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FACULTY OF LAW

LLM Course in Transnational Criminal Justice and Crime Prevention – An International
and African Perspective

Accountability for ISIS Atrocities: Is the International Criminal Court a Viable
Prosecutorial Option?



Research paper submitted in partial fulfilment of the requirements for the award of the LLM
Degree

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Date: 22 November 2016

DECLARATION

I, Adi Dekebo Dale, declare that '*Accountability for ISIS Atrocities: Is the International Criminal Court a Viable Prosecutorial Option?*' is my own work, that it has not been submitted for any degree or examination in any other University, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

Signature:.....

Date:.....

Supervisor: Prof. Gerhard Werle



Signature:.....

Date:.....

DEDICATION

I dedicate this LL.M thesis to all ISIS victims.



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KEY WORDS

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Jurisdiction

Libya

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ABSTRACT

The Islamic State of Iraq and the Levant is a jihadist militant group. The members of this militant group have committed criminal acts of unspeakable cruelty. These staggering criminal conducts are documented by the United Nations, international human rights organisations, and media. Besides, the group itself gives first-hand information through social media and its magazine. Having witnessed the atrocities committed by Islamic State of Iraq and the Levant, the United Nations Security Council affirmed that the Islamic State of Iraq and the Levant's conduct in Syria and Iraq is a threat to international peace and security. Therefore, the media and various role players have called for the intervention of International Criminal Court. This research paper analyses whether the International Criminal Court is a viable prosecutorial option to account the Islamic State of Iraq and the Levant members for their crimes. For the Court to be a viable prosecutorial avenue, it must have a jurisdiction. Accordingly, this research paper critically examines whether the International Criminal Court has subject matter, personal and/or territorial jurisdictions to try the Islamic State of Iraq and the Levant perpetrators. The study concludes that although the criminal conducts by Islamic State of Iraq and the Levant members constitute crimes under the Rome Statute, the Court, however, has limited jurisdictional reach over the perpetrators. It is submitted that with a limited and fragmented territorial and personal jurisdictional reach over the perpetrators, the Court is not a viable prosecutorial avenue.

LIST OF ABBREVIATIONS

CRC :	United Nations Committee on the Rights of the Child
ICC :	International Criminal Court
ICJ :	International Court of Justice
ICTR :	International Criminal Tribunal for Rwanda
ICTY :	International Criminal Tribunal for the Former Yugoslavia
ISIS :	Islamic State of Iraq and Syria
OHCHR :	UN Office of High Commissioner for Human Rights
OTP :	Office of the Prosecutor
PCIJ :	Permanent Court of International Justice
PTC :	Pre-Trial Chamber
TC :	Trial Chamber
UN :	United Nations
UNAMI :	UN Assistance Mission for Iraq
UNHRC :	Human Rights Council
UNSC :	United Nations Security Council



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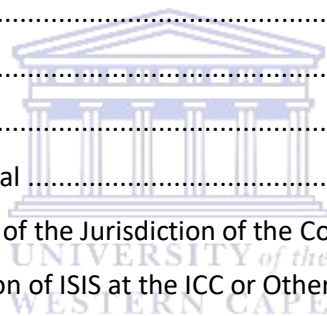
I am enormously grateful to Seada Hussien, Marshet Tessema, and Windell Nortje for all the supports and encouragements you have given me.

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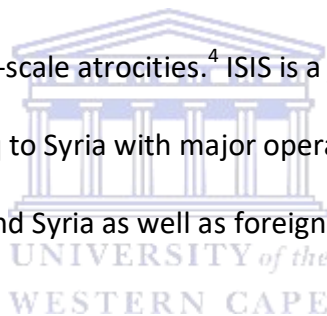


CHAPTER ONE: INTRODUCTION

1.1 Background to the Study

The rationale for the inception of international criminal law relates to the atrocities exerted by individuals with the power to plan and execute heinous acts which are regarded as a crime against the international community in general.¹ In doing so, the international criminal law protects 'peace, security and [the] well-being of the world'² as the common values of the world community.³

Mass atrocities, which have become the rationale for its inception, have continued to exist unabated in recent times. The heinous acts of the 'Islamic State of Iraq and Syria' (hereafter: ISIS) is one example of such large-scale atrocities.⁴ ISIS is a jihadist militant group which controls land stretching from Iraq to Syria with major operations in Iraq, Syria, and Libya. The group has nationals of Iraq and Syria as well as foreign fighters from different continents as its militants.⁵



¹ Werle G & Jessberger F *Principles of International Criminal law* 3 ed (2014) Para 3.

² Preamble and Para 3 of the Rome Statute of the International Criminal Court (2002).

³ Werle G & Jessberger F (2014) Paras 97-9. Cryer R *et al An Introduction to International Criminal Law and Procedure* 2 ed (2014) 6-7.

⁴ Gerges FA *ISIS: A History* (2016) 1.

⁵ Kardaş T & Özdemir Ö *The Making of European Foreign Fighters: Identity, Social Media and Virtual Radicalization* (2014) 8.

These militants had committed different atrocities in different parts of the world. ISIS has targeted religious groups.⁶ In addition to attacks against the special groups, attacks against civilians as such and their cultural heritages are also committed.⁷ Different kinds of heinous abuses are committed against women and children.⁸ Outside Syria and Iraq attacks committed by ISIS include the Paris and Nice attacks in France, the beheading of Egyptians and Ethiopians in Libya, and explosions in Brussel.⁹ Accordingly, the world is currently facing a crisis caused by ISIS and against which a strong measure need to be undertaken.

The UN High Commissioner for Human Rights called on the UN Security Council (hereafter: UNSC) to refer the situation involving ISIS to the International Criminal Court (hereafter: the Court/the ICC).¹⁰ The Commissioner has also called upon the government of Iraq to become



⁶ UN Human Rights Council 'Report of the Office of the United Nations High Commissioner for Human Rights on the Human Rights Situation in Iraq in the Light of Abuses Committed by the So-Called Islamic State in Iraq and the Levant and Associated Groups' A/HRC/28/18 (2015) Para 16.

⁷ UN Human Rights Council 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' A/HRC/27/60 (2014) Paras 32 seq. UNHRC Report A/HRC/28/18 (2015) Paras 29 seq.

⁸ UN Committee on the Rights of the Child (hereafter: CRC) 'Concluding Observations on the Combined Second to Fourth Periodic Reports of Iraq' CRC/C/IRQ/CO/2-4 (2015) Para 23. UNHRC Report A/HRC/27/60 (2014) Para 95-96. UNHRC Report A/HRC/28/18 (2015) Para 40.

⁹ Sanchez R *et al* 'ISIS: 90 Attacks, 20 Countries, 1,400 Killed' CNN updated April 29, 2016 available at <http://edition.cnn.com/2015/12/17/world/mapping-isis-attacks-around-the-world/> (Accessed June 7, 2016) (hereafter: CNN 29 April 2016).

¹⁰ UNHRC Report A/HRC/28/18 (2015) Para 79. UNHRC Report A/HRC/27/60 (2014) Para 148.

a member state of the ICC to enable the prosecution of the perpetrators of mass human rights violations.¹¹

Currently, the ICC exercises jurisdiction over the crimes of genocide, war crimes, and crimes against humanity.¹² However, not everyone who committed such crimes can be automatically subjected to the jurisdiction of the Court since it has no universal jurisdiction. This raises the question whether or not the ISIS militants can be subjected to the jurisdiction of the Court. The Court has jurisdiction if the perpetrator is a national of a member state to the ICC Statute or if the criminal conduct took place in these countries' territory.¹³ As an exception, however, the referral of the UNSC or a declaration of acceptance could prompt the Court's jurisdiction over territories or nationals of non-state parties.¹⁴

Syria and Iraq are not State Parties to the ICC Statute. However, the atrocities in these places are carried out also by foreign nationals including nationals of State Parties to the ICC Statute. The attacks outside these two countries are committed including in state parties to the ICC. In addition, the situation in Libya has been referred to the ICC by the UNSC.¹⁵ The Court's current chief prosecutor said however that the Court did not have jurisdiction to investigate the crimes of ISIS based on the principle of territoriality and also the jurisdiction based on the nationality of perpetrators was too narrow to intervene without UNSC

¹¹ UNHRC Report A/HRC/28/18 (2015) Para 79.

¹² Arts 5-8 of the ICC Statute.

¹³ Art 12 (2) of the ICC Statute. See also Wagner M 'The ICC and its Jurisdiction-Myths, Misperceptions and Realities' (2003) 7(1) *Max Planck Yearbook of United Nation Law* 482-3.

¹⁴ Art 13 (b) the ICC Statute.

¹⁵ UNSC Resolution 1970 (2011) Para 4.

referral.¹⁶ She also added the need for identifying a viable avenue to bringing to justice those perpetrators. There is, however, an on-going academic debate on the possibility of prosecution of ISIS under the ICC statute.

1.2 Problem Statement

One of the problems in international criminal law is the lack of institutional enforcement mechanisms. Now that there is the ICC, it is of the essence to measure whether the conducts exerted by the ISIS members can be prosecuted under the Rome Statute. This requires an examination into the conducts of ISIS. More specifically, this paper makes a determination of whether the ISIS members' conducts constitute genocide, crimes against humanity and/or war crimes.

Following the above determination, scrutiny into existence of jurisdiction over the members of ISIS is made by making reference to the decline of the ICC's Prosecutor to exercise jurisdiction over ISIS members in Syria and Iraq. Although the main focus of this research paper is the atrocities in Syria and Iraq, a passing reference is made to the atrocities in Libya and France as well. The role of the UNSC referral and any future declaration of acceptance of the jurisdiction of the Court by the concerned States are also analysed.

¹⁶ ICC 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the Alleged Crimes Committed by ISIS' available at https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-stat-08-04-2015-1.aspx (accessed 04 June 2014) (hereafter: ICC Press Release 8 April 2015).

1.3 Research Questions

General Research Question

The general research question to be examined in this research paper is whether or not it is possible to prosecute crimes committed by ISIS members under the ICC Statute.

Specific Research Questions

The three specific research questions analysed in this study are:

1. Does the ICC have subject matter jurisdiction over the criminal conducts of ISIS?
2. Is the jurisdictional basis for an ICC intervention against the criminal conducts of ISIS satisfied?



1.4 Significance

This examination into the above issue seeks to contribute to the literature concerning possibilities of prosecution of ISIS perpetrators or future possible militant groups under the Rome Statute. The research reveals the potential of the international criminal law in dealing with this type of atrocities. The findings of this study will contribute as a further reference on the matter.

1.5 Research Methodology

This research is carried out by utilising desktop research techniques or methodologies. As such, primary and secondary sources are evaluated. The primary instruments include, *inter alia*, the Court's legal texts, international treaties, customary international law, UN Resolutions and case laws. As a secondary source, it consults books, journals, and other

relevant publications including internet sources. The key analytical steps followed are first, the facts of the issues under current consideration are identified. Secondly, after identifying the issue, the researcher scrutinised the relevant jurisdictional rules of law regulating the matter at hand. Finally, based on the analysis made the pertinent conclusions are reached.

1.6 Chapter Outline

The research paper is organised into five chapters. Chapter one of this research provides the background information on the research paper. Accordingly, statement of the research problem, research questions, the significance of the research, and chapter outlines are indicated.

The second chapter discusses the factual background of ISIS. This part also lays down different individual acts committed by ISIS relying on reports of international human rights bodies.



Chapter three deals with the determination of whether or not the individual criminal conducts perpetrated by the ISIS members constitute genocide, crimes against humanity or war crimes as stipulated under the Rome Statute.

Chapter four analyses the ICC's jurisdiction over ISIS members based on the territoriality and passive personality principle. The decision of the Office of the Prosecutor declining preliminary examination on the issue and the effects of any future UNSC referral and declaration of acceptance of jurisdiction by the concerned state is analysed. In this part an analysis of whether the Court is a viable prosecutorial option is also indicated.


The fifth chapter draws conclusions and recommendations.

CHAPTER TWO: OVERVIEW ON THE ISLAMIC STATE OF IRAQ AND SYRIA

2.1 Introduction

The 'Islamic State of Iraq and Syria' (ISIS) also known as the 'Islamic State of Iraq and the Levant' (ISIL), 'Islamic State' or its Arabic language acronym '*Daesh*',¹⁷ is a jihadist militant group with the aim of establishing a caliphate that will have authority over the entire Muslim community in the world.¹⁸ A caliphate is a claimed political leadership of a Muslim community through the utilisation of Sharia laws.¹⁹ In the section that follows, an introduction on the establishment of ISIS and the atrocities they have committed are pinpointed.

2.2 Establishment of ISIS



The ISIS jihadist militant group has been operating under different names and leaders. *Abu Musab Al-Zarqawi* formed this group in 1999.²⁰ Before 1999, *Abu Musab Al-Zarqawi* was in a Jordan prison for illegally possessing a weapon and because of his membership in government banned a Jordanian militant organisation called *Bayat al-Imam*.²¹ After his release, he managed to establish a jihadist group called '*Jama'at al-Tawhid wal-Jihad*' that means 'unity and Jihad group'.²² From 1999 to 2004 this group wielded terrorist attacks in

¹⁷ Gerges FA (2016) 1.

¹⁸ Petrovic J & Hughes R 'The Syrian Conflict and the Use of Cultural Property for Military Purposes' in Petrovic J (ed) *Accountability for Violations of International Humanitarian Law* (2015) 141.

¹⁹ Sowerwine JE *Caliph and Caliphate* (2010) 2.

²⁰ Rasheed A *ISIS: Race to Armageddon* (2015) 7.

²¹ Rabasa A *Beyond Al-Qaeda: The Global Jihadist Movement* (2006) 136.

²² Rasheed A (2015) 16.

Iraq including the killing of Iraqi civilians, attacks on government institutions and foreign soldiers in Iraq.²³

In 2004, *Abu Musab Al-Zarqawi* and his jihadist group vowed submission to *Osama Bin-Laden*.²⁴ Following pledging allegiance to Osama Bin-Laden, the group's name was changed to '*Al Qaeda fi Bilad al-Rafiday*' or '*Al Qaeda in Iraq*' (AQI).²⁵ With the aim of establishing a caliphate, the attacks committed by them continued with the same intensity and with the plan to expand attacks in collaboration with *Al Qaeda*.²⁶ Shortly before *Abu Musab Al-Zarqawi* was killed during a 2006 US airstrike, they allied with other smaller jihadist groups in Iraq under the umbrella group called *Mujahideen Shura Council* (MSC).²⁷

Following Al-Zarqawi's death on 7 June 2006, the MSC is led by *Abu Ayyub Al-Masri*.²⁸ Under the latter's leadership, it was merged with other smaller groups in Iraq, and a new alliance was formed, called the '*Islamic State of Iraq*.' *Abu Omar Al-Baghdadi* was named as the new leader (*Emir*) of the group while Abu Ayyub Al-Masri served as minister of war.²⁹ Within this period, the group continued its attacks in Iraq.³⁰ The US and Iraq joint action against the group resulted in the death of the two top leaders of the group, namely *Abu Omar Al-*

²³ York R *Know Thy Enemy: Islamic State of Iraq and the Levant* (2015) 3.

