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**United Nations in combating the International Crimes Against Humanity
committed by the Islamic State of Iraq and the Levant in Yazidis and the
Military Forces in Myanmar.**

BACHELOR THESIS

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DECLARATION OF HONOUR: I declare that this thesis is my own work, and that
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(Signed)

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Abstract

The most tragic contemporary cases related to the Crimes Against Humanity are the Islamic State of Iraq and the Levant inhuman actions carried out against Yazidis Community and the Burmese military persecution operations against Rohingya population. The international community was not ready to respond appropriately, but the consequences of the horrific events have to be eliminated. The further development of legal instruments and approaches depends on the prosecution of Crimes Against Humanity provided by the United Nations.

Summary

United Nations uses both international organisations and legal mechanisms in combating International Crimes Against Humanity, which has not been yet systematised in a treaty of international law. However, the prohibition of Crimes Against Humanity is considered an authoritative norm of international law. The United Nations established that the Islamic State of Iraq and the Levant actions against Yazidis¹ and the Military Forces “clearance operations” against Rohingya² as a violation of the international law. Therefore, those actions fall under the prosecution by the International Criminal Court, due to the reason that such violations are the threat to international peace and security. Article 7 of the 1998 Rome Statute, the 1948 Convention on Genocide, the United Nations Agendas contain legal provisions regarding this aspect. Moreover, the International Criminal Court takes action in prosecuting of such crimes based on the Rome Statute along the United Nations.³ Thus, the perspectives of the combating International Crimes Against Humanity can be specified during the comparative-descriptive method analysis of the legal approaches, goals and obstacles met by the United Nations and International Criminal Court.

¹ Human Rights Council. “*They came to destroy*”: *ISIS Crimes Against the Yazidis*”, Thirty-second session, Agenda item 4, Human rights situations that require the Council’s attention, 15 June 2016, A/HRC/32/CRP.2

² Human Rights Council. “*Report of the independent international fact-finding mission on Myanmar*”, Thirty-ninth session, 10–28 September 2018, Agenda item 4, Human rights situations that require the Council’s attention, A/HRC/39/64

³ UN General Assembly. Rome Statute of the International Criminal Court, 17 July 1998, ISBN No. 92-9227-227-6, Article 7

Table of Contents

List of Abbreviations	5
Introduction.....	6
Literature Review.....	8
Theoretical Part:	
1. Crimes Against Humanity	10
1.1 Objective and Subjective Elements of Crimes Against Humanity.....	10
1.2. The International Criminal Court Jurisdiction: Article 7, 1998 Rome Statute.....	13
1.3. Elements of Crimes	15
2. Article 15 Draft: Convention on Crimes Against Humanity.....	16
3. Responsibility for the Crimes Against Humanity of States and Non-State Armed Groups	18
3.1 Actors: Victims and Authors	18
3.2 States Responsibility for the Crimes Against Humanity	20
3.3 Non-State Armed Groups Responsibility for the Crimes Against Humanity	22
4. United Nations Legal Mechanisms and Goals regarding the Crimes Against Humanity 24	
Empirical Part:	
1. United Nations in combating Crimes Against Humanity.....	28
1.1 Genocide in Yazidis committed by Islamic State of Iraq and the Levant	28
1.2 Rohingya persecution in Myanmar committed by the Military Forces.....	31
2. Comparison of the Legal Initiatives taken by the United Nations regarding the International Crimes Against Humanity	34
2.1 Genocide in Yazidis committed by Islamic State of Iraq and the Levant	34
2.2 Rohingya persecution in Myanmar committed by the Military Forces.....	36
2.3. Comparison of Legal Initiatives	37
3. Analysis of the Legal Approach and perspectives of the United Nations legal prosecution of Rohingya persecution in Myanmar committed by the Military Forces.	42
Conclusion	44
Bibliography	46

List of Abbreviations

UN	United Nations
ICC	International Criminal Court
ICJ	International Court of Justice
UNHCR	Office of the United Nations High Commissioner for Refugees
OHCHR	Office of the United Nations High Commissioner for Human Rights
ISIL/ISIS	Islamic State of Iraq and the Levant
ARSA	Arakan Rohingya Salvation Army

Introduction

The analysis of the Rome Statute and other legal instruments and sources can be specified on the example of challenges met by the United Nations and the International Criminal Court in prosecuting genocide of Yazidis in Iraq committed by the Islamic State of Iraq in 2014⁴ and Rohingya persecution in Myanmar committed by the Military Forces which is still ongoing nowadays.⁵ The investigation of the legal clauses and perspectives of the 1998 Rome Statute and United Nations Legal Mechanisms regarding the Crimes against Humanity and identification of the legal nature of the National States, where the compared cases and crimes took place is the central part of the comparative-descriptive approach. The comparison will evaluate and indicate the values of the legal prosecution of Crimes Against Humanity and compare the Legal Initiatives taken by the United Nations and the International Criminal Court regarding them, as well as their methods and primary goals. The comparison of the two cases will provide not only the analysis of efforts done by the United Nations but also lay down the possible improvements of the legal prosecution done by the organisation in terms of the ongoing Rohingya case. As well as, it will designate the legal clauses and challenges in the mentioned cases regarding Human Rights and Crimes Against Humanity.

The following research questions are posed in order to provide an analysis of the objectives mentioned above:

1. What were the goals of the United Nations and International Criminal Court in prosecuting the genocide of Yazidis in Iraq committed by the Islamic State of Iraq and Rohingya persecution in Myanmar committed by the Military Forces? To what extent have these goals been reached?

The Sub-question is crucial in order to provide a more profound understanding of the central question: Is the investigation limited to the use of the Rome Statute (Article 7) as the basis? Alternatively, is there other applicable jurisdiction related to the Crimes Against Humanity in the compared cases?

The second research question is also vital for providing the gap fills in the research and evaluate the variety of internal law regulations and declarations that might be used in United States prosecution of Crimes Against Humanity and the United Nations goals in implementing legal instruments during the legal investigation and criminal prosecution of Crimes Against Humanity. The second research question also determines the possible perspectives in legal approach:

2. What are the possible outcomes of the United Nations legal prosecution of Rohingya persecution in Myanmar committed by the Military Forces based on the comparison with the goals reached by the organisation in legal investigation taken towards the genocide of Yazidis in Iraq committed by the Islamic State of Iraq?

⁴ Human Rights Council. “*They came to destroy*”: *ISIS Crimes Against the Yazidis*”, Thirty-second session, Agenda item 4, Human rights situations that require the Council’s attention, 15 June 2016, A/HRC/32/CRP.2

⁵ Human Rights Council. “*Report of the independent international fact-finding mission on Myanmar*”, Thirty-ninth session, 10–28 September 2018, Agenda item 4, Human rights situations that require the Council’s attention, A/HRC/39/64

Moreover, the following Sub-question specify the details for the insight of the issue: What are the differences in the legal approach and goals taken forward the investigation of the genocide of Yazidis in Iraq committed by the Islamic State of Iraq and Rohingya persecution in Myanmar committed by the Military Forces? What is the role of International Criminal Court and the United Nations? Comparison.

The Empirical Analysis is based on the comparative method of the legal approaches, sources, jurisdiction, circumstances and perspectives in order to fill the gaps in law and provide the basis for the further development of the international regulations on the Crimes Against Humanity, as well as the analysis of the clauses and parts of the draft Convention on Crimes Against Humanity prepared by the International Law Commission.

The methodology includes the compilation of the international case law and the scholars' commentary on the Crimes Against Humanity and its legal, contextual elements and main gaps in the law, as well as, the publicists' opinions on the ongoing cases on the Crimes Against Humanity prosecuted by the International Criminal Court and the United Nations. Additionally, the general consensus of the researched field is considered, the following hypothesis is practically formed: the United Nations reached its goals in implementing legal instruments, international and national justice mechanisms during the prosecuting Yazidis genocide committed by the Islamic State of Iraq in 2014, due to the reason that United Nations successfully concluded a legal investigation and criminal prosecution of Crimes Against Humanity among the International Criminal Court.⁶ The use of appropriate legal and international organisations mechanisms can also be acknowledged in this case. Moreover, the legal investigation is not only limited to the Article 7 of the Rome Statute, due to the reason that the following legal sources, such as The Elements of Crime, 1948 Genocide Convention, The International Criminal Court Jurisdiction, the United Nations Human Rights and the United Nations Security Council Agendas, have been used in order to conclude it. The United Nations already do the legal prevention of Crimes Against Humanity actions in legal prosecution of Rohingya persecution in Myanmar committed by the Military Forces with the recommendations and joint actions with the Human Rights Council based on the Human Rights Up Front action plan. Moreover, the United Nations are taking actions towards the violation of human rights prevention since 2013.⁷ Thus, the outcome from the legal prosecution is the exercising of jurisdictions to provide investigations and prosecution on behalf of both the United Nations and the regional organisations and states.

The Empirical Analysis provides the legal analysis of the prosecution of the Crimes Against Humanity by the United Nations based on the comparison of the referred cases. Lastly, the extensive practical examination of the legal mechanisms, as well as, the obstacles and perspectives designates the further effectiveness and development of the legal approaches concerning the customary international law, human rights and international criminal law in general terms and based explicitly on the Crimes Against Humanity and War Crimes.

⁶ Schaack, Beth Van. "The Iraq Independent Investigative Team & Prospects for Justice for the Yazidi Genocide." SSRN Electronic Journal, 2018. doi:10.2139/ssrn.3099932.

⁷ "Human Right Up Front", United Nations Development Programme, <https://stories.undp.org/putting-human-rights-up-front>

Literature Review

Antonio Cassese, an author and professor in the field of Public International Law and also an author of the Cassese's International Law editions and researches on the topical issues, is an essential composer for the Thesis. In the book on International Criminal Law, among other authors, such as P. Gaeta, L. Baig, M. Fan, C. Gosnell and A. Whiting described several aspects regarding the Criminal Law. Including, International Crimes, Criminal Liability, Responsibility and Prosecution in conjunction with the International Criminal Court Jurisdiction. Generally, the methodology used by authors was mainly doctrinal analysis aimed to provide details on how the ICC prosecutes specific categories of international crimes and Crimes Against Humanity, as well. Moreover, one of the principal authors' goals in the research was to conduct the persons, who enact in the crimes as liable for them. Thus, the analysis of both procedural and substantive criminal law regarding the Crimes Against Humanity provides the imperative basis for the Thesis's hypothesis part on the perspectives and further legal recommendations on the ongoing cases.

Furthermore, Antonio Cassese describes the essence of the Article 7, 1998 Rome Statute and its interplay with other branches of jurisdiction deriving from humanitarian law, human rights and national criminal laws, which might be a proof for the hypothesis that the investigation is not only limited to the above-mentioned Article 7. As for the Crimes Against Humanity, the authors claim that it has both objective and subjective elements. Coming from this it lays down the variety of goals taken by the United Nations and ICC in order to prevent, prosecute and act in long-time perspective against the Crimes Against Humanity. The analysis of cases also derives from a comparative-descriptive approach based on the elements of crimes and its actuality for investigation under Article 7 of the ICC statute. Antonio Cassese is one of the leading scholars in the field of international criminal law, which focuses on the importance of the investigation and prosecution of the Crimes Against Humanity, as well, which is indispensable for the search for the hypotheses substantiation.⁸

Another scholar Simon Adams, author of the "The Responsibility to Protect, the Fate of the Rohingya and the Future of Human Rights" paper organized by the Global Centre for the Responsibility to Protect analyzed the current situation in Myanmar. Moreover, the scholar designated the possible perspectives of the investigation and obstacles for the legal prosecution.⁹

As for the United Nations goals, missions and practices regarding the international criminal law, Christopher C. Joyner is a scholar who mentions the importance of the international organisation in the various aspects of the international law issues. For instance, the author focuses on the fact that the United Nations had an impact on the development of international law and even had a role in defining international crimes starting from the Nuremberg Trial. However, since the Genocide Convention adoption the United Nations and its agencies enacted in the enforcement of the substantive criminal law and its jurisdiction, making the Crimes Against Humanity an additional focal point. One of the main focuses authors provides

⁸ Antonio Cassese. *International Criminal Law*. 3rd ed. P. 84-105. Oxford University Press, 2008.

⁹ Adams, Simon. "If Not Now, When? The Responsibility to Protect, the Fate of the Rohingya, and the Future of Human Rights." SSRN Electronic Journal, January 8, 2019. doi:10.2139/ssrn.3319491.

to establish the importance and the role of the United Nations in taking actions in terms of the legal framework. That is why the practice of the suppressing on international crimes and Crimes Against Humanity is an essential proof for the research analysis on the United Nations role and approach towards the international crimes committed by the Islamic State of Iraq and the Levant in Yazidis and the Military Forces in Myanmar. Also, the author mentions several other Conventions and legal sources, such as the Convention on Non-applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. The Conventions a source for identifying the Crimes Against Humanity.¹⁰ The author claims that Conventions are the appropriate basis for the prosecution and trial used by the United Nations.¹¹

Last but not least, another scholar who focused on the related issues concerning the Crimes Against Humanity and International Criminal Law is M. Cherif Bassiouni, a scholar and member of the Steering Committee on The Crimes Against Humanity Initiative. In his work, “Crimes Against Humanity in International Criminal Law”, the author focuses on the legal framework and legal development of the “Crimes Against Humanity”. Mainly, he is mentioning not only the ICC Statute but other normative prescriptions and procedural aspects. Moreover, M. Cherif Bassiouni claims in his research that there are both international and jurisdictional elements considering these particular international crimes, due to the reason that there is a connection with the States’ internal policies and responsibilities of the States and Non-State Actors. One of the main goals of the author is to conclude the specific elements and contents of crimes based on the legal sources, formulations and criminal responsibility after. The analysis provided by this scholar is essential for answering on the second research question on the outcomes of the United Nations legal prosecution of Rohingya persecution in Myanmar. The reason for it is that it is essential to provide a comparison of the legal aspects and formulations in order to constitute appropriate recommendations and legal perspectives regarding the case.

Moreover, M. Cherif Bassiouni mentions a crucial issue that is related to the gap filling in law in terms of the Thesis Empirical analysis. The author studies the jurisdictional element of conduct and basis of State’s practices based on the positive international law. Thus, the author proves the substantiality of the issues of Crimes Against Humanity and demonstrate the International Criminal Law as a progressive system in future perspectives, as well.¹²

¹⁰ Convention On The Non-Applicability Of Statutory Limitations To War Crimes and Crimes Against Humanity, General Assembly Resolution 2391 (XXIII) UN 23d Sess,S Upp No 18 at 40 UN Doc A/7218 (1968)

¹¹ Joyner, Christopher C. *The United Nations and International Law*. Cambridge: Cambridge University Press, 2003.

¹²Bassiouni, M. Cherif. *Crimes against Humanity in International Criminal Law*. The Hague: Kluwer Law International, 1999.

