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TRANSITIONAL JUSTICE IN IRAQ

Justice and reconciliation for the Yazidi minority in northern Iraq for crimes committed by ISIS

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ABSTRACT

This is an interdisciplinary analysis of how transitional justice tools can contribute to deliver justice and ensure reconciliation for the Yazidi community in Iraq. They became victims of ISIS' most cruel strategies of war including the systematic separation of families, destruction of villages, mass killings and rape as part of a genocide on an ethno-religious minority that was left defenceless by Iraqi and Kurdish military forces.

Looking into the country's history and legal framework will help to indicate the specific needs of the victims and the limitations of the judicial and extra-judicial tools that are used in transitional justice processes. The analysis will focus on five pillars: Retributive justice, Restorative justice, Reconciliation initiatives, Reform and Remembering. The analysis aims at formulating recommendations on how to avoid impunity for the ISIS leaders and combatants who orchestrated or committed these crimes and how to start rebuilding and reconciling a community in a country that was unable to protect themselves from such atrocities.

ACKNOWLEDGEMENT

Writing about transitional justice in a country you have never visited before, focussing on a minority of people you have never met before and all that related to a conflict you have never been directly involved in, is a challenge. I asked myself whether I even was in the position to choose a topic like this. I believe however, that the answer to that question is positive. It allowed me to be more objective and less tendentious about the situation. I conducted desk research to assess what has been written before and what conclusions can be derived from that information. Also, by looking into the past of other post-conflict countries, I have tried to use these good or bad practises as examples to argue for or against certain transitional justice tools. From the beginning, I have tried to reach out to many different relevant organisations and experts who are working with Yazidis. Many of them however have an considerable amount of work already. Therefore, with great respect, I would like to thank the people that have helped me throughout the process of writing this Master thesis.

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LIST OF ABBREVIATIONS

CRC	Committee on the Rights of the Child
HRC	Human Rights Council
HRW	Human Rights Watch
ICC	International Criminal Court
IDP	Internally Displaced Person
ICI	International, Independent Commission of Inquiry (Syria)
IIM	International, Impartial and Independent Mechanism (Syria)
IIT	Independent, International Investigative Team (Iraq)
IQD	Iraqi Dinars
ISIS	Islamic State in Iraq and Syria
KDP	Kurdish Democratic Party
KRG	Kurdish Regional Government
KRI	Kurdish Region of Iraq
MERI	Middle East Research Institute
MRGI	Minority Rights Group International
NGO	Non-governmental organisation
OHCHR	Office of the High Commissioner on Human Rights
PTSD	Post Traumatic Stress Disorder
SAP	Syrian Accountability Project
UN GA	United Nations General Assembly
UN SC	United Nations Security Council
UN	United Nations
UNHCR	UN Refugee Agency

INTRODUCTION

“Never again” was the fundamental motive to establish an international community in the form of the United Nations, with a system of international law and a strong belief in democracy and the respect for human rights. After the massacres of World War II and the horrors of the Holocaust, there was an almost unanimous demand for war regulations, international conventions and the establishment of international tribunals to prosecute those responsible for the most horrific crimes against humanity. After a journey of almost 75 years, many conventions have been ratified, many international trials have taken place, many memorial ceremonies have been held.

So, why is it that in reality there are still people who find themselves unprotected against genocide? And when we fail to prevent it from happening, how can we keep on trying to do better in terms of reconciliation and reparation for victims? How is it possible that perpetrators are not being sanctioned for their actions? These questions triggered me to delve into this topic, as it is extremely important to ask these questions today instead of leaving them to the next generations to reflect on in a retrospective, historical point of view.

Many scholars have written about transitional justice and how to implement justice and reconciliation tools in post-conflict situations. Transitional justice became “a globally dominant lens through which to approach states addressing legacies of a violent past.”¹ Notwithstanding the broad scope of the concept, it is difficult to speak of transitional justice already, since the conflict in Syria is still ongoing and the situation in Iraq is very unstable.² However, this is a challenge rather than a restraint.

In the aftermath of the Arab spring and the reaction of Syrian President Bashar Al-Assad, a civil war in Syria emerged in 2011. Among the rebel groups that tried to fight the Assad regime, grew the extremist, terrorist group ISIS,³ that declared the creation - or in their view restoration- of the Islamic caliphate in the region of Iraq and Syria. They emerged out of the jihadist, Salafist armed group “Jama'at al-Tawhid wal-Jihad”, who were already active in Iraq in the nineties and also known as “Al Qaeda in Iraq”. In 2014, the terrorist group captured Mosul, the second largest city in Iraq, and their leader, Abu Bakr Al-Baghdadi, proclaimed the establishment of the Islamic State. The ultimate objective is the worldwide recognition of the Islamic caliphate, which follows the Islamic Sharia law and where there is only one true religion, a Sunni, strictly conservative interpretation of

¹ P. Gready and S. Robinsy, “From Transitional to Transformative Justice: A New Agenda for Practice”, *The International Journal of Transitional Justice*, vol. 8, 2014, 339.

² This thesis will focus on the situation in Iraq, more specifically on the Yazidi minority in Iraq. However, the conflict in Syria has a great influence in the whole region and thus, where it is relevant, the situation in Syria will be looked at too.

³ The self-declared official name of the terrorist group is “Dawlat al-Islamiyah f'al-Iraq wa al-Sham” and is often shortened to “Daesh”, “Daish” or “Da’Esh” in Arabic. Other sources also use the English acronym “ISIL” to refer to “Islamic State of Iraq and the Levant”. Al Sham and the Levant both refer to the undefined territory of the wide area around Syria. In this thesis, the English acronym “ISIS” (Islamic State in Iraq and Syria) will be used throughout. The choice to use the acronym ISIS is only because of the geographical focus of this research, which is current Iraq and Syria.

Islam. In the wake of their extreme violent advance through Syrian and Iraqi territories, many Christians, Shia Muslims and non-supportive Sunni Muslims have fled their homes in order not to be persecuted. But, from all the victims of ISIS' extreme brutality, there is one community who was disproportionately affected, namely the Yazidis in the Sinjar region. In a carefully coordinated attack on the villages around Sinjar mountain, thousands of men were directly killed or separated from their families, women and girls were abducted and sold into sexual slavery and boys were sent to ISIS training camps. The United Nations Human Rights Council (HRC) has concluded that these attacks constitute war crimes, crimes against humanity and genocide.⁴ With the latter being the crime of all crimes in international customary law, the research question that this thesis will formulate an answer to is the following:

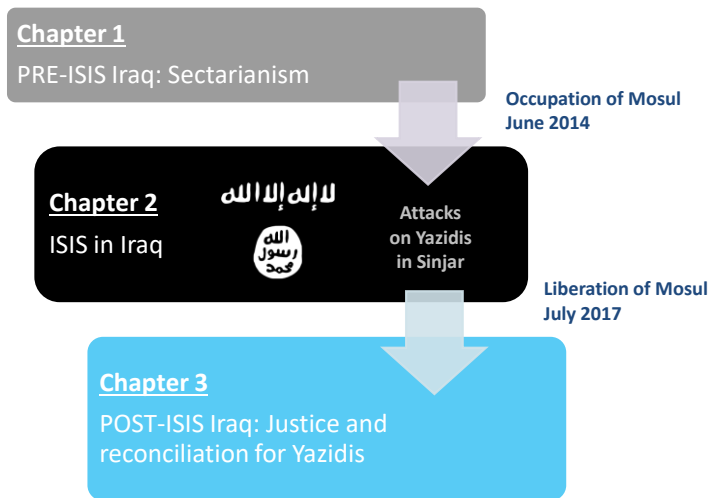
What are the potentials and limits of the transitional justice mechanisms to deliver justice to the Yazidi community in Iraq for the crimes that were committed against them by ISIS?

Since the liberation of Mosul in 2016, ISIS was defeated in Iraq and it could be argued that the transitional justice process could begin, in theory at least. In practice, it seems difficult to speak of transitional justice. Many initiatives were lanced and ISIS fighters are being brought to trial, but in terms of reconciliation, trust building and institutional reform, there is still a long way to go.

In order not to end up addressing the issue from a mere abstract point of view and rather make concrete recommendations, this thesis will focus on the specific case of the Yazidi minority in Iraq. Also, the particular context of this community in Iraq is the perfect example for uncovering many of the country's general issues with for example minority rights, gender inequality, freedom of religion, disputed territory and social justice. Many arguments will therefore be relevant for other minorities and for the country as a whole. This is why the transitional justice lens is applied when looking into the case of the Yazidis.

A transitional process in a state or nation traditionally has three periods that are important to study: the pre-conflict period, the conflict period and the post-conflict period. The latter is of course the period in which transitional justice tools can be implemented in order to deal with the past of violence and oppression in the state and to move forward to a peaceful future, where accountability and restoration will prevent it from ever happening again. The chapters of this thesis are structured accordingly, in a pre- and post-ISIS chronology. When applied to the Yazidi case in Iraq, these momentums between the three phases are the occupation and liberation of Mosul.

⁴ HRC, "They came to destroy": ISIS Crimes Against the Yazidis, 15 June 2016, A/HRC/32/CRP.2.



The first chapter will set the scene of the further analysis, addressing the issues that were already present before ISIS advanced through Sinjar. The first chapter will be a historical overview of the creation of Iraq and how it is characterised by military coups, political tensions and sectarianism. (1.1) Then, a brief summary of the legal framework of the country is given, pointing out the issues of discrimination against minorities and disputed territory, which are relevant for this research question and affect the social reality of the Yazidis in Iraq. (1.2) With this general background in mind, the last subchapter will distil all the particularities of Yazidis as a minority in Iraq, to explain why they were targeted by ISIS and what the challenges will be in the transitional justice process. (1.3)

The second chapter will establish all the relevant facts of the attacks on the Yazidi villages in Sinjar. The first subchapter will describe the conflict in a broader sense (2.1), followed by the establishment of the facts (2.2) and the determination of the crimes according to international law (2.3).

The third chapter will be the actual analysis of the post-ISIS period through a transitional justice lens. After clarifying the general definitions, concepts and limits of transitional justice in general (3.1), the subchapters will each analyse one of the five transitional justice pillars in the Iraqi context: retributive justice, restorative justice, reconciliation, reform and remembering the truth. For analysing these five interrelated pillars of transitional justice, the guiding structure will be: judicial tools (3.2) and extra-judicial tools (3.3). In each subchapter, there is a systematic approach applied of indicating the initiatives that were already taken, assessing their potentials and their limits and concluding with a recommendation.

METHODOLOGY

This dissertation is the result of detailed desk research and the analysis of reports and studies that were conducted after the events of August 2014. Reports that were published before the events were also used as a comparative tool or as background information. Many reports that have been analysed in the light of this research are the result of field work and interviews with victims and witnesses. The authors of the different reports are international NGOs or official international bodies like the UN Human Rights Council (HRC) or investigative bodies especially established by the United Nations. These documents are the main guidance for the establishment of the facts and determination of the crimes in this dissertation, as well as the basis for my analysis of the Yazidis' situation in terms of transitional justice in Iraq and Syria.

This research is exclusively conducted in English. Although there is much information on the topic in English, the access to sources was limited in this research since there is much more relevant data available in Arabic and Kurdish. This definitely constitutes an impediment for conducting the desk research and might influence the conclusion of this research.

A study visit to the International Criminal Court in The Hague was beyond useful, specifically to write the criminal justice section, and speaking to the OSCE High Commissioner on National Minorities was a great support for the research on minority rights in general.

Apart from that, several self-conducted interviews were held to support and guide the research and enrich it with a more in-depth insight into the particular issues in the region. These interviews were *inter alia* with a founder of a local NGO for Yazidi women, a local student from Baghdad and a staff member of the UNHCR mission in Duhok.

As it was written by a student with a background in Law, this dissertation has an obvious legal perspective on the transitional justice tools and that will certainly shine through in the total result of this dissertation. It will not claim to be an interdisciplinary research, because of the lack of expertise and experience in the field of political and social science, psychology or philosophy. Nevertheless, it would be unwise to limit the research on transitional justice to a strict legal analysis of the criminal justice mechanisms and legal reforms, but keep in mind that the legal perspective will be predominant.

ANALYSIS: Justice and reconciliation for the Yazidi minority in Iraq

Chapter 1: History, law and social reality in pre-ISIS Iraq

Before ISIS arrived and planted its flag in Mosul, Iraq was relatively speaking peaceful. Relatively speaking because, it was never really conflict-free in the last decades. In the last 40 years, Iraq tumbled from one war into another and it was often the population that was affected the most. Tensions between the Shia Muslims and the Sunni majority of the civilians were never absent and the disputes over territory and autonomy between Kurds and Arabs area continuum throughout the years.

After a brief introduction to the history of suffering in Iraq, it is crucial to the further argumentation to give a description of the Yazidi minority and of its culture and religion in the context of Iraq's history. This background information is needed to fully understand the specific issues that will arise in the further analysis of the research question. The combination of the tensions and intolerance in the Iraqi society in general and the particular position of Yazidis as a minority, will prove to be challenging in the transitional justice mechanism to achieve reconciliation.

1.1 History of suffering in Iraq

Iraq has a very diverse population and its history is characterised by many conflicts. Although the majority of the inhabitants are Sunni Arabs, the country has numerous different minority groups. This is a product of the original demography of the different tribes that were living in the area. Before Iraq was a country within its current borders, these tribes lived quite peacefully together.⁵ It is less than one century ago that the current borders of Iraq were drawn by foreign powers. This artificial establishment of borders and the creation of the country named Iraq has been causing conflicts ever since.

1.1.1 Mesopotamia and Ottoman Empire

In the 19th century, Western European countries started to show interest in the valuable Persian oil fields in the Gulf region and thus, invested in exploring the soils and rivers of Mesopotamia.⁶ During World War I, the former Ottoman Empire chose the side of Germany and thus, became an immediate threat and more importantly, a target for the British powers. Churchill organised the dramatic occupation of Gallipoli and Constantinople and supported the invasion of Baghdad. By 1917, the whole region between Basra and Baghdad was captured by

⁵ See e.g.: T. Abdullah, *A Short History of Iraq*, London, Routledge, 2014; H. Nissen and P. Heine, *From Mesopotamia to Iraq: A Concise History*, Chicago, University of Chicago Press, 2009.

⁶ T. Abdullah, 2014, 74-93 (note 5); H. Nissen and P. Heine, 2009 (note 5), 147-150.

British and Anglo-Indian forces.⁷ Under strong political pressure from the United States of America, France and Britain were given colonial mandates to run the administration off the provinces of the old Ottoman empire under the supervision of the international community.⁸ In 1920, Great Britain founded the state of Iraq and its borders as we know now, while Syria became a French colony.⁹ However, inhabitants were not welcoming their oppressor and revolted against the imperial British administration. With dubious methods the British forces managed to keep control of the region. Three provinces were united under the new Iraqi flag, but that unifying flag represented many tribes with distinct ethnic and religious backgrounds. These events “had certainly sown the seeds of future unrest”.¹⁰

1.1.2 Birth of a new country: Iraq

The British administration remained in power until 1932, when Iraq became independent.¹¹ The politics of the country are ever since characterised by intersectional tensions, military coups and many foreign interferences.¹² The main conflicts are based on the continuous struggle for power of Shia between Sunni Muslims on the one hand, and of Arabs between Kurds on the other hand.¹³ These two dichotomies, based on religion (Shia-Sunni) respectively ethnicity (Arab-Kurds), have been detrimental for the history of Iraq.

A) BAATHIFICATION 1968

Starting from the late sixties, the Baath Party had the political power in the Iraq.¹⁴ One of the Baath values is the unity of all Arabs and this, beyond the borders, also known as pan-Arab nationalism.¹⁵ Also in Syria, the Baath Party has representatives that strive for the political power of Arabs.¹⁶ It is a party of pan-Arab nationalist that will rule the country for decades as an authoritarian regime.¹⁷

⁷ H. Nissen and P. Heine, 2009 (note 5), 147-148.

⁸ T. Abdullah, 2014 (note 5), 94-125.

⁹ D. Hopwood, *Iraq: Conflict in Context. British Relations with Iraq*, BBC History, 18 September 2014, http://www.bbc.co.uk/history/recent/iraq/britain_iraq_03.shtml (accessed 17 May 2018).

¹⁰ D. Hopwood, 2014 (note 9).

¹¹ S. Mann *et al.*, *Report on the Yazidi Genocide: Mapping Atrocity in Iraq and Syria*, Syrian Accountability Project, Syracuse University, 30 October 2017, 6 (Hereafter: SAP report, 2017).

¹² SAP report, 2017 (note 11), 6.

¹³ R. Coury, “The demonization of pan-Arab nationalism”, *Race & Class*, vol. 46 (4), 2005, 2; P. Kurrild-Klitgaard, “Blood, Baath and beyond: The constitutional dilemma of Iraq”, *Public Choice*, vol. 119, 2004, 16.

¹⁴ J. Devlin, “The Baath Party: Rise and Metamorphosis”, *The American Historical Review*, vol. 96 (5), December 1991, 1396-1407.

¹⁵ R. Springborg, “Baathism in Practice: Agriculture, Politics and Political Culture in Syria and Iraq”, *Middle Eastern Studies*, vol. 17 (2), April 1981, 191; B. Rubin, “Pan-Arab Nationalism: The Ideological Dream as Compelling Force”, *Journal of Contemporary History*, vol. 26 (3/4), September 1991, 535-551.

¹⁶ Baathism has spread into many countries that have regional Ba’ath organizations, like in Algeria, Bahrain, Egypt, Jordan, Kuwait, Lebanon, Libya, Mauritania, Palestine, Sudan, Tunisia and Yemen.

¹⁷ J. Devlin, 1991 (note 14), 1396-1407.

As mentioned before, the majority of the Iraqi population is Muslim. The Baath Party members are all Sunni Muslims, although the Sunnis only represent the minority of the Muslim population in Iraq.¹⁸ The majority of Iraqi Muslims are Shia.¹⁹ Thus, Sunnis are in fact a religious minority in Iraq, just like for example Christians, Kakai, Turkmen and Yazidis.²⁰ Apart from being an unrealistic representation of the population of Iraq, the Baath Party did not tolerate any opposition in general, even regardless of your religion being Sunni or Shia or anything else.²¹

An important momentum for the country's young history was in 1979, when Saddam Hussein took power and became President of Iraq. His policy was focussed on expanding Iraq's power in the Persian Gulf region.²² Dissenting opinions were not appreciated and therefore those who carried them were eliminated by Hussein. For many Iraqi civilians, especially those part of a minority or Shia community, the dictatorship of Hussein has brought them more damage than development.

B) IRAN-IRAQ WAR 1980

Iraq's neighbouring country Iran also went through an Islamic revolution and that risked to cause rebellion among the Shia against Saddam Hussein. In addition to that threat, Iranian soil has important oil plants which Hussein wanted to take over. Strategically, it was the right moment. After the hostage-taking of the American diplomats in the embassy of Teheran, the international community under pressure of the United States of America had installed a weapon embargo on Iran. It should have been easy to invade Iran and take over control.²³ An eight year long, bloody war with Iran followed after Saddam Hussein's invasion in the light of his territorial expansion policy in the Gulf.²⁴ Iraq received strong support from Western countries.²⁵ The latter believed the Islamic revolution in Iran was a threat to them and thus, they delivered weapons to Iraqi troops.

¹⁸ R. Coury, 2005 (note 13), 1-19.

¹⁹ Statistical data on the demography of Iraq differs from source to source. The following percentages can only give an idea of the demography, based on data provided by Central Statistical Organization Iraq, <http://www.cosit.gov.iq/en/> and World Population Review, <http://worldpopulationreview.com/countries/iraq-population/> (accessed 13 July 2018):

According to ethnicity: 75% Arabs, 15-20% Kurds.

According to religion: 55% Shia, 40% Sunni, 3% Christian.

²⁰ Minority Rights Group International, *No Way Home: Iraq's minorities on the verge of disappearance*, July 2016, 10-11. (Hereafter: MRGI report, *No Way Home*, 2016).

²¹ J. Devlin, 1991 (note 14), 1396-1407.

²² H. Brands, "Why did Saddam Hussein Invade Iran? New Evidence on Motives, Complexity, and the Israel Factor", *Journal of Military History*, vol. 75 (3), 2011, 861-885; M.A. Tabaar, "Factional politics in the Iran-Iraq war", *Journal of Strategic Studies*, 2017, 5, <https://doi.org/10.1080/01402390.2017.1347873> (accessed 2 July 2018).

²³ M.A. Tabaar, 2017, (note 22).

²⁴ H. Brands, 2011 (note 22), 861-885.

²⁵ J. Blight, *Becoming enemies: U.S.-Iran relations and the Iran-Iraq War 1979-1988*, Lanham, Rowman & Littlefield Publishers, 2012, 69-71; X., *The Iran-Iraq War: Saddam Hussein's Attack in the Middle East*, Plurilingua Publishing, Brussels, 2016, <https://www.50minutes.com/title/the-iran-iraq-war/> (accessed 5 May 2018).

Chemical weapons, that are forbidden under the Geneva Protocol of 1925,²⁶ were allegedly supplied by the United States of America and used on Iranian soldiers and also on allied Kurdish soldiers and civilians in the Northern part of Iraq.²⁷

At first, Iran refused to sign a cease-fire peace agreement that was proposed by the UN and proudly defended its borders with the aim to win the war and take their Islamic revolution to the Iraqi population and overthrow the Sunni Baath regime. However, after grave economic, military and civilian losses, Iranian leader Ayatollah Ruhollah Musavi Khomeini could no longer resist and signed the UN peace agreement. There were no winners in this war and it would be marked as one of the deadliest wars of the twentieth century in the region.²⁸

C) ANFAL CAMPAIGN 1988

In the years before Saddam Hussein became president, the Kurdish region in Iraq was granted limited forms of autonomy.²⁹ The peace agreement between the Baghdad administration and the Kurdish Democratic Party of northern Iraq was signed in 1970 to end the tensions between Kurds and Arabs.³⁰ However, they were longing for more autonomy and felt that the promises of autonomy in the peace agreement were not implemented.³¹ Especially Saddam Hussein's vision of a Baathification with expansion of the power of Iraq in the region and the reunion and empowerment of Sunni Arabs, was not beneficial for the status of Kurds in Iraq. On the contrary, a policy of "Arabisation" was installed and the Kurdish people were severely oppressed.³²

In their strive for independence, the Iraqi Kurds used the Iraq-Iran war to revolt against Saddam Hussein's oppression against them.³³ With the Anfal campaign in 1988, Saddam and his Ba'ath party organised a genocidal campaign on the Kurds with the chemical attack on the village Halabjah as its most cruel example.³⁴ Around 100 000 Kurdish civilians died in the Anfal campaign.³⁵ The Baath party's policy of "Arabisation" had forced the Yazidis to live in constructed towns and regions, like for example Sinjar and Shaikhan.³⁶ Under the pretext of

²⁶ Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 17 June 1925, Geneva.

²⁷ See f.e. massacre of Halabja in March 1988, as part of the Anfal campaigns.

²⁸ X., 2016 (note 25).

²⁹ D. Hopwood, 2014 (note 9).

³⁰ I. Rogg and H. Rimscha, "The Kurds as parties to and victims of conflicts in Iraq", *International Review of the Red Cross*, vol. 89 (868), December 2007, 826-827.

³¹ H. Bozarlsan, "When the Present sends back to the Past: reading the Kurdish issue in the 2010s", *Middle East Critique*, vol. 27 (1), December 2017, 11; G. Stansfield, *Iraqi Kurdistan: Political Development and Emergent Democracy*, London, Routledge, 2003, 69-86.