²⁴ Flannery FL *Understanding Apocalyptic Terrorism: Countering the Radical Mindset* (2015) 127.

²⁵ York R (2015) 3.

²⁶ York R (2015) 3.

²⁷ Rasheed A (2015) 7.

²⁸ Kilcullen D *Blood Year: The Unravelling of Western Counterterrorism* (2016) 73.

²⁹ Kilcullen D (2016) 73.

³⁰ Kilcullen D (2016) 73-5.

Baghdadi and *Abu Ayyub Al-Masri*, on 18 April 2010.³¹ On 16 May 2010, however, the group appointed *Abu Bakr al-Baghdadi* as the new leader of the group, which has since been led by him.³²

Al-Baghdadi filled the group with new leaders and committed different atrocities in different parts of the world.³³ This jihadist militant group instantaneously grew in numbers and became more powerful by including members of former US military detainees in Iraq.³⁴ In April 2013, the group announced its merger with another group fighting against Syrian government called *Al-Nusra Front* which resulted in the establishment of Islamic State of Iraq and Syria /the Levant.³⁵ This resulted in the extension of this operation to Syria and also enabled ISIS to widen its territorial control to areas like oil fields that serve as key financial means.³⁶

Although the name of the group is rejected by different governments and muslim leaders, the group renamed itself as the '*Islamic State*' with the ambition of extending its authority



³¹ Gould L & Pate M *State Fragility Around the World: Fractured Justice and Fierce Reprisal* (2016) 87-88.

Also see Lawrence C *America's Modern Wars* (2015) 250.

³² Rasheed A (2015) 14.

³³ Hosken A *Empire of Fear: Inside the Islamic State* (2015) 90-1.

³⁴ York R (2015) 4-5.

³⁵ Townsend RM *The European Migrant Crisis* (2015) 62.

³⁶ York R (2015) 5.

beyond Syria and Iraq in June 2014.³⁷ Consequently, the group proclaimed itself as a Caliphate whilst *Abu Bakr al-Baghdadi* is proclaimed as a Caliph.³⁸

Although Al-Qaida regarded ISIS as too extremist, which later led to rejection of pre-existing allegiance by former,³⁹ other militant and jihadist groups in different parts of the world have submitted their fidelity or pledge of allegiance to the ISIS, including Boko Haram in Nigeria, Ansar al-Sharia in Libya, Jahba East Africa in Somalia and different groups in Sudan, Syria, Algeria, Iraq, Pakistan, and the Philippines.⁴⁰ With the wide participation of the militant groups, the members of ISIS and their affiliates have committed different atrocities across the world.

2.3 Leadership and Structural Organisation of ISIS

ISIS has the goal of establishing an Islamic state allegedly ruled by Sharia law.⁴¹ In line with the *raison d'etre* for its establishment, ISIS is a state-like organisation with a bureaucratic hierarchy.⁴² Unlike other terrorist groups, ISIS controls territory⁴³ and has a population under its administration with a conventional army.⁴⁴ A governmental authority exercised by

³⁷ York R (2015) 7.

³⁸ Rashed A (2015) 47.

³⁹ Etzioni A *Privacy in a Cyber Age: Policy and Practice* (2015) 126.

⁴⁰ The Clarion Project 'Islamic State Expands to East Africa With New Allegiance Pledge' 10 April 2016 <http://www.clarionproject.org/news/islamic-state-expands-east-africa-new-allegiance-pledge> (accessed 4 June 2016).

⁴¹ Yambert K (ed) *Security Issues in the Greater Middle East* (2016) 274.

⁴² Stakelbeck E *ISIS Exposed: Beheadings, Slavery, and the Hellish Reality of Radical Islam* (2015) 54.

⁴³ Bellal A (ed) *The War Report: Armed Conflict in 2014* (2015) 389.

⁴⁴ Crawford E *Identifying the Enemy: Civilian Participation in Armed Conflict* (2015) 119.

this militant group includes the collection of taxes and sale of oil and gas reservoirs.⁴⁵ In some parts where the group has control, they are availing municipal services to its supporters including maintaining electricity, paying municipal salaries, sewage services, health care and education.⁴⁶

ISIS is also organised in its leadership structure. It is organised into commander in chief, cabinets, *Shura* council, the military council, and media apparatus.⁴⁷ The group is led by the self-proclaimed caliph Abu Bakr al-Baghdadi.⁴⁸ He has two deputies. While one is the ISIS governor for territories held by the group in Syria, the other deputy is the ISIS governor for territories held by the organisation in Iraq.⁴⁹ The cabinet encompasses the general management, prisons, security, finance, communications, foreign fighters and suicide bombers.⁵⁰ The *Shura* (Consultative) *Council* is mandated to appoint leaders and



⁴⁵ Nance M *The Terrorists of Iraq: Inside the Strategy and Tactics of the Iraq Insurgency 2003-2014* (2014) 334. See also Atwan A *Islamic State: The Digital Caliphate* (2015) 117.

⁴⁶ Yambert K (2016) 274-5.

⁴⁷ Thompson N & Shubert A 'The Anatomy of ISIS: How the 'Islamic State' is Run, From Oil to Beheadings' CNN 14 January 2015 available at <http://edition.cnn.com/2014/09/18/world/meast/isis-syria-iraq-hierarchy/> (accessed 4 June 2016) (hereafter: CNN 14 January 2015).

⁴⁸ Rasheed A (2015) 47.

⁴⁹ CNN 14 January 2015.

⁵⁰ Glenn C 'Al Qaeda v ISIS: Leaders & Structure' Wilson Center Home September 28, 2015 available at <https://www.wilsoncenter.org/article/al-qaeda-v-isis-leaders-structure> (accessed 4 June 2016).

theoretically even has the power to recall the caliph.⁵¹ In addition to this, the group also exercises judicial power over the territory under its control.⁵²

The above factors lead to conclude that ISIS is a state-like organisation with all its format and effective control over its members through the bureaucratic structure it imposes. It follows a decentralised form of governance.⁵³ Since the group is well organised and financed as a result of the appropriation of significant funds and military equipment, it has serious military capacity.⁵⁴ With the above form of structural, financial, human resource, and military capacity, the group is able to commit atrocities in different parts of the world, which led the UN Security Council to regard this group's conduct as an unprecedented threat to international peace and security.⁵⁵

Accordingly, in addition to the war between the ISIS jihadist militant group, and the government of Iraq and Syria, the international community also intervened in the fight



⁵¹ Mezzofiore G 'Isis leadership: Who's Who in 'Fluid' Islamic State Structure of Power' International Business Times 2 July 2015 available at <http://www.ibtimes.co.uk/isis-leadership-whos-who-fluid-islamic-state-structure-power-1509014> (accessed 4 June 2016).

⁵² Neriah J 'The Structure of the Islamic State (ISIS)' Jerusalem Center for Public Affairs 8 September 2014 available at <http://jcpa.org/structure-of-the-islamic-state/> (accessed 4 June 2016).

⁵³ Yambert K (ed) (2016) 275.

⁵⁴ UNHRC Report A/HRC/27/60 (2014) Para 16.

⁵⁵ Preamble of the UN Security Council Resolution 2253 (2015).

against ISIS.⁵⁶ The ruthless attacks by ISIS against targeted victims are still ongoing unabated.

2.4 Attacks Committed By ISIS

Reports indicate that ISIS has committed atrocities in Asia, Africa, and Europe.⁵⁷ The atrocities being carried out by this group have been reported by UN human rights bodies, news media and also, the group itself is giving first-hand evidence of the barbaric acts done by members through different social media outlets.

2.4.1 Atrocities in Syria and Iraq

2.4.1.1 Attacks against Ethnic and Religious Groups

According to the report of the UN Human Rights Council (hereafter: UNHRC), in the territories under the control of ISIS, civilians belonging to some ethnic and religious groups are specifically threatened and attacked.⁵⁸ The ethnic and religious groups that were targeted by the ISIS include the Shi'a Muslims, Christians, Yezidis, Kurds, Sabea-Mandean, Turkmen, and Kaka's.⁵⁹ Attacks against Yezidis, for instance, involve killing and serious bodily injury to the members.⁶⁰ According to the account of those victims who have survived the

⁵⁶ The Guardian 'Pentagon Chief Mulls New Strategies to Fight ISIS as US Strikes in Syria and Iraq' 16 April 2016 available at <http://www.theguardian.com/us-news/2016/apr/16/ash-carter-isis-syria-iraq> (accessed 4 June 2016).

⁵⁷ CNN 29 April 2016.

⁵⁸ UNHRC Report A/HRC/28/18 (2015) Para 16.

⁵⁹ UNHRC Report A/HRC/28/18 (2015) Para 16. See also Rasheed A (2015) 92.

⁶⁰ UN Human Rights Council 'They Came to Destroy: ISIS Crimes Against the Yazidis' 15 June 2016, A/HRC/32/CRP.2 (2016) Para 17 Seq. See also UNHRC Report A/HRC/28/18 (2015) Para 17. Amnesty

execution *en masse* being shielded by the bodies of other victims, ISIS separated men and women resulting in the summary execution of the men.⁶¹ It is of essence to mention that in some cases the entire village is cleared of their Yazidi population.⁶² According to the eyewitnesses, the ISIS combatants were acting under direct order via telephone.⁶³ Yazidis' are also abducted, detained, and forced to convert to Islam.⁶⁴

In addition to Yazidis, targeted attacks were also perpetrated against Christians, including pillaging and destroying historic Christian cathedrals and churches.⁶⁵ As a result, an estimated 200,000 people belonging to Christian are subjected to displacement.⁶⁶

Attacks against *Shi'a* Muslims specifically targeted the members of this religious group. According to the UNHRC report, the militant group targeted the *Shia* Muslims by attacking their villages, killing members, burning and destroying their houses, their mosques, summarily executing members, abducting members and by subjecting them to inhumane living conditions, at least 15,000 people suffered as a result of limited access to basic necessities including food and water.⁶⁷ Survivors of the horror recounted that after taking over government prison, ISIS separated prisoners according to their ethnic and religious

International 'Escape from hell: Torture and Sexual Slavery in Islamic State Captivity in Iraq' MDE 14/021/2014 (2014) 11.

⁶¹ UNHRC Report A/HRC/28/18 (2015) Para 18.

⁶² UNHRC Report A/HRC/28/18 (2015) Para 18.

⁶³ UNHRC Report A/HRC/28/18 (2015) Para 19

⁶⁴ UNHRC Report A/HRC/28/18 (2015) Para 20

⁶⁵ UNHRC Report A/HRC/28/18 (2015) Paras 21-22

⁶⁶ UNHRC Report A/HRC/28/18 (2015) Para 21

⁶⁷ UNHRC Report A/HRC/28/18 (2015) Paras 23-7

affiliation and killed 600 prisoners mainly of Shia.⁶⁸ In general, the members of the above-mentioned targeted groups are subjected to summary execution, abduction, forced displacement, and deprivation of property.⁶⁹

2.4.1.2 Attacks against Population

The recent report by the UN High Commissioner for Human Rights (OHCHR) indicates that large numbers of people are killed in Iraq and Syria where ISIS exercises control over the territory.⁷⁰ Individuals have sustained different kinds of abuse and human right violations. First of all, anyone who is regarded as affiliated with the Iraqi or Syrian government in any capacity becomes the target of attack.⁷¹ Relying on the list from government offices, ISIS killed and summarily executed several persons searching in the areas they occupy or on checkpoints.⁷² UNHRC reported that a former police officer, who survived the attack, said that at the checkpoint ISIS militant, and killed his father, his five-year-old boy, and five-month-old daughter, leaving him alive to feel the pain of losing his loved ones. On 12 June

⁶⁸ UNHRC Report A/HRC/28/18 (2015) Para 27. See also Amnesty International 'Iraq: Yezidis Captured by ISIS Amid Mounting Sectarian Attacks' 1 July 2014 available at <https://www.amnesty.org/en/latest/news/2014/07/iraq-yezidis-captured-isis-amid-mounting-sectarian-attacks/> (accessed 8 June 2016).

⁶⁹ UNHRC Report A/HRC/28/18 (2015) Paras 2, 18 and 20. UNHRC Report A/HRC/27/60 (2014) Paras 30-38, 42, 51, 65-74 and 112-114.

⁷⁰ UN Assistance Mission for Iraq (UNAMI) 'Report on the Protection of Civilians in the Armed Conflict in Iraq: 1 May – 31 October 2015, (2016) 5.

⁷¹ UNHRC Report A/HRC/28/18 (2015) Para 29. UNHRC Report A/HRC/27/60 (2014) Para 32.

⁷² UNHRC Report A/HRC/28/18 (2015) Paras 30-1. UNHRC Report A/HRC/27/60 (2014) Paras 30-32.

2015, it is alleged that between 1,500 and 1,700 members of the Iraqi armed forces were summarily executed after they surrendered.⁷³

ISIS looted, burned and destroyed houses belonging to civilians and also allegedly used chlorine gas as a means of war and other prohibited means.⁷⁴ In addition to this, in Iraq and Syria, unfair trials, extrajudicial killings, torture and inhuman treatment have been committed against civilians, hostages, and detainees.⁷⁵ For instance, those who are accused of being homosexual are unfairly tried and thrown from the top of a tall building, children who are found watching a football match were summarily executed, and civilians are crucified in public.⁷⁶ According to the UN report, after civilians are crucified in public in the presence of children, their bodies are displayed for up to three days to serve as a warning to others.⁷⁷ Beheading is common in the ISIS-controlled areas.⁷⁸ Even in the case of beheading, the heads of the deceased were displayed on sticks for some days.⁷⁹

An act of hostage-taking, enforced disappearance, occupation of hospitals outside its humanitarian function, detention of medical personnel, and forcible displacement resulted from the conducts of ISIS.⁸⁰

⁷³ UNHRC Report A/HRC/28/18 (2015) Para 32.

⁷⁴ UNHRC Report A/HRC/28/18 (2015) Paras 33 and 42. UNHRC Report A/HRC/27/60 (2014) Para 128.

⁷⁵ UNHRC Report A/HRC/28/18 (2015) Para 48. UNHRC Report A/HRC/27/60 (2014) Paras 32-38, 65-74.

⁷⁶ UNHRC Report A/HRC/28/18 (2015) Para 49 UNHRC Report A/HRC/27/60 (2014) Para 30.

⁷⁷ UNHRC Report A/HRC/27/60 (2014) Paras 32-34

⁷⁸ UNHRC Report A/HRC/27/60 (2014) Paras 32-34.

⁷⁹ UNHRC Report A/HRC/27/60 (2014) Para 43.

