



Università
Ca' Foscari
Venezia

Master's Degree

In Comparative International Relations – Global Studies

Final Thesis

The limits in the recognition of genocide: Yazidi and Rohingya questions.

Supervisor

Ch. Prof. Sara De Vido

Assistant supervisor

Ch. Prof. Arianna Vettorel

Graduand

Elena Albani

Matriculation Number 863200

Academic Year

2020/2021

TABLE OF CONTENTS

Abstract	p. 5
List of Abbreviations	p. 9
Introduction	p. 11
Chapter 1. The evolution of the concept of genocide	p. 13
1. Raphael Lemkin's legacy	
1.1 The absence of international norms to prosecute the perpetrators of Armenian massacre	
1.2 'A war against peoples' during World War II	
1.3 From a crime without a name to the term <i>genocide</i>	
2. Post-war diplomacy	
2.1 The contribution of Lemkin to the Nuremberg Trials	
2.2 International community commitment towards the drafting of the 1948 Genocide Convention	
3. The outcomes of the Convention	
3.1 The definition of genocide	
3.2 Legal repercussions	
Chapter 2. Crimes of Da'esh in Syria and Iraq against Yazidis under a legal lens. Can it account for genocide?	p. 54
1. Actors involved	
1.1 The Yazidi minority	
1.2 The Islamic State	
2. Legal analysis	
2.1 Yazidis as a protected group	
2.2 <i>Actus rea</i>	
2.2.1 Killing members of the group	
2.2.2 Causing serious bodily or mental harm to members of the group	
2.2.2.1 Rape and sexual violence against Yazidi women	
2.2.3 Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part	
2.2.4 Imposing measures intended to prevent births within the group	
2.2.5 Forcibly transferring children of the group to another group	
2.3 <i>Mens rea</i> : Did ISIS act with the specific intent to destroy in whole or in part the Yazidi group?	
3. Responsibility	

3.1 Responsibility of Syria and Iraq

3.2 Legal obligations on ISIL as a non-State actor

Chapter 3. Actions of Myanmar against Rohingya under a legal lens. Was it a state-sponsored genocide?

p. 82

1. Actors involved

1.1 The Rohingya people

1.2 Myanmar authorities (including police, security forces and local Rakhines)

2. Legal analysis

2.1 Rohingya as a protected group

2.2 *Actus rea*

2.2.1 Killing members of the group

2.2.2 Causing serious bodily or mental harm to members of the group

2.2.2.1 Rape and sexual assaults against Rohingya women

2.2.3 Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part

2.2.3.1 Discriminatory laws and language against Rohingya

2.2.4 Imposing measures intended to prevent births within the group

2.2.5 Forcibly transferring children of the group to another group

2.3 *Mens rea*: Did the Myanmar government and local actors act with the specific intent to destroy in whole or in part the Rohingya people?

3. Responsibility

3.1 Myanmar responsibility

Chapter 4. Outcomes of the analyses

p. 107

1. Yazidi question

1.1 'Clear and convincing evidence' according to UNITAD

1.2 Consequences

2. Rohingya question

2.1 Current state of affairs

2.2 What to expect from *The Gambia v. Myanmar* case

Conclusion

p. 119

Bibliography

p. 122

Abstract

La scelta di trattare il tema del genocidio quale soggetto di codesto elaborato finale nasce dalla volontà di applicare le competenze giuridiche, acquisite in questi anni, a casi contemporanei.

Il delitto di genocidio, tuttavia, non è un fenomeno recente. Basti pensare, solamente nel secolo scorso, agli eccidi di massa in Armenia, Cambogia, Bosnia Erzegovina e Ruanda, così come, facendo un salto di circa quattrocento anni indietro, i massacri delle popolazioni indigene durante il periodo del colonialismo. Punto in comune di tutti questi eventi è la volontà di eliminare, in modo definitivo, certe porzioni della popolazione, in nome della superiorità, sia essa religiosa o etnica, dei perpetratori.

Poco più di settanta anni fa, tuttavia, un evento in particolare ha lasciato un segno profondo nella storia, portando alla presa di coscienza dei maggiori attori internazionali della necessità di imporre norme atte ad evitare simili accadimenti in futuro. Tale evento è comunemente denominato Shoah, dall'ebraico שואה, *distruzione*, oppure Olocausto, *sacrificio*, ed è consistito nella persecuzione e lo sterminio di sei milioni di ebrei nel contesto della Seconda guerra mondiale, da parte delle autorità della Germania nazista. Difatti, subito dopo la fine della guerra e la scoperta dei suddetti orrori, le potenze vincitrici si sono adoperate per dare vita all'Organizzazione delle Nazioni Unite (ONU), con il preciso scopo di creare un forum globale per il mantenimento della pace e la sicurezza internazionale, due obiettivi di fondamentale importanza per la ricostruzione della comunità internazionale nel periodo post-bellico. Nel 1948, a tre anni dalla fondazione dell'ONU, l'Assemblea Generale, suo organo principale, ha adottato due strumenti, destinati a diventare pietre miliari per la protezione dei diritti umani: la Convenzione per la prevenzione e la repressione del delitto di genocidio (Convenzione sul genocidio o Convenzione) e la Dichiarazione universale dei diritti umani. Quest'ultima, nel suo articolo primo, sancisce la libertà e l'uguaglianza insite in ogni essere umano, quale che sia la sua etnia, religione, estrazione sociale o politica, lingua o sesso. Sancisce inoltre una serie di diritti, tra i quali il diritto alla vita e alla libertà, e proibisce la loro negazione, così come l'uso della tortura e trattamenti crudeli, inumani e degradanti.

Dal canto suo, la Convenzione sul genocidio impone precisi obblighi di astensione e prevenzione, qualora le violazioni dei suddetti diritti avvengano nel contesto di una distruzione fisica, intenzionale, sistematica e pianificata di un gruppo o di una parte di un gruppo etnico, nazionale, religioso o razziale, ovvero un genocidio. La Convenzione, inoltre, sancisce il genocidio come atto proibito dal diritto internazionale, possibile anche in tempi di pace.

Nonostante questo quadro giuridico e il "*commitment to never again*" onusiano, gli eventi riconducibili ad atti genocidari sono tutt'altro che terminati. Come descritto inizialmente, ideologie totalitarie di stampo rivoluzionario (per esempio, i Khmer Rossi in Cambogia nel

1975) oppure basate sulla persecuzione etnica o religiosa (tra cui il massacro di Srebrenica del 1995) sono rimaste una triste costante nella storia più recente dell'umanità. Inoltre, non sempre è stato possibile perseguire gli autori.

Di conseguenza, le domande che questa tesi si pone sono diverse, ma possono essere riassunte in: alla luce del processo storico che ha portato all'adozione della Convenzione, è possibile stabilire dei limiti che ne impediscono la corretta attuazione? E inoltre, è possibile superare questi limiti?

L'approccio scelto per proporre delle risposte a queste domande si basa sull'analisi legale di due casi potenzialmente riconducibili alla definizione di genocidio, volta a stabilire quali sono i suddetti limiti e come la disciplina ha tentato di superarli nei procedimenti giudiziari che ne sono conseguiti. Pertanto, verranno tralasciati i dibattiti di carattere prettamente semantico, su alcuni termini del testo della convenzione, ma ci si concentrerà sui limiti nell'*accountability* per il delitto di genocidio. La metodologia scelta è di tipo misto, includendo fonti di carattere storico, legale e scientifico.

Il primo caso ha come focus geografico il Medio Oriente, sovente teatro di disordini pilotati da organizzazioni estremiste ai danni della popolazione locale. In particolare, tratterà la persecuzione e gli abusi subiti dalla minoranza religiosa degli Yazidi, colpiti duramente a partire dal 2014 nell'ambito della campagna per la creazione dello Stato Islamico, o califfato, in Siria ed Iraq. (Si tenderà a porre più accento sugli eventi in Iraq, in quanto luogo della maggior parte degli abusi, essendo la Siria territorio di *spill-over* del conflitto). Gli Yazidi sono una secolare minoranza religiosa, di etnia curda, principalmente presenti nella zona montuosa settentrionale dell'Iraq. Nonostante l'origine precisa di questo culto, spesso definito erroneamente al pari di una setta, non sia certa, il loro status di gruppo religioso protetto è innegabile. Difatti, l'appartenenza delle vittime a uno dei gruppi protetti dalla Convenzione è uno dei requisiti fondamentali per l'analisi di un potenziale atto genocida che, nel caso degli Yazidi è soddisfatto in quanto essi sono ritenuti "adoratori del diavolo" da parte dell'ISIS, a causa della loro peculiare credenza in un Dio dalla forma di pavone e dall'insieme delle loro pratiche, non comuni con nessun'altra fede. A causa della loro religione, gli Yazidi sono stati perseguitati da secoli, motivo per il quale sono diventati una minoranza tra le più povere e chiuse al mondo. Nadia Murad, tristemente famosa per essere una sopravvissuta alla schiavitù sessuale imposta dall'ISIS, scriverà nel suo libro autobiografico, che le storie di persecuzione della sua comunità sono intrinseche alla loro identità Yazida. Il suo libro, *The Last Girl*, è una delle fonti principali del presente elaborato.

Essendo gli autori degli abusi parte di un attore non-statale, la loro persecuzione risulta più limitata. Difatti, l'Art. 6 della Convenzione sul Genocidio presuppone due diversi meccanismi per il perseguimento del delitto di genocidio, ovvero il ricorso alla Corte Penale Internazionale (CPI) e la prosecuzione domestica. Tuttavia, il ricorso alla CPI è dipendente dall'accettazione della giurisdizione della Corte da parte del paese rilevante, mentre la prosecuzione domestica può avvenire qualora il Codice penale del paese abbia incorporato le norme concernenti la giurisdizione universale per il genocidio. Entrambe le due opzioni sono assenti, nel caso dell'Iraq. Si potrebbe, inoltre, presentare il caso alla Corte Internazionale di Giustizia (CIG), come previsto dall'Art. 9 della Convenzione, per ritenere l'Iraq e la Siria responsabili per aver fallito a prevenire il genocidio contro gli Yazidi. Tale opzione non è ancora stata esplorata.

È apparso necessario, perciò, rivolgersi a corti domestiche di Stati terzi con precise disposizioni in merito di giurisdizione universale per il delitto di genocidio, tra cui la Germania. Il 30 novembre 2021, il Tribunale di Francoforte ha pertanto riconosciuto l'ex membro ISIS Taha Al Jumailly, colpevole di genocidio, ai danni di due donne Yazida che aveva "comprato" come schiave. Il Tribunale ha inoltre dimostrato la possibilità di evincere il preciso intento genocida, con la morte di una sola persona. Tale caso ha imposto un fondamentale precedente nella storia del perseguimento del genocidio e porta, di conseguenza, una risposta affermativa alla seconda domanda guida del presente elaborato, ovvero che vi è la possibilità di superare i limiti della Convenzione.

Il secondo caso di studio sposta invece l'attenzione nel Sudest asiatico, in Myanmar (ex Birmania) e prevede l'analisi delle persecuzioni e le violenze del governo birmano ai danni della minoranza religiosa Rohingya. Come gli Yazidi, l'origine dei Rohingya non è chiara, in quanto al centro di un dibattito tra il Governo, che li vede come lavoratori illegali migrati nel paese dal Bangladesh durante la colonizzazione inglese, e la comunità in sé, che si considera indigena dello stato del Rakhine. Sebbene i Rohingya professino l'Islam, sono ben distinti dal restante 4% della popolazione musulmana, in quanto sono accomunati da una lingua particolare, il Ruingga, diversa dai vari dialetti dell'area, e da una propria cultura, il che fa di loro un gruppo etnico distinto, ai sensi della Convenzione.

I Rohingya sono stati oggetto di violente persecuzioni da parte dal Governo fin dall'indipendenza del Paese nel 1948, il quale ha da sempre adottato politiche discriminatorie, tra cui limitazioni della libertà di movimento e del godimento dei diritti civili e politici, fino alla promulgazione della Legge sulla cittadinanza del 1982 che non include i Rohingya tra i 130 gruppi etnici riconosciuti come cittadini rendendoli, di fatto, apolidi. La maggior parte dei crimini è stata commessa dalla giunta militare, al potere in Myanmar dal 1962, tra cui i pesanti

scontri che hanno portato alla distruzione della maggior parte dei villaggi Rohingya nel 2012. Per questo motivo, la vittoria nel 2015 del partito democratico guidato da Aung San Suu Kyi, già Premio Nobel per la Pace nel 1991, sembrava finalmente la fine delle persecuzioni ai danni della minoranza mussulmana. Tuttavia, Suu Kyi non ha mai riconosciuto la cittadinanza ai Rohingya né ha mai usato la sua posizione per fermare gli abusi commessi dall'esercito e dalle forze dell'ordine birmane. Difatti, nel 2017, un'operazione repressiva militare, tramutatasi poi in violenze sessuali sistematiche, uccisioni, torture e incendi dei villaggi, ha portato alla fuga di più di 700.000 Rohingya, verso il Bangladesh.

In questo caso, essendo gli autori organi del Governo del Myanmar, la via più plausibile è quella del ricorso alla CIG, in quanto la giurisprudenza della Corte ha sancito la possibilità di ritenere uno Stato responsabile per il delitto di genocidio (tale clausola non è tuttavia presente nella Convenzione, che non riporta riferimento alcuno a tale opzione.) Inoltre, il Myanmar potrebbe essere ritenuto responsabile anche per non aver prevenuto il delitto di genocidio sul suo territorio e per aver fallito nel perseguimento dei perpetratori birmani. Tale caso è stato presentato dal Gambia l'11 novembre 2019 e, il 23 gennaio 2020, la CIG ha adottato un'ordinanza accettando le misure cautelari richieste dal Gambia e confermando, inoltre, la propria giurisdizione *prima facie*. Nonostante la Corte abbia anche confermato lo status dei Rohingya come gruppo protetto, la questione principale sarà provare l'esistenza del dolo aggravato nelle azioni degli organi del Myanmar, in quanto, la CIG ha, in precedenza (*Bosnia c. Serbia*), utilizzato uno standard particolarmente stringente nelle considerazioni sui meriti.

La Corte terrà le prossime udienze pubbliche per il caso *Gambia c. Myanmar* dal 21 al 28 febbraio 2022, in cui i rappresentanti dei due Stati presenteranno le proprie eccezioni preliminari.

Ad ogni modo, *Gambia c. Myanmar* rappresenta già un importante precedente per il perseguimento del delitto di genocidio in quanto, per la prima volta, uno Stato non coinvolto ha presentato un caso davanti alla CIG, riguardante la responsabilità statale per un potenziale genocidio.

È auspicabile, perciò, che entrambi i casi di studio che verranno analizzati nel presente elaborato vadano a creare importanti tasselli nelle giurisprudenze rilevanti, in modo tale da portare ad un maggiore sviluppo nella responsabilità e *l'accountability* degli Stati e degli attori non-statali, ancora largamente limitate dalla Convenzione sul genocidio.

List of Abbreviations

AQI: Al-Qaeda in Iraq

ASEAN: Association of Southeast Asian Nations

CCAIL: Code of Crimes Against International Law

CIG: Corte Internazionale di Giustizia

CPI: Corte Penale Internazionale

CUP: Committee of Union and Progress

ECOSOC: Economic and Social Council

ICC: International Criminal Court

ICJ: International Court of Justice

ICRC: International Committee of the Red Cross

ICTY: International Criminal Tribunal for the former Yugoslavia

ICTR: International Criminal Tribunal for Rwanda

IDP: Internally Displaced Persons

ILO: International Labour Organization

ILC: International Law Commission

IMT: International Military Tribunal

IS: Islamic State

ISIS: Islamic State of Iraq and Syria

ISIL: Islamic State of Iraq and the Levant

JTJW: Jama'at al Tawhid wa al-Kihad

NaSaKa: Nay-Sat Kut-Kewy

NGO: Non-Governmental Organizations

NLD: National League for Democracy

NMT: Nuremberg Military Tribunal

ONU: Organizzazione delle Nazioni Unite

PILPG: Public International Law and Policy Group

PTSD: Post-Traumatic Stress Disorder

R2P: Responsibility to Protect

RNDP: Rakhine Nationalities Development Party

RuSHA: SS Race and Settlement Office

SS: Schutzstaffel

UN: United Nations

UNGA or GA: (United Nations) General Assembly

UNHCR: United Nations High Commissioner for Refugees

UNICEF: United Nations Children's Fund

UNITAD: United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL

UNSC or SC: (United Nations) Security Council

UNWCC: United Nations War Crimes Commission

WWII: World War Second

WWI: World War First

YPG: People's Defence Unit

Introduction

In most cases, genocide perpetrators have enjoyed decades of impunity, due to intrinsic limits in the prosecution of the crime.¹ The present work intends to analyse what these limits are and the ways in which they have just recently started to be overcome.

It is structured in four main chapters, in which other historical genocides will be examined in order to provide the framework for the analysis of two recent cases of alleged genocidal acts: the Yazidi and the Rohingya massacres.

The first chapter will be focused on the historical background that led to the adoption of the Genocide Convention² in 1948. The key figure throughout the chapter will be that of Raphael Lemkin, considered one of the founding fathers of the Convention³. In particular, the massacre of the Armenians and the Holocaust will be considered to explain the reasons that brought Lemkin to dedicate his whole life to the search for accountability and recognition of genocide. The Nuremberg Trials can be seen as a first attempt to provide such accountability, even though, in the end, no conviction for genocide has been recorded. Lemkin's thoughts have been fundamental for the original indictments⁴, as well as for the Subsequent Trials, but his main achievement have been the international adoption, in 1948, of the Genocide Convention. Such event has only been possible thanks to his constant lobbying at the UN level as well as his influence on the delegations. Last paragraph will be focused on the legal repercussions of genocide as an international crime, such as the inclusion *verbatim* of its definition in the Statutes of the *ad hoc* tribunals and in the Rome Statute of the International Criminal Court and its acquired *jus cogens* role.⁵

¹ GRIFFIN, M. *Ending the impunity of perpetrators of human rights atrocities: A major challenge for international in the 21st century*, 2000, International Review of the Red Cross, No. 838, available at: <https://www.icrc.org/en/doc/resources/documents/article/other/57jqhj.htm>

² Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), General Assembly, 1948, A/RES/3/260, available at: <https://www.google.com/search?q=genocide+convention&oq=genocide+convention&aqs=chrome.0.69i59l2j0i22i30l2j69i60l2j69i61j69i65.1831j0j4&sourceid=chrome&ie=UTF-8>

³ SEGESSER, D. M. et al. *Raphael Lemkin and the international debate on the punishment of war crimes (1919-1948)*, 2006, Journal of Genocide Research, Vol. 7, Issue 4, available at: <https://www.tandfonline.com/doi/full/10.1080/14623520500349860?scroll=top&needAccess=true>

⁴ EARL, H. *Prosecuting genocide before the Genocide Convention: Raphael Lemkin and the Nuremberg Trials, 1945-1949*, 2013, Journal of Genocide Research, Vol. 15, Issue 3.

⁵ VENTURA, M. & AKANDE, D. *Mothers of Srebrenica: The Obligation to Prevent Genocide and Jus Cogens – Implications for Humanitarian Intervention*, 2013, Blog of the European Journal of International Law, available at: <https://www.ejiltalk.org/ignoring-the-elephant-in-the-room-in-mothers-of-srebrenica-is-the-obligation-to-prevent-genocide-jus-cogens/>

The second and third chapter represent the core of the whole thesis, as they will include the legal analysis of the two case studies anticipated above. In both cases, each requirement of the Genocide Convention will be considered, in order to demonstrate that the various acts of the perpetrators (ISIS for the first case and the Government of Myanmar for the second one) can actually account for genocide. Particular emphasis will be put on the analysis of the mental elements of the crime, the *mens rea*, which have often been problematic for genocide convictions. Lastly, the different levels of responsibility will be raised and subsequently analysed.

Finally, the last chapter will consider the consequences of the two alleged genocide. In both cases, the two minorities have been forced to flee their homes and now live as refugees in internally displaced persons (IDP) camps, while justice is gradually being carried out.

For what concerns the Yazidi, it will focus on the landmark case *Office of the Federal Prosecutor v. Taha Al-J.*⁶ recently concluded before the Frankfurt Higher Regional Court. For the Rohingya case, although individual criminal responsibility appears not to be possible so far, the ICJ *The Gambia v. Myanmar*⁷ case is to be considered an important step forward and will, therefore, be analysed.

⁶ *German court jails ISIL member for life over Yazidi genocide*, 2021, Al Jazeera, available at: <https://www.aljazeera.com/news/2021/11/30/german-court-jails-isil-member-for-life-over-yazidi-genocide>

⁷ ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*The Gambia v. Myanmar*), available at: <https://www.icj-cij.org/en/case/178>

Chapter 1. The evolution of the concept of genocide

The aim of this chapter is to provide the historical and legal background to this work focusing on the legal analysis of two alleged genocidal events. Precisely, Chapter one will be devoted at explaining why and how the legal concept of genocide evolved until entering the realm of *jus cogens* norms.

Genocide is not an exclusive phenomenon of the 20th century.⁸ Raphael Lemkin himself defined, for instance, the colonization period as purely genocidal, due to the treatment reserved to the indigenous groups previously living in the territories colonised by the European powers,⁹ that was deemed as essential to progress by the colonizers. Nevertheless, it was during the World Wars of the 1900s that more awareness of the extent of such crimes, caused by human evil alone, began to spread.¹⁰ The symbol of this struggle is, without any doubts, Raphael Lemkin, who devoted his whole life to the fight for the recognition of genocide. For this reason, the first paragraph will explore his legacy, analysing the events (the Armenian massacres and the Jewish Holocaust) that were fundamental for his shaping of a new word to describe those phenomena.¹¹

Secondly, once the background of the coining of the word genocide will be assessed, the following paragraph will be devoted to Lemkin's quest to have it recognised as a distinct international crime first, through the references in the Nuremberg indictments and then, in an international convention. In fact, after World War II, the world came to know about the horrors committed by the Nazi state, that went beyond the "natural" consequences of an armed conflict, and which were originally conceived to completely sweep away portions of world population. This forever shocked mankind conscience that, firstly through the trials of Nazi leaders and then at the UN drafting process level, committed to never again facing the same crimes¹².

⁸ See for reference the studies conducted by American professor Rudolph Joseph Rummel. In particular, in chapter III (available at: <https://hawaii.edu/powerkills/DBG.CHAP3.HTM>) of his 1997 book "*Death by government: Genocide and mass murder since 1900*" he analysed cases of mass murder occurred in the ancient times. He was mostly interested in mass killings committed by the ruling authorities against their citizens, and he coined the word *democide*, to refer to such crimes that, according to him, often encompass the definition of genocide. See also LEVENE, M. *Why is the Twentieth Century the Century of Genocide?*, Journal of World History 2000, Vol. 11, no. 2

⁹ LEE-FRIEZE, D. (ed.), *Totally Unofficial. The Autobiography of Raphael Lemkin*, 2013, Yale University Press, New Haven-London. See also WOLFE, P. *Settler colonialism and the elimination of the native*, Journal of Genocide Research, 2006, Vol. 8, no. 4, p. 387-409

¹⁰ PINE, L. *Genocide: Twentieth-century warnings for the twenty-first century*, 2008, Institute of Historical Research, Senate House, University of London

¹¹ *Ibid.*

¹² PINE, L. *Genocide: Twentieth-century warnings*, op. cit.

Second paragraph will be then devoted to the analysis of the diplomatic operations of the post-WWII framework.

Lastly, having reached the creation of the Convention, the third paragraph will analyse its main outcomes. The first one is to have provided a widely accepted notion of genocide, result of compromises at the UN level and the second one is to serve as the *momentum* for what still needs to be achieved. For this reason, the last sub-paragraph will be devoted to the international instruments that have been created in the wake of the Convention as well as some of its flaws.

1. Raphael Lemkin's legacy

Raphael Lemkin was born in a small Jewish village in Eastern Poland (present-day Belarus) in 1900¹³. In his autobiography he wrote consistently about his early life in a farm¹⁴, a location chose by his parents to keep the family away from the anti-Semitic environment within the cities.¹⁵ Imperial Russia, in fact, had a long history of anti-Jews legislations with frequent pogroms in the areas denominated Pale of Settlement, where they were allowed to live.¹⁶ For this reason, he spent his childhood away from the big cities of the “bloodlands”¹⁷, living in the countryside where his parents literally had to “buy the right to live”¹⁸ and their protection.¹⁹ Moreover, a key role²⁰ was played by his early reading of the novel “*Quo Vadis?*” by the Polish writer Henryk Sienkiewicz, that describes the persecutions of Christians in the Roman Empire, by Nero. In particular, he would be impressed by the fact that these people could not count on the government institutions for their protection, because that same authority was their executioner.²¹ He would then began investigating similar histories of past persecutions while, when he was six, he learnt news of the 1906 pogrom in the city of Bialystok, where the mob

¹³ “*Raphael Lemkin*”, Holocaust Memorial Day Trust, available at: <https://www.hmd.org.uk/resource/raphael-lemkin/>

¹⁴ LEE-FRIEZE, D. (ed.), *Totally Unofficial*, op. cit. p. 3-25

¹⁵ IRVIN-ERICKSON, D. *Raphael Lemkin and the concept of genocide*, 2017, University of Pennsylvania Press, Philadelphia, p. 20

¹⁶ GROSFELD I. et al, *Middleman Minorities and Ethnic Violence: Anti-Jewish Pogroms in the Russian Empire*, 2020, The Review of Economic Studies, Vol. 87, Issue 1

¹⁷ The term belongs to Timothy Snyder, who, in his 2010 book “*Bloodlands: Europe Between Hitler and Stalin*” (New York: Basic Books) used it to describe the geographical area that now comprises Poland, the Baltic States, Ukraine, Belarus and the western part of Russia.

¹⁸ This is a direct reference to Chapter 11 of Lemkin's autobiography, titled “*Buying the Right to Live*”, in which explains how his family needed to pay a huge amount for rent to the farm's owner as well as a periodic sum to the police officers of the village for their security.

¹⁹ IRVIN-ERICKSON, D. *Raphael Lemkin and the concept of genocide*, op. cit, p. 20

²⁰ LEE-FRIEZE, D. (ed.), *Totally Unofficial*, op. cit. p. 1

²¹ *Ibid.*

killed 70 Jews.²² This event was fundamental in shaping his thought according to which Jewish faith in the area was at the centre of a greater path of persecutions²³.

Naturally polyglot, he began studying philology at the University of Lvov in Poland to pursue a career in languages.²⁴ The discovery of the extermination policies against the Armenian minority in Turkey in 1915, however, propelled him to change his field of study, opting for the faculty of law²⁵. Mostly, he began analysing the existence of just punishment for murders and homicide, but couldn't understand why, when the highest State authority were committing such crimes against the same population that they ought to protect, there was nothing, not even a proper name for the crime, to punish them²⁶. His discomfort led him to further study these cases and began considering them as particularly heinous and distinct crimes, for which the victims had no protection and were left without justice. This would become his life-long mission, but he quickly realised that, in order for his voice to be meaningfully heard, he needed to gain an influential posture.²⁷

After obtaining a doctoral degree in law in 1926²⁸, he became law professor in Warsaw. He also served as deputy public prosecutor of Warsaw²⁹ and represented his country in several seminars around the world, becoming a prominent international figure.³⁰ Lemkin was also called to work within the Law Codification Committee and contributed to the drafting of the criminal code of Poland.³¹ His life was thriving, but his unease never ceased.

In 1933 he was within the participants to the International Conference for the Unification of Penal Law in Madrid, where he intended to present his ideals for the codification of laws to penalise the perception of minority groups.³² However, his direct criticism against the rise into power of Adolf Hitler went in direct contrast with the policy of conciliation pursued by Poland towards the Nazi State and Lemkin was prevented from attending the Madrid conference. Moreover, one year later he was forced to abandon his public position³³ after the concerns of

²² “*Devastation, Destruction: the 1906 Bialystok Pogrom*” Museum of Jewish Heritage, available at: <https://mjhnyc.org/blog/devastation-destruction-the-1906-bialystok-pogrom/>

²³ IRVIN-ERICKSON, D. *Raphael Lemkin and the concept of genocide*, op. cit, p. 24

²⁴ “*Raphael Lemkin*”, Holocaust Memorial Day Trust, op. cit.

²⁵ LEE-FRIEZE, D. (ed.), *Totally Unofficial*. op. cit. p. 20

²⁶ *Ibid.*

²⁷ *Ibid*, p. 24

²⁸ IRVIN-ERICKSON, D. *Raphael Lemkin and the concept of genocide*, op. cit. p. 34

²⁹ LEE-FRIEZE, D. (ed.), *Totally Unofficial*. op. cit, p. 21

³⁰ “*Life of Raphael Lemkin*”, Lemkin House, available at: <http://lemkinhouse.org/about-us/life-of-raphael-lemkin/>

³¹ LEE-FRIEZE, D. (ed.), *Totally Unofficial*. op. cit. p. 21

³² *Ibid*, p. 22

³³ “*Raphael Lemkin*”, Holocaust Memorial Day Trust, op. cit.

the Foreign Minister of Poland that he was insulting German chancellor in a way that could impede the two countries' relations.³⁴ He continued, however, to pursue his private law work, by publishing several books on criminal law.³⁵

After the invasion of Poland in 1939 and the consequent anti-Jewish politics, he experienced first-hand the genocidal acts that he ought to deter. He joined Polish resistance³⁶ and became a refugee while his family chose to remain in the farm.³⁷ After being wounded, he was forced to hide in a forest, before being able to escape in Sweden and, later on, in the United States.³⁸ This saved his life. In the upcoming years, over forty members of his family were killed by the Nazis³⁹ as he will discover while working in Nuremberg.

In his autobiography, while narrating about his early life, he wrote *"I grew up with a strong feeling that persecution must cease, and that justice and love will finally prevail"*.⁴⁰ This idea of a mission based on the overarching sentiment of love would come often in his life and, if we abandon ourselves to such sentimental ideals, we can see how his life was actually devoted to the love for justice and equity. Lemkin never got married⁴¹ and, in their last encounter, his mother, while begging him to find a partner, would say to him *"You have been carrying the burden of your idea, which is based on love. [...] We know you will continue your work for the protection of peoples. Unfortunately, it is needed now more than ever before"*.⁴² And this is exactly what he did. Even after his long-awaited adoption of the Genocide Convention in 1948, he never ceased to lobby as many people as he could for its ratification, until his death, exhausted and impoverished in 1959.⁴³

³⁴ *Ibid.*

³⁵ IRVIN-ERICKSON, D. *Raphael Lemkin and the concept of genocide*, op. cit., p. 69

³⁶ "Lemkin, Raphael", UNHCR Central Europe, available at: <https://www.unhcr.org/ceu/9486-lemkin-raphael.html>

³⁷ IRVIN-ERICKSON, D. *Raphael Lemkin and the concept of genocide*, op. cit. p. 73

³⁸ The detailed history of his escape is described in Chapter 4 *A Refugee in Lithuania, Latvia, and Sweden* (pp. 60-79) and Chapter 5 *From Sweden to the United States*, of his autobiography.

³⁹ IRVIN-ERICKSON, D. *Raphael Lemkin and the concept of genocide*, op. cit., p. 74

⁴⁰ LEE-FRIEZE, D. (ed.), *Totally Unofficial*. op. cit, p. 50

⁴¹ POPOVSKI, V. Chapter 11: The Complex Life of Rafal Lemkin, in *The Dawn of Discipline, International Criminal Justice and Its Early Exponents*, 2020, ed. by MÉGRET, F. TALLGREN, I. Cambridge University Press, p. 282

⁴² LEE-FRIEZE, D. (ed.), *Totally Unofficial*. op. cit. p. 58

⁴³ *Coining a word and championing a cause: the story of Raphael Lemkin*, Holocaust Encyclopaedia, available at: <https://encyclopedia.ushmm.org/content/en/article/coining-a-word-and-championing-a-cause-the-story-of-raphael-lemkin>

This paragraph will be devoted to the historical and the legal contexts that led Lemkin to pursue his mission. It will start with an analysis of the Armenian genocide, until the coining of the word genocide during WWII.

1.1 The absence of international norms to prosecute the perpetrators of the Armenian massacre

*"Turkey is taking advantage of the war in order to thoroughly liquidate its internal foes, i.e., the indigenous Christians, without being thereby disturbed by foreign intervention. What on earth do you want? The question is settled. There are no more Armenians."*⁴⁴

In a WWI-torn world, roughly at the same time when the Allied landed in present-day Apulia, something more disturbing was happening in the Ottoman Empire. The actions of the Committee of Union and Progress (CUP)⁴⁵ are still at the centre of debates concerning their nature⁴⁶, even with the nowadays mastering and knowledge of international legal instruments. It is definitely not the intention of this project to address the political realm beyond any of the situations that will be discussed, but few considerations in this sense need to be made.

⁴⁴ Talat Pasha, in a conversation with Dr. Mordtmann of the German Embassy in June 1915. Talat Pasha was one of the leaders of the Young Turks and served as Minister of the Interior of Turkey between 1913 and 1918. He is often considered one of the major architects of the Armenian genocide.

⁴⁵ The CUP was born in the 1890s as a secret society with contacts with the Ottoman liberals exiled in Europe. They advocated for the unification of the ethnic and religious minorities under Ottoman loyalty, excluding all foreign influences. After two unsuccessful coups in 1896 and 1897, they were no longer a secret organization, and managed to form a parliamentary group in 1908. They became a proper political party only in 1913. Reference: <https://www.encyclopedia.com/humanities/encyclopedias-almanacs-transcripts-and-maps/committee-union-and-progress>

⁴⁶ As of 2022, 31 countries (including Italy) have recognised the Armenian genocide. The complete list of countries is available at: https://www.armenian-genocide.org/recognition_countries.html. Turkish government, however, has consistently refused to do so, admitting that a number of Armenians previously living in the Ottoman Empire has died during WWI but the authority challenges the figures and the events. Ankara describes the event as “serious inter-communal conflict” which does not account as genocide. See as reference *The Armenian Allegation of Genocide: The issue and the facts*, Republic of Turkey, Ministry of Foreign Affairs, available at: <https://www.mfa.gov.tr/the-armenian-allegation-of-genocide-the-issue-and-the-facts.en.mfa>.

After the mortifying defeat in the First Balkan War (1912-1913)⁴⁷, the Ottoman Empire, which was then led by an ultra-nationalist group (the CUP) within the Young Turks⁴⁸ since the 1913 *coup d'état*, experienced the growth of aversion towards the minorities present in the territory. It was not only the Armenian minority (who has lived peacefully for centuries in the Ottoman empire) but also the Greeks and other Christian groups to be targeted as “*non-Turkifiable minorities*”⁴⁹ by the nationalist political programme of the CUP. The committee, in fact, was engaged in the modernization of the empire, one which they envisaged to be composed only by descendants of the ‘pure’ Turkish ethnicity⁵⁰. The minorities’ deputies gathered at the plenary assemblies of the Parliament⁵¹ to act against the nationalist laws fostered by the CUP. In response, the party met in secrecy to discuss “*the elimination of the non-Turkish masses*”.⁵² Some disturbing ideas emerged, such as the definition of Armenians as “*internal tumours*”.⁵³ In the end, their perception was that the deficiencies of the Ottoman empire, such as the military debacle in Europe, were boosted by the presence of certain non-Turkish people in strategic areas⁵⁴ which could have betrayed the empire and be ready to do it again. This nationalist ideal marked the beginning of the end.

The reason why it was significant to provide such historical excursus is to demonstrate that, even before such action was to be legally considered as a crime, the Young Turks were exterminating the Armenians *qua* Armenians (distinct members of a certain minority group). It was surely not the first time that this *modus operandi* was applied: the 20th century has been

⁴⁷ The First Balkan War was the first of two military confrontations that led to the loss of all territories of the Ottoman Empire in Europe. It was fought between the Balkan League (Serbia, Bulgaria, Greece and Montenegro, under the patronage of Russia) and the Ottoman Empire. The only areas that it retained were the region known as Thrace and Adrianople (present-day Edirne, in Turkey).

⁴⁸ The Young Turks was a coalition of several revolutionary groups that was firstly created in 1889 in Istanbul, by a group of students. Due to the renovated spirit of Turkish nationalism, they managed to overthrow the Sultanate and establish a constitutional government in 1913.