³² HRW, "Genocide in Iraq: The Anfal Campaign against Kurds", July 1993, <https://www.hrw.org/reports/1993/iraqanfal/ANFAL1.htm> (accessed 10 July 2018).

³³ Y. Voller, *The Kurdish Liberation Movement in Iraq: From Insurgency to Statehood*, London, Routledge, 2014, 40-68.

³⁴ I. Rogg and H. Rimscha, 2007 (note 30), 828.

³⁵ HRW, 1993 (note 32).

³⁶ D. van Zoonen and K. Wirya, *The Yazidis Perceptions of Reconciliation and Conflict*, Middle East Research Institute, Erbil, 2017, 9. (Hereafter: MERI report, 2017).

being a modernisation project, these were collective towns and the concentration of the Yazidi people a security measure for the Iraqi government to control these areas and prevent the inhabitants from being influenced by the Kurdish Muslims. Ever since, these areas are disputed among the Iraqi federal government and the Kurdish separatists.³⁷

D) GULF WARS 1990 AND 2003

After the Iran-Iraq war, Hussein found his reputation severely damaged and his country in an economic ravage. With similar reasons and objectives as for his invasion in Iran, he decided to invade Kuwait in 1990.³⁸ He occupied Kuwait and faced very severe economic sanctions from the international community as a consequence.³⁹ These did not stop him from annexing the country. Consequently, the international community subjected Iraq to a weapon inspection and in the Northern part of Iraq the UN created a safe haven to protect the Kurds against Iraq's governmental troops.⁴⁰

In 2003, an international coalition led by the United States of America invaded Iraq to stop Saddam Hussein's warfare in and outside his country. Iraqi soldiers at checkpoints slowly got replaced by American soldiers and so it happened in the Sinjar region too.⁴¹ Due to the American intervention, Saddam Hussein's dictatorship came to an end and an American administration was installed. The new Iraqi government excluded any former Baath party member and in general, a mainly Shia government was established. Ever since 2003, the Iraqi federal government has been mainly represented by Shia.

E) WITHDRAWAL OF US TROOPS 2007

While the Iraqi Parliament voted for the withdrawal of the American troops and the end of the occupation in 2007, it was only in 2009 that President Barack Obama declared the withdrawal of American troops in Iraq. It took until the end of 2011 for the last American combatants to leave Iraqi territory. After the Americans had left, the national defence was fully transferred to the Iraqi government.⁴² The transition was not without vengeance from rebel groups, mostly consisting out of Sunni Muslims. This weakened central powers to have effective

³⁷ E. Savelsberg, S. Hajo and I. Dulz, "Effectively Urbanized. Yazidis in the Collective Towns of Sheikhan and Sinjar, *Etudes Rurales*, vol. 186, 2010, 101-116; International Crisis Group, *Iraq's New Battlefield: The Struggle over Ninewa*, Middle East Report nr. 90, 28 September 2009, <http://www.refworld.org/pdfid/4ac0d64f2.pdf>, (accessed 30 June 2018).

³⁸ H. Hassan, *The Iraqi Invasion of Kuwait: Religion, Identity and Otherness in the Analysis of War and Conflict*, London, Pluto Press, 1999, 5.

³⁹ UN SC, Resolution 660 (1990), 2 August 1990, S/RES/660; UN SC, Resolution 661 (1990), 6 August 1990, S/RES/661.

⁴⁰ I. Rogg and H. Rimscha, 2007 (note 30), 828-830; D. Hopwood, 2014 (note 9), 3.

⁴¹ E. Savelsberg, S. Hajo and I. Dulz, 2010, 101-116 (note 37); International Crisis Group, 2009 (note 37).

⁴² SAP report, 2017 (note 11) 8-9.

control of the Iraqi territory, especially in combination with the Arab Spring of 2011 and the emerging civil war in Syria.⁴³ The young Iraqi military was unprepared for the uprising of a terrorist organisation like ISIS.

1.1.3 Sectarianism as both a latent and acute issue

The instability of the country and the continuous tensions between different groups have created a climate of sectarianism throughout the history of the country. The physical presence or invisible influence of foreign powers have been causing tensions internally since the moment Iraq became independent. The switch of power between Sunni and Shia made the sectarian attacks among different communities peak and all minorities and ethno-religious groups were involved in such attacks at some point in history.⁴⁴ The numerous wars have left many scars on Iraqis and mark, at the same time, the cause and result of sectarianism and sectarian nationalism. Even before ISIS emerged, there was a constant latent threat or acute peak of violence among the communities because of the complex conflicts between Arab and Kurds, Sunni and Shia, nationalists and rebel groups, with many deadly casualties on all sides.

For this analysis, sectarianism is important to mention because of three reasons: 1) It explains partly why ISIS had the opportunity to flourish in northern Iraq; 2) It is an indicator for the lack of implementation of legislation on the protection of minorities and 3) It is pertinent for this research as it will be a pertinent challenge for the transitional justice process.

In this climate of sectarianism, where some even forgot who their enemy was, ISIS had the perfect opportunity to show the country its strength. In the post-Gulf War period, the rebel groups that were fighting the Iraqi government and the American troops included Abu Musab al-Zarqawi and Al Qaeda Iraq, who later became the terrorist group ISIS.⁴⁵ With the de-Baathification campaign, supported by the U.S. military, most of the Sunni Ba'ath Party members ended up in prison and were all excluded from governmental positions. Looking at the ISIS leaders with Iraqi background, it is almost a precondition to have a past in a Ba'ath Party position and being imprisoned in the national Badoush prison because that history will only put you higher in the ISIS ranks.

Further, the recourse to violence indicates that the people do not have any legal means to see themselves represented in the government. It could be seen as a measure of last resort or an act of desperation to end the

⁴³ SAP report, 2017, 9 (note 11).

⁴⁴ E.g.: Dozens of local Christian or Yazidi shops were set on fire in Duhok at the end of 2011, allegedly after an imam preached that such businesses were an "affront to the values of Islam". See: MRGI, Alternative Report to the Committee on the Elimination of Racial Discrimination (CERD), Review of the Periodic Report of Iraq, 85th Session, Geneva, 11-29 Augustus 2014, 6.

⁴⁵ See e.g.: S. Mabon and S. Royal, *The Origins of ISIS: The Collapse of Nations and Revolution in the Middle East*, London, I.B. Tauris, 2017; C. Jones, Al-Qaeda's Innovative Improvisers: Learning in a Diffuse Transnational Network, *Cambridge Review of International Affairs*, vol. 19 (4), 2006, 555-569.

oppression their communities are facing. Add the number and variety of tribes and minorities that are feeling oppressed and there is the perfect formula for a vicious spiral of violence.⁴⁶

Lastly, sectarianism and Iraq's history of suffering is relevant for the post-ISIS transitional justice process. Everybody in Iraq and in the Kurdish Region of Iraq (KRI) was affected by war or sectarian conflicts. This could unite and empower a population to enter into a national dialogue or reconciliation process, but it could also result in a renewed cycle of sectarianism. This past of intolerance will challenge the reconciliation process, that *in se* is seeking for tolerance and cooperation. When seeking the achievement of justice for the crimes committed by ISIS, the sectarian character of the Iraqi society is also an important consideration for ensuring the rights of fair trial and the impartiality of the judicial mechanism.⁴⁷

1.2 Legal framework and social reality for minorities

With sectarian attacks as an indicator for issues with the legal protection of minorities and, more generally, a democratic deficit, it is worth mentioning the Iraqi constitution. In 2005, after the invasion of U.S. troops in Iraq and the de-Baathification, a new constitution was ratified in order to reinstall peace and stability in the country. Several initiatives to protect regional interests and minority rights were included in the document. Also, the division of powers between the federal and regional governments was agreed upon and there was hope that the tensions between the Kurdish Regional Government (KRG) and the federal government would be settled in a democratic way. Unfortunately, the lack of proper implementation of this constitutional framework created a social reality that is very different.

1.2.1 Ambitions of the Iraqi Constitution

First of all, the Iraqi Constitution of 2005 introduced article 140. This article was intended to clear out the ethnic tensions between Kurdish and Arab people by allowing the organisation of a referendum in 2007 on the disputed territories, like for example the Sinjar region.⁴⁸ This article was an ambitious attempt to share powers between the federal Iraqi government and the KRG.⁴⁹ However, the implementation of the provision was never achieved because *inter alia* there was no consensus about the “disputed areas”.⁵⁰ This has caused many frustrations among the Kurdish people, who continue to long for more autonomy.

⁴⁶ *Infra*, Chapter 2, p26-35.

⁴⁷ *Infra*, Chapter 3, p36-68.

⁴⁸ P. Bartu, “Wrestling with the integrity of a nation: the disputed internal boundaries in Iraq”, *International Affairs*, vol. 86 (6), 1 November 2010, 1329–1343; J. McGarry and B. O’Leary, “Iraq’s Constitution of 2005: Liberal consociation as political prescription”, *ICON*, vol. 5 (4), 2007, 670–698.

⁴⁹ P. Bartu, 2010 (note 48), 1330.

⁵⁰ P. Bartu, 2010 (note 48), 1334-1335.

Secondly, for religious and ethnic minorities in general, the Iraqi constitution contains article 14. It serves as a constitutional protection against discrimination on the basis of religion or ethnicity. However, the implementation is poor and proves to be not sufficient for all regional minorities.⁵¹ In the Universal Periodic Review of 2010, the government of Iraq expressed its commitment to ensure and protect the rights of ethnic and religious minorities and ensured the obligations under the Convention on the Elimination of Racial Discrimination (CERD) will be fulfilled. The shadow report by Minority Rights Group International stated that the exact opposite is true.⁵² The report highlights issues for all minorities in Iraq, but since this thesis focuses on the Yazidis, they will serve as an example in the following argumentation.

1.2.2 Social reality example: Yazidis in Kurdish Region of Iraq

In the Kurdistan Regional Government region (KRG) and in the disputed regions,⁵³ there are reports on the systematic discrimination of minorities, like the Yazidis. Especially when Yazidis do not identify themselves as Kurdish or when they do not support the Kurdish presence in their region, they are arbitrarily arrested or assaulted and further marginalized.⁵⁴ The KRG and the Iraqi government consider Yazidis to be part of the Kurdish minority as they do not acknowledge their independent ethnicity.⁵⁵ However, Yazidis have different cultural traditions and customs than both Kurds or Arabs and speak a different dialect than Kurds, namely the Kurmanji dialect.⁵⁶ It is a delicate issue because some Yazidis do identify as ethnically Kurdish, but others do not. This internal division could even be worse since the attacks on Sinjar in 2014, as both the Kurdish and Iraqi security forces left them unprotected, what caused a great mistrust in both governments.

Irrespective of the fact that they should be recognised as an ethnic minority, they should be entitled to enjoy minority protection because of their status as a religious minority. The Iraqi Constitution ensures that minorities should enjoy the right to have their personal status. Nevertheless, there is no legislation adopted on the personal status of minorities, except a code in 1959 that applies Sharia law in this regard.⁵⁷ The Sharia, as Islamic law system, can therefore violate cultural and religious norms of the religious minorities.⁵⁸

⁵¹ J. McGarry and B. O'Leary, 2007, 688-689 (note 48).

⁵² MRGI, Alternative Report to the Committee on the Elimination of Racial Discrimination (CERD), Review of the Periodic Report of Iraq, 85th Session, Geneva, 11-29 Augustus 2014 (Hereafter: MRGI, Alternative Report to CERD, 2014).

⁵³ These are areas outside the KRG territory, that are formally under the control of the central Iraqi government in Iraq, but de facto in control of Kurdish militia. See: MRGI, Alternative Report to CERD, 2014, 4 (note 52).

⁵⁴ MRGI, Alternative Report to CERD, 2014 (note 52), 4.

⁵⁵ MRGI, Alternative Report to CERD, 2014 (note 52), 5.

⁵⁶ MRGI, Alternative Report to CERD, 2014 (note 52), 5.

⁵⁷ Personal Status Code of 1959. See: IILHR, *Iraq's Minorities and Other Vulnerable Groups: Legal Framework, Documentation and Human Rights*, May 2013, 72; E. Noga, "Negotiating Rights in Iraq: Women and the Personal Status Law", *Middle East Journal*, vol. 59 (4), October 2005, 577-595; J. Anderson, "Changes in the Law of Personal Status in Iraq", *International and Comparative Law Quarterly*, vol. 12 (3), 1026-1031.

⁵⁸ MRGI, Alternative Report to CERD, 2014, (note 52).

A) POLITICAL REPRESENTATION

Furthermore, the Yazidis are underrepresented in the Iraqi parliament, with only one out of the 328 seats in the Council of Representatives. The elections in 2014 reserved eight seats in total for all minorities in Iraq, which is far from representative for the Iraqi society. There is even a constitutional provision that provides a ratio for the Council that ensures that there should be one representative for every group of 100.000 Iraqi civilians. The Federal Supreme Court of Iraq decided that according to this constitutional ratio, the Yazidis should have six representatives in the Council.⁵⁹ In the KRG however, Yazidis are not given any reserved seat at all.⁶⁰ They are being pressured to identify as Kurds, so they can at least have some political influence.⁶¹ In the disputed territories, the division between Arab and Kurdish political parties is imposing a heavy burden on the populations as they are often forced to choose one side or the other.⁶² Yazidis in particular are pressured to identify as Kurdish or Arabic, because both sides of the Baghdad-Erbil conquest have interest in binding them as loyal electoral weight for their political parties in order to increase their ownership in the area.⁶³

B) HEALTH CARE AND EDUCATION

In the Sinjar region, there was a clear neglect of both the Iraqi and KRG government to provide the population in the disputed territory with the necessary education and health care facilities.⁶⁴ The Yazidi families in Sinjar lived in disproportionately poor living conditions and had no decent access to utilities and health care facilities⁶⁵ and children were not given the reasonable accommodation to go to school.⁶⁶ They were obliged to learn in Arabic, while most of them only speak their Kurdish dialect.⁶⁷ These continuous forms of discrimination on the basis of ethnicity and religion, combined with the denial of their identity, lead to a process of “increasing dehumanisation”.⁶⁸

⁵⁹ UN SC, Report of the Secretary-General pursuant to paragraph 6 of Resolution 1883 (2009), 29 July 2010, §45.

⁶⁰ MRGI, Alternative Report to CERD, 2014 (note 52), 6.

⁶¹ There are only 11 reserved seats out of 111 seats in the KRI. These reserved seats are for non-Kurdish minorities, like Christians, Turkmen and Armenians, but not for Yazidis. To have some sort of political influence, the latter need to identify with one of the Kurdish political parties. See: MERI report 2017, (note 36), 7-8.

⁶² MERI report, 2017 (note 36), 11; MRGI report, *No Way Home* (note 20), 2016, 11.

⁶³ MERI report, 2017 (note 36), 11.

⁶⁴ MRGI, Alternative Report to CERD, 2014 (note 52), 8.

⁶⁵ *E.g.*: One hospital with 15 to 20 beds for a population of more than 600,000 Yazidis in the Sinjar region. See S. Salloum (2013), *Minorities in Iraq: Memory, Identity and Challenges*; MERI report, 2017 (note 36), 11.

⁶⁶ Alternative MRGI, Alternative Report to CERD, 2014 (note 52), 8.

⁶⁷ *Cfr.*: The Assyrian community was also obliged to learn in Kurdish, in the KRG controlled areas.

⁶⁸ MERI report, 2017 (note 36), 10.

1.3 Yazidi community in Iraq

In the context of the general history of Iraq and the emergence of violent extremist groups like ISIS, the Yazidi⁶⁹ community is particularly in a vulnerable situation. Before analysing the attacks by ISIS on the Yazidis, this section will elaborate on the religion and ethnicity of this minority and their history in Iraq. This is necessary because it explains how ISIS created a narrative of dehumanisation, why they were so easily targeted and why it will be challenging to reconcile them or achieving a satisfying form justice.

Yazidism is a 4000 year old religion⁷⁰ that has a lot of elements of different religions embedded in its traditions.⁷¹ Sometimes it is also catalogued as a pre-Islam religion.⁷² It is one of the oldest religions in the East⁷³ and in the entire world.⁷⁴ They are mainly living in the northern part of the country, primarily in the Sinjar⁷⁵ area and Shaikhan⁷⁶ area.⁷⁷ There are other large Yazidi communities in north-eastern Syria and south-eastern Turkey, as well as in the Caucasus. It is a minority that has many diasporas, but primarily the biggest Yazidi community is to be found in northern Iraq, with an estimated population of 500.000 people living there and another 200.000 Yazidis living elsewhere around the world.⁷⁸ The total Yazidi population is estimated to be around 1,5 million worldwide.⁷⁹

To reach a better understanding of why the Yazidis have been targeted so specifically by ISIS troops, it is important to understand the history of suffering in Iraq and the status of them as a minority in a country where minority rights are not being sufficiently protected.

1.3.1 Yazidis' history of suffering

In a study mentioned in the report of the Syrian Accountability Project, it was calculated that over a period of 700 years, *circa* 23 million Yazidis died because of persecutions. In many other sources it is stated that Yazidis

⁶⁹ Also referred to in literature as Yezidi, Iyzidi, Ezdi or Eyzidi. This thesis uses the term “Yazidis” in accordance with the choice of the HRC in its reports.

⁷⁰ H. Haile, “Iraqi Yazidis in 2017”, Minority Rights Group International, 17 May 2017, <http://minorityrights.org/2017/05/17/iraqi-yazidis-2017> (accessed 11 May 2018).

⁷¹ MRGI, catalogue “Yezidis”, <http://minorityrights.org/minorities/yezidis/> (accessed 11 May 2018); S. De Vido, “Protecting Yazidi cultural heritage through women: An international feminist law analysis”, *Journal of Cultural Heritage*, 7 March 2018, 2, <https://doi.org/10.1016/j.culher.2018.02.008>, (accessed 23 March 2018).

⁷² MRGI, *No Way Home*, 2016 (note 20), 11.

⁷³ MERI report, 2017 (note 36), 8.

⁷⁴ MRGI, *Between the Millstones: Iraq's Minorities Since the Fall of Mosul*, 27 February 2015, 1st edition, 9, <http://www.refworld.org/docid/556ea8dc4.html>, (accessed 30 April 2018), (Hereafter: MRGI, *Between the Millstones*, 2015); MRGI, *No Way Home*, 2016 (note 20), 11; SAP report, 2017 (note 11), 3.

⁷⁵ Sinjar (Arabic), Shingal (Kurdish).

⁷⁶ Shaikhan (Arabic), Sheekhan (Kurdish).

⁷⁷ MERI report, 2017 (note 36).

⁷⁸ SAP report, 2017 (note 11).

⁷⁹ H. Haile, 2017 (note 70).

have faced an estimated 73 “annihilations”⁸⁰ or “genocidal massacres” or at least campaigns of violence against them.⁸¹ This history of persecution, forced conviction and violence against Yazidis has developed into a part of their identity as Yazidi and as members of a minority group in Iraq.

Yazidis have always lived in tribes that often involved cooperation with Muslim and Christian neighbours.⁸² During the Ottoman empire, a lot of Yazidi tribes were located around the city of Mosul. However, subsequent attacks of Ottoman and Sunni Kurdish tribes forced the Yazidis to dislocate to more remote areas further away from the city or flee to Europe, Armenia or Azerbaijan.⁸³ However, the religious connection with Iraqi soil is particularly strong because their main holy temple complex is situated in Lalish, which is located in Shaikhan, northern Iraq.⁸⁴ The founder of Yazidism, and now the community’s most important Sheik, Adi bin Musafir’s remains are conserved in a tomb in the Lalish valley. Every Yazidi should make a pilgrimage to Lalish once in their life and will be baptised with the water of the holy valley. Unfortunately, even before ISIS came, the Yazidis have faced severe hardship and sectarian attacks in Iraq.

They were often targeted and their villages and holy shrines were attacked several times.⁸⁵ During the Anfal campaign against the Kurds, the Yazidis were not directly targeted. Because of the destruction of villages and the threat of being targeted by the Anfal attacks, many Yazidis fled their homes too or were forced to identify as Arabs. Human Rights Watch reported that there is evidence to state that they were indirectly targeted because they are not “real Arabs”.⁸⁶

After the de-Baathification, the sectarian attacks continued. For example, on 14th of August 2007, several car bombs were brought to explosion in the middle of the commercial centre of two villages, namely Kataniya and Jazira. Hundreds of Yazidis were killed and more than thousand were wounded in the attack. Presumably the Iraqi division of Al-Qaeda committed this attack.⁸⁷

Another example of the sectarian climate is the conflict between the federal Iraqi government and the Kurdish Democratic Party (KDP) of the territories in the Ninewa governorate. The Yazidi villages in the Sinjar region have several checkpoints that are being controlled by either Iraqi or Kurdish soldiers, because of the ongoing

⁸⁰ MERI report, 2017 (note 36), 9.

⁸¹ SAP report, 2017 (note 11), 6.

⁸² MRGI, catalogue “Yezidis”, <http://minorityrights.org/minorities/yezidis/> (accessed 11 May 2018).

⁸³ SAP report, 2017, 6 (note 11); see “Yazidi” on <https://www.britannica.com/> (accessed 11 May 2018).

⁸⁴ E. Savelsberg, S. Hajo and I. Dulz, 2010 (note 37), 101-116; MERI report, 2017 (note 36), 8.

⁸⁵ MERI report, 2017 (note 36), 9.

⁸⁶ See: HRW, 1993 (note 32), in footnote 36: Ali Hassan al-Majid, tape-recorded conversation with unnamed Ba’ath officials, Kirkuk, August 1, 1988: “It is apparent that Ali Hassan al-Majid had nothing but contempt for the Yezidis. “We must Arabize your area,” he snaps at an unnamed official from Mosul in one tape-recorded meeting during the Anfal campaign. “And only real Arabs--not Yezidis who one day say that they are Kurds and the next that they are Arabs. We turned a blind eye to the Yezidi people joining the jahsh in the beginning, in order to stop the saboteurs from growing. But apart from that, what use are the Yezidis? No use.””.

⁸⁷ MERI report 2017 (note 36), 9-10.

territory dispute in the light of article 140 of the constitution.⁸⁸ This disputed status of the area will prove to be relevant for the events that happened in August 2014, when ISIS attacked the villages in Sinjar region.⁸⁹

1.3.2 Religious and ethnic minority, an easy target

In Iraq, they form an ethnic (*de facto*)⁹⁰ and religious minority, as they are not Arab, nor Muslim. On the account of their religion, several misunderstandings have created the climate wherein Yazidis could be easily targeted by ISIS in their pursuit of an Islamic caliphate, where there is no room for “infidels”. On the account of their ethnicity, it is complex to categorise them as a distinct minority, as the community is internally divided on their ethnic background, especially their relation to Kurds. This ambivalent position regarding their ethnicity and the misinterpretation of their religion has caused them a lot of problems in Iraq, as will be demonstrated in the following sections.

A) RELIGION

There are three distinctive characteristics of Yazidism that are relevant for this analysis. All three are aspects of the religion that distinguish them from other minorities, but at the same time also cause the community to be more isolated from their neighbours.

a) Oral religion

The community is unfortunately plagued by many misunderstandings regarding their religion. This could be attributed to, or at least be sustained by, the fact that the religion is being conveyed through oral heritage instead of written, tangible heritage. The religion is orally disseminated upon the new generations of believers through hymns, storytelling and poetry.⁹¹ Notwithstanding that there is a tangible form of handing over their beliefs through their religious leaders, also known as Mushafs. These are holy books⁹² for the Yazidi community, but they are strictly excluded from public circulation and are only to be seen by a limited number of members of the community.⁹³ The misunderstanding about their oral tradition of dissemination has been abused by ISIS to argue that they are not “people of the book” and therefore, “infidels”.⁹⁴

⁸⁸ NGO Coordination Committee for Iraq, *Ninewa. NCCI Governorate Profile*, December 2010, 5-9, <http://www.ncciraq.org/>, (accessed 30 June 2018).