⁸⁰ UNHRC Report A/HRC/27/60 (2014) Paras 42, 51, 112 and 133.

Whenever atrocities of such unspeakable scale are exerted, mostly women and children are the victims. At least that is the obvious case in Iraq and Syria. In these attacks against civilians, ISIS mainly targeted women and children.⁸¹

Sexual violence is perpetrated against women and children in these countries. According to the report of UNHRC, sexual violence is exerted against women, especially Yazidi women, including rape, sexual and other forms of enslavements, and sale. In one case, an ISIS doctor sat on a Yazidian woman's stomach hoping to kill the child in the victim's womb. In the same case, ISIS also forced the women to abort and they were later sold as sexual slaves.⁸²

Women who appeared without covering their faces and hair in public, were lashed.⁸³

Children starting from 6 years of age are subjected to repeated rape and sold over to another person for further abuse.⁸⁴ Subsequently, victims are severely traumatised which also has resulted in an increase in suicide among victims.⁸⁵

The abuse against children includes mass execution and crucifixion of children in public, burying them alive, using them as child soldiers and also using mentally handicapped

⁸¹ Rasheed A (2015) 92.

⁸² UNHRC Report A/HRC/28/18 (2015) Paras 39 and 41.

⁸³ UNHRC Report A/HRC/27/60 (2014) Para 81.

⁸⁴ UNHRC Report A/HRC/28/18 (2015) Para 40.

⁸⁵ UNHRC Report A/HRC/28/18 (2015) Para 41.

children for suicide bombing.⁸⁶ For the purpose of conscripting and enlisting child soldiers, ISIS established a military training camp.⁸⁷

2.4.1.3 Destruction of Cultural Heritages

The other forms of attacks committed by ISIS include attacks on world heritages in Syria and Iraq. Having condemned this conduct, the UN Security Council in its Resolution 2199, stated that ISIS is destroying cultural heritages.⁸⁸ It should be emphasised that the group is engaged in the destruction of cultural heritages as part of a terrorism strategy.⁸⁹

One among the destroyed heritages was the ancient city of Palmyra which is registered as world heritage site in Syria.⁹⁰ This archaeological site is estimated to be 2,000 years old; its existence is even indicated in the Bible.⁹¹ In the northeast of Damascus, the 2,000-year-old

⁸⁶ UNCRC CRC/C/IRQ/CO/2-4 (2015) Para 23. UNHRC Report A/HRC/27/60 (2014) Paras 95-96.

⁸⁷ UNHRC Report A/HRC/27/60 (2014) Para 95. See also Alexander Y & Alexander D *The Islamic State: Combating the Caliphate Without Borders* (2015) 71.

⁸⁸ UN Security Council Resolution 2199 (2015) Paras 15 and 16.

⁸⁹ UN Security Council 'Report of the Secretary-General on the Threat Posed by ISIL (Da'esh) to International Peace and Security and the Range of United Nations Efforts in Support of Member States in Countering the Threat' 31 May 2016, S/2016/501.

⁹⁰ Haviland W *et al* *Anthropology: The Human Challenge* (2013) 268. See also Aljazeera 'Syrian Army 'Recaptures City of Palmyra from ISIL' 27 March 2016 available at <http://www.aljazeera.com/news/2016/03/syrian-army-recaptures-city-palmyra-isil-160327063713862.html> (accessed 7 June 2016) (hereafter: Aljazeera 27 March 2016).

⁹¹ Taylor A 'Nine of Syria and Iraq's 10 World Heritage Sites are in Danger as Isis Ravages Centuries of History' *The Independent* 1 September 2015 available at <http://www.independent.co.uk/incoming/nine-of-syria-and-iraqs-10-world-heritage-sites-are-in->

Temple of Bel (Baal Shamin) which is also known as the 'Pearl of the Desert', was destroyed by ISIS using explosives.⁹² In addition to this, Hatra, an ancient city from second and third century BC in Iraq, was destroyed by ISIS using sledgehammers and guns.⁹³ Another act of destruction of world heritages is the destruction of the sixth century ancient city of Aleppo.⁹⁴ The city of Aleppo included 7th to 12th-century monuments and mosques, including Great Mosque of Aleppo, which was destroyed by ISIS.⁹⁵ It should be taken into account that this place was the oldest constantly inhabited cities in the world.⁹⁶ The militant group is also engaged in the destruction of other cultural heritages in Iraq and Syria, such as archaeological sites, museums, libraries, and archives.⁹⁷ Ancient treasures such as artworks, manuscripts, and seals and coins are smuggled from Iraq and Syria by the militant.⁹⁸



[danger-as-isis-ravages-centuries-of-history-10481006.html](http://www.independent.co.uk/news/world/middle-east/danger-as-isis-ravages-centuries-of-history-10481006.html) (accessed 7 June 2016) (Hereinafter: The Independent 01 September 2015).

⁹² Aljazeera 'ISIL Blows up Part of Main Temple in Syria's Palmyra' 31 August 2015 available at <http://www.aljazeera.com/news/2015/08/isil-blows-part-bel-temple-syria-palmyra-150830195420900.html> (accessed 7 June 2016) (hereafter: Aljazeera 31 August 2015).

⁹³ The Independent 01 September 2015.

⁹⁴ The Independent 01 September 2015.

⁹⁵ The Independent 01 September 2015.

⁹⁶ Carter T, Dunston L & Thomas A *Syria & Lebanon* (2008) 173.

⁹⁷ UN Security Council Resolution 2199 (2015) Paras 15-22.

⁹⁸ Dittmann A & Almohamad A 'Devastation of Cultural Heritage and Memory in Syria and Iraq: Component of a Multi-level Provocation Strategy?' 5 *International Journal of Humanities and Social Science* (2015) 29.

Alongside the destruction, the militant group embarked on the pillaging and smuggling of the heritages for the purposes of funding its terroristic and other criminal activities.⁹⁹ For instance, the funding from the sale of these pillaged cultural heritages is spent for the purpose of member's recruitment, group's operational capability building, and terrorist attacks.¹⁰⁰

2.4.2 Attacks outside Syria and Iraq

The exact number of people killed by ISIS *per se* in Syria and Iraq is yet to be determined. Outside Syria and Iraq, however, in 90 targeted attacks ISIS and its affiliates have killed 1,400 people in 21 countries up until 29 April 2016.¹⁰¹ These include the Paris attacks in 2015, the beheading of Egyptians and Ethiopians in Libya in 2015, and the recent airport explosion in Brussels in 2016.¹⁰² The November 2015 Paris attack resulted in 130 casualties. They were carried out simultaneously at different spots by gunmen and suicide bombers. The locations of the attacks include a concert hall, a stadium, restaurants, and bars. More than one hundred people were seriously injured making the attacks the worst of their kind that have happened in France since Second World War.¹⁰³ In these attacks, the nationals of France and Belgium have participated and the ISIS leadership also claimed responsibility.¹⁰⁴

⁹⁹ UN Security Council Resolution 2199 (2015) Paras 15 and 16.

¹⁰⁰ UN Security Council Resolution 2199 (2015) Paras 15 and 16.

¹⁰¹ CNN 29 April 2016.

¹⁰² CNN 29 April 2016.

¹⁰³ CNN 29 April 2016.

¹⁰⁴ BBC News 'Paris Attacks: Who Were the Attackers?' 27 April 2016 available at <http://www.bbc.com/news/world-europe-34832512> (accessed 7 June 2016).

Recently, an ISIS soldier also killed 84 people and injured more than 300 by driving cargo into the crowd in Nice, France on 14 July 2016.¹⁰⁵

According to Human Right Watch's interview with residents, the militant group made life in Libya unbearable.¹⁰⁶ Currently, they are in control of the east and west parts of Sirte, Libya. The acts committed against the Libyans include the murder of civilians, execution without a trial, public beheadings, hanging, crucifixions, flogging, looting, destroying homes, killing wounded or captive fighters, and failure to guarantee access to basic necessities.¹⁰⁷

Belgium has also been affected as a target for an attack. The explosions at Brussels Airport and in a subway station resulted in more than 30 casualties and dozens of injuries.¹⁰⁸ In these attacks, the nationals of Belgium and France have allegedly participated in the planning and execution of the attacks, while ISIS also claimed responsibility.¹⁰⁹ Thus, the

¹⁰⁵ Rubin AJ & Blaise L 'A Third of Nice Truck Attack's Dead Were Muslim' Group Says 19 July 2016 available at http://www.nytimes.com/2016/07/20/world/europe/nice-truck-attack-victims-muslims.html?_r=2 (accessed 3 August 2016).

¹⁰⁶ Human Right Watch "We Feel We Are Cursed" Life under ISIS in Sirte, Libya' (2016) 1-3 available at https://www.hrw.org/sites/default/files/report_pdf/libya0516web_1.pdf (accessed 8 June 2016).

¹⁰⁷ Human Right Watch (2016) 1-3

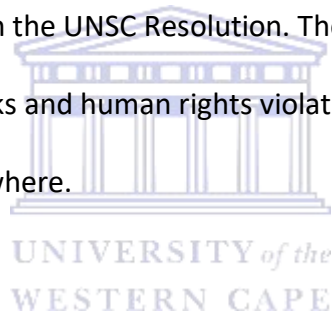
¹⁰⁸ Rubin AJ *et al* 'Strikes Claimed by ISIS Shut Brussels and Shake European Security' New York Times 22 March 2016 available on <http://www.nytimes.com/2016/03/23/world/europe/brussels-airport-explosions.html> (accessed 8 June 2016).

¹⁰⁹ McAuley J 'Brussels attackers Initially Planned to Attack France, Belgium says' The Washington Post' 10 April 2016 available at https://www.washingtonpost.com/world/brussels-attackers-initially-planned-to-attack-france-belgium-says/2016/04/10/963bbd90-ff0d-11e5-9d36-33d198ea26c5_story.html (accessed 8 June 2016).

horrific natures of atrocities that the group have been committing attest to the fact that it is a threat to world peace.

2.5 Summary

This chapter explored the origin of ISIS to its contemporary status. It pinpointed the leadership and structural setup of the ISIS jihadist militant group. Besides, the chapter indicated the threat posed by the group by exploring the military and financial capacity of ISIS. Relying mostly on reports from UN bodies, acclaimed international NGOs like Amnesty International and Human Rights Watch, worldwide media, the atrocities exerted by ISIS is outlined in this chapter. It is concluded that the group became a threat to international peace and security as indicated in the UNSC Resolution. The egregious conducts of the ISIS are explored indicating the attacks and human rights violations committed in Syria, Iraq, France, Belgium, Libya, and elsewhere.



CHAPTER THREE: SUBJECT MATTER JURISDICTION OF THE ICC OVER ISIS CRIMES

3.1 Introduction

Currently, the crimes subject to the ICC jurisdiction are the crimes of genocide, war crimes and crimes against humanity.¹¹⁰ These crimes are the most serious concern for the international community.¹¹¹ The facts of ISIS are normally described as terrorism. Terrorism *per se* as an independent crime, however, is not within the subject matter jurisdiction of the Court. At the time of negotiation of the Rome Statute, the issue of including terrorism under the jurisdiction of ICC was deliberated upon.¹¹² A lack of a standard definition of crimes of terrorism and its political character led to the exclusion of the crime.¹¹³ This does not, however, exclude the prosecution of conducts constituting terrorism under the auspices of other crimes included in the Rome Statute. As examined in this chapter, if the requirements provided for any of the three core crimes under the Rome Statute are met, terrorist conducts can successfully be prosecuted by the ICC. In the section that follows, the elements of the three core crimes under the Rome Statute are briefly discussed.

¹¹⁰ Arts 5-8 of the ICC Statute.

¹¹¹ Preamble and Art 1 of the ICC Statute.

¹¹² De Londras F 'Terrorism as an International Crime' in Schabas W & Bernaz N, (eds) *Routledge Handbook of International Criminal Law* (2010) 173. Cohen A 'Prosecuting Terrorists at the International Criminal Court: Reevaluating an Unused Legal Tool to Combat Terrorism' (2011) 20 *Michigan State University College of Law International Law Review* 238.

¹¹³ De Londras F (2010) 173. Cohen A (2011) 238, 255 and 257.

3.2 Genocide

The term 'genocide' was coined by Raphael Lemkin from Greek and Latin words in 1946. These include '*genos*,' a Greek word for race and '*caedere*', a latin word for killing.¹¹⁴ It was used to describe the Nazi atrocities against the Jews.¹¹⁵ In the aftermath of the Nazi atrocities, the UN General Assembly adopted resolution 96(1) followed by the Genocide Convention which was adopted in 1948.¹¹⁶ This was the first time that genocide was codified in a legal instrument. Later, genocide was prosecuted under the International Criminal Tribunal for the former Yugoslavia (hereafter: ICTY) and International Criminal Tribunal for Rwanda (hereafter: ICTR) Statutes which adopted *verbatim* the definition of genocide under the 1948 Genocide Convention.¹¹⁷ In addition to acquiring customary international law status, genocide is one of the core crimes adopted in the Rome Statute.¹¹⁸

Elements of the crimes of genocide are provided in Article II of the Genocide Convention which provides for authoritative meaning for the crime.¹¹⁹ The same provision is

¹¹⁴ Werle G & Jessberger F (2014) Para 778.

¹¹⁵ Cassese A *et al International Criminal Law: Cases and Commentary* (2011) 200.

¹¹⁶ Skutsch C *Encyclopaedia of the World's Minorities* Vol. 1 A-F (2013) 494. Bassiouni MC *International Criminal Law: Sources, Subjects and Contents* vol. I (2008) 409.

¹¹⁷ Bassiouni MC *International Extradition: United States Law and Practice* 6 ed (2014) 441.

¹¹⁸ O'Keefe R *International Criminal Law* (2015) 146.

¹¹⁹ Art 2 of the Convention on the Prevention and Punishment of the Crime of Genocide (1948).

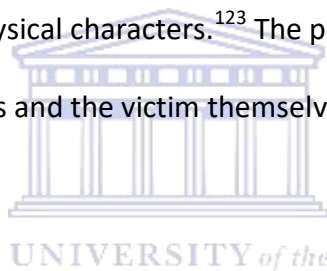
incorporated *verbatim* in most of the national and international legal instruments, including the Rome Statute.¹²⁰

3.2.1 Material Element

3.2.1.1 Protected Groups

Genocide requires an attack targeting the protected groups ‘as such’ with the intent to destroy them in whole or in part.¹²¹ According to Article 6 of the Rome Statute, the protected groups include ‘national’, ‘racial’, ‘ethnic’, and ‘religious’ group. Both a subjective and an objective approach are used to determine what constitutes a protected group.¹²²

The objective criterion encompasses identification of the group based on commonality of tradition, language, faith, and physical characters.¹²³ The perception of others towards the group, especially the perpetrators and the victim themselves, is used as a subjective criterion.¹²⁴



Religious groups in Syria and Iraq are targeted.¹²⁵ Religious groups are groups “whose members share the same religion, denomination or mode of worship”.¹²⁶ The targeted

¹²⁰ Jessberger F ‘The Definition and the Elements of the Crime of Genocide’ in Gaeta P (ed) *the UN Genocide Convention: a Commentary* (2009) 88.

