.2021.8.

[27] Luciano Mariz Maia, Do Controle Judicial da Tortura Institucional: À luz do direito Internacional dos Direitos Humanos (2006).

improved. Despite the flaws in its execution, bail hearings continue to be relevant, as they represent a paradigm shift and allow for the immediate annulment of illegal arrests, as we were able to observe in this research.

Additionally, we observed that all the people who reported having been tortured or subjected to other forms of violence at some point in their arrest were somehow socially vulnerable. Poor black men and homeless people were the main denouncers of such violence.

In this sense, it is worth noting that on May 28, 2021 – the day we used as an example for the months surveyed – only one case was sent for investigation. Despite the various torture reports made on that day, only the person who was released after the bail hearing – Júnior, who had been mistakenly arrested – had his report submitted for further investigation. The initial impression might be that "only the innocent" are entitled to have their torture reports investigated. We lack the data necessary to reach this conclusion, but the observed Judiciary's connivance with the dozens of torture allegations seems to reveal a criminal system that is still barely prepared to fight crime – which unfortunately is a reality on the Brazilian streets, prison institutions, and courts.

> The investigation of torture carried out by State agents presents difficult problems, mainly because the responsibility for investigating torture crimes lies with the judicial police, whose agents often appear in the records as perpetrators of torture crimes.

Finally, we must express, once again, our surprise. In one way or another, we believed that the Judiciary would occupy a major role in the fight against allegations of torture. That is not what we observed during this research. What we did observe was a bureaucratic system that offered little to no attention to the torture reports made within it, contributing to the reproduction of a system that resembles the evils of a Military Dictatorship that are unfortunately still present in our routines.