Theoretical Part:

1. Crimes Against Humanity

Crimes Against Humanity concatenate humanity throughout its history. However, criminalisation and establishment of laws on the Crimes Against Humanity on the international level underwent only in the last century, when this aspect became essential for the International Criminal Law. In order to allocate all the unlawful acts committed by the Islamic State of Iraq and the Levant and the Military Forces, the legal development and framework in terms of 1998 Rome Statute and ICC Jurisdiction of the misconducts mentioned above have to be designated.

1.1 Objective and Subjective Elements of Crimes Against Humanity

Today the term “Crimes Against Humanity” is rather well covered and described in the customary international law sources. The definition contains specific objective and subjective elements and also common actions in the legal framework which in general connects the understanding of the crime and its further prosecution. In general, Crimes Against Humanity nowadays are related to the serious and systematic attacks or events practice by the government, government authorities or leaders, political actors and non-state organised groups. The attack or lawful acts performed by the actors mentioned above constitute the aim to provide degradation of human and human dignity by performing rape, assassination and persecution based on the unambiguous motives. However, the individual attack is not considered as a Crime Against Humanity in large scale, due to the reason that the consequences and the contextual element of it should consider the massive effect or in other words the gargantuan incursion on the civil population. Thus, a single crime can start the chain of massive Crimes Against Humanity. Another common feature of this category of crimes is that they are prohibited and punished if they are committed during both wartime and peace. The contextual element of Crimes Against Humanity used only to include the component on situational circumstances in 1945. At that time the crime was charged particularly during the armed conflict. However, nowadays the attack on the civilian population is considered unlawful if there is a “widespread” element during any time and circumstances.¹³

Last but not least, victims of the Crimes Against Humanity are also the characteristic feature of the crime definition. For instance, the massive attack can be carried out against civilians during the armed conflict or peace and also against persons, who are not engaging in the armed hostilities anymore. The mentioned victims fall under the International Criminal Law and International Humanitarian Law. Furthermore, as for the victims who are enemy combats of the underlying crime, they are part of the Customary International Law. In general, the

¹³ Antonio Cassese. *International Criminal Law*. 3rd ed. P. 91, Oxford University Press, 2008.

victims of Crimes Against Humanity are usually civilian population, due to the reason that they fall under the motives of systematic and widespread attacks of the authors of crimes.¹⁴

Crimes Against Humanity are practised by the ICC jurisdictions. Moreover, throughout its development, they were distinguished as both atrocity crimes, such as genocide and war crimes, and as core crimes, including terrorism and piracy. However, if there is a second category related to the unlawful act committed, then it is assuredly Crime Against Humanity, due to the ICC practise. Moreover, most of the time this division of crimes as defined under the matters of international criminal law measure of international human rights facets. International Criminal Tribunals charge Crimes Against Humanity among all the three atrocity crimes in rare cases, as well.¹⁵ Several legal frameworks contain the provisions and definitions of Crimes Against Humanity, such as the 1998 Rome Statute and Elements of Crimes deriving from it. However, there is still a tie between customary international law, international criminal law and international human rights, due to the reason that its instruments, such as Universal Declaration of Human Rights and United Nations Covenant on Civil and Political Rights, include the general human rights. These human rights are particularly being violated when the person becomes a part of a massive systematic attack or Crime Against Humanity in other words. Coming from this, the State's legislation and responsibility to protect human beings is crucial and connected to the designating of Crimes Against Humanity from the legal and practical perspective.¹⁶

In general, the case law is one of the primary sources which contributed to conduct the legal context of the crime. Thus, still one of the comprehensive legal sources on this category of crime remains the ICC Statute and Article 7, which includes all the contours in the definition of Crimes Against Humanity. However, the following objective elements still have to be designated in order to hold a more considerable extent of the customary international law during the prosecution and practise of the law in international criminal law means.

The contextual element is one of the fundamental describing features of the Crime Against Humanity. That is why such a component as a massive attack can be inferred in order to differentiate one crime from the set of others. Also, in order to constitute an attack on humanity, the criminal acts, such as murder, rape or persecution based on various characteristics are counted. The contextual element includes infringements of Human Rights, as well. The international criminal law takes into account the context of the crime conducted, based on the elements described above during the trial or discussions of the crime.¹⁷

Coming to the next objective element of Crimes Against Humanity - the underlying offences, it is important to mention that there are two divisions regarding this aspect. The first one is related to the inhumane acts, which are committed against a group of civilians. These acts can be murder, slavery and deportation, not taking into account the nationality of the aimed group. Mainly, this category is covered and punished in almost all national legislation. Secondly, persecution based on religious, ethnological and political motives does not fall under the most national legal systems, and thus it is not prohibited in general. Here, the

¹⁴ Antonio Cassese. *International Criminal Law*. 3rd ed. P. 92, Oxford University Press, 2008.

¹⁵ Schabas, William A. *International Criminal Law*. P. 203 The Cambridge Companion. Cheltenham: Elgar, 2012.

¹⁶ Antonio Cassese. *International Criminal Law*. 3rd ed. P. 92, Oxford University Press, 2008.

¹⁷ Antonio Cassese. *International Criminal Law*. 3rd ed. P. 92-94, Oxford University Press, 2008.

underlying crimes are covered by customary international law. During the prosecution, the distinguishing process of underlying offences categories between murder and persecution based on motives of the actor is an essential process.¹⁸

As for the all the types of offences related to the Crimes Against Humanity, the most crucial ones are described and analysed by the scholar Antonio Cassese. Generally, the scholar outlined the most common samples of offence according to the case law. One of the most ubiquitous kinds is “murder”, where the harm is brought to the victim with audacious disrespect for human life. “Enslavement” is the second most common part of the Crime Against Humanity. It is a notion that appeared from the case law during the Nuremberg Trial, namely by the US Military Trial between Pohl and Milch.¹⁹ Moreover, according to the ICC Statute and Article 7 (2) (c), “enslavement” is an act when powers are exercised in terms of ownership over a person or a group of people.²⁰ The third type of offence, that author mentioned is “extermination”, which includes large-scale killings or castigation of circumstance of life — for example, destitution of admission to food and water resources and possibilities to receive the medical care.²¹ A proper definition was established by the International Criminal Tribunal for the former Yugoslavia Chambers in the Krstic case.²² The definition stated that extrimation is an addition to the Crimes Against Humanity with a piece of evidence that there was targeted group of people or population and that these people were killed or put in the insurmountable life conditions, which resulted in massive destruction of the population. Overall, the mentioned above aspects and categories of offence are a part of the list generated by Antonio Cassese, but the following types are also imperative, due to the reason that they emerged during the criminal tribunals and from the case law: imprisonment, deportation of population, sexual violence, and persecution of a particular group, torture and enforced disappearance.²³

The underlying offences types are essential aspects of the Crimes Against Humanity defining, due to the reason that each of the components is taken into consideration by the governmental representatives or international organisations during the prosecution or providing of legal analysis and recommendations.

Subjective elements of Crimes Against Humanity are primarily related to the mental aspects and circumstances. More directly, there are two of them. The first one is the mens rea, which indicates the managing offence itself, meaning the action committed: rape, murder, torture and other actions mentioned previously. The second subjective element is the consciousness of systematic and large-scale killings practise. Overall, international criminal law punishes persons, who are aware of the consequences of the crimes, due to the reason that they are circumstances under the general criminal law. To crown it all, the subjective elements are

¹⁸ Antonio Cassese. *International Criminal Law*. 3rd ed. P. 94, Oxford University Press, 2008.

¹⁹ The United States of America v. Erhard Milch, War Crimes Trials, Records of Case II, Special List No.38, National Archives and Records Service, General Services Administration, Washington, D.C. 1975

²⁰ UN General Assembly. Rome Statute of the International Criminal Court, 17 July 1998, ISBN No. 92-9227-227-6, Article 7 (2) (c)

²¹ UN General Assembly. Rome Statute of the International Criminal Court, 17 July 1998, ISBN No. 92-9227-227-6, Article 7 (2) (b)

²² Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991, IT-98-33-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 2 August 2001

²³ Antonio Cassese. *International Criminal Law*. 3rd ed. P. 94-97, Oxford University Press, 2008.

mainly additional ones. They are designated during the investigation in order to consider the broad picture of the Crime Against Humanity. When at the same time, the objective elements are essential aspects for indicating the circumstances of the offence and its proper investigation, due to the reason that they constitute the dispassionate details and emerged throughout the case law and ICC trials.²⁴

1.2. The International Criminal Court Jurisdiction: Article 7, 1998 Rome Statute

The Statute for a new International Criminal Court was adopted on the 17th of July in 1998 in the city of Rome. At that time only 21 States abstained from its ratification and 120 States voted for it. Nowadays, there are already 124 parties to the Rome Statute of the ICC. As for the development, at first, the notion of establishing the Court by States followed to the Rome Diplomatic conference, which was attended by the States and non-governmental and international organisations. The negotiators further created an institution and added the Court's jurisdiction structure. Overall, the ICC was established as Court of the last resort, due to the reason that there are cases which are tried before the national courts and others before the ICC, depending on the legal framework and elements of the crime. Thus, the Court aimed to have jurisdiction and hear cases in order to protect individuals from the atrocity crimes and the crimes which are not under the jurisdiction of the national courts.²⁵

Crimes Against Humanity are described in full details in Article 7 of the 1998 Rome Statute. The article includes two paragraphs. In the first one described the unlawful acts committed against the civilian population in terms of a massive and systematic attack, including the subjective element on the mental awareness of the offence. The second paragraph of Article 7 contains a more precise description of the elements of the crime and contextual aspects designated in the first paragraph.²⁶ Moreover, according to the article, it specifies the circumstances for the crime and states that there is in general no connection to an armed conflict or wartime, or conflict between two states, due to the reason that the Crime Against Humanity can emerge in one single state.

The arrangement of Article 7 is predominantly analogous to other ad hoc Statutes. However, there are peculiar differences, which emerged during the negotiation process in 1998. Several drafts were analysed until the negotiators agreed upon appropriate compromises and legal elements. The relevant point is that there are also differences in formulations stated in the ad hoc Statutes and the Rome Statute. Notwithstanding, these Statutes was also a basis for establishing a legal framework in term of the ICC Statute. Governments and organisations representatives negotiated on the proper contextual elements used for the Crimes Against

²⁴ Antonio Cassese. *International Criminal Law*. 3rd ed. P. 98-100, Oxford University Press, 2008.

²⁵ Schabas, William A. *International Criminal Law*. P. 104 The Cambridge Companion. Cheltenham: Elgar, 2012.

²⁶ UN General Assembly. Rome Statute of the International Criminal Court, 17 July 1998, ISBN No. 92-9227-227-6, Article 7

Humanity description.²⁷ For instance, the objective element in terms of armed conflict is crucial for the International Criminal Tribunal for the Former Yugoslavia²⁸ legal definition and discriminatory attack factor is a part of the International Criminal Tribunal for Rwanda context.²⁹ However, in conjunction with the differences, there are similarities. For example, the attack has to be “widespread” and “systematic” coincidence. The complementary description of this aspect is contained in the International Criminal Tribunal for Rwanda Statute. The negotiators concluded the compromise over this meaning by carrying it out as the multiple commissions of acts.³⁰ Another important prong debated is the existence of a plan or policy element required by the ad hoc Statutes and Tribunals. That is why policy as a legal element was not enough to complete the underlying offence aspect of the Crime Against Humanity. Coming from this, “widespread” and “systematic” attack description included not only the policy element but also define the well-organised and planned acts in the second paragraph section (a) of the Article 7.³¹ In general, according to the Antonio Cassese, the more specific definitions and additional ground of the Rome Statute interpretation is justifiable under the customary international law.³²

Coming to Article 7(1) and Article 7(2) of the Rome Statute analysis it is essential to mention the five legal requirements for identifying the Crimes Against Humanity. As for the Article 7 (1), the following components are designated in this paragraph: attack meaning the multiple commissions of acts, an object of the attack or victims meaning the civilian population, character of an attack, such as widespread or systematic and also including the subjective element in terms of mens rea.³³ Moreover, as for Article 7 (2) (a), it also contains the legal requirements on the attack essence and policy of the State circumstances element. The more detailed rationale of each of the components is disclosed in the Elements of Crimes.³⁴

Besides, the structure of Article 7 is divided into the general elements and the particular crimes one which more deeply uncovers the Crimes Against Humanity. More precisely most of these specific components are included in the sections from (a) to (k), which are also a part of many national legal systems and criminal laws. However, the Rome Statute applies its provisions to the State Parties to it. That is why the second paragraph of Article 7 includes all the required subjective elements and specific components which are criminalised in the international criminal law.³⁵

In order to provide more effective investigation and prosecution of the Crimes Against Humanity by the States and International Organizations, other normative prescriptions

²⁷ Gideon Boas, James L. Bischoff, Natalie L. Reid. *International Criminal Law Practitioner Library*. Vol. 2. *Elements Of Crimes Under International Law*. Cambridge University Press, 22 January 2009

²⁸ Ibid

²⁹ Ibid

³⁰ Antonio Cassese. *International Criminal Law*. 3rd ed. P. 376-377, Oxford University Press, 2008.

³¹ Gideon Boas, James L. Bischoff, Natalie L. Reid. *International Criminal Law Practitioner Library*. Vol. 2. *Elements Of Crimes Under International Law*. Cambridge University Press, 22 January 2009

³² UN General Assembly. *Rome Statute of the International Criminal Court*, 17 July 1998, ISBN No. 92-9227-227-6, Article 7 (2) (g)

³³ Case Matrix Network. “Crimes Against Humanity: Investigation and Fact-Finding Case Analysis”. *International Criminal Law Guidelines*, 2017.

³⁴ UN General Assembly. *Rome Statute of the International Criminal Court*, 17 July 1998, ISBN No. 92-9227-227-6, Article 7 (2)

³⁵ Bassiouni, M. Cherif. *Crimes against Humanity in International Criminal Law*. p. 202 The Hague: Kluwer Law International, 1999.

including the analogous international crimes should be identified. 1948 Genocide Convention³⁶ covers specific acts related to the Crimes Against Humanity, but describing the intent to commit offence against the certain groups. The 1949 Geneva Conventions and 1977 Protocols³⁷ are also a part to the customary international law. The non-governmental and state parties of it provide the limited circumstances to these crimes in terms of the context, due to the reason that they are designated in the actions which are prohibited for the combatants. However, still, these actions contain similar components of Crimes Against Humanity. The 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment³⁸ is a United Nations Convention which defines the torture as a punishable crime under the international criminal law during the wartime and peace, making it slightly different from the definition contained in the Rome Statute. Furthermore, international human rights also cover several aspects related to Crimes Against Humanity. For instance, coming back to the Article 7 of the ICC Statute, the sections (e), (h), (i) and (k) include the violations of the human rights,³⁹ which are criminalized in the Universal Declaration on Human Rights⁴⁰ and the United Nations Covenant on Civil and Political Rights.⁴¹

Finally, the diversity of legal frameworks and various legal components and effects can be found applicable during the prosecution of offences related to the “Crimes Against Humanity”. Moreover, the gaps in order to provide proper objects of crimes protection can be based on the various legal instruments mentioned above. Moreover, lastly, the provisions mentioned in these legal sources are stated without any specific detalization, but still covers the essential gaps in the law. Thus in general, it leads to the need of comprehensive codification which still has to be completed in the ICC Statute, due to the reason that there are still gaps regarding the policies, actors and proofs.⁴²

1.3. Elements of Crimes

The Preparatory Commission which is a preparing legal document and drafts on behalf of the ICC made a step further in elaborating the definitions and elements for the International Criminal Court Statute on the 30th of June, 2000. The emerging of such draft was essential in order to clarify and collect the variety of definitions related to the War

³⁶ UN General Assembly. The Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, United Nations, Treaty Series, vol. 78

³⁷ International Committee of the Red Cross (ICRC). Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287 and International Committee of the Red Cross (ICRC). Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977

³⁸ United Nations. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, United Nations, Treaty Series, vol. 1465, 1984

³⁹ UN General Assembly. Rome Statute of the International Criminal Court, 17 July 1998, ISBN No. 92-9227-227-6, Article 7 (1)

⁴⁰ United Nations. The Universal Declaration of Human Rights (UDHR), 1948

⁴¹ United Nations. International Covenant on Civil and Political Rights, United Nations, Treaty Series, vol. 999, 1976

⁴² Bassiouni, M. Cherif. *Crimes against Humanity in International Criminal Law*. p. 208-209 The Hague: Kluwer Law International, 1999.