¹²¹ Art 6 of the Rome Statute.

¹²² Tams C, Berster L & Schiffbauer B (eds) *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (2014) 165.

¹²³ Werle G & Jessberger F (2014) 296-7.

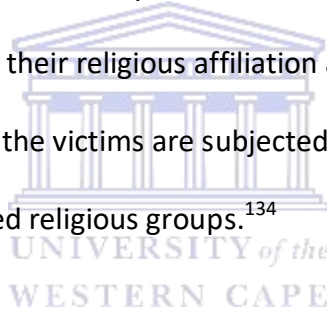
¹²⁴ Werle G & Jessberger F (2014) 296-7.

¹²⁵ UNHRC Report A/HRC/28/18 (2015) Para 16. See also Rasheed A (2015) 92.

¹²⁶ *Prosecutor v Jean-Paul Akayesu*, Trial Judgement, ICTR-96-4-T, ICTR (1998) Para 513.

religious groups in these countries include Shi'a Muslims, Christians, and Yazidis in Syria and Iraq.¹²⁷ They are subjected to attacks by the group for the mere fact of belonging to these religious groups.¹²⁸ For instance, in some cases, entire villages have been cleared of their Yazidi population.¹²⁹ The ISIS combatants refer to the Yazidi as 'devil worshippers' or 'infidels'.¹³⁰ As mentioned before, an ISIS doctor who repeatedly raped a pregnant Yazidi woman sat on her womb to abort her pregnancy telling the victim that 'his baby should die because it is an infidel...'¹³¹ moreover, Yazidi women and children are regularly forced by ISIS to change their religion to Muslim.¹³²

Once a person is identified as belonging to either the Christian church or Shi'a Muslim, he or she will automatically be slated for summary execution in Syria and Iraq.¹³³ ISIS acts of separating prisoners according to their religious affiliation and killing 600 prisoners mainly of Shia Muslims, prove the fact that the victims are subjected to such measure for the mere fact of belonging to such protected religious groups.¹³⁴



¹²⁷ UNHRC Report A/HRC/28/18 (2015) Para 16. See also Rasheed A *ISIS: Race to Armageddon* (2015) 92.

¹²⁸ UNHRC Report A/HRC/28/18 (2015) Paras 17–22.

¹²⁹ UNHRC Report A/HRC/28/18 (2015) Para 18.

¹³⁰ UNHRC Report A/HRC/32/CRP.2 (2016) Para 104.

¹³¹ UNHRC Report A/HRC/28/18 (2015) Para 38

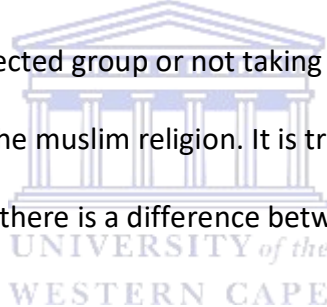
¹³² UNHRC Report A/HRC/32/CRP.2 (2016) Para 2.

¹³³ UNHRC Report A/HRC/28/18 (2015) Paras 21-27

¹³⁴ UNHRC Report A/HRC/28/18 (2015) Para 27.

The victims are, therefore, targeted because of 'what they are'. Defining a group based on what 'they are not' constitutes a negative definition of protected groups.¹³⁵ The negative approach to defining a protected group is defining a group as any other group except the group perpetrating the attack.¹³⁶ This approach is consistently rejected. For instance, the ICTY and the International Court of Justice (hereafter: ICJ) also confirmed the same.¹³⁷ In the case of ISIS, the Christian, Yazidi, and Shia groups are targeted in Syria and Iraq, indeed, because of their religious faith. They are regarded as infidels in the perpetrator's mind; that is an attack for what they are, and constitutes a positive approach to defining a protected group.

The issue that needs further examination at this juncture is whether the Shia Muslims in these countries constitute a protected group or not taking into account the fact that the offenders themselves belong to the muslim religion. It is true that Shia Muslim also belongs to the muslim religion. However, there is a difference between Shia Muslim and Sunni



¹³⁵ Lingaas C 'Defining the Protected Groups of Genocide through the Case Law of International Courts' International Crime Database Brief (2015) 15 available at <http://www.internationalcrimesdatabase.org/upload/documents/20151217T122733-Lingaas%20Final%20ICD%20Format.pdf> (accessed 26 September 2016).

¹³⁶ Akinmuwagun TL & Vormbaum M 'The Nigerian 'Jos Crisis' From the Perspective of International Criminal Law' in Werle G, Fernandez L, & Vormbaum M (eds) *Africa and the International Criminal Court* (2014) 139.

¹³⁷ *Prosecutor v Radoslav Brdjanin*, Trial Judgement, IT-99-36-T, ICTY (2004) Para 685. *Bosnia and Herzegovina v Serbia and Montenegro*, Case Concerning Application of the Prevention and Punishment of the Crime of Genocide, ICJ Judgment (2007) Para 193. See also Lingaas C (2015) 15.

Muslim in their belief systems.¹³⁸ Hence, ISIS treats the Shia Muslim as infidels indicating perpetrators perception of the Shia Muslim as belonging to an independent group that deserves protection. As such, it can be concluded that Shia Muslim is also a protected group. Consequently, on the basis of subjective and objective criteria, it is submitted that the above-mentioned religious groups are protected groups within the meaning of Article 6 of the Rome Statute.

3.2.1.2 Individual Acts

ISIS members have been committing all of the five individual acts under Article 6 of the Rome Statute. Members of Shi'a Muslims, Christians, and Yezidis in Syria and Iraq have been killed and summarily executed by ISIS members for the mere fact of belonging to this group.¹³⁹ ISIS militants have also inflicted serious bodily or mental harm by committing rape and sexual violence, including sexual slavery against the victims, enslavement, torture and other inhumane treatment in violation of Article 6 (b) of the Statute.¹⁴⁰

ISIS militants have also caused destructive conditions of life by adopting the so-called slow death measures.¹⁴¹ This includes an act of depriving basic necessities, such as food, medical facilities, and shelter. For instance, on 3 August 2014, ISIS surrounded Yazidis who had fled

¹³⁸ Arthur J Faith *and Secularisation in Religious Colleges and Universities* (2006) 11. Nesbitt P *Religion and social policy* (2001) 112.

¹³⁹ UNHRC Report A/HRC/28/18 (2015) Paras 17 - 18

¹⁴⁰ UNHRC Report A/HRC/32/CRP.2 (2016) Paras 17 Seq. See also UNHRC Report A/HRC/28/18 (2015) Para 17. Amnesty International 14/021/2014 (2014) 11.

¹⁴¹ See Art 6 (c) of the Rome Statute.

to the upper slopes of Mount Sinjar.¹⁴² ISIS intentionally prohibited access to food to those on the upper slopes of the mountain by attacking planes and helicopters coming to drop food and medical aid leaving them for death at temperatures of up to 50 degrees Celsius.¹⁴³

ISIS members have also imposed measures to prevent birth by Yazidi women. The measures include sterilisation and separation of the sexes.¹⁴⁴ The militants have also forcibly transferred children to other groups. For instance, the Yazidi and Christian children in Syria and Iraq are abducted from their families and forced to learn Sharia and jihadist ideologies.¹⁴⁵ In view of that, all of the material elements of the crime of genocide are fulfilled.

3.2.2 The Mental Element

The legal definition of genocide indicates that it is an act committed by perpetrators with intent to destroy in whole or part of a protected group.¹⁴⁶ Accordingly, what is required is intent to destroy but not necessarily an actual destruction of the group. Genocide might be committed without even killing a single person as far as the individual criminal acts are perpetrated against protected group with genocidal intent. Similarly, the killing of a single

¹⁴² UNHRC Report A/HRC/32/CRP.2 (2016) Para 27.

¹⁴³ UNHRC Report A/HRC/32/CRP.2 (2016) Para 27.

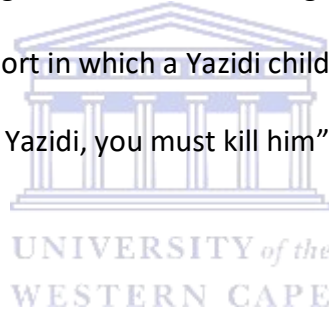
¹⁴⁴ UNHRC Report A/HRC/32/CRP.2 (2016) Para 142.

¹⁴⁵ Human Rights Watch 'Iraq: Forced Marriage, Conversion for Yazidis' 11 October 2014 available at <https://www.hrw.org/news/2014/10/11/iraq-forced-marriage-conversion-yezidis> (accessed 6 August 2016).

¹⁴⁶ Art 6 of the ICC Statute.

member of a protected group would amount to genocide as long as the genocidal intent exists.

Intent to destroy is inferred from the conduct of the perpetrators including their statements.¹⁴⁷ Thus, the intent to destroy Yazidi, Christian, and Shia Muslim in Syria and Iraq can be gathered from their conduct and their statements. According to the ideology of ISIS, the world must be emptied of religions not conforming to the concept of 'pure Islam'.¹⁴⁸ This includes Christians who are in different denominations; Yazidi's who are regarded as devil worshipers; and Shia Muslims who are not followers of 'pure Islam'.¹⁴⁹ They have declared that they intend to destroy these groups upon the latter's failure to convert to 'pure Islam' as they claim.¹⁵⁰ The genocidal intent of the group can easily be grasped from one testimony on the UNHRC report in which a Yazidi child is told by ISIS jihadist that "even if you see your father, if he is still Yazidi, you must kill him".¹⁵¹ Following the decision of the



¹⁴⁷ Behrens P & Henham R (eds) *Elements of genocide* (2013) 187.

¹⁴⁸ Dabiq 'Shari'ah Alone Will Rule Africa' Islamic State (ISIS, ISIL) Magazine: Dabiq - Issue 8, at 5 available on <http://media.clarionproject.org/files/islamic-state/isis-isil-islamic-state-magazine-issue+8-sharia-alone-will-rule-africa.pdf> (accessed 6 August 2016).

¹⁴⁹ Dabiq 'You Think They Are Together but Their Hearts Are Divided' Islamic State (ISIS, ISIL) Magazine: Dabiq - Issue 12, at 46, available at <http://www.clarionproject.org/docs/islamic-state-isis-isil-dabiq-magazine-issue-12-just-terror.pdf> (accessed 6 August 2016).

¹⁵⁰ Dabiq 'The Rafidah: From Ibn Sa'ba to the Dajjal' Islamic State (ISIS, ISIL) Magazine: Dabiq – Issue 13 available at <http://www.clarionproject.org/factsheets-files/Issue-13-the-rafidah.pdf> (accessed on 6 August 2016).

¹⁵¹ UNHRC Report A/HRC/32/CRP.2 (2016) Para 159.

ICTY in the *Kristic* case, destruction of cultural heritages in Syria and Iraq owned by these protected groups or utilised as a place of worship also indicates the genocidal intent.¹⁵²

Thus, the cumulative requirements of genocide are met in the case of ISIS atrocities and through further investigation, genocidal intent of individual perpetrators needs to be identified. In conclusion, it is submitted that the ISIS militants can be said to have committed acts of genocide in Syria and Iraq.

3.3 Crimes against Humanity

Unlike the crime of genocide, crimes against humanity have never been codified in a single treaty.¹⁵³ Individuals were held liable for crimes against humanity in the Nuremberg trial for the first time.¹⁵⁴ Since then crimes against humanity evolved in different international and national criminal trials.¹⁵⁵ Crimes against humanity can be committed during times of war or peace.¹⁵⁶ According to Article 7 of the Rome Statute, what constitutes crimes against humanity is the existence of attack which is widespread or systematic when committed in furtherance of a state or organisational policy to commit such a crime.

¹⁵² *Prosecutor v Radislav Krstic*, Appeal Judgement, IT-98-33-A, ICTY (2004) Para 33. See also Werle G & Jessberger F (2014) Para 852.

¹⁵³ Andrew Novack *International criminal Court* (2015) 45.

¹⁵⁴ Schabas (2011) 107.

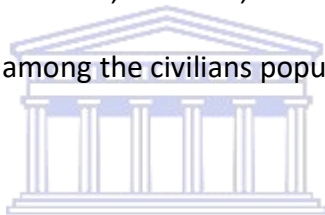
¹⁵⁵ Hwang P 'Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court' (1998) 22 *Fordham International Law Journal* 457.

¹⁵⁶ The nexus requirement between war and commission of crimes against humanity is omitted in Article 7 of the Rome Statute. See Schabas W *The International Criminal Court: A Commentary on the Rome Statute* (2010) 144-7.

3.3.1 Contextual Element of Crimes against Humanity

3.3.1.1 Widespread or Systematic Attack on Civilian Population

An attack against the civilian population is the multiple commissions of the individual criminal acts recognised under Article 7 of the Rome Statute against the civilian population.¹⁵⁷ It will be regarded as multiple if one individual criminal act is committed more than once or if different individual acts are committed at the same time.¹⁵⁸ These attacks should be targeted against the civilian population.¹⁵⁹ A civilian population refers to non-combatants.¹⁶⁰ As the aim of regulating crimes against humanity is to afford protection to the helpless and defenceless, the victim's need for protection should be central in determining 'who is a civilian'.¹⁶¹ It should, however, be taken into consideration that the mere existence of some militants among the civilians populations does not negate the protection for civilians.¹⁶²



For instance, ISIS executed former police and military members of Iraqi and Syrian governments even though, at the time of capture, these members were not involved in hostilities or declared *hors de combat*.¹⁶³ Consequently, Iraqi, Syrian, and soldiers of other

¹⁵⁷ Art 7 (2) of the Rome Statute.

¹⁵⁸ Werle G & Jessberger F (2014) Para 891.

¹⁵⁹ Triffterer O (ed) Commentary on the Rome Statute of the International Criminal Court-Observers' Notes, Articles by Article (2 ed) (2008) 180.

¹⁶⁰ Triffterer O (2 ed) (2008) 180-1.

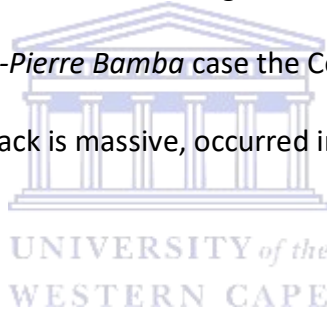
¹⁶¹ Werle G & Jessberger F (2014) Para 885.

¹⁶² Werle G & Jessberger F (2014) Para 883.

¹⁶³ UNHRC Report A/HRC/28/18 (2015) Paras 30-1. UNHRC Report A/HRC/27/60 (2014) Para 30-32.

countries who are no longer taking part in hostilities should be regarded as civilians considering the victim's need for protection.