⁸⁹ *Infra*, Chapter 2, p26-35.

⁹⁰ Iraq does not recognize them as an ethnic minority, as they are considered to be Kurdish. See *supra*, Section 1.2.2, p18.

⁹¹ MERI report, 2017 (note 36), 8.

⁹² Kitab al-jilwah also known as “Book of Revelation” and Mashafraash also known as “Black Book”. See <https://www.britannica.com/> (accessed 17 April 2018).

⁹³ MERI report, 2017 (note 36), 8.

⁹⁴ S. De Vido, 2018 (note 71), 4; MRGI, *Between the Millstones*, 2015 (note 74), 9; MRGI, *No Way Home*, 2016 (note 20), 11.

b) Devilworship

Yazidis believe that the world is created by one god, but seven angels serve as intermediaries between that god and the people.⁹⁵ The most important angel is Tawsi Melek, also referred to as the Peacock Angel.⁹⁶ According to Yazidism this angel had defied god once, but reconciled with him and later became an intermediary again between god and earth.⁹⁷ In Islam and Christianity Tawsi Melek could be seen as a similar creature in their stories, namely Shaytan or Satan.⁹⁸ The fundamental difference between Yazidism and the other two religions is that Tawsi Melek or the Peacock Angel was granted forgiveness by god. Thus, Yazidi believe that the Peacock Angel is the force of good, instead of being regarded as a force of evil.⁹⁹ There is thus no dual source of good and evil in Yazidism, which is in contrast with Islam and Christianity. In the latter religions, God is seen as the source of good, while Satan embodies the source of evil. Yazidi believe in the choice of the individual between good and bad. This power of Choice is in the heart, spirit and mind of the people and it is the Peacock Angel that helps humans to determine the difference between what is good and what is evil.¹⁰⁰ Islamic extremists have used this fundamental difference in their rhetoric to portray the Yazidi community as “infidels” and “devil worshippers”.¹⁰¹ Due to these misinterpretations the Yazidi have suffered from negative stereotyping of their religion and a large-scale discrimination of their community in the Middle-East and later also be ISIS’ foundation to dehumanise them and persecute them as “infidels”.¹⁰²

c) Exclusive religion

The Yazidis also believe that they are children of Adam, but not of Eve and therefore consider themselves as fundamentally different from all other humans. This is one of the reasons why the Yazidi community is very closed and exclusive.¹⁰³ Yazidis cannot marry a person who is not a member of the community. If they do marry someone outside their community, they thereby denounce Yazidism and are excluded from the community. In addition to that, you can never become Yazidi, except by the exclusive event of birth out of a marriage between two Yazidi members.

This tradition came under a serious form of pressure after it became clear that women and girls who were abducted by ISIS were traded as sex slaves among ISIS combatants. Becoming a victim of systematic rape by

⁹⁵ SAP report, 2017 (note 11), 4-5.

⁹⁶ Also referred to as MelekTaus or MalakTa’us , which is often shown as a peacock, thus being referred to as the “Peacock Angel”.

⁹⁷ MERI report, 2017 (note 36), 9.

⁹⁸ MERI report, 2017 (note 36), 8; SAP report, 2017 (note 11), 4-5.

⁹⁹ SAP report, 2017 (note 11), 5.

¹⁰⁰ MERI report, 2017 (note 36), 8.

¹⁰¹ MRGI, catalogue “Yezidis”, <http://minorityrights.org/minorities/yezidis/> (accessed 11 May 2018); MERI report, 2017 (note 36), 8; SAP report, 2017 (note 11), 5.

¹⁰² SAP report, 2017 (note 11), 5.

¹⁰³ S. De Vido, 2018 (note 71), 3-6.

and forced marriages to the Sunni Muslims of ISIS means that they should all be excluded from their religious community. Even if their family would not cut all the ties with them after their escape, the stigma that these women and girls have to carry will rest on them for the rest of their lives and will continue to have a great impact on the reputation of the entire family.¹⁰⁴

B) ETHNICITY

As mentioned before, some Yazidis will affiliate themselves as part of the Kurdish minority, while others do not.¹⁰⁵ It should be noted that they all speak a Kurdish dialect, Kormanje or Kurmanji.¹⁰⁶ However, their religion is closely linked with the Zoroastrian religion, which is an old religion from Iran. Therefore, some believe they have Iranian origin.¹⁰⁷

Some scholars say “Yazidi” is derived from the second Calif of the Omayyad Dynasty, whose name was Yazid ibn Muawiya.¹⁰⁸ This caliph lived in the seventh century in Arabia and was suppressed by Husayn. The latter died in the battle of Karbala and his death led allegedly to the division of Muslims in Shiites and Sunnis.¹⁰⁹ Others state that it is likely to be derived from “ized”, a Persian word for angel or God’s adorer. “Yazata” in old Iranian means “divine being”.¹¹⁰ In Kurdish “Yezdan” and “Ezid” are both words to refer to God. Many arguments both ways can therefore be brought to the table to claim that Yazidis’ origin defines them either to be Kurdish or Arab or anything other than ethnically and purely Yazidi.

Their undefined ethnicity is problematic because it made them vulnerable to opportunism of different political parties that tried to convince the Yazidi people to be part of their community, in order to gain more power in general and control in the Sinjar region. This creates a climate where Yazidis become victim of political opportunism.

1.4 Interim conclusion

Like many minorities in Iraq, the Yazidis are particularly vulnerable to become victims of political and social exclusion, discrimination and sectarian violence. This vulnerability can be attributed in particular, because of their social isolation due to misinterpretation of their religion on the one hand and their debated Kurdish ethnical background on the other hand.

¹⁰⁴ S. De Vido, 2018 (note 71), 3-6.

¹⁰⁵ *Supra*, Section 1.2.2, p18.

¹⁰⁶ MERI report, 2017 (note 36), 8.

¹⁰⁷ X., *The Human Rights Situation of the Yezidi Minority in the Transcaucasus (Armenia, Georgia, Azerbaijan)*, May 2008, <http://www.refworld.org/docid/485fa2342.html> (accessed 30 April 2018); SAP report, 2017 (note 11), 3.

¹⁰⁸ *Cfr*: His title was also “Sultan Ezi”; SAP report, 2017 (note 11), 3.

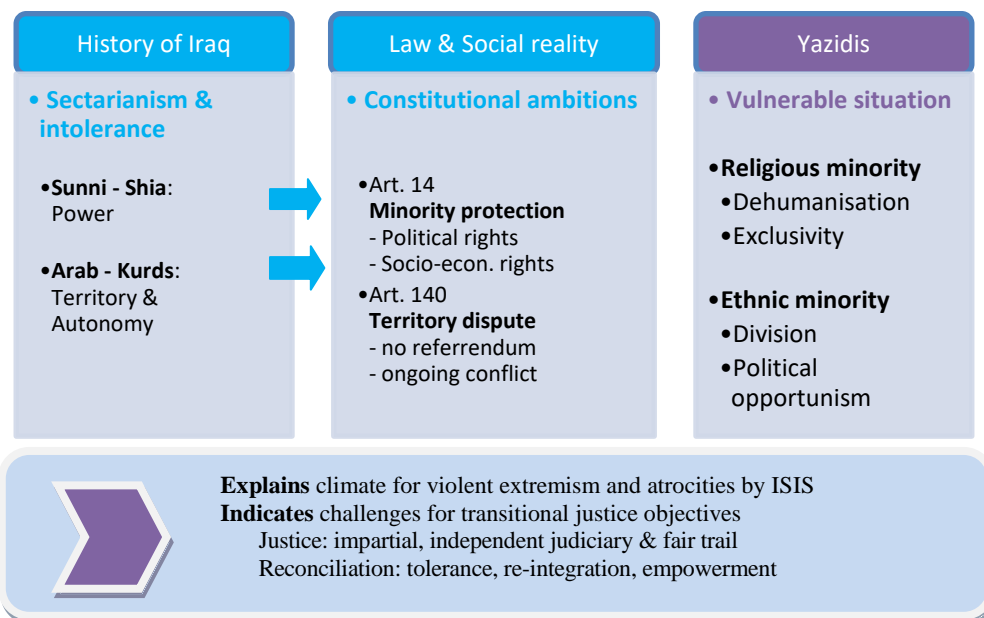
¹⁰⁹ See “Yazid I Umayyad caliph” on <https://www.britannica.com/> (accessed 17 April 2018).

¹¹⁰ See “Yazidi” on <https://www.britannica.com/> (accessed 17 April 2018).

In addition to that, their location in the disputed area of the Ninewa governorate is complicating their situation in many ways. The region has been a constant subject of conflict between KRG and the federal government and is simultaneously one of the most neglected and poorest regions of the country. These factors combined with the withdrawal of both Kurdish and Iraqi security forces, without any warning, resulted in the Yazidi villages of Sinjar being unprotected and defenceless against the threat of ISIS.

Due to the many wars, the switch of powers and the involvement of U.S. forces, the country was weakened and extremely divided, which provided a perfect fertile soil for extremists to sow the seeds of a terrorist group like ISIS. Sunni Muslims, who were once in power during the Ba'ath era of Saddam Hussein and who were completely denounced after the U.S. invasion, could see a rival of that old dream of re-establishment of the Arab power in the region, free from Western influence. Only ISIS would prove to be more destructive and cruel than any extremist group Iraq has ever seen. The dehumanising narrative for Yazidis made the villagers of Sinjar an easy target to demonstrate their strategy of terror.

All the aforementioned issues were already present before ISIS occupied Mosul and attacked Sinjar. When looking into a post-ISIS future through a transitional justice lens, these issues need to be addressed. Serious efforts will need to be made to overcome the internal divisions among Yazidis and external division and intolerance between all communities.



Chapter 2: Violations of international law by ISIS in Sinjar region

The aforementioned events and issues have all, in one way or another, amounted to the brutal attack ISIS carried out on the Yazidis in 2014. This chapter will establish the facts and determine the crimes that were committed by ISIS in this particular case. It needs to be emphasized that the scope of this analysis is very specific and narrow, only focusing on violations of international law, against Yazidis, in the Sinjar region and by ISIS. Nevertheless, there are many armed groups active in the conflict in Syria and in Iraq, with many deadly casualties and violations of international humanitarian law. Those violations will not be discussed in this thesis.¹¹¹

2.1 Preliminary facts

2.1.1 Advancement of ISIS from Syria to Iraq

The civil war in Syria started in 2011 and it posed a direct threat on its neighbouring country Iraq.¹¹² On 18 October 2011 the Human Rights Council decided that there will be an Independent International Commission of Inquiry appointed. The initial mandate of the commission was to “investigate all alleged violations of international human rights law since March 2011 in the Syrian Arab Republic, to establish the facts and circumstances that may amount to such violations and of the crimes perpetrated and, where possible, to identify those responsible with a view to ensuring that perpetrators of violations, including those that may constitute crimes against humanity, are held accountable.”¹¹³

This can be regarded as an authoritative early warning for the willingness to fight impunity on an international level of those responsible for crimes against humanity. Soon an extension to the mandate followed after repeatedly stressing the Human Rights Council’s concern on the deteriorating situation in Syria. It stressed the need for the commission to conduct an international, but independent and prompt investigation into the atrocities and violations of international law. It is stated very clearly that impunity of such crimes should not be ignored by the international community. Hereby it underlines the possibility of international prosecution of such crimes, but also the importance of achieving reconciliation, truth and accountability without neglecting the need for reparations and effective remedies for victims.¹¹⁴

¹¹¹ See e.g.: UN SC, Resolution 2379, 21 September 2017, S/RES/2379 (2017); UN SC, Resolution 2401, 24 February 2018, S/RES/2401 (2018); UN SC, Statement by the President, 24 April 2015, S/PRST/2015/10; UN SC, Report of the Secretary General, 20 June 2018, S/2018/619; UN HRC, Report of the Special Rapporteur on minority issues on her mission to Iraq, 9 January 2017, A/HRC/34/53/Add.1.

¹¹² UN SC, Statement by the President, 3 August 2011, S/PRST/2011/16; S. Mabon and S. Royal, 2017 (note 45).

¹¹³ HRC, “*They came to destroy*”: *ISIS Crimes Against the Yazidis*, 15 June 2016, A/HRC/32/CRP.2. (Hereafter: HRC, IICI report, 2016).

¹¹⁴ HRC, IICI report, 2016 (note 113).

2.1.2 Occupation of Mosul

The conflict kept on deteriorating and ISIS exercised an extreme violent offensive in the northern part of Iraq from June to September 2014.¹¹⁵ After capturing Samarra, they moved on to Mosul, Tikrit and Baiji. By 11 June 2014, all these cities were in control of ISIS troops. The Iraqi security forces were too disorganized and under armed to offer great resistance and fled to the south. Meanwhile, Kurdish Peshmerga troops had occupied Kirkuk and were the only security militia that were present in the Sinjar area.¹¹⁶

In July 2014, right before the attacks on the Yazidi minority in the Sinjar region, Amnesty International published a report on the situation in Northern Iraq. The ISIS occupation of Iraq's second largest city, Mosul, resulted in a drastic dislocation of a very large part of inhabitants, that fled their homes out of fear for sectarian attacks, killings, abductions and other reprisals by ISIS combatants. Shia and dissenting Sunni Muslims fear to be targeted by ISIS sooner or later or flee after their relatives have been targeted by ISIS. Minorities like Yazidi and Christians also fled the cities of Mosul, Kirkuk, Duhok and Erbil and their villages surrounding these cities.¹¹⁷ In the Badush prison in Mosul, approximately 600 prisoners, including Yazidi prisoners, were executed as the prison later had to serve to hold Yazidi women and children as captives, before they were "distributed" among ISIS militants or Islamic Koran schools.¹¹⁸

When Tal Afar was captured by ISIS on 16 June 2014,¹¹⁹ many Yazidi and Shia from that city fled to the Sinjar region, as the mountains have been a safe harbour for them in times of persecutions¹²⁰ and this region is densely populated by Yazidis. But the advancement that ISIS made in the region was unexpected by the Iraqi central government, the KRG and by the international community. Nobody seemed to have realised how fast ISIS was raging on in the whole Ninewa region.¹²¹ It would only take one month before ISIS militia stormed the Sinjar region.

¹¹⁵ MRGI, *No Way Home*, 2016 (note 20), 13.

¹¹⁶ MRGI, *No Way Home*, 2016 (note 20), 13.

¹¹⁷ Amnesty International, *Northern Iraq. Civilians in the line of fire*, July 2014, <https://www.amnesty.org/northern-iraq-civilians-line-fire> (accessed 7 May 2018) (Hereafter: Amnesty, *Northern Iraq*, 2014).

¹¹⁸ MRGI, *Between the Millstones*, 2015 (note 74), 12; Amnesty, *Northern Iraq*, 2014 (note 117)

¹¹⁹ MRGI, *Between the Millstones*, 2015 (note 74), 12.

¹²⁰ SAP report, 2017, 13 (note 11).

¹²¹ MRGI, *Between the Millstones*, 2015 (note 74), 11.

2.2 Attacks by ISIS on Sinjar

On August the 3rd 2014 militants of the terrorist group ISIS surrounded the Yazidi population in the villages around the Sinjar mountain. Apart from some lightly armed Yazidi men who tried to defend their people, there was no security force to protect them. In that month alone, 763 800 individuals were internally displaced, due to the ISIS offensive in Sinjar.¹²²

The Sinjar region was not only home to the “infidel” Yazidis, it was also a strategically weak area. Iraqi national military had withdrawn their troops in northern Iraq since the occupation of Mosul, which left the Sinjar region under Kurdish security.¹²³ The Kurdish security forces, more specifically the Peshmergas, withdrew their soldiers from the Yazidi villages when they became aware of the ISIS combatants advancing fast to the Sinjar villages.¹²⁴ Up until today it is unclear who made this decision and for what reasons the withdrawal of security forces was not communicated in advance, assuming that it was even communicated to the civilians at all. The withdrawal of the only defence force in the region was “not effectively communicated”, leaving the population in Sinjar unaware of and unprotected from the danger that awaited them.¹²⁵

Many NGOs have reported on the events that occurred in the days, weeks and months following the attacks.¹²⁶ Two years later, the Independent International Commission of Inquiry on the Syrian Arab Republic published its detailed report “‘They came to destroy’: ISIS Crimes Against the Yazidis”. This fact-finding investigation based on several interviews with victims resulted in the verdict that “the genocide of the Yazidis is on-going”.¹²⁷

2.2.1 Looting all Yazidi villages and capturing their inhabitants

Within 72 hours, all villages were emptied and looted by the ISIS combatants, with the exception of Kocho, which was besieged until 15th of August 2014.¹²⁸ Systematically, all men and women were separated from each other.¹²⁹ Children were left with their mothers, unless they were between 5 and 12 years old approximately. Depending on what category they were assigned to, the fate of the inhabitants was either to be killed or to be abducted. In any case, the ISIS fighters targeted civilians in order to destroy their communities and “cleanse” the country of their culture and religion. Nadia Murad, a survivor from the village Kocho, has stated in her speech to the Security Council: “Islamic State had one intention, to destroy the Yazidi identity by force, rape, recruitment of children, and destruction of holy sites they captured, especially against the Yazidi woman where they used

¹²² MRGI, *No Way Home*, 2016 (note 20), 13.

¹²³ *Supra*, Section 1.1.2, p15-16.

¹²⁴ HRC, IICI report, 2016 (note 113), 6, §24.

¹²⁵ HRC, IICI report, 2016 (note 113), 6-7, §24.

¹²⁶ Also see: Amnesty International Ltd, “*Death everywhere*” *War crimes and human rights abuses in Aleppo, Syria*, 5 may 2015; HRW, Iraq: ISIS escapees describe systematic rape, 14 April 2015.

¹²⁷ HRC, IICI report, 2016 (note 113), 2.

¹²⁸ HRC, IICI report, 2016 (note 113), 7 §29.

¹²⁹ HRC, IICI report, 2016 (note 113), 7 §30.

rape as a means of destruction for Yazidi women and girls and ensuring these women will never return to a normal life.”¹³⁰

2.2.2 Besieged refugees on Mount Sinjar

ISIS had begird the Sinjar area by sending combatants from Mosul and Tel Afar in Iraq and Al-Shaddadi and Hasakah in Syria¹³¹ to control all the important routes and strategically located junctions in the area. Therefore, the families that were able to flee their villages before being captured had little chance to escape, since they would encounter ISIS convoys everywhere on their journey.¹³² Some men in the villages Girzerik and Siba Sheikh Khedir have asked the Peshmerga forces to at least leave their weapons and ammunition behind, so they could defend their villages themselves. However, this wish was not granted and they could only attempt to defend their families with some *ad hoc* local groups of men with light armours.¹³³ In those few hours of little resistance against the ISIS troops, many families were trying to flee to the Sinjar Mountain. Tens of thousands of Yazidis were able to seek refuge in the mountains.¹³⁴ Although they were safe from ISIS combatants once they reached the upper plateaus of the Mount, they were trapped there with little to no access to water, food or medical care and this in absurdly high temperatures of up to 50°C.¹³⁵ Hundreds of people died from dehydration, exhaustion or starvation, among them many children, women and elderly.¹³⁶

The central government of Iraq called for humanitarian assistance and on the 7th of August, the United States of America (U.S.) stated that help was on the way. Airdrops of food, water and aid from the American, Iraqi, British, French and Australian armies prevented the catastrophe from deteriorating further.¹³⁷ Together with their support, the Syrian Kurdish troops (YPG), were eventually able to create a corridor on the mountain to allow the besieged Yazidis to seek shelter and safety in Syria.¹³⁸

¹³⁰ Statement by Nadia Murad BaseeTaha, trafficking survivor, to the UN Security Council, 18 December 2015, available on <https://freedomfund.org/blog/5380/> (accessed 4 May 2018).

¹³¹ HRC, IICI report, 2016 (note 113), 6 §23.

¹³² HRC, IICI report, 2016 (note 113), 7 §26.

¹³³ HRC, IICI report, 2016 (note 113), 6-7 §24-25.

¹³⁴ HRC, IICI report, 2016 (note 113), 7 § 27.

¹³⁵ HRC, IICI report, 2016 (note 113), 7 §27.

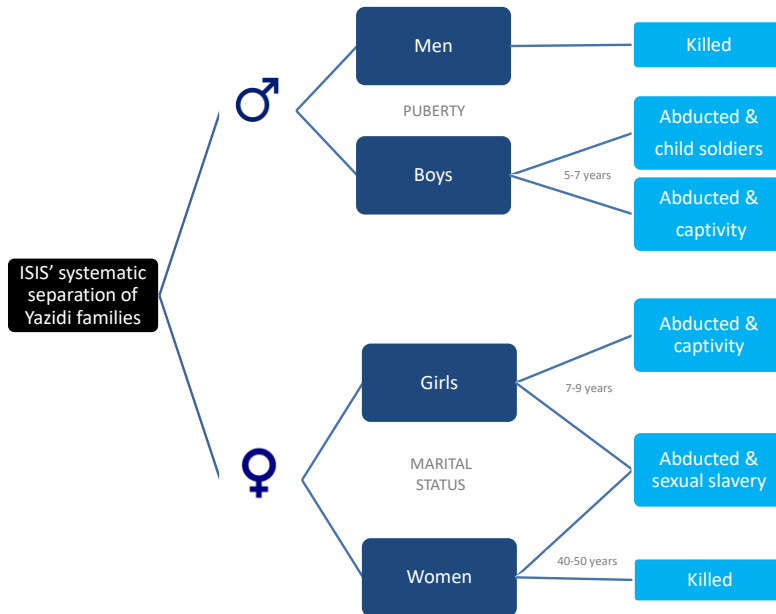
¹³⁶ HRC, IICI report, 2016 (note 113), 7 § 28.

¹³⁷ HRC, IICI report, 2016 (note 113), 7 §27.

¹³⁸ HRC, IICI report, 2016 (note 113), 7 §28.

2.2.3 Systematic separation of Yazidi families

ISIS fighters separated the villagers on the basis of their sex and age.¹³⁹ The first separation took place based on sex and subsequently on age, with men and elder women most at risk of being killed immediately. As this happened systematically and very fast, the age of children was often arbitrarily decided on the basis of physical features like, armpit hair or facial features. In general, this is a visual representation of the systematic separation:



A) MASS KILLINGS

According to testimonies, some men were executed by beheadings or gunshots in the head, often while their family members were still watching or were close enough to hear the executions.¹⁴⁰ In Kocho and Qani, two mass graves of men and boys were found.¹⁴¹ In Kocho, a village in the South of Sinjar, the village was besieged for almost two weeks before the ISIS militants lined them up behind the school building and executed them. The only case in which men and boys who had reached the age of puberty survived the attacks was when they were forcibly converted to Islam together with their families. In that case they became part of the ISIS activities and were often forced to work.¹⁴²

¹³⁹ HRC, IICI report, 2016 (note 113).

¹⁴⁰ HRC, IICI report, 2016 (note 113), 8.

¹⁴¹ 413 men were found in the mass graves in Kocho, with only 19 of them who survived the mass execution by playing dead, approximately 80 men in Qani. See: HRC, IICI report, 2016 (note 113), 8-9 §36; HRC, Report of the OHCHR 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, §19; US Holocaust Memorial Museum, "Our Generation is Gone" *The Islamic State's Targeting of Iraqi Minorities in Ninewa*, 2015, §§18-19.