⁴⁹ ‘Turkey for the Turks’: Demographic Engineering in Eastern Anatolia, 1914–1945,” in *A Question of Genocide, 1915: Armenians and Turks at the End of the Ottoman Empire*, ed. Ronald G. Suny and Fatma M. Göçek (Oxford: Oxford University Press, 2011), p. 291

⁵⁰ *Ibid.*, p. 51

⁵¹ *Ibid.*, p. 293

⁵² *Ibid.*, p. 295

⁵³ *Ibid.*

⁵⁴ After the loss of its European territories, Ottoman policies began to be more suspicious of outside influences, in particular against Russia, which was on the opposing site of Turkey during WWI. Most Armenian communities were located in strategic areas for communication, vulnerable to foreign attacks such as in the Caucasus, Palestine and Mesopotamia. The suspicion was that they may be willing to help the bordering troops penetrate the Ottoman territory or to attack the sensitive areas first. The Russian Empire, moreover, showed its support for the Armenian question, which exacerbated already odd sentiments. Reference: BUTT, A. *The Ottoman Empire’s Escalation from Reforms to the Armenian Genocide, 1908-1915*. In *Secession and Security: Explaining State Strategy against Separatists*, 2017, Cornell University Press, pp. 125-129

frequently defined as “the century of genocide”⁵⁵ due to the unprecedented number of mass killings as results of nationalist policies.

However, between 1914 and 1915, the Armenians in the Ottoman Army started to be expelled and killed in what was the beginning of systematic mass killing and deportation, as well as torture and forced conversion to Islam, under the cover of war.⁵⁶ Humanitarian intervention of American and British missionaries⁵⁷ proved to be of little help to stop the fury of the CUP and historians have estimated that as many as 1.2 million⁵⁸ of Armenians have perished in the period. An event, however, signalled the growing interest of the international community for matters concerning violations of human rights. In May, the 24th 1915, the Allied governments issued a joint declaration condemning “*the new crimes of Turkey against humanity and civilization*”, ensuring that “*they will hold personally responsible for the said crimes all members of the Ottoman Government*”.⁵⁹ The declaration is considered a landmark as it has been indicated that that was the first time, at least in an international legal context, that the notion of crimes against humanity was used.⁶⁰ Moreover, that term meant that it was possible to indicate such crimes in which *humanity as a whole* was at stake and that had characteristics that went far beyond the ordinary war times consequences. “*It is one of the blackest pages in the history of this war*”⁶¹, according to US Secretary of State Robert Lansing, who had considered the right of Turkey to deport the Armenians to be an exercise of its state sovereignty but condemned *the way* it was conducted.

⁵⁵ LEVENE, M. (2000), “Why is the Twentieth Century the Century of Genocide?”, op. cit.

⁵⁶ SUNY, R. G. *Armenian Genocide*, 2021, in Encyclopedia Britannica, available at: <https://www.britannica.com/event/Armenian-Genocide>

⁵⁷ *Ibid.*

⁵⁸ I chose to report the number as indicated in the online encyclopaedia: <https://encyclopedia.ushmm.org/content/en/article/the-armenian-genocide-1915-16-in-depth>

⁵⁹ Department of State, Washington, 1915. France, Great Britain, and Russia Declaration. American Embassy, Constantinople, Single page. Available at: https://www.armenian-genocide.org/Affirmation.160/current_category.7/affirmation_detail.html

⁶⁰ SCHABAS, W. *Genocide in International Law: The Crime of Crimes*, 2009 (2nd ed.) Cambridge University Press, p. 20

⁶¹ Secretary of State Robert Lansing, in a letter to President Wilson of 21 November 1916, wrote ““It was not to my mind the deportation which was objectionable but the horrible brutality which attended its execution. It is one of the blackest pages in the history of this war, and I think that we were fully justified in intervening as we did in behalf of the wretched people, even though they were Turkish subjects.” As quoted in DADRIAN, V. N. *Genocide as a Problem of National and International Law: The World War I Armenian Case and Its Contemporary Legal Ramifications*, 1989, The Yale Journal of International Law, Vol. 14, No. 2, p. 228

A meaningful step, at least substantially, was represented by the appointment of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties⁶², during the preliminary Paris Peace Conference⁶³ in January 1919. The Commission was mandated to produce a report on the violations of international norms committed by Germany and its allies during WWI. The report⁶⁴, although not directly targeting the Armenian massacres, provided a definition of ‘Violations of the laws and customs of war and the laws of humanity’⁶⁵, that considered the persecution of ethnic groups such as the actions against the Serbian population, committed by Germany, Austria, and Bulgaria in Serbia. Accordingly, it referred mainly to acts conducted in the territories of occupied states.

The first concrete action towards reparation for the Armenian minority came during the Peace Conference. Greek Foreign Minister, Nicolas Politis, suggested the creation of a new category of war crimes, denominated ‘crimes against the laws of humanity’⁶⁶, to bring the Armenian question under such legal lens. Although American President Wilson lamented the retroactivity of such a law (considering it to be an *ex post facto law*)⁶⁷, an agreement was reached, and German soldiers were to be tried at the Supreme Court of the Empire in Leipzig⁶⁸. The subsequent first international war crimes trial, however, mainly focused on the losers of the war’s offences against the laws of the war, without giving due attention to the prosecution of crimes against harmless minorities.

For Turkey, in fact, the situation was more complicated. In January, the 18th 1919, British Admiral Calthorpe, referred to the Turkish Foreign Minister the intention of the former’s government to prosecute the perpetrators of the Armenian massacre.⁶⁹ An underlying aspect of

⁶² The Commission was created on 25 January 1919, with the mandate of inquiring on the violations of international law and customs of law committed by Germany and its allies during WWI as well as the degree of responsibility for the offences. Reference: Annex 2, *Draft Resolution Relative to the Responsibility of the Authors of the War and the Enforcement of Penalties*, in Preliminary Peace Conference, Protocol No. 2, Plenary Session of January 25, 1919. Available at: <https://history.state.gov/historicaldocuments/frus1919Parisv03/d4>

⁶³ The preliminary meetings of the Peace Conference began on 12 January 1919 between British Prime Minister Lloyd George, American President Woodrow Wilson, French Premier Georges Clemenceau and Italian Prime Minister Vittorio Orlando. The Conference would then end one year later, in 1920 with the creation of the League of Nations. Reference: *The Paris Peace Conference*, in Library of Congress, Digital Collections, available at: <https://www.loc.gov/item/today-in-history/january-18/>

⁶⁴ Available at: https://www.jstor.org/stable/2187841?seq=1#metadata_info_tab_contents

⁶⁵ *Violations of the Laws and Customs of War*, Reports of Majority and Dissenting Reports of America and Japanese Members of the Commission of Responsibilities, Conference of Paris, 1919, Oxford: Clarendon Press, p. 23

⁶⁶ DADRIAN, V. N. *Genocide as a Problem of National and International Law*, op. cit. p. 280

⁶⁷ *Ibid.* See also SCHABAS, W. *Genocide* op. cit. p. 23

⁶⁸ Pursuant to art. 228 of the Versailles Treaty of 1919, the Allied powers could “bring before military tribunals persons accused of having committed acts in violations of the laws and customs of war.” The tribunal could be located in Germany as well as in her allies territories. Full text available at: https://www.census.gov/history/pdf/treaty_of_versailles-112018.pdf

⁶⁹ DADRIAN, V. N. *Genocide as a Problem of National and International Law*, op. cit., p. 282

this action was that, once again, the potential trial was to be based on the common law of war, hence London was going to try the alleged Turkish offenders on the basis that the former had *de facto* authority on the territory of Turkey, as occupying military power. We were evidently very far from the concept of universal jurisdiction we have today, but it was, however, an important step forward.

Following the urgency put on the question by the Allies, Turkey detained some of its leaders to be tried, just to release them soon after, out of public demonstrations and pressure.⁷⁰ London, then, took the lead and sent 67 Turkish prisoners to other protected locations in Malta. Britain, however, failed to consider the delicate equilibrium that the European powers were struggling to achieve⁷¹ coupled with the influence competition of the interwar years. In addition, due to the highly corrupted nature of the Turkish governmental bodies, the collection of evidence to try genocide suspects proved increasingly complicated.⁷² In late 1921, therefore, political considerations prevailed, and the suspects were discharged.

Many Turkish jurists wanted to pursue in the ‘quest for justice’ and tried the war time criminals before the national courts according, then, to the domestic penal code. Their responsibility for the ‘organization and execution of crime of massacre against the Armenian minority’⁷³ was engaged and the ministers of the cabinet of wartime Turkey were sentenced *in absentia*.

The Treaty of Sèvres⁷⁴, signed on 10 August 1920 was another attempt to provide guarantees to minorities. Turkey, pursuant to art. 230⁷⁵, was compelled to surrender all persons accused of crimes against the ethnic groups, in a landmark step towards the prosecution of crimes against humanity. However, the treaty was never ratified by the Ottoman Parliament, leaving those affected ‘justiceless’.

“A nation was killed, and the guilty persons were set free. Why is a man punished when he kills another man, yet the killing of a million is a lesser crime than the killing of an individual?”⁷⁶

⁷⁰ *Ibid*, p. 284

⁷¹ SCHABAS, W. *Genocide*, op. cit. 25

⁷² *Ibid*.

⁷³ DADRAN, V. N. *Genocide as a Problem of National and International Law*, op. cit. p. 307

⁷⁴ The Treaty of Sèvres was part of the Versailles Peace Settlement mechanism and was signed between the Allied and Turkey, ending the Ottoman Empire, in 1920. It also created an independent Armenia.

⁷⁵ Section I, Artt. 1-260 available at: https://wwi.lib.byu.edu/index.php/Section_I_Articles_1_-_260

⁷⁶ LEE-FRIEZE, D. (ed.), *Totally Unofficial*. op. cit. p. 19

Raphael Lemkin will later refer to much of these developments⁷⁷ in his work to define genocide as a ‘new’ and distinct crime, one which needed clear and defined international norms for its prosecution.

Its quest intensified in 1921⁷⁸, during the trial of Soghomon Tehlirian, a young Armenian student that, on 15 March 1921, killed the former Turkish Minister of Interior Talat Pasha, in Berlin.⁷⁹ Tehlirian was tried at the District Court of Berlin⁸⁰ and on June 2-3, 1921, German society, until then largely unaware of what happened in the territory of one of their motherland’s allies, was shocked to learn about the horrors experienced by the Armenian population. In the end, Tehlirian was acquitted on the ground of temporary insanity, and it was stated that he has acted according to the “manifest remembrance of a traumatic experience”⁸¹ as he witnessed the slaughtering of his whole family. Lemkin wrote: “*He had acted as the self-appointed legal officer for the conscience of mankind. But can a man appoint himself to mete out justice?*”⁸² Moreover, Lemkin, at the time a law student in Poland, questioned his professor⁸³ about the ‘right’ of a State to conduct such atrocities against its own people and he was presented with the concept of ‘State sovereignty’ as a sort of justification for the misbehaviour of a State.⁸⁴

The case of Tehlirian as well as the case of Schwarzbard⁸⁵ provided the momentum for Lemkin as he “felt that a law against this type of racial or religious murder must be adopted by the world”.⁸⁶

⁷⁷ BALAKIAN, P. *Raphael Lemkin, Cultural Destruction, and the Armenian Genocide*, 2013, Holocaust and Genocide Studies, Vol. 27, no. 1, p. 58

⁷⁸ LEE-FRIEZE, D. *The “Insistent Prophet”*, Introduction of *Totally Unofficial*, op. cit., p. xi

⁷⁹ HOFMANN, T. *A Hundred Years Ago: The Assassination of Mehmet Talaat (15 March 1921) and the Berlin Criminal Proceedings against Soghomon Tehlirian*, in *International Journal of Armenian Genocide Studies*, Vol. 5, No. 1, p. 67

⁸⁰ *Ibid.*

⁸¹ MANUKYAN, S. *A Beautiful Crime: Soghomon Tehlirian and the Birth of the Concept of Genocide*, EVN Report, 2019, available at: <https://evnreport.com/raw-unfiltered/a-beautiful-crime-soghomon-tehlirian-and-the-birth-of-the-concept-of-genocide/>

⁸² LEE-FRIEZE, D. (ed.), *Totally Unofficial*. op. cit, p. 20

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ Shalom Schwarzbard was a Jewish tailor who, in 1918, assassinated Symon Petliura, the Ukrainian Minister of War. Petliura was considered one of the major designers of the Jewish pogrom in Ukraine, in the context of the Polish-Ukrainian War of 1918-1919. In the same fashion as Tehlirian, Schwarzbard was considered insane and released. Lemkin has referred to the latter’s trial as a “beautiful crime”.

⁸⁶ LEE-FRIEZE, D. (ed.), *Totally Unofficial*. op. cit. p. 21

1.2 ‘A war against peoples’ during World War II

The first attempt of Lemkin to propose a legislation was in 1933, the same year of the rise into power of Adolf Hitler, in Germany. Lemkin’s document⁸⁷ was proposed at the 5th International Conference for the Unification of Criminal Law⁸⁸, in Madrid and it contained the definition of two ‘new’ crimes: acts of barbarity and vandalism. These two terms will be analysed further in the next part but, for the purpose of this paragraph, it is enough to indicate that Lemkin’s report consisted in an attempt to prohibit acts that he defined as premeditated destruction of racial, religious or social collectivities.

However, once again, politics prevailed⁸⁹, and Lemkin was precluded from attending the conference. It would be difficult and complex to speculate about the impact that the recognition of such crimes would have had if only it was in place during (and after) the crimes of the Nazis. Regardless, the League of Nations had already put in place a system of minority protection⁹⁰ since the end of World War I, but the seed of hate had already been planted and the mass obliteration of nationhoods⁹¹ in Europe was just beginning.

The peculiar aspect here is that the Holocaust in Europe was not the product of an international conflict, but it was a precise and detailed State policy aimed at getting rid of innocent people in the name of a self-proclaimed biological superiority⁹². So, in 1933, the Nazi Party rose to power, signalling the end of the parliamentary democracy of Germany, the Weimar Republic.⁹³ Already then, the first concentration camp was established, in Dachau, Germany, to host political prisoners and, in general, the people considered to be dangerous for the regime.⁹⁴ They also put in place a systematic revision of the set of social and political rights of the German citizenry starting with, in February 1933, an emergency decree known as the Reichstag Fire

⁸⁷LEMKIN, L. *Les Actes Constituant un Danger General (Interétatique) Considérés Commédits Débats de Droit des Gens Rapport*, 1933 Pédone, Paris, presented at the 5th International Conference for the Unification of Criminal Law of Madrid, October 1933

⁸⁸ The agenda involved the proposals by eminent legal scholars of acts to be included within the list of crimes creating danger for multiple States.

⁸⁹ LEE-FRIEZE, D. (ed.), *Totally Unofficial*. op. cit, p. 23

⁹⁰ ROSTING, H. *Protection of Minorities by the League of Nations*, 1923, *The American Journal of International Law*, Vol. 17, No. 4, p. 647

⁹¹ LEMKIN, L. *Genocide*, 1946, *American Scholar*, Volume 15, no.2, pp. 227-230

⁹² LEMKIN, L. *Genocide – A Modern Crime*, 1945, *Free World*, Vol. 4, p. 40

⁹³ *1929: A Turning Point During the Weimar Republic*, in *Facing History & Ourselves*, available at: <https://www.facinghistory.org/weimar-republic-fragility-democracy/readings/1929-turning-point>

⁹⁴ *Timeline of Events*, in United States Holocaust Memorial Museum, available at: <https://www.ushmm.org/learn/timeline-of-events/1933-1938/establishment-of-dachau-camp>

Decree⁹⁵ that ceased the individual rights of citizens and the due process of law. Germany became a military State in which the *Schutzstaffel* (the SS)⁹⁶ were increasingly central and above the police.

In particular, members of minorities such as the Jews started to be gradually excluded from certain sphere of the society through a series of laws. We cite, for example, the Law against Overcrowding in Schools and Universities,⁹⁷ that cut the number of Jewish students allowed in public schools or the Law for the Prevention of Offspring with Hereditary Diseases⁹⁸, that forced the sterilization of people with mental and physical disabilities. In the years that preceded the outbreak of WWII, the Nazi state issued more than 400 decrees and regulations⁹⁹, mainly aimed at restricting the freedom of the minority communities.

In 1939, after the invasion of Poland, the German war machine spread throughout Europe, putting more and more European nations and their populations under the control of the Nazi state. Their fate was based on a hierarchical set of values¹⁰⁰ according to the race of the person. The Jews, as the most inferior race, were to be annihilated. The Slav peoples, such as the Poles, the Czechs, or the Russians, were to remain on the lowest levels of society¹⁰¹. There were some, however, with which the Nazi felt a sort of “blood-relation”, such as the Norwegian and the Dutch, that were granted the choice of either embrace the “Germanism” (i.e., Nazism) or be considered inferior.¹⁰²

Perfectly summing up German strategy, the official Nazi ideologue Alfred Rosenberg stated that "*History and the mission of the future no longer mean the struggle of class against class,*

⁹⁵ The 1933 burning down of the German Parliament building was blamed on the regime’s oppositions and the event was used by the Nazi for the approval of an emergency decree, known as Reichstag Fire Decree, which gave to the ruling authority the power to overthrow the government and the existing laws. This decree was fundamental for the consolidation of Nazi dictatorship. Reference: <https://www.ushmm.org/learn/timeline-of-events/1933-1938/reichstag-fire-decree>

⁹⁶ The SS were founded in 1925 as a small paramilitary organization within the Nazi party. They grew along with the party until reaching more than 250.000 men and they became an independent organization with a detailed bureaucratic apparatus under the responsibility of Hitler alone. Under the lead of Heinrich Himmler, they controlled the concentration camps until 1945. The organization would then be the subject of a separate military trial in 1947. Reference: <https://www.britannica.com/topic/SS>

⁹⁷ Issued on 25 April 1933, this law transformed public schools in propaganda outlets. Reference: <https://www.ushmm.org/learn/timeline-of-events/1933-1938/law-limits-jews-in-public-schools>

⁹⁸ Issued on 14 July 1933, this law included also Afro-Germans and Roma people. Reference: <https://www.ushmm.org/learn/timeline-of-events/1933-1938/law-for-the-prevention-of-offspring-with-hereditary-diseases>

⁹⁹ *Anti-Jewish Legislation in Pre-war Germany*, in Holocaust Encyclopedia, available at: <https://encyclopedia.ushmm.org/content/en/article/anti-jewish-legislation-in-prewar-germany>

¹⁰⁰ LEMKIN, R. *Axis Rule in Occupied Europe. Laws of Occupation, Analysis of Government, Proposals for Redress*, 1944, Carnegie Endowment for International Peace, Washington, D.C., p. 81

¹⁰¹ *Ibid*, p. 82

¹⁰² *Ibid*, p. 83

the struggle of church dogma against dogma, but the clash between blood and blood, race and race, people and people."¹⁰³

In May, the 20th 1940, while pursuing their "mission", the SS established the Auschwitz Camp, a massive concentration camp located in South Poland. Auschwitz was active from 1940 to 1945 and around 1.1 million of Jews, non-Jewish Poles, Soviet prisoners, gypsies, and other minorities perished there¹⁰⁴ either by being sent directly to the gas chambers or through forced labour. The Nazi authorities also established several ghettos in European towns¹⁰⁵, in most of the cases condemning the people forced to reside there to death by starvation or indecent health conditions.

In June 1941, Germany turned towards its former ally, the Soviet Union, in the well-known 'Operation Barbarossa'.¹⁰⁶ A joint action of the German armed force and a department of the SS named *Einsatzgruppen*, entered in the USSR. The campaign in the Soviet Union was one of the bloodiest and central for the work of the *Einsatzgruppen*, that, with the coordinated work of the SS, the army, the allied forces as well as local partners¹⁰⁷ carried out mass shooting operations within the war of annihilation against the USSR. They targeted Jews, Communists and State officials and Roma. The local collaborators covered a key role, in particular for the identification of victims, often their direct contacts.¹⁰⁸ An event in which they proved fundamental was in September 1941, when, aided by Ukrainian on-the-spot soldiers, the *Einsatzgruppen* murdered 33,771 Jews in Babyn Yar,¹⁰⁹ near present-day Kiev. It has been estimated that one third of the total number of Jewish victims of the Holocaust died because of shooting actions of which the *Einsatzgruppen* were key authors.¹¹⁰

On 24 August 1941, few months after the *Einsatzgruppen* reached the USSR, Winston Churchill, the then British Prime Minister, gave a speech during his radiobroadcasting in which

¹⁰³ As cited by Lemkin in *Genocide: A Modern Crime*, op. cit. p. 40

¹⁰⁴ I chose to report the number as indicated in *Holocaust Encyclopedia*, available at: <https://encyclopedia.ushmm.org/content/en/article/auschwitz>

¹⁰⁵ The first ghettos were established in Poland, where Warsaw became the biggest one. Reference: <https://www.ushmm.org/learn/timeline-of-events/1939-1941>

¹⁰⁶ The operation began on 22 June 1941, breaking the German-Soviet nonaggression pact of 1939. Germany employed 80 percent of its army to invade USSR, expecting a quick victory. After six months, having not reached its primary objective to effectively defeat Soviet Union (with the capitulation of Moscow), the Wehrmacht was forced to retreat. Reference: <https://www.history.com/topics/world-war-ii/operation-barbarossa>

¹⁰⁷ *Einsatzgruppen: an overview*, in *Holocaust Encyclopedia*, available at: <https://encyclopedia.ushmm.org/content/en/article/einsatzgruppen>

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

he described the Nazi invasion of Russia as “the most frightful cruelties”. “*As his army advance, whole districts are being exterminated. Scores of thousands – literally scores of thousands – of executions in cold blood are being perpetrated by the German Police-troops*”. He closed “*We are in the presence of a crime without a name*”¹¹¹. It became clear that there were two wars being fought at the same moment: one in the battlefield, between armies and a war against peoples.¹¹² Churchill grasped that what the Nazis were doing, went well beyond mass murder or the annihilation of a people.¹¹³ The Nazis’ plan was to completely exterminate the testimony of Jewish existence in the world.¹¹⁴

The last years of the war were marked by intense fighting in the battlefield as well as an intensive working by the Nazi authorities towards the “Final solution”. They improved their killing methods in order to maximise the “result” and even issued laws imposing death penalty for whoever tried to aid Jews.¹¹⁵

On 17 December 1942, the Allied governments issued a joint declaration¹¹⁶ in which they acknowledged the crimes committed by the Nazis against “hundreds of thousands”¹¹⁷ of Jews: mass executions, forced labour, incarceration in ghettos and concentration camps. They described Poland as “the principal Nazi slaughterhouse”¹¹⁸ and affirmed their resolution “to ensure that all responsible for these crimes shall not escape retribution”¹¹⁹.

Moreover, in 1943 – two years before the constitution of the United Nations – under the proposal of the British government, the Allied created the United Nations War Crimes Commission (UNWCC)¹²⁰ to collect evidence of the war crimes committed by the Nazis and

¹¹¹ Winston Churchill, Prime Minister of the United Kingdom "Public Broadcast Regarding Meeting with President Roosevelt" (Public Radio Broadcast, 24 August 1941). Full text available at: <https://www.ibiblio.org/pha/timeline/410824awp.html>

¹¹² LEE-FRIEZE, D. (ed.), *Totally Unofficial*. op. cit. p. 109

¹¹³ PATTERSON, D. “*A crime without a name*” – Churchill, *Zionism & the Holocaust*, 2015, Finest Hour 170, available at: <https://winstonchurchill.org/publications/finest-hour/finest-hour-170/a-crime-without-a-name-churchill-zionism-the-holocaust/>

¹¹⁴ *Ibid.*

¹¹⁵ It was announced on 5 September 1942 during the mass deportations to Treblinka killing centre. Reference: <https://www.ushmm.org/learn/timeline-of-events/1942-1945/german-poster-announces-death-penalty-for-aiding-jews>

¹¹⁶ Full text available here: <https://api.parliament.uk/historic-hansard/commons/1942/dec/17/united-nations-declaration>

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ BATHURST, M. E. *The United Nations War Crimes Commission*, 1945, The American Journal of International Law, Vol. 39, No. 3, Cambridge University Press, p. 505

the Axis powers during WWII and to finally expose the crimes of the Nazi.¹²¹ It remained active until 1948 and, although it didn't have any prosecuting authority, it contributed to much of the findings that will be used to try Nazis in the following years. During the course of the war, however, the victims have been abandoned by institutions as, for instance, the International Committee of the Red Cross (ICRC) couldn't visit occupied countries to collect information about the mistreatment of civilians.¹²² The ICRC had, in fact, according to the 1929 Geneva Convention, the right to supervise and protect prisoners of war¹²³ while, in this case, the victims were not all involved in the conflict. A paradox emerged: men involved in the direct confrontations survived, while their families were murdered at home.¹²⁴

In June 1944, two Slovak Jewish, that had previously managed to escape from Auschwitz¹²⁵, published a report (named "The Auschwitz Protocol"¹²⁶) considered one of the first direct testimony of a camp, with names and numbers (victims referred to as "souls"). The report was received by a Romanian diplomat, Florian Manoliu, who was engaged with the rescue mission of diplomat George Mandel-Mantello¹²⁷, that immediately translated the document in various languages and launched a global campaign of awareness.

During the spring 1945, the Axis powers started to lose grounds and the SS started to evacuate, either by killing the inmates or by sending them to long death marches, the camps and the facilities. Gradually the Allied discovered and liberated all the concentration camps, some, however, had already been abandoned, leaving besides thousands of ill and dying people. Collecting of evidence for the subsequent trials appeared easy, although necessary.

¹²¹ *Ibid.*

¹²² LEMKIN, L. *Genocide*, 1946, op. cit. p. 6

¹²³ According to Artt. 79 and 88 of the Geneva Convention relative to the Treatment of Prisoners of War of 1929, the ICRC shall always be able to perform its humanitarian work for the protection of POWs. Full text available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/52d68d14de6160e0c12563da005fdb1b/eb1571b00daec90ec125641e00402aa6?OpenDocument>

¹²⁴ LEMKIN, L. *Genocide*, 1946, op. cit, p. 6

¹²⁵ For reference: <https://www.ushmm.org/learn/timeline-of-events/1942-1945/auschwitz-report>

¹²⁶ Transcriptions from the original document available here: <http://vrbawetzler.eu/img/static/Prilohy/The-Auschwitz-Protocol.pdf>

¹²⁷ George Mandel-Mantello was a Hungarian Jewish businessman working at the El Salvador's Consulate in Geneva. During WWII he managed to save thousands of European Jews by using his diplomatic connections to issue Salvadorian citizenship certificates for them. See as reference: <https://www.ushmm.org/collections/the-museums-collections/collections-highlights/mantello-rescue-mission>

1.3 From a crime without a name to the term ‘genocide’

As anticipated in the previous paragraph, in 1933, Lemkin proposed the recognition of two new international crimes: acts of barbarity and vandalism.

First of all, he underlined the necessity to broaden the concept of *danger commun* to the wider concept of *danger interetatic*¹²⁸ used to describe “acts so harmful and dangerous to the international community that their character as offences against the law of nations [...] could not raise any objection”.¹²⁹ Moreover, transnational danger was a threat to the interests of a number of States and their populations touching all the sectors of societies.¹³⁰ His proposal then, was to be added to the list of *delicta iuris gentium*¹³¹ codified at the 1st Conference for the Unification of Penal Law which met in Warsaw in 1927. The list has often been referred to as the Warsaw Formula¹³², also by Lemkin himself in his writings. The list included: piracy, counterfeiting of coins, bank notes and securities, trade in slaves, trade in women or children, intentional use of any instrument capable of producing a public danger (there has also been an attempt, in 1930, at introducing the term ‘terrorism’ here, but it wasn’t successful, due to the nature of the crime¹³³), trade in narcotics and traffic in obscene publications.¹³⁴ Lemkin, in his report to the 5th Conference for the Unification of Penal Law in Madrid of 1933, proposed five other offences to be added:

- Acts of barbarity,
- Acts of vandalism,
- Provocation of catastrophes in international communications
- Intentional interruption of international communications,
- Propagation of human, animal or vegetable contagions.

For the purpose of this present work, only the first two crimes will be analysed.

Lemkin believed that, until then, and he was influenced by the Armenian massacres he witnessed during WWI, there existed two clearly separated classes of offences.¹³⁵

¹²⁸ LEMKIN, R. Additional explications to the Special Report presented to the 5th conference for the Unification of Penal Law in Madrid, 1933

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

¹³² *Ibid.*

¹³³ *Ibid.*

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

The first class were the crimes against the individual human rights while, the other class, was composed of the crimes involving the individual and the collectivity.¹³⁶ But after WWI it became clear that some offences are fulfilled in order to attack an individual as part of a collectivity, in other words, to target human groups for destruction as the author's goal is not only to harm the individual, but his/her own community.¹³⁷ Barbarity, in turn, refers to "*acts of extermination directed against the ethnic, religious or social collectivities whatever the motives (political, religious, etc.)*"¹³⁸. Examples of such acts are pogroms, massacres and "*all sort of brutality which attack the dignity of the individual [...] in a campaign of extermination directed against the collectivity in which the victim is a member*".¹³⁹ These acts, considered together against a particular group, are *delicta iuris gentium*, as they "*shake the very basis of harmony in social relations between particular collectivities*".¹⁴⁰ Because of their nature, such acts do not remain in just one State but they can pass from one nation to another, involving also the economic sphere.¹⁴¹ An example of this consequence is the migration of a distressed population to another country as a consequence of persecutions.¹⁴² For this reason, they are transnational. The second crime is acts of vandalism that basically expand the concept of barbarity to the cultural realm. The destruction of a group can comprise the systematic devastation of cultural and artistic heritage that is then, according to Lemkin, "*directed against world culture*" as "*it is also all humanity which experiences a loss*".¹⁴³ Lemkin anticipated the Nazi destruction of books and libraries, that he considered to be opposite to human progress.

Moreover, in the end of the report, he deemed necessary to conclude an international convention to bind States into the prohibition of the crimes he explained.

After the German invasion of Poland in 1939, Lemkin, who has joined Polish resistance, was forced to flee his home¹⁴⁴, and hid in the forest for several months before being able to reach Lithuania, then Latvia and, eventually, Sweden (in his autobiography he often calls himself a nomad¹⁴⁵). He was offered a job as visiting lecturer of law at the University of Stockholm¹⁴⁶ and, since he was not convinced with the concept of State sovereignty that he has been offered years before as answer to the crimes of the Ottoman Empire, he began studying Nazi New Order

¹³⁶ *Ibid.*

¹³⁷ LEE-FRIEZE, D. (ed.), *Totally Unofficial*. op. cit, p. 23

¹³⁸ LEMKIN, R. Additional explications, op. cit.

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

¹⁴⁴ LEE-FRIEZE, D. (ed.), *Totally Unofficial*. op. cit. p. 25.

¹⁴⁵ *Ibid*, p. 91.

¹⁴⁶ *Ibid*, p. 75.

for Europe from its own jurisprudence.¹⁴⁷ He studied its structure, the domestic law of Germany and the Courts, its financing and Nazi foreign policy and treatment of minorities. He even collected the detailed reports of the quantities of food and calories that the Nazi were allocating to the different occupied countries.¹⁴⁸

In the meanwhile, in 1941, he moved to the United States, where he was offered a job at Duke University¹⁴⁹ and lectured at the US War Department.¹⁵⁰ He believed that the Stockholm audience was no longer enough for his quest, and he needed American determination to fight against the oppression.¹⁵¹

The result of his study was his masterpiece, titled “*Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*”¹⁵² of 1944. The ninth chapter is devoted to the introduction of his novel concept: genocide, as a distinct way for the destruction of nations. He coined this term by unifying the ancient Greek word *genos* which means race and the Latin word *cide*, to kill,¹⁵³ very similar to another term that, in his opinion could be used, which is *ethnocide* (from the Greek suffix, *ethnos*, nation).¹⁵⁴ It doesn’t necessarily refer to the immediate mass killing of a nation’s group but rather to a premeditated and coordinated set of actions aimed at the complete annihilation of all spheres of life of a group.¹⁵⁵

This plan, according to him is composed of two phases: first, the disintegration of the national heart of the group and, second, the replacement through forced imposition of the national heart of the aggressor.¹⁵⁶ Lemkin will often underline that the concept of denationalization, often used by scholars to define the loss of a national identity at the hands of another, is not enough.¹⁵⁷ Denationalization does not take into account the biological character of the annihilation, which is a fundamental one as the oppressor will bring about the physical decline of the population and its destruction.¹⁵⁸ The essential biological aspect is conducted, in practice, through a series of measures such as racial discrimination in food supplying, endangering of the health of the group and, finally, mass killing.¹⁵⁹

¹⁴⁷ *Ibid*, p. 77.

¹⁴⁸ LEMKIN, R. *Axis Rule in Occupied Europe*, op. cit, p. 88.

¹⁴⁹ IRVIN-ERICKSON, D. *Raphael Lemkin and the concept of genocide*, op. cit. p. 77

¹⁵⁰ *Ibid*, p. 109

¹⁵¹ LEE-FRIEZE, D. (ed.), *Totally Unofficial*. op. cit. p.78

¹⁵² LEMKIN, R. *Axis Rule in Occupied Europe*, op. cit.

¹⁵³ *Ibid*, p. 79

¹⁵⁴ *Ibid*.

¹⁵⁵ *Ibid*.

¹⁵⁶ *Ibid*.

¹⁵⁷ *Ibid*. See also LEMKIN, L. *Genocide*, 1946, op. cit, pp. 227-230

¹⁵⁸ LEMKIN, R. *Axis Rule in Occupied Europe*. Op. cit. p. 80

¹⁵⁹ *Ibid*.

Moreover, there are several other aspects considered by the perpetrator, that Lemkin enlists under the title “Techniques of genocide”.¹⁶⁰ First of all, there’s the political dimension¹⁶¹, in which the oppressor will destroy the institutions (if present) of the group. This will be concretised also through the modification of the names of the streets, the commercial signs as well as the names of the communities.¹⁶² This was especially the case in the occupied countries of Europe, where the Nazi imposed their puppet governments. The social aspect involves the abolition of local laws and courts, replaced by the oppressor’s ones.¹⁶³ The targets would be the clergy and the intelligentsia, that would be removed from the territory of the group. Culturally, the local population would be prevented from using its own language and customs such as in the schools and in the press.¹⁶⁴ There may be also subtle ways of bringing forward the annihilation of the group, such as in occupied Poland where Polish students were prohibited from the study of liberal arts¹⁶⁵, as it could develop a more independent thinking. All expressions of national pride, like cinemas, radio, literature or music, would be prohibited. The economic sector would be affected as well, in order to bring about the lowering of the overall living standard of the group.¹⁶⁶ In the New Order policies of the Nazi, for instance, a recurrent action in several occupied countries was the possession of the bank deposits of Jewish and Polish people and of their private property.¹⁶⁷ Lastly, probably the most important point for a contemporary analysis of genocide, is the religious component.¹⁶⁸ In fact, the religious leadership of the group would be the primary target of the annihilators, as religion often plays a fundamental role in the identity of a people.

All of this would contribute to the weakening of the morale of the group,¹⁶⁹ hampered by attempts to divert the group’s attention from whatever activity could bring to a sharing of nationalist ideals.¹⁷⁰ According to Lemkin, the National Socialist Party incorporated all these techniques and gave rise to an unprecedented system of extermination, that began years before the commencement of the war.¹⁷¹ For this reason, Lemkin pushed for the recognition of

¹⁶⁰ *Ibid*, p. 82

¹⁶¹ *Ibid*.

¹⁶² *Ibid*.

¹⁶³ *Ibid*, p. 83

¹⁶⁴ *Ibid*, p. 84

¹⁶⁵ *Ibid*, p. 84

¹⁶⁶ *Ibid*, p. 85

¹⁶⁷ *Ibid*.

¹⁶⁸ *Ibid*, p. 89

¹⁶⁹ *Ibid*.

¹⁷⁰ In the book, Lemkin asserted that one of the tactics of the Germans was to prevent the Jews from gathering, for example by imposing a strict curfew, favouring, on the other hand, all other sorts of “instincts” and solitary activities such as gambling, pornography, and alcohol consumption.

¹⁷¹ *Ibid*, p. 90

genocide not only in times of war, but also in periods of peace, going well beyond the scenarios referred to in the Hague Regulations.¹⁷²

Moreover, Lemkin believed that, because of the substantive importance of the prohibition of genocide, it needed to be included not only in the constitutional and national law of States, but also in their criminal law.¹⁷³ Genocide is not only a distinctive crime, but it's distinctively heinous¹⁷⁴, deserving a more specific rebuke. In this respect, he highlighted the procedure to be followed. Firstly, the international community should establish an international multilateral treaty which would then provide for laws protecting the rights of minority in the criminal code of nations.¹⁷⁵ Specifically, the criminal code should contain explicit provision for the prosecution of genocide, comprehending the liability of the individuals who charge genocide as well as those who execute the orders.