According to Article 7 of the Rome Statute, the attack against a civilian population should be widespread *or* systematic. As can be discerned from the wording, these requirements are alternative.¹⁶⁴ The widespread nature of the attack refers to the quantitative nature of the attack.¹⁶⁵ Consequently, it is regarded as widespread either in terms of geographic coverage or number of victims involved.¹⁶⁶ For instance, the ICC Pre-Trial Chamber I in the Al Bashir case reasoned that even if the term "widespread" and "systematic" are not defined in the Statute, it excludes random or isolated acts of violence.¹⁶⁷ The Court held that, a criminal act can be regarded as "widespread" based on the 'large-scale nature of the attack and the number of victims.'¹⁶⁸ In the *Jean-Pierre Bamba* case the Court also ruled that it can be regarded as widespread if the attack is massive, occurred in a frequent manner, serious, and if it involves multiple victims.¹⁶⁹



The alternative term "systematic" refers to the qualitative nature of the attack. It denotes the organised nature of the attack.¹⁷⁰ If the attack is committed with a certain degree of

¹⁶⁴ Ambos K *Treatise on International Criminal Law: Volume II: The Crimes and Sentencing* (2014) 62.

¹⁶⁵ Werle G & Jessberger F (2014) Para 895.

¹⁶⁶ Arts 7 of the ICC Statute. See also Werle G & Jessberger F (2014) 339.

¹⁶⁷ *Prosecutor v Al Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest, ICC-02/05-01/09-3 (2009) Para 81.

¹⁶⁸ *Prosecutor v Al Bashir* (2009) Para 81.

¹⁶⁹ *Prosecutor v Bemba*, Decision Pursuant to Article 61 (7) (a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424 (2009) Para 83.

¹⁷⁰ *Prosecutor v Al Bashir* (2009) Para 81. See also Schabas W (2010) 148-9.

organisation and planning, it can be referred to as systematic attack.¹⁷¹ The ICC Pre-Trial Chamber I (hereafter: PTC) stated that systematic nature concerns the organised nature of the attack and the fact that the said attack is improbable for its random occurrence.¹⁷² Consideration can also be given to the specific pattern of the attacks.¹⁷³

ISIS attacks are both widespread and systematic. They are widespread in terms of its geographic coverage and the number of victims involved. ISIS controls broad territory and has a large population under its control. In all those territories and other places, it has committed several attacks in Syria and Iraq encompassing hundreds of villages.¹⁷⁴

Even from the perspective of number of victims, the ISIS attacks can be regarded as widespread. According to an estimation by the UN in January 2016, the death toll of ISIS-linked violence reached 18, 800 in Iraq alone.¹⁷⁵ An independent organ did not estimate the number of casualties in Syria. However, there is no doubt that a significant or a comparable number of people have been killed. The attacks are also systematic as they are committed in an organised and planned manner. ISIS has a conventional army with all state like organisational and command structure, with a clear aim and goal of establishing an Islamic State. They also have the military capacity to launch serious waves of attacks. With such features, they have targeted and attacked civilians. These attacks are not a random target or

¹⁷¹ Werle G & Jessberger F (2014) Para 896.

¹⁷² *Prosecutor v Al Bashir* (2009) Para 81. See also Schabas W (2010) 148-9.

¹⁷³ Werle G & Jessberger F (2014) Para 896.

¹⁷⁴ UNHRC Report A/HRC/32/CRP.2 (2016) Para 167.

¹⁷⁵ BBC News 'Iraq conflict: Civilians Suffering 'Staggering' Violence – UN' 19 January 2016 available at <http://www.bbc.com/news/world-middle-east-35349861> (accessed 6 August 2016).

sporadic violence. Rather they are planned and well organised. The organised nature of its attacks can also be grasped from the identical nature of the attacks committed by ISIS members.¹⁷⁶ Thus, the attacks by ISIS are both widespread and systematic.

3.3.1.2 The Policy Element

Unlike the ICTY and ICTR Statutes, the Rome Statute requires a policy element.¹⁷⁷ The policy element requires the attack against a civilian population to be committed 'pursuant to or in furtherance of a state or organisational policy to commit such attack'.¹⁷⁸ The policy need not necessarily be predetermined or clearly stipulated by the highest officials.¹⁷⁹ The important thing here is to avoid spontaneous, isolated acts not to form part of crimes against humanity.¹⁸⁰ The existence of a policy to commit such atrocities can be grasped from total circumstances, including ISIS statements and conducts.

The meaning and scope of the organisation under Article 7 of the Rome Statute are not clear. Cherif Bassiouni, who chaired the drafting committee at the Rome Conference, argues a crime against humanity is not applicable to non-state actors and further states that:

The question arose after 9/11 as to whether a group such as al-Qaeda, which operates on a worldwide basis and is capable of inflicting significant harm in more than one state, falls within this category. [He opined that], such a group does not

¹⁷⁶ UNHRC Report A/HRC/32/CRP.2 (2016) Para 167.

¹⁷⁷ Schabas W (2010) 151. Werle G & Jessberger F (2014) Para 900.

¹⁷⁸ Art 7 (2) (a) of the ICC Statute.

¹⁷⁹ Werle G & Jessberger F (2014) Para 901-2.

¹⁸⁰ Ambos K (2014) 67. Schabas W (2010) 151. Werle G & Jessberger F (2014) Para 901.

*qualify for inclusion within the meaning of crimes against humanity as defined in Article 7, ...notwithstanding the international dangers that it poses ...*¹⁸¹

According to the jurisprudence of the ICC, however, the organisation is a group of individuals who are capable of committing an attack against the civilian population in a systematic or widespread manner.¹⁸² Gerhard Werle argues that there is no reason for restrictive interpretation.¹⁸³ He further notes that if the law wanted to refer to a state-like organisation, the law could have provided it in an expressive manner like the reference under Article 6 of the Rome Statute.¹⁸⁴

On the basis of the ICC jurisprudence, there is no doubt that ISIS fulfils the requirement of 'organisation' as the group has already shown the capacity to commit atrocities in a systematic and widespread manner. ISIS controls territory, has a population under its administration, has a conventional army, exercises governmental authority in the territories it controls, and it has serious military capacity including manpower with organised military hierarchical structures. ISIS operates under one group name i.e. Islamic State of Iraq and Syria. They have shared the political view of establishing an Islamic State. Based on these natures of the ISIS, it is safe to conclude that the group does not only possess the capacity to attack, but also has a state like feature, although there is no legal requirement under the

¹⁸¹ Bassiouni MC Crimes against Humanity: Historical Evolution and Contemporary Application (2011) 27.

¹⁸² Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya ICC-01/09 (2010) Para 90.

¹⁸³ Werle G & Jessberger F (2014) 906. See also Ambos K (2014) 74.

¹⁸⁴ Werle G & Jessberger F (2014) 906.

Rome Statute for the organisation to look like a state. In sum, ISIS meets the policy element of crimes against humanity.

The ISIS jihadist militant group has declared the establishment of a caliphate ruled by the caliph.¹⁸⁵ The attacks by ISIS are committed pursuant to an unequivocal ideological policy of the terrorist group.¹⁸⁶ The group aims at establishing Islamic State by abolishing all other religious groups and with all criminals means available. The attacks are committed against anyone who does not share their ideological beliefs. Their radical religious interpretation does not allow for the existence of other groups within the territory it controls. Therefore, the attacks are committed based on the premise of ISIS's stated organisational policy to commit an attack.

3.3.2 Individual Acts

The Rome Statute under Article 7 (1) provides for individual criminal conducts that constitute crimes against humanity. This includes murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment, torture, sexual violence, persecution, enforced disappearance, apartheid, and other inhumane acts. ISIS has committed all the above crimes except the offence of apartheid. As an example, ISIS has committed murder and extermination as crimes against humanity by slaughtering children, burning and crucifying men, and killing men by throwing them off buildings.¹⁸⁷ They have

¹⁸⁵ Rashed A (2015) 47.

¹⁸⁶ Dabiq Magazine Issue 8 at 5.

¹⁸⁷ See generally UNHRC Report A/HRC/28/18 (2015); UNHRC Report A/HRC/27/60 (2014); UNHRC Report A/HRC/32/CRP.2 (2016).

also committed sexual violence against victims as young as six.¹⁸⁸ They kidnapped women, sold them as sex slaves and forced them to marry ISIS fighters.¹⁸⁹ Other atrocities committed by ISIS include acts of torture, other inhumane acts, and severe deprivation of liberty.¹⁹⁰

3.3.3 Mental Elements

In addition to the intent to commit the underlying crime required for the particular offence, the Statute requires the individual acts to be committed with knowledge of 'broader context in which his actions occur.'¹⁹¹ Knowledge, as defined in the Statute, is 'awareness that a circumstance exists, or consequence will occur in the ordinary course of events'.¹⁹² The perpetrator must be aware that there is an on-going systematic and widespread attack against the civilian population and his criminal conducts form part of such attack.¹⁹³

Whenever there is well-known widespread and systematic attack against the civilian population, it is inconceivable to deny the existence of knowledge of on the part of perpetrators. Most reasonable people are presumed to know about ISIS and the danger that

¹⁸⁸ UNHRC Report A/HRC/28/18 (2015) Para 40.

¹⁸⁹ UNHRC Report A/HRC/28/18 (2015) Para 35. See also Wheeler S 'Why has the World Forgotten Islamic State's Female Sex Slaves?' Human Right Watch 14 April 2016 available at <https://www.hrw.org/news/2016/04/14/why-has-world-forgotten-islamic-states-female-sex-slaves> (accessed 8 June 2016).

¹⁹⁰ UNHRC Report A/HRC/32/CRP.2 (2016) Para 168.

¹⁹¹ Art 7 (1) of the Rome Statute.

¹⁹² Art 30 (3) of the Rome Statute.

¹⁹³ Art 7 (1) of the Rome Statute. See also Werle G & Jessberger F (2014) 913-5.

they pose to human security. For that reason, the perpetrators who are participating as combatants in an ISIS attacks are expected to have knowledge of the existence of the systematic and widespread attack against the civilian population. In general, knowledge of ISIS members can be inferred from the overall circumstances. There is no need for the perpetrators to share the purpose of the attack. Rather knowledge of the context suffices. This is because it is said that not all foreign fighters from the different continent have joined ISIS believing in their ideology. As a result, no consideration is given to the personal motive or opportunistic personal reasons. Instead, an obvious knowledge of the context of the attack is sufficient for the mental element. For the purpose of establishing individual guilt, specific evidence must be adduced to prove the existence of knowledge on the part of that specific suspect. It should be noted, however, that the requirements as described above will be frequently satisfied.



3.4 War Crimes

War crimes are the oldest of the crimes under the jurisdiction of the ICC.¹⁹⁴ Criminal liability for serious violations of humanitarian law extends to both international and internal armed conflicts.¹⁹⁵ Law of armed conflict regulates conducts of war.¹⁹⁶ Not all violations of international humanitarian law constitute war crimes.¹⁹⁷ The sorts of conducts which are regarded as a war crime are regulated under Article 8 of the Rome Statute which incorporated the two areas of laws of war i.e. Law of Geneva which protects persons not

¹⁹⁴ Schabas W (ed) *The Cambridge Companion to International Criminal Law* (2016) 208.

¹⁹⁵ See Art 8 of the Rome Statute.

¹⁹⁶ Cavaleri D *Law of War: Can 20th-Century Standards Apply to the Global War on Terrorism?* (2005) 13.

¹⁹⁷ Solis G *The Law of Armed Conflict: International Humanitarian Law in War* (2016) 330.

taking part in hostilities and Law of the Hague which protects soldiers by regulating means and method of warfare. The elements of war crimes require the serious violations of humanitarian law during an international or internal armed conflict with an adequate nexus to an armed conflict as examined herein below.

3.4.1 Armed Conflict

For the law of war to apply there must be an armed conflict.¹⁹⁸ According to the jurisprudence of the ICTY Appeal Chamber, an armed conflict is said to exist if there is 'resort to armed force between States or protracted armed conflict violence between governmental authorities and organised armed groups or between such groups within a State'.¹⁹⁹ In the *Lubanga* case, the ICC Trial Chamber recognised the same meaning for an armed conflict.²⁰⁰ For the international humanitarian law to apply in an internal armed conflict, a certain level of intensity is required while any resort to armed conflict between States calls for the application of the international humanitarian law from the moment when the first shot is fired or when a war is declared.²⁰¹ A question of the existence of an armed conflict in the case of ISIS atrocities and its characteristics are analysed below.

¹⁹⁸ Triffterer O (2 ed) (2008) 290.

¹⁹⁹ *Prosecutor v Dusko Tadic aka "Dule"*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1, ICTY (1995) Para 70. See also Werle G & Jessberger F (2014) Para 1078.

²⁰⁰ *Prosecutor v Lubanga Dyilo*, Judgment Pursuant to Article 74 of the Statute, ICC-01/04-01/06 (2012) Para 531.

²⁰¹ Werle G & Jessberger F (2014) Paras 1082 and 1095.

3.4.2 Character of Armed Conflict

The kind of liability under Article 8 of the Rome Statute relies on the distinction between the international *vis-à-vis* internal armed conflicts. Though both types of armed conflict are recognised in the Rome Statute, the conducts which entail individual criminal responsibility differs depending on the type of armed conflict. The regulatory regimes for the international armed conflict and internal armed conflict are converging from time to time.²⁰² At this juncture, however, the Rome Statute does not provide identical rules for both armed conflicts. Thus, there is a need to determine the nature of the ISIS armed conflict.

The international armed conflict involves an armed conflict between two or more states.²⁰³ In this case, the scale of the armed conflict is irrelevant.²⁰⁴ The internal armed conflict might be internationalised armed conflict i.e. involvement of other states in the internal armed conflict.²⁰⁵ In *Lubanga*, ICC PTC II ruled that the conflict is internationalised when the third state participates “in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group”.²⁰⁶

There are States other than Iraq and Syria that are involved in the war against ISIS. In the US-led coalition, Bahrain, Jordan, France, Australia, and Turkey launched airstrikes against

²⁰² Liivoja R & McCormack T (eds) *Routledge Handbook of the Law of Armed Conflict* (2016) 137.

²⁰³ *Prosecutor v Lubanga Dyilo* (2012) Para 1177.

²⁰⁴ Werle G & Jessberger F (2014) Para 1082.

²⁰⁵ *Prosecutor v Bemba* (2009) Para 220. *Prosecutor v. Lubanga Dyilo* (2012) 541.

²⁰⁶ *Prosecutor v Lubanga Dyilo* (2012) Para 541.

IS-targets and Russia has also participated in the war against ISIS.²⁰⁷ For the war to be regarded as internationalised, the overall control by other states should be in support of ISIS. However, all of the above countries are involved in the conflict not in support of this group but against the group. Accordingly, the ISIS conflict cannot be regarded as internationalised.