Crimes and Crimes Against Humanity. The Elements of Crimes was signed and adopted by the ICC Assembly in 2011. Moreover, the negotiations between the experts in criminal, humanitarian and human right law from the States Parties to the Assembly marked an essential step in the historical development of the international crimes regulations and crimes prosecution, as well. The reason for it is that the Elements of Crimes include the definitions and structure of crimes based on the perspectives and experiences of the experts and lawyers presented on the negotiations. The final and adopted draft is considered as somewhat useful and is implemented a lot during the exercise of criminal prosecution nowadays.

Furthermore, the definitions were elaborated in order to indicate the customary international law from various perspectives and priorities, that is why the Articles from 6 to 8 of the International Criminal Court Rome Statute were primarily considered, as well as the experience of its legal effectiveness.⁴³

Crimes Against Humanity under Article 7 are subdivided into 16 additional contextual categories in the Elements of Crimes. The reason for it is that the Crimes Against Humanity are related to international criminal law and its provisions apply to serious crimes. However, the two opening paragraphs in the 1998 Rome Statute were not considered by the Preparatory Commission as a sufficient description of the crime elements. Thus, the characteristics of the attack itself and namely its details were elaborated in order to provide additional explanation during the prosecution.⁴⁴

2. Article 15 Draft: Convention on Crimes Against Humanity

Article 15 Draft is a project of the International Law Commission on Convention on Crimes Against Humanity which is aimed to balance the controversy among the states autonomy and judicial supervision. Moreover, the ICC faced challenges and clauses in law during the Georgia v. Russian Federation case, where the *ratione temporis* or in other words temporal jurisdiction was the component of the clause. That is why the new draft on the Crimes Against Humanity discussion is ongoing, undertaking the states responsibility and its relationship with the International Court of Justice. Furthermore, the new future Treaty source is discussed in order to indicate all the measures requested concerning this particular clause by the International Court of Justice.^{45 46} The Draft Articles were adopted at the first reading in 2017, which included another precondition for the current discussions. Mainly it involved the clause on the official position of the defendant and its relation to the grounds of

⁴³ Dörmann, Knut, Louise Doswald-Beck, and Robert Kolb. *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*. P. 8 Cambridge: Cambridge University Press, 2008.

⁴⁴ International Criminal Court. *Official Records of the Review Conference of the Rome Statute of the International Criminal Court*, Kampala, 31 May -11 June 2010, International Criminal Court publication, RC/11

⁴⁵ Georgia on Preliminary Objections. *Application of The International Convention on The Elimination of All Forms of Racial Discrimination Georgia v. Russian Federation* Written Statement.

⁴⁶ Andreas Zimmermann and Felix Boos, "Bringing States to Justice for Crimes against Humanity: The Compromissory Clause in the International Law Commission Draft Convention on Crimes against Humanity", *Journal of International Criminal Justice*, Volume 16, Issue 4, September 2018, PP. 835–855, Accessed April 2, 2019, PP. 835–855

the crime, where it is considered not to exclude the criminal liability of the offender based on it. Coming from this the final draft is aimed to reject the feasibility of the state's officials who are suspected in the Crimes Against Humanity to use the *ratione materiae* as the immunity before the judicial supervision. However, the issues remain essential in terms of prosecuting of Crimes Against Humanity by the ICC and the United Nations, as well.

Nevertheless, there are still insufficient provisions in the Draft Articles on the *ratione personae* in terms of its use as the immunity, due to the reason that the customary international law contains other provisions regarding it. There is no possibility for a state official who is an offender to enjoy these personal amnesties before the Tribunal in the ICC. However, the consequences of the non-existence of this provision is still a gap in the Draft Articles, due to that reason the Special Rapporteur on Crimes Against Humanity is taking up this issue in case of accusation of a Crime Against Humanity.⁴⁷

The current version of the Draft Article 15 paragraph 1 is aimed to reduce the legal disputes on the further Convention developments and practical use, and the second paragraph states the jurisdiction of the International Court of Justice over the application of the legal provisions regarding the disputes arose between the parties. Moreover, paragraph 3 stresses the situation when states can become contracting parties on the dispute resolve matters even without being the subject under the International Court of Justice jurisdiction. Overall, in analysing the Draft Article 15, the following parts can be designated: the obligation to negotiate, the disputed requirement and the obligation to settle the disputes through the negotiations. As for the scope of *Ratione Temporis* contained in the Draft Article, it is predicted to have the retroactive impact of the substantive obligations designated in the proposed Convention on Crimes Against Humanity. This one issue is crucial, due to the reason that it will probably apply to the ongoing Crimes Against Humanity situations and Myanmar case is not an exception.⁴⁸

As for the perspective of the Convention on Crimes Against Humanity ratification, this current project is one of the main for the International Court of Justice representatives, due to the reason that it is compelling for the comprehensive peace security and as well a responsibility to the international community.⁴⁹ *Belgium v. Senegal* case included the states responsibility breach to enact on behalf of all States Parties as a part of an international community.⁵⁰ Alternatively, in other words, the ICC, in this case, established the violation of the obligation to prosecute by Senegal. Moreover, *Belgium v. Senegal* case provided the consideration that the proposed Convention should apply equally to both parties, who are related to the crime committed and who is responsible for prosecuting and being a part of the States Parties' obligations. Furthermore, *Belgium v. Senegal* and *Georgia v. Russian Federation* are not the only ground cases which influenced the need for drafting a new

⁴⁷ Micaela Frulli, *The Draft Articles on Crimes Against Humanity and Immunities of State Officials: Unfinished Business?* Journal of International Criminal Justice, Volume 16, Issue 4, September 2018, P. 775–793

⁴⁸ Andreas Zimmermann and Felix Boos, “Bringing States to Justice for Crimes against Humanity: The Compromissory Clause in the International Law Commission Draft Convention on Crimes against Humanity”, Journal of International Criminal Justice, Volume 16, Issue 4, September 2018, PP. 835–855, Accessed April 2, 2019, PP. 835–855

⁴⁹ United Nations. *Report of the International Law Commission on the work of its Sixty-ninth session* (1 May-2 June and 3 July-4 August 2017), UN Doc. A/72/10, Chap. IV

⁵⁰ International Court of Justice. Questions relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*), available on: <https://www.icj-cij.org/en/case/144>

Convention in terms of gap filling in law and relationships between the states and judicial supervision. There are more additional gaps, to be covered in the future until the Convention ratification, such as provision matter on negotiations and the relationships with the Treaty body.⁵¹ Finally, the application of the Convention on Crimes Against Humanity or Draft Article 15 would be a focal point for the prosecution of the ongoing cases in North Korea, Myanmar and Syria.

3. Responsibility for the Crimes Against Humanity of States and Non-State Armed Groups

Crimes Against Humanity and its contents are a part of the international criminal laws. Thus, most of the national legislations contain more or less the same laws on similar crimes. The states which are parties to the Human Rights international conventions are obliged to protect the civil society and their rights. The Non-State Armed Groups are not excepted from the punishment of international criminal laws regarding violation of Human Rights, as well. However, there are differences between nationally and internationally defined Crimes Against Humanity and how they are related to Human Rights. There is also a jurisdictional element, which is influencing the national laws on the international courts level. That is why an examination of the national legal systems and courts concerning the Human Rights obligations and protection and the immunities of authors of the crimes before the International Court of Justice is an essential part of the research. Moreover, the distinctions between international, jurisdictional and national elements are based on it.

3.1 Actors: Victims and Authors

First of all, it is imperative to allocate the actors, who are the primary components of the Crimes Against Humanity. Scholar Antonio Cassese provided the simple, but very distinctive research and division of the actors into the authors and victims. The authors are commonly the state organs or in other words the particular individual in the official governmental positions. These individuals might be connected to the Military Ministry or even can be the Head of the State. Overall, they remain as the perpetrators of the Crimes Against Humanity, War Crimes and other international crimes. The contextual element of the crime includes the significance of the author or offender and his intentions. Another critical factor is that the offender must be a government authority or act on behalf of the government and that the author of the crime can also be an individual who is acting in his capacity. According to the case law, the individuals committing the Crimes Against Humanity nevertheless acted in unison with the State's policy or with its support.

⁵¹ Andreas Zimmermann and Felix Boos, "Bringing States to Justice for Crimes against Humanity: The Compromissory Clause in the International Law Commission Draft Convention on Crimes against Humanity", *Journal of International Criminal Justice*, Volume 16, Issue 4, September 2018, PP. 835–855, Accessed April 2, 2019, PP. 835–855

Moreover, the same focal point can be the actions of the state officials in their private capacities. However, in such cases, the approval from the government authorities is an essential component, due to the reason that it is indispensable for the crime to be encouraged by the domestic legislation. Coming from this, in order to be a crucial component of the Crimes Against Humanity, the author of it should be related to the governmental authorities or behave with the support of the State's policy. However, in recent cases, the non-state armed groups are also considered to be related to the authors of international crimes.⁵²

It is interesting that the international legal elements and its relation to the national laws can be touched upon the victims of the Crimes Against Humanity. The perspective of this legal element is presented in the Article 6(c) of the Nuremberg Charter, which states that the crime has to be enormous and victimise the group of any civilians committed with the support of the action or policy of the State. It is vital to notice that in terms of victims, the Article indicates them as "any" and "civilians". By uncovering the meaning of it and looking at the historical development of the Article, part "any" means mainly the civilians, who are protected by the humanitarian law and law of wartime. More generally, the Article contains provisions on the obligations to protect the civilian population of the State, which is executing the Crimes Against Humanity and civilian populations of the States under the military occupation.

Additionally, the term "civilians" in Article 6(c) generally is not related to combatant's protection.⁵³ Mainly, the target of the authors committing the Crimes Against Humanity must be the civilian population of the State. However, if the military people or combatants were affected by the large-scale murder among the civilians, then they are also classified as victims. The tendency that the victims of Crimes Against Humanity must be only civilian population is developing and changing in order to contribute to the prosecution depending on the contextual circumstances of the case.⁵⁴ For instance, in the case of Mrkšić, the trial concluded that the crimes could be executed against both civilians and armed people.⁵⁵ The reason for it is the vanishing borders between the understandings of customary international law. It is seen in the nexus of Crimes Against Humanity and armed conflicts. Moreover, the broadening of the scope of persons affected by these particular crimes and defended under the international humanitarian law is influenced by the overall swelling of protection of human dignity. In these terms, the legal status of the person is not taken into account, as well.⁵⁶

Additionally, today's international human rights principles are developed in terms to protect human beings from actions of the governmental authorities. Generally, the case law, international humanitarian law and international human rights supported the notion that the victims are primary the civilian population and that the international treaties must protect them. However, the other focal point designated by these legal frameworks is that the military and governmental authorities affected by the large-scale murder or Crime Against Humanity

⁵² Antonio Cassese. *International Criminal Law*. 3rd ed. P. 104-105. Oxford University Press, 2008.

⁵³ United Nations, Charter of the International Military Tribunal, Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis, Nuremberg Trial Proceedings Vol. 1, 8 August 1945. Article 6 (c)

⁵⁴ Antonio Cassese. *International Criminal Law*. 3rd ed. P. 105. Oxford University Press, 2008.

⁵⁵ Prosecutor v. Mrksic et al., IT-95-13/1, International Criminal Tribunal for the former Yugoslavia (ICTY), 5 May 2009.

⁵⁶ Antonio Cassese. *International Criminal Law*. 3rd ed. P. 106. Oxford University Press, 2008.

are also considered as the victims. This exception related to the persons, who do not obtain any legal status, as well.

3.2 States Responsibility for the Crimes Against Humanity

States responsibility for the Crimes Against Humanity and other atrocity crimes is an indispensable component of the customary international law with an effect of various legal frameworks and general aims.⁵⁷ The fact of the shared international responsibility of the States for such crimes, as Crimes Against Humanity, is analysed through the case law and particular actions of the ICC and ICJ and international organisations, such United Nations. More generally, there are two types of shared responsibility for large-scale and systematic murder. The first one is related to the crimes committed by the joint actions of its authors. For instance, the coordinated international crime can be committed by two or more States, political authorities and military or armed group's commanders and even a group consisting of numerousness of individuals. Moreover, the second category of responsibility is related to the non-coordinated mass atrocity crimes, meaning by that the cases where the States failed to fulfil its obligations and was not able to prevent the crimes. The Islamic State of Iraq and the Levant actions in Yazidis and other international crimes committed on the territory of Syria is one of the known cases.⁵⁸

The response to atrocity crimes is an essential point for the responsibility of the States and individuals. Ultimately, the following factors influence the effectiveness of the response. Firstly, the political circumstances play a crucial role, due to the reason that government authorities and structures' willingness to act lay down the general perspective of the response. The level of the competence of the international instruments accessible is an essential factor, as well. The outside elements and consequences of the Crimes Against Humanity demand at least the minimum involvement of the State, because of these particular crimes presented as widespread and systematic actions. Moreover, both States and individuals hold the responsibility for the mass atrocity crimes in the specific cases. The most significant ones are the genocide in Rwanda⁵⁹ and the Crimes Against Humanity committed in the former Yugoslavia.⁶⁰ According to the case law, the individuals might be considered liable for the atrocity crimes, meaning the situations where the State influenced the crime by actions or a specific policy. Alternatively, the cases, where the concurrence between the States and Individuals appear.⁶¹

The Obligations to conduct preventive actions and involve are required to perform by both States and individuals. Moreover, the following international treaties include the provisions on the obligations mentioned above. More specifically, the Treaties contain the prohibitions

⁵⁷ Croatia v. Serbia. Application of the Convention on the Prevention and Punishment of the Crime of Genocide, 3 February 2015, para. 129.

