



VOL. 5 - ISSUE 1 (2024)

Journal of International Criminal Law

Online Scientific Review

EDITED BY

Heybatollah Najandimanesh
Anna Oriolo

ISSN: 2717-1914

www.jiclonline.org



TABLE OF CONTENTS
VOLUME 5 – ISSUE 1

**PROSECUTING INTERNATIONAL LAW: DIAGNOSING THE INTERNATIONAL LEGAL
ASTHENIA CONCERNING THE GAZA CRISIS**

Pages 1-17

 10.22034/JICL.2024.202181

Yassin Abdalla Abdelkarim

**INTERNATIONAL CRIME AND ARMED CONFLICT RECONSTRUCTION ADJUDICATION
PRACTICES: A HUMAN RIGHTS-BASED ANALYSIS OF SIERRA LEONE AND WESTERN
DARFUR EXPERIENCES**

Pages 18-32

 10.22034/JICL.2024.202182

Harry Amankwaah

THE RESPONSIBILITY OF ISIS FOR CRIMES AGAINST THE ÊZÎDÎS

Pages 33-70

 10.22034/JICL.2024.202183

Hoshman Ismail

**NAVIGATING JUSTICE: ASSESSING THE CRUCIAL ROLE OF POLICE ADMINISTRATION IN
THE CRIMINAL JUSTICE SYSTEM**

Pages 71-82

 10.22034/JICL.2024.202253

Panchota Mohan; Jayanti Majhi

**WHAT HAPPENS TO TORTURE REPORTS MADE IN BAIL HEARINGS IN BRAZIL? AN
ANALYSIS OF THE CITY OF CUIABÁ BETWEEN MAY AND JULY 2021**

Pages 83-93

 10.22034/JICL.2024.202252

Gustavo Silveira Siqueira; Marcos Faleiros

BOARD OF EDITORS

EDITOR-IN-CHIEF

Heybatollah Najandimanesh, Allameh Tabataba`i University of Tehran (Iran)

GENERAL EDITOR

Anna Oriolo, University of Salerno (Italy)

EDITORIAL BOARD

Sètondji Roland J.B. Adjovi, Arcadia University (United States of America)

Hussein Aghaei Janatmakan, Shahid Chamran University of Ahwaz (Iran)

Mohammad Ali Ardebili, Shahid Beheshti University (Iran)

Mohamed Badar, Northumbria University (United Kingdom)

Flavio de Leao Bastos Pereira, Mackenzie Presbyterian University of São Paulo (Brazil)

Paolo Benvenuti, 'Roma Tre' University of Rome (Italy)

Michael Bohlander, Durham University (United Kingdom)

Homayoun Habibi, Allameh Tabataba`i University of Tehran (Iran)

Gerhard Kemp, University of Derby (United Kingdom)

Anja Matwijkiw, Indiana University Northwest (United States of America)

Solange Mouthaan, University of Warwick (United Kingdom)

Ali Hussein Najafi Abrand Abadi, Shahid Beheshti University of Tehran (Iran)

Behzad Razavifard, Allameh Tabataba`i University of Tehran (Iran)

Mehdi Zakerian, Islamic Azad University of Tehran (Iran)

ADVISORY BOARD (REFEREES)

Amina Adanan, Maynooth University (Ireland)

Girolamo Daraio, University of Salerno (Italy)

Ali Garshasbi, AALCO of New Delhi (India)

Noelle Higgins, Maynooth University (Ireland)

Kriangsak Kittichaisaree, ITLOS of Hamburg (Germany)

Gianfranco Liace, University of Salerno (Italy)

Panagiota Manoli, University of Peloponnese (Greece)

Roxana Matefi, Transilvania University of Braşov (Romania)

Mauro Menicucci, University of Salerno (Italy)

Marco Naddeo, University of Salerno (Italy)

Virginie Mercier, University of Aix-Marseille (France)

Hector Olasolo, Universidad del Rosario of Bogotá (Colombia)

Gisella Pignataro, University of Salerno (Italy)

Irena Rajchinovska Pandeva, Ss. Cyril & Methodius University of Skopje (North Macedonia)

Eduardo Toledo, International Nuremberg Principles Academy (Germany)

Antonio Vecchione, University of Salerno (Italy)

EDITORIAL ASSISTANTS

Stefano Busillo (*in-Chief*), University of Salerno (Italy)

Emanuele Vannata (*in-Chief*), University of Salerno (Italy)

JICL'S INSIGHTS

Mohammadmehdi Seyed Nasseri, Islamic Azad University of Tehran (Iran)

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 publication;
- 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).

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

* Ph.D., Birmingham Law School, University of Birmingham (United Kingdom).

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 ABTAHL, 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).

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-Nusra, 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-Nusra Front, with its sphere of influence in Syria, to operate under his authority.⁹ Rejecting the decision by the head of al-Nusra, Baghdadi seceded from al-Nusra 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

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,

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.nrtv.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 *Shari'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

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 Ariel 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 Parliament⁵⁶ 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 government⁶² and the Armenian government⁶³ have all recognised the ISIS crimes against the Êzîdîs as genocide.

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=hrbeMwBYLY&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 Nevertheless, 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* (Sept. 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 Sabine 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

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 against 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_5rYO7IEPzt_3MT2V6AkfWm3nvn1CzqafX2RAKR0teV4.

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, Judgment (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 I⁹⁵ 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

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 préparatoires* 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 extermination. Although the latter¹⁰⁵" 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

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. LAFAYE, 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 definition¹¹⁹ 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%20YazidisOxfordResearchEncyclopediaofReligion%20A0.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 *Fermans* have restricted the Êzîdîs from preserving their religion through artefacts. For example, due to the *Fermans*, 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 Yazidis, 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 Cihwe* (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 deliberate¹³⁸ 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 Ndirabatware, 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) JINT'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

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. HILTMANN, 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

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 motive¹⁸⁰ 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 important¹⁸⁹

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 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

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 Commission, *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 commissions²⁰² 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

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: Yazidi Survivors of Atrocities Committed by ISIL* (Aug. 2016), at 10, www.ohchr.org/Documents/Countries/IQ/UNAMIRreport12Aug2016_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 Yuçe, *Sex-Slavery: One Aspect of the Yazidi 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

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 NEWS* (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 impending 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

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 *Shari'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 members²⁵² 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

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=Te6H0tiBcf.

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-Bukhārī].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:

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"ĀN 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

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 Syria²⁸⁶ 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

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/I-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 Yazidis’. Consequently, many Êzîdî women committed suicide or developed post-traumatic stress disorder (PTSD).³⁰²

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 Jihadis 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 Traumatized 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

³⁰³ *Akayesu* (Trial Judgement), para. 506.

³⁰⁴ ICC Elements of Crimes, art. 6, lett. c).

³⁰⁵ Fazil Moradi, Kjell Anderson, *The Islamic State's Ezidi 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

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/cimmp18/cimmp18-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 Shafsky 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 Yazidis, Healing Remains a Long Way, Seven Years after IS Genocide*, WILSON CENTER (Aug. 2, 2021), www.wilsoncenter.org/blog-post/yazidis-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 Yazidi 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 slaves³³⁹ 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

³³³ *Akayesu* (Trial Judgement), paras. 507-508.

³³⁴ Amnesty International, *Legacy of Terror: The Plight of Yazidi 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 indoctrination³⁵² 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

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

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-isis-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-committing-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 Convention³⁶² 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:

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, *Sharî'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 jâhiliyyah [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 mushrikîn 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 *Sharî'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

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

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 Yazidi 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.