He also advocated for the entry of genocide in the realm of *delicta juris gentium*,¹⁷⁶ in order to impose on offenders the principle of universal repression.¹⁷⁷ Lemkin finally, in his 1944 work, promoted the creation of a specific organ or agency to conduct inquiries and perform controlling functions on “nations in prison”.¹⁷⁸

Axis Rule in Occupied Europe was undoubtedly innovative as it promoted the classification of a crime that went far beyond the lawful actions of the armies in a conflict. However, its actual and far-reaching appreciation had to wait other four years.

2.1 Post-war diplomacy

The years that followed the end of World War II were marked by some exemplar displays of diplomacy that forever changed the structure of the international legal community. As after every destructive period in history, what followed was a constructive term,¹⁷⁹ one which provided the right context for the revolution in the human rights awareness.

¹⁷² *Ibid.*

¹⁷³ *Ibid.*, p. 93

¹⁷⁴ BOGHOSSIAN, P. 2010, The concept of genocide, *Journal of Genocide Research*, 12:1-2, 69-80, p. 73

¹⁷⁵ LEMKIN, R. *Axis Rule in Occupied Europe*, op. cit. p. 93

¹⁷⁶ *Ibid.*, p. 94

¹⁷⁷ LEMKIN, L. *Genocide*, 1946, op. cit, pp. 227-230

¹⁷⁸ LEMKIN, R. 1944, “*Axis Rule in Occupied Europe*, op. cit.

¹⁷⁹ LEE-FRIEZE, D. (ed.), *Totally Unofficial*. op. cit. p. 121

First of all, in 1945, the leaders of fifty States created the United Nations¹⁸⁰ (UN) from the ashes of the unfortunate League of Nations.¹⁸¹ Their aim was to create an international body composed of the representatives of States in order to promote the respect of peace, cooperation and security among world nations.¹⁸² Lemkin would recall that, at the first regular session of the General Assembly, “*the statemen felt as if they owed an apology to the world for the holocaust and past follies, frustrations, and the many crimes committed*”.¹⁸³ The work at the UN produced two outstanding instruments: the Universal Declaration of Human Rights, according to which “*All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood*”¹⁸⁴ and the Genocide Convention, which was the outcome of Lemkin’s life-long mission of recognising genocide as an international crime with a legally binding instrument. They were both adopted in 1948, within a day from each other, after years of work that began right after 1946.

Moreover, in November 1945, Nazi officials were convicted of war crimes, crimes against humanity and against peace before the International Military Tribunal (IMT) in Nuremberg, Germany which was followed by the trials at the US Nuremberg Military Tribunal (NMT).¹⁸⁵ Nuremberg was a truly revolutionary event of the 20th century as, for the first time, individuals from a defeated country were tried for crimes committed during the war.¹⁸⁶

This paragraph will explain the key role of Lemkin’s work and publications firstly in the Nuremberg Trials and then for the work at the UN for the adoption of the Convention.

¹⁸⁰ *History of the United Nations*, in United Nations official website, available at: <https://www.un.org/en/about-us/history-of-the-un>

¹⁸¹ MAZOWER, M. *Governing the world. The history of an idea*, 2012, Penguin Group, London, p. 196

¹⁸² *History of the United Nations*, in United Nations official website, available at: <https://www.un.org/en/about-us/history-of-the-un>

¹⁸³ LEE-FRIEZE, D. (ed.), *Totally Unofficial*. op. cit. p.121

¹⁸⁴ General Assembly Resolution 217 A, *Universal Declaration of Human Rights*, 1948, Art. 1

¹⁸⁵ Another landmark trial of the post-war period was the International Military Tribunal for the Far East, known as Tokyo Trial, which, from 1946 to 1948 tried officials of the Japanese Empire for the same set of crimes as the proceedings in Nuremberg.

¹⁸⁶ TOMUSCHAT, C. *The Legacy of Nuremberg*, 2006, Journal of International Criminal Justice, Vol. 4, Issue 4, p. 831

2.1 The contribution of Lemkin to the Nuremberg Trials

*“The real complaining party at our bar is civilization”*¹⁸⁷

At the beginning of 1945, enough was known about the genocidal acts of the Nazis in occupied Europe, and the Allied were discussing the prosecution of German war criminals. On May 2, 1945, US President Truman appointed Robert H. Jackson to be Chief Prosecutor to the International Military Tribunal¹⁸⁸ in Nuremberg, Germany, with the mandate to try *“major criminals whose offenses have no particular geographical localization and who will be punished by joint decision of the governments of the Allies”*.¹⁸⁹ The IMT was the first and the most renowned one in a series of thirteen separate trials of Nazi officials conducted at the Palace of Justice in Nuremberg. Jackson - known as ‘the architect of Nuremberg’¹⁹⁰ - in his report of 6 June 1945, indicated that the alleged criminals had to be tried for genocidal acts occurred since 1933.¹⁹¹ By doing so, Jackson legitimised the prosecution of such crimes committed also in times of peace (as the “since 1933” indicates).

The following negotiations among the Allied produced, on 8 August 1945, the London Charter,¹⁹² containing the procedures and norms to be observed during the Trials. Article 6c of the London Charter, however, detached itself from the landmark assertion of Jackson, in describing crimes against humanity as: *“murder, extermination [...] and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crimes within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.”*¹⁹³ The reference to the jurisdiction of the Tribunal means that the

¹⁸⁷ Opening Statement of Chief United States Prosecutor Robert H. Jackson. 21/11/1945 "Second Day, Wednesday, 11/21/1945, Part 04", in Trial of the Major War Criminals before the International Military Tribunal. Volume II. pp. 98-102.

¹⁸⁸ KING JR, H. T. & FERENCZ, B. B. & HARRIS W. R. 2007, *Origins of the Genocide Convention*, Case Western Reserve Journal of International Law, Volume 40, Issue 1, p. 15.

¹⁸⁹ Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, London 1945. Full text available at: https://www.loc.gov/rr/frd/Military_Law/pdf/jackson-rpt-military-trials.pdf

¹⁹⁰ KING JR, H. T. & FERENCZ, B. B. & HARRIS W. R. 2007, *Origins of the Genocide Convention*, op. cit., p. 15.

¹⁹¹ Report of Robert H. Jackson, op. cit.

¹⁹² Full text available at: https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.2_Charter%20of%20IMT%201945.pdf

¹⁹³ *Ibid.*

persecutions on social grounds can be indictable only for crimes against peace or war crimes, hence, only in a belligerent scenario. A crime against humanity, then, was not an independent crime (as Lemkin envisaged for the crime of genocide) but it depended on the outbreak of a war of aggression or of a crime against peace.¹⁹⁴ The provision concerning the irrelevance of domestic law, on the other hand, is fundamental as it signals that German domestic law could not interfere with the punishment for such crimes, nor they could have been permitted by it. Abstractly, it was an important limitation on State sovereignty¹⁹⁵ which proved pivotal for the handling of similar prosecutions and for the development of the universal jurisdiction of such crimes.

However, the official indictment of 6 October 1945 made a direct reference to the crime of genocide, when dealing with treatment of civilian populations in occupied territory. The exact formulation was: *“They conducted deliberate and systematic genocide, viz., the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial or religious groups, particularly Jews, Poles and Gypsies and others.”*¹⁹⁶ This meant that the effort of Raphael Lemkin, the lobbying while working as legal expert with Jackson for the drafting of the indictment, paid back.

Thus, on the 20th of November 1945 the IMT began and for ten months people from all over the world came to know about the horrors of the Nazi rule over Europe, with detailed evidence coming directly from the Nazi archives and that led to the prosecution of twenty-two (plus one, Martin Bormann, tried *in absentia*) former Nazis¹⁹⁷.

Several judicial statements are particularly important to assess the contribution of Lemkin to the trials. On 25 June 1946, British deputy prosecutor Sir David Maxwell-Fyfe directly referred to Lemkin while performing the cross-examination of former Foreign Minister of Germany Konstantin von Neurath, concerning the treatment of Czechs. He stated: *“Now, Defendant, you know that in the Indictment in this Trial we are charging you and your fellow defendants, among many other things, with genocide, which we say is the extermination of racial and national groups, or, as it has been put in the well-known book of Professor Lemkin, “a co-ordinated plan of different actions aiming at the destruction of essential foundations of the life of national*

¹⁹⁴ EARL, H. *Prosecuting genocide before the Genocide Convention*, op. cit. p. 327

¹⁹⁵ KING JR, H. T. & FERENCZ, B. B. & HARRIS W. R. 2007, *Origins of the Genocide Convention*, op. cit. p. 16.

¹⁹⁶ Indictment presented to the International Military Tribunal sitting at Berlin on 18th October 1945. London: Her Majesty's Stationery Office, November 1945. 50 p. (Cmd. 6696). p. 12.

¹⁹⁷ EARL, H. *Prosecuting genocide before the Genocide Convention*, op. cit. p. 318.

groups with the aim of annihilating the groups themselves." And then added *"by achieving your policy you meant to destroy the Czech people as a national entity with their own language, history and traditions and assimilate them into the Greater German Reich"*.¹⁹⁸ With this formulation, Maxwell-Fyfe summed up the two characteristics of genocide envisaged in Lemkin's book.

The French prosecutors Charles Dubost and Deputy August Champetier De Ribes often elaborated on the concept of genocide during hearings. On 26 July 1946, in the closing remarks, Chief Prosecutor Dubost referred to genocide as *"the greatest crime of all"*¹⁹⁹ and that the *"scientific and systematic extermination of [...] certain national or religious groups"*²⁰⁰ was an offence so heinous that it couldn't be described by any existing term, making the coining of a new one necessary.²⁰¹

Nevertheless, the main goal of Lemkin to have the concept of genocide legally recognised through its use in an international tribunal seemed closer to be satisfied. Indeed, on the 1st of October 1946 the IMT delivered its verdict which accounted for twelve death sentences, seven incarcerations and three acquittals, on the ground of conspiracy, war crimes, crimes against humanity and crimes against peace.²⁰²

However, with the great disappointment of Lemkin, who will often refer to this day as the blackest day of his life,²⁰³ the judgement didn't contain reference to his term at all. In a similar fashion as for the Charter, the IMT ended up considering only the genocidal activities committed during the belligerent phase, leaving out Lemkin's provision of genocide in times of peace. The reason has been anticipated by Jackson already in the period of negotiations in 1945. At the International Conference on Military Trials of 23 July 1945, Jackson, in a seemingly contradictory way, stated that *"ordinarily we do not consider that the acts of a government toward its own citizens warrant our interference. [...] We think it is justifiable that we interfere or attempt to bring retribution to individuals or to states only because the concentration camps and the deportations were in pursuance of a common plan or enterprise"*

¹⁹⁸ Nuremberg Trial Proceedings, One Hundred and Sixty-third Day, Tuesday, 25 June 1946, Morning session. *The Avalon Project at Yale Law School* website: <https://avalon.law.yale.edu/imt/06-25-46.asp>

¹⁹⁹ Nuremberg Trial Proceedings Volume 19, One Hundred and Eighty-ninth Day, Monday, 29 July 1946. Morning session. *The Avalon Project at Yale Law School* website: <https://avalon.law.yale.edu/imt/07-29-46.asp>

²⁰⁰ *Ibid.*

²⁰¹ *Ibid.*

²⁰² For reference: *The verdict, International Military Tribunal at Nuremberg*, in Holocaust Encyclopedia, available at: <https://encyclopedia.ushmm.org/content/en/article/international-military-tribunal-at-nuremberg>

²⁰³ EARL, H. *Prosecuting genocide before the Genocide Convention*, op. cit, p. 325

of making an unjust or illegal war in which we became involved. We see no other basis on which we are justified in reaching the atrocities which were committed inside Germany, under German law, or even in violation of German law, by authorities of the German state."²⁰⁴ The last part will be incorporated in the London Charter, and it automatically meant that the offences committed by Germany (and in Germany), before 1939 were to be regarded as domestic affairs of Germany and no following crimes was, then, independent from the war.

According to Lemkin, "*the Allied decided their case against a past Hitler but refused to envisage future Hitlers*".²⁰⁵

The IMT preceded the twelve Subsequent Nuremberg Trials²⁰⁶ (known as NMT).

It is important to underline that, although the NMT was a continuation of the IMT and they are often considered together, one fundamental different between the two can be gleaned, i.e., the role of the concept of genocide. In fact, such principle has been invoked in several of the subsequent trials.

The legal team, already in December 1945, rewrote the Control Council Law N. 10²⁰⁷ in a way that let the notion of crimes against humanity, contained in Art. II(c)²⁰⁸ to be independent from other crimes. Its formulation allowed the prosecutors to eliminate "the nexus" with war, rendering it irrelevant for the crime to be committed within or outside the conflict. They could, then, include the notion of peacetime genocide. Although not directly mentioning the term, it was clear that Lemkin's idea has been very influential for the subsequent trials, as will be shown below.

²⁰⁴ Robert H. Jackson, "International Conference on Military Trials: London, 1945. Minutes of Conference Session, July 23, 1945", *The Avalon Project at Yale Law School* website: <https://avalon.law.yale.edu/imt/jack44.asp>

²⁰⁵ LEE-FRIEZE, D. (ed.), *Totally Unofficial*. op. cit. p. 118.

²⁰⁶ The NMT can be considered as an "inter-Allied tribunal", given the fact that, according to its nature it was not an international tribunal nor an American Court. However, Telford Taylor would state that the proceedings of the cases were particularly binding on the US. Reference: HELLER, K. J., *The Nuremberg Military Tribunals, and the Origins of International Criminal Law*, 2011, Oxford University Press, p. 109-113.

²⁰⁷ Control Council Law No. 10 was the legislation governing the NMT, issued by the Allied Control Council. It applied similar provisions as the London Charter, such as the indicted crimes, but it also gave the Allied the authorization to create zonal courts, which proved fundamental also for other trials in subsequent years. Reference: HELLER, K. J., *The Nuremberg Military Tribunals, and the Origins of International Criminal Law*, 2011, Oxford University Press, p. 12

²⁰⁸ In Art. 2(c), crimes against humanities were described as "*atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.*" Reference: <https://www.legal-tools.org/doc/ffda62/pdf/>

Among the twelve trials, three of them deserve to be analysed in a work considering the impact of Lemkin's term. The first trial to be held before the Nuremberg Military Tribunal started on 9 December 1946 and was the so-called "Doctors' trial". The opening statement of US Brigadier General Telford Taylor, Chief of Counsel, was significant. He stated that the term "*thanatology*" ("science of producing death")²⁰⁹ needed to be coined to refer to the crimes committed by the Nazi defendants, through their activities of human experimentations. The experiments were just a part of the wide euthanasia program, put in place to accelerate the process of the "Final Solution" according to the techniques of genocide²¹⁰ employed by the Nazi.

Another case in which the concept of genocide was directly evoked was the one known as RuSHA Trial (officially, *United States of America v. Ulrich Greifelt, et al*) that was focused on the policies of the SS Race and Settlement Office (RuSHA)²¹¹, active since 1931. In the trial, the prosecutors focused on the concept of the wide extermination program of the Nazi. The prosecutors asserted that, while other trials charged the defendants to participate in vicious acts that were phases of the Nazi genocidal program, this Trial was the first one in which the whole scheme was brought before justice.²¹² The purpose of the SS policies, which was the "*strengthening of Germanism*"²¹³, entailed the empowerment of some portions of the German population as well as groups of people accurately selected from the conquered territories by forcing German ideals, culture, language, etc upon them. On the other hand, the part of population considered unfit (racially inferior) was exterminated or marginalised, at the very best.²¹⁴ These are the two characteristics that shape the genocide envisaged by Lemkin²¹⁵ and that concretised in the years of the Nazi rule reaching, for instance, the almost complete destruction of Poland. In his closing statement, Trial Counsel Mr. Shiller listed all the organs of the "machine", each with a specific function, going from planning and coordination to kidnapping, deciding who was going to the concentration camps and taking care of the "*foreign element dangerous to the German Folkdom*"²¹⁶. The "group" in this case was composed of the

²⁰⁹ Opening Statement in the Doctors Trial by Brig. General Telford Taylor (December 9, 1946). Text available at: <https://famous-trials.com/nuremberg/1912-doctoropen>

²¹⁰ *Ibid.*

²¹¹ It was the one of the central offices of the SS. It became increasingly important as it was charged with the preservation of racial purity.

²¹² Closing remarks RuSHA case, *Trials of War criminals before the Nuremberg Military Tribunals*, Vol. V, p. 31.

²¹³ *Ibid*, p. 30.

²¹⁴ *Ibid*, p. 31.

²¹⁵ The double nature of the action of the Nazis has been described in almost equal terms in LEMKIN, R. *Axis Rule in Occupied Europe*, op. cit. p. 79.

²¹⁶ *Ibid.* p. 39.

populations of occupied Europe deemed as inferior such as Russians, Poles, Jews and Gypsies, among others.

Instead, the Trial that precisely focused on the treatment of Jews was the *Einsatzgruppen* Trial, that lasted from September 1947 to April 1948 and the defendants were persons “*whose sole job was their participation in the genocidal murder of Jews*”²¹⁷. Count one (crimes against humanity) of the indictment is relevant here as it began by stating the crimes committed by the defendants such as persecutions on political, racial and religious grounds, murder and extermination. Paragraph two directly points at the concept of genocide as it adds: “*The acts [...] were carried out as part of a systematic program of genocide, aimed at the destruction of foreign nations and ethnic groups*”.²¹⁸ Moreover, Chief Prosecutor Benjamin Ferencz, in his opening statement, asserted that “*Genocide, the extermination of whole categories of human beings, was a foremost instrument of the Nazi doctrine*”²¹⁹ and he would later recall “*I took him (Lemkin, ndr) seriously. [...] In that opening minute you heard at the Einsatzgruppen Trial, although genocide was not listed as a crime in either the IMT Charter or the Control Council Law, I called it genocide. [...] And I was thinking of Lemkin when I did that*”²²⁰.

However, although the numerous references to Lemkin’s idea in the NMT, genocide was not a juridical distinct crime yet as it was still considered “a type” of crime against humanity.

2.2 International community commitment towards the drafting of the 1948 Convention

According to Lemkin, the IMT was a mixed success for the international recognition of genocide as a stand-alone crime. After the initial disappointment at the outcome of the International Military Tribunal, Lemkin, however believed that the time was ripe²²¹ and, already in October 1946 he began contacting several newspapers, such as the *New York Times* or the *Washington Post*²²² to spread awareness about his proposal, i.e., to have the crime of genocide recognised in an international convention. It became clear that he needed to go through the diplomatic channels,²²³ he thus began making contacts with UN delegations in

²¹⁷ EARL, H. 2013, *Prosecuting genocide before the Genocide Convention*, op. cit. p. 318.

²¹⁸ Indictment, *Einsatzgruppen* case, *Trials of War Criminals before the Nuremberg Military Tribunals*, Vol. VI, p. 13.

²¹⁹ *Ibid*, p. 30.

²²⁰ KING JR, H. T. & FERENCZ, B. B. & HARRIS W. R. 2007, *Origins of the Genocide Convention*, op. cit. p. 27.

²²¹ LEE-FRIEZE, D. (ed.), *Totally Unofficial*. op. cit. p.120.

²²² *Ibid*.

²²³ *Ibid*.

order to put the question of genocide on the agenda of the first session of the General Assembly. The scope he had in mind was to create a “*marriage between the West and the East for the sake of [the] resolution*”²²⁴ by gaining the sponsorship of Latin American countries together with Asian ones.²²⁵

He wrote a draft resolution himself, asking the United Nations to study genocide as an event that, throughout the course of history has brought huge losses to humankind and needs to be recognised as an international crime. Several delegations, such as Panama, Cuba and India appeared enthusiastic about Lemkin’s idea and signed his resolution.²²⁶ He also gained the support of the International Alliance of Women²²⁷ and in his autobiography, Lemkin will praise this meeting as the beginning of a fruitful cooperation with women’s organization of the world.²²⁸ Finally, at the meeting of the steering committee²²⁹, US Ambassador Adlai Stevenson proposed, on behalf of the United States to put the item of genocide in the agenda. The resolution was adopted but instead of the unanimity, the Soviet Union opposed it, deeming it non necessary.²³⁰ After some pressure by the other delegations, such as Czech Minister of Foreign Affairs who personally spoke to Lemkin as well, Russian delegates endorsed the proposal.²³¹

The question was then referred to the Legal Committee where, on 22 November 1946 the draft resolution on genocide was proposed, the text presented by Cuban delegate Ernesto Dihigo.²³² He stressed the war nexus envisaged in Nuremberg I, in which certain acts of genocide remained on the downlow as they have been committed before 1939. This, paired with the principle *nullum crimen sine lege*, led to the unpunishment of several genocidal acts.²³³ For this reason, Dihigo brought forward Lemkin’s proposal, also highlighting the authoritarian, although non legislative, character of GA resolutions.

²²⁴ *Ibid*, p. 122.

²²⁵ The reason behind this decision was that he knew that getting the sponsorship of the powers was difficult if not impossible, so he decided to concentrate on smaller delegations. His intuition proved successful. Reference: *Ibid*.

²²⁶ *Ibid*.

²²⁷ IAW is an international organization working to promote the rights of women worldwide. (See <https://www.womenalliance.org>) One of its founders, Dame Margery Corbett Ashby (1882-1981), was a women’s rights pioneer and during the lobbying work of Lemkin, she organised a gathering with women from different countries in which they shed light on the treatment of women during the genocidal acts of WWII. Reference: *Ibid*, p. 125.

²²⁸ LEE-FRIEZE, D. (ed.), *Totally Unofficial*. op. cit. p. p. 124.

²²⁹ The steering committee is composed by the President and Vice President of the General Assembly, plus the chairmen of each of the committees. One of its functions is to approve the agenda of the GA.

²³⁰ LEE-FRIEZE, D. (ed.), *Totally Unofficial*. op. cit, p. 126.

²³¹ *Ibid*, p. 128.

²³² *Ibid*, p. 129.

²³³ SCHABAS, W. *Genocide*, op. cit. p. 52.

The draft resolution invited the Economic and Social Council (ECOSOC) to conduct a study on the issue, ensuring “international cooperation for its prevention and punishment”.²³⁴ Moreover, it also underlined the necessity to prosecute genocide within the national legislations, as per the practice related to the international crimes such as piracy, trade in women, slaves and so on.²³⁵ This, however, was not sufficient and, by dint of the effort of Saudi Arabian King Advisor, Judge Riad,²³⁶ the idea that the resolution needed to be considered as a first step towards the creation of a new convention began to spread. Judge Riad, has personally addressed Lemkin, asserting that “[*Genocide*] is a beautiful concept. It is something worth living for.”²³⁷ His delegation began to work soon after and, on 26 November 1946, it proposed a draft convention, named “*Draft Protocol for the Prevention and Punishment of Genocide*”²³⁸, composed of four articles. It was then decided to charge with the preparation of the draft resolution a new sub-committee, composed by the representatives of Saudi Arabia, the Soviet Union, France, India, Panama, Poland, the United States, the United Kingdom, Cuba, and Chile as the chair. The first controversy emerged about the criminal responsibility to be engaged for a prosecution of genocide.²³⁹ Hartley Shawcross, who previously served as British Chief Prosecutor at the IMT, proposed to amend paragraph 3 of the resolution adopted on the 22nd of November, by adding that “*genocide is an international crime for the commission of which principals and accessories, as well as States, are individually responsible*”²⁴⁰.

On 11 December 1946, the Sixth Committee unanimously adopted Resolution 96 (I)²⁴¹ prepared by the sub-committee. In the Resolution, the General Assembly therefore affirmed that genocide is a crime under international law, breaking all the ties with crimes against humanity and thus also removing the Nuremberg legacy,²⁴² i.e., the nexus between genocide and armed conflicts. As international crime, perpetrators can be prosecuted even when it does not contravene the domestic law of the relevant country, authorising then, such form of international jurisdiction.

²³⁴ *The Crime of Genocide: Request from the Delegations of Cuba, India and Panama for the Inclusion of an Additional Item in the Agenda*, UN Doc A/C.6/SR.22, 22 November 1946, available at: <https://digitallibrary.un.org/record/752134>

²³⁵ *Ibid.*

²³⁶ LEE-FRIEZE, D. (ed.), *Totally Unofficial*. op. cit. p.129.

²³⁷ *Ibid.*

²³⁸ Draft Resolution A/C.6/86, available at: <https://digitallibrary.un.org/record/752077>

²³⁹ SCHABAS, W. *Genocide*, op. cit. p. 54.

²⁴⁰ Document A/C.6/83, 1946, available at: <https://digitallibrary.un.org/record/752074>

²⁴¹ *The Crime of Genocide*, A/RES/96(I), available at: <https://digitallibrary.un.org/record/209873>

²⁴² SCHABAS, W. *Genocide*, op. cit. p. 57.

The aspect which remained controversial, however, was the universal jurisdiction.²⁴³ There was not an explicit reference to such concept but instead the Resolution mentioned international cooperation as a prerogative of States in order to facilitate prosecution and punishment. Indeed, it described genocide as the destruction, in whole or in part of racial, religious, political, and other groups; a definition that will be recalled in article I of the Genocide Convention.

Moreover, last paragraph of Resolution 96(I) mandated the ECOSOC to study and draw a draft convention²⁴⁴ on the crime of genocide. Before that could be possible, the bureaucratic apparatus of the UN implied another step, which involved the production of a Secretariat Draft, with the joint work of three experts in the field and the Human Rights Division. They were Raphael Lemkin, Henri Donnedieu de Vabres, a former judge of the Nuremberg Tribunal, and Vespasian V. Pella who, back then was the President of the International Association for Penal Law.²⁴⁵ The Secretary General however recommended to quit all the links to crime against humanity, which were being studied by an ongoing analysis within the Human Rights Committee for the creation of the Universal Declaration.

The Secretariat Draft²⁴⁶ resulted in a document with 24 articles plus a commentary of the experts and two draft statutes of an international criminal court, and it was sent to the Committee charged with the codification of new laws on 13 June 1947 to be presented at the fifth session of ECOSOC starting in July.

Before the debate, a French memorandum tried to challenge the progress made, as they Frenchs deemed as pointless the use and the international recognition of the term genocide, as they preferred to keep the issue in the domain of crimes against humanity.²⁴⁷ However, the draft was presented at the fifth session which was attended also by several non-governmental organizations such as the World Jewish Congress and the Commission of the Churches on International Affairs.²⁴⁸ There was still lack of consensus about the fundamental assumption of Lemkin itself, as was then showed by the debate. Venezuela, for their part, asserted that a convention commending States to enforce their domestic provisions for the punishment of genocide was preferable, instead of universal or international jurisdiction.²⁴⁹ The United States also believed that if there was to be something like that, then the jurisdiction of domestic and international tribunals needed to be precisely defined.²⁵⁰ The American delegation also

²⁴³ *Ibid.*

²⁴⁴ *The Crime of Genocide*, A/RES/96(I), available at: <https://digitallibrary.un.org/record/209873>

²⁴⁵ SCHABAS, W. *Genocide*, op. cit, p. 60.

²⁴⁶ *Draft Convention on the Crime of Genocide*, E/447, available at: <https://digitallibrary.un.org/record/611058>

²⁴⁷ SCHABAS, W. *Genocide*, op. cit. p. 63.

²⁴⁸ *Ibid*, p.64.

²⁴⁹ *Ibid*, p. 65.

²⁵⁰ *Ibid.*

advocated for the inclusion of political groups as victims of genocide, an idea strongly opposed by the Soviet Union.²⁵¹ France, adding to their previously circulated idea, added that genocide need to be mainly directed to States' authority and their rulers, as they believed that genocide was dependent from the complicity of the governments.²⁵² The proposal to adopt a separate convention on genocide remained however, largely undisputed.

During the second session of the GA of September-December 1947, a point was raised by Sir Hartley Shawcross. He noted that genocide needed to remain under the realm of crimes against humanity and, hence, of the IMT. The reason was that the failure of some States to ratify a potential convention would have the consequences of compromising all the efforts at asserting its universal acceptance.²⁵³

At the subsequent session of the General Assembly, in the first months of 1948, a new ad hoc committee was established by the ECOSOC, with the task of drafting the convention.²⁵⁴ It was composed by the United States, China, France, Poland, Lebanon, the Soviet Union and Venezuela. Throughout their meetings, they were asked to clarify the subjects that were still matters of debate among the international community, which were the kind of groups envisaged by the convention, the specific acts of genocide to be prohibited, whether cultural genocide was to be involved and, lastly, the degree to which the convention was intended to apply to States' leaders, civilians or officials.²⁵⁵ According to the records, France kept insisting on the notion of crimes against humanity as best suited to describe genocide, asking that it was put in the preamble of the convention.²⁵⁶ In the end, the words used will be 'crimes against humankind'²⁵⁷, as the members of the Ad Hoc Committee rejected French proposal, considering that their suggested term already had a clearly defined meaning in the London Charter.

Regarding the type of genocide, the United States opposed the inclusion of cultural genocide within the Convention, but their view was not shared by the other members of the Committee, leading to the acceptance of three kinds of genocide: biological, physical and cultural.²⁵⁸ The draft convention and the draft resolution were adopted on 2 December 1948, with thirty votes

²⁵¹ *Ibid*, p. 71.

²⁵² *Ibid*, p. 65.

²⁵³ *Ibid*, p. 79.

²⁵⁴ *Ibid*, p. 69.

²⁵⁵ *Ibid*, p. 70.

²⁵⁶ *Ibid*, p. 73.

²⁵⁷ *Report of the Committee and draft Convention drawn up by the Committee / Ad Hoc Committee on Genocide (Dr. Karim Azkoul - Rapporteur)*, E/794, available at: <https://digitallibrary.un.org/record/604195>

²⁵⁸ SCHABAS, W. *Genocide*, op. cit. p. 75.

to none, although with eight abstentions. Several significant points were raised by the abstainers. Firstly, the UK believed the whole convention to be a misconception, as it mainly focused on individual responsibility while, according to the British, it was State responsibility that needed to be addressed.²⁵⁹ In addition, Yugoslavia and Poland abstained because of the absence of references to hate speech and hate propaganda.²⁶⁰

The resolutions adopted involved, on one hand, the creation of an international judicial organ especially suited for the prosecution of similar international crimes and, on the other hand, the need for States with administered territories to extend the provisions to them as well.²⁶¹ The third session of the General Assembly was held in Paris, at the Palais de Chaillot in December 1948. Two vital instruments were on the Assembly's agenda: what will become known as the Universal Declaration of Human Rights and the Convention on Genocide. In the end, the Convention on the Prevention and Punishment of the Crime of Genocide was adopted on 9 December 1948, as Resolution 260A (III) with an annexed text and two resolutions, by fifty-six to none. The two accompanying resolutions were adopted as well. The Convention entered into force on 12 January 1951²⁶². It became the first human rights treaty to be adopted by the United Nations, forever changing the fields of international criminal law and international human rights law. Moreover, it undoubtedly underlined the international community's commitment to 'never again'. Raphael Lemkin, in his autobiography, recalled how the day immediately after the adoption, he needed to be admitted at the Paris hospital, where he remained for three weeks out of what he self-diagnosed "*exhaustion from the work on the Genocide Convention*"²⁶³. Indeed, all of this would have not been possible without his assiduous work. Throughout the years, he remained committed at keeping the question of genocide up on the agenda, establishing a web of meaningful contacts with diplomats, judges, journalists and so on, that supported him at the UN headquarters. In his autobiography he recalled that the Convention had created "*a new partnership between two worlds: my own world of long, frustrating efforts, hopes, and agonizing fears, and this new official world which now made a solemn pledge to preserve the life of the peoples and races of mankind.*"²⁶⁴

²⁵⁹ *Ibid*, p. 89.

²⁶⁰ *Ibid*.

²⁶¹ *Ibid*, p. 90.

²⁶² The United States, however, considering their weight as member of the international system, did not ratify it until forty years later, in 1988.

²⁶³ LEE-FRIEZE, D. (ed.), *Totally Unofficial*. op. cit. p.90.

²⁶⁴ *Ibid*. p. 177.

3. The outcomes of the Convention

After having outlined the processes that led to its adoption, this paragraph will focus on the concept of genocide as envisaged by the Genocide Convention, which will be used as legal framework for the case studies of the second chapter.

The definition of genocide would have not been possible without with the joint work of Raphael Lemkin and the international legal community which lasted for years from the conception of the term to the final adoption of the Convention.

However, since international law is a continuously evolving machine, it's important to underline also that what was accepted more than seventy years ago has often proved to not be enough for the ever-changing system of international actors of the contemporary period.²⁶⁵ For this reason, the second sub-paragraph will analyse the subsequent legal instruments that have tried to improve the punishment and prevention of genocide as well as to strengthen the applicability of the Convention.²⁶⁶

3.1 The definition of genocide

The atrocities committed by the Nazis during WWII profoundly shocked the world, in particular for the moral significance of the acts: the Nazis intentionally wanted the extermination of other human beings. This concept then, that needed a new term to be addressed, was not only a type of violent crime such as murder, but it had a clearly defined moral attribute which “*was synonymous with the apex of human evil*”.²⁶⁷

Raphael Lemkin immediately proposed it as a distinct crime, with an international nature and as something that could exist not necessarily linked to the notion of war.

Before having it recognised as part of the international legal framework, several other instruments were deployed. The London Charter and the Control Council Law, although

²⁶⁵ ADANAN, A., *Symposium on the Genocide Convention: Reflecting on the Genocide Convention at 70: How genocide became a crime subject to universal jurisdiction*, 2019, as presented at the Nottingham International Law and Security Centre conference of 9 November 2018. Published on Blog of the European Journal of International Law, p. 1.

²⁶⁶ SCHABAS, W. *Genocide*, op. cit. p 90.

²⁶⁷ STRAUS, S. 2001, *Contested Meanings and Conflicting Imperatives: A Conceptual Analysis of Genocide*, Journal of Genocide Research, Vol. 3, p. 359.

significant, remained in the realm of crimes against humanity, (hence of the war nexus) even though the wording used matched the definition of genocide. The two instruments defined crimes against humanity as accounting for, among other acts, persecutions on political, racial and religious grounds.²⁶⁸ Genocidal acts then, were considered as forms of persecutions.

In the Subsequent Trial, genocide was often employed in the indictments, namely for individuals charged with pursuing a systematic program of genocide.²⁶⁹ Finally, in 1948, after the work of the bureaucratic machine of the UN, the world acquired a widely accepted definition of genocide. The preamble of the Genocide Convention recalled the 1946 Resolution wording of genocide as an international crime which is “*contrary to the spirit and aims of the United Nations and condemned by the civilized world*”.²⁷⁰ This definition goes on, in Art. 1, in defining genocide as a crime, no matter its relationship with a conflict, rendering it prosecutable even in times of peace.²⁷¹

Art. 1 also impose an obligation on States Parties to prevent and punish it.²⁷²

Art. 2 and 3 are the core of the Convention.²⁷³ Art. 2 provides the definition of genocide:

“Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.”²⁷⁴

Genocide was no longer a moral concept; it had a codified legal significance.²⁷⁵

²⁶⁸ London Charter, 1945, Art. 6(c) available at: https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.2_Charter_of_IMT_1945.pdf and Control Council Law No. 10, Art. 2.1(a) available at: <https://www.legal-tools.org/doc/ffda62/pdf/>

²⁶⁹ See for reference, case no. 73, *United States v. Ulrich Greifelt and others*. Available at: http://www.worldcourts.com/imt/eng/decisions/1948.03.10_United_States_v_Greifelt2.htm

²⁷⁰ Preamble of the Genocide Convention, op. cit.

²⁷¹ The wording is clear as it states “whether committed in time of peace or in time of war”.

²⁷² Art. 1: “which they undertake to prevent and punish”.

²⁷³ SCHABAS, W. *Genocide*, op. cit. p. 81.

²⁷⁴ Art. 2, Genocide Convention, op. cit.

²⁷⁵ LEE-FRIEZE, D. (ed.), *Totally Unofficial*. op. cit. p. 171.