¹⁴² HRC, IICI report, 2016 (note 113), 9 §§37-40.

2.2.4 Child soldier training camps

The boys who had not reached puberty yet, were initially left with their mothers and female relatives and all together they were forcibly transferred to ISIS controlled cities.¹⁴³ Many of them were imprisoned in the abovementioned Badush prison.¹⁴⁴ Others were later on transferred to Syria.¹⁴⁵ The prisoners were often registered and their valuable belongings were collected and taken away from them, like money, jewels, identity documents and cell phones.¹⁴⁶ In the different places they were brought to, another separation according to ISIS installed categories was executed. Boys who were old enough to be trained were taken away from their mothers and had to go to the “Koran schools”. There, they would have to learn the Koran verses by heart, learn about ISIS’ interpretation of Islam and the ideology of the terrorist group. They are trained to use heavy weapons and to get familiar with horrific amounts of violence, beheadings and all kind of torture techniques. They are violently forced to deny their identity as Yazidi and their religion and are brainwashed in order to become loyal ISIS fighters.¹⁴⁷

2.2.5 Sexual enslavement

The female Yazidis were also categorised in different groups upon the separation with their male relatives. The unmarried girls, who were above approximately eight years old, were separated from the married women and the younger girls.¹⁴⁸ This separation was made in order to distinguish the girls that have not yet lost their virginity. This was of importance for the value of the girl on the slave markets.¹⁴⁹ Reportedly the vast majority of women were “purchased” by individuals, *id est* mainly by ISIS fighters on their personal account. Other women were held as a collective property of ISIS and were held in military bases across Iraq and Syria.¹⁵⁰ In some occasions, like for example in Kocho, the women and mothers who were considered to be too old for sexual slavery were killed.¹⁵¹ By July 2016 - two years later after the offensive, it is reported that still at least 3500 Yazidi women are being held captive by ISIS militants.¹⁵²

¹⁴³ HRC, IICI report, 2016 (note 113), 10 §42-43.

¹⁴⁴ HRC, IICI report, 2016 (note 113), 18 §90-93 and §50. The latter mentions the counter offensive of the Iraqi government troops, upon the call for help by MP Vian Dakhil in the Iraqi Parliament.

¹⁴⁵ HRC, IICI report, 2016 (note 113), 10, §43.

¹⁴⁶ HRC, IICI report, 2016 (note 113), 11 §47.

¹⁴⁷ HRC, IICI report, 2016 (note 113), 19, §94-97.

¹⁴⁸ HRC, IICI report, 2016 (note 113), 10-11 §44-46.

¹⁴⁹ HRC, IICI report, 2016 (note 113), 12 §57.

¹⁵⁰ HRC, IICI report, 2016 (note 113), 12 §55.

¹⁵¹ HRC, IICI report, 2016 (note 113), 11 §48; US Holocaust Memorial Museum, “Our Generation is Gone” The Islamic State’s Targeting of Iraqi Minorities in Ninewa, 2015.

¹⁵² MRGI, *No Way Home*, 2016, 14 (note 20).

2.3 International criminal and humanitarian law

Iraq has ratified all the important treaties for the respect of international humanitarian law, like all four Geneva Conventions of 1949 and later their two Additional Protocols. Also the Convention Against Torture of 1987 was ratified by the Iraqi authorities. However, the country is not a Contracting Party of the Rome Statute and did not accept the jurisdiction of the International Criminal Court (ICC). It is argued that this does not impeach the customary international law to be applicable on crimes committed on Iraqi soil. The Rome Statute is a mere codification of existing international customary law on war crimes and crimes against humanity. Also, the prevention and prohibition of torture and genocide are considered to be *jus cogens* in international law.¹⁵³ Thus, the country does not have to be a signatory of the Rome Statute to be bound by the customary principles of international law and should even have the *erga omnes* obligation to prevent such crimes from happening.

The real legal issue is who is going to decide whether the customary law has been violated and how perpetrators will be held accountable. Being a signatory to the Rome Statute will allow the International Criminal Court to look into the events and prosecute individuals who can be held accountable for the crimes they have committed, but this has not happened yet. Although this makes it very complex, it is not impossible to ensure criminal prosecution on the basis of international criminal and humanitarian law.¹⁵⁴

2.3.1 War crimes

The IICI report detected the following war crimes, committed by ISIS fighters during the attack in Sinjar. The mass killings of Yazidi men and boys and elderly women in the Sinjar villages constitutes the war crime of murder.¹⁵⁵ The sexual enslavement of Yazidi girls and women and treating them as property constitute the severe war crimes of rape, sexual violence, sexual slavery, torture, cruel and degrading treatment and outrages upon personal liberty.¹⁵⁶ And lastly, the forced military training of Yazidi boys constitutes the war crime of using, conscripting and enlisting children,¹⁵⁷ which is prohibited by the 2002 Optional Protocol to the CRC. Syria ratified this protocol in 2003. However, there are more provisions to be mentioned, that were all violated by individual combatants.¹⁵⁸

When there are “serious violations of customary or treaty rules belonging to international humanitarian law”, the individual perpetrator can be held accountable for the commitment of war crimes.¹⁵⁹ Traditionally these crimes

¹⁵³ See e.g.: C. Tomuschat, *The fundamental rules of the international legal order: jus cogens and obligations erga omnes*, Leiden, Nijhoff, 2006.

¹⁵⁴ *Infra*, Section 3.2.1, p39-52.

¹⁵⁵ HRC, IICI report, 2016 (note 113), 32 §170.

¹⁵⁶ HRC, IICI report, 2016 (note 113), 32 §§171-172.

¹⁵⁷ HRC, IICI report, 2016 (note 113), 32 §173.

¹⁵⁸ See e.g.: MRG report, 2015, 29-31.

¹⁵⁹ A. Cassese, *Cassese's International Criminal Law*, 3rd edition, Oxford University Press, Oxford, 2013, 65.

could only be committed by combatants in international armed conflicts.¹⁶⁰ However, this point of view is not supported any longer in the international jurisprudence and also non-international conflicts like civil wars are included in the material scope.¹⁶¹ The ICTY specified that there is an armed conflict when two states use armed force against each other or whenever “there is armed violence between governmental authorities and organized armed groups or between such groups within a state.”¹⁶² In the case of the conflict with ISIS in Syria and in Iraq, there is definitely an armed conflict, if not an international armed conflict.¹⁶³ This is an important qualification, because international humanitarian law would not be applicable in a mere internal situation of unrest or violent disturbance.¹⁶⁴ The emergence of ISIS in the Syrian civil war and later the violent attacks on Iraqi cities, *de facto* controlling a large part of both territories involved other countries in the conflict that are supporting or allying with the different parties of the conflict. As the report of MRGI argues, the advancement of ISIS in the Sinjar region, but more generally in the Ninewa governorate and the previous attack and seizure of Mosul, are military offensives against the Iraqi central government and the Kurdish government.¹⁶⁵

Not targeting civilians is one of the most primordial rules of warfare. Both in Iraq and in Syria, ISIS leaves a trail of killed civilians behind everywhere they go. The four 1949 Geneva conventions prohibit crimes committed against persons not taking part, or no longer taking part, in armed hostilities.¹⁶⁶

In the Sinjar region in general and more specifically because there were not many security forces present at the time of the attack, there is no reason for ISIS to believe that there were military objectives to target.¹⁶⁷ Further, the civilians of Sinjar did not initially take part in the hostilities between ISIS and the Iraqi government.¹⁶⁸ It was only when some villagers found out that ISIS was going to attack their village that they used light armours to defend themselves and enable their families to flee to Mount Sinjar.¹⁶⁹

Article 8(2)(e)(i) of the Rome Statute also prohibits crimes committed against civilians that are not taking part in the hostilities. To be individually prosecuted for war crimes there is, apart from the objective elements,¹⁷⁰ a subjective element required. This is the requirement of a criminal intent of the perpetrator.¹⁷¹ There is evidence to state that ISIS combatants acted under the plan to control the Ninewa governorate and the policy to destroy all

¹⁶⁰ A. Cassese, 2013 (note 159), 63.

¹⁶¹ A. Cassese, 2013 (note 159), 66 and 71; ICTY, Appeals Chamber, *Prosecutor v. Tadic*, 2 October 1995, nr. IT-94-I.

¹⁶² ICTY, Appeals Chamber, *Prosecutor v. Tadic*, 2 October 1995, nr. IT-94-I, §70; ICTY, Appeals Chamber, *Prosecutor v. Boskoski and Tarculovski*, 19 May 2010; MRGI, *Between the Millstones*, 2015 (note 74); A. Cassese, 2013 (note 159), 66.

¹⁶³ MRGI, *Between the Millstones*, 2015 (note 74), 28-29.

¹⁶⁴ MRGI, *Between the Millstones*, 2015 (note 74), 28; A. Cassese, 2013 (note 159), 66.

¹⁶⁵ MRGI, *Between the Millstones*, 2015 (note 74), 28.

¹⁶⁶ In particular in non-international armed conflict. See: Article 3.1 in all four 1949 Geneva Conventions, article 4 of the 2nd Additional Protocol and article 4 of the ICTR Statute.

¹⁶⁷ HRC, IICI report, 2016 (note 113), 7 §26.

¹⁶⁸ HRC, IICI report, 2016 (note 113), 32 §169.

¹⁶⁹ HRC, IICI report, 2016 (note 113).

¹⁷⁰ *Id est*: the nexus with the hostilities in the armed conflict and the targeting of civilians.

¹⁷¹ A. Cassese, 2013 (note 159), 75; MRGI, *Between the Millstones*, 2015 (note 74), 29.

communities of the “infidels”, *id est* all the people who do not conform to their ideology.¹⁷² The fact that ISIS combatants perpetrated these crimes as part of the ultimate goal of their military campaign would be enough to demonstrate the subjective element is fulfilled.¹⁷³

2.3.2 Crimes against humanity

Again relying on customary international law, this concept is defined as serious systematic and widespread attacks on human dignity or grave humiliation or degradation of one or more persons. Whether the victims are civilians or whether there is a nexus with an armed conflict is irrelevant for defining the acts as crimes against humanity.¹⁷⁴ The widespread, systematic aspect in the case of the crimes committed against the Yazidis is indisputable because hundreds of villages in the Sinjar region were targeted¹⁷⁵ and the violence against the Yazidis has not ceased ever since the first attack in August 2014. The underlying offences that can be considered as crimes against humanity are for example: murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment, torture, sexual violence, persecution, enforced disappearance of persons or any other inhumane acts of similar character and gravity, intentionally causing great suffering.¹⁷⁶

2.3.3 Crime of genocide

In various reports it is convincingly argued that the acts committed by ISIS combatants against the Yazidi population in Sinjar amount to the commission of the crime of genocide.¹⁷⁷ The crime consists out of three crucial elements: the four categories of protected groups, the *actus reus* is the range of destructive acts and the *mens rea* is the specific intent to destroy, in whole or in part, a protected group of people. As it is argued by many, the Yazidis fall within the category of a protected group, as it is an ethnic and religiously distinct group.¹⁷⁸

ISIS did strategically and systematically attack the Yazidi villages with the intent to destroy, in whole or in part, an ethnic but more importantly a religious group as such by (a) killing many male members of the group, (b) causing serious bodily or mental harm to all members of the group, (c) deliberately inflicting on the group

¹⁷² *E.g.*: ISIS had a document circulating with Q&A on the rules for the use of sex slaves.

¹⁷³ ICTY, Appeals Chamber, *Prosecutor v. Kunarac*, 12 June 2002, nr. IT-96-23&23/1, §58.

¹⁷⁴ A. Cassese, 2013 (note 159), 90-91.

¹⁷⁵ HRC, IICI report, 2016 (note 113), 31 §167.

¹⁷⁶ A. Cassese, 2013 (note 159), 94-98.

¹⁷⁷ HRC, IICI report, 2016 (note 113), 20-31 §§100-165; MRGI, *Between the Millstones*, 2015, p47-49; S. van den Berg, Former US War Crimes Ambassador Calls for UN Investigative Probe into Yazidi Genocide, *International Justice Tribune*, 21 July 2016, <http://genocidewatch.net/2016/08/01/> (accessed 22 June 2018);

Also: Immediately after the first attacks on August the 3rd 2014, President Obama made a public statement on the intervention in Iraq, stating that “ISIL forces below have called for the systematic destruction of the entire Yezidi people, which would constitute genocide” and later said: “I believe the United States of America cannot turn a blind eye. We can act, carefully and responsibly, to prevent a potential act of genocide.” See Office of the Press Secretary, Statement by the President, The White House, 7 August 2014.

¹⁷⁸ See *e.g.*: HRC, IICI report, 2016 (note 113); US Holocaust Memorial Museum, 2015 (note 141).

conditions of life by forcibly impregnate women of the group, (d) imposing measures intended to prevent births within the group and forcibly transferring children of the group to another group (*id est* ISIS itself).¹⁷⁹

2.4 Interim conclusion

At this point in the analysis, it is clear that what has happened to the Yazidi community since the summer of 2014 is an international humanitarian catastrophe with violations of international customary law on many levels. The severity of the violations of international law by ISIS is so serious that it affects the entire international community as a whole. Therefore, not only Iraqi authorities, but the whole international community should focus on facilitating a transitional justice process in order to hold those responsible accountable for the atrocities and to remedy the harm that has been caused to the Yazidis.

The Rome Statute is not ratified by Iraq, nor by Syria and this makes it complex to prosecute high profile leaders in front of the International Criminal Court (ICC) in The Hague. Nevertheless, from the transitional justice perspective, criminal prosecution is a crucial mechanism. Because of the severity of the crimes, it is important to avoid impunity and to redress the victims. It should also serve as a non-recurrence measure, but this can only be reached if the criminal prosecution happens in the accordance with the principles of international law.

¹⁷⁹ Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948; MRGI, *Between the Millstones*, 2015 (note 74), 33.

Chapter 3: Transitional justice tools for the Yazidis in Iraq

Recapitulating the research question, this thesis aims at assessing what the potentials and limitations are of the transitional justice tools to deliver justice to the Yazidi community. The first chapter referred already to challenges for achieving justice and reconciliation in the transitional justice mechanism. The second chapter elaborated on the importance of holding perpetrators accountable according to international law. This chapter will attempt to give an abstract overview of what transitional justice in Iraq could look like in theory after a successful transitional justice process. This first part discusses in general the definition of transitional justice, objectives and possible tools to achieve those objectives. As is will be argued, the ultimate goal to have a successful transitional justice mechanism can only be reached if you treat all the objectives and tools equally. (3.1)

Building on these theoretical ideals set out in the first section, the concrete dimension of transitional justice in Iraq will be thoroughly examined per tool, with a very specific attention to the situation of the Yazidis.¹⁸⁰ There are two sets of tools, that focus on different disciplines. The first set are the judicial tools, because they traditionally need a legal analysis as they are related to the criminal prosecution. (3.2) The second set of tools are extra-judicial,¹⁸¹ because they are assessed from a more sociological, psychological, historical or political point of view. In this regard, the importance of an interdisciplinary approach becomes clear. A mere legal approach to the needs of Yazidis would be highly unsatisfying. (3.3)

3.1 Holistic approach as the key to success

First of all, the conflict situation should be addressed in a holistic way.¹⁸² In a traditional conception, transitional justice is often associated with a political change after the wrongdoings of a repressive regime.¹⁸³ But over time, the concept of transitional justice is also used in broader context.¹⁸⁴ Whenever a country is dealing with massive violations and abuses in a conflict situation, the transitional justice tools should be used to deal with that violence.¹⁸⁵

¹⁸⁰ Note that this specific focus on one minority allows to make concrete recommendations, but this is also at the expenses of the holistic approach that is crucial to have a meaningful transitional justice process for all people in Iraq. Let this in depth analysis be an example for further research on other communities in Iraq, (in)directly affected by ISIS.

¹⁸¹ *Id est* beyond (extra-) judicial.

¹⁸² M. Lawry-White, "The Reparative effect of truth seeking in transitional justice", *International and Comparative Law Quarterly*, vol. 64 (1), 2015, 141-177.

¹⁸³ R.G. Teitel, "Transitional Justice Genealogy", *New York Law School*, 2003, 69.

¹⁸⁴ E. Stover and H. Weinstein, *My Neighbor, My Enemy: Justice and Community in the Aftermath of Atrocity*, Cambridge University Press, New York, 2004; R.G. Teitel, "The Law and Politics of Contemporary Transitional Justice", *Cornell Int'l L.J.*, vol. 38, 2005, 839-840.

¹⁸⁵ HRC, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, 7 September 2015, A/HRC/30/42 (Hereafter: HRC, Report of the Special Rapporteur P. de Greiff, 2015)

In many cases where atrocities are committed, the narrative tends to be one-sided. Often the new government that succeeded the oppressive regime focuses exclusively on the violations and abuses of the oppressor and not on the possible atrocities committed by the successors or other parties in the conflict. Also, any kind of severe violence should be taken seriously.¹⁸⁶ The violence that occurred could be structural, but also interpersonal violence might need to be looked at during the transitional justice process, as long as it happened in the course of the conflict.¹⁸⁷ While transitional justice is often a top-down system, it is primordial to let all the local communities engage in the process.¹⁸⁸

Secondly, the objectives should be aimed at in a holistic manner. The ambitions of transitional justice broadened over the course of history, aiming at peace-building and post-conflict reconstruction, rather than only ensuring justice through criminal prosecution.¹⁸⁹ It equally aims at ensuring the promotion of truth, justice, reparation and guarantees of non-recurrence.¹⁹⁰ *Prima facie*, criminal prosecution is in that sense the perfect judicial tool to start with, as it aims at investigating the events, punishment of the perpetrators, redress for the victims and prevention for recidivism. But when dealing with severe and massive violations of international customary law for example, this is deemed to be insufficient if there is no holistic approach to the objectives of the tool. This is primarily because criminal justice tends to focus disproportionately on punishing the perpetrator (retributive justice), rather than ensuring reparation for the victims or rebuilding a society (restorative justice).¹⁹¹ Therefore, recognition of the victims, truth seeking initiatives, empowerment of local communities and rebuilding trust are important to meet this holistic approach to justice.¹⁹²

Thirdly, the holistic approach also means that all the tools should be seen as a whole and should be applied equally. Therefore, the government is ought to react to all these forms of violence in a manner that is also beyond legal or judicial.¹⁹³ Political and social justice need to complement the criminal justice effort.

This holistic approach is thus, very important in order to avoid undesirable dichotomies where one is favoured above another, like peace or justice, punishment or forgiveness, retributive or restorative justice.¹⁹⁴ Nevertheless, it is challenging to define transitional justice, while including all the necessary tools and find a balance between all of them. For the sake of argumentation, this chapter will build upon the following definitions, objectives and tools of transitional justice in Iraq.

¹⁸⁶ See e.g.: M. Williams, R. Nagy and J. Elster, *Transitional Justice*, New York, New York University Press, 2012.

¹⁸⁷ P. Gready and S. Robins, "From Transitional to Transformative Justice: A New Agenda for Practice", *International Journal of Transitional Justice*, vol. 8, 2014, 344.

¹⁸⁸ HRC, Report of the Special Rapporteur P. de Greiff, 2015 (note 185).

¹⁸⁹ P. Gready and S. Robins, 2014 (note 187), 344.

¹⁹⁰ HRC, Report of the Special Rapporteur P. de Greiff, 2015 (note 185).

¹⁹¹ M. Wenzel *et al.*, "Retributive and Restorative Justice", *Law and Human Behavior*, 2008, vol.32(5), 375-389.

¹⁹² HRC, Report of the Special Rapporteur P. de Greiff, 2015 (note 185).

¹⁹³ P. Gready and S. Robins, 2014 (note 187), 344.

¹⁹⁴ P. Gready and S. Robins, 2014 (note 187), 344.

In accordance with the UN's interpretation, transitional justice is “the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecution, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.”¹⁹⁵ This definition or interpretation honours the broad and holistic approach towards transitional justice, with references to terms like accountability, justice and reconciliation. It elucidates this broad definition by giving some examples of tools that can be used to achieve the objectives.

The objectives of transitional justice in post-conflict situations will depend on the particular context of that country, the conflict and the parties to that conflict.¹⁹⁶ In general the main purposes for applying certain tools are ending impunity, recognition of and redress for victims, fostering trust, strengthening the rule of law and achieving reconciliation in the country.¹⁹⁷ If this dissertation is trying to formulate a transitional justice plan for Iraq, then it needs to bear in mind what objectives should be aimed at in all these initiatives and with what tools they can be achieved.

Regarding the tools, the analysis will assess five pillars of transitional justice: retributive justice, restorative justice, reconciliation, reform and remember.¹⁹⁸ The first one is a traditional judicial tool to ensure accountability and will predominantly be discussed from a legal point of view, without ignoring its interdependence with the other extra-judicial tools. The other three are extra-judicial tools, that go beyond judicial and legal mechanisms. For reconciliation, psycho-sociological theories will be important. With institutional reforms, the socio-political considerations will complement the legal analysis and truth requires a real interdisciplinary approach. This dissertation will touch upon all of these tools, but for the Yazidis especially criminal justice and reconciliation seem to enjoy the priority.¹⁹⁹ As mentioned before, it is important to not fall into the trap of dichotomising the process.

¹⁹⁵ UN Secretary-General, *Guidance note of the Secretary-General on United Nations Approach to Transitional Justice*, March 2010, https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf (accessed 14 May 2018); HRC, Report of the Special Rapporteur P. de Greiff, 2015 (note 185), 5.

¹⁹⁶ UN Secretary-General, *Guidance note of the Secretary-General on United Nations Approach to Transitional Justice*, March 2010 (note 195).

¹⁹⁷ European External Action Service, *The EU's Policy Framework on support to transitional justice*, http://eeas.europa.eu/archives/docs/top_stories/pdf/the_eus_policy_framework_on_support_to_transitional_justice.pdf (accessed 17 May 2018); L. Davis, *The European Union and Transitional Justice*, Civil Society Dialogue Network (CSDN), Brussels, 3 April 2014, <http://www.eplo.org/civil-society-dialogue-network.html> (accessed on 29 June 2018).

¹⁹⁸ See visual representation of chapter 3, *infra* Section 3.4, p67.

¹⁹⁹ See e.g. HRW, *Flawed Justice. Accountability for ISIS Crimes in Iraq*, December 2017, <https://www.hrw.org/report/2017/12/05/flawed-justice/accountability-isis-crimes-iraq> (accessed 11 June 2018) (Hereafter: HRW, *Flawed Justice*, 2017); J. Karadsheh and C. Jackson, “Fighting to bring ISIS to justice for war crimes against Yazidis”, *CNN*, 11 October 2017.

3.2 Judicial tools

In July 2017, Mosul was liberated by the Iraqi and Kurdish security forces, with the assistance of troops from the global coalition against ISIS.²⁰⁰ This liberation of Iraq's second biggest city and the rest of the Ninewa governorate became the symbolic victory of winning the battle against ISIS.²⁰¹ Although ISIS has lost territory and power in Iraq and Syria, it is still quite euphemistic to speak about a post-conflict situation already. In the case of the Yazidis, there are reports that state that there are still approximately 3000 women and girls that are missing and local media claim that they are still being sold in Syria and other countries in the Middle East.²⁰² Nevertheless, if there would be a point in time where Iraq could start thinking about transitional justice tools, it would be after the liberation of Mosul.