In the case of internal armed conflict, the level of intensity must be high.²⁰⁸ In *Tadić*, the ICTY stated that an internal armed conflict exists whenever there is 'protracted armed violence between governmental authorities and organised armed groups or between such groups within a State'.²⁰⁹ It is protracted armed violence if it is prolonged armed conflict in its nature.²¹⁰ The intensity of the armed conflict should not be determined from a temporal perspective *per se*.²¹¹ The fact that the intensity of the conflicts affects the interest of international community should be considered.²¹² However, internal disturbances like riots and isolated acts of violence cannot be regarded as an armed conflict for the law of war to apply.²¹³

In this regard, the ISIS conflict can be considered as protracted both in Syria and Iraq. It is protracted as it has been actively going on for nearly three years. In comparison, the war in

²⁰⁷ BBC 'Islamic State group: Crisis in Seven Charts' 3 August 2016 available at <http://www.bbc.com/news/world-middle-east-27838034> (accessed 7 August 2016).

²⁰⁸ Ambos K (2014) 123.

²⁰⁹ *Prosecutor v Dusko Tadic aka* (1995) Para 70.

²¹⁰ Triffterer O (2 ed) (2008) 292.

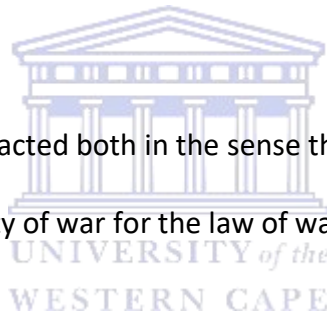
²¹¹ Werle G & Jessberger F (2014) Para 1099.

²¹² Werle G & Jessberger F (2014) Para 1099.

²¹³ Art 8 (2) (d) (f) of the Rome Statute.

Syria is more intensified than the war in Iraq. The intensity of war in Iraq also justifies the application of the law of war. The Iraqi government lost wide territory to ISIS.²¹⁴ ISIS controlled cities including Mosul, Tikrit, Ramd, Amerli, and Albaghdadi killing thousands of soldiers.²¹⁵ Among the list, Mosul is Iraq's second largest city.²¹⁶ Al-Anbar the largest province in Iraq also fell into the hands of ISIS.²¹⁷ In 2014, ISIS was in control of nearly a third of Iraq alone.²¹⁸ The total area under control of ISIS in Syria and Iraq was greater than the territory of Israel and Lebanon.²¹⁹ The intensity of the war can also be grasped from the casualties sustained. According to estimation by UN, from January 2014 to October 2015, UN recorded 55,047 civilian casualties in Iraq alone.²²⁰ From this, the death toll of the ISIS-linked violence reached 18, 802.²²¹ More than 3 million people are internally displaced in Iraq.

Thus, the war against ISIS is protracted both in the sense that it is prolonged and intensified. The purpose of requiring 'intensity of war for the law of war to apply' is to exclude internal



²¹⁴ Gerges FA (2016) 226.

²¹⁵ UNAMI (2016) 2.

²¹⁶ Kendal E *After Saturday Comes Sunday: Understanding the Christian Crisis in the Middle East* (2016) 172.

²¹⁷ UNAMI (2016) 2.

²¹⁸ Rosen A Here's all of the Area that ISIS Controls' Business Insider 11 June 2014 available at <http://www.businessinsider.com/isis-controls-shocking-percentage-of-iraq-and-syria-2014-6> (accessed 18 October 2016) (hereafter: Business Insider 2014)

²¹⁹ Business Insider (2014).

²²⁰ UNAMI (2016) I.

²²¹ UNAMI (2016) I.

disturbances such as a riot or isolated acts of violence.²²² At least, the war against ISIS in Iraq and Syria cannot be regarded as a riot or isolated acts of violence when properly structured soldiers are fighting against government forces, other militia forces, and international allied forces.

According to the ICC Trial Chamber, the organised nature of the group can be deduced from factors such as internal hierarchy within the group, the command structure, military capacity of the group, and intensity of the armed conflict.²²³ Whether a belligerent group is party to an armed conflict which is liable under war crime should be assessed on a case by case basis.²²⁴ Some scholars, for instance, rejected a claim that the Al-Qaeda terrorist group constitute party to the armed conflict.²²⁵ The reason given by Kai Ambos is the fact that the *Al Qaeda* terrorist group lacks the required organisation or chain of command.²²⁶

In contrast to the Al-Qaeda terrorist group, however, the ISIS terrorist group possesses the required hierarchical structure which is set up in such a way that it resembles a state bureaucratic structure with sufficient chain of command.²²⁷ It is well organised, comprising of the commander-in-chief, cabinets, Shura Council, the military council, and media apparatus.²²⁸ The group also has serious military capacity and has engaged in intensified

²²² Art 8 (2) (d) (f) of the Rome Statute.

²²³ *Prosecutor v Lubanga Dyilo* (2012) 236.

²²⁴ Werle G & Jessberger F (2014) Para 1079.

²²⁵ Ambos K & Alkatout J 'Has 'Justice Been Done'? The Legality of Bin Laden's Killing Under International Law' (2012) 45(02) *Israel Law Review* 346 seq.

²²⁶ Ambos K (2014) 138.

²²⁷ Stakelbeck E (2015) 54.

²²⁸ CNN 14 January 2015.

armed conflict in Syria and Iraq.²²⁹ Accordingly, both requirements of intensity and organisation are fulfilled for the application of the law of war in the ISIS conflict.

War crimes during an international armed conflict are regulated under Article 8(2) (a) and (b) while for the non-international armed conflict they are regulated under Article 8(2) (c) and (e) of the ICC Statute. Accordingly, in this scenario the applicable provisions regulating the ISIS situation is the rules for non-international armed conflict which are provided under Article 8(2) (c) and (e).

3.4.3 Commission of Individual Acts

The ICC Statute includes an extensive list of offences which constitute war crimes. It should, however, be observed that not all offences under the customary international law are included in the Rome Statute. Thus, the list of crimes enumerated under Article 8 (2) (c) and (e) of the Rome Statute, are only exhaustive as regards the jurisdiction of the Court as other war crimes exist under customary international law.²³⁰

ISIS members have committed different crimes enumerated under Article 8 (2) (c) and (e) of the Rome Statute. The individual acts committed against persons by ISIS include killing and wounding persons not involved in combat, mistreatment, sexual violence, hostage taking, and use of child soldiers are the major ones.²³¹ ISIS has also committed attacks against the

²²⁹ UNHRC Report A/HRC/27/60 (2014) Para 16.

²³⁰ Werle G & Jessberger F (2014) Paras 1061 and 1405.

²³¹ See A/HRC/32/CRP.2 (2016) Paras 17 Seq. UNHRC Report A/HRC/28/18 (2015) Paras 16-49. UNHRC Report A/HRC/27/60 (2014) Para 30 seq.

property by destructing cultural and religious heritages.²³² Destruction of the 2,000 years old ancient city of Palmyra,²³³ the 2,000-year-old Temple of Bel (Baal Shamin), which is also known as 'Pearl of the Desert',²³⁴ Hatra, an ancient city from second and third century BC in Iraq,²³⁵ and the destruction of the sixth century ancient city of Aleppo,²³⁶ are all examples of cultural heritages destroyed by ISIS.

3.4.4 Nexus between Armed Conflict and Individual Acts

In order to say that ISIS committed war crimes, there must be a nexus between armed conflict and individual acts perpetrated by the group.²³⁷ The purpose of requiring a nexus is to differentiate the war crime from other core crimes and ordinary crimes like murder.²³⁸

The nexus between the two should be an 'evident' one.²³⁹ The link between the 'war' and the 'individual act' must be closely and obviously related.²⁴⁰ It should be noted that the requirement of nexus is not strict causal, and even the perpetrator is not required to be allied to the ISIS group. The functional relationship between the act and armed conflict is

²³² UN Security Council, Resolution 2199 (2015) Paras 15 and 16.

²³³ Haviland W *et al* (2013) 268. See also Aljazeera 27 March 2016.

²³⁴ Aljazeera 31 August 2015.

²³⁵ The Independent 01 September 2015.

²³⁶ The Independent 01 September 2015.

²³⁷ Triffterer O (2 ed) (2008) 293-4.

²³⁸ Ambos K (2014) 141.

²³⁹ Ambos K (2014) 140.

²⁴⁰ Triffterer O (2 ed) (2008) 294.

required.²⁴¹ It is said to have related to the armed conflict if the armed conflict plays a substantial role in the offender's ability, decision, and manner to commit the act.²⁴²

In accordance with the jurisprudence of the ICTY, the following facts about ISIS establish the close and obvious nexus between the acts committed and the armed conflict. The perpetrators are combatants of ISIS who are killing the civilians and soldiers who have surrendered by beheading, shooting, burning alive and bulldozing. Most of the victims are non-combatants as well as those who have surrendered to ISIS. The perpetrator's position and the victim's identity is an indicative factor of the nexus between the ISIS armed conflict and their individual criminal acts.

3.4.5 Mental Element

The Rome Statute requires the offenders to be aware of the 'factual circumstances that established the existence of an armed conflict' and the fact that the victim belongs to a protected person.²⁴³ This is not a requirement of awareness of character of armed conflict.²⁴⁴ Rather, it is the awareness of a factual scenario of the armed conflict. The required *mens rea* for individual conducts should also be fulfilled. Article 30 of the Rome Statute provides for a mental element which requires intent and knowledge concerning acts and consequences. Different mental element standards departing from Article 30 of the Statute are provided for some acts.

²⁴¹ Ambos K (2014) 141.

²⁴² *Prosecutor v Dragoljub Kunarac*, Appeal Judgment, IT-96-23 & IT-96-23/1-A, ICTY (2002) Para 58.

²⁴³ The Introduction to the Elements of Crimes for Article 8 of the ICC Statute.

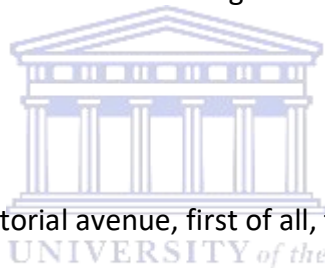
²⁴⁴ The Introduction to the Elements of Crimes for Article 8 of the ICC Statute.

Looking at the overall conduct of ISIS, it can be said that most of the attacks are committed by the members of ISIS who are parties to the armed conflict. Accordingly, it can be said that they are aware of the probable factual circumstance of existence armed conflict. When it comes to the individual acts, the atrocities committed in Syria and Iraq of attacks against protected persons and attacks against property are committed intentionally following the plan and policy of the group. Though this mental requirement needs to be supported by other evidence to determine individual guilt, in general however, the attacks by members of this group are committed with the requisite mental element.

Thus, all the required elements of war crimes under the Rome Statute are fulfilled and it is hereby submitted that ISIS militants should be charged with war crimes.

3.5 Summary

For the ICC to be a viable prosecutorial avenue, first of all, the acts giving rise to prosecution should fall within the subject matter jurisdiction of the Court. Accordingly, this chapter determined whether the violent conduct of ISIS constitutes one of the core crimes under the Rome Statute. Relying on the reports by human rights bodies, this chapter concluded that the current atrocities exerted by ISIS constitute crimes of genocide, a crime against humanity, and war crimes. It should be observed that the mere fact of having subject matter jurisdiction does not make the ICC a viable prosecutorial avenue. As such, based on the jurisdictional basis provided by the Rome Statute and other factors as well, the next chapter determines whether the ICC can be regarded as a viable prosecutorial avenue for ISIS atrocities.



CHAPTER FOUR: PERSONAL AND TERRITORIAL JURISDICTION OF THE ICC OVER ISIS CRIMES

4.1 Introduction

The States Parties to the Rome Statute accept the jurisdiction of the Court upon ratification of the Statute.²⁴⁵ Corporations, persons without the capacity for criminal responsibility, or those under 18 years of age at the time of committing the crime are exempt from the jurisdiction of the Court.²⁴⁶ This chapter scrutinises whether the ICC has personal and territorial jurisdiction against the ISIS perpetrators in Syria and Iraq.

4.2 Jurisdictional Basis of ICC

During the negotiation of the Rome Statute, different proposals were presented to set the jurisdictional basis of the ICC. On the one hand, Germany proposed universal jurisdiction while the United States advocated for requesting the consent of both the territorial and nationality state.²⁴⁷ A compromise between negotiating states resulted in the formation of jurisdictional bases as enumerated under Article 12 of the Rome Statute. Accordingly, the territoriality and nationality principle are the jurisdictional basis of the Court. Both of these situations presuppose being a party to the Rome Statute. As an exception, however, the UN Security Council referral and declaration of acceptance of the jurisdiction of the Court by concerned States are also the jurisdictional basis for the ICC against non-state members.

²⁴⁵ Art 12 (1) of the Rome Statute.

²⁴⁶ Arts 25 (1), 26, and 31 of the Rome Statute.

²⁴⁷ Cryer R *et al* (2014) 167.

4.2.1 Territoriality

The first jurisdictional basis of the ICC is grounded on the requirement of the place of occurrence of the crime i.e. territorial jurisdiction or *ratione loci* jurisdiction. The ICC can exercise jurisdiction over crimes which took place in the territory of States Parties to the Statute.²⁴⁸ Jurisdiction based on the territoriality principle extends to crimes occurring on board-vessels or aircraft registered in the States Parties.²⁴⁹ It is on the basis of this principle that the Union of Comoros referred the Israeli interception of a humanitarian aid committed on board vessels.²⁵⁰

There are two types of territorial jurisdiction i.e. subjective territoriality and objective territoriality. A certain court will have a jurisdiction based on subjective territoriality when a crime has “commenced within the State but completed or consummated abroad.”²⁵¹ In the case of objective territoriality, the conduct commences abroad but completes within the state territory.²⁵² In the *Lotus case*, the Permanent Court of International Justice ruled that a state may exercise jurisdiction when “a direct physical result which is itself a constituent or essential element in the offence charged” occurs in its territory.²⁵³

The Rome Statute provides that if “the conduct in question occurred” in the territory of the States Parties, the ICC will have jurisdiction. The conduct in question refers to the act or

²⁴⁸ Article 12 (2) (a) of the Rome Statute.

²⁴⁹ Article 12 (2) (a) of the Rome Statute.

²⁵⁰ Ambos K & Triffterer O (2015) 683.

²⁵¹ Vagias M *The Territorial Jurisdiction of the International Criminal Court* PhD Thesis (2011) 39.

²⁵² Vagias M (2011) 40.