⁵⁸ Gentian Zyberi, *Responsibility of States and Individuals for Mass Atrocity Crimes*, Cambridge University Press, 2017

⁵⁹ International Criminal Tribunal for Rwanda, <http://unictr.irmct.org/en/tribunal>

⁶⁰ International Criminal Tribunal for the former Yugoslavia, <http://www.icty.org/>

⁶¹ André Nollkaemper, *Concurrence between Individual Responsibility and State Responsibility in International Law*, Vol. 52, Issue 3 July 2003, P. 615-640, British Institute of International and Comparative Law 2003

on violation of Human Rights and Humanitarian Law. Convention on the Prevention and Punishment of Crime of Genocide 1948⁶², Geneva Conventions⁶³ and Additional Protocols⁶⁴, 1998 Rome Statute of ICC⁶⁵ and also the Statutes concluded by the international tribunals in terms of the international crimes committed in the former Yugoslavia⁶⁶ and Rwanda.⁶⁷ Nevertheless, the customary international law is the comprehensive source for the duties or the States. Furthermore, the States must provide the prosecution of the atrocity crimes, including the cooperation with the ICC and the United Nations during the investigation.⁶⁸

International responsibility for atrocity crimes can be produced in terms of the legal breach by both States and individuals. Moreover, the customary international law contains responsibilities and legal repercussions for the wrongful acts performed by the State.⁶⁹ However, there are differences between the responsibilities for the States and individuals, due to the specific legal instruments and international treaties. For instance, according to the article 25 para 4 of the 1998 Rome Statute, the provisions of the Statute concerning the criminal liability of the individual are not affecting the State's responsibility based on the general international law arrangements.⁷⁰ Overall, the international obligations and duties imposed on the States and individuals are based on the objective and subjective elements of the crime committed. Furthermore, the legal framework and imposition mechanisms influence the various regimes and nature of the responsibility.

Taking into account the legal process of the perspectives of international responsibility from the institutional imposition, the circumstance of the crime is also the key-point. The International Court of Justice adjudicates the Crimes Against Humanity executed during the inter-state disputes.⁷¹ At the same time, international crimes are prosecuted by the ICC and Tribunals. It is essential to notice that the ICCs are concentrated on the individuals and high-level perpetrators. The legal processes take place on both national and international levels. For example, the domestic courts deal with the asserted perpetrators in most cases.⁷² The interaction between international criminal courts and tribunal and the domestic courts is an essential aspect of the legal process of the Crime Against Humanity prosecution. The reason for it is the chronology of the crime elements and the operational perspective of the procedure. However, the State immunity principle and the official status of the person

⁶² UN General Assembly. The Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, United Nations, Treaty Series, vol. 78

⁶³ International Committee of the Red Cross (ICRC). Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287

⁶⁴ International Committee of the Red Cross (ICRC). Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977

⁶⁵ UN General Assembly. Rome Statute of the International Criminal Court, 17 July 1998, ISBN No. 92-9227-227-6

⁶⁶ International Criminal Tribunal for the former Yugoslavia, <http://www.icty.org/>

⁶⁷ International Criminal Tribunal for Rwanda, <http://unictr.irmct.org/en/tribunal>

⁶⁸ Gentian Zyberi, *Responsibility of States and Individuals for Mass Atrocity Crimes*, Cambridge University Press, 2017

⁶⁹ ILC Yearbook. "Draft articles on Responsibility of States for Internationally Wrongful Acts", with commentaries, ILC Yearbook 2001

⁷⁰ UN General Assembly. Rome Statute of the International Criminal Court, 17 July 1998, ISBN No. 92-9227-227-6

⁷¹ International Court of Justice. Cases on Legality of Use of Force, available on: <https://www.icj-cij.org/en/list-of-all-cases>

⁷² Antonio Cassese. *International Criminal Law*. 3rd ed. P. 2072-308, Oxford University Press, 2013

immunity are the obstacles for such cooperation and the cooperation between the States, as well. In the Milosevic case, this particular immunity of the official status was used by the President of Serbia in order to get away from the criminal responsibility concerning Kosovo. Moreover, the Trial contained plenty of case management and legal procedure challenges.⁷³ The domestic courts had issues concerning the volume of the individual cases and the impact of international criminal law on them.⁷⁴

The inevitable conclusion is that the atrocity crimes including the Crimes Against Humanity are covered by the international responsibility and obligations and duties of the State and individuals. The basis for it is international Treaties and customary international law. Nevertheless, the scope of legal prosecution and responsibility for the crimes committed depends on the circumstances and elements of the crimes, legal regimes and nature within the State.

3.3 Non-State Armed Groups Responsibility for the Crimes Against Humanity

Non-State armed groups are constrained by the customary international law and international Human Rights Law. Individuals and civil society are also victims of the Crimes Against Humanity committed by the armed groups. Moreover, these crimes' authors have a particular impact on the individuals during the armed conflict and peacetime, as well. It includes the responsibility for international crimes and obligations regarding Human Rights. International Human Rights Law does not include any legal measures on the individuals altered by the activities performed by the non-state armed groups. However, international Human Rights are considered applicable universally during any circumstances.⁷⁵ The focal point regarding the international law obligations of the armed groups is that no any other body is legally responsible or have obligations on the actions committed by the armed groups if international rights or duties are applied to the non-state armed groups straight. From another perspective, an armed group might be "completely dependent" on a third state or international body. Coming from this, in this case, the State or entity is responsible for obtaining the international legal obligations and responsibility for the consequences.⁷⁶ The main concern of the concurrence of the obligations for the State and a non-state armed group is whether the second one is comprehensively dependent on the State. If the group is fully

⁷³ Boas, Gideon. *The Milošević Trial: Lessons for the Conduct of Complex International Criminal Proceedings*. P.131 Cambridge: Cambridge University Press, 2007.

⁷⁴ Boas, Gideon. *The Milošević Trial: Lessons for the Conduct of Complex International Criminal Proceedings*. P.132 Cambridge: Cambridge University Press, 2007.

⁷⁵ Murray, Daragh. *Human Rights Obligations Of Non-State Armed Groups.*, PP.6-8 S.I.: HART PUBLISHING, 2018.

⁷⁶ International Court of Justice. *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina v. Serbia and Montenegro*, "The question of attribution of the Srebrenica genocide to the Respondent on the basis of the conduct of its organ", para. 385-395, Judgement Of 26 February 2007, I.C.J. Reports 2007

independent in its activities, then it means that it does not obtain a superior authority or removed them from its influence.⁷⁷

Furthermore, customary international law not only addresses the issues regarding the crimes carried out by the non-state armed groups but also secures through the international instruments and United Nations actions according to the protection of Human Rights. Nevertheless, the lack of the protection and gap in the jurisdiction appears, due to the reason that in practice the state is inadequate to provide the domestic law on the armed opposition. Another aspect is that non-state armed groups are not subjects to the international regulations precisely. Thus, the protection of Human Rights and the prosecution of crimes are addressed through the means of international law measures and perspectives.⁷⁸

Crimes Against Humanity are directly related to the Human Rights law violations committed by the non-state armed groups. International organisations and the United Nations bodies address such cases in the context of the International Humanitarian law, as well. According to the Special Rapporteur on the analysing of Human Rights in 2010 provided that not only State officials are capable of carrying out the systematic attacks on the civil society, but also the non-state actors or groups compose death threats to the individuals, based on their ideas or goals.⁷⁹ The international criminal law instruments determine the criminal responsibility of the non-state armed groups or opposition groups. Moreover, the individual members of the groups, who are the leaders, are considered as perpetrators of the international crimes and violations of Human Rights in terms of the Crimes Against Humanity.

Nevertheless, the elements of the crime are observed as well, due to the reason that such a violation might be executed during both armed conflicts and be a subject to the International Humanitarian Law and peacetime.⁸⁰ In many cases, in order to provide the prosecution of the non-state armed group and the actions committed by it, the United Nations bodies among the International Criminal Court established the special monitoring missions. Coming from this, most of these actions might have a rather destructive element affecting civil society. That is why such acts entice the liability for the Crimes Against Humanity. Acts of terrorism are frequently executed by the non-state groups, which are usually systematic, widespread and aimed to attack the large-scale amount of people. Moreover, these acts contain analogic objective elements as atrocity crimes. That is why the acts of terrorism are considered on the same line with the Crimes Against Humanity from the criminal responsibility perspective. However, there is still a different aspect, according to which Crimes Against Humanity conclude the international repercussions.

Due to the development of international law in the regard of the atrocity crimes in terms of the 1998 Rome Statute and the Elements of Crimes, for instance. The ICC Statute provides a detailed description of crimes for which the non-state armed groups and entities held liable.

⁷⁷ Murray, Daragh. *Human Rights Obligations Of Non-State Armed Groups.*, P.42 S.I.: HART PUBLISHING, 2018.

⁷⁸ Murray, Daragh. *Human Rights Obligations Of Non-State Armed Groups.*, PP.9-10 S.I.: HART PUBLISHING, 2018.

⁷⁹ United Nations. *Report of the Special Rapporteur on the situation of human rights defenders, Sixty-fifth session Item 69 (b) of the provisional agenda** Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms, 4 August 2010, A/65/223

⁸⁰ Geneva Academy of International Humanitarian Law and Human Rights. *Human Rights Obligations of Armed Non-State Actors: An Exploration of the Practice of the UN Human Rights Council*, December 2016. P.22

Thus, the main concern and legal dilemma are that the crimes are committed by the non-state actors daily and internationally. The monitoring of the unlawful acts is an obstacle for adjusting and prosecuting of international crimes in practice. Nevertheless, the success partly has been reached in terms of the International Criminal Court Statute application in the recent cases concerning the Crimes Against Humanity.⁸¹

4. United Nations Legal Mechanisms and Goals regarding the Crimes Against Humanity

The United Nations is combating threats against the human population worldwide among the international criminal courts. Besides successful monitoring, peacekeeping and prevention functions, the United Nations General Assembly carries out the function of the legislative advisor and body by ratifying Declarations in the regard of international crimes and violations committed by the states and non-states actors. Atrocity crimes among terrorism and drug trafficking is a crucial goal to combat by the United Nations. Moreover, the international organisation among its agencies provides prosecution of international crimes by implementing particular methods and reaching goals.⁸² General Assembly asserted the Nuremberg Principles and adopted the Convention on the Prevention and Punishment of the Crime of Genocide back in the last century. Furthermore, the organisation established a number of agencies and missions, which resulted in a step forward in advancing its legal framework in terms of international criminal law and human rights protection.⁸³

United Nations Member States during the 2005 World Summit Outcome Document considered the protection measures of the civilian populations from the atrocity crimes, including the Crimes Against Humanity. The Member States conferred to the Responsibility to Protect principle regarding this aspect. The term “atrocity crimes” have been extended during the negotiations and therefore the term “ethnic cleansing”. The term is not yet considered as international crimes, but overall represents the serious violations which affect the civil populations under the international criminal law and international humanitarian law. Moreover, the term is identified among the definition of the Crimes Against Humanity in the legal practise and prosecution.⁸⁴

One of the primary concerns of the United Nations Special Advisers is to assemble the actions in terms of the prevention of the atrocity crimes, due to the reason that one of the fundamental goals of the organisation is to defend human lives. Thus, in order to prevent the systematic, widespread and large-scale attacks on civil society worldwide, the prevention

⁸¹ Duncan Brown, *Holding Armed Rebel Groups and Terrorist Organisations Accountable for Crimes Against Humanity and War Crimes, and for ‘Terrorist Offences’ under International Anti-Terrorist Conventions*, P.44, Åbo Akademi Institute for Human Rights

⁸² Joyner, Christopher C. *The United Nations and International Law*. P.362 Cambridge: Cambridge University Press, 2003.

⁸³ Joyner, Christopher C. *The United Nations and International Law*. P.365 Cambridge: Cambridge University Press, 2003.

⁸⁴ United Nations. *Framework of Analysis for Atrocity Crimes*, United Nations Office on Genocide Prevention and the Responsibility to Protect, 2014

mechanism must be applied. Another goal of the organisation is to contribute to the international and national peacekeeping and security measures. The consequences of such crimes, as Crimes Against Humanity carry under themselves the higher level of regional and international crisis and instability. Moreover, the subjective elements of the crime include the particular aims of its authors, which is mainly a focus on the specific groups' killings, based on its religious, ethnic or ideological identifications. This factor is a focal point influencing the appearance of the conflicts and tensions between the States and nations. Overall, the aspects mentioned above and the consequences of the atrocity crimes are the threats to international security. That is why the international human rights and humanitarian law is the legal instruments which constitute these breaches, as it was indicated in considerable resolutions of the United Nations Security Council. Another, legal framework operated by the United Nations in terms of combating international crimes is the 1998 Rome Statute, which contains the definitions on the atrocity crimes and mentions its effect as the threat to the security of the world. Thirdly, the prevention mechanisms are essential in terms of avoiding the difficulties and costs of the intervention into the conflicts or situations, where the Crimes Against Humanity are executed. Moreover, the aftermath actions would not be successful by objective reasons. That is why monitoring missions are one of the methods used by the organisation regarding avoiding the challenges. However, the preventive mechanisms might face peculiar obstacles in terms of the circumstances where the crime is likely to be carried out. The political nature, armed conflict situation or even the peacetime might be a limitation for the proper prevention activities.

Last but not least, the States immunity and sovereignty in terms of jurisdiction is an obstacle to take proper prosecution and preventive measures by the United Nations. Nevertheless, the principle of the Responsibility to Protect can be considered as an ally to the sovereignty of the States and one the obligations, due to the reason that most of the Member States still take actions in preventive measures of the atrocity crimes within its territories in terms to protect the civilians. As for the legal obligations of the States, the international instruments indicate them. The United Nations agencies in general words play a role of the supporter and associate by implementing its functions among the Member States regarding the international human rights law, international criminal law and international humanitarian law.⁸⁵

There are specific bodies and agencies of the United Nations which perform the functions concerning the prevention and prosecution measures considering the atrocity crimes. The United Nations Human Rights Council is a legislative actor, which establishes the specific legal mechanisms and instruments, as well as, assigns the special fact-finding missions. For instance, particular Declarations have been ratified in the States, where the crimes occurred. The United Nations Secretary-General's Special Advisers on the Responsibility to Protect provide the implementation of the mechanisms to prevent international crimes in practice by establishing the developments of the national and international actions regarding this aspect. The Special Adviser also performs the function of the warning mechanism to provide further recommendations.

Moreover, this body is an essential unit, which stabilises the actions of the United Nations, regional organisations and the Member States in the crises and preventive goals achievement.