In the context of Iraq, a holistic approach in ensuring justice is necessary, but it is also a challenge to find a satisfying balance between retributive and restorative justice or between repression and restoration.²⁰³ As indicated, the sectarian past can impose challenges for the right to fair trial. The main challenges for retributive justice will therefore be of a procedural nature: Who will prosecute ISIS leaders and combatants, how will evidence be gathered and how can their right to fair trial be ensured? The main challenges for restorative justice will be more substantial: How can these trials contribute to the restoration of the nation and the redress of victims? Depending on where the criminal trials will take place, these questions will be answered differently and thus, the success of this pillar will largely depend on the jurisdiction of the criminal proceedings.

3.2.1 Retributive justice

Every state has the obligation to punish persons that commit crimes against humanity, war crimes or the crime of genocide.²⁰⁴ Thus, it is not only desirable for the transitional justice project to use criminal justice as a tool to end impunity, it is also a legal obligation.²⁰⁵ For the victims it is also important to see their perpetrators being prosecuted for their actions and to see justice to be done to their community that suffered such unimaginable

²⁰⁰ Global Coalition, Statement on the liberation of Mosul, <http://theglobalcoalition.org/en/global-coalition-statement-on-the-liberation-of-mosul/> (accessed 7 June 2018).

²⁰¹ D. O'Driscoll, "Liberating Mosul: Beyond the Battle", *Middle East Policy*, 15 December 2015, 61.

²⁰² Interview with Zinah Mohammed, Oxfam Iraq; NRT, "Over 3000 Ezidis still remain in ISIS captivity: KRG, 30 May 2018, <http://www.nrtv.com/EN/News.aspx?id=1555&MapID=1> (accessed 8 June 2018).

²⁰³ C. Lak and T. Khoun, "In Pursuit of Transitional Justice in Cambodia: From Theoretical to Pragmatic Applications", *CICP Working Paper, no. 47*, February 2012, 6; M. Wenzel *et al.*, 2008 (note 191), 375-389.

²⁰⁴ Preamble of ICC Statute, §6, as written form of *ius cogens* rule.

²⁰⁵ See e.g.: C. Tomuschat, *The fundamental rules of the international legal order: jus cogens and obligations erga omnes*, Leiden, Nijhoff, 2006.

horrors.²⁰⁶ What ISIS combatants have done to the Yazidis cannot be left unpunished. For such grave violations of international law, there is no room for impunity.²⁰⁷

The first actor who is responsible for prosecuting perpetrators is the sovereign state, namely Iraq, but also Syria has this responsibility towards the Yazidi victims that were sold into sexual slavery. Then there is the responsibility of the international community to assist those countries who face difficulties in effectively investigating and prosecuting the most severe violations of international law. Following the liberation of Mosul, the central government of Iraq requested the UN Security Council already to assist in the prosecution and punishment of the ISIS combatants who severely violated international criminal law.²⁰⁸ As it will be argued hereafter, Iraq is facing some constraints to adequately prosecute ISIS members and thus, it is necessary to look to alternative jurisdictions, like the ICC, an international *ad hoc* tribunal or other national jurisdictions that take recourse of the theory of universal jurisdiction to ensure accountability for crimes committed by ISIS in Iraq.

A) NATIONAL TERRITORIAL JURISDICTION

Although chapter 2 emphasised the violations of the international law, it needs to be stressed that “under the Rome Statute, the primary responsibility for the investigation and prosecution of perpetrators of mass crimes rests, in the first instance, with the national authorities.”²⁰⁹ In criminal law, the principle of territoriality is the rule to define which jurisdiction has the competence to penalise the acts. This means that ISIS combatants will be prosecuted by Iraqi courts and according to the Iraqi criminal law. The crimes against the Yazidis were initiated in the Ninewa governorate in Iraq, but some crimes were continuing crimes that occurred transnational. The sexual enslavement and the forced displacement to training camps for example, were committed both in Iraq and in Syria. Deviation from the principle of territoriality happens only in the case that impunity might occur. Then the extraterritorial application of the criminal law is allowed. For example, when Iraq fails to prosecute all the individual perpetrators, it is possible for Germany to prosecute foreign terrorist fighters of German nationality.²¹⁰ In this case of avoiding impunity, universal jurisdiction might also be a possible alternative.²¹¹

²⁰⁶ See e.g.: N. Murad, *The last girl: my story of captivity, and my fight against the Islamic State*, Tim Duggan Books, New York, 2017.

²⁰⁷ See foreword of A. Clooney in N. Murad, 2017 (note 206).

²⁰⁸ UN SC, Resolution 2379, 21 September 2017, S/RES/2379 (2017): “Welcoming the considerable efforts of the Government of Iraq to defeat ISIL (Da’esh), and its letter to the Secretary-General and Security Council dated 9 August 2017 calling for the assistance of the international community to ensure that members of ISIL (Da’esh) are held accountable for their crimes in Iraq, including where those may amount to crimes against humanity.”

²⁰⁹ ICC prosecutor in statement 2015, available at <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-08-04-2015-1&ln=en> (accessed 24 June 2018).

²¹⁰ Theory of active personality, see *infra* Section 3.2.1 (C)(a), p50.

²¹¹ Theory of universal jurisdiction, see *infra* Section 3.2.1 (C)(c), p51.

a) Syria: IICI and IIIM

Syria was the cradle of the whole ISIS network, with the Syrian city Raqqa as the capital of their Islamic caliphate. The attack on the Yazidis might have started in northern Iraq, but many of the victims were forcibly transferred to Syria and continued to be imprisoned, assaulted, raped etc. Also, the whole policy on captivity of the Yazidi “spoils of war” as sex slaves for ISIS combatants is likely to be instructed by the higher ISIS authorities in Raqqa. Unfortunately, the regime of Assad in Syria has failed to hold perpetrators accountable for such gross violations of international law.²¹² Therefore, the international community has tried to pressure the Syrian government to cooperate in order to avoid impunity.²¹³

Already in the early days of the conflict, in June 2012 the International Independent Commission of Inquiry on the Syrian Arab Republic (IICI) was commissioned with the mandate to “investigate all alleged violations of international human rights law since March 2011 in the Syrian Arab Republic, to establish the facts and circumstances that may amount to such violations and of the crimes perpetrated and, where possible, to identify those responsible with a view to ensuring that perpetrators of violations, including those that may constitute crimes against humanity, are held accountable”. Later that year the Human Rights Council extended that mandate and stressed the need to follow up the IICI’s reports and to conduct an international, transparent, independent and prompt investigation into abuses and violations of international law in order to avoid impunity. The HRC stressed that the Syrian authorities failed to hold perpetrators accountable and “notes in this regard the potential relevance of international justice” together with the importance of “mechanisms to achieve reconciliation, truth and accountability for gross violations, as well as reparations and effective remedies for victims”.²¹⁴

It is this commission of inquiry of the HRC (IICI) that published the report “*They came to destroy*”: *ISIS Crimes Against the Yazidis* in June 2016²¹⁵ that officially stated that the crimes that were committed against the Yazidis in the Sinjar region amounted to genocide. Only a few months later, the General Assembly of the UN created an International Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons

²¹² “Noting with concern the impunity for serious violations of international humanitarian law and violations and abuses of human rights law committed during the conflict in the Syrian Arab Republic, which has provided a fertile ground for further violations and abuses”. See UN GA, Draft Resolution, 19 December 2016, A/71/L.48, http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/a_res_71_248.pdf (accessed 30 June 2018).

²¹³ UN HRC, Resolution S-19/1, 4 June 2012, A/HRC/RES/S-19/1, §9.

²¹⁴ UN HRC, Report of the High Commissioner for Human Rights on the protection of human rights of juveniles deprived of their liberty 13 August 2012, A/HRC/21/26.

²¹⁵ Since the IICI only has a mandate to investigate events that occurred on the Syrian territory, it is stated in the report itself as followed: “In accordance with its mandate, the present report focuses on violations committed against Yazidis in Syria. As the initial attack occurred in northern Iraq, however, it is necessary to set out ISIS conduct in Iraq in order to understand the context in which ISIS forcibly displaced Yazidi civilians into Syria, and the architecture of the system, initially set up by ISIS in Iraq, which allowed these crimes to take place as they did.”

Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 (IIIM).²¹⁶ The objective was that the IICI and the IIIM would cooperate together “to collect, consolidate, preserve and analyse evidence of violations of international humanitarian law and human rights violations and abuses and to prepare files in order to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards, in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes, in accordance with international law.”

This shows the creativity of the General Assembly when there seem to be a lack of credible accountability efforts due to political paralysis.²¹⁷ Whenever the General Assembly created justice institutions in the past, for example in the case of Cambodia and Sierra Leone, it was always with the consent of the country involved.²¹⁸ This is a new approach in hybrid justice for international crimes in two ways: 1) There was no consent of the Syrian Arab Republic to install such a justice mechanism with a mandate to investigate and prepare files for prosecution. 2) There is no nexus between the preparatory work of the IIIM and a specific jurisdiction or body that has the competence to prosecute these crimes. The IIIM refers itself to the “quasi-prosecutorial function” it has to ensure that there is no impunity for these grave violation of international law.²¹⁹

The IICI has actively reported on different particular human rights related issues in Syria and serves as the more traditional fact-finding body to the HRC. The establishment of the IIIM seems, in terms of transitional justice, like a dream come true. The first report of the IIIM sets out the guiding principles of the mechanism, which include many lessons from the past and objectives to deliver criminal justice with enough consideration for other transitional justice mechanisms. They will conduct their work on accountability with a victim-centred approach, that avoids secondary trauma, empowers the affected communities and recognised the efforts of civil society.²²⁰

²¹⁶ UN GA, Resolution 71/248, 21 December 2016; B. Van Schaack, “The Iraq Independent Investigative Team & Prospects for Justice for the Yazidi Genocide”, *SSRN*, 10 January 2018, 1, <https://ssrn.com/abstract=3099932> (accessed 19 June 2018).

²¹⁷ See *infra* Section 3.2.1 (B)(a), p46-48

²¹⁸ Hybrid international tribunals were installed to deal with the prosecution of individual leaders. See B. Van Schaack, 2018 (note 216), 1; B. Van Schaack, “The General Assembly & Accountability for International Crimes”, *Just Security*, 27 february 2017, <https://www.justsecurity.org/38145/general-assembly-accountability-international-crimes/> (accessed 22 June 2018)

²¹⁹ UN GA, Report of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, 28 February 2018, 6 §10 (Hereafter: IIIM report, 2018); UN General Assembly, Implementation of the resolution establishing the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, 19 January 2017, A/71/755, §32.

²²⁰ IIIM report, 2018 (note 219).

b) Iraq: IIIT

The situation for ensuring accountability through the national jurisdiction in Iraq is different, yet aims at the same goal of ensuring justice and avoiding impunity. Nevertheless, there are the same concerns of respect for the country's sovereignty and there is a problem of inadequate national jurisdiction.²²¹ Other than the case of Syria, Iraq gave in to the multilateral pressure and requested in its letter to the President of the UN Security Council the assistance of the international community in fighting impunity in its territorial jurisdiction.²²² In that request, Iraq emphasised clearly its concern about the national sovereignty and demands to retain its jurisdiction. Iraq had always expressed its self-confidence on ensuring accountability for ISIS crimes, because it has great expertise of prosecuting terrorists in the long history of sectarianism in Iraq.²²³ Prior to this letter, there were already some initiatives to draft a resolution on the creation of an international body that would assist Iraq in prosecuting ISIS members. Furthermore, the government of Iraq also experienced some pressure after several outcries for justice for the Yazidis. Human rights lawyer Amal Clooney definitely brought the issue to the attention of the broader public by giving her speech at the UN in the company of her client Nadia Murad.²²⁴ Also the Iraqi member of parliament Vian Dakhil urged for serious action on international level²²⁵ and in general the western media covered the issue in quite an extensive manner.²²⁶

On 21 September 2017, the Security Council agreed with consensus on resolution 2379 that mandates the Secretary-General to create an Iraqi Independent Investigative Team (IIIT).²²⁷ The mandate of the IIIT will be assisting Iraqi domestic institutions in collecting evidence to hold ISIS members accountable.²²⁸ The mandate aims at ensuring “the broadest possible use before national courts, and complementing investigations being carried out by the Iraqi authorities, or investigations carried out by authorities in third countries at their request.”²²⁹ This is interesting because it holds the door open for possible prosecutions in third countries, which is directly suggesting an extraterritorial application of criminal laws. This is quite new in the practice of creating

²²¹ HRW, *Flawed Justice*, 2017 (note 199).

²²² Letter dated 14 August 2017 from the Chargé d'affaires a.i. of the Permanent Mission of Iraq to the United Nations addressed to the President of the Security Council.

²²³ B. Van Schaack, 2018 (216), 2.

²²⁴ Amal Clooney's speech, available at <https://www.independent.co.uk/news/world/americas/amal-clooney-speech-in-full-transcript-human-rights-lawyer-isis-iraq-speech-un-united-nations-a7622176.html> (accessed 23 March 2018).

²²⁵ MP VianDakhil addresses Iraqi federal parliament, available at <https://www.unwatch.org/yazidi-mp-vian-dakhil-addresses-human-rights-council/> (accessed 5 June 2018).

²²⁶ See for example: E.M. Lederer, “Amal Clooney Urges World Leaders Not to Let Isis Get Away with Genocide in Passionate Address to UN”, *The Independent*, 10 March 2017, <http://www.independent.co.uk/news/world/americas/amal-clooney-isis-genocide-yazidis-iraq-united-nations-security-council-passive-response-nadia-murad-a7621871.html> (accessed 24 June 2018); S. Sengupta, “For a Yazidi Woman, Justice for ISIS Crimes is Still Elusive”, *New York Times*, 17 August 2017; L. Kelly, “There's Still No Justice for Yazidi Genocide Victims, Human Rights Activists Say”, *Washington Times*, 3 August 2017.

²²⁷ UN SC, Resolution 2379, 21 September 2017, S/RES/2379 (2017).

²²⁸ UN SC, Resolution 2379, §2.

²²⁹ UN SC, Resolution 2379, §2.

hybrid justice bodies, but it is also logic given the fact that many foreign terrorist fighters within ISIS come from third countries and have returned thereto after the caliphate imploded. Another interesting aspect of the mandate is that the Security Council will have to agree on the Terms of Reference that are “acceptable to the Government”.²³⁰ This grants the Iraqi government an extra insurance that their sovereignty will be respected and that they have a say in the scope of the competences and mandate of the IIIT. This resolution was welcomed by many as a “breakthrough” and “historical moment for justice” by advocates for the Yazidi people and civil society.²³¹

The establishment of the IIIT is indeed unique and is a positive solution for the otherwise political paralysis in the Security Council.²³² However, the inspiration for such an international investigative team that is focused on domestic prosecutions²³³ came from the previously created International Independent Investigation Commission (IIIC) that assisted Lebanon in investigating the terrorist attack on Rafiq Hariri.²³⁴ In this case, the IIIC transformed into the Office of the Prosecutor once the Special Tribunal for Lebanon was created. Whether this will happen in Iraq’s case is still uncertain.

The IIIT’s mandate to investigate the crimes that were committed by ISIS is a positive response to the outcry to deliver justice for the Yazidi community.²³⁵ Its limited scope to only the crimes that were committed by ISIS is however not praised by everyone, as it is not in line with the holistic approach of transitional justice.²³⁶

First of all, there were many armed troops involved in the Iraqi combat against ISIS. To deliver justice and fight impunity in a credible and comprehensive manner, it would be better to broaden the mandate to collecting evidence on crimes committed by any armed group on the Iraqi territory.²³⁷ The IIIM in Syria on the contrary has such a comprehensive approach.²³⁸ Van Schaack argues that the limited scope of the IIIT’s mandate is worrisome but proves to be rather irrelevant for the Yazidis. The crimes against the latter were only specifically

²³⁰ UN SC, Resolution 2379, 21 September 2017, §§4 and 7.

²³¹ See e.g.: UN Press, Security Council Requests Creation of Independent Team to Help in Holding ISIL (Da’esh) Accountable for Its Actions in Iraq, <https://www.un.org/press/en/2017/sc12998.doc.htm> (accessed 4 July 2018)

²³² See *infra* Section 3.2.1 (B)(a), p46.

²³³ All the previous UN Security Council initiatives were focused on prosecutions in a hybrid international tribunal, especially established to deal with crimes committed during a conflict: Yugoslavia, Rwanda, Burundi, Côte d’Ivoire, Sudan, East-Timor, Central African Republic. See B. Van Schaack, 2018 (note 216), 3, footnote 17.

²³⁴ UN SC, Resolution 1595, 7 April 2005.

²³⁵ B. Van Schaack, 2018 (note 216), 3.

²³⁶ B. Van Schaack, 2018 (note 216), 3; Z. Kaufman, “New UN Team investigating ISIS atrocities raises questions about justice in Iraq and beyond”, *Just Security*, 28 September 2017.

²³⁷ HRW, *Flawed Justice*, 2017 (note 199); HRW, *Marked with an “X”: Iraqi Kurdish Forces’ Destruction of Villages, Homes in Conflict with ISIS*, November 2016, <https://reliefweb.int/report/iraq/marked-x-iraqi-kurdish-forces-destruction-villages-homes-conflict-isis-enarku> (accessed 5 July 2018).

²³⁸ UN GA, Draft Resolution, 19 December 2016, A/71/L.48.

attacked by ISIS after all.²³⁹ Nevertheless, it does not seem that the Iraqi or KDP government are simultaneously investigating abuses or violence by their own (affiliated) groups.²⁴⁰

Secondly, the domestic judicial system in Iraq might not be as apt to prosecute these crimes as the Iraqi government claims it is. Three main objections or concerns have to be raised in this regard: 1) The Iraqi law still allows the death penalty.²⁴¹ 2) The judicial system has been characterised as corrupt and partial for many years.²⁴² 3) Although cooperation with other investigative bodies (IICI, IIM, NGOs and national investigative bodies like Iraqi Investigation and Gathering Evidence Commission CIGE in Duhok)²⁴³ is encouraged in resolution 2379, the tensions between the federal government and the KRG²⁴⁴ since the independence referendum²⁴⁵ in September 2017 might complicate the process of a truly national criminal justice mechanism.²⁴⁶

Finally, there is the practical difficulty of the ongoing conflict. Mosul might have been liberated, but there are still sleeping cells of ISIS in Iraq and the situation in Syria is far from being stabilised. Up until today, there are still Yazidi women and girls missing and some regions are still too dangerous to go back to.

B) INTERNATIONAL JURISDICTION

The Preamble of the Rome Statute affirms “that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.”²⁴⁷

These efforts on national level are being taken, but as demonstrated previously, some questions arise on the effectiveness and proportionality of the Iraqi and Syrian domestic criminal jurisdiction. Since the Human Rights Council and many academics and NGOs have stated that the crimes committed in Sinjar amount to war crimes, crimes against humanity and maybe even genocide, it would be relevant to let the International Criminal Court (ICC) in The Hague examine this situation to ensure accountability. Or, when the ICC is not eligible to do so, there may be a necessity to create a special international tribunal with specific competences to prosecute ISIS combatants and officers on the basis of international law.

²³⁹ B. Van Schaack, 2018 (note 216), 16-17.

²⁴⁰ HRW, *Flawed Justice*, 2017 (note 199), 6.

²⁴¹ But also: Counter terrorism laws are not always desirable in terms of restorative justice: e.g.: Perpetrator will be prosecuted on membership of terrorist organisation instead of for murder, rape or torture of an individual; HRW, *Flawed Justice*, 2017 (note 199), 52-54;

²⁴² M. Cherif Bassiouni, “Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal”, *Cornell International Law Journal*, vol. 38 (2), 2005, 38.

²⁴³ B. Van Schaack, 2018 (note 216), 3.

²⁴⁴ HRW, *Flawed Justice*, 2017 (note 199), 2-3.

²⁴⁵ B. Van Schaack, 2018 (note 216), 17.

²⁴⁶ B. Van Schaack, 2018, (note 216), 4.

²⁴⁷ Preamble Rome Statute of the International Criminal Court, 17 July 1998, A/CONF.183/9, §4.

a) ICC

If the national authorities are not able or unwilling to prosecute such serious international crimes, then the ICC can do it as a matter of last resort to avoid impunity.²⁴⁸ Unfortunately, as mentioned before, both the Syrian Arab Republic and Iraq are not signatories to the Rome Statute and have not undertaken any steps to change that. Thus, the competences of the ICC cannot be triggered on the basis of article 12 (2) or 13 (a) of the Rome Statute. This does not mean that the ICC Prosecutor cannot look into the situation though.

Article 13 (b) of the Rome Statute foresees another possibility of referral by the UN Security Council acting under Chapter 7.²⁴⁹ This was recommended in many different reports, including by the Human Rights Council.²⁵⁰

In May 2014, even before the attacks in Sinjar occurred, the Republic of France has drafted a resolution²⁵¹ that was co-sponsored²⁵² by 65 other states.²⁵³ From the start of the civil war in Syria, Russia has always taken the Assad regime under its protection against the international community. A blockade in the Security Council was predictable, but France nevertheless tried to push for the referral to the ICC of the situation in Syria.²⁵⁴ The draft resolution was proposed in preparation of a military intervention in Syria, but to ensure that mass atrocities on all sides of the conflict will be sanctioned by prosecution on international level.²⁵⁵ To kick off the draft resolution emphasised the respect for Syria's sovereignty.²⁵⁶ The situation was mainly defined as the "widespread violations of human rights and international humanitarian law by the Syrian authorities and pro-government militias, as well as the human rights abuses and violations of international humanitarian law by non-State armed

²⁴⁸ The Rome Statute art. 8(1) states "the court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes."

²⁴⁹ S. De Vido, 2018 (note 71), 2.

²⁵⁰ HRC, IICI report, 2016 (note 113), §164: "there are reasonable grounds to believe that ISIS committed prohibited acts, as set out in Article II of the Genocide Convention and Article 6 of the Rome Statute, against individual Yazidis as a consequence of his or her belonging to the Yazidi group, and as an incremental step in the overall objective of destroying the group."

²⁵¹ UN SC, Draft (French) Resolution on Referral of Situation in the Syrian Arab Republic to the International Criminal Court, S/2014/348, <http://www.securitycouncilreport.org/un-documents/document/s2014348.php> (accessed on 18 February 2018).

²⁵² UN SC, Draft (French) Resolution (note 251).

²⁵³ Letter of Switzerland to SC members to urge them to co-sponsor the draft resolution of France, <http://www.securitycouncilreport.org/> (accessed 21 June 2018).

²⁵⁴ "If the Council were not to adopt it, that would be an insult to the millions of Syrians who are suffering. It would be proof that some have learned nothing from history. It would recall that some, whatever they may claim, have opted for unconditional support for the Damascus regime, whatever crimes it commits, and by the same stroke to exonerate Al-Qaida. Extending equal impunity to all criminals is not a paradox; there is brotherhood in crime. A veto today would recall that fact. A veto would cover up all crimes; it would be a veto against justice. It would give new justification to the French proposal to limit the use of the right of the veto in the case of mass atrocities." See: Statement by Mr. Gérard Araud, Permanent Representative of France to the United Nations, Delegation of France in Security Council, 22 May 2014, <https://onu.delegfrance.org/22-May-2014-Security-Council-Syria> (accessed 20 June 2018).

²⁵⁵ Statement by Gérard Araud (note 254).

²⁵⁶ Preamble of Draft (French) Resolution (note 251): "Reaffirming its strong commitment to the sovereignty, independence, unity and territorial integrity of the Syrian Arab Republic, and to the purposes and principles of the Charter of the United Nations".

groups, all committed in the course of the ongoing conflict in the Syrian Arab Republic since March 2011”.²⁵⁷ Russia and China both used their veto²⁵⁸ power²⁵⁹ to block the resolution from being passed.²⁶⁰ All the other voting members of the Security Council voted in favour.