²⁵³ Vagias M (2011) 40.

omission giving rise to the criminal responsibility.²⁵⁴ Hence, the ICC can exercise jurisdiction when an act or omission including preparatory acts, attempts, and consequences occurs in the territory of States Parties.²⁵⁵ In other words, the ICC exercises jurisdiction based on both subjective and objective jurisdictional bases.²⁵⁶ According to Kai Ambos, such broad interpretation of the Rome Statute enables the Court to exercise jurisdiction over transnational non-party state actors like ISIS for crimes they commit in the territory of States Parties without being physically present.²⁵⁷

The Court exercises jurisdiction irrespective of the nationalities of the perpetrators as far as the crime occurred in the territory of States Parties. This complies with the principle of sovereignty as the states can subject anyone committing crimes in their territory except persons enjoying immunities. The change in the case of the ICC is the fact that the Court is exercising this delegated power of each States Parties.

To date, the principal jurisdictional basis of the ICC has been a territorial principle.²⁵⁸ States are not allowed to make a reservation to the territorial jurisdiction of the Court. The power to exercise jurisdiction based on the territorial principle operates automatically upon the ratification of the Rome Statute by the territorial state.

²⁵⁴ Ambos K *Treatise on International Criminal Law: International Criminal Procedure* Vol III (2016) 1887.

²⁵⁵ Ambos K (2016) 1887.

²⁵⁶ Rastan R 'Jurisdiction' in Stahn C *The Law and Practice of the International Criminal Court* (2014) 167.

²⁵⁷ Ambos K (2016) 1888.

²⁵⁸ Rastan R in Stahn C (2015) 165.

Only States Parties are obliged to cooperate with the Court.²⁵⁹ This means that if the suspect is residing in a country which is not a member of the ICC after committing a crime in the territory of State Party, his country of nationality or custodial State are not obliged to cooperate with the Court unless they are a State Party.²⁶⁰

The question then is whether the ICC can exercise jurisdiction over ISIS atrocities. The atrocities committed by ISIS are mostly committed in Syria and Iraq. Unfortunately, however, these two countries are not States Parties to the ICC. Accordingly, the Court cannot exercise jurisdiction over the atrocities committed in these countries based on the territorial jurisdiction or *ratione loci* jurisdiction.

As already anticipated by Rod Rastan, there might be a circumstance in which the ICC might exercise partial territorial jurisdiction over a certain incidence of attacks crossing more than one territory.²⁶¹ Although the focus of this research is Syria and Iraq, it is important to note that ISIS leaders in Syria and Iraq have also committed widespread attacks in France.²⁶² France is a member of the ICC. Accordingly, Kai Ambos argues that irrespective of the

²⁵⁹ Art 86 of the Rome Statute.

²⁶⁰ Art 9 and 12 (3) of the Rome Statute.

²⁶¹ Rastan R in Stahn C (ed) (2015) 166.

²⁶² CNN 'Iraqi Official: ISIS Leader Ordered Attacks' CNN news 16 October 2015 available at <http://edition.cnn.com/videos/world/2015/11/16/iraqi-official-isis-leader-ordered-paris-attacks-bergen-nr.cnn> (accessed 27 August 2016).

physical presence of the ISIS perpetrators, the ICC will have jurisdiction over crimes which took place in France.²⁶³

This, however, partially captures the atrocities by ISIS as the perpetrators can only be tried for what they have done in the territory of the State Party to the ICC without the inclusion of major atrocities in Syria and Iraq. Thus, proceedings to prosecute the ISIS members based on the territorial jurisdictional basis results in fragmented jurisdictional reach over the ISIS atrocities as the jurisdiction of the ICC will not extend to the major atrocities committed in Syria and Iraq.

4.2.2 Nationality

The second jurisdictional basis for the ICC is the nationality principle. As opposed to the passive personality principle in which courts exercise jurisdiction when the victims are national of the State Party, the ICC exercises jurisdiction when the perpetrators are national of a State Party.²⁶⁴ This principle is in compliance with the sovereign power of States as they can subject their citizens to their jurisdiction or delegate their power to the ICC.²⁶⁵ This kind of jurisdictional base is prevalent in civil law countries while it is also exercised in common law countries for most serious crimes.²⁶⁶ It should be noted that the ICC will exercise jurisdiction over crimes occurring anywhere in the world as long as the perpetrator of the

²⁶³ Ambos K *The New Enemy of Mankind: The Jurisdiction of the ICC over Members of "Islamic State"* available at <http://www.ejiltalk.org/the-new-enemy-of-mankind-the-jurisdiction-of-the-icc-over-members-of-islamic-state/> (accessed 27 August 2016).

²⁶⁴ Art 12 (2) (b) of the Rome Statute.

²⁶⁵ Ambos K (2016) 217.

²⁶⁶ Schabas W (2010) 286. Cassese A (2009) 229.

crime is a national of a State Party. In such cases, all Member States are duty bound to cooperate with the court in apprehending or extraditing the suspect including all other forms of co-operation. An example of investigation based on this jurisdictional base is the current investigation against the United Kingdom for the alleged criminal conduct in non-party state Iraq in 2003.

The question that needs examination at this stage is about the nationality of the ISIS perpetrators which could give rise to the jurisdiction of the ICC. In the commission of atrocities, foreign fighters from different continents including Europe and America have joined ISIS.²⁶⁷ In 2014, the member combatants of ISIS were estimated to be 30, 000.²⁶⁸ These members joined ISIS from including but not limited-to, Libya, Tunisia, Egypt, Lebanon, Morocco, France, Turkey, Jordan, Russia, Saudi Arabia, United States, UK, Belgium, France, Germany, and Denmark.²⁶⁹ From this, we can understand that the ISIS offenders are not only nationals of non-party States but also from States Parties to the ICC. Accordingly, the ICC has jurisdiction against the perpetrators from States Parties.

Prosecutor Fatou Bensouda has already considered prosecution of ISIS based on nationality principle.²⁷⁰ On 8 April 2015, she said the jurisdiction based on the nationality of the offenders can be pursued but it cannot be against the most responsible perpetrators.

²⁶⁷ Kardaş T & Özdemir Ö *The Making of European Foreign Fighters: Identity, Social Media and Virtual Radicalization* (2014) 8.

²⁶⁸ Kardaş T & Özdemir Ö (2014) 8. See also Preamble and Para 97 of the UN Security Council, Resolution 2253 (2015).

²⁶⁹ Akbar J 'Tentacles of Terror' Daily Mail 16 December 2015 available at <http://www.dailymail.co.uk/news/article-3350779/> (accessed 4 June 2016).

²⁷⁰ ICC Press Release 8 April 2015.

According to her, this is because foreign fighters are not within the leadership structure. She added that the jurisdictional basis for the ICC at this stage is too narrow.

Most of the ISIS offenders' who are national of States Parties might be engaging at a lower level. It is not correct to assume, however, that they are not the most responsible. There are times when the ISIS offenders at a lower level are notorious for their heinous acts of beheading and burning people alive. Accordingly, even if a perpetrator is not in the hierarchy of leadership, he might still be the most responsible for the atrocities. For instance, by the time the ICC Prosecutor rejected the investigation against ISIS, there are perpetrators who have committed atrocities. For example, the United Kingdom militant Mohammed Emwazi, known as Jihadi John was behind the beheading of captives from 2014 to until his death on 12 November 2015.

In addition to this, there were also ISIS commanders nationals of States Parties. The best example is the Georgian national called Abu Omar al-Shishani who was later killed on July 10, 2016.²⁷¹ By the time the ICC Prosecutor rejected the investigation against ISIS, he was ISIS Chief of Syria military operations. The military commander of Nineveh, who is a German national, is still alive.²⁷² The point here is that as far as the nationals of States Parties are

²⁷¹ Aljezeera 'Iraq: ISIL says Omar al-Shishani killed in air Strike' 14 July 2016 available at <http://www.aljazeera.com/news/2016/07/iraq-isil-omar-al-shishani-killed-air-strike-160713203202458.html> (accessed 29 August 2016).

²⁷² Iraqi News 'ISIS Appoints German National as Military Commander for Nineveh' 29 June 2016 available at <http://www.iraqinews.com/iraq-war/isis-appoints-german-national-military-commander-nineveh/> (accessed 29 August 2016).

participating as ISIS militants, the ICC will have jurisdiction and the question of who is most responsible comes next among the indicted individual who is national of a State parties.

The problem with this base of jurisdiction, however, is that it results in a fragmented jurisdictional reach, as the jurisdiction based on nationality would remain intact for States Parties nationals, while it would not extend to nationals of non-States Parties.

4.2.3 UN Security Council Referral

As part of the mandate of preserving the international peace and security, UNSC can establish international tribunals authorised to prosecute international crimes.²⁷³ In addition to this, the Rome Statute gave the UNSC a power to refer a situation to the Court.²⁷⁴ UNSC exercises this power in accordance with Article 13 (b) of the Statute and Chapter VII of the UN Charter.²⁷⁵ To date, the situation in non-party state Libya and Sudan have been referred to the Court by UNSC.²⁷⁶ As the referral of the situation is made as part of maintaining international peace under the UN Charter, the referral extends the ICC jurisdiction against non-party states. Accordingly, this power of the UNSC serves as a jurisdictional provision.²⁷⁷

Before referring the situation to the Court, however, the UNSC needs to determine whether the conducts of ISIS-related conflict constitute ‘a threat to international peace and security’.

²⁷³ Chapter VIII of the Charter of the United Nations (1945).

²⁷⁴ Art 13 (b) of the Rome Statute.

²⁷⁵ Art 13 (b) of the Rome Statute. See also the General Assembly Resolution 58/318.

²⁷⁶ United Nations Security Council Resolution 1970 (2011) Para 4. United Nations Security Council Resolution 1593 (2005) Para 1.

²⁷⁷ Triffterer O (2008) 569.

The UNSC has already held that the ISIS attacks constitute an unprecedented threat to international peace and security.²⁷⁸ Though the Rome Statute is silent on the issue, according to the jurisprudence of the ICTY Appeal Chamber, the Court can determine whether the situation is a real threat to international peace.²⁷⁹ Thus, if the UNSC referral is not made in accordance with Chapter VII of the UN Charter, it should be treated as a mere communication.²⁸⁰

Even if the UNSC refers the situation, still the Office of the Prosecutor (OTP) has the right to determine whether there exists a reasonable basis to proceed with the investigation.²⁸¹ In the case of the OTP, to proceed with the case, the UNSC can request for review of the decision by the Pre-Trial Chamber.²⁸² It should be observed that even if the ICC refused to prosecute the case referred, the UNSC can establish an international tribunal like the ICTY or ICTR.²⁸³

There is a difference between a referral of a situation and a case. The situation is defined by ‘temporal, territorial and in some cases, personal parameters’, while a case is about a specific incident committed by ‘identified suspects’.²⁸⁴ The UNSC can only refer a situation,

²⁷⁸ Art 13 (b) of the ICC Statute.

²⁷⁹ Triffterer O (2008) 573.

²⁸⁰ Olasolo H *The Triggering Procedure of the International Criminal Court* (2005) 92.

²⁸¹ Art 53 of the ICC Statute.

²⁸² Art 53 (3) (a) of the ICC Statute. Rule 107 of the ICC Rules of Procedure and Evidence (2002).

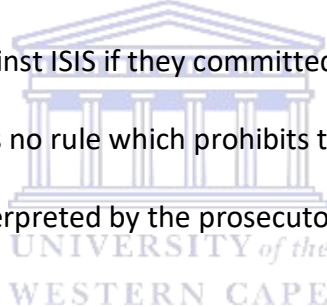
²⁸³ Olasolo H (2005) 92.

²⁸⁴ Pre-Trial Chamber I, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 (2006) Para 65.

not a case.²⁸⁵ There are instances in which the UNSC referred a situation excluding jurisdiction over a national of a non-party state to the ICC. In the referrals of the Darfur and the Libyan situations, nationals of non-party states were excluded except for the referred states even if they have committed a crime in those territories.²⁸⁶ This, however, is contrary to the ICC Statute.²⁸⁷ For instance, in the *Mbarushimana* case ICC PTC I ruled that investigation can be conducted extending to all parties in a situation as long as that situation is triggered.²⁸⁸

The ISIS related conflict can either be referred in temporal basis or in terms of territory or other personal basis. The subsequent effect of this is that the ISIS conflict in Iraq and Syria includes the other parties in the conflict, including the two governments, other militant groups, and states in the war against ISIS if they committed a crime in Syria or Iraq.

According to Bill Schabas, there is no rule which prohibits the UNSC to refer ISIS to the ICC. However, this might again be interpreted by the prosecutor and the Court to include all parties to the conflict.²⁸⁹



²⁸⁵ Schabas WA (2011) 162.

²⁸⁶ Shabas WA (2011) 172. UN Security Council Resolution 1593 UN Security Council Resolution 1970.

²⁸⁷ Triffterer O (2008) 571 and 572.

²⁸⁸ Pre-Trial Chamber I, Decision on the Defence Challenge to the Jurisdiction of the Court, ICC-01/04-01/10-451, 26 (2011) Para 27. See also Sarah M *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (2013) 87.

²⁸⁹ Nichols M 'France Presses at U.N. for Islamic State to Face World Court' Reuters 27 March 2015 available at <http://www.reuters.com/article/us-mideast-crisis-islamic-state-un-idUSKBNOMN2EJ20150327> (accessed 29 August 2016).

Human rights bodies including the UN Human Rights Committee advocated for the referral of these atrocities to the ICC. The UNSC as a political body is affected by problems of selectivity. The Syrian case, for instance, was vetoed from being referred to the ICC because of the political affiliation of the party committing the crime with the permanent member countries of the UNSC.²⁹⁰ Though it is rigorously discussed, to date, the ISIS related conflict either in Iraq and Syria is not referred to the ICC irrespective of the kind and extent of atrocities committed in these two countries.²⁹¹ This is happening because of the difficulty of finding political consensus between the members of the UNSC. The previous attempts to refer the Syrian situation failed due to Russian and Chinese veto to protect the Assad government.

A comprehensive referral of atrocities in which ISIS is involved should encompass the territorial, temporal and personal parameters. In terms of territory, Iraq and Syria should be included while the temporal parameter should consider the time which ISIS atrocities emerged. ISIS members do not have one nationality which makes defining the personal parameter of 'situation' as referring to nationality difficult. Defining the personal parameter as including all the members of ISIS is the only way to refer the ISIS atrocities in Syria and Iraq.

²⁹⁰ Mark K 'Missing the Mark: The ICC on Its Relationship with the UN Security Council.' *Justice in Conflict* available at <http://justiceinconflict.org/2012/10/24/missing-the-mark-the-icc-on-its-relationship-with-the-un-security-council/> (accessed 22 March 2016). UN 'Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution' available at <http://www.un.org/press/en/2014/sc11407.doc.htm> (accessed 20 March 2016).

²⁹¹ The UN Security Council meeting held on 27 March 2015.