Indeed, the most interesting provision is the one regarding the intent to destroy the group, which must be specific, i.e., the *dolus specialis*.²⁷⁶ Each case needs to be thoroughly analysed in order to find the extremes of the specific intent which needs to be a collection of evidenced acts, and not a single act. Moreover, not only there must be the acts envisaged by the Article (the *actus rea*), but the perpetrator must show to have been acting with a specific intent, a plan, in mind.²⁷⁷ An important assumption is that, in light of the different kind of perpetrators, whether it's a State through State's policies or an individual through individual acts, the criteria for the establishment of the intent need to be adapted, as "*the nature or the level of involvement of the subject in the commission of genocide is different.*"²⁷⁸ As per the jurisprudence of the Courts, the intent has often been a controversial issue. For instance, in the ICTY²⁷⁹ *Jelisić* case, the Tribunal found that the defendant has often issued *laissez passers* to the victims and could not establish the existence of an overall plan since many of his killings were arbitrary and "against all logic".²⁸⁰ This led to his acquittal for the count of genocide, since no genocidal intent could be inferred.²⁸¹ The concept of intent will be a significant part of the case studies of chapter two and three.

Article 3 goes on by listing the acts, other than genocide, that shall be punishable:

- conspiracy to commit genocide,
- direct and public incitement to commit genocide,
- attempt to commit genocide,
- complicity in genocide.²⁸²

This list was the result of the compromise that the drafting States had to achieve. In particular, the paragraph concerning the incitement to commit genocide was at the centre of a discussion with some delegations pushing for its cancellation out of fear that it could contrast with freedom of expression while others – the Soviet Union in particular – believed that the concept of direct

²⁷⁶ SCHABAS, W. *Genocide*, op. cit. p. 260.

²⁷⁷ STRAUS, S. 2001, *Contested Meanings and Conflicting Imperatives*, op. cit. p. 364.

²⁷⁸ DE VIDO, S. "*On the "specific intent" of the crime of genocide. Beyond individual criminal responsibility*" 2018, in *Il genocidio. Declinazioni e risposte di inizio secolo*, Torino, Giappichelli, p. 68.

²⁷⁹ The International Criminal Tribunal for the former Yugoslavia was instituted in 1993 to prosecute individuals for the war crimes committed within the conflicts of the Balkan forwards from 1991 onwards.

²⁸⁰ *The Prosecutor v. Goran Jelisić*, ICTY, Decision of 14 December 1999, para 106. Available at: <https://www.icty.org/x/cases/jelusic/tjug/en/>

²⁸¹ *Ibid*, para. 16. See also JENSEN, O. *Evaluating genocidal intent: the inconsistent perpetrator and the dynamics of killing*, 2013, *Journal of Genocide Research*, Vol. 15, Issue 1, p. 5

²⁸² Article 3, Genocide Convention, op. cit.

incitement needed to be strengthened further, also including a direct description of the forms of public propaganda.²⁸³ The discussion was mainly driven by the original inclusion of political groups within the potential victims of genocide, which was later eliminated.²⁸⁴

Another significant aspect of the Convention is that it defines genocide as a crime which can be committed not only by ordinary individuals but also and by States' authorities. Even though this does not directly entail State responsibility,²⁸⁵ it is an important attribute for the international criminal nature of genocide. Accordingly, in Article 4 there's a reference to the persons committing genocide, whom shall be punished "*whether they are constitutionally responsible rulers, public officials or private individuals*".²⁸⁶

3.2 Legal repercussions

As monumental as it is, the merit of the convention to have established genocide as an international crime that States have the duty to prevent and punish is not the only one.

Three other aspects need to be considered to establish the international legal framework. First of all, the Genocide Convention provided the impetus for the conversation on universal jurisdiction. Years before the drafting of the Convention, there was the idea of 'universal repression'²⁸⁷ to be applied to crimes against humanity. Thanks to Raphael Lemkin and other academics, this was theorised within the obligation to prosecute or extradite.²⁸⁸ The main idea was to prevent alleged *génocidaires* from enjoying freedom in other States.²⁸⁹ According to this obligation, the State which found the alleged genocide perpetrator(s) was under an obligation to try them or, rather, to resort to extradition to another country, which was normally the country of which the offender was a national. The findings of the UNWCC (which considered genocide as a crime against humanity which arose in belligerent context), moreover, brought to the prosecution of genocide by several States, such as the United States and Poland, under the principle of universal repression, as envisaged until then.²⁹⁰

²⁸³ SCHABAS, W. *Genocide*, op. cit. p. 580.

²⁸⁴ *Ibid.*, p. 160.

²⁸⁵ AQUILINA K, & MULAJ. K, *Limitations in Attributing State Responsibility under the Genocide Convention*, 2017, *Journal of Human Rights*, p. 10.

²⁸⁶ Article 4, *Genocide Convention*, op. cit.

²⁸⁷ LEMKIN, R. *Axis Rule in Occupied Europe*, op. cit. p. 92.

²⁸⁸ *Ibid.*

²⁸⁹ *Ibid.*

²⁹⁰ ADANAN, A. *Symposium on the Genocide Convention*, op. cit. p. 2.

In addition, the NMT insistence at breaking the genocide-war nexus, indirectly led to the assertion that genocide as well, could be tried under such a universal principle.²⁹¹ However, universal jurisdiction was included only in the draft Convention prepared by Lemkin, Pella and de Vabres,²⁹² in the original article 7, titled “*Universal enforcement of municipal criminal law*” as well as in original article 8, “*Extradition*”. In the end, it was excluded from article 6 of the Genocide Convention, out of apprehension that it may impede State sovereignty.²⁹³ The final text of the article is: “*Persons charged with genocide or any of the other acts enumerated in article 3 shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.*”²⁹⁴

This absence was challenged in several trials that followed. The most striking example is the *Eichmann* case²⁹⁵ of 1968, held by the Government of Israel. The defendant strategy was to refer to Art. 6 of the Convention as non-allowing a “third party” (Israel in this case) to prosecute him.²⁹⁶ However, the District Court of Jerusalem asserted that by giving a strict interpretation of the article (so to allow only the domestic court of the State in which the crime has been conducted, or an international court, which didn’t exist yet) meant to undermine the main objective of the Convention, i.e., the prevention and the punishment of genocide.²⁹⁷ The Court stated that what follows from this, is that “*the jurisdiction to try such crimes is universal*”.²⁹⁸ Several other documents then seemed to confirm the universal character of the jurisdiction to prosecute genocide. In 1992, the UN Security Council mandated the Secretary General to create a Commission of Experts to investigate on the grave breaches of the Geneva Convention and international humanitarian law.²⁹⁹ In the *Final Report of the Commission of Experts established pursuant to Security Council Resolution 780*³⁰⁰, the Commission asserted that “*the only offences committed in internal armed conflict for which universal jurisdiction exists are “crimes against*

²⁹¹ *Ibid.*

²⁹² *Draft Convention on the Crime of Genocide*, E/447, op. cit.

²⁹³ ADANAN, A. *Symposium on the Genocide Convention*, op. cit. p. 2.

²⁹⁴ Article 6, Genocide Convention, op. cit.

²⁹⁵ The *Attorney General v. Adolf Eichmann* case was held from 11 April 1961 before the District Court of Jerusalem. Adolf Eichmann was a top-ranked Nazi officials charged with the implementation of the Final Solution. Eichmann was found in Argentina by Israeli secret services, where he has been hiding since the end of WWII and was prosecuted for fifteen counts and eventually sentenced to death. Reference: <https://www.internationalcrimesdatabase.org/Case/192/Eichmann/>

²⁹⁶ *Attorney General v. Adolf Eichmann*, Judgement, para. 8, full text available at: https://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Israel/Eichmann_Judgement_11-12-1961.pdf

²⁹⁷ *Ibid*, para. 19.

²⁹⁸ *Ibid.*

²⁹⁹ S/RES/780 of 6 October 1992, available at: <https://digitallibrary.un.org/record/151310>

³⁰⁰ *Letter dated 24 May 1994 from the Secretary-General to the President of the Security Council*, available at: https://www.icty.org/x/file/About/OTP/un_commission_of_experts_report1994_en.pdf

humanity” and genocide”³⁰¹. In addition, the *Draft Code of Crimes against the Peace and Security and Mankind*³⁰², issued by the International Law Commission in 1996, considered universal jurisdiction for the crime of genocide, consisting of the obligation for State Party to try or extradite the alleged *genocidaire*.³⁰³

Finally, considering the Convention, it does not specifically recognise it as several States, during the *travaux préparatoires* opposed it and it remained as such.³⁰⁴ Anyway, the principle of universal jurisdiction for the prosecution of genocide is well-established in the contemporary legal discipline³⁰⁵, even though the practice is still lacking.

Furthermore, Article 6 of the Convention also recommended the creation of an international criminal tribunal³⁰⁶ which became reality in the 90s. In late 1992, the International Law Commission was working on the creation of the draft statute of such instrument while, simultaneously, the SG Commission of Experts was collecting evidence on the consequences of war raging in Bosnia.³⁰⁷ An *ad hoc* tribunal was soon established to try persons responsible for the violations of international humanitarian law in the territory of former Yugoslavia since 1991, named International Criminal Tribunal for the former Yugoslavia (ICTY). Similarly, in November 1994, Rwanda sent an official request to the Security Council³⁰⁸, which prompted the creation of a second *ad hoc* tribunal, in order to prosecute genocide committed in the country in 1994, named International Criminal Tribunal for Rwanda (ICTR). They both were established by the UN Security Council as enforcement measures to create legally binding obligations on States for judicial cooperation, in particular giving concurrent jurisdiction to national courts,³⁰⁹ up against the serious genocidal acts that affected Rwanda and former Yugoslavia.

Their Statutes are similar in nature, although the ICTR is to judge events that happened within an internal armed conflict. They both included the definition of genocide contained in Art. 2 of

³⁰¹ *Ibid*, para 294.

³⁰² Full text available at: https://legal.un.org/ilc/texts/7_4.shtml

³⁰³ *Ibid*, Art. 9.

³⁰⁴ ADANAN, A., *Symposium on the Genocide Convention*, op. cit. p. 4.

³⁰⁵ *Ibid*. See also VAN DE VYVER, J. D., *Prosecution and Punishment of the Crime of Genocide*, 1999, Fordham International Law Journal, Vol. 3, Issue 2, p. 320.

³⁰⁶ Article 6, Genocide Convention, op. cit.

³⁰⁷ SCHABAS, W. *Genocide*, op. cit. p. 112.

³⁰⁸ PESKIN, V. *International justice and domestic rebuilding: an analysis of the role of the International Criminal Tribunal for Rwanda*, 2000, The Journal of Humanitarian Assistance, p. 12

³⁰⁹ ADANAN, A., *Symposium on the Genocide Convention*, op. cit. p. 3.

the Genocide Convention as well as the “other acts punishable” provision³¹⁰, that make them the “direct heirs” of the Convention. In addition to the 1948 instrument, they also have jurisdiction over war crimes and crimes against humanity,³¹¹ despite the fact that they were not operating under universal jurisdiction.

Already in 1951, the General Assembly established a committee of seventeen States to draft a statute for an international criminal court, but it was only in 1992 that real effort was employed.³¹² In fact, Special Rapporteur Doudou Thiam proposed a draft to the International Law Commission where it was stated that the Court was to have exclusive and compulsory jurisdiction over the crime of genocide, that was one of those crimes of peculiar severity to need a special criminal court for its prosecution.³¹³

The draft statute was adopted by the International Law Commission (ILC) in 1994 and it referred to the Convention as authoritative basis for the complaints.³¹⁴ This, according to Schabas, confirmed genocide’s place “*at the apex of the pyramid of international crimes*”³¹⁵ also since the establishment of the international court was specifically envisaged in the Genocide Convention itself.³¹⁶

A comprehensive and final agreement was reached at the UN Diplomatic Conference of Plenipotentiaries, held in Rome from 15 June to 17 July 1998. The outcome was the Rome Statute of the International Criminal Court³¹⁷ that finally established an international tribunal with inherent jurisdiction over genocide, (but also crimes against humanity, aggression and war crimes).³¹⁸ It integrated *verbatim* the definition of genocide of the Convention.³¹⁹ Furthermore,

³¹⁰ See as reference Art. 2 of the ICTR Statute, available at: https://legal.un.org/avl/pdf/ha/ictr_EF.pdf and Art. 4 of the ICTY Updated Statute, available at: https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf

³¹¹ SCHABAS, W. *Genocide*, op. cit. p. 115.

³¹² *Ibid*, p. 102.

³¹³ *Tenth Report of the Special Rapporteur, Mr. Doudou Thiam*, available at: https://legal.un.org/ilc/documentation/english/a_cn4_442.pdf para. 38.

³¹⁴ *Draft Statute for an International Criminal Court*, 1994, International Law Commission forty-sixth session, Art. 25, available at: https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_4_1994.pdf

³¹⁵ SCHABAS, W. *Genocide*, op. cit., p. 103.

³¹⁶ It was already pointed out by PELLA, V. *Towards an International Criminal Court*, 1950, The American Journal of International Law, Cambridge University Press, p. 42.

³¹⁷ Full text available at: <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>

³¹⁸ SCHABAS, W. *Genocide*, op. cit. p. 107. It refers to Art. 5, Rome Statute of the ICC, available at: <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>

³¹⁹ In fact, Art. 6 describes genocide as composed by the same list of offences envisaged in Art. 2 of the Genocide Convention.

to reinforce its application and to provide a clear mode of interpretation of the Statute, an additional instrument, namely *Elements of Crimes*, was adopted.³²⁰

The other legal repercussion of the recognition of genocide at the international level has to do with its collocation within the inner sanctum of *jus cogens*³²¹. In particular, the provisions concerning the prohibition of genocide have been gradually evolving into customary international law.³²² This status seemed to have been confirmed by several international instruments. Already in 1951, the International Court of Justice presented its Advisory Opinion³²³ within the reservations to the Genocide Convention in which it asserted that the principles issued by the Convention were to be binding on States, even in the absence of conventional obligations.

Moreover, the opinion of the ICJ was recalled also in ICTR *Akayesu* case that stated that “*the Genocide Convention is undeniably considered part of customary international law*”³²⁴ as well as ICTY *Krstić* case that, accordingly, stated that the case-law of the Convention “*would soon elevate to the level of a peremptory norm of general international law (jus cogens)*”³²⁵.

The jurisprudence of the ICJ seems to confirm this status as well. For instance, the prohibition of genocide has been cited among the obligations *erga omnes* (which refer to obligations owed to the entirety of the international community) in the *Barcelona Traction Case*.³²⁶ For genocide to be included within the *erga omnes* obligations, it means that all States have a legal interest in its protection³²⁷, which in this case translates into the outlawing of genocide.

Lastly, the majority of legal scholars agree in conferring *jus cogens* status to the prohibition of genocide³²⁸.

³²⁰ It contains the elements required for each of the crimes of Art. 5 of the ICC Statute in order to be prosecuted by the Court.

³²¹ RATNER, STEVEN R. ET AL, *The Genocide Convention after Fifty Years*, 1998, Proceedings of the Annual Meeting (American Society of International Law), vol. 92, p. 7.

³²² *Ibid*, p. 2.

³²³ Full text available at: <https://www.icj-cij.org/public/files/case-related/12/012-19510528-ADV-01-00-EN.pdf>

³²⁴ *The Prosecutor v. Jean-Paul Akayesu*, Decision of 2 September 1998, , available at: <https://unictr.irmct.org/sites/unictr.org/files/case-documents/ict96-4/trial-judgements/en/980902.pdf>, para. 495.

³²⁵ *Prosecutor v. Radislav Krstić*, Judgement in the Trial Chamber of 2 August 2001, available at: <https://www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf> , para. 54.

³²⁶ The case *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* was held before the ICJ by an Application of the Belgian Government of 1962 which claimed the accountability of Spain for the injury suffered by Belgian nationals who had invested in a Canadian corporation based in Spain.

³²⁷ *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgement of 5 February 1970, para. 33, available at: <https://www.icj-cij.org/public/files/case-related/50/050-19700205-JUD-01-00-EN.pdf>

³²⁸ See for reference: CASSESE, A. *International Criminal Law*, in EVANS, M. *International Law*, (First ed.) 2003, Oxford University Press, p. 743, VAN DER VYVER, J. D. *Prosecution and*

However, although it had been in force for more than seventy years, the Convention still has several ambiguities in its definition of genocide that, although its considerable status among the wide categories of international law, international humanitarian law and international criminal law, have often impeded its enforcement so far and the world is unfortunately still plagued by acts of (alleged) genocides. These limits will be demonstrated in the next chapters, concerning the study of two modern cases of massacres against minority groups.

Punishment of the Crime of Genocide, op. cit., p. 287, LYMAN BRUUN, L. *Beyond the 1948 Convention – Emerging Principles of Genocide in Customary International Law*, 1993, Maryland Journal of International Law, p. 216.

Chapter 2. Crimes of Da'esh in Syria and Iraq against Yazidis under a legal lens. Can it account for genocide?

The Genocide Convention, although possessing a substantial legal value, has not been able to halt the perseverance of genocidal acts.

Our 21st century world, more than seventy years after the entry into force of the Convention, is still plagued by discriminatory conducts against minority groups with little, if any, accountability.

This chapter will focus on the first of the two case studies that compose this present work, the alleged genocide perpetrated by members of ISIS against the Yazidi community in Iraq and Syria. The time span of the legal analysis will focus on the events that occurred from August 2014 onwards, with due regard to previous matters, whenever necessary.

1. Actors involved

The first step of a legal analysis is the description of the actors involved. In this case, the first actor is a minority group, the Yazidis, native of Syria and Iraq.

The second actor, the perpetrator, is a non-state entity, the so-called Islamic State.

Due regard will be paid, in this paragraph, to explain the origin of the two actors and the circumstances that led to 2014 genocidal acts.

1.1 The Yazidi Minority

The correct and proper name of this people is *Êzidi*³²⁹, which derives from the Sumerian word *Ê Zi Dî* that means “*the ones who are on the right path and have the good and unspoiled spirit*”.³³⁰ They are a Kurdish-speaking people scattered among northern Iraq and Syria, the Caucasus region and Iran³³¹. Since Yazidism is based on oral traditions³³² and there is not a

³²⁹ *Destroying the soul of the Yazidi*, 2019, RASHID International, Yazda et EAMENA Project, p. 29. The term “Yazidi” is used as English translation of the Sumerian word.

³³⁰ *Ibid.*

³³¹ *Yazîdî*, in Encyclopaedia Britannica, available at: <https://www.britannica.com/biography/Nadia-Murad>

³³² MURAD, N. *The Last Girl*, 2017, Tim Duggan Books, New York, p. 25.

holy book comparable to the Bible or the Koran, their origins are subject of debates among scholars. In Western academia, it is widely held³³³ that they began to develop around 750 CE within the Umayyad Caliphate³³⁴ successors who, after the fall of the dynasty, migrated to the neighbouring Kurdish mountains and were welcomed there.³³⁵ This theory appears meaningful as the Caliphate was ruled by Yazid I from 680 to 683 CE.³³⁶ However, during the Battle of Karbala (680 CE)³³⁷, Yazid I has been attributed the assassination of Imam Hussein³³⁸, the grandson of Prophet Muhammad³³⁹. Due to this action, he continues to be considered as the worst figure in Islamic narrative,³⁴⁰ and the Yazidis as a whole are frequently insulted for his alleged murder.³⁴¹

Although their origin is blurred, the first available historical recordings on Yazidi are the data collected by Muslim historian Abd al-Karim al-Sam'ani³⁴² who, for the first time, described a population living in Iraq in the 12th century, called al-Yazidiyya³⁴³ with neighbouring Kurds who practiced Zoroastrianism and pre-Islamic faiths, which could explain the syncretic nature of current Yazidism. In early 12th century, a Sufi mystic, named Sheikh 'Adi reached the Valley of Lalish, Northern Iraq from Baghdad, in order to live an ascetic lifestyle there and established a convent.³⁴⁴ He quickly gained followers among the Kurds peasants who worshipped caliph

³³³ EISLUND, S. *Yazidism*, 2019 World History Encyclopedia, available at: <https://www.worldhistory.org/Yazidism/>

³³⁴ It was an ancient dynasty established in Damascus, ruling over a vast empire stretching as far as Spain and Northern Africa. It was overruled by the rival Arab dynasty, Abbasids (750-1258 CE) in 750 CE. Reference: KHAN, S. M. *Umayyad Dynasty*, 2020, World History Encyclopedia, available at: https://www.worldhistory.org/Umayyad_Dynasty/

³³⁵ EISLUND, S. *Yazidism*, op. cit.

³³⁶ KHAN, S.M. *Umayyad Dynasty*, op. cit.

³³⁷ It was mainly fought in Iraq on October; the 10th BCE and the two warring factions were composed by the small army of Imam Hussien and Yazid I from the Umayyad caliph. Source: Encyclopaedia Britannica.

³³⁸ (626 – 680 BCE) He is still considered a very important figure for Islam, as he is considered to be the third Imam. Source: *Ibid*.

³³⁹ (570 – 632 BCE) He is considered the father of Islam as well as the proclaimer of the Koran. Source: *Ibid*.

³⁴⁰ KHAN, S.M. *Umayyad Dynasty*, op. cit. Several other articles seem to confirm this matter, although they are highly biased. See for reference: MAISAH, *What Happened to Yazid After the Battle of Karbala?* 2021, The Islamic Information, available at: <https://theislamicinformation.com/blogs/what-happened-to-yazid-after-the-battle-of-karbala/> or *The Full Story of Hussain*, in whoishussain.org.

³⁴¹ SALLOUM, S. *Ézidîs in Iraq. Memory, Beliefs and Current Genocide*, 2016, Research conducted in partnership with Un ponte per... and CEI, available at: https://www.academia.edu/33292077/ÉZIDÎS_IN_IRAQ (open access), p. 20.

³⁴² (1113-1166) He was a Muslim historian and biographer. His main work was “Ansāb”, which is a biographical dictionary with more than 10 thousand items. Reference: <https://artsandculture.google.com/entity/g120wkvv0?hl=nl>

³⁴³ EISLUND, S. *Yazidism*, op. cit.

³⁴⁴ *Ibid*.

Yazid and educated them his form of mystical Islam. After his death in Lalish, in 1162 CE, his grave became the holiest place of Yazidism, towards which they turn to pray every day.³⁴⁵ In 13th century, Yazidism with Adi's grandson, Sheikh Hasan, spread throughout Iraq, gaining more and more power among the Muslim community, which made the Muslim governor of the area wary. Yazidis and the Kurds rebelled to his rule and the latter were imprisoned. Muslim soldiers, moreover, desecrated Adi's grave and executed Hasan, in what marked the beginning of centuries of discrimination against the Yazidis.³⁴⁶ From that moment on, Yazidis began living in isolated locations, with few contacts with other communities, to escape from the prosecutions.

Through the isolation, Yazidism could develop and distance itself from Islam into becoming a distinct and rather secret religion. It remained, however, a monotheistic faith, based on one God who, according to the legend, was invisible and had no family members.³⁴⁷ Moreover, God created seven angels as his reflections and sent their chief, Tawusi Melek, down to earth, in the form of a peacock.³⁴⁸ Tawusi Melek is considered by the Yazidis as the only representation of God but, since he refused to bow to Adam on earth, hence refusing a God's order, he is seen as heretical by Muslims.³⁴⁹ The reason is because in Koran, Satan refused Allah order as well and was then sent to Hell, which is a concept that does not exist in Yazidism. This parallelism with Muslim Satan is the reason why Yazidis are considered devil worshippers by Islam³⁵⁰ and have been persecuted for centuries. According to the oral traditions, which is the only way in which Yazidism is handed down, there have been 72 attempted genocides – which they call *firman*s³⁵¹ – that make them one of the most persecuted minorities in the world.³⁵² In *The Last Girl*, Nadia Murad, a Yazidi survivor and Nobel-prize winner, recalled that “(they) were taught about the seventy-three past *firman*s against Yazidis, and these stories of persecution were so intertwined with who (they) were that they might as well have been holy stories.”³⁵³

³⁴⁵ MURAD, N. *The Last Girl*, op. cit. p. 49.

³⁴⁶ *Ibid.*

³⁴⁷ EISLUND, S. *Yazidism*, op. cit.

³⁴⁸ MURAD, N. *The Last Girl*, op. cit. p. 65.

³⁴⁹ EISLUND, S. *Yazidism*, op. cit.

³⁵⁰ *Ibid.*

³⁵¹ MURAD, N. *The Last Girl*, op. cit. p. 69.

³⁵² CARUSO, A. *Iraqi's Yazidis: Among the World's Most Threatened Minorities*, 2021, Istituto Affari Internazionali, available at: <https://www.iai.it/it/pubblicazioni/iraqs-yazidis-among-worlds-most-threatened-minorities>

³⁵³ MURAD, N. *The Last Girl*, op. cit. p. 69.

The last *firman* began on 3 August 2014 and is enduring ever since with thousands of Yazidis still unaccounted for.³⁵⁴

1.2 The Islamic State

The second relevant actor for this case study is the organization Islamic State of Iraq and Syria (ISIS), also known as Islamic State of Iraq and the Levant (ISIL) or Da'esh.³⁵⁵

The first fundamental figure of the organization is Abu Musab al-Zarqawi, a Jordan terrorist released in 1999 after serving five years of prison for his membership in the jihadist organisation Bayat al-Imam.³⁵⁶ After his release, he moved to Afghanistan, where he made contacts with Al-Qaeda and began running a training camp for the newly created group Jama'at al Tawhid wa al-Kihad (JTWJ).³⁵⁷ JTWJ became an ally to al-Qaeda and the Taliban forces and stabilised itself in Northern Iraq.³⁵⁸ In 2003 the organization began carrying out attacks, mainly through suicide car bombs, such as the explosion in front of the Jordan Embassy in Baghdad³⁵⁹, that killed at least 11 people, or the one outside the UN Assistance Mission in Iraq³⁶⁰, which left 22 casualties. It became clear that they targeted the international community as well as Iraqi institutions, an objective constantly fomented by the personality cult around al-Zarqawi.

³⁵⁴ CARUSO, A. *Iraqi's Yazidis*, op. cit.

³⁵⁵ This term is used to refer to the organization in a pejorative way. It is mostly used by European and American media, in order not to legitimize the statehood pretences of the organization with the word "Islamic State". It can have two meanings in Arabic, either referring to "to trample down and crush" or to "a bigot". Reference: GARRITY, P. *Paris Attacks: What Does 'Daesh' Mean and Why Does ISIS Hate it?* 2015, NCB News, available at: <https://www.nbcnews.com/storyline/isis-terror/paris-attacks-what-does-daesh-mean-why-does-isis-hate-n463551>

³⁵⁶ LISTER, C. *Profiling the Islamic State*, 2014, Brookings Doha Center, Brookings Institution, Washington, D.C., p. 6.

³⁵⁷ It was a radical jihadist organization which remained active from 1999 to 2004, in Iraq. According to US Government Spokesman, Richard Boucher, the organization's objective was to destabilise Iraq's attempts at establish a democratic government. They have been held accountable for several killings, of civilians, Iraqi politicians, and former Iraqi Government Council President. In a bombing to the UN Headquarters in Baghdad, the group has killed UN Special Representative of the Secretary General for Iraq, Sergio Vieira de Mello. Reference: BOUCHER, R. *Foreign Terrorist Organization: Designation of Jama'at al-Tawh wa'al-Jihad and Aliases*, 2004, Press Statement, Washington, DC, available at: <https://2001-2009.state.gov/r/pa/prs/ps/2004/37130.htm>

³⁵⁸ LISTER, C. *Profiling the Islamic State*, op. cit. p. 6

³⁵⁹ FILKINS, D. *At Least 11 Die in Car Bombing at Jordan's Embassy in Baghdad*, 2003, The New York Times, available at: <https://www.nytimes.com/2003/08/07/international/worldspecial/at-least-11-die-in-car-bombing-at-jordans-embassy.html>

³⁶⁰ *UN should never be a target, Baghdad bombing survivors stress, 15 years after deadly attack*, 2018, UN News Global perspective Human stories, available at: <https://news.un.org/en/story/2018/08/1016462>

In 2004, after consolidating its presence in Iraq, JTWJ finally blended with al-Qaeda becoming known as al-Qaeda in Iraq (AQI). This partnership was controversial as, for its part, al-Qaeda leader believed they needed to fight against the regimes, while AQI was engaged in the “cleansing of the society” through acts of appalling violence that mainly targeted civilians.³⁶¹ AQI, however, continued attracting insurgent fighters and, in 2006, it merged with other jihadist groups, greatly enhancing its capabilities.³⁶²

On 7 June 2006, al-Zarqawi was killed in Baghdad, by an American air strike, in the context of the “war on terror” initiated after the 9/11 events.³⁶³ Soon after, the new chief, Abu Omar al-Baghdadi proclaimed the birth of a newly established organization, fully structured in a cabinet-like manner, named Islamic State of Iraq (ISI),³⁶⁴ thereby suggesting a distancing from al-Qaeda. In fact, ISI became financially self-sufficient in 2006, controlling the oil smuggling of Iraq as well as substantial portions of organised crime and drug trafficking.³⁶⁵ It also controlled Sunni areas in Northern Iraq were, backed by external forces, such as the United States³⁶⁶, internal militias, began mounting a counterinsurgency.³⁶⁷ In fact, those autonomous militias proved to be able to effectively counter ISI advance, thereby only strengthening the terrorist aspiration of crushing those minorities.³⁶⁸ As a consequence, they began carrying out car bombings in Northern Iraq, which disproportionately affected the Yazidi community, with the bloodiest attack on 14 August 2007, that killed 800 people.³⁶⁹

However, thanks to the reinforcement of US presence in the area, ISI suffered considerable losses and remained rather silent during the 2007-2009 period, only to resurface at the withdrawal of American troops in 2009-2010.³⁷⁰ In that period, ISI could further strengthen its ties with Iraqi intelligence services as well as its propaganda machinery, that attracted an increasing number of foreign fighters.³⁷¹ It also expanded its presence in Syria where,

³⁶¹ LISTER, C. *Profiling the Islamic State*, op. cit. p. 8.

³⁶² *Ibid.*

³⁶³ *Al-Zarqawi killed in air strike*, 2006, Al Jazeera News, available at: <https://www.aljazeera.com/news/2006/6/8/al-zarqawi-killed-in-air-strike>

³⁶⁴ The full Arabic name was al-Dawla al-Islamiya fi Iraq. Reference: LISTER, C. *Profiling the Islamic State*, op. cit. p. 9.

³⁶⁵ *Ibid.*

³⁶⁶ Already in 2004, ISI has been included in the list of the Foreign Terrorist Organizations by the US Department of State. Reference: <https://www.state.gov/foreign-terrorist-organizations/>

³⁶⁷ LISTER, C. *Profiling the Islamic State*, op. cit. p. 9.

³⁶⁸ *Ibid.*

³⁶⁹ *A tough time*, 2013, The Economist, available at: <https://www.economist.com/pomegranate/2013/11/13/a-tough-time>

³⁷⁰ *Timeline: the Rise, Spread and Fall of the Islamic State*, 2019, Wilson Center, available at: <https://www.wilsoncenter.org/article/timeline-the-rise-spread-and-fall-the-islamic-state>

³⁷¹ *Ibid.*

exploiting the internal disorders, ISI leaders could consolidate their position by forming Jabhat al-Nusra organization.³⁷²

Their self-proclaimed legitimacy was based on the propaganda campaign, aimed at recognising their leader, al-Baghdadi, as a descendant of the Quraysh tribe that, according to the Koran tradition, was the dynasty from which the caliph would emerge.³⁷³ Likewise, the expansion of ISI rule was to be regarded as the continuation of Prophet Muhammad mission of spreading Islamic belief.³⁷⁴

Exploiting the raising civil war in Syria, ISI expanded in the area, and, on April 9, 2013, ISI leader confirmed their affiliation with al-Nusra, stating that the organization was to be recognised as Islamic State of Iraq and Syria.³⁷⁵ This was accompanied by ongoing violent operations, which disproportionately affected civilians, and led to the capture of Raqqa and the spread of ISIS influence in the neighbouring Sunni areas.

On 29 June 2014, on the first day of Ramadan, Abu Muhammad al-Adnani³⁷⁶ proclaimed the establishment of the Caliphate with him as official spokesman and Abu Bakr al-Baghdadi³⁷⁷ as the Caliph³⁷⁸, governing an area from Aleppo, Syria to Diyala, Iraq.³⁷⁹ This entailed the enforcement of the organisation's bureaucracy, increasing its funds by controlling oil and agricultural commerce as well as the bank services of the area.³⁸⁰ In fact, it had proto-State functions, such as levying taxes, the control of the judicial system, that they based completely on their extremist version of Sharia law, as well as of the education system and of public sector, like the electricity.³⁸¹ Moreover, their active presence on social media and online outlets, was aimed at spreading the ideology in the world, in particular the idea of a holy war, the *jihad*, to

³⁷² LISTER, C. *Profiling the Islamic State*, op. cit. p. 10.

³⁷³ *Ibid.*

³⁷⁴ *Ibid.*

³⁷⁵ *Timeline of the Islamic State*, Wilson Center, op. cit.

³⁷⁶ His real name was Taha Subhi Falaha and he was the “chief propagandist and strategist” of ISIS. Reference: WRIGHT, R. *Abu Muhammad al-Adnani, The Voice of ISIS, is Dead*, 2016, The New Yorker, available at: <https://www.newyorker.com/news/news-desk/abu-muhammad-al-adnani-the-voice-of-isis-is-dead>

³⁷⁷ His real name was Ibrahim Awwad Ibrahim Ali al-Badri al-Samarra'iy. He succeeded Abu Bakr al-Baghdadi as ISIS leader. Reference: *Who was ISIL's self-proclaimed leader Abu Bakr al-Baghdadi?*, 2019, Al Jazeera, available at: <https://www.aljazeera.com/news/2019/10/27/who-was-isils-self-proclaimed-leader-abu-bakr-al-baghdadi>

³⁷⁸ The caliph is often referred to as “the shadow of God on earth”, hence, he is the apex of Muslim society. ISIS ideology is mainly centred on the renewal of caliphate that, they envisage, would mean to return to a past version of Islam, were Muslim were self-disciplined and always ready to sacrifice their life to Allah. Reference: KENNEDY, H. *How ISIS Twisted the Meaning of 'Caliphate'*, 2016, Time, available at: <https://time.com/4471463/caliphate-history/>

³⁷⁹ *Timeline of the Islamic State*, Wilson Center, op. cit.

³⁸⁰ ALMOHAMAD, S. *Not a Storm in a Teacup: The Islamic State after the Caliphate*, 2021, German Institute for Global and Area Studies, Number 3, available at: <https://www.giga-hamburg.de/en/publications/giga-focus/not-a-storm-in-a-teacup-the-islamic-state-after-the-caliphate>

³⁸¹ *Ibid.*

purify the world and returning to the original version of Islam,³⁸² making it both a regional and an international threat. In fact, in their crusade against the infidels, ISIS carried out deadly attacks in Europe and in the United States, considered to be lands of infidels.³⁸³ As a response, the United States formed a Combined Task Force, with 64 countries that, with the aid of local forces, such as the Syrian Democratic Forces and the Iraqi Security Forces, had the shared mission of defeating ISIS.³⁸⁴ The international effort proved successful and, by the end of 2017, ISIS had lost 95% of its caliphate and, one year later, on 19 December 2018, former US President Donald Trump proclaimed the defeat of ISIS.³⁸⁵

ISIS, however, continued operating on a smaller scale in the Middle East, in attempts to regaining the former-controlled territories, under the lead of al-Qurashi, who succeeded ISIS “caliph” al-Baghdadi after his killing by US airstrike of 26 October 2019. The group kept being under military pressure by the US and the international coalition and, on 2 February 2022, the US Government reported the killing of al-Qurashi, considered, among the other crimes, to be one of the architects of the Yazidis massacres of 2014.³⁸⁶ At the time of writing, ISIS has yet to communicate any attempts at vindication or the establishment of a new chief.

2. Legal analysis

Having established some background knowledge on the actors involved, the following paragraphs will proceed with the legal analysis of the acts that, according to a vast account of evidence, have been committed from August 2014, in the Sinjar region, by ISIS.

It will start by establishing whether the victims, the Yazidi community, can be considered as a protected group under Art. 2 of the Genocide Convention. Similarly, the acts of ISIS will be analysed in light of the genocide requirements of the Convention. The legal analysis will be based on the complementarity of the *actus rea* of the crime and the specific intent, the *mens rea*, to destroy the Yazidi group.

³⁸² WOOD, G. *What ISIS Really Wants*, 2015, The Atlantic, available at: <https://www.theatlantic.com/magazine/archive/2015/03/what-isis-really-wants/384980/>

³⁸³ *Ibid.*

³⁸⁴ ALMOHAMAD, S. *Not a Storm in a Teacup*, op. cit.

³⁸⁵ *Timeline of the Islamic State*, Wilson Center, op. cit.