Although highly regrettable and may even be catalogued as immoral, the position of Russia in particular is “understandable”. The vague description²⁶¹ of referring “a situation” has proven that the ICC rather works according to a philosophy of following the evidence, rather than focussing on one particular group of perpetrators.²⁶² In order to shield Syrian leaders and military officials for risking to be held accountable for their crimes committed in the Syrian territory, they are not keen on letting such a resolution pass.²⁶³ However, this was never officially stated by Russia nor China.²⁶⁴ The official argument was that this referral would impeach the quick and sustainable resolution of the conflict. However, peace negotiations were not even initiated at that point.²⁶⁵

In April 2015, when the atrocities in northern Iraq were well documented already, the Prosecutor of the ICC made a statement.²⁶⁶ Prosecutor Fatou Bensouda, emphasised that the primary responsibility for fighting impunity in the case of such atrocities lies with the domestic jurisdictions of the states where ISIS is acting. After mentioning that the widespread criminality in Syria and Iraq constitute a threat for the world security and peace, he concludes with an attempt to pressure the Security Council: “I remain profoundly concerned by this situation and it needs to be emphasised that it is our collective duty as a global community to respond to the plight of

²⁵⁷ UN SC, Draft (French) Resolution (note 251), §1.

²⁵⁸ UN Meetings coverage and press releases, Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution, 22 May 2014.

²⁵⁹ For info on France initiative to refrain from veto right in case of mass crimes: UN SC, Research Report, 2015, http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/research_report_3_the_veto_2015.pdf

²⁶⁰ I. Black, “Russia and China veto UN move to refer Syria to international criminal court”, *The Guardian*, 22 May 2014.

²⁶¹ A. Skander Galand, “The Situation Concerning the Islamic State: Carte Blanche for the ICC if the Security Council Refers?”, *EJILtalk*, 27 May 2015, <https://www.ejiltalk.org/the-situation-concerning-isis-carte-blanche-for-the-icc-if-the-security-council-refers/> (accessed 20 June 2018).

²⁶² “During the drafting of the Statute, the word ‘situation’ was expressly adopted in order to avoid that ‘cases’ be referred to the Court. Even the word ‘matter’ was rejected. Indeed, it is not a simple matter to refer IS to the ICC. While the politically informed body that is the Council may believe it can refer a group, the Court may decide that if such referral is not linked to a territory it does not fit within the definition of a situation.” See A. Skander Galand, 2015 (note 261).

²⁶³ E. McKirdy, “8 times Russia blocked a UN Security Council resolution on Syria”, *CNN*, 13 April 2017.

²⁶⁴ Russia has very good reasons to veto, since they have trusted the international community twice and also twice the international community (under pressure of US) has abused that trust by not respecting the sovereignty of the states involved (*id est* Iraq and Libya intervention). Twice Russia has lost a lot of contracts and allies in the region for this reason. For Russia it is crucial not to give in on this item of sovereignty and definitely make sure they look strong in this regard. From the moment Putin loses his credibility in this regard, he will get internal troubles within his country.

²⁶⁵ E. McKirdy, 2017 (note 263).

²⁶⁶ Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the alleged crimes committed by ISIS, 8 April 2015, available at <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-08-04-2015-1&ln=en> (accessed 21 June 2018); A. Skander Galand, 2015 (note 263).

victims whose rights and dignity have been violated.”²⁶⁷ This attempt did not stop the Security Council from remaining paralysed on this matter and it raised only more concern on the effectiveness of the Council in responding to mass commission of crimes against humanity.²⁶⁸

The Prosecutor of the ICC could, on the basis of article 13 (c) and in accordance with article 15 of the Rome Statute, start an investigation *proprio motu*. As Syria and Iraq are not parties to the Rome Statute, they will need to consent and accept the jurisdiction of the Court.²⁶⁹ In her statement, ICC Prosecutor Bensouda, made it clear that there is too little evidence available to start an investigation *proprio motu* as this will only be possible on the basis of personal jurisdiction.²⁷⁰ Foreign terrorist fighters that committed crimes as ISIS combatants could be prosecuted if their nationality is one of the state parties to the Rome Statute.²⁷¹ There is documentation on their involvement in the crimes against the Yazidi community in Iraq, but they are mostly part of the lower ranks within the terrorist group. The ICC is particularly interested in the highly ranked ISIS terrorists, who are in the majority of cases Syrian or Iraqi.²⁷² As this situation did not change over the past three years, the statement of the ICC Prosecutor is still in order and thus, the ICC will only start an investigation upon referral by the Security Council or upon the accession of Iraq or Syria to the Rome Statute.

Because of the unsuccessful attempts to trigger the competence of the ICC, there have been several calls for Iraq to simply ratify the Rome Statute, to make sure that ISIS terrorists can be prosecuted for crimes against humanity.²⁷³ So far, Syria nor Iraq have taken steps in this direction.

b) *Ad hoc* tribunals

It is likely that the Security Council will remain paralyzed because Russia will never let a referral of any situation in Syria or Iraq happen because of the argument of the sovereignty of the state. Nevertheless, there are initiatives to try to advocate for consensus on the establishment of a regional or hybrid tribunal that will have jurisdiction over the crimes committed by ISIS. Recently, on 6th of July 2018, the Founding Conference on Bringing ISIS to Justice was held in The Hague. The ultimate goal of that Conference was to make a concrete

²⁶⁷ Statement of the Prosecutor, 8 April 2015 (note 266).

²⁶⁸ No further initiatives were taken on this matter, although some countries still raised the issue. See B. Van Schaack, 2018 (note 216), 18; See e.g.: UN Security Council, 7433rd session, 24 April 2015, S/PV.7433.

²⁶⁹ S. De Vido, 2018 (note 71), 7; W. Schabas, *An introduction to the International Criminal Court*, Cambridge University Press, Cambridge, 2014; B. Van Schaack, 2018 (note 216), 19.

²⁷⁰ Statement of the Prosecutor, 8 April 2015 (note 266); A.M. Brennan, “Prosecuting ISIL before the ICC: challenges and obstacles”, *ASIL Insights*, 17 September 2015; J. Trahan, “New paths to accountability for crimes in Syria and Iraq (including ICC jurisdiction over foreign fighters)”, *Just Security*, 12 November 2014.

²⁷¹ *Inter alia* Australian, Belgian, UK, German; See Statement of the Prosecutor, 8 April 2015 (note 266); B. Van Schaack, 2018 (note 216), 19.

²⁷² A. Skander Galand, 2015 (note 261).

²⁷³ B. Van Schaack, 2018 (note 216), 18; Parliamentarians for Global Action, *Iraq: PGA calls on Iraq to ratify the Rome Statute of the ICC*, 11 August 2014, <http://www.pgaction.org/news/pga-calls-on-iraq-to-ratify-rome-statute.html> (accessed 29 June 2018); HRW, *Flawed Justice*, 2017 (note 199), 65.

proposal for the creation of a mechanism to prosecute the members of ISIS according to the existing international law, so the Netherlands can bring the proposal forward to the UN Security Council. The conference was organised for experts and definitely discussed the possibility of a hybrid Tribunal, which would ensure the reintegration in the Yazidi community of women who survived rape by ISIS combatants and the children who were born out of rape.

The advantages of an *ad hoc* tribunal is that the criminal trials are centralised and that international justice standards can be applied in all of these trial. The coordination of collecting and archiving evidence could also be centralised, which is relevant for the cross-border dimension of a terrorist group like ISIS. The possible pitfalls however, could be the time lengthy procedures of a hybrid internationally established tribunal and the high demand in recourses. Further, the *ad hoc* character of the tribunal could be a blessing as it allows to tailor the statutes according to the specific context, or it could be a condemnation to end up being too politicised and dominated by foreign powers. In that sense, the same sovereignty argument arises both for the approval of Iraq or Syria to the establishment of such a court, as for the veto power that Russia has in the Security Council.

C) NATIONAL EXTRATERRITORIAL JURISDICTION

As mentioned before, some third countries have started investigations and filed complaints against ISIS suspects in their domestic judicial system. They do this, because of the severity of the violations against international criminal or humanitarian law or because the suspect is found on their territory or is a national that joined ISIS as a foreign fighter.²⁷⁴ In the last case, the domestic courts of the third country can prosecute them for their crimes, on the basis of personal jurisdiction.

The UN General Assembly resolution 71/248 encourages this and also the UN Security Council states in Resolution 2379 an explicit encouragement for third parties to start investigations and share their findings with the Investigative Team, ensuring “the broadest possible use before national courts, and complementing investigation being carried out by the Iraqi authorities, or investigations carried out by authorities in third countries at their request.” However, there is an exception foreseen in the provision that states that any other use than serving as evidence in Iraqi domestic proceedings, the consent of Iraq is needed “on a case by case basis”.²⁷⁵ The interpretation of this wording is key to establish whether national prosecutors of third countries can cooperate with the IIIT and IIIM and make use of their gathered evidence in national proceedings against ISIS members.

In the following sections, the different legal grounds on which third countries can have jurisdiction over the crimes against the Yazidis will be illustrated with examples of Germany and the United States. These examples

²⁷⁴ See: HRW, *Flawed Justice*, 2017 (note 199), 65, in footnote 203.

²⁷⁵ B. Van Schaack, 2018 (note 216), 19-20.

will illustrate, on the one hand, why this can be beneficial to complement the domestic trials in Iraq and Syria and in that sense can ensure that there is no space for impunity for serious international crimes like genocide or crimes against humanity. On the other hand, this wording of the IIIM and IIIT mandate creates a serious pitfall for this idea of complementary jurisdiction of third countries.

a) Active personal jurisdiction: Foreign terrorist fighters

It can be assumed that foreign terrorist fighters were involved in several crimes against Yazidis, as testimonies of victims show. However, most of the victims of sexual violence testified that their captors and buyers were Syrian or Iraqi nationals, if not from other Arabic speaking countries.²⁷⁶ There is no public data that shows there have been individuals convicted by a third country for a crime committed against a Yazidi person specifically. There are records however on the prosecution of ISIS members in for example Belgium and Germany.²⁷⁷

In two cases that were analysed by Human Rights Watch in 2017, the perpetrator was a German national who joined ISIS as a foreign terrorist fighter and they were both convicted for war crimes. One got a 2 years sentence of imprisonment for desecrating two corpses and the other one 8,5 years for desecrating a corpse, membership of a terrorist organisation and illegal military weapons.²⁷⁸ The challenges of prosecuting foreign terrorist fighters are numerous since collecting conclusive evidence is extremely difficult for the national prosecutor. In theory, it could be possible that foreign terrorist fighters will be prosecuted for war crimes or crimes against humanity upon their return to their home country, if the right legislation is in place.

b) Passive personal jurisdiction

It is not common, but the nexus between the crime and the country that has jurisdiction on it can also be the nationality of the victim. In the United States there is a War Crimes Act ²⁷⁹ that grants passive personal jurisdiction to U.S. Courts in the case of war crimes against or slavery of U.S. citizens.²⁸⁰

This War Crimes Act was used by the American prosecutor in the Criminal Complaint of the U.S. against Nisreen Assad Ibrahim Bahar.²⁸¹ The woman and her husband had been keeping U.S. humanitarian worker Kayla Mueller in captivity and Mrs. Baharis now being charged with the crime of slavery. In this particular case,

²⁷⁶ Amnesty International Ltd, *Escaped from hell: Torture and sexual slavery in Islamic State captivity in Iraq*, December 2014, 9, <https://www.amnesty.org.uk> (accessed 21 May 2018).

²⁷⁷ HRW, *These are the Crimes we are Fleeing: Justice for Syria in Swedish and German Courts*, October 2017, 33-35.

²⁷⁸ Frankfurt Higher Regional Court, *Prosecutor v. Aria L.*, 12 July 2016, nr. 5-3StE2/16-4-1/16; German Code of Crimes Against International Law, section 8; HRW, *“These are the Crimes we are Fleeing”*, 2017 (note 277), 33-35.

²⁷⁹ U.S. Act To amend title 18, United States Code, to carry out the international obligations of the United States under the Geneva Conventions to provide criminal penalties for certain war crimes of 21 August 1996.

²⁸⁰ B. Van Schaack, 2018 (note 216), 20; 18 U.S.C §2441 (2006)

²⁸¹ She is the wife of Abu Sayyaf, a quite highly ranked ISIS leader that was killed in a raid.

there is an extradition needed from the Kurdish authorities. She is in Kurdish custody, as she was convicted for terrorism already.²⁸²

This case illustrates why third countries can stand for complementary jurisdiction or some sort of insurance for flawed justice. When the Kurdish authorities fail to prosecute Mrs. Bahar for the enslavement of women, terrorism or any kind of war crime, then the U.S. can step in and urge for an extradition, so they can prosecute her and avoid impunity.²⁸³

c) Universal jurisdiction

The encouragement towards third country investigations in the resolutions of the Security Council and General Assembly can be interpreted as a subtle endorsement to an expansive interpretation of the principle to prosecute on the basis of universal jurisdiction.²⁸⁴ According to this principle, some crimes are so horrendous and despicable that a link between the country and the crime is not needed for triggering the jurisdiction of the court. This means that any court in the world – if the criminal proceedings can be initiated on the basis of universal jurisdiction - could prosecute the perpetrator, regardless of the *locus delicti* or the nationalities of perpetrator and victim.

Germany opened a broad and generic investigation to examine the abuses committed by ISIS, with a particular focus on the Yazidi victims and without having specific suspects. They started preliminarily in 2014 and by 2017 there were 27 investigations running against individual suspects.²⁸⁵

d) Noble goal, hidden motives

While the idea of complementary jurisdiction in third countries to avoid impunity for severe violations of international sounds like a noble pursue, the reality tells something different. In the HRW report, it is mentioned that the Syrian population too is not pleased with the fact that the world is almost exclusively concentrating on the crimes that were committed by terrorist groups like ISIS and thus seem to forget or not prioritise the atrocities of the Assad regime.²⁸⁶ In the analysis of case law by HRW, it was noted that only one of the cases involved a suspect of the Syrian army.²⁸⁷

Further, the aforementioned cases illustrate that there might be other objectives pursued primarily. For example in Germany it is interesting to see that the persons who were convicted so far, were most of the time lowly

²⁸² B. Van Schaack, 2018 (note 216), 20.

²⁸³ B. Van Schaack, 2018 (note 216), 20.

²⁸⁴ *Cfr.*: ECtHR, *Nait-Liman v. Switzerland*, 15 March 2018, <http://hudoc.echr.coe.int/eng?i=001-181789> (accessed on 6 July 2018).

²⁸⁵ HRW, *These are the Crimes we are Fleeing*, 2017 (note 277); HRW, *Flawed Justice*, 2017 (note 199), 66.

²⁸⁶ HRW, *These are the Crimes we are Fleeing*, 2017 (note 277), 36.

²⁸⁷ HRW, *These are the Crimes we are Fleeing*, 2017 (note 277), 36.

ranked members of a terrorist group and in almost all the cases on the basis of a counter-terrorism law.²⁸⁸ As far as this research went, there are no records on any Yazidi woman or girl that has testified against a suspect of sexual violence for example. HRW raises the concern that it “could send the message that the authorities’ only focus is to combat domestic threats.”²⁸⁹ In defence of this critic, practitioners have stated that it is also a matter of evidence gathering. It is easier for prosecutors in a third country to prove that someone is linked, affiliated and a member of a terrorist group, than collecting evidence for an international crime.²⁹⁰ This is because of the *mens rea*, the subjective element of crimes against humanity for example. Collecting evidence is hard in such a position and costs a lot of resources, so charging a person on the basis of being member of a terrorist group will be enough to get them off the streets, in custody and in front of a judge.

If the real philosophy of universal jurisdiction and the objective of personal jurisdiction is avoiding impunity for the most serious crimes, then the cooperation between investigative bodies like the IIM and the IIT should be strengthened. Collecting, processing and sharing evidence and information on suspects will make it easier to determine the specific crimes that ISIS members committed. Nonetheless, by limiting the possibility of using information that was collected under their mandate for prosecutions in third countries, justice will not be equally delivered to the victims.

3.2.2 Restorative justice

Retributive justice and punishment of the responsible for the atrocities proves not to be enough in order to ensure a successful transitional justice system. To heal from national and collective trauma, restorative justice might be even more effective than punishment.²⁹¹ Redress for the victims and restoration of relationships within and among communities is crucial for the deliverance of justice and for the sustainability of peace in the country.²⁹² Nevertheless, too little effort is made in this regard. And this is the exact critic that was pointed out in the beginning of this chapter 3, that an equal amount of attention should be given to retributive and restorative justice in order to have a successful holistic approach.

Because of the challenges in the retributive pillar, there is no or too little prosecution on the basis of international criminal and humanitarian law. Perpetrators are convicted on the basis of counter-terrorism laws, because that is sometimes easier to prove. However, this leaves little room for victim participation in the criminal proceedings.

²⁸⁸ HRW, *Syria: First Atrocities Trials Held in Europe: Sweden, Germany Take Lead on Justice for Syrians*, 3 October 2017, <https://www.hrw.org/news/2017/10/03/syria-first-atrocities-trials-held-europe> (accessed 29 June 2018).

²⁸⁹ HRW, *Syria: First Atrocities Trials Held in Europe*, 2017 (note 288).

²⁹⁰ HRW, *These are the Crimes we are Fleeing*, 2017 (note 277), 39.

²⁹¹ C. Lak and T. Khoun, 2012 (note 203), 18-19; V. Doung and S. Ear, 2009, “Transitional Justice Dilemma: The case of Cambodia”, *Peace & Conflict Review*, vol. 4, no. 1, 2009, 5.

²⁹² HRC, Report of the Special Rapporteur Pablo de Greiff, 2015 (note 185).

Although it is often a stressful experience,²⁹³ survivors of sexual violence can also feel empowered by testifying during criminal trials of the perpetrator.²⁹⁴ It can help them in their personal reconciliation process and can contribute to the truth-seeking initiatives. By testifying in front of a court, in accordance with the principles of international law, their suffering can be archived and their stories will contribute to the collective memory of history.

3.3 Extra-judicial tools

3.3.1 Reconciliation

In order to deal with the traumas of a national, violent conflict, it is important to equally invest in reconciling the parties than in ensuring justice. These two tools are interdependent and indivisible. Retributive justice through criminal prosecution might help victims to reconcile because they no longer have the need to take revenge or continue the conflict. But that prosecution needs to happen in a fair and adequate way, otherwise the convicted will feel unfairly treated and will never be able to reconcile with that past. Criminal justice should attempt to redress the victims and recognise their needs and rights as victims in order to deliver a restorative form of justice, which again will benefit the reconciliation process.

Reconciliation is a broad and frequently used concept and it is therefore crucial to define it a bit more *in concreto* in order to understand what the Yazidis needs to reconcile with other communities in Iraq. In defining what national reconciliation means in Iraq new concepts arise including “civil peace and harmony, national unity, social integration and several other synonymous terminologies that imply the principles of forgiveness, amnesty and justice.”²⁹⁵ But maybe these terms do not really elucidates the meaning of reconciliation. This description might express the core idea of reconciliation: the acceptance and desire to co-exist, cooperate and integrate as a society.²⁹⁶ The main question regarding reconciliation and restoration in this research is thus, whether it is possible and desirable for the Yazidi community to go back to their villages in northern Iraq and live in peace with their Muslim, Kurdish, Christian, Turkmen, Kakai neighbours. And if so, how can they move towards a safe, inclusive society without sectarianism?

The reconciliation process in Iraq started in theory after the liberation of Mosul. This was a step forward in re-establishing the effective control of the Iraqi government on the territory and the opportunity for many internal

²⁹³ N. Henry, “The Impossibility of Bearing Witness: Wartime Rape and the Promise of Justice”, *Violence Against Women*, 2010, Vol.16(10), 1098-1119.

²⁹⁴ J.Koomen, “Without These Women, the Tribunal Cannot Do Anything”: The Politics of Witness Testimony on Sexual Violence at the International Criminal Tribunal for Rwanda,’ *Signs, Journal of Women in Culture and Society*, 38:2, 2013, 253-277.

²⁹⁵ A.S. Baghdadi, “National Reconciliation: An Analytical Approach from a Sociopolitical Perspective”, in X., *National Reconciliation in Iraq: Reality & Horizon*, published in *al-Sabah*, vol. 1437, 26 August 2008, available at: http://www.socialwatch.org/sites/default/files/National_Reconciliation_Iraq.pdf (accessed 29 June 2018).

²⁹⁶ A.S. Baghdadi, 2008 (note 295).

displaced persons to go back to their homes.²⁹⁷ In practice however, many Yazidis are still living in refugee camps in and outside Iraq or in host families or in abandoned and unfinished buildings in the Kurdish region of Iraq.²⁹⁸ When families were able to return to their villages, there are many tensions with neighbouring tribes and issues of mistrust to overcome. Above all, the Yazidi community does not only have to deal with reconciliation with the other communities in Iraq, but also internally trying to overcome differences and conflicts that might threaten their recovery of these traumatic events.²⁹⁹

Before the Yazidi victims of ISIS can start reconciling with other communities, their basic needs have to be accommodated first. In the socio-psychological theory of Maslow there is a hierarchy in human needs.³⁰⁰ Reconciliation and the need to belong to a community and the wish of that community co-existing with other communities only come after the basic human needs are fulfilled. These basic needs start with mere physiological needs like food, water and sleep, followed up by safety and security.³⁰¹ Only when these needs are being properly accommodated, there will be room for real reconciliation efforts to attempt to overcome the sectarian tensions that have lasted among Iraqis for generations.

The first two achievements in terms of reconciliation would be tolerance among the different communities and simultaneously reintegration of victims within the community. For the first aim, it could be stated that Yazidism is a tolerant religion, but that the community's patience and tolerance has been severely under distress lately. The second objective poses real challenges for the female survivors of sexual enslavement and for the boys that were abducted and brainwashed in the "Koran schools". Again, only when tolerance and re-integration can be achieved, the full potential of reconciliation can be reached by investing in empowering civil society, rebuilding genuine social and political trust and to top it all: forgiving the wrongdoings in the past and sharing a vision on the future of Iraq.

²⁹⁷ UN Iraq, Women's Participation in Iraq's National Reconciliation Process Paramount, 21 July 2017, <http://www.uniraq.org/> (accessed 29 June 2018).

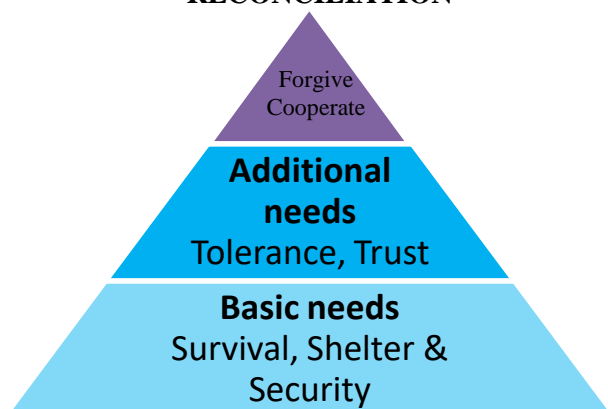
²⁹⁸ Rescue UK, *The forgotten humanitarian crisis in Iraq*, 16 April 2015, <https://www.rescue-uk.org/article/photos-forgotten-humanitarian-crisis-iraq> (accessed 30 June 2018); MRGI, *Between the Millstones*, 2015 (note 74); MRGI, *No Way Home*, 2016 (note 20).

²⁹⁹ MERI report, 2017 (note 36), 4.