As it stands, the referral of the UNSC of the situation of ISIS remains impossible. In passing, it should be noted, however, that the situation in Libya is different as atrocities in this country are already under UNSC referral. While reporting to the UNSC on the status of Libyan situation, the ICC Prosecutor stated that her office is considering to prima facie extending to the beheading of Egyptians and Ethiopians in Libya. The ICC has jurisdiction over crimes under Rome Statute committed in Libya since 15 February 2011, in accordance with the UN Security Council resolution 1970.²⁹² In view of that, a referral of a situation to the ICC is defined based on temporal and territorial bases. As long as the ISIS crimes are committed after the defined date in the territory of Libya, the ICC will have jurisdiction to try ISIS atrocities in Libya while it will not have jurisdiction emanating from the UNSC referral for the atrocities in Iraq and Syria.



4.2.4 Declaration of Acceptance of the Jurisdiction of the Court

Non-party states can make a declaration of acceptance of the jurisdiction of the Court. In doing so, non-party states are given an opportunity to participate in the fight against atrocities committed on their territory or by their nationals.²⁹³ This ad hoc jurisdiction is a form of voluntary self-referral and the States submitting such a declaration are referred to as 'accepting State'.²⁹⁴ The accepting states are required to cooperate with the Court.

²⁹² UN Security Council Resolution 1970 (2011).

²⁹³ Art 12 (3) of the ICC Statute. See also Novak A *The International Criminal Court* (2015) 48

²⁹⁴ Art 12 (3) of the ICC Statute.

Ivory Coast, the Palestinian National Authority, and Ukraine have submitted a declaration of acceptance to the registrar of the Court.²⁹⁵ As the ICC is a treaty-based Court, the consent of non-party states is required to prosecute their nationals unless they have committed the crime in the territory of States Parties or the situation is referred by UNSC. Declaration of acceptance of the jurisdiction of the Court is a precondition to the exercise of jurisdiction in non-party states territory or against their national.²⁹⁶ After submitting this declaration, the investigation is initiated through the triggering mechanisms provided under the Rome Statute, the relevant one being *proprio motu*.²⁹⁷

The problem with the Rome Statute regulating the declaration of acceptance of the jurisdiction of the Court is the fact that the law did not make clear whether the accepting State can accept jurisdiction in relation to the specific case or situation or even specific crime or all crimes under the Statute.²⁹⁸ The ICC Trial Chamber (hereafter: TC), however, decided that accepting States accepts the jurisdiction of the court in respect to all crimes under the Statute.²⁹⁹ Accepting jurisdiction in relation to a single crime is not possible.

²⁹⁵ ICC 'Declarations Art 12 (3)' available at https://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/registry/Pages/declarations.aspx (accessed 20 March 2016).

²⁹⁶ Art 13 and 12, ICC Statute see also Müller AT & Ignaz S (2010) 1277.

²⁹⁷ Müller AT & Ignaz S (2010) 1277-1278.

²⁹⁸ Triffterer O & Ambos K (eds) *The Rome Statute of the International Criminal Court: A Commentary* 3 ed (2016) 684.

²⁹⁹ *Prosecutor v Laurent Gbagbo*, Decision on the Confirmation of Charges against Laurent Gbagbo, ICC-02/11-01/11-212 (2014) Para 59.

The UN Human Right Committee has called upon the Iraqi and Syrian governments to join the ICC. Neither State, however, showed any interest of that sort. The other option is that Iraq or Syria can submit a declaration of acceptance of the jurisdiction of the Court to the Registrar of the ICC without a need to be a member of the Court. This act gives the court the jurisdiction to try ISIS perpetrators by avoiding the problems of disjointed jurisdictional reach. To date, however, neither Iraq nor Syria has submitted the declaration of acceptance of the jurisdiction of the Court.

It seems unlikely that they would submit a declaration of acceptance. As already decided in the *Laurent Gbagbo* case selective acceptance of the Court's jurisdiction is not possible. This means that the governments of Iraq and Syria cannot opt to refer the ISIS, leaving themselves or another militant group like Shia militant group out of the jurisdictional reach of the ICC. Though this research paper only dealt with the atrocities committed by ISIS, other parties within the ISIS conflict including Iraq and Syrian governments have also allegedly committed crimes. For that reason, it is unlikely that the two governments will refer themselves to the ICC. As a result, a declaration of acceptance of the jurisdiction of the Court in this scenario seems unlikely.

4.3 The Way Forward: Prosecution of ISIS at the ICC or Other Prosecutorial Options?

Accountability for ISIS atrocities is necessary for halting the contemporary and similar future atrocities by a militant group capable of exerting such unprecedented attacks against civilian population, protected groups, and against other protected targets. It is also a mechanism of showing solidarity with the victims and indicating further that atrocities will not be tolerated. Hence, one such a response is the prosecution of the perpetrators.

The ICC has a subject matter jurisdiction over the atrocities committed by ISIS as the conducts by the jihadist militant group constitutes a crime of genocide, crimes against humanity and war crimes under the Rome Statute. The ICC has jurisdiction over crimes committed in France, although the complementarity principle poses a challenge. It also has jurisdiction over the ISIS foreign fighters' in Iraq and Syria who are national of States Parties. Similarly, the ICC has jurisdiction for the atrocities committed by ISIS in Libya as the country is already under referral of the UNSC.

It should be noted, however, that the ICC inbuilt system in the Rome Statute itself recognises the prosecution at the national level to be the primary avenue for prosecution of atrocities. When the national prosecution fails or is unable to prosecute an offence, international criminal justice should intercede by way of the principle of the complementarity.³⁰⁰



Therefore, be it France or other States like Germany, United Kingdom and Belgium are ready to prosecute their nationals for war crimes and other crimes in which their nationals have participated in Iraq or Syria. Thus, even if the ICC has jurisdiction over ISIS foreign fighters nationals of States Parties, it can be challenged based on willingness and ability of these States to prosecute their nationals i.e. complementarity principle. In Germany for instance, ISIS members have been prosecuted.³⁰¹ The Libyan situation is already under consideration

³⁰⁰ Art 17 of the ICC Statute. See also Cryer R *et al* (2014) 153. Cassese A *et al* *The Oxford Companion to International Criminal Justice* (2009) 212.

³⁰¹ The Local 'Germany's First ISIS War Crimes Trial Starts in Frankfurt' 03 May 2016 available at <http://www.thelocal.de/20160503/germanys-first-isis-war-crimes-trial-starts-in-frankfurt> (accessed 4 September 2016).

by the ICC. It, however, does not include the major atrocities that were committed in Iraq and Syria.

The ICC, as it stands, is in a situation of partial jurisdiction, or it has fragmented jurisdictional bases. The complementarity principle poses a challenge to the prosecution of ISIS foreign fighters. The jurisdictional basis of the Court is not comprehensive enough to prosecute all the ISIS participant and major offenders of the ISIS for all the atrocities which they have committed in Iraq and Syria.

To make the ICC a viable prosecutorial avenue, the Court needs to have jurisdiction over all the ISIS atrocities. The solution for this is either for the Iraqi and Syrian governments to accept the jurisdiction of the Court by ratifying the Statute or by submitting a declaration of acceptance, or for the UNSC to refer the situation to the ICC. Neither of these solutions, however, seems to materialise anytime soon. As both governments themselves are accused of committing war crimes, it is unlikely that they would subject themselves to the Court. A referral by the UNSC is also inconceivable since Russia and China have vetoed the referral because of their affiliation with Assad government.

In the absence of jurisdiction over the major atrocities committed in Syria and Iraq by nationals of non-party states, the ICC cannot be regarded as a viable prosecutorial avenue for ISIS atrocities. The numbers of perpetrators are numerous and among them, there are militants who were arrested in the battlefield. Accordingly, the ISIS perpetrators need more than the ICC effort. For that reason, there is a need for sophisticated and multilayered prosecutorial approach to ISIS atrocities. Perpetrators should be prosecuted at the national level through the utilisation of the territoriality principle, active and passive personality

principle and universal jurisdiction. Instead of utilising the ICC with its fragmented jurisdictional reach over the perpetrators, it is advisable to establish hybrid tribunals to supplement the prosecution at the national level. Be that as it may, the ICC cannot be regarded as a viable prosecutorial avenue with its limited and fragmented jurisdictional base over ISIS perpetrators.

4.4 Summary

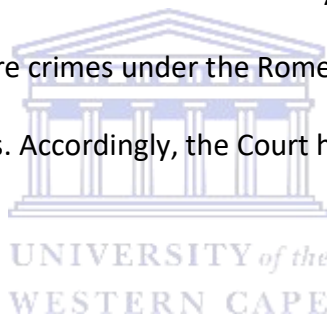
The ICC has a limited and fragmented jurisdictional reach over the ISIS atrocities. Based on the territorial principle the ICC cannot exercise jurisdiction over the major atrocities in Syria and Iraq. Based on the nationality principle, the ICC can exercise jurisdiction over nationals of States Parties participating as ISIS militants. Still, however, the ICC cannot exercise jurisdiction over the nationals of non-party States participating more aggressively in the same ISIS atrocities mostly as commanders and leadership structure of ISIS. Even for the prosecution of perpetrators who are national of States Parties, a challenge based on complementarity principle makes the Court non-preferable to step in for prosecution. If the situation by ISIS is referred to the Court by UNSC or if Iraq and Syria accept the jurisdiction, the officials of the two governments can be prosecuted for war crimes in the same situation as the reports by independent bodies makes such allegation. Accordingly, both possibilities seem unrealistic now. The referral from the UNSC is vetoed by Russia and China to protect the Assad government. Both governments are not accepting the jurisdiction of the Court as it may result in their prosecution as well. As the ICC has a limited and fragmented jurisdictional basis, it cannot be regarded as a viable prosecutorial avenue for ISIS atrocities, while other prosecutorial avenue like national courts and hybrid courts needs to be explored.

CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS

5.1 Conclusions

Since its formation, ISIS members have committed crimes under international law. ISIS has become a threat to international peace and security. Therefore, the media and various role players have called for the ICC to intervene.

This research paper accordingly dealt with an issue of whether the Court is a viable prosecutorial avenue for ISIS perpetrators. For the ICC to be a viable prosecutorial avenue, the Court should have subject matter, territorial and personal jurisdiction over the ISIS atrocities. Accordingly, it is concluded that the atrocities by the militant group in Syria and Iraq constitute all of the three core crimes under the Rome Statute i.e. genocide, crimes against humanity, and war crimes. Accordingly, the Court have subject matter jurisdiction over the matter.



It is submitted, however, that the ICC is not a viable prosecutorial avenue. This is because the Court has limited and fragmented territorial and personal jurisdictional reach over the perpetrators. The following has been concluded in relation to the jurisdictional basis of the ICC over the ISIS atrocities.

- **Territorial jurisdiction:** the ICC lacks territorial jurisdictional base in Syria and Iraq where the major atrocities are occurring. Although the Court has territorial jurisdiction over the atrocities committed by ISIS in the territory of France, the Court's competence cannot extend to the crimes perpetrated in Syria and Iraq.

- **Nationality Jurisdiction:** ICC has jurisdiction over the perpetrator's nationals of States Parties participating as ISIS militant. If the ICC wants to utilise this jurisdictional base against a national of States Parties a principle of complementarity bars the proceedings as the state are willing and able to prosecute their nationals. However, this jurisdictional base is limited as it cannot reach all perpetrators and nationals of the non-party states who have dominated the leadership of the militant group.
- **United Nations Security Council referral:** UNSC referral of ISIS situation in Iraq and Syria could have extended the jurisdiction of the Court over the ISIS perpetrators. There is no UNSC referral of the situation in Iraq or Syria. Since the governments in both countries are also alleged to have committed core crimes, the possibilities of UNSC referral are dim. The referral from UNSC of the Syrian situation, for instance, is vetoed by Russia and China to guard Assad government.
- **Ad-hoc jurisdiction:** submission of acceptance of the jurisdiction of the ICC by Iraq and Syria could have extended the jurisdiction of the Court over the ISIS perpetrators. Both Countries did not, however, accept the ad-hoc jurisdiction of the ICC. Since it is alleged that the governments of Iraq and Syria have themselves committed international crimes, they do not seem to be ready to accept the jurisdiction of the Court.

As it stands now, the ICC has limited and fragmented jurisdictional bases against ISIS perpetrators and as such the Court cannot be regarded as a viable prosecutorial avenue.

5.2 Recommendations

5.2.1 With Regards to Broadening the Jurisdictional Reach of the ICC

- To make the ICC a viable prosecutorial avenue and bring about accountability against ISIS members, the jurisdictional base of the Court should be broadened. For instance, the UNSC can refer the matter to the Court. Syria and Iraq can also be a member of the Court or accept the jurisdiction of the Court.
- Provisions dealing with the jurisdictional bases in the Rome Statute need to be renegotiated in order readjust it and broaden the jurisdictional basis to any ISIS-like perpetrators. An example in this regard is the inclusion of universal jurisdiction as a base of jurisdiction against non-state actors like ISIS.

5.2.2 Recourse to other Prosecutorial Avenues

- Since arrests of the ISIS perpetrators are already taking place, the already available prosecutorial avenue at the national level needs to be pursued in all countries based on the available jurisdictional bases including territorial principle, active and passive personality principle, the universality principle.
- There must be co-operation among States to bring the perpetrators to justice.

5.2.3 Additional Research on the Matter

- This research paper only examined whether ICC can currently be regarded as a viable prosecutorial avenue and concluded it is not a viable prosecutorial avenue unless the jurisdictional bases against the group are broadened. Accordingly, additional research need to be conducted to indicate which other prosecutorial avenue under



the international criminal law is a viable prosecutorial avenue currently for atrocities of ISIS and/or ISIS like militant group.

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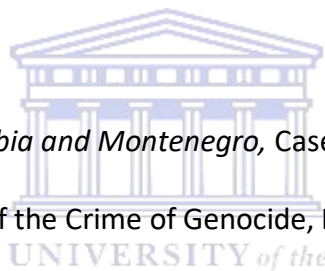
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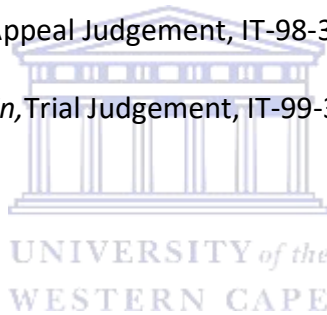
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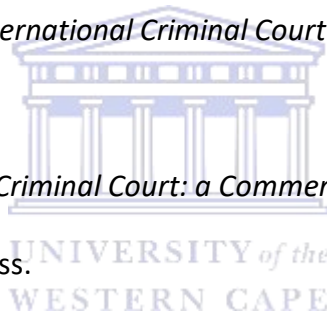
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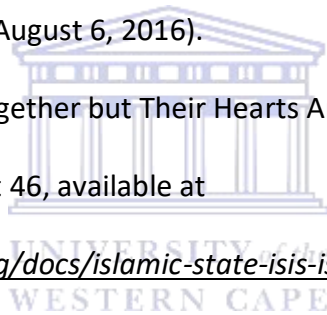
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