³⁸⁶ *Profile: Who was Abu Ibrahim al-Qurayshi?*, 2022, Al Jazeera, available at: <https://www.aljazeera.com/news/2022/2/4/abu-ibrahim-al-qurayshi-who-was-isil-killed-in-us-raid> See also: *Islamic State leader Abu Ibrahim al-Qurayshi killed in Syria, US says*, 2022, BBC News, available at: <https://www.bbc.com/news/world-middle-east-60246129>

Due attention will be paid to the Human Rights Council Report of 2016³⁸⁷ as well as survivors' testimonies.

2.1 Yazidis as a protected group

The first step to define the crimes committed by Da'esh as genocide is to understand whether the Yazidi minority is to be considered as a protected group. The legal framework is the Genocide Convention that, in Art. 2 extends its jurisdiction to genocidal acts committed against a national, ethnical, racial or religious group.³⁸⁸ The same definition is reproduced in the Statutes of the *ad hoc* tribunals as well as in the Statute of the ICC and its auxiliary instrument Elements of Crimes.

Since the definition of the Convention is exclusive but it does not, however, provide comprehensive and unequivocal definitions of the groups³⁸⁹, we shall turn to the jurisprudence of the tribunals, in particular to the landmark ICTR *Akayesu* case. Regarding the characterization of the Yazidi minority, the two relevant definitions are those of religious group and of ethnical group. In *Akayesu*, a religious group has been defined as “*one whose members share the same religion, denomination or mode of worship*”.³⁹⁰ Although the numerous commonalities with other monotheistic religions, such as Christianity and Islam, Yazidism is based on its own definition of God, enshrined in the figure of the Peacock Angel Tawusi Melek, whom they worship in a unique and distinct manner. For instance, the day of rest and prayer is Wednesday, considered to be the day in which Tawusi Melek first descended on earth.³⁹¹ The daily prayers are to be done three times a day, first towards the sun, then towards the Lalish mountain and lastly towards the moon.³⁹² Conversion as well as inter-religious marriage are prohibited and the only way to become a Yazidi is to be born out of Yazidi parents.³⁹³ This prohibition confirms that they see themselves as a separate faith, from which the other religions

³⁸⁷ “*They came to destroy*”: *ISIS Crimes Against the Yazidis*, Human Rights Council, A/HRC7327CRP.2, available at: <https://digitallibrary.un.org/record/843515>

³⁸⁸ *Genocide Convention*, Art. 2, op. cit.

³⁸⁹ LINGAAS, C. *Defining the protected groups of genocide through the case law of international courts*, 2015, International Crimes Database, ICD Brief no. 18, p. 1.

³⁹⁰ *The Prosecutor v. Akayesu*, ICTR, Judgement of 2 September 1998, para. 515, available at: <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/ICTR-96-04/MS15217R0000619817.PDF>

³⁹¹ MURAD, N. *The Last Girl*, op. cit. p. 67.

³⁹² *Ibid.*

³⁹³ *Ibid.*, p. 69.

are excluded.³⁹⁴ Moreover, the crimes against the Yazidis has been committed by the ISIS out of the latter's belief of the devil worshipping attitude of the former³⁹⁵, suggesting that the persecution had a religious base. Accordingly, ISIS combatants have often referred to the Yazidis as dirty "*kuffar*" and have often forced their conversions to Islam.³⁹⁶ The subjective standard³⁹⁷ is therefore fulfilled, both with the perception of the group itself and the "outsiders" one. Regarding the objective level, it can be considered that all the elements above-mentioned constitute part of the objective definition of a religious group which, in the case of the Yazidis is fulfilled as well.

Concerning the definition of ethnical group, in *Akayesu*, the ICTR defined it as "*a group whose members share a common language or culture*"³⁹⁸. The Yazidi communities dispersed in the Middle East share their native language, which is Kurdish. In addition, in *Akayesu*, the tribunal set a precedence, by considering the Tutsi as an ethnic group, even though they shared the same language and culture with the Hutu.³⁹⁹ This would seem to be the case for the Yazidis as well, since they share the Kurdish language with other people, but they differ substantially from them in their own tribal practices, such as the caste system and the prohibition from marrying a non-Yazidi. Moreover, the ethnicity factor is debated among the community itself, with many members considering Yazidism both an ethnic and a religious identity.⁴⁰⁰

However, the Human Rights Council has not analysed this possibility further, concluding that the Yazidis "*are a protected religious group within the meaning of Art. 2 of the Genocide Convention.*"⁴⁰¹

³⁹⁴ POTOT-WARREN, J. *Identifying Genocide: The Yazidi Massacre in the Context of the Convention for the Prevention and Punishment of Genocide*, 2020, Student Journal of Professional Practice and Academic Research, Vol. 2, Issue 1, p. 36.

³⁹⁵ EISLUND, S. *Yazidism*, op. cit.

³⁹⁶ A/HRC/32/CRP.2, op. cit. para. 104.

³⁹⁷ The standards of subjectivity and objectivity in defining the membership of a group have been developed by the tribunals whilst proceeding on a case-by-case basis for the subsequent cases of genocide. In some instances, the tribunal relied more on the subjective approach, such as in *Gacumbitsi* case where the ICTR stated that the "*membership of a group is a subjective rather than an objective concept*" (ICTR, *The Prosecutor v. Gacumbitsi*, Trial Judgement of 17 June 2004, para. 254). In *Akayesu*, on the other hand, the standard employed has been a mainly objective one which resulted in more emphasis on the physical and biological characteristics of the Tutsi instead of the historical and social context. In *Krstić*, however, the ICTY stated that "*to attempt to differentiate each of the named groups on the basis of scientifically objective criteria would thus be inconsistent with the object and purpose of the Convention*". (ICTY, *The prosecutor v. Krstić*, Judgement of 2 August 2001, para. 556). In the end, the practice has been to use a mixed approach, considering both standards, and to always proceed on a case-by-case basis. Reference: LINGAAS, C. *Defining the protected groups of genocide*, op. cit. p. 9-14.

³⁹⁸ ICTR, *Prosecutor v. Akayesu*, op. cit.

³⁹⁹ *Ibid.*

⁴⁰⁰ MURAD, N. *The Last Girl*, op. cit. p. 74.

⁴⁰¹ A/HRC7327CRP.2, op. cit. para. 110.

2.2 *Actus rea*

The *actus reus* of a crime is its objective constituent element.⁴⁰² Already in *Axis Rule in Occupied Europe*, Lemkin had anticipated the complementary role of the material element by defining the techniques of genocide⁴⁰³ based on the actions of the Nazi against the population in the occupied countries of Europe.

A further characterization is that such element can account for an act of commission or an act of omission.⁴⁰⁴ An example of act of omission is in Art. 2(c) of the Genocide Convention, “*deliberately imposing conditions of life designed to destroy the group*”⁴⁰⁵. In *Axis Rule in Occupied Europe*, Lemkin described the deliberate choice of the Nazi to dramatically reduce the ratio of food to be provided to the populations deemed as inferior which resulted in, for instance, a rise in anaemia in Poland and increase in deathrate.⁴⁰⁶

The *actus rea* for the crime of genocide are enlisted in Art. 2 of the 1948 Convention:

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

In the next section, the acts committed by ISIS will be analysed in light of the definition provided by the Convention, to establish whether they can account for genocidal activities.

⁴⁰² EVANS, M. *International Law*, op. cit. p. 723.

⁴⁰³ LEMKIN, R. *Axis Rule*, op. cit.

⁴⁰⁴ SCHABAS, W. *Genocide*, op. cit. p. 177

⁴⁰⁵ *Ibid.*

⁴⁰⁶ LEMKIN, R. *Axis Rule*, op. cit. p. 88

2.2.1 Killing members of the group

The act of killing members of a group can be considered as the definitive mode of annihilation one that is both irreversible and immediate.⁴⁰⁷

Its genocidal nature can be proved by three additional characterising elements:

1. the victim is dead;
2. the death resulted from an unlawful act or omission of the accused or a subordinate;
3. at the time of the killing the accused or a subordinate had the intention to kill or inflict grievous bodily harm on the deceased having known that such bodily harm is likely to cause the victim's death, and is reckless whether death ensues or not.⁴⁰⁸

Moreover, art. 6 of Elements of Crimes specified that the word "killed" as in Art. 6(a)1 "*The perpetrator killed one or more persons*",⁴⁰⁹ shall be interchangeable with the notion of "caused death".⁴¹⁰ This means that, for instance, an act of suicide within the pattern of genocidal violence against a group, can account for killing as envisaged in Art. 2 of the Genocide Convention when an act or an omission of the accused person "*induced the victim to take action which resulted in his death, [...] or was an action of a type which a reasonable person could have foreseen as a consequence of the conduct of the accused*".⁴¹¹ What results then, is also that the body of the victim does not necessarily need to be used as proof, but the death can be inferred from the circumstances.⁴¹²

On 3 August 2014, ISIS fighters attacked the Sinjar region on the border with Northern Iraq and Syria, seizing villages and towns in the Mount Sinjar areas, pushing the Kurdish forces, the Peshmerga⁴¹³ to withdraw. After the first news of the attack began to circulate among the community some Yazidi tried to mount a limited resistance⁴¹⁴ while others were able to flee in the upper side of the Mountain.⁴¹⁵ The latter were quickly reached and trapped by ISIL militants

⁴⁰⁷ PALEVIĆ, M. et al. *Actus reus of genocide and types of genocidal destruction*, Ekonomika, Vol. 65, Issue 4, p. 4

⁴⁰⁸ ICTR, *Prosecutor v. Akayesu*, Judgement of 2 September 1998, para. 589.

⁴⁰⁹ *Elements of Crimes*, Art. 6(a)1.

⁴¹⁰ *Elements of Crimes*, ICCSt., p. 241.

⁴¹¹ ICTY, *Prosecutor v. Krnojelac*, Judgement of 15 March 2002, para. 329.

⁴¹² SCHABAS, W. *Genocide*, op. cit. p. 180.

⁴¹³ The Peshmerga were Iraqi Kurdish soldiers, sent by the Kurdish autonomous region to protect Yazidi villages after the capture of Mosul in 2014. Reference: MURAD, N. *The Last Girl*, op. cit. p. 32.

⁴¹⁴ MURAD, N. *The Last Girl*, op. cit. p. 119.

⁴¹⁵ A/HRC7327CRP.2, op. cit. para. 27.

who blocked all the passages impeding then the access to water or food to tens of thousands of Yazidi children⁴¹⁶, women and men.⁴¹⁷ On 7 August 2014 an international American-led coalition sent planes and helicopters to provide humanitarian aid to the people on the mountain, but were reportedly shot at by ISIS fighters on the ground.⁴¹⁸ Moreover, also the attempts of opening a corridor to Syria by the Syrian Kurdish Forces – the YPG – were hampered by continuous ISIS attacks to maintain the siege.⁴¹⁹ The corridor was opened on 10 August and, as result of starvation and dehydration, hundreds of people perished.⁴²⁰

ISIS blocked all roads and communication points of the villages they attacked, thereby blocking thousands of Yazidis from escaping, and that were captured.⁴²¹ After the capture, they were divided into groups based on sex and age. Men and boys considered to be adults, were killed when they refused to convert as well as when they were found with hidden weapons, in summarily executions either through gunshots or by having their throats cut.⁴²² When the other family members were not direct witnesses, they could hear gunshots or see blood stains on the fighters' vests.⁴²³ The “converted” ones were sent to ISIS training camps and executed when they tried to escape. Several mass killings have been reported in the villages of Kocho and Qani. According to witnesses, 80 men were killed in Qani⁴²⁴ while estimates point to up to 700 male victims in Kocho.⁴²⁵

Moreover, females were divided between married and unmarried women. On 16 August, a group of older women were executed after having been confined for days in the Solagh Technical Institute of Kocho.⁴²⁶ Unmarried women were sold as sexual slaves to IS fighters and transferred in several locations. Among them, there were several accounts of suicide in the

⁴¹⁶ Statement of Italian UNICEF doctor Marzio Babilie referred to “up to 25.000 children” trapped in Mount Sinjar, on 5 August 2014. Reference: <https://www.unicef.org/mena/press-releases/statement-on-child-deaths-in-iraq>

⁴¹⁷ CETORELLI, V. et al. *Mortality and kidnapping estimates for the Yazidi population in the area of Mount Sinjar, Iraq, in August 2014: A retrospective household survey*, 2017, PLoS Med, Vol. 14, Issue 5, p.3

⁴¹⁸ A/HRC/7327CRP.2, op. cit. para. 27.

⁴¹⁹ A/HRC/32/CRP.2, op. cit. para. 28

⁴²⁰ *Ibid.* See also CETORELLI, V. & ASRAPH, S. *A demographic documentation of ISIS's attack on the Yazidi village of Kocho*, LSE Middle East Centre reports, p. 9

⁴²¹ A/HRC/32/CRP.2, op. cit. para. 29.

⁴²² *Ibid.* para. 33.

⁴²³ *Ibid.* para. 34.

⁴²⁴ *Report of the Office of the United Nations High Commissioner for Human Rights on the human rights situation in Iraq in the light of abuses committed by the so-called Islamic State in Iraq and the Levant and associated groups*, 27 March 2015, A/HRC/28/18, para. 19.

⁴²⁵ CETORELLI, V. & ASRAPH, S. *A demographic documentation of ISIS's attack on Kocho*, op. cit.

⁴²⁶ A/HRC/32/CRP.2, op. cit. para. 48.

holding sites of Raqqa, Mosul and Tel Afar.⁴²⁷ If they tried to escape from their “owners”, they were punished either by killing or harsh punishment. In addition, access to medical care for them and their children was not allowed,⁴²⁸ leaving their health seriously affected.

The facts occurred between August, the 3rd and the 15th 2014 are confirmed by several witnesses’ records from survivors. Moreover, the non-profit association *Yazda* published a report in 2016 and a subsequent one in 2018, in which it accounted for 35 mass graves in the Sinjar region.⁴²⁹ Recent articles have raised the number to at least 80 mass graves, with the quantity expected to grow.⁴³⁰

The total estimated number of victims caused by the ISIS attacks against the Yazidi starting from August 2014 is of the 2.5% of the Yazidi population, accounting for, at least, 3,100 victims and more than 6,000 kidnappings.⁴³¹

It appears, then, that ISIS fighters have committed the act of killing members of the protected religious group Yazidi, in violation of the Genocide Convention.

2.2.2 Causing serious bodily or mental harm to members of the group

The meaning of this requirement can be inferred by the jurisprudence of the tribunals. In *Stakić*, the ICTY interpreted Art. 4(2)b of its Statute (which replicated *verbatim* Art.2 of the Genocide Convention) as meaning “*acts of torture, inhumane or degrading treatment, sexual violence including rape, interrogations combined with beatings, threats of death, and harm that damages health. [...] The harm inflicted need not to be permanent and irremediable.*”⁴³²

In *Akayesu*, rape and sexual violence were considered as accounting for both mental and physical harm, as long as a connection between the acts and the specific intent to destroy the group as such, in whole or in part, could be established.⁴³³ Accordingly, Elements of Crimes

⁴²⁷ *Ibid*, para. 53.

⁴²⁸ *Ibid*, para. 66.

⁴²⁹ Yazda, *Mass Graves of Yazidis Killed by the Islamic State Organization or Local Affiliates On or After August 3, 2014*” 2016 and 2018.

⁴³⁰ See for reference: DAWOD, S. *Neglected Yazidi mass graves finally exhumed in Iraq*, 2020, Al-Monitor, available at: <https://www.al-monitor.com/originals/2020/10/iraq-sinjar-yazidis-mass-graves.html> and AL-MASHAREQ, *Yazidi ISIS victims laid to rest in Sinjar*, available at: https://almashareq.com/en_GB/articles/cnmi_am/features/2021/02/08/feature-02

⁴³¹ CETORELLI, V. et al. *Mortality and kidnapping estimates for the Yazidi population*, op. cit. p. 1. See also Yazda, *Mass Graves of Yazidis*.

⁴³² ICTY, *Prosecutor v. Stakić*, Judgement of 31 July 2003, para. 516.

⁴³³ ICTR, *Prosecutor v. Akayesu*, Judgement of 31 July 2003, para. 731.

specified that Art. 6(b) includes acts of torture, rape, sexual violence and inhuman or degrading treatment.⁴³⁴

Regarding torture and inhuman or degrading treatment, several acts can be regarded as such, connected to the capture of Yazidis from August 2014 discussed above.

The selling and buying of Yazidi women and girls left an indelible mark in the psychology of the victims, with several witnesses reporting fear and discrimination once they were bought back by their families.⁴³⁵ The mental trauma was hampered by the impossibility to know the fate of other family members, as ISIS fighters divided them into race and age groups and, in most times, they never saw each other again. An estimate of 2017 concluded that there are 2,500 people still missing.⁴³⁶

Moreover, ISIS fighters were buying women and girls from each other, making them endure a never-ending circle of violence and enslavement.⁴³⁷ In fact, other to be used as sexual slaves, several witnesses reported being forced to work as domestic servant for the fighter-owner's families,⁴³⁸ suggesting that there were other people, possibly women, involved, which pretended nothing was happening nor tried to help.⁴³⁹ Nevertheless, while in captivity, they were severely beaten and denigrated as ISIS men called them infidels, or stinking.⁴⁴⁰ In addition, their original IDs were collected at the holding sites and probably burned⁴⁴¹, as well as their belongings confiscated, with them only allowed to wear what their captors gave them.

Younger children were allowed to remain with their mothers where they endured similar living conditions as the women. They were beaten when the fighters wanted to punish their mothers and insulted accordingly. Once they were free, several survivors described their children as much more protective towards them, suggesting that they most likely witnessed the abuses suffered by their mothers.⁴⁴²

⁴³⁴ *Elements of Crimes*, ICCSt., p. 241.

⁴³⁵ A/HRC/32/CRP.2, op. cit. para. 77

⁴³⁶ CETORELLI, V. et al. *Mortality and kidnapping estimates for the Yazidi population*, op. cit. p. 8. See also MURAD, N. *The Last Girl*, op. cit. Chapter 5.

⁴³⁷ *Ibid.* p.321

⁴³⁸ A/HRC/32/CRP.2, op. cit. para. 126. See also MURAD, N. *The Last Girl*, p. 331-332

⁴³⁹ At a certain point of her captivity, Nadia recalled the encounter with a woman, the mother of an ISIS soldier. She wrote about her desire to talk to her, but she desisted as the woman never showed a sign of compassion for her. Reference: *Ibid.*

⁴⁴⁰ MURAD, N. *The Last Girl*, op. cit.

⁴⁴¹ *Ibid.* p. 290

⁴⁴² A/HRC/32/CRP.2, op. cit. para. 88

Men and older boys who “converted” were then sent to training camps, where they were indoctrinated to ISIS ideology through military training and forced to watch videos of violent propaganda, in order to brainwash them into refusing their roots and family.⁴⁴³ They eliminated their old Yazidi identities, by registering them with new Islamic names.⁴⁴⁴ They were also severely beaten for the least mistake, such as difficulty in learning Koran or in training.⁴⁴⁵

Although the treatment of Yazidis persons differed depending on sex and age, the common point to all the captured Yazidis was the continuous denigration of their original religion, as ISIS fighters kept calling them *kuffar*, devil and stones worshippers. Even when they “converted”, they were never granted positions of equality.

2.2.2.1 Rape and sexual violence against Yazidi women

Rape and sexual violence were extensively deployed by ISIS fighters, with Yazidi women and girls disproportionately affected. In particular, the treatment of Yazidi women can be described as sexual slavery, which is considered as a crime against humanity according to Art. 7(1)g of the ICC Statute.⁴⁴⁶ The material elements of the crime are also further described in Elements of Crimes:

1. the perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, [...] or by imposing on them a similar deprivation of liberty;
2. the perpetrator causes such person or persons to engage in one or more acts of a sexual nature;
3. the conduct was committed as part of a widespread or systematic attack directed against a civilian population.⁴⁴⁷

After the attacks on the Sinjar region, Yazidis were transferred to several holding locations both in Tel Afar and Mosul, as well as in Raqqah, Syria, where their fate was established. Women and girls aged above 9 were then registered according to their marital status and further transferred to other sites, such as a prison, occupied schools and houses⁴⁴⁸ where they were sold as sexual slaves to ISIS fighters. It is estimated that 1,800 are still held under ISIS rule.⁴⁴⁹

⁴⁴³ MURAD, N. *The Last Girl*, op. cit. para. 432.

⁴⁴⁴ A/HRC/32/CRP.2, op. cit. para. 94.

⁴⁴⁵ *Ibid.*

⁴⁴⁶ ICC Statute, full text available at: <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>

⁴⁴⁷ *Elements of Crimes*, ICCSt.

⁴⁴⁸ *Ibid.*, para. 49.

⁴⁴⁹ Council of Europe, *The roles of women in Daesh*, Committee of Experts on Terrorism, 26 October 2016, available at: <https://rm.coe.int/16806b33a7> p. 10

The “market” was thoroughly organised with a set of rules, such as the prohibition to sell Yazidi women to non-ISIS fighters, and a bureaucratic system, that required the conversion and the “marriage”⁴⁵⁰ between the fighter and the woman, before the latter could become a *sabiyya*.⁴⁵¹ The rules included the permission to take the women captive, according to their being inferior as “unbeliever”.⁴⁵² It was then ISIS duty to convert them in order to possess them. Moreover, ISIS fighters were permitted to have sexual intercourse with the women they possessed, even when they had not reached puberty, but they were “fit for it”.⁴⁵³ Consent was not envisaged. If a woman tried to escape, she was to be punished as to “deter others like her from escaping”,⁴⁵⁴ which often resulted in gang rapes.⁴⁵⁵ Yazidi women suffered continued rapes and abuses while being forced to move from one place to another with their “owner” and being sold for few hundred dollars.⁴⁵⁶ A woman reported being sold seven times in fifteen months.⁴⁵⁷ Accordingly, women could not dispose of their own bodies, as showering or the choice of clothing were always conditional to the rapes.⁴⁵⁸

If the fighter died, the *sabiyya* became property of ISIS as a whole, waiting to be remarried to another militant.⁴⁵⁹

Such acts left both physical and mental trauma on the victims. A report of 2018 concluded that the abuses suffered by the enslaved Yazidi women led to high rates of depression and post-

⁴⁵⁰ MURAD, N. *The Last Girl*, op. cit. p. 301.

⁴⁵¹ This term derives from *al-sabi* which refers to women captured as prisoners of war by Muslims. Reference: ROTH, K. *Slavery: The ISIS Rule*, 2015, Human Rights Watch, available at: <https://www.hrw.org/news/2015/09/05/slavery-isis-rules> See also Council of Europe, *The roles of women in Daesh*, op. cit.

⁴⁵² ROTH, K. *Slavery: the ISIS Rule*, op. cit.

⁴⁵³ *Ibid.*

⁴⁵⁴ *Ibid.*

⁴⁵⁵ A/HRC/32/CRP.2, op. cit. para. 68. Direct testimony can be found in MURAD, N. *Last Girl*, op. cit. p. 345-346.

⁴⁵⁶ A/HRC/32/CRP.2, op. cit. para. 76.

⁴⁵⁷ GRAHAM-HARRISON, E. ‘I was sold seven times’: the Yazidi women welcomed back into the faith, 2017, The Guardian, available at: <https://www.theguardian.com/global-development/2017/jul/01/i-was-sold-seven-times-yazidi-women-welcomed-back-into-the-faith>

⁴⁵⁸ In MURAD, N. *The Last Girl*, Nadia, in the chapters about her captivity, often recalls that every time, before being raped, she would be commanded to go take a shower. In no other occasion, she recalled having the opportunity to wash herself, suggesting that her life and dignity were totally at the mercy of her owner’s sexual desires.

⁴⁵⁹ Human Rights Council, “I lost my dignity”: *Sexual and gender-based violence in the Syrian Arab Republic*, 2018, para. 86.

traumatic stress disorder among them.⁴⁶⁰ Moreover, several survivors accepted to be interviewed and reported evidence of the systematic rapes and violence, including physical wounds.⁴⁶¹

Accordingly, ISIS fighters, through acts of sexual enslavement, torture and inhumane and degrading treatment appear to have caused serious bodily and mental harm to members of the group.

2.2.3 Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part

The meaning of this requirement can be inferred by the jurisprudence of the tribunals.

In *Brdanin* case, the ICTY concluded that it comprises “*methods of destruction apart from direct killings such as subjecting the group to a subsistence diet, systematic expulsion from homes and denial of the right to medical services.*”⁴⁶² A similar conclusion was reached in the previous ICTR *Kayishema et al* case.⁴⁶³

It can be inferred then that such acts shall not be considered as entailing the direct killing, but as aiming at the slow death of the members of the group.⁴⁶⁴

During the siege on Mount Sinjar which began on 3 August 2014, ISIS fighters deliberately impeded the arrival of food, water and medical aid to the Yazidis that escaped on the mountains. It has been reported that they also shot and endangered any attempts, both on the ground and through planes, of sending such humanitarian aid,⁴⁶⁵ leading, as discussed above, to the death of hundreds of them.

⁴⁶⁰ IBRAHIM, H. et al. *Trauma and perceived social rejection among Yazidi women and girls who survived enslavement and genocide*, 2018, BMC Med, available at: <https://bmcmedicine.biomedcentral.com/articles/10.1186/s12916-018-1140-5#citeas>

⁴⁶¹ A/HRC/32/CRP.2, op. cit. para. 114.

⁴⁶² ICTY, *Prosecutor v. Brdanin*, Judgement of 1 September 2004, para. 691, available at: <https://www.icty.org/x/cases/brdanin/tjug/en/brd-tj040901e.pdf>

⁴⁶³ ICTR, *Prosecutor v. Kayishema et al.* Judgement of 21 May 1999, para. 116, available at: <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/ICTR-95-01/MS45055R0000620218.PDF>

⁴⁶⁴ ICTY, *Prosecutor v. Stakić*, op. cit. para. 517, available at: <https://www.icty.org/x/cases/stakic/tjug/en/stak-tj030731e.pdf>

⁴⁶⁵ A/HRC/32/CRP.2, op. cit. para. 138.

Moreover, along with daily rapes and harsh punishment from their “owners”, Yazidi women were also kept in dire conditions which lacked hygiene standards, often being forced to sleep on or to wear clothes of previously owned *sabiyya*.⁴⁶⁶

The food and water given to the captives were often scarce, with starvation used as a mode of punishment.⁴⁶⁷ The same held for medications. In her book, Nadia Murad recalled feeling sick after suffering a gang rape as a punishment for an escape attempt. She was given some unspecified pills only after more than one day, during which she was raped again.⁴⁶⁸

Similar treatment was employed also towards the children allowed to remain with their mothers.⁴⁶⁹

According to the evidence, it appears then, that ISIS carried out acts that inflicted conditions of life in order to bring about the physical destruction, in whole or in part, of the group.

2.2.4 Imposing measures intended to prevent births within the group

This requirement can have multiple, complementary meanings.

In *Akayesu*, the ICTR found that the acts to be inscribed within this category were: “*sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages*”⁴⁷⁰ A similar conclusion was reached in the ICTR *Rutaganda* case.⁴⁷¹ Moreover, the ICTR recognised the mental element as being part of the measures imposed on the victims. In fact, in *Akayesu*, the tribunal indicated rape as its consequence may be the refusal of the victim to procreate afterwards.⁴⁷²

Right after ISIS emptied the villages and captured the Yazidis, they divided them into groups, rigorously based on sex. Husbands and wives were also divided. Since Yazidism strictly impose the requirement of having two Yazidis parents in order to be Yazidi⁴⁷³, such separation evidently prevented the birth of Yazidi infants. Similarly, by being divided and by killing most Yazidi men, no marriages among Yazidis were finalised during the time of ISIS occupation.

⁴⁶⁶ MURAD, N. *The Last Girl*, op. cit.

⁴⁶⁷ A/HRC/32/CRP.2, op. cit. para. 73.

⁴⁶⁸ MURAD, N. *The Last Girl*, op. cit. pp. 381-382.

⁴⁶⁹ A/HRC/32/CRP.2, op. cit. para. 140.

⁴⁷⁰ ICTR, *Prosecutor v. Akayesu*, op. cit. para. 507.

⁴⁷¹ ICTR, *Prosecutor v. Rutaganda*, Judgement of 6 December 1999, para. 53, available at: <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/ICTR-96-03/MS0318272R0000620661.PDF>

⁴⁷² ICTR, *Prosecutor v. Akayesu*, op. cit. para. 508.

⁴⁷³ MURAD, N. *The Last Girl*.

The extent of the sexual violence suffered by Yazidi women has been discussed above. It left a permanent trauma on the victims, with several, in particular younger women, reporting not being comfortable around men since the facts.⁴⁷⁴ Moreover, a woman reported being divorced by her husband once she returned with their family,⁴⁷⁵ in a common pattern of refusal by their religious community. In fact, Yazidi women raped or impregnated by ISIS fighters were often prevented from reaching a full reintegration, with their babies not allowed to baptise into Yazidism and with fewer possibility to remarry afterwards.⁴⁷⁶

Accordingly, it appears that ISIS has committed acts aimed at preventing the birth of Yazidi children with the community.

2.2.5 Forcibly transferring children of the group to another group

During the *travaux préparatoires* of the Genocide Convention, this requirement appeared to be connected to the notion of cultural genocide, which was later rejected in the final text of the document.⁴⁷⁷ In fact, according to Schabas, the transfer of children of victimised group to another group would mean the loss of the former's identity, replaced by a new, forced one.⁴⁷⁸

The treatment of children by ISIS fighters differed according to their sex. However, both boys and girls were separated by their mothers once they reached the age of 12 and 9, respectively.⁴⁷⁹ Boys were sent to ISIS training camp, where they were indoctrinated as ISIS cadets and forced to follow the strict interpretation of *Shari'a* law, cancelling their Yazidi identities. Several women reported being told by ISIS fighters that their children were being trained to kill infidels like them.⁴⁸⁰

Yazidi girls were allowed to remain with their enslaved mothers until reaching the older age of 9 after which they became slaves themselves. They were prevented from following their

⁴⁷⁴ A/HRC/32/CRP.2, op. cit. para. 145.

⁴⁷⁵ *Ibid*, para. 70.

⁴⁷⁶ GREASER, J. *Attitudes of Sinjari Yezidis in Iraq Regarding the Rape of Yezidi Women and the Babies Born from Rape During the ISIS Genocide*, 2018, University of Nebraska Medical Center, available at: <https://digitalcommons.unmc.edu/cgi/viewcontent.cgi?article=1317&context=etd>

⁴⁷⁷ SCHABAS, W. *Genocide*, op. cit. p. 201.

⁴⁷⁸ *Ibid*, p. 203.

⁴⁷⁹ A/HRC/32/CRP.2, op. cit.

⁴⁸⁰ *Ibid*, para. 93.

original religion and being forced to wear Muslim clothes, “married” to ISIS fighters and “converted”, and subjected to the abuses described above, becoming property of ISIL. A woman recalled being sold at a market, where she could see girls as young as seven years old for sale.⁴⁸¹

These acts, hence, constitute breach of the prohibited act of forcibly transferring children of the group to another group.

2.3 *Mens rea*: Did ISIS act with the specific intent to destroy in whole or in part the Yazidi group?

Having assessed the material elements of the acts committed by ISIS against the Yazidis, we shall now turn to the analysis of the *mens rea*, hence, the mental elements of the crime.

The mental element does not necessarily need to be directly proven as “*only the accused himself has first-hand knowledge of his own mental state, and he is unlikely to testify to his own genocidal intent.*”⁴⁸² The existence of the *mens rea*, hence, shall be deduced by the context and the circumstances around the commission of the *actus rea*. The reference to the general context can be inferred by the case law, such as *Kayishema* case, where it was defined as the existence of systematic acts directly aimed at the same group, because of their membership to the group. Likewise, the scale and the repetition of the atrocities shall be taken into account.⁴⁸³

Furthermore, the ICC Statute reports that the acts constituting a crime under the jurisdiction of the Court, shall be committed with a specific intent and knowledge.⁴⁸⁴ Knowledge refers to the awareness that a consequence of the act will exist, while intent refers to the person’s willingness to engage in the conduct of the material prohibited element.⁴⁸⁵ More specifically, knowledge goes beyond the *dolus eventualis*⁴⁸⁶ inasmuch as it requires the existence of a precise bureaucratic apparatus and a systematic plan, aimed at the destruction of the group, in whole or in part.

⁴⁸¹ *Ibid*, para. 58.

⁴⁸² ICTY, *Prosecutor v. Popovic*, Judgement of 10 June 2010, para. 823, available at: <https://www.icty.org/x/cases/popovic/tjug/en/100610judgement.pdf>

⁴⁸³ ICTR, *Prosecutor v. Kayishema et al.*, op. cit. para. 93.

⁴⁸⁴ Art. 30, Rome Statute of the ICC.

⁴⁸⁵ *Ibid*.

⁴⁸⁶ SCHABAS, W. *Genocide*, p. 254.

Even if criminal law is mainly focused on the prosecution of individual actors, genocide cannot be conducted by a singular person⁴⁸⁷, hence, the existence of the above-mentioned comprehensive plan⁴⁸⁸ of which the individual is a willingly part (not necessarily the head of the project)⁴⁸⁹, shall be established. The intent shall therefore be specific, or special, accounting for a *dolus specialis*, and directed to the destruction of the group, in whole or in part.

Regarding the plan, it is important to underline that premeditation is not an essential element of genocide, although a “*manifest pattern of similar conduct directed against that group*” shall be observed.⁴⁹⁰ This would allow the prosecution of individuals whose acts cannot be deemed as premeditated, but who possess the full knowledge of the plan and of the consequences of its actions.

The specific intent of ISIS to destroy the religious group Yazidi can be inferred by the organization’s sources of propaganda. Evidence of an extensive research conducted by the terrorists, prior to the attacks of 3 August 2014, can be found in the ISIS magazine *Dabiq*, which described how Shari’a scholars were charged with the precise task to understand whether the Yazidis could be treated as “People of the Book”, such as Christians, thereby permitting them to buy their freedom through the payment of the *jizyah* tax.⁴⁹¹ The conclusion was that they were not, and “*their continual existence*”⁴⁹² as infidels, according to the fighters, was a matter that they, as true Muslims, were called to resolve, by God. They advocated for the complete erosion of Yazidis existence, because of the latter’s religious beliefs, and created a set of rules to convert and enslave them.

The plan comprised a coordinated effort to register and dispose of the victims, with marriage acts notarised at the Islamic Courts.⁴⁹³ At the same time, the terrorist organization was engaged in a huge propaganda machine, aimed at justifying the treatment of Yazidis under the religion and the Shari’a law.⁴⁹⁴ Several witnesses recalled being told about the legitimate right for the actions of ISIS fighters.

⁴⁸⁷ *Ibid*, p. 246.

⁴⁸⁸ Lemkin based his book (*Axis Rule in Occupied Europe*, 1944) on the understanding that the crimes of the Nazi were based on a comprehensive mechanism at the State level.

⁴⁸⁹ SCHABAS, W. *Genocide*, p. 252.

⁴⁹⁰ Art. 6 Elements of Crimes.

⁴⁹¹ A/HRC/32/CRP.2, op. cit. para. 154.

⁴⁹² Dabiq, *The Revival of Slavery Before the Hour*, 2014, Issue 4.

⁴⁹³ MURAD, N. *The Last Girl*, op. cit. p. 298.

⁴⁹⁴ CALLIMACHI, R. *ISIS Enshrines a Theology of Rape*, 2015, The New York Times, available at: <https://www.nytimes.com/2015/08/14/world/middleeast/isis-enshrines-a-theology-of-rape.html>

Moreover, Nadia Murad recalled that, already at the beginning of 2014 summer, Yazidi villages began experiencing disturbing facts, like small cattle thefts. The reason was explained to her by an ISIS militant after the capture of her village, Kocho. The soldier explained that those were signals sent to the Yazidis, for instance, when they robbed the hen and the chicks, it meant that they were about to take Yazidi women and children.⁴⁹⁵ This can suggest and perhaps confirm the existence of an organised plan.

It appears then, that, from August, the 3rd 2014 onwards, ISIS fighters have acted with the specific intent to destroy the Yazidi group.