³⁰⁰ See e.g.: M. Hagerty, "Testing Maslow's Hierarchy of Needs: National Quality-of-life Across Time", *Social Indicators Research*, vol. 46, 1999, 249; J. Davies, "Maslow and theory of political development: Getting to fundamentals", *Political Psychology*, vol. 12(3), 1991, 389-420; M. Klicperova and J. Kostal, "Frustration and satisfaction in a post-communist democracy: Empirical assessment and interpretation in terms of Maslow's hierarchy of needs", *International Journal of Psychology*, vol. 51(1), July 2016, 922.

³⁰¹ M. Hagerty, 1999 (note 300), 249.

RECONCILIATION



A) BASIC NEEDS: SURVIVAL, SHELTER AND SECURITY

a) Refugee camps

All ethnic and religious minorities of Iraq were affected by the violence of armed groups in Iraq and were often forced to flee their homes. A disproportionate high number of those minorities are therefore refugees that left Iraq or chose to stay in their country but are now internally displaced persons.³⁰² Many Yazidis from the Sinjar region fled to the Kurdish region in northern Iraq for shelter and safety. Around the Kurdish city Duhok specifically, the refugee camps consist almost exclusively out of displaced persons from the Ninewa governorate. First they sheltered many Christians who had fled the region, after the attack on Sinjar in August 2014, a stream of Yazidis made the refugee camp expand even more. Bersive 1 and 2 in Duhok are now considered to be the largest camps for displaced Yazidis.³⁰³ These UNHCR established refugee camps are an immediate form of security for many affected minorities, but are far from ideal environments for highly traumatised victims that all need very specific needs.³⁰⁴ Although a lot of efforts from local and international NGOs has proven to be very helpful and effectively supporting many, there is still so much more needed for the victims of violence of ISIS, especially the Yazidis of Sinjar.³⁰⁵

Women who were in ISIS captivity and became victim of aggressive forms of sexual violence and torture, are often in desperate need of PTSD treatment, medical care and psychological therapy.³⁰⁶ Sexual and gender-based

³⁰² UNHCR, *CCCM Cluster Iraq*, http://data2.unhcr.org/en/situations/iraq_cccm (accessed 29 June 2018); MRG report, 2016, 20.

³⁰³ UNHCR, *Mosul Emergency Response Since October 2016*, 19 March 2017, <http://reporting.unhcr.org/sites/> (accessed 30 June 2018).

³⁰⁴ *Id est* e.g.: Persons with disabilities, Yazidi women pregnant by ISIS combatant, boys with PTSD after ISIS training camps, etc. Interview with Elie Zartarian, UNHCR Duhok, Iraq, July 2018.

³⁰⁵ See e.g.: EMMA Organisation, <http://emmaorg.me/>; Ezidi Relief Fund, <https://www.ezidirelieffund.org/>; Yazda, <http://www.yazda.org/>; Nadia's Initiative, <https://nadiasinitiative.org/> (accessed on 5 July 2018).

³⁰⁶ I. Gerdau, J. Ilhan Kizalhan and M. Noll-Hussong, "Posttraumatic Stress Disorder and Related Disorders among Female Yazidi Refugees following Islamic State of Iraq and Syria Attacks—A Case Series and Mini-Review", *Front. Psychiatry*, 13 December 2017, <https://doi.org/10.3389/fpsy.2017.00282>; L. Whyte, "The world forgot us": inside the scheme to

violence not only has a profound impact on survivors but it can also breakup families and hinder efforts to achieve durable peace.³⁰⁷ Near-total absence of accountability for such violations perpetuates the cycle of violence, manifesting in shame and entrenching grievances within affected communities.³⁰⁸ If any political and reconciliation efforts are to succeed, survivors must obtain justice and reparation, and be provided with adequate psychosocial support and rehabilitation.³⁰⁹

Men that survived the mass killings also need good medical care for the physical injuries and mutilations, but also psychological care and support to deal with the trauma and grievance.³¹⁰ Children need adapted psychological therapy and qualitative education. Especially in the long-term reconciliation process, education will be key to overcome inter-community tensions. In addition thereto, the young Yazidi boys who were abducted and sent to the so called “Koran schools”, often need some kind of rehabilitation program to deradicalise them.³¹¹ Boys from 5 until 12 years old have often been exposed to mass violence during an intense ISIS training program that taught them to be terrorist fighters and denounce their Yazidi religion, culture, community and identity. If there will be no rehabilitation program or decent psychological counselling for these boys, they allegedly pose an imminent threat to their own communities.³¹²

Apart from these critics, it must be highlighted that the Iraqi government has established a Supreme Committee for Displaced Person, following the Resolution 328, in July 2014.³¹³ This Committee has established operational centres in KRI and Kirkuk with the governments funding of 1 trillion IQD.³¹⁴ Together with the KRG, they joined forces in 2015, to try to contain the humanitarian catastrophe of 3,3 million internally displaced persons.³¹⁵ In 2016 the national Plan for Relief got allocated another 800 billion IQD.³¹⁶ However, there is still a deficit in the budget to accommodate the needs of all these internally displaced persons.

rehabilitate Yazidi sex slaves who have escaped Isis, 26 January 2016, <https://www.newstatesman.com/> (accessed 30 June 2018).

³⁰⁷ N. Henry, 2010 (note 293), 1098-1119.

³⁰⁸ *Supra*, Section 1.1.3, p.16.

³⁰⁹ UN HRC, “*I lost my dignity*”: *Sexual and gender-based violence in the Syrian Arab Republic*, 8 March 2018, A/HRC/37/CRP.3, <https://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A-HRC-37-CRP-3.pdf> (accessed 4 May 2018).

³¹⁰ Amnesty International, *Ethnic cleansing on a historic scale: Islamic State’s systematic targeting of minorities in Northern Iraq*, September 2014, 8-16, <https://www.es.amnesty.org/> (accessed 5 May 2018).

³¹¹ J. Ilhan Kizilhan and M. Noll-Hussong, “Post-traumatic stress disorder among former Islamic State child soldiers in northern Iraq”, *British Journal of Psychiatry*, vol. 213, July 2018, 425-429, <https://doi.org/10.1192/bjp.2018.88> (accessed 1 July 2018).

³¹² MRGI, *No Way Home*, 2016 (note 20), 14; According to internal statistical data, approximately 300 children of Bersive 1 and 2 have received psychological help from UNHCR in the past 6 months. This is not a bad start, but the needs are much higher than UNHCR can provide (data provided by Elie Zartarian, UNHCR Duhok, Iraq).

³¹³ MRGI, *No Way Home*, 2016 (note 20), 27.

³¹⁴ Iraqi Dinars.

³¹⁵ MRGI, *No Way Home*, 2016 (note 20), 27.

³¹⁶ MRGI, *No Way Home*, 2016 (note 20), 28.

b) Return home

Many Yazidis who directly experienced the betrayal of some of their Muslim neighbours, are very reluctant to go back to their hometown.³¹⁷ Even Kurdish Muslims have actively assisted ISIS in identifying for example the marital status of the Yazidi girls of the village.³¹⁸ Many villages were looted too and apart from destroyed, abandoned houses and equally destroyed memories of their lives before ISIS took over Sinjar, they have nothing left to go back too.

Nevertheless, some people do return. Some do not have any other option, some want to go back and start rebuilding their villages and lives. It is argued before that the Yazidi community demands secured semi-autonomous territories for Yazidis only. This could raise the arguments that rely on the remedial secession theory, also often raised in the general conflict between Kurds and Arabs. Nevertheless, this theory is not accepted as international customary law and is highly debatable. So far, nobody has used this theory in their recommendations for compensating the victims of these atrocities, but it might be useful to make the links with the doctrine to conclude that an autonomous, exclusive territory for Yazidis might not be a feasible and desirable solution to ensure reconciliation.³¹⁹

The theory is about a people that was denied the right to internal self-determination within the country, accompanied with oppression and gross violations of their fundamental human rights, should have the right to external self-determination as a compensation.³²⁰ Many difficult questions arise when applying this theory, because of the lack of consensus on the doctrine and definitions of for example “a people”. The fact that ISIS committed the gross human rights violations also hinders the application of the doctrine. Even if it could be stated that Iraq oppressed the Yazidi community and denied their internal right to self-determination, it was the Kurdish government that withdrew their forces in Sinjar and there is no way that the commitment of the crimes can directly be attributed to the state authorities. For these reasons, this thesis will not look into this application of the doctrine any further. Instead, it will be argued that institutional reform is needed and that the Iraqi legislation should implement effective protection mechanisms for minorities all over the country, making sure that minorities are represented in the decision-making process.

³¹⁷ Population Ninewa governorate: majority Sunni Muslim, then Kurdish Muslim, then Assyrians, Turkmen, Yazidis, Shabak and Kaka'i or Baha'i. as cited in MRGI, *No Way Home*, 2016 (note 20), footnote 107.

³¹⁸ See Shirin, A. Cavellius and J. Kizilhan, *Ich bleibe eine Tochter des Lichts*, Berlin, Europa Verlag, 2016, 136: “What do you have to look for at home, when your brothers (Kurdish Muslims) want you dead?”

³¹⁹ Remedial secession and especially the Kurdish strive for independence is a distinct theory that is not thoroughly examined in relation to this research question. Nevertheless, further research is recommended.

³²⁰ I. Vezbergaitė, *Remedial Secession as an Exercise of the Right to Self-Determination of Peoples*, Central European University, Budapest, 2011; J. Vidmar, “Remedial Secession in International Law: Theory and (Lack of) Practice”, *St. Antony's International Review*, vol. 6 (1), 2010, 37-56.

B) ADDITIONAL NEEDS: TOLERANCE AND TRUST

With a history of sectarian attacks and sectarian governments that have been ruling the country for decades, it is necessary for the country that there is finally room for forgiveness and the possibility to work on a joint future perspective.³²¹ After the elections on 12 May 2018 and the quite surprisingly result of the coalition between the Shiite and Communist bloc, there is hope that this government will rule with a more civil based approach, rather than a sectarian.³²²

While tolerance and re-integration both require immediate and long-term action to ensure the healing process, it takes a lot more long-term efforts to ensure trust and forgiveness. Only if appropriate measures are taken to ensure that victims and communities can heal from physical and psychological wounds and that the country can deal with individual and collective grief, there will be the right context to start rebuilding trust among and within communities. And only if those two capacities are being enabled, there will be the possibility of forgiveness.

a) Inter-community challenge: intolerance and mistrust

The direct victims of the attacks in Sinjar are either killed or abducted, with the majority of women and girls becoming victims of sexual violence and the boys becoming victims of forced enlisting as child soldiers. All of these victims were systematically forced to convert to Islam. Recapitulating to the first chapter of this dissertation, the Yazidis have become the victims of such atrocities as a result of a process of dehumanisation by Islamic extremists.³²³ In ISIS' ideology, Yazidism is a religion for devil worshippers and the Yazidis are seen as infidels. This dehumanisation risks to be reversed by Yazidis as a result of the great suffering their community has faced under the ISIS regime. It would be wrong to make such a generalised statement, but certain arguments both ways can be mentioned to illustrate that forgiveness is an issue in the reconciliation process.

First of all, there were reports of Yazidi armed groups who attacked Sunni villages in Sinjar to take revenge of the grave crimes they became a victim of in August 2014.³²⁴ Amnesty International has made reports and collected data on these crimes and reminded that “rounding up villagers and forcing them to endure public

³²¹ MERI report, 2017 (note 36).

³²² R. Jalabi and M. Georgy, “Cleric Moqtada al-Sadr's bloc wins Iraq election”, *Reuters*, 19 May 2018; I. Al-Marashi, “Iraq elections: The curious case of the Communist-Sadrism alliance”, *Middle East Eye*, 21 February 2018; T. Barnes, “Iraq election: Coalition led by nationalist cleric takes shock lead as vote count continues”, *The Independent*, 14 May 2018.

³²³ *Supra* Section 1.3, p20.

³²⁴ Amnesty International, *Briefing on Iraq: Revenge attacks in Sinjar – Arab civilians pay the price for IS crimes*, 10 June 2015 <http://www.refworld.org/docid/56b44a704.html> (accessed 27 May 2018); Amnesty International, *A deadly spiral of sectarian violence - a year on from IS onslaught on Iraq*, 10 June 2015, <https://www.amnesty.org/en/latest/news/2015/06/a-deadly-spiral-of-sectarian-violence-a-year-on-from-is-onslaught-on-iraq/> (accessed 28 June 2018).

humiliation or other violations, including torture, is no way of securing justice, truth and reparation for victims of IS crimes”.³²⁵

Secondly and contrarily, there are many voices from inside the Yazidi community, including their leaders, that strongly disapprove this kind of revenge actions.³²⁶ They advocate for bringing the terrorist fighters will be brought to justice for the crimes they have committed against their people and emphasise that Yazidism is a peaceful and tolerant religion that leaves other people the freedom of following their own religion and believes. Nevertheless, even those advocates for justice and reconciliation express their concerns of not being able to forgive.³²⁷ Although their rescuers from ISIS captivity were Sunni or Kurdish Muslims, the mistrust in and anxiety of Muslims is very serious. They associate Arabs with the Sunni Muslims that were part of or affiliated to ISIS and the Kurds with the withdrawal of Peshmerga forces in the wake of the genocide. In a country like Iraq, where the division between Kurds and Arabs and Sunni and Shiites has led to so many bloodsheds, is there anybody that the Yazidi can trust?

b) Intra-community challenge: stigma and re-integration

On top of the struggle to reconcile with others who are external to their community, there is an inherent threat that might cause slow extinction of this minority in Iraq. This internal distortion and disruption of the Yazidi community was the exact aim of ISIS when dividing the families in the different categories, as indicated before.³²⁸ By using sexual violence and forced marriage as a weapon of war, they knew that the Yazidi girls and women would not be able to return to their communities, as it is forbidden to marry to a man that is not Yazidi.³²⁹

Many girls and women have therefore committed suicide during their captivity. Losing their virginity is losing their honour as a Yazidi and therefore losing their sense of belonging to their community. In order to not bring shame to their families' reputation they took their own lives.³³⁰ Luckily the Yazidi religious leader Baba Sheijk announced that any girl that has been raped or assaulted by ISIS combatants while they were in captivity, should

³²⁵ L. Maalouf, Deputy Director for Research at Amnesty International's regional office in Beirut. See: Amnesty International Ltd., *Iraq: Tribal militia tortured detainees in revenge attacks during Mosul offensive*, 2 November 2016, <https://www.amnesty.org/en/latest/news/2016/11/iraq-tribal-militia-tortured-detainees-in-revenge-attacks-during-mosul-offensive/> (accessed 7 May 2018).

³²⁶ Amnesty International, *Briefing on Iraq*, 2015 (note 324).

³²⁷ Interview with Behar Ali, EMMA Organisation.

³²⁸ *Supra*, Section 2.2.3, p30-31.

³²⁹ *Supra*, Section 1.3.2 (A)(c), p22-23 ; A. Della Subin, “When Rape Becomes a Weapon of War”, *NYT*, 18 January 2018.

³³⁰ HRC, “*I lost my dignity*”: *Sexual and gender-based violence in the Syrian Arab Republic*, 8 March 2018, A/HRC/37/CRP.3 , <https://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A-HRC-37-CRP-3.pdf> (accessed 4 May 2018); A. Della Subin, 2018 (note 329).

not be excluded from the Yazidi community.³³¹ This has been a great relief for many girls and women and is an important change of tradition decided by the religious leadership.

But survivors of sexual violence still face a lot of stigma. This results in girls not speaking about the abuse and therefore they are not able to get the right medical and psychological care. Other women do speak out about the abuse and are subsequently abandoned by their husbands or families.

Another serious problem regarding the sexual violence against Yazidi women is the future of children born out of an ISIS rapist and a Yazidi victim. Many women aborted their child or gave it up for adoption right after giving birth. Within the community, these children are being seen as one of the ISIS affiliates and their status within the community is highly problematic.

Yazidism as a religion and its traditions can both prevent the victims from healing and the families from reuniting, as it can empower the community and strengthen the individual and collective identity to be Yazidi. The exact same thing applies for the issue of trust in other communities. The past events dissociate them with both Muslim Arabs and Kurds, which could result in an irreparable mistrust and a reluctance to return to their homes or in a pretext for the recognition of their distinct ethnic and religious minority status in Iraq. The latter option should be translated in the Iraqi legislation in order to effectively contribute to the reconciliation process and make the first small steps in the direction of building trust and creating space for forgiveness.

In addition, it needs to be emphasised again that a holistic approach is desperately needed in the reconciliation pyramid. Therefore, a holistic national dialogue needs to be held in order to indicate all the needs of all the victims. *Id est*, not only the Yazidis have faced sufferance and hardship, but all the communities in Iraq were affected by ISIS or sectarianism in the past. Since 2015, there has been an annual Conference for Peace and Coexistence and it is organised in Lalish. It is a positive initiative to try to overcome the challenges as were set out above. It has participants from the local activists and to international law experts, that all come together to discuss the focal points of the reconciliation process in relation to criminal prosecution and institutional reform.³³²

³³¹ E. Graham-Harrison, “‘I was sold seven times’: the Yazidi women welcomed back into the faith”, *The Guardian*, 1 July 2017.

³³² See: EMMA Organisation, 3rd Lalish Conference for Peace and Coexistence, <http://emmaorg.me/lalish-confrance/3rd-lalish-conference-for-peace-and-coexistence/> (accessed 8 July 2018).

3.3.2 Reform of institutions and legislation

In terms of transitional justice, it is important to work towards reconciliation and towards a future where such atrocities can be avoided. All parties should be convinced of the idea that this can never happen again.³³³ Apart from the issues of mistrust, there has been several concerns regarding the reconciliation process in Iraq being undermined by political and legal obstacles: “Since the start of the national reconciliation process, Iraq adopted an approach aimed at harmony, unity and prevention of ethnic and sectarian divisions. Nevertheless, the inclination to reconciliation does not depend solely on one party but on the real will of all parties. The first element missing in the Iraqi national reconciliation experience is trust, followed by not wanting to give up the social and official positions for some parties involved in the reconciliation process.”³³⁴

An institutional reform in the wake of the reconciliation process is primordial for success. It can also be argued that the legal reform is necessary to ensure a successful criminal justice system, by changing the legislation on death penalty for example.³³⁵ However, transitional justice mechanisms have been criticised already in the context of Iraq’s past that they are “treating symptoms rather than the causes of conflict,” focussing too much on liberal paradigms that are not so easily transferred onto a situation like Iraq.³³⁶ In such fragile state context, it is important to not prioritise civil and political rights like institutional reform on elections and minority representation above socio-economic and cultural rights.³³⁷ Welfare, the right to development and education may not be excluded or trespassed in the objectives of applying one of the four transitional justice tools. Therefore, local entities should be involved in the implementation of each tool in order to avoid the criticism of domination “by an elite international professional and donor network, rather than locally rooted movements”.³³⁸

Transitional justice should not only cure the society of the post-conflict symptoms, but should also address the causes of the conflict.³³⁹ Therefore, considerate institutional reforms and legislative reforms should be implemented in order to ensure security, non-recurrence, fair and equal justice and a strengthened application of the rule of law.³⁴⁰

³³³ HRC, Report of the Special Rapporteur Pablo de Greiff, 2015 (note 185).

³³⁴ Al-Bayan Center for Planning and Studies, *National Reconciliation in Iraq: A Comparative Study*, Baghdad, Al-Bayan Center Publications Series, 2016, <http://www.bayancenter.org/> (accessed 14 June 2018).

³³⁵ *Supra* Section 3.2.1 (A), p45.

³³⁶ P. Gready and S. Robins, 2014 (note 187), 340.

³³⁷ UN Secretary-General, *Guidance note of the Secretary-General on United Nations Approach to Transitional Justice*, March 2010 (note 195); P. Gready and S. Robins, 2014 (note 187), 340-342.

³³⁸ P. Gready and S. Robins, 2014 (note 187), 342.

³³⁹ P. Gready and S. Robins, 2014 (note 187), 340.

³⁴⁰ EEAS, The EU’s Policy Framework on support to transitional justice (note 197).

A) INSTITUTIONAL REFORMS

In reforming institutions in a fragile state like Iraq, it is important to be cautious with the following aspects. First of all, participation of all stake-holders in the reform initiatives are crucial to maintain peace in the country.³⁴¹ Institutional reform is often discussed on the national level, but local entities and the representation of women and all minorities are in this context indispensable, which will be further elaborated on. Secondly, the federal structure of Iraq is under severe pressure with the Kurdish conquest for more decentralisation of powers from Baghdad to the Kurdish region.³⁴² Thirdly, building or reforming institutions is not meaningful if the effective functioning of the institutions are flawed by corruption.³⁴³

B) LEGISLATIVE REFORMS

In reforming legislation, it is important to recapitulate that the legal protections are often present on paper, but that they need proper implementation.³⁴⁴ However, *in concreto* for the Yazidi minority, there are some changes in the legislation needed, regarding minority rights and women's rights. Again, the neo-liberal paradigms often tend to focus on strengthening the civil and political rights, but in this context it is better to pay more attention to the social, economic and cultural rights.³⁴⁵ The roots of conflicts are often to be found in "inequality, poverty, exclusion and marginalization, as well as a broader absence or weakening of social cohesion in a society."³⁴⁶

a) Minority rights

Even before the ISIS depredations, the Yazidi community has been facing many difficulties in Iraq as a ethno-religious minority that lived in the disputed Arabic-Kurdish territory of Ninewa governorate.³⁴⁷ Among many other minorities, they were disproportionately affected by the violence of ISIS troops. From at least two perspectives, the legislation of Iraq should be changed in order to ensure protection in the future.

The Iraqi federal government and the KRG in a post-ISIS era should acknowledge and ensure minority representation. In the past, Yazidis have always relied on the political representation by the Kurds. Although some Yazidis will still consider themselves to be ethnically Kurdish, there are many victims that have lost their

³⁴¹ P. Gready and S. Robins, 2014 (note 187), 345.

³⁴² "Yet a federation involves shared rule as well as self-rule, and how Iraq's different communities and regions share power within institutions at the federal level will determine, arguably, whether loyalty to the federation can be developed and if the state will survive intact." See J. McGarry and B. O'Leary, 2007 (note 48), 689.

³⁴³ P. Gready and S. Robins, 2014 (note 187), 345.

³⁴⁴ *Supra*, Section 1.1.2 (C), p14-15 and Section 1.2.2, p18-19

³⁴⁵ P. Gready and S. Robins, 2014 (note 187), 345.

³⁴⁶ P. Gready and S. Robins, 2014 (note 187), 346; D. Smith, *Trends and Causes of Armed Conflict*, Berlin, Berghof Research Centre for Constructive Conflict Management, 2004; R. Kanbur, *Poverty and Conflict: The Inequality Link*, New York, International Peace Academy, 2007; D. McCoy, "Rectifying Horizontal Inequalities: Lessons from African Conflict," *African Journal on Conflict Resolution*, vol. 8(1), 2008, 105-134.