⁸⁵ United Nations. *Framework of Analysis for Atrocity Crimes*, United Nations Office on Genocide Prevention and the Responsibility to Protect, 2014

The Special Advisor operates jointly with the Office on Genocide Prevention and Responsibility to Protect. The Office main goals are to collect the data and manage appraisals on the crises internationally, which could result in the Crimes Against Humanity. Furthermore, the Office performs an essential function of providing training assistance to the Member States, United Nations and regional organisations. This particular function is one of the preventive mechanisms, as well, which raises the awareness level worldwide.⁸⁶

Ultimately, the bodies mentioned above are not the only actors dealing with atrocity crimes prevention and peacekeeping goals. There are other departments, which are dealing with the prosecution and combating of such international crimes. The Office of the United Nations High Commissioner for Human Rights observes human rights law violations considering the mass atrocity crimes. Primary, an example is the large-scale attacks on the religious groups in Syria. According to the report and fact-finding mission provided by the International Commission of Inquiry on Syria, the non-state armed group the Islamic State of Iraq and the Levant committed violations of the human rights and Crimes Against Humanity against the civilian population. This one institution not only provides the awareness spread but also considers the specific measures on the prevention of human rights breaches in such cases.⁸⁷ The Department of Peacekeeping Operations is an institution aimed to provide planning of the peacekeeping, prevention operations and mainly protecting of the civilian population.⁸⁸ The United Nations Office for the Coordination of Humanitarian Affairs is a body which is regulating the status of the humanitarian law violations among the United Nations human rights monitoring mechanisms.⁸⁹ The Department of Political Affairs performs peace-making functions. Among its broad goals is to provide preventive diplomacy efforts and support the Security Council. One of the main actors is the United Nations Development Programme, which is an essential institution establishing the promotion of the rule of law means.⁹⁰

Another important aspect is the framework of analysis established by the Office of the Special Adviser on the Prevention of Genocide, which contributed to the analysis of the elements of atrocity crimes, as well as, maintained to the risk appraisal. The Framework provides the revision of the elements of the crimes and allocates the risk assessment mechanisms. It is a comprehensive tool added into the United Nations system and used by the organisation agencies concerning the States which are most in risk. The empirical analysis of the case law of the International Criminal Court, International Court of Justice and International Tribunals serves the source for the risk identification definitions. That is why the cooperation of the United Nations with the international courts is essential for further perspectives and developments in terms of the international criminal law prosecution. However, the Framework deal with the crimes directly affecting human rights, due to the absence of sufficient legal instruments, which define not only the objective definitions of the

⁸⁶ United Nations. *Framework of Analysis for Atrocity Crimes*, United Nations Office on Genocide Prevention and the Responsibility to Protect, 2014

⁸⁷ United Nations. “*Preventing and addressing violence and atrocity crimes targeted against minorities*”, Contribution of the United Nations Network on Racial discrimination and Protection of Minorities to the Seventh session of the Forum on minority issues, 25-26 November 2014

⁸⁸ United Nations Peacekeeping Operations, Principles and Guidelines, Approved by J.-M. Guéhenno, USG/DPKO, January 2008

⁸⁹ United Nations. *Framework of Analysis for Atrocity Crimes*, United Nations Office on Genocide Prevention and the Responsibility to Protect, 2014

⁹⁰ United Nations. *Framework of Analysis for Atrocity Crimes*, United Nations Office on Genocide Prevention and the Responsibility to Protect, 2014

atrocities crimes. The 1998 Rome Statute and the Elements of Crimes is the supportive legal basis in defining the crime. The International and National actors, as well as the Member States, handle the Framework as a tool for monitoring and preventive measures of such crimes as Crimes Against Humanity. Moreover, Crimes Against Humanity tend to occur during the peacetime. That is why the analysis of the risks should be provided systemically.⁹¹

Finally, another critical issue for the Crimes Against Humanity prosecution by the United Nations is that the crime still is not codified in the Treaty. The definition of it appears in the customary international law and case law emerged from the international courts practise -the Article 7 of the 1998 Rome Statute of the International Criminal Court, the Elements of Crimes, which contains the broader definition and the Statutes of the International Criminal Tribunals for the Former Yugoslavia and Rwanda. However, these definitions do not entirely concur. According to the Final Report of the Commission of Experts Established Pursuant to United Nations Security Council Resolution, the objective elements of the Crimes Against Humanity, including the context of the crime, such as torture, murder, rape or persecution based on various characteristics, are counted to constitute the Crime Against Humanity and establish its further prosecution.⁹²

⁹¹ Ibid

⁹² United Nations. *Final Report of the Commission of Experts Established Pursuant to United Nations Security Council Resolution 780 (1992)*, M. Cherif Bassiouni Chairman and Rapporteur on the Gathering and Analysis of the Facts, Commission of Experts Established Pursuant to Security Council Resolution

Empirical Part:

1. United Nations in combating Crimes Against Humanity.

1.1 Genocide in Yazidis committed by Islamic State of Iraq and the Levant

The Islamic State of Iraq and the Levant committed multiple Crimes Against Humanity against the Yazidi community back in August 2014, when the non-state armed group occupied Sinjar. Moreover, the group violated the international humanitarian law and international human rights by committing acts of Genocide and Crimes Against Humanity on the territory of the Syrian Arab Republic.⁹³ The Independent International Commission of Inquiry on the Syrian Arab Republic is a legal United Nations mechanism established in 2011 by the Human Rights Council. The resolution S-17/1 on the situation of human rights in the Syrian Arab Republic related to this issue, states that all the international crimes and violations of international human rights law must be investigated and prosecuted by the unique missions of the United Nations.⁹⁴ Overall, the armed group destroyed the Yazidis population through the measures incompatible with life, causing severe bodily and mental harm, as well.⁹⁵ These actions lead to the goal of completely erasing the Yazidis community, as well as, their beliefs and identity. Yazidis population is considered as a minority group, due to the reason that they obtain different ethnographic and religious sings. Soldiers of the Islamic State consider these beliefs and religion as “Satanic”.⁹⁶ The Islamic State of Iraq aimed to prove the world and the public, that they are capable of performing abominable actions. Nevertheless, the States, international legal instruments and the actions of the United Nations accomplished to counter the international and atrocity crimes carried out by the non-state armed group.⁹⁷

According to the underlying goals of the United Nations, the exclusive recordings of the missions can serve a basis for its specification. Mainly, the reports are focusing on the factual findings on the violations committed by the perpetrators against the Yazidi population. The Commission assembled data, statistics, interviews and reports during its fact-finding

⁹³ Special Court of Sierra Leone. *Report On The Yazidi Genocide: Mapping Atrocity In Iraq and Syria*, Syrian Accountability Project 2017-18, Project Leader: Professor David M. Crane, Former Chief Prosecutor.

⁹⁴ Independent International Commission of Inquiry on the Syrian Arab Republic, United Nations Human Rights Council, <https://www.ohchr.org/en/hrbodies/hrc/iicisyria/pages/independentinternationalcommission.aspx>

⁹⁵ Human Rights Council. “*They came to destroy*”: *ISIS Crimes Against the Yazidis**”, Thirty-second session, Agenda item 4, Human rights situations that require the Council’s attention, 15 June 2016, A/HRC/32/CRP.2. p.3

⁹⁶ Special Court of Sierra Leone. *Report On The Yazidi Genocide: Mapping Atrocity In Iraq and Syria*, Syrian Accountability Project 2017-18, Project Leader: Professor David M. Crane, Former Chief Prosecutor.

⁹⁷ Human Rights Council. “*They came to destroy*”: *ISIS Crimes Against the Yazidis**”, Thirty-second session, Agenda item 4, Human rights situations that require the Council’s attention, 15 June 2016, A/HRC/32/CRP.2, p.3

missions. The International Commission of Inquiry provides one of the latest reports on this situation on the Syrian Arab Republic.⁹⁸ Moreover, its general focus is related to the analysis of international crimes. The report includes the findings of the Office of the United Nations High Commissioner for Human Rights fact-finding on human rights violations in this region.⁹⁹ The overall goals of the United Nations according to the crimes carried out by the Islamic State of Iraq and Levant include prosecution of the Crimes Against Humanity, as well.

The investigation of mass atrocity crimes and Crimes Against Humanity are provided by the States, United Nations Security Council and ICC. According to Article 14 of the 1998 Rome Statute the ICC Prosecutor can arrange legal investigation with a referral from these additional actors.¹⁰⁰ Article 7 (1) and Article (2) contain the legal requirements for identifying the Crimes Against Humanity committed by the non-state armed group. Moreover, the second paragraph includes the subjective elements of the offences, which are criminalized under international criminal law. The analysis carried out by the Commission established that the acts against the Yazidi Community were systematic attacks against the civilian population.¹⁰¹ Moreover, the attacks constituted under themselves the following contextual elements: massive attacks including infringements of Human Rights¹⁰², inhumane acts and persecution based on certain religious, ideological or political motives in the underlying offences.¹⁰³ Additionally, among the Crimes Against Humanity, other atrocity crimes and Human Rights law violations were prosecuted. The attack committed by ISIS in August of 2014 and its specific objective and subjective elements of the offence constitute Crimes Against Humanity. Due to the factual findings provided by the Commission of Inquiry the elements and legal grounds for the United Nations and ICC prosecution of the crimes are following. Moreover, the findings are essential for the further preventive and monitoring mechanisms of the United Nations concerning the areas of Syria and Iraq controlled by the non-state armed groups.¹⁰⁴

Firstly, the unlawful actions against the civilian population took place in Sinjar Region, where the population constituted mostly Yazidi Community. On the 3rd of August, 2014 the ISIS intervened the area organized with 100 of fighters ambushed the villages and towns.¹⁰⁵ This fact confirms the presence of the offence elements designated in Article 7 (2), due to the

⁹⁸ *ibid*

⁹⁹ Report of the Office of the United Nations High Commission 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, 13 March 2015. "A/HRC/28/18"

¹⁰⁰ UN General Assembly. Rome Statute of the International Criminal Court, 17 July 1998, ISBN No. 92-9227-227-6, Article 14

¹⁰¹ UN General Assembly. Rome Statute of the International Criminal Court, 17 July 1998, ISBN No. 92-9227-227-6, Article 7 (1)

¹⁰² Antonio Cassese. *International Criminal Law*. 3rd ed. P. 92-94,. Oxford University Press, 2008.

¹⁰³ Antonio Cassese. *International Criminal Law*. 3rd ed. P. 94,. Oxford University Press, 2008.

¹⁰⁴ Human Rights Council. "*They came to destroy*": *ISIS Crimes Against the Yazidis*", Thirty-second session, Agenda item 4, Human rights situations that require the Council's attention, 15 June 2016, A/HRC/32/CRP.2, p.31

¹⁰⁵ Human Rights Council. "*They came to destroy*": *ISIS Crimes Against the Yazidis*", Thirty-second session, Agenda item 4, Human rights situations that require the Council's attention, 15 June 2016, A/HRC/32/CRP.2, p.6-8

reason that the attack was planned intentionally.¹⁰⁶ The operation was controlled from the Mosul and Tel Afar. Hundreds of Yazidis were killed within two days, due to the non-state armed group ideological framework and ideas. Others were separated or transferred.¹⁰⁷ After the forcible separation, the following Human rights violations were conducted. Fighters converted men and boys above 12 as Muslims and forced them to act on their side. Also, they carried out mass killings and put people in insurmountable life conditions. One of the most severe documented actions is the sexual violence acts done to the group of victims consisting of women and girls above 9.¹⁰⁸ That is why the recovery processes are still ongoing for the victims who survived the Crimes Against Humanity. All of the findings mentioned above contain the objective elements of the crime, stated in Article 7(1), such as the deportation of population, torture, sexual violence, enslavement and extermination.¹⁰⁹

In general, the impact of the mass atrocity crimes carried out against the Yazidi Community resulted in huge loss of approximately 400.000 of its members. Meanwhile, the Kurdish Regional Government experience momentous anger from the Yazidi population. However, the attacks on the Yazidi are still partly ongoing, but with a less frequency. That is why the preventive measures and establishing of international justice are primary goals of the international community and actors in terms of similar cases. Furthermore, regarding the obligations and accountability, both state and non-state actors responsible for international crimes should be considered. Nevertheless, the obstacles in terms of legislation and state immunity appeared. That is why United Nations legal initiatives included the applicable law to fill the gaps and exclude the obstacles.¹¹⁰

The situation in 2019 is still far from stable, even though the persecution of Yazidi ended in late 2015 because it was liberated. Still, there are more than 300.000 Yazidi survivors, who were transferred in the Kurdistan Region of Iraq and remained there. Moreover, more than 1.000 people were seized, and nowadays there are considered uncounted for. Most of the population escaped abroad and feared to return. Those people are unable to return, due to the reason that the ISIS utterly destroyed villages and towns.¹¹¹ Even though the region has been liberated from the ISIS presence, still it endures de facto and taken over, where the Iraqi Government and international actors are competing. Mainly, there are Iraqi Government powers, several non-governmental organizations and Iran's Iraqi Government-Sanctioned

¹⁰⁶ UN General Assembly. Rome Statute of the International Criminal Court, 17 July 1998, ISBN No. 92-9227-227-6, Article 7 (2)

¹⁰⁷ Human Rights Council. "*They came to destroy*": *ISIS Crimes Against the Yazidis*", Thirty-second session, Agenda item 4, Human rights situations that require the Council's attention, 15 June 2016, A/HRC/32/CRP.2, p.6-8

¹⁰⁸ Human Rights Council. "*They came to destroy*": *ISIS Crimes Against the Yazidis*", Thirty-second session, Agenda item 4, Human rights situations that require the Council's attention, 15 June 2016, A/HRC/32/CRP.2, p.77

¹⁰⁹ UN General Assembly. Rome Statute of the International Criminal Court, 17 July 1998, ISBN No. 92-9227-227-6, Article 7 (1)

¹¹⁰ Human Rights Council. "*They came to destroy*": *ISIS Crimes Against the Yazidis*", Thirty-second session, Agenda item 4, Human rights situations that require the Council's attention, 15 June 2016, A/HRC/32/CRP.2, p.36-37

¹¹¹ "Iraq: Yazidis of Sinjar Today - Iraq." Relief Web. October 15, 2018. Accessed April 15, 2019. <https://reliefweb.int/report/iraq/iraq-yazidis-sinjar-today>.

forces. However, none of the actors acquires full control of the territories, but each contributes to creating a safe area for the Yazidi.¹¹²

1.2 Rohingya persecution in Myanmar committed by the Military Forces

The United Nations Security Council and the Office of High Commissioner for Human Rights are sufficient bodies in prosecuting of one of the latest cases, where Crimes Against Humanity occurred. The Rohingya Community is an ethnic group inhabiting on the territory of Myanmar in Rakhine State. Overall, the population of Myanmar hold Buddhist religion, but the Rohingya is the largest group of Muslims in the State. Due to that reason, this community faced many adversities coming from the Government. For instance, the members of it have been declined in receiving a Myanmar citizenship and not under any condition were legally identified as an ethnic group.¹¹³ The Rohingya were besides revoked from receiving higher education, leave the State, faced forced labour and other deprivations of general freedoms.¹¹⁴ Mass atrocity crimes, Human Rights and International Humanitarian law violations intervened in Rakhine, Kachin and Shan States. The perpetrators of the international crimes are the Myanmar Security and Military Forces and the Arakan Rohingya Salvation Army.¹¹⁵

The United Nations Charter contains provisions on the Security Council authority and responsibility to protect. Including, the responsibility to establish the mechanisms to prevent international crimes and return security. The Responsibility to Protect principle is aimed to prevent the emerging of atrocity crimes, as well. According to this principle, if the State failed to protect its citizens from these crimes, then the international community steps in and uses legal and international organizations mechanisms in order to protect the civilian population. Moreover, international actors must take action if the States are the authors of the crimes.¹¹⁶ There are three Pillars designated during the United Nations World Summit in 2005, which state how the principle is applied. The second and third one contains provisions that the international community must assist the State and take the diplomatic and legal means to protect the civilian population.¹¹⁷ Moreover, the United Nations Security Council is a part of the international community and thus assists through the processes.¹¹⁸

The United Nations Security Council and United Nations Human Rights Council established a fact-finding mission based on the following legal framework relevant in Myanmar, including the Human Rights Law, Humanitarian Law and International Criminal Law.