3. Responsibility

The Genocide Convention is mainly directed at prosecuting individuals for the commission of genocide and, accordingly, it imposes a requirement for States to enact the relevant domestic criminal law for the prosecution of such crime.⁴⁹⁶

The relevant articles for the prosecution of genocide are Art. 5 and Art. 6. As explained above, Art. 5 requires State parties to implement the provisions of the Convention in their domestic legislation. Art. 6 specifies that the relevant trials shall be held in the territory where the act have been committed or, under the jurisdiction of an international penal tribunal, which is the International Criminal Court, that did not exist in 1948. According to Schabas, Art. 6 leaves the ground open for other alternatives, such as the State of which the offender is a national, or the territory of another State, particularly committed to justice.⁴⁹⁷

Moreover, from the 1990s onwards, States have increasingly based their prosecutions of genocide on the concept of universal jurisdiction.⁴⁹⁸ Examples are the cases brought in front of the *ad hoc* tribunals, in particular for what concerned the genocidal acts occurred in Rwanda and former Yugoslavia.⁴⁹⁹ In *Cyjetkovic*, for example, the Supreme Court of Austria interpreted Art. 6 of the Convention as imposing the obligation of extradition for war criminals, to the

⁴⁹⁵ MURAD, N. *The Last Girl*, op. cit. p. 41.

⁴⁹⁶ SCHABAS, W. *Genocide*, op. cit. p. 491.

⁴⁹⁷ *Ibid*, p. 401.

⁴⁹⁸ *Ibid*.

⁴⁹⁹ *Ibid*.

country in which the crime was committed.⁵⁰⁰ A similar stance was taken for the arrest of Duško Tadić who, however, ended up being tried before the ICTY.⁵⁰¹

Thus, it is well established that the Convention entails a set of obligations on States, but the question whether States can have a degree of responsibility for the commission of genocide themselves has been a controversial one since the *travaux préparatoires*.

Already within the debates of the Sixth Committee, the United Kingdom proposed an amendment that specifically extended the responsibility of genocide to State or government as well.⁵⁰² In the end, the amendment was not adopted, but the debate showed the support for provisions that included the recourse to the International Court of Justice, that was finally incorporated in Art. 9 of the Convention.⁵⁰³

The most relevant case concerning State responsibility before the ICJ is the *Bosnia and Herzegovina v. Serbia and Montenegro* case. In fact, in its judgement of 26 February 2007, the Court found that the events that took place in Srebrenica in 1995 accounted to genocide.⁵⁰⁴ It established that the decision to murder Muslim male community in Srebrenica was taken by the Army of the Republika Srpska leaders, but it could not, however, ascribe the responsibility of the Army to Serbia.⁵⁰⁵ Nevertheless, the Court found that Serbia was responsible for the violation of Art. 1 of the Genocide Convention, which bind the parties to employ all reasonable means to prevent genocide.⁵⁰⁶ In addition, the Court clarified that obligation to prevent and the duty to act, “*arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed.*”⁵⁰⁷

This case set a precedence for the prosecution of genocide, clarifying that States could be held responsible as well, for violations of the Genocide Convention.

The question of Yazidis is, however, more complicated. For this reason, a dual approach will be adopted for the following paragraphs.

⁵⁰⁰ *Cyjetković (Duško) v. Austria*, Supreme Court of Justice Decision of 13th July 1944, available at: <https://opil.ouplaw.com/view/10.1093/law-ildc/3054at94.case.1/law-ildc-3054at94>

⁵⁰¹ SCHABAS, W. *Genocide*, op. cit. p. 435.

⁵⁰² *Ibid*, p. 492.

⁵⁰³ *Ibid*.

⁵⁰⁴ *Ibid*, p. 507.

⁵⁰⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Overview of the case, in International Court of Justice website, available at: <https://www.icj-cij.org/en/case/91>

⁵⁰⁶ ICJ, *Bosnia and Herzegovina v. Serbia and Montenegro*, Judgement of 26 February 2007, para. 438, available at: <https://www.icj-cij.org/public/files/case-related/91/091-20070226-JUD-01-00-EN.pdf>

⁵⁰⁷ *Ibid*, para. 431.

First, the alleged responsibility of Syria and Iraq, as the territories in which the crimes took place, will be addressed. Secondly, since the perpetrators of the alleged genocide against the Yazidis are the members and leaders of ISIS, the analysis will focus on the international legal framework upon non-State actors.

3.1 Responsibility of Syria and Iraq

The Yazidi massacres occurred within the context of a series of non-international armed conflicts⁵⁰⁸ fought in Iraq and Syria, against the ISIS. The two countries, moreover, in an effort to deter ISIS expansion, often sought the aid of international actors.

Accordingly, in 2014, the US reportedly intervened at the request of the Iraqi government to airdrop humanitarian aid to the Yazidis trapped in the siege on Mount Sinjar.⁵⁰⁹ Immediately after the authorization of the operations, Former US President Barack Obama released a statement in which he directly mentioned the potential genocide that was occurring in Iraq, against the Yazidis.⁵¹⁰

Iraqi request, however, appeared to have been the only measure, employed by the government of either Syria or Iraq, directly aimed at preventing the genocide of Yazidis.

In fact, the US-led coalition of States that carried out several attacks in Iraq from 2014 onwards, had intervened with the precise mission of defeating ISIS and no other mention of genocide has appeared.⁵¹¹

Moreover, just right before the 3 August attacks in Sinjar area, the Iraqi Kurdish forces Peshmerga withdrew, leaving the Yazidi villages they were called to protect, vulnerable. However, the Peshmerga are to be perceived as an independent organisation that allied with Iraq only for the purpose of the fight against ISIS. Hence, their connection with the Iraqi government is blurred, but it seems that they were not under its control.⁵¹²

⁵⁰⁸ Legal definition of the Syrian and Iraqi conflict as NIAC as provided by *RULAC Project*, Geneva Academy of International Humanitarian Law and Human Rights, available at: <https://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-syria#collapse1accord>

⁵⁰⁹ A/HRC/32/CRP.2, op. cit.

⁵¹⁰ Statement by the President, of August, the 7th 2014, Office of the Press Secretary, The White House, available at: <https://obamawhitehouse.archives.gov/the-press-office/2014/08/07/statement-president>

⁵¹¹ A/HRC/32/CRP.2, op. cit. para. 192.

⁵¹² FLIERVOET, F. *Fighting for Kurdistan?* 2018, Netherlands Institute of International Relations, available at: <https://www.clingendael.org/sites/default/files/2018-03/fighting-for-kurdistan.pdf>

Similarly, when the conflict spilled over in Syria, the Syrian Government requested the intervention of Russia and Iran and continued combating ISIS internally. But in Syria as well, the objective of outside intervention was to defeat ISIS and not to prevent genocide against Yazidi Syrians.⁵¹³

Hence, it appears that Syria and Iraq may bear responsibility for, apart from the Mount Sinjar humanitarian operation, failing to undertake all reasonable measures to prevent the commission of genocide against the Yazidi protected group.

3.2 Legal obligations on ISIL as a non-State actor

Given the nature of the perpetrator of Yazidi massacre, we shall now turn to the analysis of legal obligations on ISIS as a non-State actor.

The first question to be answered is “Can a non-State actor commit genocide?”

According to the Rome Statute of the ICC, genocide shall have two underlying characteristics: each act is committed within a manifest pattern of similar conduct and a *dolus specialis* can be inferred. Since the Genocide Convention does not provide a specific indication about the degree of organization required for the perpetration of a genocidal act, it seems that, if the non-State entity has the capacity to engage in a manifest pattern of genocidal acts, to incite the crime and it has a particular intent to destroy the protected group, hence, it can commit genocide.⁵¹⁴

The coordinated plan, the slaves’ market, and the organized bureaucracy behind their operations, seem to confirm ISIS capacity to potentially commit genocide.

Then, we shall reflect on the question: “Are non-State actors under an obligation not to commit genocide?”

Non-State actors are, by definition, entities that are not affiliated nor dependent from any governments. They cannot, traditionally, enter into treaties.⁵¹⁵

⁵¹³ A/HRC/32/CRP.2, op. cit.

⁵¹⁴ ASHRAPH, S. *Organizing Rebellion Symposium: Who Can Commit Genocide? A Discerning Analysis of Non-State Entities as Perpetrators*, *Opinio Juris*, available at: <http://opiniojuris.org/2019/09/20/organizing-rebellion-symposium-who-can-commit-genocide-a-discerning-analysis-of-non-state-entities-as-perpetrators/>

⁵¹⁵ EVANS, M. D. *International Law*, op. cit. p. 99.

However, there are a set of norms, namely *jus cogens* norms, which do not allow deviations and non-State actors are bound to respect them.⁵¹⁶ For the reasons explained in the previous chapter, the prohibition of genocide is one of those norms. Moreover, the protection of civilians during international and non-international armed conflicts is a fundamental aspect of international humanitarian law, whose provisions bind non-State actors as well.⁵¹⁷

Hence, the issue concerns the prosecution of alleged genocidal acts committed by ISIS.

Under the Genocide Convention and since ISIS does not possess statehood, the International Criminal Court is the only tribunal to possess jurisdiction to prosecute ISIS individuals.⁵¹⁸ However, neither Syria nor Iraq are part to the ICC Statute, nor they have issued an *ad hoc* declaration to accept the Court's jurisdiction, hence, the ICC cannot open an inquiry on the matter.⁵¹⁹

The other possibility would be a formal referral on the matter by UN Security Council, composed by State parties to the Genocide Convention.⁵²⁰ A first attempted draft resolution to give the Court the mandate to investigate on the crimes, including Yazidi genocide, committed among the Syrian civil war was supported by thirteen members of the UNSC in 2014, but was blocked by the veto of Russia and China.⁵²¹

No other draft resolutions have been proposed, nor the establishment of *ad hoc* tribunals to prosecute ISIS crimes in Syria and Iraq.⁵²²

According to Human Rights Council, the only option for accountability remains within domestic tribunals.⁵²³ To date, the first and most important domestic prosecution for genocide has recently been concluded in Germany, and it represents an historic conviction.⁵²⁴ The case,

⁵¹⁶ *Ibid*, p. 158.

⁵¹⁷ *How can international humanitarian law bind non-State actors?*, 2012, Global Justice Center, available at: <https://globaljusticecenter.net/blog/441-how-can-international-humanitarian-law-bind-non-state-actors>

⁵¹⁸ A/HRC/32/CRP.2, op. cit. para. 196.

⁵¹⁹ Associated Press in The Hague, *ICC has no jurisdiction to prosecute Isis despite 'crimes of unspeakable cruelty'*, 2015, The Guardian, available at: <https://www.theguardian.com/law/2015/apr/08/icc-no-jurisdiction-prosecute-isis-despite-crimes-unspeakable-cruelty>

⁵²⁰ A/HRC/32/CRP.2, op. cit.

⁵²¹ *Russia, China block Security Council referral of Syria to the International Criminal Court*, 2014, UN News, available at: <https://news.un.org/en/story/2014/05/468962-russia-china-block-security-council-referral-syria-international-criminal-court>

⁵²² A/HRC/32/CRP.2, op. cit. para. 198.

⁵²³ *Ibid*, para. 200.

⁵²⁴ *German court jails ISIL member for life over Yazidi genocide*, Al Jazeera, op. cit.

*Office of the Federal Prosecutor v. Taha A.-J.*⁵²⁵, has been held at the Frankfurt Higher Regional Court, under the principle of universal jurisdiction.⁵²⁶ The relevant domestic provisions for the filing of charges of genocide are contained in Section 6(1) of the Code of Crimes against International Law (CCAIL)⁵²⁷, which consists of the definition of genocide as it appears in the Genocide Convention.

The respondent, former ISIS member Taha al-Jumailly, has been arrested in Greece and subsequently extradited to Germany in 2019.⁵²⁸ According to the indictment of 21 February 2020, al-Jumailly became a member of ISIS before 2013. In 2015, he bought a Yazidi woman, identified with “Nora”, and her child, “Reda”, and subsequently enslaved them, forcing them to live with him and his wife, also prosecuted under pseudonym “Jennifer W.” in a separate trial, while observing strict Islamic rules to which the two Yazidis were forcibly converted.⁵²⁹ The German judge defined the purchase and the enslavement of Yazidi woman and her daughter as carried out “*with the intent to destroy the Yazidis, their religion, and culture in accordance with the goal of ISIS.*”⁵³⁰ While in captivity, Nora and Reda were often beaten and abused, while the food and water they could dispose of was scarce.

On an unspecified day, roughly during 2015 summer, the defendant punished Reda by tiding her to the outside grille of the house, in direct sunlight and with temperature rising up until 51° Celsius in that period. The child remained there for an unspecified amount of time, which resulted in her death by heat stroke.⁵³¹ The girl’s mother, Reda, who witnessed the scene, was a key testimony in the trial.⁵³²

⁵²⁵ The defendant has been accused of genocide, crimes against humanity and war crimes. For the purpose of present work, only the provisions regarding genocide will be analysed.

⁵²⁶ SIEBERT, P. M. *Genocide Against the Yazidis – Accountability before German Courts?*, 2021, Junge Wissenschaft, available at: <https://www.juwiss.de/64-2021/>

⁵²⁷ CCAIL is an Act that came into force on 30 June 2002, which gives German domestic courts universal jurisdiction to prosecute genocide, war crimes and crimes against humanity. Full text of the Code available at: http://www.gesetze-im-internet.de/englisch_vstgb/englisch_vstgb.html#p0029 Further reference: *The Legal Framework for Universal Jurisdiction in Germany*, 2014, Human Rights Watch, available at: https://www.hrw.org/sites/default/files/related_material/IJ0914German_0.pdf

⁵²⁸ *German court jails ISIL member for life over Yazidi genocide*, Al Jazeera, op. cit.

⁵²⁹ *Ibid.*

⁵³⁰ (Unofficial Translation) *Charges brought against a suspected member of the foreign terrorist group "Islamic State (IS)" for murder, genocide and others*, Indictment of 21 February 2020, Der Generalbundesanwalt beim Bundesgerichtshof, available at: <https://www.generalbundesanwalt.de/SharedDocs/Pressemitteilungen/DE/2020/Pressemitteilung-vom-21-02-2020.html>

⁵³¹ Press Release, *Higher Regional Court Frankfurt/Main sentences Taha Al-J. to lifelong imprisonment for genocide and other criminal offences*, 2021, Ordentliche Gerichtsbarkeit Hessen, available at: <https://ordentliche-gerichtsbarkeit.hessen.de/pressemitteilungen/higher-regional-court-frankfurt-main-sentences-taha-al-j-to-lifelong-imprisonment>

⁵³² *German court jails ISIL member for life over Yazidi genocide*, Al Jazeera, op. cit.

The central argument for the Frankfurt Court was that the defendant, through the damage to the joint plaintiff and her daughter, had acted with the intent to eliminate the Yazidi minority.

On 30 November 2021, the Higher Regional Court of Frankfurt found Taha Al-J. guilty of “*genocide, in combination with a crime against humanity resulting in death, a war crime against persons resulting in death, aiding and abetting a war crime against persons in two cases, and bodily harm resulting in death.*”⁵³³ He was sentenced to life in prison and to pay a fine of 50,000 euro for the psychological damage to the victim.

Indeed, this case is a major landmark in the prosecution of genocide, as it allowed for the conviction of genocide, out of the killing of just one person.⁵³⁴ However, it is nothing but a first step in the accountability for the physical and mental atrocities suffered by the Yazidis, after 8 years from the attacks in Sinjar.

⁵³³ Press Release, op. cit.

⁵³⁴ EL-HITAMI, H. *The Yazidi Trial in Germany: How to Prove Genocide in a Single Case?*, 2020, Justiceinfo.net, available at: <https://www.justiceinfo.net/en/45808-yazidi-trial-germany-prove-genocide-single-case.html> See also: EL-HITAMI, H. *Germany: First Conviction for Genocide Against the Yazidi*, 2021, Ibid.

Chapter 3. Actions of Myanmar against Rohingya under a legal lens. Was it a state-sponsored genocide?

Myanmar, formerly known as Burma, is one of the poorest countries in Asia with its population mainly concentrated in rural areas.⁵³⁵ In ancient times, Burma was the crossroad of merchants from all Southeast Asia, making it a key centre of cultural exchange.⁵³⁶ In the 18th century, it became a British colony and, since then, the country has been the theatre of violent conflicts, both of an internal and external nature. In fact, after the independence of 1948, disturbing accounts of sectarian violence began to shed light on the persecutions suffered by religious minority, in particular, the Muslim Rohingyas. Such violence is supported by a huge amount of evidence, that points to the government as the perpetrator.

This chapter will perform a legal analysis of the atrocities committed in Myanmar against the Rohingya community, under the provisions of the Genocide Convention. The time span of the analysis will be the events of 2012 and of 2016-2017, with due reference to previous events, whenever needed.

1. Actors involved

The first paragraph will be focused on the description of the actors involved: the Rohingya people and Myanmar authorities. Particularly, emphasis will be placed on the historical origin of both actors and their previous clashes.

⁵³⁵ *Poorest Asian Countries 2022*, World Population Review, available at: <https://worldpopulationreview.com/country-rankings/poorest-asian-countries>

⁵³⁶ AUNG-THWIN, M. A. *Myanmar*, in Encyclopaedia Britannica, available at: <https://www.britannica.com/place/Myanmar>

1.1 The Rohingya people

As the Yazidis, the Rohingya are considered among the most persecuted minorities in the world.⁵³⁷ They are a Muslim community of which 1.1 million live in Myanmar, concentrated in the western state of Rakhine (also known as Arakan).⁵³⁸

There are two different lines of narrative around the origin of this people.

The first one, sustained by Muslim leaders, is that the Rohingya has inhabited the Rakhine since the 8th century, rendering them an indigenous people of the area.⁵³⁹ Moreover, they were the predominant culture during the rule of the Mrauk U dynasty⁵⁴⁰, which governed from the 15th century to the 18th century, until the beginning of the Burma Empire in 1784.⁵⁴¹ The persecutions against them began in that period, with empire-sponsored campaigns with the objective of reducing the spread of Islam in the area.⁵⁴² The Rohingya continued living in Arakan and, after the British conquest of Burma in 1826, they were made British subjects.⁵⁴³ Due to British colonization and the increasing demand of workforce in the colonies, a massive in-flow of Bengalis arrived in Burma, more than doubling the Muslim population of Rakhine.⁵⁴⁴ This is the friction point between the two narratives. In fact, according to the Burmese and non-Muslim Rakhine people, the Rohingya belong to the Sunni Muslims from Bangladesh that settled in Arakan during the 19th century, which they consider illegal immigrants.⁵⁴⁵ Prior to

⁵³⁷ Statement of Pramila Patten, Special Representative of the Secretary-General on sexual violence in conflict during the Human Rights Council opens special session on the situation of human rights of the Rohingya and other minorities in Rakhine State in Myanmar, 5 December 2017, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22491&LangID=E>

⁵³⁸ *Who are the Rohingya?*, 2018, Al Jazeera, available at: <https://www.aljazeera.com/features/2018/4/18/who-are-the-rohingya>

⁵³⁹ *The Rohingya Origin Story: Two Narratives, One Conflict*, 2017, TANENBAUM, Center for Interreligious Understanding, available at: <https://tanenbaum.org/wp-content/uploads/2017/11/Rohingya-Origin-Fact-Sheet-.pdf>

⁵⁴⁰ This dynasty governed Arakan from 1430 to 1784, in what is considered by the Rohingya as the “glorious period” or the “golden age of power and prosperity” as the society was a positively blended one, with both Muslim and Buddhist elements of culture. Examples were the Buddhist-Islamic courts and the frequency with which the rulers adopted Muslim titles along with their Buddhist names. Reference: *Muslim influence in the kingdom of Arakan*, 2011, Arakan Rohingya National Organisation, available at: <https://www.rohingya.org/muslim-influence-in-the-kingdom-of-arakan/>

⁵⁴¹ *The Rohingya Origin Story*, TANENBAUM, op. cit.

⁵⁴² MOHAJAN, H. *History of Rakhine State and the Origin of the Rohingya Muslims*, 2018, The Indonesian Journal of Southeast Asian Studies, Vol. 2, Issue 1, p. 14

⁵⁴³ *Ibid.*

⁵⁴⁴ BLAKEMORE, E. *Who are the Rohingya people?*, 2019, National Geographic, available at: <https://www.nationalgeographic.com/culture/article/rohingya-people>

⁵⁴⁵ MOHAJAN, H. *History of Rakhine State*, op. cit. p. 12.

that, they believed that the Muslims living in Rakhine before British rule were not the Rohingya's ancestors as the Mrauk U dynasty was prevalently Buddhist.⁵⁴⁶

Scholars, however, agree to consider the Rohingya as an “*amalgamation of peoples*”⁵⁴⁷, underlining an existing Muslim influence during the 15th-18th century dynasty, which was heightened by the extensive migration from Bangladesh.⁵⁴⁸ Since it was administered within the context of British colonization, such migration was seen as an intrusion of unwanted workers and perceived in a negative way by the Buddhist native population.⁵⁴⁹ Moreover, the advent of World War II further exacerbated internal tensions. Britain, in fact, promised the creation of an autonomous state for the Muslim people, in exchange for their allegiance during the war.⁵⁵⁰ Therefore, the Rohingya fought alongside the British, while the Buddhist were recruited by the Japanese forces that had invaded Burma.⁵⁵¹ At the end of the conflict, however, British promise was not fulfilled and further attempts by Muslims to create their own State in an area which comprised present-day Bangladesh were not successful⁵⁵² and Myanmar became an independent State in 1948.

Already in the first period of Myanmar's new government, Rohingya were excluded from the equality provisions of the new Constitution. In fact, the Union Citizenship Act of 1948⁵⁵³ did not include the Rohingya among the “*indigenous races of Burma*”⁵⁵⁴ that could obtain the citizenship. They were allowed, however, to obtain government-issued identity cards, if they could demonstrate a Burmese lineage of at least two generations.⁵⁵⁵

In 1962, a military coup led by General Ne Win overturned the government, in what marked the beginning of military rule and of ongoing crimes against the Rohingya minority.⁵⁵⁶ The army modified the Constitution, completely excluding Rohingya, and granting power to

⁵⁴⁶ NEMOTO, K. *The Rohingya Issue: A Thorny Obstacle between Burma (Myanmar) and Bangladesh*, 1991, p. 10, available at: <https://rohingyakhobor.com/mdocs-posts/the-rohingya-issue-a-thorny-obstacle-between-burma-myanmar-and-bangladesh/>

⁵⁴⁷ *The Rohingya Origin Story*, TANENBAUM, op. cit.

⁵⁴⁸ *Ibid.*

⁵⁴⁹ *Who are the Rohingya?*, Al Jazeera, op. cit.

⁵⁵⁰ BLAKEMORE, E. *Who are the Rohingya people?*, op. cit.

⁵⁵¹ *The Rohingya Origin Story*, TANENBAUM, op. cit.

⁵⁵² *Ibid.*

⁵⁵³ Full text available at:

<https://data.globalcit.eu/NationalDB/docs/1948%20Union%20Citizenship%20Act%20%5BENG%5D.pdf>

⁵⁵⁴ *Ibid*, Art. 3.

⁵⁵⁵ *Ibid*, Art. 4.

⁵⁵⁶ MOHAJAN, H. *History of Rakhine State*, op. cit. p. 14.

military leaders within the Burma Socialist Party.⁵⁵⁷ The Party engaged in a “Myanmarisation” policy, based on the supremacy of the pure race of Myanmar people and Buddhist religion.⁵⁵⁸ The Rohingya were excluded from both characterisations and could only obtain foreign identity cards, which greatly reduced their working and educational rights in the country and any form of Muslim association was banned.⁵⁵⁹

From the 1970s onwards, a number of events pushed more than one million Rohingyas to escape Rakhine and seek refuge in neighbouring Bangladesh, Thailand, Malaysia and several Southeast Asian countries.⁵⁶⁰ The first event was the 1978 operation named *Nagamin* or Dragon King, aimed at censing the illegal immigrants in the country, which resulted in an ethnic cleansing campaign that mainly targeted Rohingya.⁵⁶¹ Similar censuses were pushed by the authorities again in 1989, 1991 and 2002.⁵⁶² Lastly, the 1982 Citizenship Law made the Rohingya entirely stateless.⁵⁶³ The Law recognised 135 ethnic groups within the country, and the Rohingya were not included.⁵⁶⁴ Moreover, the authority recognised three degrees of citizenship, requesting proof of living in Myanmar before the 1948 independence even for obtaining the most basic one, the naturalised citizenship.⁵⁶⁵ Due to the high degree of illiteracy among the Rohingya⁵⁶⁶, the majority of Rohingya could not dispose of the necessary documentation and could not be recognised as citizens. Lack of citizenship meant the absolute restriction of their civil and political rights in the country.⁵⁶⁷ The strengthening of the hard line against Rohingya was accompanied by racial violence against them, subjected to forced labour, torture and sexual violence.⁵⁶⁸

Today, there are approximately 250,000 Rohingya in Rakhine, living under constant violence and threats by the Myanmar authorities.⁵⁶⁹

⁵⁵⁷ *Ibid.*

⁵⁵⁸ AHMED, A. *The Rohingya: Myanmar's outcasts*, 2012, Al Jazeera, available at: <https://www.aljazeera.com/opinions/2012/1/30/the-rohingya-myanmars-outcasts/>

⁵⁵⁹ *Timeline: Being Rohingya in Myanmar, From 1874 to Now*, 2017, Alal O Dulal Collective in The Wire, available at: <https://thewire.in/external-affairs/rohingya-myanmar-timeline>

⁵⁶⁰ MOHAJAN, H. *History of Rakhine State*, op. cit. p. 14.

⁵⁶¹ AHMED, A. *The Rohingya*, Al Jazeera, op. cit.

⁵⁶² *Timeline: Being Rohingya in Myanmar*, The Wire, op. cit.

⁵⁶³ *Who are the Rohingya?*, Al Jazeera, op. cit.

⁵⁶⁴ *Ibid.*

⁵⁶⁵ *Ibid.*

⁵⁶⁶ Recent estimates point to up to 80% of illiteracy within the community. This is

⁵⁶⁷ A Briefing by Burmese Rohingya Organisation UK, *Myanmar's 1982 Citizenship Law and Rohingya*, 2014, available at: <https://burmacampaign.org.uk/media/Myanmar%E2%80%99s-1982-Citizenship-Law-and-Rohingya.pdf>

⁵⁶⁸ *Who are the Rohingya?*, Al Jazeera, op. cit.

⁵⁶⁹ *Ibid.*

1.1 Myanmar authorities (including police, security forces and Rakhines)

The perpetrators of crimes against the Rohingya have been unequivocally linked with Myanmar authorities. This comprises a vast portion of the population, involving Myanmar Army, police and security forces as well as local Rakhines.

The Myanmar Army is commonly known as Tatmadaw, that refers to “armed forces”.⁵⁷⁰ It derives from the Burma Independence Army, led by revolutionary leader Aung San and founded in 1941, that was trained by Imperial Japanese military as aid to defeat the Allied during WWII.⁵⁷¹ After the independence of 1948, the Army melded with other militias, thereby forming the national armed force of newly independent Burma. Sectarian conflicts within the country allowed the army to maintain its influence and to progressively acquire power until, in 1962, Tatmadaw seized power in a *coup d'état*, marking the beginning of more than fifty years of military rule.⁵⁷² It was led by General Ne Win, that pursued ultra-isolationist policies based on socialism.⁵⁷³ Military rule took a hard nationalist line against non-Buddhist minorities, excluding them from the Constitution, establishing national census to clear the country from illegal citizens, and enacting the 1982 Citizenship Law.

Military spending grew exponentially, with a huge part of the country’s gross domestic product spent as such.⁵⁷⁴ The Tatmadaw is often considered to be “*a state within the state*”⁵⁷⁵ as it controls its own schools, universities, hospitals as well as the national police force.

The military dictatorship and the little economic progress often sparked civilian protests in Myanmar, that were always brutally suppressed by the army and the police forces. However, in 2007, the spike in oil prices culminated in the spread of the Saffron Revolution which advocated for the creation of a democratic government under the lead of Aung Suu Kyi.⁵⁷⁶ Several images

⁵⁷⁰ MARSH, N. *Tatmadaw: Myanmar’s notoriously brutal military*, 2022, BCC, available at: <https://www.bbc.com/news/world-asia-56660483>

⁵⁷¹ STEINBERG, D. I. et al, *History of Myanmar*, 2021, in Encyclopaedia Britannica, available at: <https://www.britannica.com/place/Myanmar/The-emergence-of-nationalism#ref509624>

⁵⁷² *Timeline: Being Rohingya in Myanmar*, The Wire, op. cit.

⁵⁷³ MAIZLAND, L. *Myanmar’s Troubled History: Coups, Military Rule and Ethnic Conflict*, 2022, Council on Foreign Relations, available at: <https://www.cfr.org/backgrounder/myanmar-history-coup-military-rule-ethnic-conflict-rohingya#chapter-title-0-3>

⁵⁷⁴ MOHAJAN, H. *History of Rakhine State*, op. cit. p. 17.

⁵⁷⁵ BARONIO, F. *Myanmar’s Army Will Do Whatever It Takes to Hold Onto Power*, 2021, Italian Institute for International Political Studies, available at: <https://www.ispionline.it/en/publicazione/myanmars-army-will-do-whatever-it-takes-hold-power-31157>

⁵⁷⁶ She was the leader of the National League for Democracy and the daughter of Aung San. Due to her human rights activism, she has been placed under house arrest by the military junta from 1989 onwards, with sporadic relaxation of the imprisonment, until at least 2012. In 1991, she was awarded the Nobel Peace Prize for her commitment to establish democracy in Myanmar. References: PLETCHER, K. *Aung*

of the protest circulated abroad, putting international pressure on the military junta that was compelled to step back, not before further modifying the Constitution, consolidating military powers even under hypothetical civilian ruling.⁵⁷⁷ The junta officially left the power in 2011, replaced by a transitional military-controlled government, with Prime Minister Thein Sein as President.⁵⁷⁸ Sein would undergo a series of reforms, which will lead to a relaxation of the sanctions imposed on Myanmar by the EU or the US.⁵⁷⁹

Sectarian violence, however, will not cease and, in June 2012, 88 Rohingya were killed by Arakanese Buddhist in retaliation for the murder and rape of an Arakanese woman.⁵⁸⁰ The violence continued until November 2012 and the government kept refusing citizenship rights to the Rohingya, maintaining that the minority poses a threat to the Myanmar ethnicity.⁵⁸¹

The first multiparty election was held in 2015 and resulted with the victory of the National League for Democracy (NLD) party, with Suu Kyi as State counsellor, hence, *de facto* leader of the civilian government.⁵⁸² The Tatmadaw, however, maintained control over vast part of the policy-making capacity of the government, such as in matters of domestic policies and security.⁵⁸³

Furthermore, in 1992, the government created a special border security force, called Nay-Sat Kut-kewy (NaSaKa), composed of police, intelligence, and customs officials.⁵⁸⁴ The agency was mainly active in the Rakhine State, enforcing the discriminatory policies against the Muslim community and securing the border with Bangladesh. It was under the control of the Minister for Border Affairs until 2013, when it was disbanded, after years of accusations of human rights violations against the Rohingya.⁵⁸⁵

San Suu Kyi, Myanmar politician and opposition leader, 2021, Encyclopaedia Britannica, available at: <https://www.britannica.com/biography/Aung-San-Suu-Kyi> and Statement by the Norwegian Nobel Committee, 2022, available at: <https://www.nobelprize.org/prizes/peace/1991/statement/>

⁵⁷⁷ MAIZLAND, L. *Myanmar's Troubled History*, op. cit.

⁵⁷⁸ Thein Sein was a former general within the military regime.

⁵⁷⁹ *Timeline: Being Rohingya in Myanmar*, The Wire, op. cit.

⁵⁸⁰ *Ibid.*

⁵⁸¹ Statement published on 12 July 2012 by the President's Office following a meeting on 11 July 2012 with the UN High Commissioner for Refugees António Guterres, available at: <http://www.networkmyanmar.org/ESW/Files/Thein-Sein-Guterres.pdf>

⁵⁸² MAIZLAND, L. *Myanmar's Troubled History*, op. cit.

⁵⁸³ *Ibid.*

⁵⁸⁴ DELLA-GIACOMA, J. *Myanmar's "Nasaka": Disbanding an Abusive Agency*, 2013, International Crisis Group, available at: <https://www.crisisgroup.org/asia/south-east-asia/myanmar/myanmars-nasaka-disbanding-abusive-agency>

⁵⁸⁵ MOHAJAN, H. *History of Rakhine State*, op. cit. p. 17.

Local Rakhines also played a fundamental role in the spread of anti-Rohingya sentiments, with the formation of the Rakhine Nationalities Development Party (RNDP) which became the most powerful in the Rakhine State.⁵⁸⁶ The party was directly asking the government to repatriate the non-Myanmar Bengali nationals, as they were not to be considered as part of Myanmar as a whole.⁵⁸⁷

Lastly, in the 1990s, Buddhist monks created the 969 Movement⁵⁸⁸, with the objective of preserving the cultural customs of Buddhism.⁵⁸⁹ In the already-nationalist context of Myanmar, it quickly gained followers and became a symbol of nationalism.⁵⁹⁰ The leaders, the extremist monk Ashin Wirathu⁵⁹¹, believed that the Muslims were undertaking a secret mission to seize the ruling power in Myanmar, due to their higher fertility rates and population growth.⁵⁹² The Movement was engaged in a strong propaganda against the Rohingya living in Rakhine, which was often endorsed by government institutions themselves.⁵⁹³

2. Legal analysis

As explained above, Rohingya have been living under constant threat and persecution in the State of Rakhine. Although the country reached a tottering stability in its quest for democratic rule, the fate and the treatment of Rohingya has not improved. In fact, democratic leader Suu Kyi has reportedly discarded claims of ethnic violence in the country, defining the accusations as “fake information” with the aim of “promoting the interest of the terrorists”.⁵⁹⁴

⁵⁸⁶ *Persecutions of the Rohingya Muslims: Is Genocide Occurring in Myanmar's Rakhine State?*, 2015, Allard K. Lowenstein International Human Rights Clinic, Yale Law School and Fortify Rights.

⁵⁸⁷ *Ibid.*

⁵⁸⁸ 9 refers to the virtues of Buddha, 6 are His teachings, while 9 refers to the monkhood. Reference: ROUSTRAY, B. P. *Myanmar, Profiling the 969 Movement*, 2013, Institute of Peace and Conflict Studies, available at: http://www.ipcs.org/comm_select.php?articleNo=4029

⁵⁸⁹ MOHAJAN, H. *History of Rakhine State*, op. cit. p. 16.

⁵⁹⁰ *Ibid.*

⁵⁹¹ He is a Burmese Buddhist monk, often known as the “Burmese Bin Laden”. He was jailed from 2003 to 2012 for anti-Muslim propaganda. Reference: SUMON, S. *Ashin Wirathu: The Buddhist Bin Laden*, 2019, Arab News, available at: <https://www.arabnews.com/node/1532846/world>

⁵⁹² *Ibid.*

⁵⁹³ MOHAJAN, H. *History of Rakhine State*, op. cit. p. 16

⁵⁹⁴ SAFI, M. *Aung San Suu Kyi says 'terrorists' are misinforming world about Myanmar violence*, 2017, The Guardian, available at: <https://www.theguardian.com/world/2017/sep/06/aung-san-suu-kyi-blames-terrorists-for-misinformation-about-myanmar-violence>

Such declaration has been made in the context of a massive military clash between Rohingya insurgents and Rakhine police forces that started in August 2017 and led to the flight of more than 140,000 Rohingya refugees in Bangladesh.⁵⁹⁵

The above-mentioned persecutions against the Rohingya minority by the Myanmar government will be the focus of the following legal analysis. As for the previous chapter, each crime will be analysed in line with the provisions of the Genocide Convention.

2.1 Rohingya Muslims as a protected group

Art. 2 of the Genocide Convention describes the potential victims of genocide as members of “*a national, ethnical, racial or religious group*”.⁵⁹⁶

According to the 2016 Report of the United Nations High Commissioner for Human Rights, Rohingya identify themselves “*as a distinct ethnic group with their own language and culture*”⁵⁹⁷. Such claims have been rejected by Myanmar’s authorities, which did not include the Rohingya in the list of ethnic groups, going as far as to denying the existence itself of the minority.⁵⁹⁸

However, several international instruments describe Rohingya as an ethnic group,⁵⁹⁹ seemingly confirming their status as such.

Furthermore, all Rohingyas speak the same language, which is called Rohingya or Ruaingga, which is a distinct language and differ from the other idioms or dialects spoken in the Rakhine State.⁶⁰⁰

⁵⁹⁵ *Ibid.*

⁵⁹⁶ Art. 2, Genocide Convention, op. cit.