³⁴⁷ MRGI, *Between the Millstones*, 2015 (note 74), 4.

trust in Kurdish authorities that take their interest and safety into account.³⁴⁸ As the Iraqi Supreme court has decided in one of its judgements, even before the events of 2014, the Yazidis should have 6 reserved seats in the federal parliament instead of one. This illustrates, as explained before, that regarding the minority rights the legislation is not that bad. It is often the implementation of these protections that are lacking.³⁴⁹

b) Women's rights

Women particularly have been suffering from gender-based violence by ISIS, but the Iraqi legislation is not very protective in terms of women's rights. Of all the victims of a conflict, women and children of minority communities are the most vulnerable, because of that double discriminatory status. They risk exploitation, violence and discrimination because of their status as an ethnic and/or religious minority community member, as well as their status as female and/or a child.³⁵⁰

In general, issues of forced marriage, child marriage, honorary killings, domestic violence, human trafficking and gender based discrimination have been under-addressed by the Iraqi Parliament.³⁵¹ Discriminatory laws are still in place. The constitution of 2005 installed a quota system for female representatives in the parliament. However, in reality the number of female members of parliament has dropped instead of increased.³⁵² Especially in villages where the male population was instantly killed and boys were enlisted as terrorist fighters, the female inhabitants outnumbered their male peers. Sadly, this would be an argument to improve women's political representation. This could be done by a quota system on paper, but it would be more effective if the issue is addressed as a whole, involving the improvement of socio-economic rights like education for girls. It would empower the women with knowledge and skills, instead of continue to treat them as victims without giving them any opportunity to improve their situation or that of the next generation.

A more specific and urgent challenge is that of unwanted pregnancies, which is most of the case if a Yazidi woman became pregnant due to rape by ISIS fighters.³⁵³ Abortion is illegal in Iraq and in the KRI, which forces women and girls to get illegal abortions in often hideous circumstances.³⁵⁴ According to Islamic law, a child that has a Muslim father, is considered to be Muslim too. And Yazidi women who become pregnant with a Muslim

³⁴⁸ *Supra*, Section 1.3.2 (B), p24.

³⁴⁹ *Supra*, Section 1.2.2, p18-19.

³⁵⁰ MRGI, *No Way Home*, 2016 (note 20), 12.

³⁵¹ Interview with Zinah Mohammed, Oxfam Iraq and Behar Ali, EMMA Organisation.

³⁵² From 6 women in 2003, to 1 woman in 2010 (data provided by Elie Zartarian, UNHCR Duhok, Iraq).

³⁵³ Interview with Behar Ali, EMMA Organisation; After the Gulf War in 1990, the Muftis (religious legal scholars that interpret the Fatwas or rules of Islamic law) also did not accept the legalization of abortion on demand of Kuweiti women who were raped by Iraqi soldiers, see L. Hessini, "Abortion & Islam: Policies and Practice in the Middle East and North Africa", *Reproductive Health Matters*, vol. 15 (29), 2007, 77.

³⁵⁴ Only under exceptional circumstances when the life of the woman is at risk, an abortion is legalized. Rape or incest are not accepted as such an exceptional circumstance, see G. Shapiro, "Abortion law in Muslim-majority countries: an overview of the Islamic discourse with policy implications", *Health Policy and Planning*, vol. 29, 2014, 490.

man, loses her membership of the Yazidi community too, according to their old traditions.³⁵⁵ The religious leaders might have made a great effort by welcoming the abducted girls back in the Yazidi community, the stigma is enormous.³⁵⁶ If the woman could not get an abortion somehow, she often leaves it behind in the family of her captors when she escapes or gives it up for adoption. What also happens sporadically is that they lie about the father being an ISIS member. This indicates that changing the legislation on abortion might be a step forward in helping these women getting better health care and the liberty to choose whether they want to keep the baby or not. However, without the effort to remove the intra-community stigma and ensure re-integration of these women and their potential newborn baby, such legislative reform will not have its full potential value.

3.3.3 Remembering the truth

Establishing the truth and remembering the past as a collective history is a real underrated transitional justice tool. Of course, a conflict is always caused by tensions and there is no magical trick to make those disappear. Nevertheless, in the best case they can be mutually acknowledged, recognised and accepted by all parties of the conflict.³⁵⁷ On the one hand, uncovering the truth - often but not necessarily at the expenses of granting amnesty to the perpetrators - can foster the reconciliation process in some contexts.³⁵⁸ Therefore, it happened in the past that truth commissions were established for that purpose.³⁵⁹ On the other hand, remembering the atrocities and learn from the past will be an important non-recurrence measure for the next generations. Education is therefore the key tool to foster tolerance and maintain sustainable peace.

A) TRUTH SEEKING

“If we say that the past is gone and forgotten, then we embarrass ourselves. The past is still there, and if we hadn’t done what we’ve done in the Truth and Reconciliation Commission, then it can return. Our past is a monster, and we must confront that monster face to face, or it will come back to haunt us.”³⁶⁰

A simple example will follow to illustrate the importance of truth in a transitional justice process and to also consider to install a Truth and Reconciliation Commission in the case of Iraq. There is anyway nearly no family

³⁵⁵ I. Gerdau, J. IlhanKizalhan and M. Noll-Hussong, 2017 (note 306).

³⁵⁶ N. Henry, 2010 (note 307), 1098-1119; I. Gerdau, J. IlhanKizalhan and M. Noll-Hussong, 2017 (note 306), <https://doi.org/10.3389/fpsyg.2017.00282>; Interview with Behar Ali, EMMA Organisation; Interview with Elie Zartarian, UNHCR Duhok.

³⁵⁷ See e.g.: E. Brahm, “Uncovering the Truth: Examining Truth Commission Success and Impact”, *International Studies Perspective*, vol. 8 (1), February 2007, 16-35.

³⁵⁸ C. Stahn, “Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission for East Timor”, *American Journal of International Law*, vol. 95 (4), October 2001, 952-966.

³⁵⁹ C. Stahn, 2001 (note 358), 952-966;

³⁶⁰ Desmond Tutu Archbishop, Head of the Truth and Reconciliation Commission in South Africa, in A.S. Baghdadi, 2008 (note 295).

in Iraq that has not been affected by the decades of conflict in the country, especially in the North where ISIS sowed anxiety and terror among the civilians.

Notwithstanding the tragedies of the history that Iraqis share, the division among civilians is still deeply rooted in all the communities and this is a serious challenge for achieving a sort of collective memory of the atrocities. The creation of a collective memory can be a very effective way of dealing with the past and strengthening the reconciliation process. Whenever grave violations of humanitarian law occur, it would be detrimental for the victims when their suffering would be instrumentalised for the sake of political opportunism.³⁶¹ To avoid that from happening, the proceedings in front of a Truth and Reconciliation Commission could be helpful to respect the healing process of every party in the conflict. Again, the holistic approach is key to the success of the truth-seeking tool.

The establishment of the IIIM and IIIT can be of importance in this regard as they operate as quasi-prosecutors and will gather a lot of evidence on crimes that were committed and relevant facts to the events. However, their mandate is mainly to avoid impunity, which possibly clashes with the mandate of a truth commission.

Another *sui generis* institute or initiative that has been proposed by France last year, is the national dialogue.³⁶² France proposed this in the light of the need for a constructive dialogue between the KRG and the Iraqi federal government, upon a visit of KRG Prime Minister Nechirvan Barzani to France. This would be a positive starting point, although there were no real attempts to organise a national dialogue with all stakeholders. The Lalish Conferences and the Conference in the Hague are valuable initiatives that need to be encouraged, but a true Iraqi National Dialogue between communities, minorities, political and religious representatives, victims and perpetrators, would be such a huge step forward for the whole transitional justice process. It would provide a neutral platform to express particular needs and concerns and in a holistic manner, all stakeholders can try to search for a common ground and move forward from there on.

B) EDUCATION

Education has been mentioned here and there, but is so important that it needs to be emphasised. Quite often is education not the top priority on the list in countries that only recently ended a conflict. It is normal to prioritise the humanitarian relief of the population and make sure they are all provided with food, water, shelter and that

³⁶¹ E.g.: To free the captured Yazidi girls, the last years and months it has been an increasingly profitable business for ISIS militants to sell the girls back to their families for a large amount of money. It has been reported that a family paid 80,000 USD to free 7 of the 45 captive family members. Two businessmen from Erbil and Kirkuk paid 850,000 USD to free 196 Yazidis. The KRG also claims to finance these ransoms. However, Yazidi and federal Iraqi leaders deny these claims of the latter. This is a clear example of how political tensions undermine to shape the collective memory. In this way, many communities will have their own version of the facts and their own stories on heroes versus enemies.

³⁶² Kurdiu, "France calls for national dialogue in Iraq", 2 December 2017, <http://www.kurdiu.org/index.php/en/news/kurdistan/58628> (accessed 5 July 2018).

they are safe.³⁶³ Then, the urgent action needs to be taken to make sure that children receive education, whether they are living in a refugee camp or not, whether they speak Arabic or not. Every child has the right to education, irrespective of its ethno-religious background.³⁶⁴ It is an urgent matter for restoration of the society and inter-community reconciliation and it urges communities to collaborate on the following factors.³⁶⁵

Firstly, a better education will better prevent the child from being recruited by a terrorist group like ISIS. Recently, the UN Committee on the Rights of the Child has given Iraq the recommendation to address child recruiting by terrorist groups and expressed its concern on the nexus between the lack of education and the rate of recruitment. It also expressed its concerns “that measures to address the leading factors in the involvement of children in armed conflict, notably poverty and lack of education and economic opportunities, as well as discrimination towards some ethnic and religious minorities, have proved insufficient.”³⁶⁶

Secondly, when these children are recruited involuntarily at a very young age, they are likely to suffer from PTSD or struggle with concentration and aggression problems.³⁶⁷ This is a very difficult issue to address and some efforts for rehabilitation programs should urgently be made.

Thirdly, Iraq needs to rethink its curriculum and could work on educating the children and students in a tolerant and more pluralistic way. This includes effort to include minority groups in the history books, to install or help install schools for linguistic minorities and adequate emergency education in refugee camps.³⁶⁸

Lawyers, judges, sociologists, psychologists, politicians, prosecutors, investigative mechanisms, fact-finding missions and historians, from all ethno-religious groups, will all need to contribute to seek for truth and to create a collective memory of their common history of suffering. A coordinating commission or institute would be important to ensure the unifying aspect. Together with all the other transitional justice tools, the Iraqi society can start to think forward again. Hopefully it is true that gaining knowledge is the first step to wisdom, and sharing knowledge is the first step to humanity.³⁶⁹

³⁶³ P. Buckland, *Reshaping the Future: Education and Post-Conflict Reconstruction*, Washington DC, World Bank Group, 2005, 114.

³⁶⁴ Articles 28 - 29 Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989.

³⁶⁵ P. Buckland, Post-Conflict Education: Time for a reality check?, *FMR Education Supplement*, 7-8, <http://www.fmreview.org/sites/fmr/files/FMRdownloads/en/education/buckland.pdf> (accessed 11 July 2018).

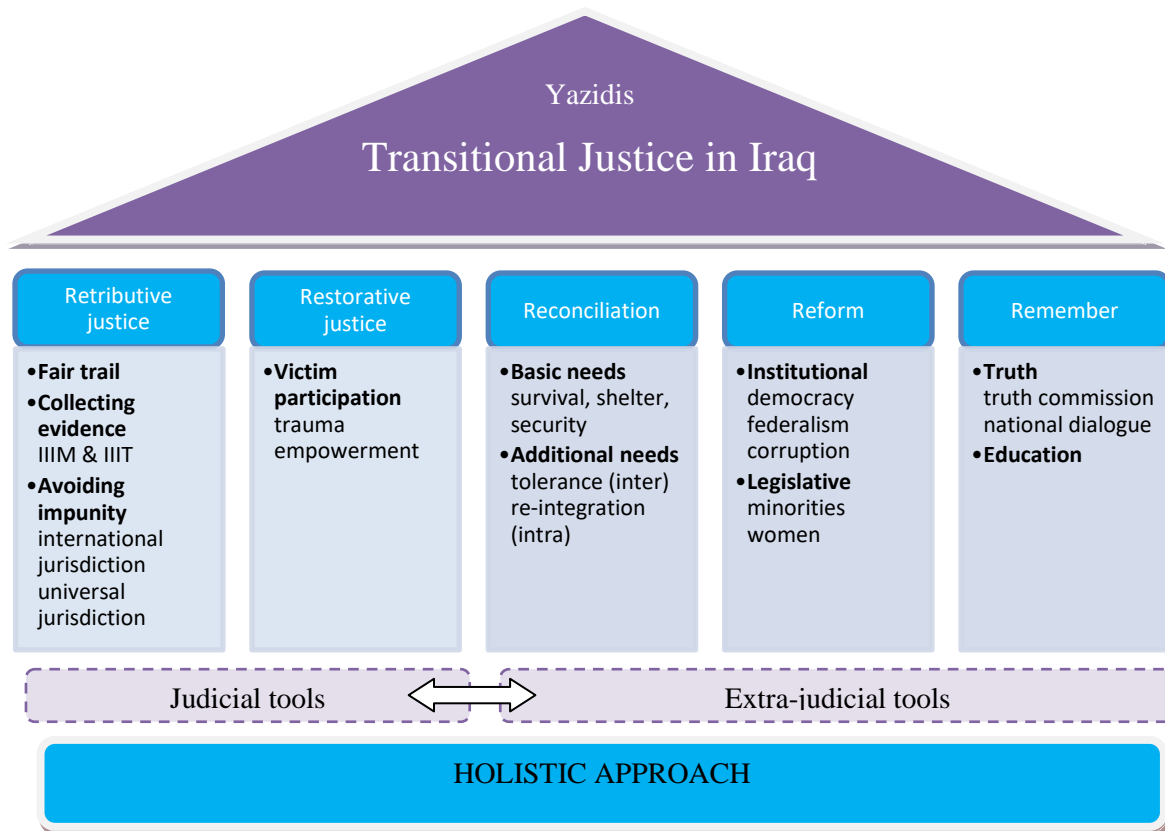
³⁶⁶ UN Committee on the Rights of the Child (CRC), Concluding observations on the report submitted by Iraq under article 8, paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 5 March 2015, CRC/C/OPAC/IRQ/CO/1, §25-26.

³⁶⁷ P. Buckland, 2005 (note 363), 58.

³⁶⁸ See e.g.: C. McGlynn, M. Zembylas, Z. Bekerman and T. Gallagher, *Peace education in conflict and post-conflict societies: Comparative perspective*, New York, Palgrave Macmillan, 2009, 274.

³⁶⁹ One of the favorite motivational quotes of the author.

3.4 Interim conclusion



Recapitulating to the objectives of transitional justice, the whole transitional justice process should look like the following summary of the judicial and extra-judicial efforts that were discussed in detail.

The judicial tools should put an end at the impunity of perpetrators that committed the worst crimes in international law. The rule of law - as one of the fundamental principles of international law – shall be respected and strengthened through the accountability process. But at the same time, it should also enable to compensate the victims or will at least acknowledge and recognise their victim status.

There have been creative effort to try to prosecute ISIS fighters on the basis of international humanitarian law, but the sovereignty argument of Syria and Iraq, seconded by Russia, seems to make it difficult to accomplish this objective. The extraterritorial jurisdiction based on universal jurisdiction is a positive initiative with a lot of potential, but it is limited by the national counter-terrorism policies, the limited resources and the issue of collecting evidence. The creation of the IIIM and the IIIT are therefore initiatives that will be crucial for the success of the criminal prosecution of perpetrators. Another big issue that judicial tools have is that the victims are not acknowledged enough. There is no victim participation and thus, the restorative justice pillar is neglected. Especially for the victims of sexual violence, there is a direct threat that they will be re-victimised while testifying in front of a court. Therefore, when there would be an ad hoc tribunal or national dialogue or truth

commission, there should be given special attention to these women, so that they will not be re-traumatised again.

The extra-judicial tools should try to achieve reconciliation, reform and remembrance. The objectives are that the population will become tolerant towards each other, respecting other communities and start healing their own communities from the suffering they have been facing. Redress of the victims is important, as well as empowering them. They should also include measures of non-recurrence and truth-seeking initiatives, so the communities can share a vision on the future together in Iraq.

First, there have been humanitarian aid to relief the victims from direct threats of starvation, homelessness and diseases by providing them shelter in refugee camps. This humanitarian relief is crucial for the transitional justice process because the basic needs of the people need to be accommodated, before the reconciliation process can be successful. Prioritising these needs is justified, but without neglecting the community's needs to reconcile and re-integrate. The main challenges are the lack of education systems and the lack of psychological help for the women and children who suffer from severe PTSD. The stigmas of sexual violence are decreased by the acceptance of the religious leaders of the Yazidi women in ISIS captivity, but are still a reality that many women deny access to the appropriate medical and psychological care. For the pregnant women, there is a desperate need for a change of the abortion laws. However, it is more realistic to invest in local organisations who can help those women in seeking help, for example adoptive families or psychological help to assist her in raising her child herself. Secondly, the tensions between KRI and Iraq and between different tribes is also a big challenge to achieve reconciliation and reform. In general, the right legislation is in place, but needs to be better implemented. In this regard, the importance of socio-economic and cultural rights is not sufficiently acknowledged and local communities are not represented nor empowered. Thirdly, the annual Conference for Peace and Co-existence is a good example of a holistic approach to seek common grounds among communities, foster tolerance, indicate particular needs and create a collective memory. This initiative can only be encouraged and has the potential to be the first step in the organisation of a national dialogue. However, what is still urgent on the agenda is the investment in a good education system that teaches future generations in a neutral way about what has happened in the history of Iraq, acknowledging plurality and the heteronymous society and accommodating linguistic needs for minorities.

CONCLUSION

A transitional justice mechanism in Iraq is desperately needed after the decades of armed conflict and sectarianism. The emergence of a terrorist group like ISIS is only an indicator of how intolerance and inequality can be so destructive. This analysis focused on the Yazidi community, as a ethno-religious minority in Iraq and by focussing on one particular group, the holistic approach to try to achieve justice and reconciliation for all, is a bit undermined. However, it is justified because of the particular characteristics of the minority. They can be a guiding example of how to deal with the mass atrocities in the past, both during the ISIS era and before. As a religious minority, they point out the lack of implementation of minority protection in the country and this is not only about political representation, but also in terms of socio-economic development. As an ethnic minority, being Kurd or being a distinct ethnicity, they are the painfully pertinent example of how identity and autonomy are problematic for the country's unity and stability. As a federal government, real attempts to enter into a constructive dialogue with the Kurdish Regional Government is needed and there should be special attention to the fact that the Yazidis are not being used for political opportunism, but instead given a voice in the decision-making process. The same argument goes for the participation and empowerment of women. Again, the Yazidi women can be a leading example for a national reform that truly strives for gender equality and empowerment of women on a political and socio-economical level.

In terms of justice, the crimes against humanity committed by ISIS cannot be left unpunished and the victims should receive reparations. However, with the pre-ISIS history in mind, there are little parties of the conflict with clean hands. Criminal prosecution of ISIS members is needed, but they need to have a fair trial and other actors in the conflict that committed gross violations of international law should enjoy impunity either. Iraq and Syria both seem to be unable to comply with these conditions and therefore, two international and independent investigative bodies were created by the UN. The IIIM and IIIT have the potential to ensure a holistic approach to criminal justice and can be useful for helping the extraterritorial jurisdiction to collect evidence and for potential international trials in the future. A referral to the ICC is unlikely at this point, but the creation of a ad hoc tribunal is highly recommended. The biggest challenge however is to overcome the sovereignty argument and to maintain impartiality. If an ad hoc tribunal will be established in the future, the participation of victims and the special role of women should be integrated in the criminal proceedings to enforce the objectives of restorative justice.

Additionally, it is crucial to strengthen the rule of law in Iraq. While judicial tools mainly focuses on the past events, the extra-judicial tools focus more on the future perspectives of the country and on the non-recurrence of such atrocities. The equal treatment of every community and every individual in Iraq should be the leading idea in these extra-judicial initiatives and discriminative or sectarian legislation should be eliminated. Minority representation and women's participation in the political decision-making is key to reform the country's

institutions and legislation. Only in this way, mutual trust in the government and among communities can be build.

“If I am on the receiving end of violence, should I not be included in the discussions to end it?”³⁷⁰

In terms of reconciliation, many efforts have been made to reconcile victims with their families and fellow community members to ensure inclusiveness, peace and healing. The religious leaders in Lalish have proven to be able to provide space and time for reconciliation and rebuilding trust in their community. Also many NGOs are active to provide support for the Yazidis. Nevertheless, these efforts should be continuously encouraged and enhanced. Despite of these positive efforts, the main issue is still the lack of trust in other communities, especially in respect of the Sunni Muslims and Kurdish Peshmergas. It is difficult for the Yazidis to forgive their neighbours and their country’s government for the betrayal and abandonment. The inhuman treatment by ISIS risks to result in a strong urge for revenge. Apart from the inter-community challenges, the Yazidi community itself also still has to deal with the stigmas on sexual violence and the re-integration of children that were send to ISIS training camps. Many Yazidis – like other victims of the conflict - suffer from PTSD and there is a lack of medical treatment and psychological support in general. Although the resources are very limited, education is a very important and empowering tool to complement the psychological support of victims to ensure re-integration and healing.

Additionally, truth and remembrance are often overlooked but are often the start and end of each tool that is applied. Truth-seeking is necessary to ensure fair trials and establish objective education programs for example. And remembering the truth is what the country needs in order to prevent such atrocities from happening again, with education as its most powerful tool. Throughout the whole transitional justice process, they should both constantly interact with the mechanisms of criminal justice, reconciliation and institutional reform. The detailed reports of the IICI , IIM and IIT will hopefully help the national process in finding evidence for what has happened. But a lot has still to be done to find all accurate information on the identity of perpetrators, their motives, the responsibility to protect of the security forces etc. Since there is not yet a centralised body that can archive all these sources of information, the Conferences in Lalish are a good initiative to centralise knowledge and expertise and let all voices be heard. Ideally, these efforts of collaboration would eventually lead to historically objective curriculums and more pluralism in the education system, so ethno-religious tensions can be kept at their minimum.

The final recommendation would be to organise a National Dialogue with all minorities, tribes and religious representatives. This dialogue will enable all parties to bring their stories, concerns and demands onto the table, so that institutional reforms can be discussed and a collective memory of the Iraqi history can be created. Further

³⁷⁰ Hajiya Amina Ahmed from Nigeria, UN Women, <http://www.unwomen.org/en/news/stories/2017/8/from-where-i-stand-hajiya-amina-ahmed> (accessed 6 June 2018).

it would be recommended to prioritise education as one of the most important tools to reach a sustainable form of reconciliation. By teaching about the past and addressing the harm they or their families have suffered, they can be supported and empowered to heal the wounds of the past and create a better future. Women are also a crucial actor in the transitional justice process, especially those who have suffered from sexual violence may not be overlooked. They should be given a voice in the negotiations for institutional reforms, especially regarding women's rights in Iraq.

“After years of activism everybody reacts with anger and outcries to our story. But if this doesn't come along with actions, you lose hope. (...) We can choose to protect human rights for all, any religion and any culture. Let humanity unite. It is what our children deserve. We can make human rights a reality for all the people.”³⁷¹

Hope requires actions, otherwise it dies alongside the victims.

³⁷¹ Nadia Murad, speech for the Vienna +25 Conference on Human Rights Building trust: Making Human Rights a Reality for All, 22 May 2018. She is a survivor of ISIS captivity after the attacks in her village Kocho, in the Sinjar region on 3rd August 2014.

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APPENDIX

List of Interviews

Skype interview with Zinah Mohammed, 15 June 2018, Oxfam Iraq, Founder of LBF project & ST charity team, residing in Erbil, Iraq.

Skype interview with Elie Zartarian, 23 June 2018, UNHCR, residing in Duhok, Iraq.

Interview *in persona* with Dilman Ghazi, 2 July 2018, Kurdish Regional Government Representation in Austria, Vienna.

Skype interview with Behar Ali, 7 July 2018, Director of EMMA Organisation Iraq, participant of the Founding Conference on Bringing ISIS to Justice (6 July 2018), residing in Erbil, Iraq.