¹¹² Mednick, Sam. "ISIS May Be Gone, But Iraq's Yazidis Are Still Suffering." *Foreign Policy*. November 23, 2018. Accessed April 15, 2019. <https://foreignpolicy.com/2018/11/23/isis-may-be-gone-but-iraqs-yazidis-are-still-suffering-sinjar-ezidjan-pmu-nadia-murad/>.

¹¹³ United Nations Association of Sweden. "*Model UN On The Situation In Myanmar 2018*." 2018, pp. 6-7.

¹¹⁴ *ibid*

¹¹⁵ United Nations Association of Sweden, "*Model UN On The Situation In Myanmar 2018*." 2018, p.8

¹¹⁶ Global Centre for the Responsibility to Protect. "About R2P." Accessed April 17, 2019. available on: http://www.globalr2p.org/about_r2p.

¹¹⁷ *ibid*

¹¹⁸ United Nations Association of Sweden, "*Model UN On The Situation In Myanmar 2018*." 2018, p.8

Additionally, the missions concluded the presence of non-international armed conflicts within the State. In general, the violations of the frameworks mentioned above are based on the factual findings of the offences committed by the Myanmar military forces against the Rohingya population. The factual findings are formed on reasonable grounds, collected through the primary information consisting of interviews and materials. It is essential to mention that the Rohingya population is the only ethnic group in Myanmar to experience such offences.¹¹⁹

One hundred ninety-two people were killed, 265 abused and 8,614 houses were dismantled during the two outbreaks of violence in June and October of 2012. That year characterized the start of systematic discriminative actions carried out by the Radical Buddhist organizations against the Rohingya Community. The Myanmar government inquiry mission established that the violence occurred from the intercommunal tensions. Still, the military forces stepped in and instead of preventing the violence engaged on behalf of the Rakhine Nationalities Development Party. One hundred forty thousand victims experienced Crimes Against Humanity, as well, such as imprisonment, forcible displacement and staying in the insurmountable life conditions.¹²⁰

Another essential date is the 25th of August, 2017 when the Government established the disintegration and persecution of the Rohingya population. As established by the fact-finding mission provided by the OHCHR Arakan Rohingya Salvation Army started widespread and systematic attacks on the Rohingya on the 25th of August beginning with a military base located on the borders of Rakhine. The ARSA spread the information that the ethnic group is a terrorist threat for the whole State, due to their Muslim religion. Furthermore, the operations were headed by the Tatmadaw leadership, which was one of the leading military figures contributed to the planning of the attacks.¹²¹ During the prosecution and monitoring missions, the United Nations Security Council among the ICC designated international crimes, including Human Rights violations and atrocity crimes. Mainly, as for human rights, the attacks culminated in up to 10.000 death.¹²² Maiming, torture, murders and sexual violence were also elements of the offences.¹²³ These elements serve grounds for legal prosecution and investigation of Crimes Against Humanity committed by the Tatmadaw in three States. The objective elements of the offences included extermination, murder, enforced deportation, torture, sexual violence and enslavement. Each of these elements constitutes the

¹¹⁹ Human Rights Council. “*Report of the independent international fact-finding mission on Myanmar**”, Thirty-ninth session, 10–28 September 2018, Agenda item 4, Human rights situations that require the Council’s attention, A/HRC/39/64, pp.2-4

¹²⁰ Human Rights Council. “*Report of the independent international fact-finding mission on Myanmar**”, Thirty-ninth session, 10–28 September 2018, Agenda item 4, Human rights situations that require the Council’s attention, A/HRC/39/64, p.7

¹²¹ Human Rights Council. “*Report of the independent international fact-finding mission on Myanmar**”, Thirty-ninth session, 10–28 September 2018, Agenda item 4, Human rights situations that require the Council’s attention, A/HRC/39/64, p.8

¹²² “No One Was Left: An MSF Special Report on Violence against the Rohingya in Myanmar’s Rakhine State.” Doctors Without Borders / Médecins Sans Frontières (MSF) Canada. July 05, 2018. Accessed April 12, 2019. <https://www.doctorswithoutborders.ca/article/no-one-was-left-msf-special-report-violence-against-rohingya-myanmars-rakhine-state>.

¹²³ Human Rights Council. “*Report of the independent international fact-finding mission on Myanmar**”, Thirty-ninth session, 10–28 September 2018, Agenda item 4, Human rights situations that require the Council’s attention, A/HRC/39/64, p.9

inhumane acts.¹²⁴ Moreover, one of the preeminent bases for prosecution is that the acts were widespread and large-scale and carried out against the particular group of the civilian population. 1998 Rome Statute Article 7 (1) specify the endorsement of the above-mentioned contextual elements.¹²⁵ Additionally, the attacks constitute the subjective elements of Crimes Against Humanity. The ARSA planned the persecution operations. The harsh measures emerged in response to the events in 2012. Thus, the subjective elements are related to the mental aspects. The mens rea or intentionally committing the objective elements is related to actions of the Myanmar military, due to their beliefs and ideology. Furthermore, the consciousness of the large-scale and systematic killings is also a subjective element applied to the authors of the crimes. The reason for it is that ARSA was aware of the consequences of the offences.¹²⁶

The current situation in Rakhine State is unstable, due to the reason that the clearance operations by the ARSA are still ongoing. According to the 2018's statistics over than 680.000 of Rohingya became refugees mainly in Bangladesh. The local humanitarian and human rights organizations are tracking the flow of refugees and human rights violations.¹²⁷ Moreover, according to the report of OHCHR, the Myanmar security forces are aiming to expel the Rohingya from Myanmar completely. The United Nations definitions describe the actions carried out in order to accomplish these aims are recognized as Crimes Against Humanity and ethnic cleansing.¹²⁸ As for the Aung San Suu Kyi, the leader of the Government, she claims that there is no persecution of the Rohingya Community. The leader declares that the Myanmar security forces are executing counterbalancing of militants and threats.¹²⁹ The Myanmar Government among the United Nations Security-General Kofi Annan established the Advisory Commission on the Rohingya case in 2016. The Annan Commission is aimed to encounter the solving for the international crimes supervening.¹³⁰ The UNHCR also contributes to the signing of the first agreement on the Rohingya refugees between Bangladesh and Myanmar.¹³¹

¹²⁴ Antonio Cassese. *International Criminal Law*. 3rd ed. P. 92, Oxford University Press, 2008.

¹²⁵ UN General Assembly. Rome Statute of the International Criminal Court, 17 July 1998, ISBN No. 92-9227-227-6, Article 7 (1)

¹²⁶ Antonio Cassese. *International Criminal Law*. 3rd ed. P. 92-94, Oxford University Press, 2008.

¹²⁷ United Nations Office of High Commissioner. "Mission report of OHCHR rapid response mission to Cox's Bazar, Bangladesh", 13-24 September 201, pp.1-2

¹²⁸ United Nations High Commissioner for Human Rights. "Darker and more dangerous: High Commissioner updates the Human Rights Council on human rights issues in 40 countries", Human Rights Council 36th session, Opening Statement by Zeid Ra'ad Al Hussein, available on: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22041>.

¹²⁹ United Nations Association of Sweden, "Model UN On The Situation In Myanmar 2018." 2018, p.8

¹³⁰ ibid

¹³¹ ibid

2. Comparison of the Legal Initiatives taken by the United Nations regarding the International Crimes Against Humanity

The comparison of the legal initiatives and mechanisms used by the United Nations bodies and ICC in both of the cases is essential in order to constitute appropriate recommendations and prospects for the Rohingya case. Moreover, the obstacles and practical examination of legal mechanisms designate the further effectiveness and development of legal frameworks, for instance, Draft of the Article 15 Convention on Crimes Against Humanity and approaches, as well. The comparison of initiatives taken during the prosecution can be accomplished by answering the research questions of the Thesis. Mainly, allocating the goals of the United Nations and to what extent they have been reached in both cases. Moreover, what are the similarities and differences in the legal prosecution of the Yazidis genocide and persecution of Rohingya?

2.1 Genocide in Yazidis committed by Islamic State of Iraq and the Levant

The Security Council proceed to strengthen the mechanisms and measures to combat the deriving threat spread by the ISIL, as well as, to prosecute international crimes.¹³² Moreover, the UN offices and monitoring teams establish engagement with the Member States on these matters in order to provide assistance and training. The Yazidi case, where the ISIS-held liable for the mass-atrocity crimes is an essential case for the UN Security Nations during the last decade.¹³³ The primary goals of the United Nations Security Council regarding the Crimes Against Humanity carried out against the Yazidi Community are following. The fundamental goal is to defend human lives. Thus the UN assembled the actions to prevent the current and further atrocity crimes. .¹³⁴ Monitoring missions had been established as soon as the crimes were committed. The missions are aimed to avoid the intervention and the use of force.¹³⁵ The body responsible for endowing legal mechanisms is the United Nations Human Rights Council because it provides tracking of the human rights violations in terms of the primary goals of the organization.¹³⁶ The UN Security Council and Secretary-General's special Advisers are the first legal instances in prosecuting and addressing the Yazidis genocide and violations of the Responsibility to Protect principle.¹³⁷ Another primary goal is

¹³² United Nations Security Council. "Eighth report of the Secretary-General on the threat posed by ISIL (Da'esh) to international peace and security and the range of United Nations efforts in support of Member States in countering the threat", S/2019/103, 1 February 2019, p.8.

¹³³ *ibid* pp.8-10

¹³⁴ United Nations. *Framework of Analysis for Atrocity Crimes*, United Nations Office on Genocide Prevention and the Responsibility to Protect, 2014

¹³⁵ Human Rights Council. "Report of the independent international fact-finding mission on Myanmar*", Thirty-ninth session, 10–28 September 2018, Agenda item 4, Human rights situations that require the Council's attention, A/HRC/39/64

¹³⁶ United Nations. *Framework of Analysis for Atrocity Crimes*, United Nations Office on Genocide Prevention and the Responsibility to Protect, 2014

¹³⁷ United Nations Association of Sweden, "Model UN On The Situation In Myanmar 2018." 2018

the use of applicable legal frameworks to contribute prosecution. Thus, according to the monitoring mission the 1998 Rome Statute Article 7 contains definitions of the Crimes Against Humanity carried out against the Yazidi.¹³⁸ Nevertheless, even though the Commission did not consider the Elements of Crimes, still Article 7 subdivided into 16 additional contextual categories could provide additional explanation and evidence.¹³⁹ Draft Convention on Crimes Against Humanity since its ratification would balance the State's autonomy and judicial supervision.¹⁴⁰ The Commission, however, found the obligations of the States under the Genocide Convention, where the State must prevent international crimes on their territories.¹⁴¹

As for the particular legal initiatives taken by the UN both international and national mechanisms have to be analysed. First of all, the ICC is the only criminal tribunal to obtain jurisdiction over international crimes, including atrocity crimes committed by the ISIS.¹⁴² Resolution 2170 of the UN Security Council provides measures on the State's obligations to prevent the actions committed by the non-state armed group and its entities.¹⁴³ Additionally, the UN Human Rights Council in Resolution S/22-1 and S-17/1 states duties for the Member States to provide accountability on the Human Rights and its violations.¹⁴⁴¹⁴⁵ However, due to the jurisdictional inability of Iraq and Syria to provide prosecution of the crimes, the additional reconciliation mechanisms are taken into account by the UN Security Council. According to this case, the ICC has jurisdiction over the case, if the State is unable to provide it due to the particular obstacles.¹⁴⁶ The reason for them is that Syria and Iraq are not parties to the Rome Statute.¹⁴⁷ In order to provide the prosecution, the ICC is required to receive a referral from the UN Security Council.¹⁴⁸ Since the Draft Resolution regarding the referral to

¹³⁸ UN General Assembly. Rome Statute of the International Criminal Court, 17 July 1998, ISBN No. 92-9227-227-6, Article 7

¹³⁹ Dörmann, Knut, Louise Doswald-Beck, and Robert Kolb. *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*. P. 8 Cambridge: Cambridge University Press, 2008.

¹⁴⁰ Andreas Zimmermann and Felix Boos, "Bringing States to Justice for Crimes against Humanity: The Compromissory Clause in the International Law Commission Draft Convention on Crimes against Humanity", *Journal of International Criminal Justice*, Volume 16, Issue 4, September 2018, PP. 835–855, Accessed April 2, 2019, PP. 835–855

¹⁴¹ Human Rights Council. "*They came to destroy*": *ISIS Crimes Against the Yazidis*", Thirty-second session, Agenda item 4, Human rights situations that require the Council's attention, 15 June 2016, A/HRC/32/CRP.2,

¹⁴² *ibid*

¹⁴³ United Nations Security Council. *Resolution 2170 (2014)*, Adopted by the Security Council at its 7242nd meeting, 15 August 2014

¹⁴⁴ United Nations Human Rights Council. *Resolution S-22/1*, "*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*", Twenty-second special session, 1 September 2014

¹⁴⁵ United Nations Human Rights Council. Resolution adopted by the Human Rights Council at its seventeenth special session, *S-17/1*, "*Situation of human rights in the Syrian Arab Republic*"

¹⁴⁶ UN General Assembly. Rome Statute of the International Criminal Court, 17 July 1998, ISBN No. 92-9227-227-6, Article 13

¹⁴⁷ Kenny, Cöman. "Utrecht Journal of International and European Law." *Utrecht Journal of International and European Law*. April 12, 2017. Accessed April 17, 2019. <https://www.utrechtjournal.org/articles/10.5334/ujiel.364/>.