⁵⁹⁷ Report of the United Nations High Commissioner for Human Rights, 2016, Human Rights Council, para. 3, A/HCR/32/18, available at: <https://digitallibrary.un.org/record/846981?ln=ar>

⁵⁹⁸ BEECH, H. ‘*No Such Thing as Rohingya*’: Myanmar Erases a History, 2017, the New York Times, available at: <https://www.nytimes.com/2017/12/02/world/asia/myanmar-rohingya-denial-history.html>

⁵⁹⁹ See for instance: Committee on the Elimination of All Forms of Discrimination against Women, Concluding observations on the combined fourth and fifth periodic reports of Myanmar, 2016, p. 10, available at: <https://digitallibrary.un.org/record/842386> and Committee on the Rights of the Child, Consideration of reports submitted by States parties under article 44 of the Convention: Concluding observations: Myanmar, 2012, para. 35, available at: https://www2.ohchr.org/english/bodies/crc/docs/co/CRC_C_MMR_CO_3-4.pdf

⁶⁰⁰ *Documenting Atrocity Crimes Committed Against the Rohingya in Myanmar’s Rakhine State*, 2018, The Public International Law and Policy Group’s (PILPG), p. 72.

Regarding their status as religious group, few considerations need to be made. Myanmar is a prevalently Buddhist country, with almost 90% of people identifying as Buddhists, while only the 4% are Muslim.⁶⁰¹ The Rohingya are part of the Muslim minority, and they have been frequently targeted inasmuch as non-Buddhist people by Burmese authorities as well as Buddhist monks. Their Islamic roots have been perceived as a threat to the society as a whole, with accusations of having a “*master plan*” to overturn the country to make it a Muslim country.⁶⁰² However, there are other Muslim groups in Myanmar, which have blended with the society, such as the “Arakanese Muslims” or the “Black Karen”, which share the language and some of the customs with the Burmese communities.⁶⁰³ All of these groups suffer or have suffered a certain degree of discrimination, but the Rohingya have historically been disproportionately affected. For this reason, religion does not appear to be the sole basis for the ongoing persecution against the Rohingya, although it is a significant aspect of their identity.⁶⁰⁴

Moreover, in *Akayesu*, the ICTR underlined the importance of the perpetrator’s perception of the group, as a distinct group. Myanmar authorities do not accept the term Rohingya, as it would confirm their indigenous status in Myanmar, but they refer to them as Bengalis, which is only used to describe the Rohingya. The fact that the term Bengali is used for all and only the Rohingya, seems to confirm that they are viewed as a distinct group by Myanmar authorities.⁶⁰⁵

The International Court of Justice, in its Order of 23 January 2020, confirmed the above presuppositions, by stating that the Rohingya “*appear to constitute a protected group within the meaning of Article 2 of the Genocide Convention.*”⁶⁰⁶

2.2 *Actus rea*

The *actus rea* of a crime, as explained in the previous chapter, are its material elements. For what concerns the crime of genocide, they can be found in Art. 2 of the Genocide Convention.

⁶⁰¹ *Burmese Myanmar Culture*, in Cultural Atlas, available at: <https://culturalatlas.sbs.com.au/burmese-myanmar-culture/burmese-myanmar-culture-religion>

⁶⁰² FISHER, J. *Anti-Muslim monk stokes Burmese religious tensions*, 2013, BBC News, available at: <https://www.bbc.com/news/world-asia-23846632>

⁶⁰³ *Muslims and Rohingya*, in Minority Rights Group International, 2019, available at: <https://minorityrights.org/minorities/muslims-and-rohingya/>

⁶⁰⁴ *Persecutions of the Rohingya Muslims*, Allard K. Lowenstein International Human Rights Clinic, op. cit. p. 43.

⁶⁰⁵ *Ibid.*

⁶⁰⁶ ICJ, *The Gambia v. Myanmar*, op. cit. para. 52.

Art. 3, moreover, goes on by enlisting the other acts that shall be punishable, which are:

- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide

For what concerns conspiracy, the actual proof of the committed act(s) can at times be unnecessary, as long as the circumstantial evidence of the existence of a common plan or of a concerted action, can be inferred.⁶⁰⁷

Accordingly, direct and public incitement to commit genocide can be prosecuted even when the final act has not been committed. It is enough to determine that the direct and public incitement occurred, and that the offender acted with the intent to destroy the group.⁶⁰⁸

A meaningful provision concerning attempt is in the Rome Statute, which defines it as the commencement of the execution of the crime of genocide, but the latter does not take place by reason of unforeseeable circumstances, that do not depend on the person.⁶⁰⁹ There have not been, however, prosecutions for attempted genocide to date.⁶¹⁰

Lastly, complicity has been defined as the participation and contribution to the genocidal act by the other members of the offender's group.⁶¹¹ It has a particular importance as it can often facilitate the commission of the act, hence, it shall be prosecuted as well. Such view is sustained by Schabas as well, which wrote that the accomplice is usually the "*real villain*"⁶¹² while the offender, intended as the one that actually commits the offence, is just the performer.⁶¹³

These acts will be particularly useful in the analysis of the present case study. Therefore, the next section will analyse the acts committed against the Rohingya by the authorities of Myanmar.

⁶⁰⁷ ICTR, *Nahimana et al v. Prosecutor*, Judgement of 28 November 2007, para. 896, available at: <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/ICTR-99-52/MS31299R0000555171.PDF>

⁶⁰⁸ SCHABAS, W. *Genocide*, op. cit. p. 319.

⁶⁰⁹ ICC Statute, Art. 25(3)f.

⁶¹⁰ SCHABAS, W. *Genocide*, op. cit. p. 337.

⁶¹¹ ICTY, *Prosecutor v. Tadić*, Judgement of 15 July 1999, para. 191.

⁶¹² SCHABAS, W. *Genocide*, op. cit. p. 340.

⁶¹³ *Ibid.*

2.2.1 Killing members of the group

In October 2012, Rohingya community in Rakhine became the target of a series of attacks by Arakanese mobs.⁶¹⁴ Muslim villages were burnt down, and an unknown number of Rohingya people were killed. The attacks lasted for a week and 9 cities of the Rakhine State were targeted. Human Rights Watch reported at least 70 Rohingya killed in Yan Thei Village on October 23.⁶¹⁵

Several witnesses recalled not recognising as locals, the Arakanese that attacked them. Moreover, a shared testimony among the survivors was the complete lack of help by the security forces that attended the massacres.⁶¹⁶ On the contrary, they reported that the Army, the police and the NaSaKa were often engaged in killing as well. In particular, the witnesses recalled that the security forces attacked unarmed Rohingya, because their weapons have been previously confiscated by the police, that were trying to stop the fire in the mosques or in the houses.⁶¹⁷ A survivor told PILPG that the police went to a hospital, telling the doctors to kill Rohingya.⁶¹⁸

The authorities, moreover, failed to hold the perpetrators of the massacres accountable, as no evidence of ongoing government inquiries has started.⁶¹⁹

Furthermore, the attacks of October-November 2012 have been conducted in an organised manner, with well-armed perpetrators, and several attacks occurring at the same time in different cities, and the complicity of the security forces.⁶²⁰

In August 2017, due to the increasing number of Rohingya insurgents, Myanmar authorities launched a series of “clearing operations” in Rakhine, aimed at targeting “terrorists”.⁶²¹

⁶¹⁴ “All You Can Do is Pray” *Crimes Against Humanity and Ethnic Cleansing of Rohingya Muslims in Burma’s Arakan State*, 2013, Human Rights Watch, p. 47, available at: https://www.hrw.org/reports/burma0413_FullForWeb.pdf

⁶¹⁵ *Ibid.*

⁶¹⁶ *Ibid.*

⁶¹⁷ *Ibid.*

⁶¹⁸ *Persecutions of the Rohingya Muslims*, Allard K. Lowenstein International Human Rights Clinic, op. cit. p. 27

⁶¹⁹ *All You Can Do is Pray*, Human Rights Watch, op. cit.

⁶²⁰ *Persecutions of the Rohingya Muslims*, Allard K. Lowenstein International Human Rights Clinic, op. cit. p. 46.

⁶²¹ *Thousands in western Myanmar flee as army plans operations, monitors say*, 2020, Reuters, available at: <https://www.reuters.com/article/us-myanmar-rakhine-idUSKBN23Y0Q1>

In several cases, men and boys were abducted and only released if the family could pay a fee, but in the majority of cases they went missing.⁶²² Many were incarcerated out of accusations of terrorist membership. The family members then received fake death certificates of their relatives, stating that they had died of disease while in jail, and that their bodies have been disposed in “special burial grounds”.⁶²³

During the operations of 2017, almost every witness reported mass killings in Rohingya villages as well as the hundreds of arbitrary killings while they were trying to escape to Bangladesh, with an estimate of 2,000 people drowned while trying to flee by boat.⁶²⁴ The military reportedly killed 1,000 people by shooting on groups of people, creating a “killing field”.⁶²⁵ The targets were women, children and the elders as well. Several disturbing testimonies describes the killing of pregnant women and children with flamethrowers or the murder of at least 100 people that were drowned in a river.⁶²⁶

In the light of the events of 2012 and of 2017, it appears, then, that Myanmar’s authorities, including police forces, the army, the NaSaKa and local Rakhines, have committed the prohibited act of killing member of the group against the protected group Rohingya.

2.2.2 Causing serious bodily or mental harm to members of the group

As addressed in the previous chapter, the acts that can constitute serious bodily or mental harm to the members of the group are acts of torture, inhuman or degrading treatment, including sexual violence and rape, beatings during interrogation and threats to death.⁶²⁷

In the context of the 2012 attacks, evidence points to widespread abuses and violence against the Rohingya. The 2016 Report of the United Nations High Commissioner for Human Rights disclosed allegations of torture and inhumane treating, which included severe beating, burning by cigarettes and of Muslim beards, forced labour and degrading conditions of detentions.⁶²⁸

⁶²² *Documenting Atrocity Crimes Committed Against the Rohingya*, PILPG, op. cit. p. 23.

⁶²³ *Ibid.*

⁶²⁴ *Ibid.*, p. 73.

⁶²⁵ *Ibid.*

⁶²⁶ *Ibid.*

⁶²⁷ ICTY, *Prosecutor v. Stakić*, op. cit. para. 516.

⁶²⁸ *Report of the UN High Commissioner for Human Rights on the Situation of human rights of Rohingya Muslims and other minorities in Myanmar*, 2016, Human Rights Council, para. 32.

Moreover, inhabitants of the Northern area of Rakhine State, were subjected to arbitrary detentions, extortion, and excessive use of force while in prison.⁶²⁹ The laws for fair trial were not respected and the imprisonment often resulted in torture and death.⁶³⁰ Police forces' patrols and law enforcement were mainly carried out with excessive and indiscriminate use of force.⁶³¹

The Tatmadaw has reportedly encouraged as well as took an active part in the violence.⁶³² Similarly, the NaSaKa have been actively participating, with several Rohingya blogs pointing to torture, murder, extortion and arbitrary arrests. In May 2013, the security force arrested and tortured Rohingya people in an effort to force them to be registered as Bengali.⁶³³ Moreover, the security forces reportedly prevented Rohingya to enter the refugee camps, forcing them to remain under their surveillance where they were subjected to beatings and abuses by the border police.⁶³⁴

In 2017, similar atrocities were committed against the Rohingya, as they endured arbitrary arrests and subsequent torture, use of landmines, beatings, knifing and humiliation. The majority of humiliating acts were reserved to women, such as pulling off their veil during patrolling, and forcing them to go outside without wearing it.⁶³⁵ Young men were mainly targeted to be terrorists and arrested. One testimony reported the capture of 1,000 men and boys that were brought to a military camp where they were beaten, some to death, for one day.⁶³⁶ Moreover, in efforts to “discover” terrorists among the Rohingya villages, many were arrested and tortured to extort confessions of membership to the Arakan Rohingya Salvation Army and the positioning of the Army's weapons.⁶³⁷

According to the reports, there were also civilians, of non-Rohingya ethnicity, among the perpetrators of mass violence, setting the villages on fire or shattering the corpses.⁶³⁸

⁶²⁹ *Ibid.*

⁶³⁰ *Ibid.*

⁶³¹ *Ibid.*

⁶³² *Burma Risk Assessment*, 2013, the Sentinel Project for Genocide Prevention, p. 14, available at: <https://thesentinelproject.org/wp-content/uploads/2013/09/Risk-Assessment-Burma-September-2013.pdf>

⁶³³ *Ibid*, p. 13.

⁶³⁴ *All You Can Do is Pray*, Human Rights Watch, op. cit.

⁶³⁵ *Documenting Atrocity Crimes Committed Against the Rohingya*, PILPG, op. cit. p. 22.

⁶³⁶ *Ibid.*

⁶³⁷ *Ibid.*

⁶³⁸ *Ibid.*

On both occasions, the actions of Myanmar's authorities caused serious mental harm to the Rohingya. The survivors, in fact, after witnessing and suffering the killing and the abuses, were left with uncertainties about the fate of their abducted family members.⁶³⁹

2.2.2.1 Rape and sexual assaults against Rohingya women

The Myanmar police and security forces as well as the Army extensively engaged in rape and sexual violence against Rohingya women.⁶⁴⁰ The attacks happened while women and girls were detained in military facilities, in their homes or while performing forced labour.⁶⁴¹

NaSaKa, moreover, often engaged in so-called "night checks" where they forcibly entered in Rohingya houses to count family members. Among them, at least one night check reportedly was followed by a mass rape.⁶⁴²

Women and girls were also increasingly attacked during the 2016-2017 attacks. The military forces were actively looking for women, touching them and accusing them of being terrorists.⁶⁴³ Many women were reportedly captured by combatants to be released only after the payment of fees by their families.⁶⁴⁴ Women were also subjected to mass gang rapes, mutilations and public sexual violence. Women were raped in front of their families and villages. In the majority of cases, after the rapes they were killed.⁶⁴⁵ In one case, a group of women were locked into a house where they were raped and, after that, the house was burnt.⁶⁴⁶ Whenever they, or their husbands or family members, tried to defend the women, they were either beaten or mutilated, or killed.

When they were not raped, women suffered humiliation as they were forced to be touched by the soldiers and to take off their clothes, under the threat of rape.⁶⁴⁷

Survivors often reported being affected by serious mental health issues such as PTSD, often linked to the stigma associated with such violations.⁶⁴⁸

⁶³⁹ *Ibid*, p. 74.

⁶⁴⁰ *Persecutions of the Rohingya Muslims*, Allard K. Lowenstein International Human Rights Clinic, op. cit. p. 15.

⁶⁴¹ *Ibid*.

⁶⁴² WADE, F. *Rapes by Burmese security forces 'may cause more strife' in troubled region*, 2013, The Guardian, available at: <https://www.theguardian.com/world/2013/feb/26/burma-security-forces-rape-arakan>

⁶⁴³ *Documenting Atrocity Crimes Committed Against the Rohingya*, PILPG, op. cit. p. 21.

⁶⁴⁴ *Ibid*.

⁶⁴⁵ *Ibid*.

⁶⁴⁶ *Ibid*.

⁶⁴⁷ *Ibid*.

⁶⁴⁸ *Ibid*.

Sexual violence was the main *modus operandi* of the Tatmadaw, but they often included other Rakhine civilians. There has been no ongoing internal investigation for the sexual violence committed by the authorities, that enabled the military to act in a longstanding environment of impunity, where the sexual assaults were “normalised” and part of the widespread persecutions.⁶⁴⁹

According to the evidence, it appears that the Myanmar forces, through acts of torture, inhuman and degrading treatment including rape and sexual violence, have inflicted serious mental and bodily harm to the Rohingya ethnic group.

2.2.3 Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part

This requirement includes all those acts which are not intended to directly kill the members of the group, but rather to reach their slow death.⁶⁵⁰

As result of the destruction of Rohingya villages in 2012, the former villagers were expelled from their homes, becoming internally displaced persons or refugees abroad.⁶⁵¹ Due to their lack of citizenship, moreover, Rohingya could not access medical care, nor working opportunities to provide for their subsistence. They could not even go back to their former houses, as the NaSaKa, the Army and the police forces controlled the entrances and redirect Rohingya towards the ghetto-like IDP camps, which were under government control.⁶⁵² The authority, moreover, often prevented displaced persons from receiving humanitarian aid by the United Nations or other agencies, such as Save The Children.⁶⁵³ In the camps, the government was unable to provide for adequate food and health standards, thereby not permitting Rohingya to go out to work nor to seek medical assistance.⁶⁵⁴ The access to the camps was also based on

⁶⁴⁹ *Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts*, 2019, Human Rights Council, A/HCR/42/CRP. 4.

⁶⁵⁰ ICTY, *Prosecutor v. Stakić*, op. cit. para. 517.

⁶⁵¹ *Persecutions of the Rohingya Muslims*, Allard K. Lowenstein International Human Rights Clinic, op. cit. p. 48.

⁶⁵² *Ibid.*

⁶⁵³ *Ibid.*

⁶⁵⁴ STOAKES, E. *Burma's Rohingya Ghettos Broke my Heart*, 2013, Vice, available at: <https://www.vice.com/en/article/kwndbn/visiting-burmas-muslim-ghettos>

a system of permissions that was totally arbitrary and whoever was not allowed to live in the “official” camps was confined in other parts of the area, where aid was almost absent.⁶⁵⁵

The villagers that maintained their houses after the attacks of 2012, were not displaced in the camps but they were forced to remain confined in their villages, as their freedom of movement was totally banned and they had to respect imposed curfews.⁶⁵⁶ However, due to the lack of external aid, the villages were insufficient to sustain the lives of Rohingya, as they lacked proper infrastructure to buy food, water and medical supplies. Moreover, Rohingya used to work in lands traditionally rented to them by Rakhine people but, as a consequence of the 2012 disorders, those “contracts” were ended, definitely leaving the Rohingya without a source of sustenance.⁶⁵⁷

Witnesses also pointed out to the forced labour imposed on the Rohingya by NaSaKa and the police forces. According to Art. 2.1 of the International Labour Organization (ILO) Forced Labour Convention, compulsory labour means “*all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.*”⁶⁵⁸

In 2012, the government signed a Memorandum of Understanding with ILO in which it actively engaged to adopt the relevant measures to end forced labour in the country by 2015.⁶⁵⁹ However, UN agencies reported that in the first half of 2014, at least 6,000 adults and 2,000 children, among the Rohingya, kept being exploited by the authorities in Rakhine.⁶⁶⁰

The labour they were compelled to perform included agricultural and construction work, working as night guards to the villages or the camps or street maintenance.⁶⁶¹

The curfews were imposed again in the context of the operations of 2016-2017, where from 6 pm to 6 or 8 am, Rohingya were prohibited from leaving their houses and to turn on any lights.⁶⁶² Similarly, their movements were strictly controlled and Rohingya needed to obtain a

⁶⁵⁵ *Ibid.*

⁶⁵⁶ *Persecutions of the Rohingya Muslims*, Allard K. Lowenstein International Human Rights Clinic, op. cit. p. 49.

⁶⁵⁷ *Ibid.*

⁶⁵⁸ Art. 2.1, ILO Forced Labour Convention, No. 29, 1930, available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C029

⁶⁵⁹ *Persecutions of the Rohingya Muslims*, Allard K. Lowenstein International Human Rights Clinic, op. cit. p. 14.

⁶⁶⁰ *Ibid.*

⁶⁶¹ *Ibid.*, and *All You Can Do is Pray*, Human Rights Watch, op. cit.

⁶⁶² *Documenting Atrocity Crimes Committed Against the Rohingya*, PILPG, op. cit. p. 13.

permit to do almost everything, such as going to the hospital for pregnant women or go to funerals.⁶⁶³ The military was very rarely granting those permits, and when it happened, it was after the payment of a substantial bribe. Whenever a violation of the rules occurred, they were beaten or even killed.⁶⁶⁴

The majority of villages, however, were burned down or destroyed, including the mosques, by the military as well as by Rakhine locals.

Access to food was also heavily restricted, as the authorities confiscated the cultivation lands of the Rohingya as well as their boats, killed their cattle, and they destroyed the majority of food markets in the villages.⁶⁶⁵ In addition, there are several documented cases of the military poisoning the water sources in the villages, by dumping oil or chemicals in the wells and in the rivers.⁶⁶⁶

As stated above, forced labour virtually never stopped in Rakhine. Survivors often recalled being compelled to work seven days per week, without compensation nor adequate food supplies, constantly under the threat of violence or death.⁶⁶⁷ They often worked to build infrastructure for the Rakhine locals, either in their fields or in construction sites.

It appears, thus, that government authorities, by imposing restriction on freedom of movement, forced labour and displacing Rohingya individuals, have inflicted conditions of life in order to reach their physical destruction.

2.2.3.1 Discriminatory laws and language against Rohingya

An important aspect that can confirm both harsh conditions of life and the intent of the perpetrators is that the persecutions occurred in a widespread pattern of discriminatory behaviours against the Rohingya, such as the enactment of discriminatory laws and, in general, use of denigratory language.

Since the 1990s, hatred and intolerance against the Rohingya have been a prevalent feature of extremism and ultra-nationalism among the Buddhist associations.⁶⁶⁸ Muslims were often

⁶⁶³ *Ibid.*

⁶⁶⁴ *Ibid.*

⁶⁶⁵ *Ibid.*

⁶⁶⁶ *Ibid.*, p. 44.

⁶⁶⁷ *Ibid.*, p. 18.

⁶⁶⁸ A/HCR/32/18, op. cit. para. 22.

compared to animals, hence dehumanizing them, and the locals were incited to kill or mistreat them.

The core of the discriminatory law practices is the 1982 Citizenship Law. It is well established that each State has the authority to determine who are to be considered as its nationals.⁶⁶⁹ It is for each country, hence, to establish the criteria for the acquisition or the loss of the citizenship. Such “power”, indeed, shall be exercised in conformity with relevant international law provisions and this gradually evolved onto a human rights-oriented approach. In fact, the 1948 Universal Declaration of Human Rights stated that “*Everyone has the right to a nationality. No one shall be arbitrarily deprived of his nationality nor denied the rights to change his nationality*”.⁶⁷⁰

It appears then, that the Citizenship Law of 1982 is in contravention with such international provision, as it excludes former citizens (the Rohingyas) from obtaining the citizenship and consequently enjoying political and civil rights in the country. Rohingya were allowed to hold only “temporary registration cards” that entailed no civil rights. Only few of them met the requirements to obtain a degree of citizenship, which were to show proof of settlement in Burma prior to 1823 and having already applied for citizenship before 1982. These conditions excluded the majority of Rohingya.⁶⁷¹ Moreover, foreign nationals (as the Rohingya were considered) could naturalize, only if they could provide conclusive evidence of their residence in Myanmar before the independence of 1948 and if they could speak perfectly one of the national languages, among which Ruaingga was not included.⁶⁷² In order for their request to be accepted, potential citizens needed to prove that they were of “good character and sound mind”, a totally subjective and arbitrary requirement as the Law provided to the State the faculty of revoking the non-birth citizenship at any time.⁶⁷³ Due to their imposed lack of citizenship and to permeate the hatred towards them, government authorities and the local population as well, referred to Rohingya as a “fabricated” or “invented group”.⁶⁷⁴

⁶⁶⁹ *Convention on Certain Questions Relating to the Conflict of Nationality Law*, 13 April 1930, League of Nations, Art. 1, available at: <https://www.refworld.org/docid/3ae6b3b00.html>

⁶⁷⁰ *Universal Declaration of Human Rights*, General Assembly of the United Nations, 1948, A/RES/2/217A, available at:

[https://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/UniversalDeclarationofHumanRights\(1948\).aspx](https://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/UniversalDeclarationofHumanRights(1948).aspx)

⁶⁷¹ *All You Can Do is Pray*, Human Rights Watch, op. cit. p. 110.

⁶⁷² *Ibid.*

⁶⁷³ *Ibid.*

⁶⁷⁴ *Ibid.*

In the majority of cases, Rohingya lacked the required documents, and this situation was hampered by the destruction and arson of their homes in 2012. Their ID cards were also seized by the authorities.

Thein Sein government, moreover, passed a series of laws, named “Race and Religion Protection Laws”, which disproportionately affected Rohingya, in order to halt the higher population growth of “illegal migrants”.⁶⁷⁵ An example was a provision to force women to wait at least 36 months between one pregnancy and the other, or the need to obtain permission by the local authority to get married.⁶⁷⁶

Such discriminatory practices can account for conditions of life calculated to bring about the physical destruction of the Rohingya group.

2.2.4 Imposing measures intended to prevent births within the group

Accordingly, Myanmar authorities imposed several sets of laws intended to prevent the enlargement of the Rohingya population.

First of all, Rohingya were required to get state permission in order to marry. The process was expensive, (they often had to bribe the officials) and long and, in the majority of cases, their requests were not accepted.⁶⁷⁷ Moreover, they needed to submit a formal request, including pictures of the men without beards and the women without the hijabs, which went openly against Islam.⁶⁷⁸ A 2005 policy, known as the two-child policy, imposed the obligation to agree to have no more than two children, in order to get permission to marry. Violations of said rule resulted in ten years of prison.⁶⁷⁹

Several witnesses reported being forced to take birth control pills or undergo abortions in the hospitals.⁶⁸⁰ Women were also severely beaten while pregnant, resulting in miscarriages.⁶⁸¹

⁶⁷⁵ *Persecutions of the Rohingya Muslims*, Allard K. Lowenstein International Human Rights Clinic, op. cit. p. 34.

⁶⁷⁶ *Ibid.*

⁶⁷⁷ *Persecutions of the Rohingya Muslims*, Allard K. Lowenstein International Human Rights Clinic, op. cit. p. 51.

⁶⁷⁸ *Ibid.*

⁶⁷⁹ *Ibid.*

⁶⁸⁰ *Ibid.*

⁶⁸¹ *All You Can Do is Pray*, Human Rights Watch, op. cit. p. 122.

Survivors of sexual violence while detained, both men and women, reported suffering from psychological issues, such as loss of cognitive function and of emotional control as well as physical harms, such as internal bleeding, which greatly prevented them from entering in consensual relationships after their flight or to conceive babies.

The Myanmar authorities, both through physical constraints and psychological wounds, appear to have imposed measures intended to prevent births within the Rohingya protected group.

2.2.5 Forcibly transferring children of the group to another group

Rohingya children have been transferred to other locations in the context of mass displacement of Rohingya.

Save the Children has estimated that of the 700,000 Rohingya children, almost all of them live in IDP camps, or have been forced out of their country.⁶⁸²

UNICEF has also estimated that of the 890,000 refugees in Bangladesh, half of them are children.⁶⁸³

The majority of displaced children, suffer severe malnutrition, shortage of water and a general lack of hygiene. This led to the outbreak of several diseases such as cholera, which disproportionately affected children.⁶⁸⁴

The forcibly transfer and the degrading conditions suffered by Rohingya children are part of the long-lasting Myanmar's anti-Rohingya campaigns, which resulted in a dire humanitarian crisis which persists today.

⁶⁸² *No Safe Heaven: The plight of Rohingya children across Asia*, 2021, Save The Children, available at: <https://www.savethechildren.net/news/stranded-stateless-detained-new-report-reveals-700000-rohingya-children-are-denied-basic-rights>

⁶⁸³ *Rohingya Crisis*, 2021, UNICEF, available at: <https://www.unicef.org/emergencies/rohingya-crisis>

⁶⁸⁴ *Two months since outbreak of violence in Myanmar, Rohingya refugee children still at acute risk*, 2017, UNICEF, available at: <https://www.unicef.org/press-releases/two-months-outbreak-violence-myanmar-rohingya-refugee-children-still-acute-risk>

2.3 Mens rea: Did the Myanmar government and local actors act with the specific intent to destroy in whole or in part the Rohingya people?

As explained in previous chapter, in order to be considered as such, an alleged genocidal act must be committed with the specific intent to destroy a protected group.⁶⁸⁵

Available evidence supports the view that Myanmar's government, aided by local Rakhine actors, have perpetrated genocidal acts which directly targeted Rohingya because of their membership to the Rohingya group.⁶⁸⁶ Government policies as well as the mass atrocities committed against the Rohingya, have been committed with the specific intent of eliminating the Rohingya.⁶⁸⁷ The tangible result was the destruction of substantial portions of Rohingya minority and such acts were completely foreseeable by the perpetrators.⁶⁸⁸

Even before the attacks of 2012 and 2016-2017, Rohingya have been the victims of widespread hatred and discriminatory practices against them, which have persisted during the alleged democratic turn of the government. The belief was that Rohingya were a menace to Myanmar State and needed therefore to be removed.⁶⁸⁹

In 2012, Myanmar's President Thein Sein attended a meeting with former UN High Commissioner for Refugees, António Guterres, where he stated that “*We will take care of our own ethnic nationalities, but Rohingyas who came to Burma illegally are not of our ethnic nationalities and we cannot accept them here,*” and he added “*The solution to this problem is that they can be settled in refugee camps managed by UNHCR, and UNHCR provides for them. If there are countries that would accept them, they could be sent there.*”⁶⁹⁰

Evidence of a plan for the events of 2012 can be found in the resolutions adopted after a large meeting of Buddhist monks in September 2012. In fact, local leaders agreed to undertake

⁶⁸⁵ ICTR, *Prosecutor v. Akayesu*, op. cit. para. 497-499.

⁶⁸⁶ *Persecutions of the Rohingya Muslims*, Allard K. Lowenstein International Human Rights Clinic, op. cit. p. 53.

⁶⁸⁷ *Ibid.*

⁶⁸⁸ *Ibid.* p. 58.

⁶⁸⁹ *Ibid.*

⁶⁹⁰ VANDENBRINK, R. *Call to Put Rohingya in Refugee Camps*, 2012, Radio Free Asia, available at: <https://www.rfa.org/english/news/rohingya-07122012185242.html>

several measures, such as eliminating Rohingya villages, controlling their birth rates and guarding the activities of humanitarian agencies in the Rakhine.⁶⁹¹

The government, along with taking part in the persecutions, did nothing to prevent the strengthening of harsh conditions on Rohingya by local Rakhines, which can be categorised as omissions on the part of the authorities.⁶⁹² Moreover, the authority has yet to undertake programs of rebuilding the destroyed houses of Rohingya or to provide them with adequate assistance. On the other hand, Myanmar government has actively aided the IDP camps populated by other non-Muslim Arakanese people, and has provided them with adequate shelter, water and food. This shows that the national administration has the capacity and the resources to provide humanitarian aid to displaced people.⁶⁹³

The intentional displacement of hundreds of thousands Rohingya, that fled Myanmar after decades of persecutions and violations of human rights, can amount to a state policy of deportation and forcible transfer.⁶⁹⁴

Lastly, witnesses have reported disproportionate attacks against Islamic symbols, such as the destruction of mosques, burning of Koran as well as the killing of Imams as first victims during the raids.⁶⁹⁵ A common testimony among the survivors was the extensive use of insults against the Rohingya by the perpetrators, who used to call them ‘Bengali’ and all other sorts of racial and ethnic slurs, showing that the persecutions were of an ethnic and religious nature.⁶⁹⁶ A refugee recalled that when his village was attacked, the military began beating a group of Hindus and when they realised the mistake, they instantly halted the violence against them, while they kept shooting at Rohingyas.⁶⁹⁷

According to the evidence discussed above, it is reasonable to assess that the genocidal acts of Myanmar’s government and local actors against the Rohingya group, were carried out with the specific intent to destroy, in whole or in part, the group.

⁶⁹¹ *Persecutions of the Rohingya Muslims*, Allard K. Lowenstein International Human Rights Clinic, op. cit. p. 54.

⁶⁹² *Ibid.*

⁶⁹³ *All You Can Do is Pray*, Human Rights Watch, op. cit. p. 89.

⁶⁹⁴ *Ibid.*

⁶⁹⁵ *Documenting Atrocity Crimes Committed Against the Rohingya*, PILPG, op. cit. p. 76.

⁶⁹⁶ *Ibid.*

⁶⁹⁷ *Ibid.*

3. Responsibility

Last paragraph will be focus on the responsibility for the alleged genocide born by Myanmar. In particular, the aspects that will form the object of the analysis will be the alleged responsibility of Myanmar for failure to prevent genocide in its territory and the responsibility of Myanmar for the conduct of its state organs.

3.1 Myanmar responsibility

As explained in the previous chapter, a State can be held responsible for genocide, when it did not prevent such crime to be committed in its territory, by undertaking all measures in its capacity.⁶⁹⁸

In this regard, even if it could be established that the State has not directly committed genocide, it can be assessed that Myanmar may be hold responsible as it did not prevent genocide from happening within its national borders.⁶⁹⁹

Moreover, Myanmar has frequently been attributed unwillingness to adequately protect the Rohingya community from genocide.⁷⁰⁰ Although several platforms⁷⁰¹ condemned the atrocities in the Rakhine state, there have been no real consequences faced by Myanmar. In 2019, however, The Gambia, supported by 57 members of the Organisation of Islamic Cooperation, submitted a case to the ICJ, against Myanmar, on the basis that the latter had violated the Convention on Genocide, that it has ratified in 1956.⁷⁰² The basis for the Court's jurisdiction in this case is Art. 9 of the Genocide Convention, that allows the parties to bring a matter "*relating to the responsibility of a State for genocide*"⁷⁰³ before the ICJ.

The case is pending, but the order of the Court of 23 January 2020 is already of particular importance. During the oral proceedings, Myanmar has stated before the Court that it was engaged in initiatives aimed at repatriating displaced Rohingya in Bangladesh and that it aimed

⁶⁹⁸ ICJ, *Bosnia and Herzegovina v. Serbia and Montenegro*, op. cit. para. 166.

⁶⁹⁹ *Persecutions of the Rohingya Muslims*, Allard K. Lowenstein International Human Rights Clinic, op. cit. p. 60.

⁷⁰⁰ SINGH, P. P. *What Myanmar Is and Is Not Doing to Protect Rohingyas from Genocide*, 2020, Human Rights Watch, available at: <https://www.hrw.org/news/2020/07/23/what-myanmar-and-not-doing-protect-rohingyas-genocide>

⁷⁰¹ *Ibid.*

⁷⁰² ICJ – *The Gambia v. Myanmar*, op. cit.

⁷⁰³ Art. 9, Genocide Convention, op. cit.

at restoring peace and stability in Rakhine.⁷⁰⁴ However, a General Assembly Report of 27 December 2019, welcomed “*some steps*” undertaken by Myanmar’s Government towards the repatriation but established that “*the situation has not improved in Rakhine State to create the conditions necessary for refugees and other forcibly displaced persons to return to their places of origin*”.⁷⁰⁵ Moreover, the GA reported that violence against unarmed Rohingya continues to be perpetrated in Rakhine.

In this regard, the ICJ stated that the steps taken by Myanmar so far, are not sufficient and, most importantly, Myanmar “*has not presented to the Court concrete measures aimed specifically at recognizing and ensuring the right of the Rohingya to exist as a protected group under the Genocide Convention.*”⁷⁰⁶ Although the order was focused on the issuing of provisional measures, it is undoubtedly an important step forward to imply Myanmar alleged responsibility for the breach of the Genocide Convention.⁷⁰⁷

Myanmar may also bear responsibility for the acts committed by State organs.

According to the Draft Articles on Responsibility of States for Internationally Wrongful Acts, the conduct of a State organ shall be attributed to the State, irrespective of the role covered by the organ within the organization of the State.⁷⁰⁸ This means that the State shall be held internationally responsible for the acts of one or more of its organs, when that conduct is conducive to a crime under international law, such as genocide.

In this case, several State organs can be recognised: the Tatmadaw as the national Army, the NaSaKa (until 2013) and the national police forces.

The Tatmadaw have often been described as Myanmar’s “*coercive State apparatus*”⁷⁰⁹, a status that it endured during the more than fifty years of military dictatorship. Accordingly, the Myanmar’s police force has played a critical role in the administration of the country.⁷¹⁰ Finally,

⁷⁰⁴ ICJ, *The Gambia v. Myanmar*, op. cit. para 73.

⁷⁰⁵ *Situation of human rights of Rohingya Muslims and other minorities in Myanmar*, 2019, General Assembly, PP. 20, A/RES/74/246, available at: <https://undocs.org/pdf?symbol=en/A/RES/74/246>

⁷⁰⁶ ICJ, *The Gambia v. Myanmar*, op. cit. para 73.