¹⁴⁸ Human Rights Council. "*They came to destroy*": *ISIS Crimes Against the Yazidis*", Thirty-second session, Agenda item 4, Human rights situations that require the Council's attention, 15 June 2016, A/HRC/32/CRP.2, p.36

the ICC on Syria matters failure, there have not been any consecutive exertions to refer. Moreover, the ad hoc tribunal was not established, as well. The Prosecutor of the ICC also refused to provide investigation on crimes.¹⁴⁹

Coming from this, the prosecution status of crimes committed by ISIS against Yazidi by 2019 is still unsuccessful, due to the jurisdictional obstacles and lack of referral. However, the United Nations provided active monitoring missions and investigative commissions. For instance, Resolution 2379 in 2017, which is related to the ISIS accountability and collection of evidence on Crimes Against Humanity. This step contributed to the UN and States obligations fulfilment under international law.¹⁵⁰ Furthermore, the Commission on Inquiry in 2016 provided recommendations on the preventive measure for both the States and the UN Security Council. The recommendations are useful, due to the reason that the Yazidi persecution is still ongoing, even though the community was partly liberated on 2015.¹⁵¹ Recommendations include consideration of the powers to prevent the ISIS threats and including of the briefings concluded by the Commission into the formal agenda. The aims of it are to contribute to the developments of justice mechanisms.¹⁵²

Finally, it is essential to mention that the prosecution by the ICC has not been launched yet, but the United Nations Security Council demonstrated the effective goal accomplishment, as well as, the compelling legal initiatives.

2.2 Rohingya persecution in Myanmar committed by the Military Forces

According to the Model of United Nations in 2018 the previous actions of the UN in between 2016 and 2017 constituted reports and fact-finding missions, but only a few meetings. Due to that reason no actions were taken. Secretary-General Antonio Guterres influenced the importance of the Rohingya persecution in late 2017.¹⁵³ That is why the UN Security Council promulgated a statement punishing the presence of large-scale attacks in the Rakhine State. That statement also called on the Myanmar Government to cease the military forces' actions. Moreover, it included a full report on the offences committed by the ARSA.¹⁵⁴ However, since then there was not ratified any legally binding resolution.

The overall goals of the UN regarding this case are to assemble actions to monitor the violence, establish legal mechanisms and provide an implementation of Responsibility to Protect. Each of these goals contributes to the prevention of atrocity crimes and restores

¹⁴⁹ *ibid*

¹⁵⁰ United Nations Security Council. *Resolution S/RES/2379 (2017)*, 21 September 2017

¹⁵¹ "Iraq: Yazidis of Sinjar Today - Iraq." Relief Web. October 15, 2018. Accessed April 15, 2019. <https://reliefweb.int/report/iraq/iraq-yazidis-sinjar-today>.

¹⁵² Human Rights Council. "*They came to destroy*": *ISIS Crimes Against the Yazidis**", Thirty-second session, Agenda item 4, Human rights situations that require the Council's attention, 15 June 2016, A/HRC/32/CRP.2,

¹⁵³ "Myanmar Chronology of Events." Security Council Report. Accessed May 1, 2019. <https://www.securitycouncilreport.org/chronology/myanmar.php>.

¹⁵⁴ United Nations Security Council. "*Security Council Presidential Statement Calls on Myanmar to End Excessive Military Force, Intercommunal Violence in Rakhine State*", SC/13055, 6 November 2017

peace.¹⁵⁵ The use of the appropriate legal framework in the investigation of the Rohingya persecution has not been declared by the UN Security Council yet. However, the materials on particular crimes have been collected during the monitoring. According to it, the applicable law is international criminal law, Human Rights Law and Humanitarian Law.¹⁵⁶

The use of the appropriate legal framework in terms of investigation of the Rohingya persecution has not been declared by the UN Security Council yet. However, the materials on particular crimes have been collected during the monitoring. According to it, the applicable law is international criminal law, Human Rights Law and Humanitarian Law.¹⁵⁷ As for the Crimes Against Humanity, the objective and subjective elements acknowledged from the scholars' researchers constitute grounds for the 1998 Rome Statute Article 7 to be the applicable legal instrument.¹⁵⁸ Generally, the Elements of Crimes can be used as an additional legal source on collecting evidence on Crimes Against Humanity during the ICC prosecution.¹⁵⁹ As for Draft 15, it would apply to the case by the time it will be ratified, due to the reason that it would balance the immunity clauses.¹⁶⁰

Another goal of the UN is to contribute to the prosecution of atrocity crimes. That is why it has an authority to refer to the ICC on the criminal investigation. According to this aspect, the ICC will have a jurisdiction over the case not taking into account the State's party to the Statute.¹⁶¹ ICC is a legal mechanism of UN which has a function to prosecute international crimes, including the Crimes Against Humanity, due to the Rome Statute. If the United Nations Security Council refers to the ICC, then it can investigate Myanmar. The reconciliation mechanisms include ICC jurisdiction and tribunals, as well. One of the current possible outcomes from the legal initiatives taken by the UN and ICC is the requirement for the Myanmar government to establish national courts on resolving the Rohingya case.¹⁶²

2.3. Comparison of Legal Initiatives

The comparison of legal initiatives and goals of the United Nations in combating the International Crimes Against Humanity committed by the Islamic State of Iraq and the Levant in Yazidis and the Burmese military in Myanmar is essential. The result of the

¹⁵⁵ United Nations. *Framework of Analysis for Atrocity Crimes*, United Nations Office on Genocide Prevention and the Responsibility to Protect, 2014

¹⁵⁶ United Nations Association of Sweden, "Model UN On The Situation In Myanmar 2018." 2018, p.10

¹⁵⁷ Human Rights Council. "Report of the independent international fact-finding mission on Myanmar*", Thirty-ninth session, 10–28 September 2018, Agenda item 4, Human rights situations that require the Council's attention, A/HRC/39/64

¹⁵⁸ Antonio Cassese. *International Criminal Law*. 3rd ed. P. 92-94, Oxford University Press, 2008.

¹⁵⁹ Dörmann, Knut, Louise Doswald-Beck, and Robert Kolb. *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*. P. 8 Cambridge: Cambridge University Press, 2008.

¹⁶⁰ Andreas Zimmermann and Felix Boos, "Bringing States to Justice for Crimes against Humanity: The Compromissory Clause in the International Law Commission Draft Convention on Crimes against Humanity", *Journal of International Criminal Justice*, Volume 16, Issue 4, September 2018, PP. 835–855, Accessed April 2, 2019, PP. 835–855

¹⁶¹ United Nations Association of Sweden, "Model UN On The Situation In Myanmar 2018." 2018, p.9

¹⁶² United Nations Association of Sweden, "Model UN On The Situation In Myanmar 2018." 2018, p.10

analyze will designate the similarities and differences concerning the two latest cases on Crimes Against Humanity.

Firstly, the similarities appear in the United Nations Security Council and the United Nations Human Rights Council primary goals. Mainly, monitoring of the crises through a collection of the essential documents, materials and interviews, implementation and development of the appropriate preventive mechanisms and peacekeeping in terms of restoring the security and protecting of Human Rights.¹⁶³

Moreover, one of the legal functions of the United Nations is to provide investigation and prosecution of international crimes, as well as, provide analyses of the international and national mechanisms and legal frameworks. In terms of the reports, the applicable law and jurisdiction over the crimes are designated.¹⁶⁴ As for the Yazidi and Rohingya cases, International Criminal Court still has not been established as the prosecutor. However, the functions of Secretary-General's Special Advisers include preventive and monitoring mechanisms. In terms of the second ones, the United Nations bodies established successful Fact-finding Commissions and Monitoring Missions. Each of the missions contributed to the accomplishment of crucial goals concerning the assembling of the legal grounds for prosecution. For instance, the Crimes Against Humanity among other atrocity crimes have been analysed in details. Contextual elements of the crimes committed by the ISIS and Military Forces mainly constituted similar elements. The comparison of the objective and subjective factors is based on the research of Antonio Cassese - the most comprehensive scholar in the field since the last century. According to the results of the fact-finding missions, the Crimes Against Humanity committed against Yazidi and Rohingya included similar components. For instance, against both of the Communities have been carried out the following objective elements, such as murder, torture, rape, sexual violence, enslavement and forced deportation. As for the subjective aspects, the authors of the crimes were aware of the consequences. Moreover, they committed widespread and systematic attacks due to their beliefs and motives. The United Nations among the ICC established the State's responsibility, due to the Responsibility to Protect principle, Human Rights law and Humanitarian law means. The State's responsibility for Crimes against Humanity and accountability for them is an essential point for the prosecution process. Moreover, in both cases, the United Nations concluded the criminal liability of non-state armed groups for international crimes. However, the United Nations Security Council provided recommendations for the States in terms of the further development of the combating.¹⁶⁵¹⁶⁶¹⁶⁷

Secondly, the differences in the legal initiatives can be compared in analysing of monitoring mechanisms, resolutions and statements, prosecution and investigation successes and failures, and the obstacles appeared in terms of the combating Crimes Against Humanity.

¹⁶³ United Nations. *Framework of Analysis for Atrocity Crimes*, United Nations Office on Genocide Prevention and the Responsibility to Protect, 2014

¹⁶⁴ *ibid*

¹⁶⁵ Human Rights Council. "*Report of the independent international fact-finding mission on Myanmar**", Thirty-ninth session, 10–28 September 2018, Agenda item 4, Human rights situations that require the Council's attention, A/HRC/39/64

¹⁶⁶ United Nations Association of Sweden, "Model UN On The Situation In Myanmar 2018." 2018

¹⁶⁷ Human Rights Council. "*They came to destroy*: ISIS Crimes Against the Yazidis**", Thirty-second session, Agenda item 4, Human rights situations that require the Council's attention, 15 June 2016, A/HRC/32/CRP.2,

As for the monitoring mechanisms, the United Nations established the International Commission of Inquiry on Syria. The Commission is responsible for the monitoring and fact-finding missions. It concluded that the non-state armed group, the ISIS Levant, committed Crimes Against Humanity against the civilian population. Moreover, the factual-finding provided all the necessary offence details for the legal investigation grounds.¹⁶⁸ One of the latest Resolutions 2379 in 2017 included provisions on ISIS accountability and collection of evidence on Crimes Against Humanity. Coming from this, the monitoring mechanisms aimed at the investigation of crimes committed by ISIS against Yazidi were somewhat far-reaching in terms of results. Recommendations of the Commission of Inquiry influenced the development of further preventive measures, as well.¹⁶⁹

On the contrary, the monitoring mechanisms implemented regarding the Rohingya persecution did not reach coincidental outcomes. The fact-finding missions were conducted by the United Nations Security Council and the United Nations Human Rights Council. However, the specific applicable law was not designated, due to the reason that the violations mostly constitute inhumane acts in various legal frameworks. The mass-atrocity crimes were described in more specific details. That is why the result of the monitoring is the primary analysing of the circumstances and current events. Coming from this, the result of one of the latest fact-finding missions to Myanmar is overall theoretical for establishing grounds for prosecution.¹⁷⁰

Nonetheless, the Model of the United Nations concerning the investigation of international crimes in Myanmar was carried out rather successfully in 2018. According to which, the actions of the United Nations were exclusively monitoring during the period between 2016-2017. However, Secretary-General Antonio Guterres influenced the importance of starting more effective operations and reconciliation processes.¹⁷¹

In a comparison of the monitoring mechanisms, the United Nations Security Council acted more compelling and undeviating during the observing of the Yazidi genocide. The difference is that the preconditions were already known and legal mechanisms were established before the event occurred in the first case.¹⁷² Moreover, the missions resulted in excellent results in terms of collecting data on evidence and designating elements of Crimes against Humanity. The 1998 Rome Statute was determined as the legal instrument for the investigation of the Crimes against Humanity.¹⁷³ As for the Rohingya persecution, the United Nations Security Council did not provide sufficient legal frameworks for further steps yet.

¹⁶⁸ Independent International Commission of Inquiry on the Syrian Arab Republic, United Nations Human Rights Council, <https://www.ohchr.org/en/hrbodies/hrc/iicisyria/pages/independentinternationalcommission.aspx>

¹⁶⁹ United Nations Security Council. *Resolution S/RES/2379 (2017)*, 21 September 2017

¹⁷⁰ Human Rights Council. “*Report of the independent international fact-finding mission on Myanmar**”, Thirty-ninth session, 10–28 September 2018, Agenda item 4, Human rights situations that require the Council’s attention, A/HRC/39/64

¹⁷¹ United Nations Association of Sweden, “*Model UN On The Situation In Myanmar 2018.*” 2018,

¹⁷² Independent International Commission of Inquiry on the Syrian Arab Republic, United Nations Human Rights Council, <https://www.ohchr.org/en/hrbodies/hrc/iicisyria/pages/independentinternationalcommission.aspx>

¹⁷³ Human Rights Council. “*They came to destroy*”: *ISIS Crimes Against the Yazidis**”, Thirty-second session, Agenda item 4, Human rights situations that require the Council’s attention, 15 June 2016, A/HRC/32/CRP.2,

It is also essential to mention that several extensive Resolutions were issued in regard to the Yazidi Community persecution. For instance, S-17/1, which is related to the United Nations Human Rights violations prosecution in Syria. Resolution 2170, which measures the State's obligations to prevent actions of non-state armed groups. Last but not least, the resolutions on accountability for the inhuman acts were considered too.¹⁷⁴ As for the investigation of the Myanmar events, there were no far-reaching official statements promulgated.

Another important factor in comparing is the steps towards the prosecution and legal investigation. As for the Crimes Against Humanity committed by the ISIS, successes and failures can be designated. The profitable steps include the analyses provided by the Commission of Inquiry, which contributed to the detailed description of the objective and subjective elements of the Crimes Against Humanity. Moreover, the applicable legal instruments on the prosecution of these crimes were designated. They are the Genocide Convention and the 1998 Rome Convention. In general, these steps influenced further reasoning on the international crimes committed by the ISIS.¹⁷⁵ However, there are failures to mention, as well. The prosecution by the International Criminal Court still has not been established, due to several reasons. Firstly, the draft resolution on the United Nations Security Council referral to ICC on Syria was declined. Thus, there have not been any exertions to refer to since then. Secondly, other reconciliation mechanisms, such as ad hoc tribunal, were not provided. Moreover, the Prosecutor of ICC refused to prosecute, due to the appropriate referral absence. That is why the obstacles, such as the jurisdictional inability of Iraq and Syria to provide prosecution and the fact that these States are not parties to the 1998 Rome Statute have to be solved. The lack of the referral to prosecute is the main failure of the investigation mechanisms.¹⁷⁶

The second case on Rohingya persecution and the Crimes against Humanity committed by the Myanmar Military Forces constitutes both successes and failures in steps forward the prosecution. As for the achievements, the special attention to the Responsibility to Protect principle was taken into account. Additionally, the start of persecution and atrocity crimes was designated with emphasis to preconditions. Coming from this, the reconciliation mechanisms are being discussed and developed. These mechanisms are aimed to restore justice and punish the Military Forces.¹⁷⁷¹⁷⁸

Moreover, the United Nations Security Council do sufficient steps towards the responsibilities of the State, which is also a component of criminal liability. The reason for it is that the Military Forces and ARSA are both being justified by the Government Leader. That is why the statement on Myanmar to cease Military Forces actions was provided.¹⁷⁹

¹⁷⁴ United Nations Security Council. *Resolution 2170 (2014)*, Adopted by the Security Council at its 7242nd meeting, 15 August 2014

¹⁷⁵ Human Rights Council. “*They came to destroy*”: *ISIS Crimes Against the Yazidis*”, Thirty-second session, Agenda item 4, Human rights situations that require the Council’s attention, 15 June 2016, A/HRC/32/CRP.2,

¹⁷⁶ *ibid* p.36

¹⁷⁷ United Nations. *Framework of Analysis for Atrocity Crimes*, United Nations Office on Genocide Prevention and the Responsibility to Protect, 2014

¹⁷⁸ United Nations Association of Sweden, “*Model UN On The Situation In Myanmar 2018*.” 2018, p.10

¹⁷⁹ Human Rights Council. “*Report of the independent international fact-finding mission on Myanmar*”, Thirty-ninth session, 10–28 September 2018, Agenda item 4, Human rights situations that require the Council’s attention, A/HRC/39/64

Furthermore, the ICC required the State to establish special national courts on the international crimes committed on their territory.¹⁸⁰ Nevertheless, the failures are present, as well. Firstly, the situation had to be monitored with more attention, due to the reason that the ethnic group suffered human rights and freedoms violations since the last century. Also, the preconditions of the 2017 events include the attacks on Rohingya in 2012. The preventive mechanisms concerning Myanmar failed, due to the reason that the several States Rakhine, Kachin and Shan are the territories where the international crimes occurred. That is why it is harder to provide more detailed monitoring and peacekeeping functions.¹⁸¹

Moreover, the conflict in Myanmar is considered as non-international. Thus, there are obstacles in terms of the State's immunity and accountability. The ARSA forces are one of the foremost perpetrators among the Military Security and Military Forces. According to the fact-finding missions, the perpetrators are aiming to destroy the whole Rohingya on the territory that is why the clearance operations are still ongoing. The further legal initiatives of the United Nations have to be direct, due to the reason that it would contribute to the accomplishment of the peacekeeping and prevention goals. As for the legal initiatives taken by the United Nations by 2019, still, the referral to the ICC was not executed.¹⁸²

According to the comparison, the following focal points can be designated. Monitoring mechanisms are somewhat effective in both cases, due to the reason that violation and international crimes elements were established. However, the United Nations Security Council monitoring appeared rather compelling regarding the Yazidi genocide, even though the situation occurred fast and large-scale in comparison to the Myanmar case. The reason for it is that the crisis conditions and inner-state instabilities were monitored before the persecution took place. Meaning that the sufficient institutions on the issue were already established.¹⁸³

That is why the more considerable attention to the prevention functions and reconciliation instruments has to be considered in terms of the Rohingya case. Last, but not least the prosecution is still unsuccessful initiative concerning the crimes committed by ISIS. That is why the steps towards the adequate prosecution of Crimes against Humanity committed against the Rohingya population can be developed through the comparison with the jurisdictional failures in the Yazidis.

¹⁸⁰ *ibid*

¹⁸¹ *ibid*

¹⁸² Adams, Simon. "If Not Now, When? The Responsibility to Protect, the Fate of the Rohingya, and the Future of Human Rights." SSRN Electronic Journal, January 8, 2019. doi:10.2139/ssrn.3319491.

¹⁸³ United Nations Human Rights Council. Independent International Commission of Inquiry on the Syrian Arab Republic, available on: <https://www.ohchr.org/en/hrbodies/hrc/iicisyrria/pages/independentinternationalcommission.aspx>

3. Analysis of the Legal Approach and perspectives of the United Nations legal prosecution of Rohingya persecution in Myanmar committed by the Military Forces.

The Crimes Against Humanity is one of the undeveloped aspects of atrocity crimes in terms of legal examination. That is why not only legal frameworks and historical materials can serve the basis for its analysis, but also the comparison with the similar cases and inquiries.

The Fact-finding mission provided the recommendations for Myanmar and the United Nations Security Council. According to them the future perspectives of their accomplishment will be reviewed. The International Community is responsible for the assistance in combating the atrocity crimes in Myanmar. As well as, the State is accountable for addressing the crimes crucially. The following steps are concluded by the United Nations High Commissioner for Human Rights and the General Assembly. Moreover, the Advisory Commission on Rakhine State is an annual assisting body, which provides recommendations and reports.¹⁸⁴

The United Nations should provide diplomatic and peaceful mechanisms to protect the civilian population from the current crimes against humanity acts. The Security Council is the responsible body for protection of responsibility for international crimes by providing a referral to the ICC. Moreover, this body is liable for the establishment of additional reconciliation mechanisms, such as ad hoc tribunal. Other applicable legal measures can be imposing of individual punishments and sanctions on the perpetrators, due to the reason that the members of Military Forces committed the crimes. The Security Council should also consider the arms embargo. The General Assembly is recommended to initiate the new mechanisms with the collective and analysing functions for designation of international crimes. The arrangements should investigate the failures to provide the national and international prosecution of crimes.¹⁸⁵

One of the additional steps should be an establishment of the second fact-finding mission to assemble the evidence for the new strategy of the United Nations. However, one of the primary obstacles is creating engagement with the Myanmar Government to implement the Human Rights Up Front action plan.¹⁸⁶ The Myanmar Government should provide analysis of the policies, as well.

The following actions of the United Nations, Myanmar and the international community can contribute to the perspectives of the prosecution and combating international crimes. The international community and humanitarian organizations should provide humanitarian aid and assistance for Myanmar's population. Moreover, the Tatmadaw forces and ARSA should be discontinued and held liable for the crimes. It can be reached with the support from the Member States and cooperation under the international mechanisms, such as not to justify the relocation of arms in Myanmar. As for the United Nations, the organization should consider

¹⁸⁴ Human Rights Council. “*Report of the independent international fact-finding mission on Myanmar**”, Thirty-ninth session, 10–28 September 2018, Agenda item 4, Human rights situations that require the Council's attention, A/HRC/39/64

¹⁸⁵ *ibid*

¹⁸⁶ “Human Right Up Front”, United Nations Development Programme, <https://stories.undp.org/putting-human-rights-up-front>

allocating of trust fund aimed to counter the negative consequences and support victims' recovery from violations.¹⁸⁷

The comparison of the legal initiatives and steps towards the prosecution in Yazidis case provides the basis for the analysis of the current legal perspectives of the judicial investigation of Rohingya persecution in Myanmar. In general, the following aspects have to be considered.

Firstly, the investigation process of the Crimes against Humanity committed by the ISIS against the Yazidi Community is not moving forward. The successful monitoring and designating of applicable laws is the far-reaching example, which can be taken into account in terms of its effectiveness and primary mechanisms.

Secondly, the attention to the efficient peacekeeping and preventive goals has been made through the Resolutions, which can also be a basis for the Rohingya case prosecution. However, the failures have to be taken into account, as well. In terms of prosecution process among the International Criminal Court, the United Nations Security Council did not accomplish to provide the referral. The reason for it is the jurisdictional obstacles, which were not resolved. Including, the veto of China, Russia and United States, which serves the joint obstacle for the cases.¹⁸⁸ That is why the United Nations Security Council's perspectives in the legal initiatives regarding the Crimes against humanity committed in Myanmar should provide more satisfactory legal actions in 2019.

The scholar, Simon Adams, in his research acknowledged the consecutive points on the Rohingya case prosecution. The United Nations Security Council and its peacekeeping missions are historically profitable. Moreover, both are acting concerning the mandate of the task. Similarly, the Security Council regarding Myanmar managed to aim the peacekeeping goals. As for the peacekeeping and prevention, the scholar claims that these are not used as the political option.¹⁸⁹ In the recent cases, these mechanisms served as the allies or the parties to the investigation.¹⁹⁰ Simon Adams concluded that ICC is the legal arm of the prosecution and responsibility to protect, according to its Chief Prosecutor. However, he also confirms that it is not the only institution responsible for the punishment of the perpetrators for Crimes against Humanity. The international community can even impose determinations to warrant the international law application. For instance, Canada and the European Union imposed sanctions on the seven superior members of the Myanmar Military Forces. In general, the scholar claims that the Security Council failed in terms of preventive actions during the last three years as it was also concluded by the Model of UN concerning this issue.¹⁹¹ However, the author mentions one of the main jurisdictional obstacles on the international level. Mainly, China, Russia or the United States veto accomplishing, so that the ICC would receive a referral from the Security Council. Correspondingly, the same issue preserves in the Yazidi genocide prosecution. Last but not least, one of the general ideas of the author is that the

¹⁸⁷ "Report of the independent international fact-finding mission on Myanmar*" Human Rights Council, Thirty-ninth session, 10–28 September 2018, Agenda item 4, Human rights situations that require the Council's attention, A/HRC/39/64

¹⁸⁸ Adams, Simon. "If Not Now, When? The Responsibility to Protect, the Fate of the Rohingya, and the Future of Human Rights." SSRN Electronic Journal, January 8, 2019. doi:10.2139/ssrn.3319491.

¹⁸⁹ *ibid*

¹⁹⁰ United Nations Association of Sweden. "*Model UN On The Situation In Myanmar 2018.*" 2018, p.10

¹⁹¹ *ibid*

combined actions of the Member States and the Security Council would contribute to the positive perspectives of peace restoring. Furthermore, the joint efforts would constitute a powerful message to the Myanmar Military Forces concerning the termination of their actions and awareness on the prosecution matters. According to the author fact-finding missions and targeted sanctions are not able to stop the persecution, but they can contribute to the perpetrator's accountability.¹⁹²

Conclusion

The legal perspectives and initiatives of combating International Crimes Against Humanity is the main focus of the Thesis. The comparative-descriptive method analysis of the legal approaches, goals and obstacles met by the United Nations and International Criminal Court was used to answer the research questions. The comparison of two cases the Islamic State of Iraq and the Levant actions against Yazidis and the Military Forces clearance operations against Rohingya evaluated the legal prosecution of Crimes against Humanity by United Nations and International Criminal Court. The Theoretical analysis was based on the leading scholars' researchers in the relevant field and legal instruments. It served the basis for the comparative analysis. Generally, the objective and subjective elements of Crimes Against Humanity were specified according to Antonio Cassese. International Criminal Court jurisdiction was described through Article 7 of the 1998 Rome Statute and Elements of Crimes. And as for the additional potential legal instruments, the Draft on Convention on Crimes Against Humanity was evaluated, as well. The determining of the responsibilities for the Crimes Against Humanity of States and Non-state armed groups provided primary aspects in considering Perpetrators' accountability and jurisdictional obstacles. Moreover, the theoretical analysis of United Nations legal mechanisms and institutions were essential for the comparison part of the Thesis. The following research questions were answered during the comparative-descriptive analysis. The goals of the United Nations and ICC in prosecuting the genocide of Yazidis in Iraq committed by the Islamic State of Iraq were monitoring, prevention, peacekeeping and legal investigation. Overall, the monitoring mechanisms were far-reaching and effective. As for legal investigation goal, the applicable legal frameworks and the elements of atrocity crimes were designated. In general, all the primary goals concerning the Yazidi persecution, excluding the providing of steps forward prosecution, were accomplished. As for the goals concerning Rohingya persecution in Myanmar committed by the Military Forces, the further development of legal initiatives and goals reaching have been analysed. Mainly, only the monitoring goals have to be advanced. Overall, the purposes of the United Nations bodies concerning Crimes against Humanity combating are relatively comparable. As for the first sub-question, theoretically, the investigation is not limited to Article 7 of the 1998 Rome Statute in both cases. The reason is that Elements of Crimes and Draft Article 15 could be considered in terms of gaps filling during the investigation. Moreover, other legal frameworks' instruments were used by the United Nations bodies. The second research question on the outcome and perspectives of the Rohingya population persecution was based on the Empirical Analysis. The comparison

¹⁹² Adams, Simon. "If Not Now, When? The Responsibility to Protect, the Fate of the Rohingya, and the Future of Human Rights." SSRN Electronic Journal, January 8, 2019. doi:10.2139/ssrn.3319491.

provided the legal analysis of the prosecution of the Crimes Against Humanity by the United Nations based on extensive practical examination of the legal mechanisms, as well as, the obstacles and perspectives designated the further development and implementation of the legal initiatives. The similarities and differences served the basis for analysing the failures and successes in each corresponding component.

Last, but not least the literature review contributed to both Theoretical and Empirical analysis. Antonio Cassese's study on the essence of Crimes Against Humanity provided objective and subjective elements of it implemented in the Empirical Part of the Thesis. Moreover, it contributed to the urgent basis on actors of the crimes, and ICC and UN goals.¹⁹³ Christopher C. Joyner claimed for the essential role of the UN in prosecuting of international crimes and provided legal sources for its analysis. His researches established the Theoretical legal basis.¹⁹⁴ M. Cherif Bassiouni focused on the development of the Crimes Against Humanity and international crimes connected with the national laws. The confirmation of his approach assigned the analysis of the legal initiatives.¹⁹⁵ Finally, Simon Adams studies were crucial for providing analysis of the future legal perspectives of the Crimes Against Humanity prosecution.¹⁹⁶

According to the hypothesis formed in the Introduction Part of the Thesis, it appeared to be incorrect in some measure. The United Nations used the compelling investigation and monitoring mechanisms in terms of the prosecution of Yazidi genocide committed by the ISIL. However, the trial was not established among the International Criminal Court, due to the legal obstacles. Mainly, the veto from the several Member States and the deficiency of the referral. That is why the continuous progress of the prosecution is blocked. Nonetheless, the United Nations concluded efficacious investigation missions and designated international crimes details. Moreover, according to the reports, the investigation is not limited to Article 7 of the 1998 Rome Statute. The reason is that the Commission of Inquiry allocated crimes in other legal frameworks, such as International Human Rights Law. According to it, the 1948 Genocide Convention is applicable for the investigation of Crimes Against Humanity, as well. Furthermore, the Elements of Crimes would also be pertinent in terms of trial procedures. In general, the legal prosecution of persecution of Rohingya in Myanmar is advancing, as well. The latest fact-finding missions were also somewhat successful in terms of the investigation, monitoring and use of the legal instruments. Coming from this, the United Nations did not reach its goals in implementing legal instruments, international and national justice mechanisms during the prosecution of both cases. Notwithstanding, if the legal obstacles are conquered, then the goals will be achieved in the further prosecution advancements. Additionally, the results obtained during the monitoring and fact-finding missions serve the solid basis for the further successful case determination.

¹⁹³ Antonio Cassese. *International Criminal Law*. 3rd ed. P. 84-105. Oxford University Press, 2008.

¹⁹⁴ Joyner, Christopher C. *The United Nations and International Law*. Cambridge: Cambridge University Press, 2003.

¹⁹⁵ Bassiouni, M. Cherif. *Crimes against Humanity in International Criminal Law*. The Hague: Kluwer Law International, 1999.

¹⁹⁶ Adams, Simon. "If Not Now, When? The Responsibility to Protect, the Fate of the Rohingya, and the Future of Human Rights." *SSRN Electronic Journal*, January 8, 2019. doi:10.2139/ssrn.3319491

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