⁷⁰⁷ PATEL, C. *What the ICJ Decision on Myanmar Means*, 2020, Chatham House, available at: <https://www.chathamhouse.org/2020/01/what-icj-decision-myanmar-means>

⁷⁰⁸ *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, 2001, International Law Commission, art. 4, available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf

⁷⁰⁹ SELTH, A. *Myanmar’s Police Forces: Coercion, Continuity and Change*, 2012, Contemporary Southeast Asia, Vol. 34, No. 1, p. 54, available at: https://www.jstor.org/stable/41446244?seq=2#metadata_info_tab_contents

⁷¹⁰ ZAW OO, M. & NAING, M. *The decentralization of the police and its performance in four ethnic states of Myanmar*, 2021, Myanmar Institute for Peace and Security, available at: <https://idl-bnc-idrc.dspacedirect.org/bitstream/handle/10625/60791/1/feecd71-63fc-4a8e-9293-a0b904acffaa.pdf>

the NaSaKa has been almost exclusively employed in the northern state of Rakhine where it has committed various genocidal acts and human rights abuses against the Rohingya community.⁷¹¹ Out of international pressure, in particular the 2013 Report of the UN Special Rapporteur on the situation of human rights in Myanmar⁷¹², President Thein Sein disbanded NaSaKa, thereby confirming the dependency of NaSaKa from the central government. This, however, did not prove to be a sufficient move to counter the violence, as the attacks of 2016-2017 demonstrate.

Hence, if the acts against the Rohingya will be considered as genocide, then, Myanmar is responsible for the actions of the NaSaKa and, since no investigations have been carried out, it is responsible for the failure to punishing perpetrators of genocide, as per Art. 1 of the Genocide Convention.

⁷¹¹ *Persecutions of the Rohingya Muslims*, Allard K. Lowenstein International Human Rights Clinic, op. cit. p. 61.

⁷¹²In his 2013 Report, UN Special Rapporteur Tomás Ojea Quintana stated that he received a great number of allegations of human rights violations committed by NaSaKa, particularly directed to the Muslim community. He therefore urged the government to initiate an internal investigation on the accountability of the security force. Reference: *U.N. Report of the U.N. Special Rapporteur on the Situation of Human Rights in Myanmar*, Tomás Ojea Quintana, 2013, Human Rights Council, A/HRC/22/58, para. 54, available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.58_A_UV.pdf

Chapter 4. Outcomes of the analyses

In *Axis Rule in Occupied Europe*, Lemkin has sought to present the world with its broad understanding of genocide,⁷¹³ as he believed that it entailed the destruction of the “*essential foundations of the life of a national group*”.⁷¹⁴ Similarly, the UN General Assembly described it as the “*denial of the right of existence of entire human groups*”⁷¹⁵.

However, it can be asserted that the final definition adopted in the Genocide Convention has narrowed the meaning of genocide, with a reduced list of the protected group and a restricted jurisdictional scope.⁷¹⁶ Its customary status has probably impeded any further developments in the codification of genocide⁷¹⁷, also due to the still modest jurisprudence on the matter. It has maintained, then, few limits in its prosecution.

It could have, for instance, developed in the framework of State responsibility, with precise and specific provisions concerning States. However, such approach has undoubtedly developed in the jurisprudence of the *ad hoc* tribunals, in particular, the *Bosnia and Herzegovina v. Serbia and Montenegro* case. Regarding contemporary challenges, the role of non-State entities is gradually emerging as a key one in the international law discipline but their prosecution for genocide is just emerging in recent times and is always connected to States.

Modern cases of genocide, however, have called for modern methods and, as will be shown below, could serve as precedents to overcome the structural limits in genocide prosecution.

1. Yazidi question

This section will begin by exploring the data collected by UNITAD, which led to the evidence of an ongoing genocide. Then, we shall turn to the limits of the Convention and their overcoming, in light of the legal analysis performed in Chapter 1.

⁷¹³ MUNIVRADA VAJDA, M. *Symposium on the Genocide Convention: Codification of the Crime of Genocide – a Blessing or a Curse?*, 2019, Blog of European Journal of International Law, available at: <https://www.ejiltalk.org/symposium-on-the-genocide-convention-codification-of-the-crime-of-genocide-a-blessing-or-a-curse/>

⁷¹⁴ LEMKIN, R. *Axis Rule in Occupied Europe*, op. cit. p. 79.

⁷¹⁵ A/RES/96(1), op. cit.

⁷¹⁶ MUNIVRADA VAJDA, M. *Symposium on the Genocide Convention*, op. cit.

⁷¹⁷ *Ibid.*

1.1 'Clear and convincing evidence' according to UNITAD

Starting from 2014, until its alleged defeat in 2017, ISIS has committed a series of violations of international human rights law, international humanitarian law and international criminal law,⁷¹⁸ which have been the subject of Chapter 2 analysis. Such violations have been widely documented by testimonies from survivors as well as by the 2016 Report of the Human Rights Council⁷¹⁹. The attacks have targeted Iraqi and Syrian populations indiscriminately, in particular religious minorities, who suffered executions, torture and sexual slavery.⁷²⁰

Under these circumstances, in a letter dated 14 August 2017⁷²¹, the *Chargé d'Affaires* of the Government of Iraq addressed the President of the Security Council, asking for the aid of the international community to provide for the accountability of ISIS members. The answer of the Council was Resolution 2379 (2017)⁷²² through which it requested the Secretary General to form an investigative team to support the collecting and the analysis of the evidence of crimes against humanity, war crimes and genocide in Iraq. Such team has been named the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL (UNITAD).⁷²³ The mandate of the team has been effective since 2018 and it was requested to submit reports to the Security Council every 180 days.⁷²⁴ A total of seven reports have been presented so far.⁷²⁵

⁷¹⁸ *Our Mandate*, Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL (UNITAD), available at: <https://www.unitad.un.org/content/our-mandate>

⁷¹⁹ A/HRC/32/CRP.2, op. cit.

⁷²⁰ *Our Mandate*, UNITAD, op. cit.

⁷²¹ 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, S/2017(710), available at: <https://undocs.org/en/S/2017/710>

⁷²² Resolution 2379 (2017), Adopted by the Security Council at its 8052nd meeting on 21 September 2017, S/RES/2379, available at: [https://undocs.org/S/RES/2379\(2017\)](https://undocs.org/S/RES/2379(2017))

⁷²³ *Our Mandate*, UNITAD, op. cit.

⁷²⁴ S/RES/2379, op. cit. OP. 15.

⁷²⁵ The complete list of reports published from 16 November 2018 to 10 May 2021, is available at: <https://www.unitad.un.org/content/resolutions>

In light of the subject of this present work, the most fundamental one is the sixth report⁷²⁶, presented by the Head of UNITAD⁷²⁷ to the President of the Security Council on 10 May 2021. The document reported that the investigations carried out by the team on the crimes committed against the Yazidis, has led to the identification of 1,444 alleged perpetrators and, in particular, 494 of them are considered to be directly involved in the attack on Sinjar of 2014, while 120 in the attack on Kocho village.⁷²⁸ The team also focused on the structured organisation of ISIS and its policies for the sexual enslavement of Yazidi women and girls.⁷²⁹ Through purposefully designed interviews with survivors, the Gender Crimes and Children Unit has been able to acquire more evidence of the individual perpetrators as well as the territorial routes of the slaves “market”.⁷³⁰

Further proofs have been collected during in-field operations, such as the DNA identification and post-mortem analysis of victims, carried out with the joint work of UNITAD and Iraqi and Kurdish authorities.⁷³¹ Such operations led to the location of several mass graves in the area and the subsequent dignified return of remains to the families.⁷³²

During his briefing before the Security Council, former Special Adviser Khan explained how the investigations leading to the sixth report have been a landmark moment, as UNITAD was thereby able to establish “*clear and convincing evidence that genocide was committed by ISIL against the Yazidi as a religious group*”.⁷³³ Moreover, Khan also asserted that the specific intent of ISIS to destroy the group could be inferred by the widely-reported ultimatum to

⁷²⁶ Letter dated 1 May 2021 from the Special Adviser and Head of the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da’esh/Islamic State in Iraq and the Levant addressed to the President of the Security Council, S/2021/419, available at: https://www.unitad.un.org/sites/www.unitad.un.org/files/general/s.2021.419_-_sixth_unitad_report_en.pdf

⁷²⁷ This report has been the last one presented by former Special Adviser Karim Asad Ahmad Khan, who, on June 2021, has took office of ICC prosecutor. Reference: *Mr Karim Asad Ahmad Khan QC sworn in today as the Prosecutor of the International Criminal Court*, Press Release, ICC, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=pr1598> The current Special Adviser and Head of UNITAD position is held by German lawyer Christian Ritscher. He has previously led the German War Crimes Unit S4 which is responsible for the prosecution of, among others, Taha Al-J. Reference: GOEBEL, N. *Follow the money: How to bring IS extremists to justice*, 2021, Deutsche Welle (DW), available at: <https://www.dw.com/en/bringing-islamic-state-extremists-to-justice/a-60276889>

⁷²⁸ S/2021/419, op. cit. para. 10.

⁷²⁹ *Ibid*, para. 35.

⁷³⁰ *Ibid*, para. 38.

⁷³¹ *Ibid*, para. 58.

⁷³² *Ibid*.

⁷³³ *ISIL/Da’esh Committed Genocide of Yazidi, War Crimes against Unarmed Cadets, Military Personnel in Iraq, Investigative Team Head Tells Security Council*, Press Statement, 10 May 2021, SC/14514, available at: <https://www.un.org/press/en/2021/sc14514.doc.htm>

convert to Islam or to be killed.⁷³⁴ The abuses, in particular the sexual enslavement, endured by Yazidi population have lasted years and have often resulted in death which, according to Khan, shows ISIS intent to permanently alter the demographic composition of the minority.⁷³⁵

1.2 Consequences

The verdict of Taha Al-J. trial and the findings of UNITAD, as well as the factual circumstances explained in Chapter 2, confirm that a genocide had, in fact, been committed by ISIS against the Yazidi religious group. The Genocide Convention, however, imposes two kinds of obligations on State parties: the obligation to prevent and the obligation to punish.⁷³⁶ Regarding the punishment, there have been several domestic developments to provide accountability for individual perpetrators which are, indeed, to be praised. The prevention, nevertheless, is more problematic, constituting an intrinsic limit of the convention.

The obligation to prevent is directly linked to the assessment of the specific intent, as States, in order to imply all the measures at their disposal to prevent the escalation of violence, shall be able to determine the existence of an evident plan to destroy a group.⁷³⁷ This would require a fast and efficient bureaucracy, able to recognise the genocidal characteristics in cases of mass violence, in the short term. It has proven to be nearly impossible, leading to the application of preventive strategies in a retroactive way, which does nothing to assist civilians in immediate danger.⁷³⁸

For what concerns the Yazidi, except for the requested US intervention in Mount Sinjar, no other actions that could aim at a preventive recognition of genocide on the part of Syria or Iraq have been employed.⁷³⁹

⁷³⁴ *Ibid.*

⁷³⁵ *Ibid.*

⁷³⁶ Art. 1, Genocide Convention, op. cit.

⁷³⁷ KARZSIA, Z. A. *An Unfulfilled Promise*, 2018, Journal of Strategic Security, Vol. 11, No. 4, p. 21.

⁷³⁸ *Ibid.*

⁷³⁹ A/HRC/32/CRP.2, op. cit. para. 192.

To strengthen early warning capabilities to halt genocidal acts, in 2001, the International Committee on Intervention and State Sovereignty has developed the principle of Responsibility to Protect (R2P)⁷⁴⁰. Such principle is aimed at avoiding the intrastate indiscriminate harm to civilian population, in cases of genocide, ethnic cleansing, war crimes or crimes against humanity.⁷⁴¹ R2P was adopted in 2005, in paragraphs 138 and 139 of the World Summit Outcome Document⁷⁴², which indicate that, first, “*each individual State has the responsibility to protect its population from genocide, war crimes, ethnic cleansing and crimes against humanity*”⁷⁴³ and, secondly, that the international community is to engage in a collective action to protect populations in distress.⁷⁴⁴ Moreover, R2P is based on three pillars: to prevent, to react and to rebuild. The global community intervention is particularly fundamental in situations where the State in question does not have the means nor the willingness to provide for the appropriate protection.⁷⁴⁵ Although R2P is not a legally binding principle, it shall be intended as a political commitment of States that arises from the pre-existing sets of international humanitarian and human rights norms and the actual dangers faced by population at risk.⁷⁴⁶

Since the beginning of the attacks of 2014, the preventive response of outside actors has been scarce and is again only traceable to the US-led airdrops of food and other humanitarian aid to the sieged Yazidis on Mount Sinjar.⁷⁴⁷ However, one week later, the mission was halted, despite raising pressure from human rights organizations⁷⁴⁸, and the coalition turned to the direct conflict against ISIS.⁷⁴⁹

⁷⁴⁰ *What is R2P?*, Global Centre for the Responsibility to Protect, available at: <https://www.globalr2p.org/what-is-r2p/>

⁷⁴¹ *The Responsibility to Protect*, UN Chronicle, available at: <https://www.un.org/en/chronicle/article/responsibility-protect>

⁷⁴² Resolution adopted by the General Assembly on 16 September 2005, A/RES/1, available at: https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_60_1.pdf

⁷⁴³ *Ibid*, para. 138.

⁷⁴⁴ *Ibid*, para. 139.

⁷⁴⁵ Report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, 2001, p. XI, available at: https://walterdorn.net/pdf/Responsibility-to-Protect_ICISS-Report_Dec2001.pdf

⁷⁴⁶ Responsibility to Protect, UN Office of Genocide Prevention and the Responsibility to Protect, available at: <https://www.un.org/en/genocideprevention/about-responsibility-to-protect.shtml#:~:text=The%20responsibility%20to%20protect%20embodies,forms%20of%20violence%20and%20persecution.>

⁷⁴⁷ SOLOMON, D. *The Yazidi crisis and the responsibility to protect*, 2014, Al Jazeera America, available at: <http://america.aljazeera.com/opinions/2014/8/iraq-s-yazidi-u-shumanitarianinterventionresponsibilitytoprotect.html>

⁷⁴⁸ See for instance: *Iraq: “Immediate action needed to protect human rights of Yazidis in grave danger” – UN experts*, 2014, United Nations Human Rights Office of the High Commissioner, available at: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=14936>

⁷⁴⁹ SOLOMON, D. *The Yazidi Crisis*, op. cit.

The results of the actions of ISIS and the inactions of the international community, have been the death of a substantial part of Yazidi population, while the survivors are currently living in IDP camps in the Iraqi-Kurdish border.⁷⁵⁰ The return and the rebuild of their former homeland is almost impossible as most of the area is still devastated and uninhabitable as well as at the centre of a territorial dispute between Iraq and the autonomous region of Kurdistan.⁷⁵¹ Yazda estimates point to up to 360,000 Yazidis in the camps, while 90,000 have sought refuge abroad.⁷⁵²

Although the huge aid provided by UN agencies and non-governmental organizations for the camps, the projects are often of a short-term nature, thereby not providing long-lasting improvements to the humanitarian refugees crisis.⁷⁵³ The success of international support is mixed. While there are several accounts of the building of schools, the delivering of everyday needs⁷⁵⁴ as well as projects aimed at providing psychological assistance to survivors,⁷⁵⁵ there are still many structural difficulties, which led to a rise in suicide rates among the refugees.⁷⁵⁶ The conditions of the camps are still precarious, with inadequate tents not been replaced for years, lack of electricity for many hours a day, insufficient medical supplies and periodic outbreaks of diseases caused by the bad hygienic conditions.⁷⁵⁷ Such circumstances hamper the already narrow hopes for the reconstruction of Yazidi society as well as the provision of a stable and durable security environment for them.

To conclude, indeed Taha Al-J. case has demonstrated that a ground for prosecution of ISIS members can be achieved, and, in particular, that the conviction for genocide is possible with the death of a single person. The road to accountability is still long but it is advisable that this case will serve as a fundamental precedent (at the level of *Akayesu*, for instance) for the next steps in providing justice for Yazidis, that have been abandoned by it, so far.

⁷⁵⁰ TOMIAK, K. *After Genocide: How Yazidi Perceive the Responsibility to Protect and the Actions of the International Community*, 2020, Centre for Peace and Human Security, The American University of Kurdistan, p. 14.

⁷⁵¹ *Ibid.*

⁷⁵² KHOUDEIDA, L. *The Yazidi Refugee Crisis*, Yazda, available at: <https://www.ourcommons.ca/Content/Committee/421/CIMM/Brief/BR9342569/br-external/Yazda-e.pdf>

⁷⁵³ TOMIAK, K. *After Genocide*, op. cit. p. 20

⁷⁵⁴ *Ibid.*

⁷⁵⁵ STOTER, B. *Suicide rates increase within Iraq's Yazidi community*, 2020, Al-Monitor, available at: <https://www.al-monitor.com/originals/2020/05/iraq-minorities-yazidis-suicide.html>

⁷⁵⁶ *Ibid.*

⁷⁵⁷ KHOUDEIDA, L. *The Yazidi Refugee Crisis*, op. cit.

2. Rohingya question

This section will begin by drawing conclusions concerning the available data on the alleged genocide and its consequences on the Rohingya population. Given the fact that there is a pending case on such genocide before the ICJ, the last paragraph will deal with its analysis.

2.1 Current state of affairs

Since 1948 independence of Myanmar, Rohingya Muslims have endured a never-ending cycle of violence and hatred against them. The subsequent military coup in 1962 and the enactment of the 1982 Citizenship Law have worsened the already dire conditions of Rohingya in Rakhine. The Government and its organs, namely the Army, the security and police forces, have directly engaged in actions aimed at openly persecute and oppress the Rohingyas, thereby failing to prevent genocidal acts in the country. Firstly, the Rohingya were excluded from the list of ethnicities, then the Government erased their citizenship and the consequent enjoyment of civil and political rights, leading to their complete marginalization and the suppression of their freedom of movements in the State of Rakhine.

The Government's intent and its compliance with Tatmadaw actions are clearly inescapable.⁷⁵⁸ In fact, all survivors recalled the use of military equipment, such as helicopters or vehicles, and the presence of government officials, mainly locals, during the operations, as signals that the Government was providing its resources to the anti-Muslim actions.⁷⁵⁹ Accordingly, in the aftermath of the attacks, government policies did nothing to provide relief to the displaced people but endorsed the actions⁷⁶⁰ and the situation did not change even with the democratic turn of the government in 2015.

⁷⁵⁸ Detailed findings of the Independent International Fact-Finding Mission on Myanmar, Human Rights Council, 2019, A/HRC/42/CRP.5, para. 222.

⁷⁵⁹ *Ibid.*

⁷⁶⁰ *Ibid.*

Already in 2012, the violence in Rakhine led to the displacement of more than 140,000 Rohingya⁷⁶¹ and the exodus was hampered by the “clearance operations” initiated by the government in 2017 that led to the flight of more than 743,000 Rohingya towards Bangladesh, in the Cox’s Bazar district.⁷⁶² In 2019, moreover, the Independent International Fact-Finding Mission on Myanmar asserted that the return of displaced Rohingya was impossible, as their former villages have been destroyed, burned and renamed.⁷⁶³ Moreover, the Mission has concluded that the threat of genocide remains present for Rohingya, as Myanmar keeps harbouring genocidal intent, which makes their repatriation unsafe.⁷⁶⁴

Of the 600,000 Rohingya that remained in the Rakhine State, it is estimated that more than 140,000 are internally displaced, living in IDP camps which are overcrowded, with low levels of hygiene and the access to aid provided by humanitarian organizations is mostly blocked by the government.⁷⁶⁵ Human Rights Watch had defined those camps as “*open-air prisons*”.⁷⁶⁶

In Bangladesh, the situation isn’t much better. The country has been the main destination of Rohingya refugees since the 1990s, with occasional peaks of migration, which led today to a total of 1.1 million Rohingya refugees in Bangladesh,⁷⁶⁷ the majority of which are concentrated in Cox’s Bazar settlements, that is one of the poorest districts of the country.⁷⁶⁸ The conditions of the camps are considerably degrading and Rohingya are prevented from accessing education and other basic services.⁷⁶⁹ This stems from the fact that Bangladesh is not a signatory to the 1951 Refugee Convention, and does not consider Rohingya as refugees, but instead as “Forcibly Displaced Myanmar Nationals”, and the Government does not allow them the right to work

⁷⁶¹ MENNECKE, M. & STENSRUD, E. E. *The Failure of the International Community to Apply R2P and Atrocity Prevention in Myanmar*, 2021, Global Responsibility to Protect, Vol. 13, Issue 2-3, Brill-Nijhoff, p. 118, available at: <https://brill.com/view/journals/gr2p/13/2-3/gr2p.13.issue-2-3.xml>

⁷⁶² A/HRC/42/CRP.5, op. cit. para. 59.

⁷⁶³ MENNECKE & STENSRUD, *The Failure to Apply R2P*, op. cit.

⁷⁶⁴ A/HRC/42/CRP.5, op. cit. para. 216.

⁷⁶⁵ BROWN, M. *5 Facts about IDPs in Myanmar*, 2019, The Borgen Project, available at: <https://borgenproject.org/idps-in-myanmar/>

⁷⁶⁶ Human Rights Watch, “*An Open Prison without End*”, 2020, available at: <https://www.hrw.org/report/2020/10/08/open-prison-without-end/myanmars-mass-detention-rohingya-rakhine-state#>

⁷⁶⁷ SHAHID, R. *Assessing the treatment of Rohingya refugees in Bangladesh*, 2019, Atlantic Council, available at: <https://www.atlanticcouncil.org/in-depth-research-reports/issue-brief/assessing-the-treatment-of-rohingya-refugees-in-bangladesh/>

⁷⁶⁸ *The Displaced and Stateless of Myanmar in the Asia-Pacific Region*, 2021, UNHCR, available at: <https://reporting.unhcr.org/sites/default/files/The%20Displaced%20and%20Stateless%20of%20Myanmar%20in%20the%20Asia-Pacific%20Region%20-%20January%202021.pdf>

⁷⁶⁹ SHAHID, R. *Assessing the treatment of Rohingya*, op. cit.

nor the freedom of movement.⁷⁷⁰ This has caused a rise in black labor as Rohingya set up illegal shops in order to earn a living or they are illegally employed by Bengal citizens.⁷⁷¹

The security is mainly lacking in the camps, thwarted by tensions with local Bengals. In September 2019, in response to the demonstrations in one of the camps, the Bangladesh Telecommunication Regulatory Commission shut down all 3G and 4G services in the camps, out of the belief that the refugees had obtained SIM cards through illegal smuggling.⁷⁷²

Moreover, Bangladesh provides for no possibility of integration as Rohingya do not possess identity cards nor refugee status, and the Government is mainly concerned at pushing for their repatriation in Myanmar. However, few positive steps have been undertaken by the country, with the aid of UNHCR. For example, towards the end of 2019, the Government completed the registration of the refugees, providing them some sort of identity documents. More recently, Bangladesh has included the Rohingya into the country's COVID-19 response.⁷⁷³ The situation that unfolded since the outbreak of the pandemics has, however, aggravated the economic situation of the refugees, with peaks in poverty and debts.⁷⁷⁴

Regarding, the use of R2P by the international community, it can be argued that such approach has failed in Myanmar.⁷⁷⁵ In fact, the 2017 atrocities occurred in a context in which Myanmar had reopened up to the outside world, and several other countries were engaged in relationships with the country, China in particular.⁷⁷⁶ Several UN agencies as well as NGOs published reports containing evidence of the massacres carried out against the Rohingya both in 2012 and in 2017, shedding light on the situation in Myanmar. But still, no outside intervention has been issued. The ASEAN countries, for instance, deemed the matter as internal affairs of Myanmar.⁷⁷⁷ A similar stance has been taken in response to the recent 2021 military coup, where the Tatmadaw regained full control and completely crashed the fragile steps towards democracy and equality in Myanmar.⁷⁷⁸

⁷⁷⁰ DEMPSTER, H. & SAKIB, N. H. *Few Rights and Little Progress: The Rohingya in Bangladesh, 2021*, Centre for Global Development, available at: <https://www.cgdev.org/blog/few-rights-and-little-progress-rohingya-bangladesh>

⁷⁷¹ SHAHID, R. *Assessing the treatment of Rohingya*, op. cit.

⁷⁷² *Ibid.*

⁷⁷³ *The Displaced and Stateless*, UNHCR, op. cit.

⁷⁷⁴ *Ibid.*

⁷⁷⁵ MENNECKE & STENSRUD, *The Failure to Apply R2P*, op. cit.

⁷⁷⁶ *Ibid.*

⁷⁷⁷ *Ibid.*

⁷⁷⁸ *Ibid.*

2.2 What to expect from the *Gambia v. Myanmar* case

There are different ways to ensure responsibility and/or accountability for the alleged genocide committed by Myanmar against the Rohingya. First, similarly to the Yazidi case, accountability could be searched within domestic courts. However, due to the nature of Myanmar's authorities, the Fact-Finding Mission has determined that the domestic avenue is attainable, because of the Government's denial of existence of Rohingya as well as of any wrongdoing.⁷⁷⁹

There has been an attempt at referring the matter to the ICC, without direct referral from the Security Council (which would be needed as Myanmar has not ratified the Rome Statute). In fact, in September 2019, the Pre-Trial Chamber III of the ICC has authorised the Chief Prosecutor to carry out an investigation under the jurisdiction of the Court. However, the case has been configured to have more focus on the geographical area of Bangladesh, and on the crimes against humanity of deportation as well as ethnic and religious persecution against the Rohingya.⁷⁸⁰ Hence, it does not investigate over individual responsibility for the crime of genocide committed in Myanmar. Although an important step, this case is not the most preferred way to deal with the vast amount of evidence of genocidal acts.⁷⁸¹

Thirdly, as anticipated in the previous chapter, the case has been brought before the ICJ, in an effort to establish Myanmar's State responsibility for the alleged genocide. The case was admissible as Myanmar has ratified the Convention and, although it has made reservations to Art. 6 and 8, it has not done the same to Art. 9, which is concerned with the jurisdiction of the ICJ for cases of State responsibility.

Through the Court's adoption of The Gambia's request for provisional measures⁷⁸², Myanmar has been ordered to prevent all genocidal acts, to enforce Government's control over military

⁷⁷⁹ A/HRC/42/CRP.5, op. cit.

⁷⁸⁰ ICC, Pre-Trial Chamber III, Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, 4 July 2019, paras. 77-78, available at: https://www.icc-cpi.int/CourtRecords/CR2019_03510.PDF

⁷⁸¹ VAN POECKE, T. et al. *The Gambia's gamble, and how jurisdictional limits may keep the ICJ from ruling on Myanmar's alleged genocide against Rohingya*, 2019, Blog of the European Journal of International Law, available at: <https://www.ejiltalk.org/the-gambias-gamble-and-how-jurisdictional-limits-may-keep-the-icj-from-ruling-on-myanmar-alleged-genocide-against-rohingya/>

⁷⁸² ICJ, *The Gambia v. Myanmar*, op. cit.

forces and to submit periodical reports on compliance with the provisional measures.⁷⁸³ Such measures are legally binding on the parties.⁷⁸⁴ Prior to the 2021 military coup, the Government of Myanmar has submitted two implementation reports which, however, are not public.⁷⁸⁵ Nevertheless, a Human Rights Watch report of October 2020 has documented a continued pattern of abuses against Rohingya.⁷⁸⁶ For example, in the elections of November 2020, several Rohingya candidates have been prevented to run, as a signal that their political rights have yet to be restored.⁷⁸⁷ Since the 1 February coup, moreover, Rohingya face even more restrictions on their movements and harsh punishments.⁷⁸⁸

The arguments made by Myanmar during the hearings of December 2019 show the attempt to dismiss the case on the ground that it lacked standing as The Gambia was not an affected party and it has acted as a proxy for the Organisation for Islamic Cooperation, which is a regional body.⁷⁸⁹ The Court, however, dismissed such contentions, thereby marking the first time in the ICJ's history that a party which has no direct bond with the alleged genocide, has brought a case before it, through the use of its partnership to the Genocide Convention.⁷⁹⁰ This is already a fundamental precedent.

It is not easy to assert any expectations on the case, in particular because genocide cases usually take a long time before the judgement⁷⁹¹ and many events can occur in the meantime, as the 2021 military coup demonstrates. As a matter of fact, if the Court would eventually rule in favour of The Gambia, Myanmar would be legally bound to ensure the “*safe and dignified return*”⁷⁹² to the displaced Rohingya, meaning that the Government would also have to engage

⁷⁸³ Q&A: The Gambia v. Myanmar, Rohingya Genocide at the International Court of Justice, May 2020 Factsheet, 2020, Global Center for the Responsibility to Protect (GCRP), available at: <https://www.globalr2p.org/publications/myanmarqav2/>

⁷⁸⁴ ICJ, “LaGrand Case” (*Germany v. United States of America*), Judgement of 27 July 2001, para. 102, available at: <https://www.icj-cij.org/public/files/case-related/104/104-20010627-JUD-01-00-EN.pdf>

⁷⁸⁵ Q&A: *The Gambia v. Myanmar*, GCRP, op. cit.

⁷⁸⁶ Human Rights Watch, “*An Open Prison without End*”, op. cit.

⁷⁸⁷ *Ibid.*

⁷⁸⁸ Developments in Gambia's Case Against Myanmar at the International Court of Justice, 2022, Human Rights Watch, available at: <https://www.hrw.org/news/2022/02/14/developments-gambias-case-against-myanmar-international-court-justice#whatisthe>

⁷⁸⁹ *Ibid.*

⁷⁹⁰ *Ibid.*

⁷⁹¹ For instance, the case against Serbia was filed by Bosnia in 1993, while the final judgement on the merits has been delivered in 2007.

⁷⁹² ICJ, *The Gambia v. Myanmar*, Application Instituting Proceedings and Request for Provisional Measures, para. 112, available at: <https://www.icj-cij.org/public/files/case-related/178/178-20191111-APP-01-00-EN.pdf>

in the rebuilding and reconstructing of previous homes. Moreover, the Government would be bound to recognise the full citizenship to Rohingya⁷⁹³, for the first time since 1982.

The ruling in favour of The Gambia would also entail the international responsibility of Myanmar, which would also be obliged to provide assurances and guarantees that the violations of the Convention will not be repeated⁷⁹⁴, which would consequently mean the end of abuses and atrocities against Rohingya, after a more than sixty years.

The case will be resumed from 21 to 28 February 2022, when the Court will hear Myanmar's preliminary objections.⁷⁹⁵

⁷⁹³ *Ibid.*

⁷⁹⁴ *Ibid.*

⁷⁹⁵ ICJ, *The Gambia v. Myanmar*, The Court to hold public hearings on the preliminary objections raised by Myanmar from Monday 21 to Monday 28 February 2022, Press Release of 19 January 2022, available at: <https://www.icj-cij.org/public/files/case-related/178/178-20220119-PRE-01-00-EN.pdf>

Conclusion

As previously specified, the scope of this work was to highlight the current legal framework surrounding the prosecution of the crime of genocide.

In 1915, while WWI was raging in Europe, Armenians were being massacred in the Ottoman Empire with little, if any, outside aid. Such event, which has yet to be recognised by Turkish authorities⁷⁹⁶, has become the catalysator for Raphael Lemkin's lifelong mission.⁷⁹⁷

Accordingly, in 1933 he proposed the recognition of two new crimes: acts of barbarity and vandalism⁷⁹⁸, to be included within the crimes against the individual and the collectivity. This first attempt was not successful as Lemkin was precluded from attending the Madrid Conference of 1933.⁷⁹⁹

However, 1933 was the year of the rise to power of Adolf Hitler, an event that would forever change the world. In fact, already before the outbreak of WWII, the Nazi Party issued at least 400 decrees, that greatly restricted social and civil rights of German Jews and subjected them to the politics of "Aryanization" of the society, which summarily excluded them from the economic sector.⁸⁰⁰ The same policies were later implemented all over Europe, as precursors of the "Final Solution".

In 1939, with the beginning of WWII, Lemkin, a Jew himself, fled Poland and eventually reached the United States.⁸⁰¹ In the meanwhile, he was carefully following the developments of German rule over occupied Europe, in particular for what concerned the treatment of Jews. The result of this involvement was his 1944 masterpiece, *Axis Rule on Occupied Europe*, where he introduced the term genocide. From that moment onwards, he began his quest for the recognition of genocide as an international distinct crime. His main concern was to prevent that governments could destroy their own citizens, with impunity.⁸⁰² The word was firstly used in the indictments of the Nuremberg Trials but was eventually discarded in the final judgements. The recognition, however, occurred as a GA resolution⁸⁰³ on the first place, and then, in 1948,

⁷⁹⁶ BEDROSSIAN, K. *The Armenian Genocide and Acts of Denial*, 2021, Human Rights Pulse, available at: <https://www.humanrightspulse.com/mastercontentblog/the-armenian-genocide-and-acts-of-denial>

⁷⁹⁷ LEE-FRIEZE, D. (ed.), *Totally Unofficial*. op. cit. p. 19-21.

⁷⁹⁸ LEMKIN, L. *Les Actes Constituant un Danger General (Interétatique) Considérés Commédits Débats de Droit des Gens Rapport*, 1933, op. cit.

⁷⁹⁹ LEE-FRIEZE, D. (ed.), *Totally Unofficial*. op. cit, p. 23.

⁸⁰⁰ *Anti-Jewish Legislation in Prewar Germany*, Holocaust Encyclopaedia, available at: <https://encyclopedia.ushmm.org/content/en/article/anti-jewish-legislation-in-prewar-germany>

⁸⁰¹ LEE-FRIEZE, D. (ed.), *Totally Unofficial*. op. cit. p. 25.

⁸⁰² KUNZ, L. *The United Nations Convention on Genocide*, 1949, The American Journal of International Law, p. 739, available at: https://www.jstor.org/stable/2193262?seq=2#metadata_info_tab_contents

⁸⁰³ A/RES/96(1), op. cit.

Lemkin mission proved to be successful when the GA adopted the Genocide Convention. Such moment has been defined “*and epoch-making event*”⁸⁰⁴ by the then-President of the General Assembly. The first chapter, therefore, was focused on explaining the struggle endured by people like Raphael Lemkin to achieve the final definition of genocide as adopted in the Genocide Convention. Moreover, it is important to underline that the adoption of the Convention was surrounded by a positive climate, built on the international commitment “*to never again*”.⁸⁰⁵

Chapter two and three, however, showed that this commitment was not fulfilled.

The overall research questions were focused on whether there are limits in the recognition and in the prosecution of genocide. The legal analysis of chapter 2 and 3 answered the question about recognition and assessed that the Yazidi and the Rohingya massacres can account for genocide. Regarding Yazidi, it was committed by ISIS, a non-State actor, while concerning Rohingya, it was a government-sponsored genocide.

Turning to the prosecution, for the Rohingya case, being it a State-sponsored genocide, the resort to the ICJ can be considered a valuable option, although individual criminal responsibility for such cases would be preferable. However, as already stressed, *The Gambia v. Myanmar* will hopefully serve as a precedent for the fight against impunity for other cases of genocide committed by a State. For what concerns the Yazidi, the limits, as already specified, are in the Iraq’s non-membership to the ICC and the domestic impossibility to prosecute ISIS members. Such limits have been successfully circumvented with the brilliant use of universal jurisdiction by Germany, which led to the conviction of genocide of Taha al-Jumailly.⁸⁰⁶

Another venue to provide a wider range of accountability would be the establishment of a hybrid international tribunal, such as the Special Court for Sierra Leone or the Special Tribunal for Lebanon. Such option, however, encounters several structural (and political) limitations. Hybrid tribunals usually combine international and domestic law, and they can be organised through a UN Security Council’s decision or through an agreement with states, that must possess jurisdiction over the potential perpetrators.⁸⁰⁷ Unfortunately, such an option could hardly come to existence. First of all, at the UNSC level, such proposal involving Syria and

⁸⁰⁴ KUNZ, L. *The UN Convention on Genocide*, op. cit.

⁸⁰⁵ *The Genocide Convention, Background*, United Nations Office on Genocide Prevention, and Responsibility to Protect, available at: <https://www.un.org/en/genocideprevention/genocide-convention.shtml>

⁸⁰⁶ EL-HITAMI, H. *Germany: First Conviction for Genocide*, op. cit.

⁸⁰⁷ *Accountability for the Yazidi Genocide*, Position Paper for the Dutch Parliament, 10 February 2022, PILPG.

Iraq would most likely encounter the veto of Russia. Similarly, a hybrid tribunal involving Myanmar would be confronted with a veto from China, an historical partner of Myanmar. The possibility of an agreement between the States involved is also not to be expected as, in the case of Iraq and Syria, they lack the domestic provisions to prosecute genocide. Myanmar, on the other hand, would never consent to create a tribunal to directly prosecute itself.

Hence, to conclude, there is still a lot that needs to be done to provide complete accountability for the two cases of genocide but yet, there have been several positive developments that may be seen as signs of hope that the era of impunity for genocide perpetrators is about to come to an end.

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